Federal Court | Cour fédérale

MEMORANDUM

Comments

TO: The Honourable Mr. Justice Stratas, Federal Court of Appeal

FROM: The Honourable Mr. Justice Hughes, Federal Court

DATE: July 26th, 2012

RE: Judge Young of the Federal District Court in Boston

David,

The enclosed material makes a case for less Case Management and mediation and for more just getting down to trial.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON, 02210

WILLIAM G. YOUNG
DISTRICT JUDGE

June 4, 2012

Professor Stephen N. Subrin
Northeastern School of Law
30 Cargill Hall
400 Huntington Avenue
Boston, MA 02115

Re: DISTRICT COURT PRODUCTIVITY AND CASE PROCESSING

Dear Steve,

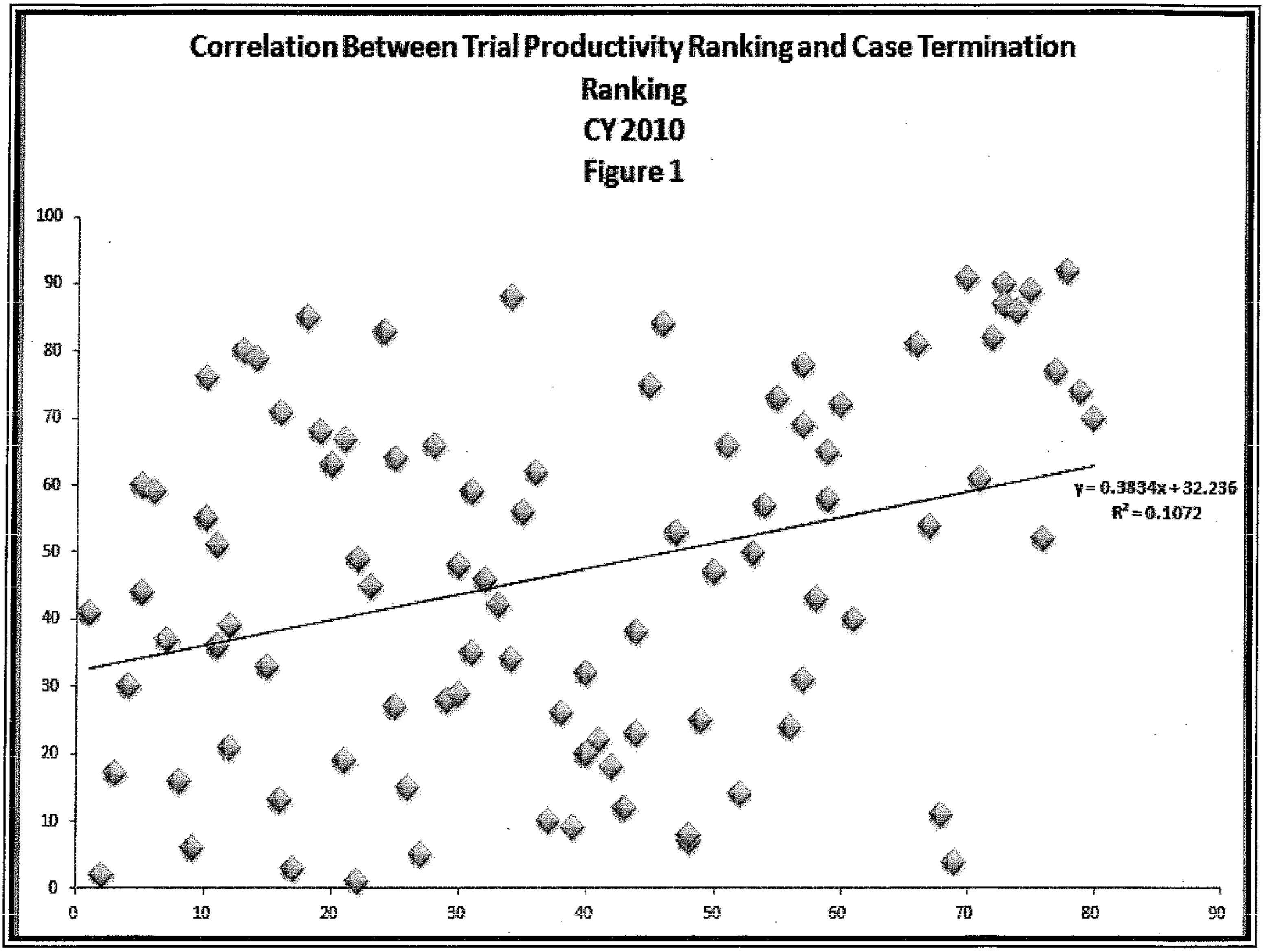
Our lunch a few months ago was, for me, most enjoyable, productive, and challenging. Your especially insightful inquiry set us off on a fairly formidable inquiry that (finally) yielded some modest yet important and reliable results. Along the way, a number of people have expressed interest in this project and I have taken the liberty of copying them on this letter.

To set the stage, my concern that our statistical measurements overemphasize efficiency and an administrative model of judging at the expense of a more just and responsive trial model led me to create an index of America's most productive district courts by averaging the time on the bench, time on trial, number of civil cases, and number of criminal cases tried per active district judge in each of our district courts. See **Appendix A**. I repeated the process the next year, see **Appendix B**, garnering an increasing interest from the legal press.

It was against this background that you joined me for lunch and observed that logically there ought be a relationship between court productivity and case terminations. I replied that, while this had been my personal experience, I'd try to verify it more rigorously throughout the district court system.

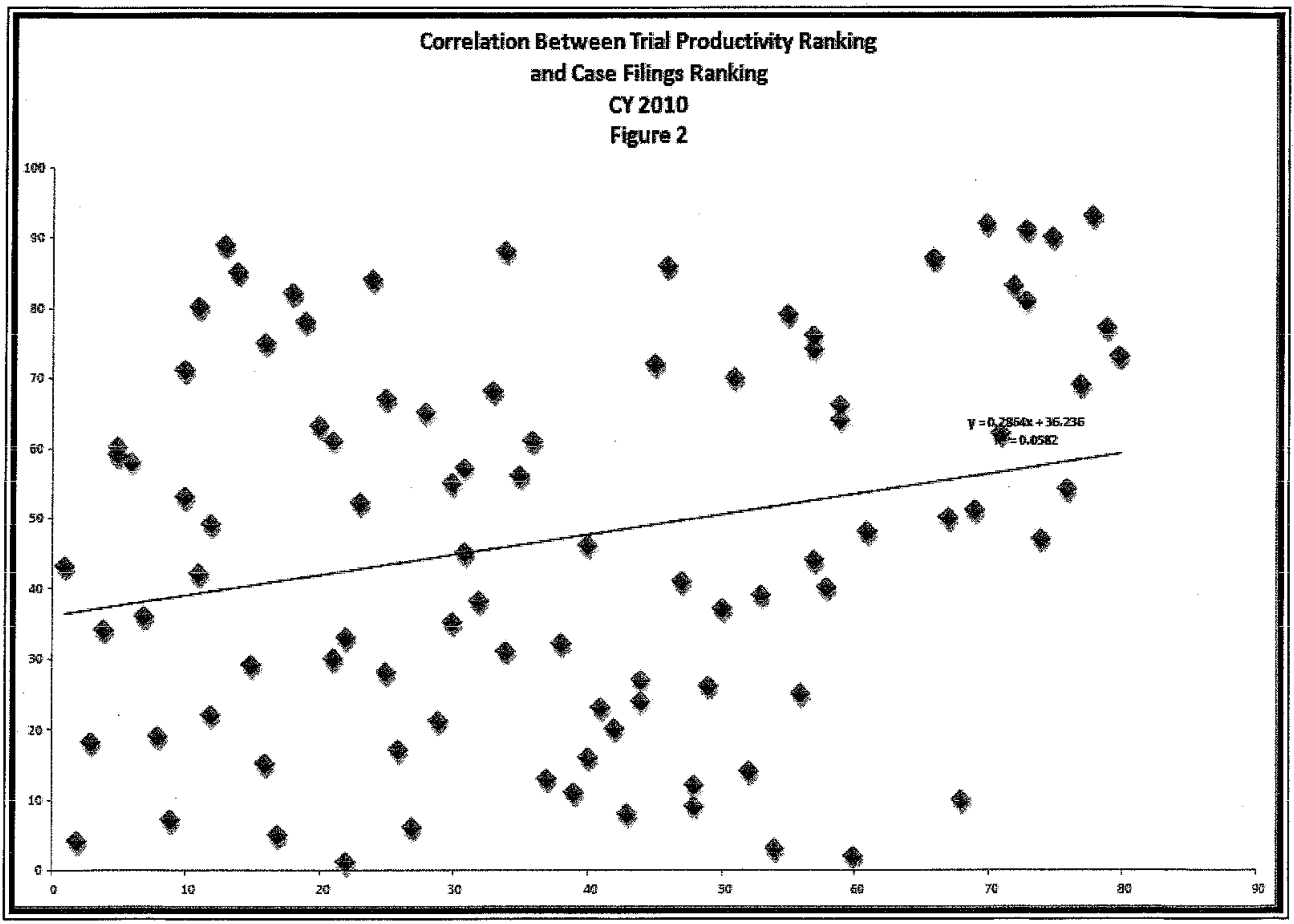
A word on methodology: I am assisted by my superb Judicial Assistant, Elizabeth Sonnenberg. All data comes from the AO databases and is common throughout our district courts. Our focus is on each court as a unit, the aggregate figure being divided by the number of assigned active district judges fairly to compare court to court. As is obvious, courts with a proportionately greater number of magistrate judges and engaged senior judges will be more productive; while a court with one or more active judge vacancies will be less productive. Jake Pugh's article, Jake D. Pugh, Another Nail in the [Trial Model] Coffin? Whether Federal District Court Vacancies Push Adjudication Toward an Administrative Model (forthcoming 2012 at the Social Law Library Research Portal) (on file with Judge William G. Young (D. Mass.)) shows that most important and persuasive conclusions can be derived from the productivity index in the hands of a skilled researcher and scholar. See **Appendix C**.

Using this methodology, we first directly compared productivity and case terminations, See **Figure 1** below.



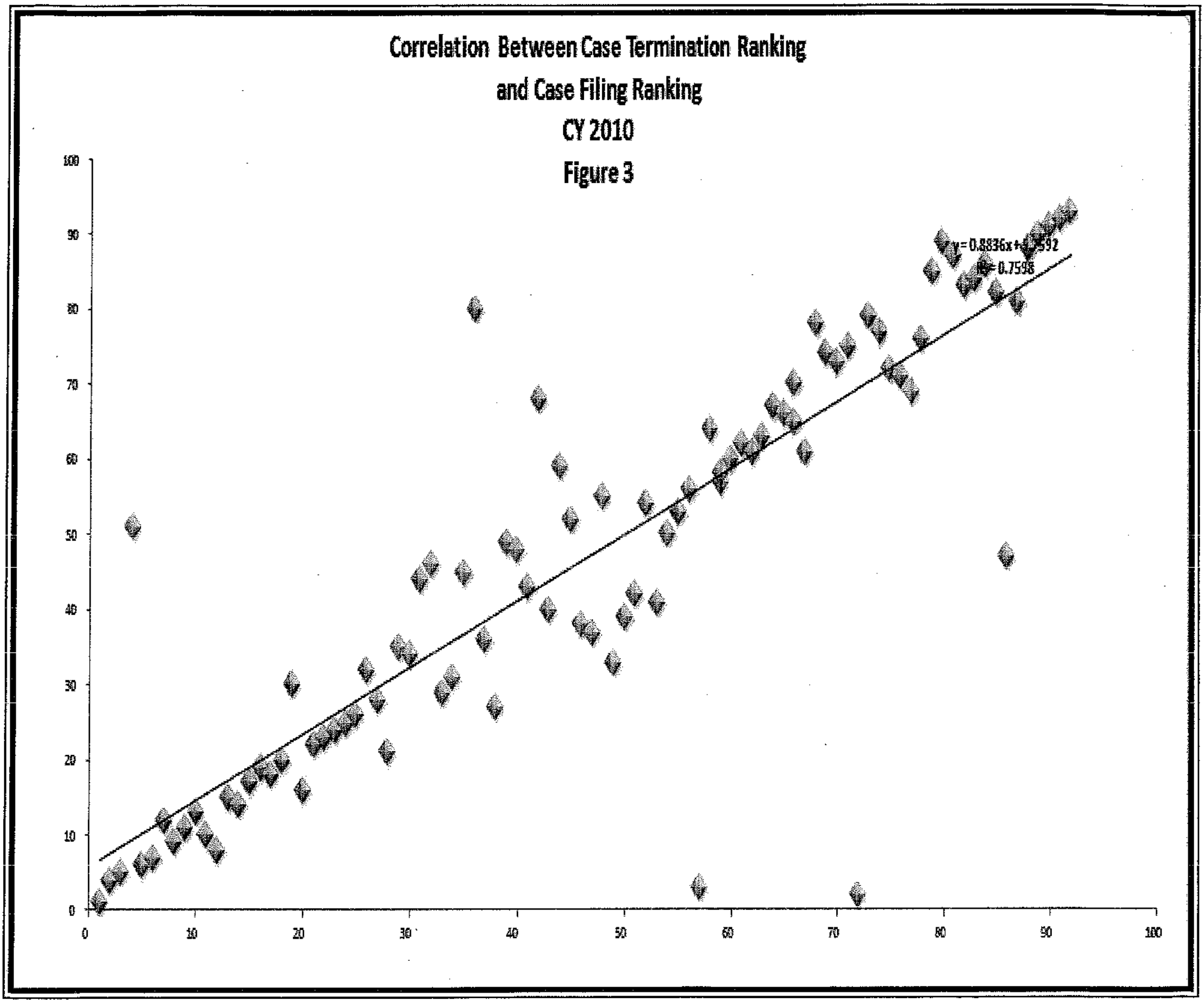
That's right, there's no direct relationship.

This set me to thinking that maybe the discontinuity occurred among those courts which had the highest caseloads (swamped with cases, perhaps productivity doesn't count for much) and the lowest (with only a few cases to get to trial, perhaps productivity is marginalized). Maybe productivity affects terminations among courts with roughly average caseloads. Thus, we ranked productivity against case filings. See **Figure 2** below.



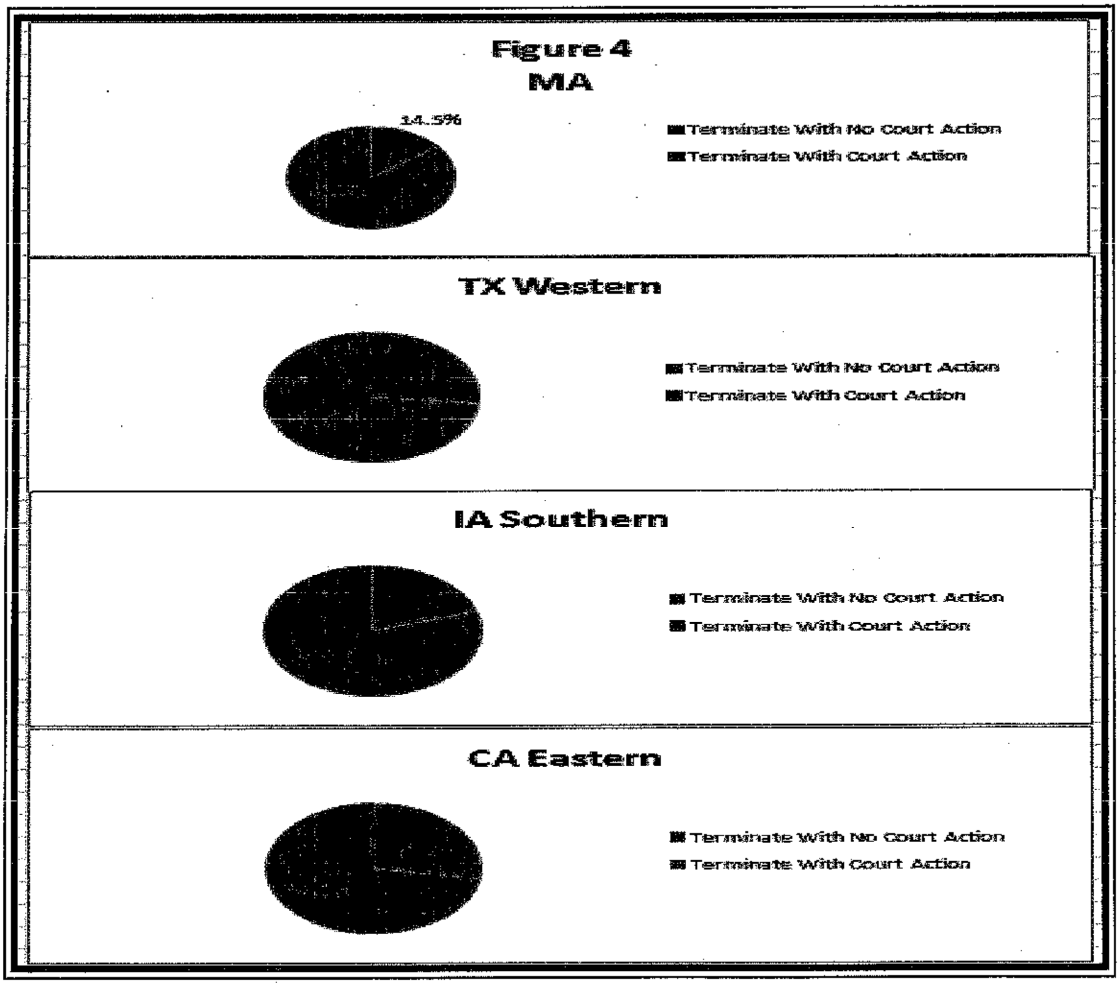
Again, there is no relationship.

There matters sat for awhile. Matching various variables, we matched case filings with terminations on the same per active judge basis. See **Figure 3** below.



Bingo. The relationship is unmistakable. This is the first noteworthy finding from this effort. It appears that, by hook or crook, across the district court board, court "through-put" is more or less constant. Courts with the highest per active judge case filings also have the highest per active judge terminations and the courts with the lowest caseloads seem satisfied to dispose of their business without ever getting ahead.[1] It almost seems as though court productivity makes little practical difference.

Before abandoning the inquiry, however, we took a closer look at four districts with which I have some familiarity: the District of Massachusetts, the Southern District of Iowa, the Eastern District of California, and the Western District of Texas. Each comes from a different circuit, each serves a different portion of the country, yet all are among America's most productive courts. Indeed, the Eastern District of California ranks virtually at the top, with the Southern District of Iowa close behind. Where they differ is in caseload per judge. Massachusetts has a low caseload, the Southern District of Iowa is average, and the Eastern District of California and the Western District of Texas are swamped with cases. Indeed, so overwhelmed are they that today, given the waning influence of the Judiciary with Congress, they are the only two courts where we dare suggest new judgeships ought be created. **Figure 4** focuses on how these four courts dispose of their business:



Only a small slice of the cases disposed of after judicial action are trials, of course; about ten

[1]This is a bit unfair as courts with low caseloads frequently help out other courts and that help properly boosts the productivity of the recipients.

percent in the case of the Southern District of Iowa ("a real trial machine," the late Steve Schlesinger called that court), and somewhat less for the other three. The intriguing finding is the portion of cases disposed of "without judicial action" which seems to increase with per judge case load.

To explore the matter further, Elizabeth created the chart at **Appendix D**. To my surprise, nearly half of the district courts (42 out of 94) dispose of more than a quarter of their business without any judicial action at all. Indeed, the figure approaches or exceeds 50% for some courts. This is the second important finding of this project. Thousands of cases are filed in our federal courts only to disappear without any judicial action. What happens to these cases? This surely is an area that warrants further rigorous study. See generally Emery G. Lee III, Early Stages of Litigation Attorney Survey, Fed. Jud. Ctr., Mar. 2012.

My own preliminary inquiries and analysis suggest that the cases that disappear without judicial action fall into three broad categories that I'll call: **quick settlements, insurmountable access costs**, and **skewed settlements**.

Quick settlements are generally attributable to the success of the federal district court system: its integrity, even-handedness, and power to render comprehensive, nuanced, enforceable judgments. A quick settlement arises when the mere filing of a federal court complaint brings the parties to the negotiating table where a risk-cost-benefit analysis leads to private ordering. This is (almost) an unqualified success for the court system as it represents a leveraging of its best institutional strengths without incurring anything more than the most minimal case processing costs.

The problem of **insurmountable access costs** is largely beyond the purview of this analysis of the benefits of court productivity. These are the cases that fail for want of service or default for want of any response. It seems to me federal courts (generally) have nothing to be ashamed of in this area. We have consistently argued for keeping filing fees low, we're generous in approving in forma pauperis petitions, in fostering pro bono legal services, and in excellent treatment of pro se litigants.

Our shame is that the cost of litigation itself is so staggeringly expensive. We can take no comfort in the meritorious case abandoned because it will take $10,000 to bring it to trial ($50,000 to $100,000 for patent cases) or in the small business defendant who simply crumples, goes into bankruptcy, or sells off its assets and lets its employees go simply because it cannot afford to mount a meritorious defense.[2]

This concern shades into the area I call **skewed settlements** - settlements that do not

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[2]We ought acknowledge the almost complete failure of the cost and delay reduction plans in vogue at the turn of the century. True, they have increased judicial management but this has only raised the costs for litigants. There has been no appreciable delay reduction.

reflect the actual "value" of a case. These skewed settlements are the product of judicial non-involvement. They come about because no judge has the time (or will take time) to become involved in the case. Rights mean nothing unless a judge will enforce them. Skewed settlements affect plaintiffs who bring meritorious cases that languish until more well-heeled defendants force settlements at unfair discounts, and defendants with meritorious defenses who pay undeserved damages because they cannot engage a judge in prompt adjudication.[3] Indeed, social costs escalate with every day a case waits in limbo without judicial attention. Mortgage foreclosure cases are a prime example. Simply filing such a case may cause a gun-shy bank to postpone foreclosure. Without judicial action, everyone loses. The homeowner teeters on the brink of foreclosure, the bank does not realize on its security. The economy is deprived of a house that (perhaps) ought be on the market.

Recognizing that, except for quick settlements, the percentage of cases that resolve without judicial action reflects adversely on a court's performance, Elizabeth ranked all 94 district courts on a per judge basis in ascending order of the terminations without judicial action. <u>See</u> **Appendix E**. The results are worthy of further study.

Fully 6 out of the top 10 district courts in handling cases through judicial action (10 out of the top 20) are also among America's most productive courts, yet only 4 of the bottom 20 are in this same cohort of America's most productive courts. This is not random chance. It appears that a productive court is particularly well equipped to address its full caseload.

This is the third important result of this study. It is neither flashy nor counterintuitive. Rather, it is just common sense, but demonstrable: a productive court is simply more likely to address the claims of all those who seek its services. In this way, America's most productive federal district courts make a special contribution to the "just, speedy, and inexpensive" resolution of every civil action.

I would argue that productive courts do much more: that they are less likely to make unwarranted grants of summary judgment, less likely to engage in ham fisted arm twisting for settlement, and far more likely to be viewed by all participants as actively engaged in the hands-on search for justice. But these are all matters that go beyond the question you posed.

As always, your comments and suggestions are very much appreciated.

Warmest regards,

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[3]An especially pernicious recent example of this phenomenon are "copyright trolls" who purchase the copyright to a pornographic work with an especially salacious title, trace down the ISP addresses of folks who may have downloaded the film illegally, and sue them in expectation of forcing a quick settlement so the defendants will not be "outed" as voyeurs of pornography.

A LAMENT FOR WHAT WAS ONCE AND YET CAN BE

Hon. William G. Young*

Abstract: In the wake of 9/11, the American people showed unwavering faith in justice, fairness, and the rule of law through their steadfast service to the legal system. Yet one of the Bush administration's first orders in the new "war on terror" was effectively to strip the courts and the juries of their role in the "trials" of our enemies, instead creating streamlined military tribunals. This diminished role of the judiciary is unfortunately just the latest feature in a disturbing trend in the federal district courts, which has seen the process of fact-finding in open court exchanged for a reflective in-chambers review of written submissions, and the trial of actual disputes replaced with "litigation management." Most shocking is that the diminishment of the traditional American trial has been facilitated by the judiciary's own institutional policies. Judge William G. Young of the United States District Court for the District of Massachusetts makes a plea to all branches of government and the American people to halt the erosion of the judiciary and return to the founding principles of our democracy.

* United States District Judge, District of Massachusetts. The author would like to thank Angela M. Bushnell and her Boston College Law School Article Editing team for their research assistance, and Guarav Singh for his work on Appendices A & B. The author would also like to thank David Chen and David Hine for their outstanding editorial assistance.

Introduction

> *At what point shall we expect the approach of danger? By what means shall we fortify against it? Shall we expect some transatlantic military giant, to step the Ocean, and crush us at a blow? Never! All the armies of Europe, Asia and Africa combined, with the treasure of the earth (our own excepted) in their military chest; with a Buonaparte for a commander, could not by force, take a drink from the Ohio, or make a track on the Blue Ridge, in a trial of a thousand years.*
>
> *At what point then is the approach of danger to be expected? I answer, if it ever reach us, it must spring up amongst us. It cannot come from abroad. If destruction be our lot, we must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide.*
>
> —Abraham Lincoln, January 27, 1838, age 27[1]

At 8:56 AM, Tuesday, September 11, 2001, an unwanted future burst upon us. Terrorists launched a vicious attack upon Americans, unparalleled in ferocity and horror.[2] When it was over, we had lost more people than were killed at Pearl Harbor,[3] but unlike the Imperial Japanese Navy in 1941, the terrorists left no return address.[4]

Yet Americans were undaunted. We had heroes aplenty. Passengers attempted to retake United Flight 93 and, at the cost of their own lives, diverted it from its intended target.[5] New York's firefighters ran into the doomed towers with cool professionalism even as people fled from every exit or jumped to their deaths.[6] Some reported even when expressly told not to, and many others rushed to the crash sites directly from their own houses.[7] President Bush immediately convened a "war council" with advisors from the State Department, Central Intelligence Agency, National Security Agency, and other key departments, and, on September 21, approved the first military plans to attack al Qaeda and Taliban targets in Afghanistan.[8]

The federal courthouse in Boston, with its beautiful glass wall overlooking the harbor, was guarded by Coast Guard reservists in

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[1] Francis Trevelyan Miller & Edward Bailey Eaton, Portrait Life of Lincoln: The Greatest American 113 (1910).

[2] *See* Nat'l Comm'n on Terrorist Attacks upon the U.S., The 9/11 Commission Report 1–14, 339 (2004) [hereinafter 9/11 Report].

[3] *See id.* at 311, 552 n.188.

[4] *See id.* at 326, 399, 554 n.6.

[5] *Id.* at 13–14.

[6] *Id.* at 287, 289–91, 298–302, 306–08.

[7] 9/11 Report, *supra* note 2, at 314.

[8] *Id.* at 330–38.

Boston whalers mounting .50 caliber machine guns. Boarder Patrol officers in unfamiliar green uniforms thronged the courthouse cafeteria in between shifts of screening passengers at Logan International airport. Americans stood united in a way not seen since Pearl Harbor, but our unity was not only expressed in our military response or our humanitarian outreach to the victims.[9] Within the judicial branch, citizen response to jury subpoenas spiked to record levels.[10] Amidst all the frenetic activity in the months following September 11, not one potential juror—not one—sought to be excused on the ground that the courthouse itself was a probable terrorist target. Americans came to serve in record numbers simply because their country called them. Still more impressive, and ultimately far more profound, in the year following September 11 the government's conviction rate remained relatively unchanged.[11] In other words, juries continued to perform their constitutional role of providing impartial, even-handed justice even in the face of a looming, inchoate terrorist threat, and never subordinated their independent judgment to that of the government.

Then, on November 13, 2001, the President promulgated an order authorizing military tribunals to try non-citizens meeting certain criteria.[12] Such tribunals were not limited to theaters of active combat operations, but were authorized to sit within the United States itself,[13] where federal district courts have exclusive jurisdiction over the trial of federal crimes.[14] The tribunals did not have to follow the rules of

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[9] *See id.* at xv–xviii, 13–14, 289–311, 326–34.

[10] *See* Thanassis Cambanis, *Juror Scrutiny Reaches New Level*, BOSTON GLOBE, July 12, 2002, at B1.

[11] *Compare* U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, app. B at "National Data" (2001), *available at* www.ussc.gov/ANNRPT/2001/nat01.pdf (showing trial convictions as 3.4% of national convictions), *with* U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, app. B at "National Data" (2002), *available at* www.ussc.gov/ANNRPT/2002/nat02.pdf (showing trial convictions as 2.9% of national convictions).

[12] *See* Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 4(a), *reprinted in* 10 U.S.C. § 801 (2006).

[13] *See id.* §§ 3(a), 4(c)(1).

[14] *Compare Ex parte* Quirin, 317 U.S. 1, 1, 40 (1942) (holding that an unlawful enemy belligerent may be tried by secret military tribunal within the territorial jurisdiction of the United States District Court), *with Ex parte* Milligan, 71 U.S. 2, 3 (1866) (holding that absent proper declaration of martial law, a secessionist saboteur who is not himself an enemy belligerent may not be tried by military tribunal within the territorial jurisdiction of a U.S. District Court).

evidence,[15] nor were their actions subject to judicial review.[16] The saddest irony is that the government justified these military tribunals in part by conjecturing that jurors might be fearful of serving on such cases,[17] even though Americans were turning out in record numbers for jury service.[18]

I read this Military Order the next day while sitting in my chambers. I remember with distinct clarity looking out over Boston Harbor at the city I love, where I have spent my entire professional life, and thinking, "This cannot be. Surely this will not stand."[19]

How wrong I was. After some bleating about civil liberties by pundits in the media, the press quickly fell into line, blandly referring to military detention as simply a "parallel track" to being indicted in the federal court system.[20] The creation of these military tribunals thus reduced the citizen jury from the central feature of the U.S. justice system to nothing more than a "parallel track."[21] This has been the most profound shift in our legal institutions in my lifetime, and—most remarkable of all—it has taken place without engaging any broad public interest.

What is even more devastating is the fact that, rather than being an excrescence on our Constitution, this dismissive view of juries, fact-finding, and judicial review may well prove the most enduring legacy of the Bush administration.[22] This is because the policy making body for the lower level federal courts, the U.S. Judicial Conference, has little concern for any of these things.

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15 Military Order, *supra* note 12, § 4(c)(3).

16 *See id.* §§ 4(c)(8), (7)(b)(2).

17 *See* Elisabeth Bumiller & David Johnston, *A Nation Challenged: Immigration: Bush Sets Option of Military Trials in Terrorist Cases*, N.Y. TIMES, Nov. 14, 2001, at A1 ("White House officials said the tribunals were necessary to protect potential American jurors from the danger of passing judgment on accused terrorists.").

18 *See* Cambanis, *Juror Scrutiny Reaches New Level*, *supra* note 10.

19 *Cf.* Thomas L. Friedman, *The Iraqi Invasion: Bush, Hinting Force, Declares Iraqi Assault "Will Not Stand"; Proxy in Kuwait Issues Threat*, N.Y. TIMES, Aug. 6, 1990, at A1 (quoting President George H.W. Bush).

20 *See, e.g.*, Thanassis Cambanis, *New Federal Security Act Remains Largely Unused*, BOSTON GLOBE, June 23, 2002, at B1.

21 *See* Adam Liptak, *Accord Suggests U.S. Prefers to Avoid Courts*, N.Y. TIMES, July 16, 2002, at A14.

22 American exceptionalists (I consider myself one) can but rue the fact that jury trials for those whom the executive has characterized as terrorists apparently survived for seven years longer in Russia than in the United States. *See* Megan K. Stack, *New Law in Russia Ends Jury Trials for "Crimes Against State"*, L.A. TIMES, Jan. 2, 2009, at A3.

I. Jury Trials

This is a trial court. Trial judges ought go out on the bench every day and try cases.

—John H. Meagher, 1978[23]

The American jury system is dying—more rapidly on the civil than the criminal side, and more rapidly in the federal than the state courts—but dying nonetheless.

For decades, our civil juries have been incessantly disparaged by business and insurance interests. These interests know what they are doing. Recent analysis has led one commentator to conclude that "a civil justice system without a jury would evolve in a way that more reliably serve[s] the elite and business interests."[24] What is most disturbing about this trend is that it has occurred without the courts offering any defense for the institution upon which their moral authority ultimately depends.[25] Indeed, federal courts today seem barely concerned with jury trials.[26] The federal judiciary has been willing "to accept a diminished, less representative, and thus sharply less effective civil jury."[27] The predicable result is that bipartisan majorities in Congress have severely restricted access to the jury.[28]

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[23] John H. Meagher, the senior justice of the Massachusetts Superior Court, told me this when first I joined that bench. Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 30 Suffolk U. L. Rev. 67, 83, 92 (2006) (quoting Hon. John Meagher in 1978).

[24] Valerie P. Hans, Business on Trial: The Civil Jury and Corporate Responsibility 226 (2000).

[25] *See* Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 141. *But see* United States v. Luisi, 568 F. Supp. 2d 106, 110–11 (D. Mass. 2007) (defending the jury as the cornerstone of the legal system's legitimacy); Ciulla v. Rigny, 89 F. Supp. 2d 97, 100–03 (D. Mass. 2000) (offering a defense of juries).

[26] *See* Edmund V. Ludwig, *The Changing Role of the Trial Judge*, 85 Judicature 216, 217 (2002) ("Trials, to an increasing extent, have become a luxury . . . when cases are handled as a package or a group instead of one at a time, it is hard, if not impossible, for the lawyers or the judges to maintain time-honored concepts of due process and the adversary system."). Judge Ludwig was at the time a member of the Court Administration and Case Management Committee of the Judicial Conference of the United States. *See* Comm. on Court Admin. & Case Mgmt., Judicial Conference of the U.S., Civil Litigation Management Manual, at iii (2001), *available at* http://www.fjc.gov/public/home.nsf (follow "Publications & videos" hyperlink; then follow "Browse by Subject" hyperlink; then follow "Case Management—Civil" hyperlink).

[27] *Rigny*, 89 F. Supp. 2d at 102 n.6 (citing Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice and Civil Judging*, 49 Ala. L. Rev. 133, 127–52 (1997)); *see also* Am. Coll. of Trial Lawyers, Report on the Importance of Twelve-Member Civil Jury in the Federal Courts 34 (2002) ("The real question . . . is whether there are any legitimate reasons for departing from [twelve-

On the criminal side, manipulation of the federal sentencing guidelines has had the consequence of imposing savage sentences upon those who requested jury trials, a choice guaranteed under the Constitution.[29] Small wonder that the rate of criminal jury trials in the federal courts has plummeted.[30]

Yet in a government of the people, the justice of the many cannot be left to the judgment of the few. Nothing is more inimical to the essence of democracy than the notion that government can be left to elected politicians and appointed judges. As Alexis de Tocqueville so elegantly stated, "The jury system . . . [is] as direct and extreme a consequence . . . of the sovereignty of the people as universal suffrage."[31] Like all government institutions, our courts draw their authority from the will of the people. The law that emerges from these courts provides the threads with which all our freedoms are woven. It is through the rule of law that liberty flourishes. Yet "there can be no universal respect for law unless all Americans feel that it is *their* law . . . ."[32] Through the jury, the citizenry takes part in the execution of the nation's law, and in that way, each can rightly claim that the law belongs partly to him or her.[33]

Only because juries may decide most cases is it tolerable that judges decide some. However highly we view the integrity and quality of our judges, it is the judges' colleague in the administration of justice—the jury—which is the true source of a court's glory and influence. The involvement of ordinary citizens in judicial tasks provides legitimacy to all that is decreed. When a judge decides cases alone, "memories of the jury still cling to him."[34] A judge's voice echoes the values and judgment learned from observing juries at work. Ours is not a system

member juries]."); *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1466–89 (1997).

[28] *See, e.g.*, Employee Retirement Income Security Act, Pub. L. No. 93-406, 88 Stat. 832 (1974); Private Securities Litigation Reform Act, 48 Stat. 899 (1934); Lirette v. Shiva Corp., 27 F. Supp. 2d 268, 271 n.3 (D. Mass. 1998); Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 63 n.74 (D. Mass. 1997).

[29] *See* Berthoff v. United States, 140 F. Supp. 2d 50, 67–68 (D. Mass. 2001) (noting a 500% greater average sentence for criminals found guilty via jury trial over those who pleaded guilty and cooperated).

[30] *See id.* at 68–69.

[31] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 273 (J.P. Mayer ed., George Lawrence trans., Harper Collins 2000) (1835).

[32] Irving R. Kaufman, *A Fair Jury—The Essence of Justice*, 51 JUDICATURE 88, 91 (1967).

[33] *See* DE TOCQUEVILLE, *supra* note 31, at 273.

[34] *Id.* at 276.

where judges cede some of their sovereignty to juries, but rather one where judges borrow the jury's fact-finding authority.[35]

In recent years, many judges appear to have forgotten that the true source of their power to render legal interpretations stems from the jury—their co-equal constitutional officers.[36] It is the *judiciary* which has failed to place the jury trial at the very center of its operations where it belongs:[37]

> [T]hose judges who thought that, by and large, we could do without juries and we would still have the same moral authority, and our written opinions, our constitutional interpretations would still occupy the center stage of political discourse. Well, we are rather stunned that the President thought that, with respect to those people that he designated as enemies of the state, by and large, he could do without courts. And the Congress acquiesced.[38]

Whenever Congress extinguishes a right which, heretofore, has been vindicated in the courts through citizen juries, there is a cost. It is not a monetary cost, but rather a cost paid in rarer coin—the treasure of democracy itself.[39]

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[35] *See* Akhil Reed Amar, America's Constitution: A Biography 236 (2005) ("A criminal judge sitting without a criminal jury was simply not a duly constituted federal court capable of *trying* cases, just as the Senate sitting without the House was not duly constituted federal legislature capable of enacting statutes.") (emphasis added).

[36] *Luisi*, 568 F. Supp. 2d at 111, 114–19.

[37] *See generally* Andrew Seigel, *The Court Against the Courts: Hostility to Litigation as an* [illegible]

II. Fact-Finding

You have to listen to the bastards, Austin. They might just have something.
—Hon. Franklin H. Ford[40]

Over a quarter century has passed since I first came to the bench. I remember well the extraordinary emphasis that was then placed on fact-finding, and the meticulous observance of the rules of evidence, in order that we might "get it right."[41]

Yet as I came to learn over the next few years, fact-finding is difficult. Exacting and time consuming, it inevitably falls short of absolute certainty. More than any society in history, the United States entrusts fact-finding to the collective wisdom of the community. Our insistence on procedural safeguards,[42] application of evidence rules,[43] and our willingness to innovate[44] are all designed to enhance impartial fact-finding.

Judicial fact-finding is equally rigorous. Necessarily detailed, judicial fact-finding must draw logical inferences from the record, and, after lucidly presenting the subsidiary facts, must apply the legal framework in a transparent written or oral analysis that leads to a relevant conclusion.[45] Such fact-finding is among the most difficult of judicial tasks. It is tedious and demanding, requiring the entirety of the judge's attention, all her powers of observation, organization, and

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[40] These are the words of my distinguished predecessor, Franklin H. Ford to his legendary Courtroom Deputy Clerk, Austin W. Jones. *See* Young, *Vanishing Trials*, *supra* note 23, at 93.

[41] Hon. Raymond S. Wilkins, former Chief Justice of the Massachusetts Supreme Judicial Court. "Facts are like flint," he used to say. I clerked for Chief Justice Wilkins, and have never met a greater proponent of careful fact-finding.

[42] *See, e.g.*, Victor v. Nebraska, 511 U.S. 1, 1–3 (1994) (discussing "beyond reasonable doubt" standard of proof); Duncan v. Louisiana, 391 U.S. 145, 150 (1968) (mandating jury trials for serious crimes); Andres v. United States, 333 U.S. 740, 748–49 (1948) (requiring jury unanimity in death penalty cases). *But see* Apodaca v. Oregon, 406 U.S. 404, 410–12 (1972) (affirming non-unanimous criminal convictions and holding that the Constitution does not require unanimity in all criminal trial verdicts).

[43] *See, e.g.*, Daubert v. Merrell Dow Pharm., 509 U.S. 579, 588–95 (1993).

[44] *See, e.g.*, Fortenberry v. Maggio, 664 F.2d 1288, 1288 (5th Cir. 1982) (allowing juror note-taking); People v. Cummings, 850 P.2d 1, 46–48 (Cal. 1993) (allowing juror questions); Thomas A. Mauet, Trial Techniques 179 (7th ed. 2007) (outlining the panorama of demonstrative aids); Administrative Office of the District Court of Mass., Criminal Model Jury Instructions for Use in the District Court (2009), *available at* http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/jury-instructions/criminal/pdf/0004-drafting-a-plain-language-jury-instruction.pdf (providing jury instructions in plain English).

[45] *See* Fed. R. Civ. P. 52(a)(1).

recall, and every ounce of analytic common sense he possesses. Moreover, fact-finding is the one judicial duty that may never be delegated to law clerks or court staff.[46] Indeed, unlike legal analysis, many judges will not even discuss fact-finding with staff, lest the resulting conclusions morph into judgment by committee rather than the personal judgment of the duly constituted judicial officer.

Fair and impartial fact-finding is supremely important to the judiciary because, as Judge Robert E. Keeton has so cogently observed:

> Judging is choice. Choice is power. Power is neither good nor evil except as it is allocated and used. Judging in a legal system is professional. Professionals, including judges, represent interests other than their own. One who accepts a professional role in a legal system accepts an obligation to confine the exercise of power within the limits of authority. For each professional role the limits of authority are defined by law . . . . The quality of judging in a legal system depends on commitment. It depends first on commitment to the aim of justice. Second, it depends on commitment to professionalism . . . . Third, the quality of judging depends on commitment to method. Judicial choice, at its best, is reasoned choice, candidly explained.[47]

While trial court legal analysis is appropriately constrained by statutes and the doctrine of stare decisis, the true glory of our trial courts, state and federal, is their commitment to fair and neutral fact-finding. Properly done, facts found through jury investigation or judicial analysis truly are "like flint."[48]

Yet there has been virtual abandonment by the federal judiciary of any sense that its fact-finding processes are exceptional, or due any special deference.[49] Federal district court judges used to spend their

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[46] *Cf.* David Crump, *Law Clerks: Their Roles and Relationships with Their Judges*, 69 JUDICATURE 236, 237 (1986) (acknowledging a common criticism of the "overuse" of law clerks who are not constitutionally authorized to perform judicial functions); John B. Cheadle, *The Delegation of Legislative Functions*, 27 YALE L.J. 892, 896 (1918) (noting that a judge cannot further delegate authority with which he himself has been delegated and entrusted).

[47] ROBERT E. KEETON, KEETON ON JUDGING IN THE AMERICAN LEGAL SYSTEM 5 (1999).

[48] Wilkins, *supra* note 41.

[49] This is similar to what Marc Galanter calls the "jaundiced view"—that there has been a decline in faith in adjudication by the courts and their key constituencies—a "turn from law, a turn away from the definitive establishment of public accountability in adjudication" and that there exists a "very real fear of trials." He argues that lawyers, judges, and corporate users, misled by the media, believe that America is amidst a

time on the bench learning from lawyers in an adversarial atmosphere, and overseeing fact-finding by juries or engaging in it themselves. This was their job and they were proud of it. Today, judges learn more reflectively, reading and conferring with law clerks in chambers. Their primary challenge is the proper application of the law to the facts—facts that are either taken for granted, or sifted out of briefs and affidavits, and, in the mode of the European civil justice systems, scrutinized by judges and clerks behind closed doors.[50] While judges do talk to lawyers in formal hearings, these hearings can be short, and usually serve to test and confirm a judge's understanding rather than develop it.[51]

The major reasons for the decline in the preeminence of fact-finding are not structural but cultural. On the civil side, they result from a marked shift in emphasis from the trial of actual disputes to mere litigation management, resulting in an overuse of summary judgment[52] and a concomitant settlement culture.[53] On the criminal side, the sentencing guidelines ushered into judicial opinions a degree of sophistry heretofore unknown to the federal judiciary. For seventeen years, an entire generation of federal judges spoke of sentencing based on "facts" determined by a "preponderance of the evidence," when what they had before them was manifestly *not* evidence, but rather "faux facts" that had neither been tested by cross examination nor presented to a jury.[54]

"litigation explosion" and that trials are expensive and risky because juries are pro-plaintiff, "arbitrary, sentimental and 'out of control.'" *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1266–68, 1272–73 (2005).

[50] For an apt criticism of this approach, see Sabin Willett, *Clericalism and the Guantanamo Litigation*, 1 NORTHEASTERN U. L.J. 51, 52 (2009). *See generally* Dennis Jacobs, *The Secret Life of Judges*, 75 FORDHAM L. REV. 2855 (2007).

[51] *See, e.g.*, Eugene R. Fidell, *Hearings on Motions: A Modest Proposal*, NAT'L L.J., Dec. 22, 2008, at 23 (bemoaning the rarity of hearings on dispositive motions in the D.C. district court: "[e]ven in this digital era, there is still a participatory and symbolic aspect to the administration of justice that remains key to its legitimacy. That interest is not served when business is transacted without human contact.").

[52] Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984 (2003).

[53] *See, e.g.*, *In re* One Star Class Sloop Sailboat Built in 1930 with Hull Number 721, Named "Flash II", 517 F. Supp. 2d 546, 548, 552 (D. Mass. 2007), *aff'd* United States v. One Star Class Sloop Sailboat Built in 1930 with Hull Number 721, Named "Flash II", 546 F.3d 26 (1st Cir. 2008).

[54] United States v. Green, 346 F. Supp. 2d 259, 280–81 (D. Mass. 2004), *vacated in part*, United States v. Yeje-Cabrera, 430 F.3d 1 (1st Cir. 2005), *vacated*, United States v. Pacheco, 434 F.3d 106 (1st Cir. 2006).

In so doing, we lost our way. In 1980, the average amount of time a U.S. district judge spent in the court room was 790 hours. In 2008, the average was just 353 hours, of which only 189 were spent in trial.[55] The judiciary hates it when I say this, because the immediate reaction is that we are not working very hard, and that is wrong. We are working as hard, or harder, than ever before. It took seventy-five years for the Federal Supplement, the vanity press for district judges, to fill a thousand volumes; my first published opinion was in Volume 656. My most recent opinions appear in Volume 578 of the *second* Federal Supplement. If I survive another year, I will have opinions *spanning* a thousand volumes. And what are they about? Are they great cases, findings and rulings? There are a few, but as Patricia Wald, former chief of the D.C. Circuit Court of Appeals stated, "[f]ederal jurisprudence is largely the product of summary judgment in civil cases."[56] If she had added motions to dismiss, she would have gotten it completely right. Page after page of carefully reasoned adjudications explaining why we don't go to trial— and we wonder why trials are vanishing.

This massive drift away from rigorous fact-finding in open court did not happen randomly. It did not result from the personal predilections of those newly appointed to the trial bench, who are every bit as vigorous and skilled as their predecessors.[57] The shift was instead occasioned by less-than-subtle institutional cues from within the judiciary itself. For years, newly appointed district judges have been taught that the focus of their job is primarily the "management" of their caseload, not the trial of the cases before them.[58] "Of course, we

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[55] In 1980, the average trial time reported by federal judges who were active district judges for at least 11 months was approximately 550 hours. In 2002, the average trial time was just over 250 hours. *See* FEDERAL JUDICIAL CENTER, REPORT (based on data reported to the Administrative Office on the Monthly Report of Trials and Other Court Activity) [App. A]. Data for fiscal years 2003 and 2004 confirm that trial time has consistently remained lower than it was during the 1980s. *See* Data derived from the Reports of the Clerk, United States District Court, District of Massachusetts 2005–2008 [App. B]. There has also been a decrease in bench time and trials in the state courts. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–60 (2004).

[56] Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1897 (1998).

[57] *See Open Letter*, *supra* note 39, at 31–33.

[58] The brilliant judge Richard S. Arnold cuts directly to the bone:

> I think in the 20 years since I was a district court judge, we've seen a tremendous increase in volume, tremendous pressure to decide cases without thinking very much about them, tremendous pressures to avoid deciding cases. I mean, some judges will do almost anything to avoid deciding a case on the merits and find some procedural reason to get rid of it, coerce the parties into settling or whatever it might be.

must be skilled managers. But to what end? To the end that we devote the bulk of *our* time to those core elements of the work of the Article III trial judiciary—trying cases."[59]

Yet the time spent at trial continues to fall.[60] While courtroom deputy clerks dutifully record the time each judge spends on the bench,[61] the results are a closely guarded secret, known only to the Committee on Judicial Resources which is adjured to not share such information even within the judiciary.[62] Although the Civil Justice Reform Act requires that judge-specific comparative data be published for cases over three years old and motions pending for more than six months,[63] the central uniform measure of actual trial judging is never even mentioned, and those judges who desire to measure their efforts against the most productive courts are rebuffed by internal secrecy.

The Administrative Office of the U.S. Courts annually publishes the number of "trials" in which the federal judiciary engages, and ranks

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Hon. Richard S. Arnold, *Mr. Justice Brennan and the Little Case*, 32 LOY. L.A. L. REV. 663, 670 (1999). My colleague, Judge Nancy Gertner, has also addressed this issue:

> In baby judge school, one trainer went so far as to begin a session on employment discrimination by saying, "Here's how you get rid of these cases!" "Here's how you get rid of these cases?" I could have sworn it was about justice, not digging for an excuse to close the case. When I was a baby judge we had more courses on case management, and mediation, than on opinion writing.

Hon. Nancy Gertner, United States District Judge for the District of Massachusetts, "A Quasi-Independent Judiciary," Address before the Massachusetts Bar Foundation (Jan. 26, 2006) (on file with author); *see also* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982).

59 *Open Letter*, *supra* note 39, at 33.

60 *Compare* App. A *with* App. B.

61 *See generally* 28 U.S.C. § 604 (2009) (outlining administrative duties of court personnel).

62 *See* 3 GUIDE § A, chap. 2, part B, § 2, Part C, para. 6 ("Access to Committee Reports and Other Material") (on file with author) ("Reports approved by the Conference for transmission to Congress shall not be publicly released prior to their submission to Congress .... Background materials, files, minutes and the like, are considered working papers of the Conference . . . and generally are not available to the public.").

63 Civil Justice Reform Act of 1990 (CJRA), 28 U.S.C. §§ 471, 472–482 (1990). This "sunshine" has had the predictable and desirable result of increasing judges' productivity. *See, e.g.*, A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877, 900–03 (1993) (commending the reporting requirements of CJRA as possibly the most important and potentially successful features of the Act); Doreen Carvajal, *Awaiting Judgment: New York's Clogged U.S. Courts Delaying Civil Verdicts for Years*, N.Y. TIMES, Apr. 17, 1995, at 1 (reporting criticism of Federal Judge I. Leo Glasser and his delays in issuing verdicts and decisions in civil cases, in reference to CJRA reports).

the courts accordingly.[64] Words matter,[65] however, and the Conference has debased the term "trial." The term once denoted a jury or bench proceeding that led to a verdict; now it encompasses any disputed evidentiary hearing.[66] Thus, a criminal case with a motion to suppress, a *Daubert* hearing,[67] a genuine trial, and a sentencing hearing count as four "trials," as does a civil patent case with a preliminary injunction hearing, a *Markman* hearing,[68] a genuine trial, and a separate damages hearing. As a result, the Administrative Office inflates the actual number of trials by approximately 33%.[69] However much this may impress Congress, such imprecision renders the term "trial" essentially meaningless, a result not lost on scholars[70] and the knowledgeable press.[71] To the judges, the message could not be more clear—trial time, indeed, any on-bench time, matters less than does "moving the business."[72] Judge Irene M. Keeley, former president of the Federal Judges Association, states:

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[64] *See, e.g.*, STATISTICS DIV., OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 19, 23, 388 tbl. T-1.

[65] *See* Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.: "A word is . . . the skin of a living thought . . . .").

[66] *See* Memorandum from Michelle Rynne to Helen Costello (Aug. 22, 2007) (on file with author) (providing guidance on reporting criteria for JS10 Monthly Trials Reports: "The following are types of proceedings which should be reported as trials . . . hearings on preliminary injunctions and temporary restraining orders . . . hearings on mental competency; hearings on petitions for probation revocation . . . hearings on motions to remand; evidentiary hearings . . . ."); *see also* Zach Lowe, *Federal Court Statistics, or: How Numbers Can Drive You Mad*, LAW.COM, Sept. 2, 2008, http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202424181868 (last visited Apr. 16, 2008).

[67] *See* Daubert v. Merrell Dow Pharm., 509 U.S. 579, 579–95 (1993).

[68] *See generally* Markman v. Westview Instruments, 517 U.S. 370 (1996).

[69] *Cf. Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2008: Hearing on S. 2774 Before the S. Comm. on the Judiciary*, 110th Cong. 88–89 (2008) (statement of William O. Jenkins, Jr., Director Homeland Security and Justice) [hereinafter Jenkins statement].

[70] *Cf.* Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1470–73 (2003) (comparing the Administrative Office's database records and case dockets in PACER for tort and inmate cases, and concluding that the Administrative Office method of recording judgments created disparities in the data).

[71] *See, e.g.*, Lowe, *supra* note 66.

[72] The internal process of the Judicial Conference has real world consequences. For example, from time to time the Judicial Conference takes upon itself the authority to advise the President *not* to nominate judges to fill vacancies it deems superfluous. It makes this decision by fixing an arbitrary cutoff point based upon the court's "weighted caseload," derived by a methodology that has been sharply (and accurately) criticized by independent observers. *See* S. REP. No. 110-427, at 17–19 (2008); Jenkins Statement, *supra* note 69, at 82–

> Litigation management is our primary job, and, even with fewer trials, there is a lot of litigation to be managed. We trial judges still spend a lot of time on the bench resolving disputes, even if it is not always during trial. Discovery is a demanding—and growing—part of litigation management expense. Mediation—even when it occurs early—doesn't always succeed in resolving the case. The lawyers engage in extensive, contentious discovery that requires an enormous amount of attention both from magistrate and district judges.[73]

Litigation management: hardly a shining vision. Once divorced from daily interaction with jurors, our written opinions subtly mock the very idea that democratic institutions might be made to serve the cause of justice. This leads us to prefer knowledge over hope, and the jury system is, if nothing else, our country's finest expression of hope. We district judges are more than pint-sized court of appeals aspirants, for we have the sole and unique responsibility for our constitutionally guaranteed modes of fact-finding. Yet as judicial face time with jurors, lawyers, and litigants becomes increasingly rare, and as the federal courtrooms throughout the land go dark with disuse, the moral force of what is decreed is increasingly marginalized. Soon, society may begin to wonder why we have the lower federal courts at all.

95; *see also* John Shapard, Fed. Judicial Ctr., How Caseload Statistics Deceive 2–5 (1991), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/0020.pdf/$file/0020.pdf (discussing common problems of misinterpretation with caseload statistics). While the "weighted caseload" ranking may be modified by various gestalt factors, none of them have anything to do with the actual work being performed by the judges of the affected court, i.e. the on bench and trial time of those judges.

Even putting aside the larger issues of the separation of powers—the fact that the Judicial Conference is, in effect, advising the President not to enforce a law passed by Congress setting the number of district judges within each judicial district and is interfering with the Senate's constitutional prerogative to advise and consent to such nominations—what message does this communication send to the people of the affected district? *Cf.* S. Rep. No. 110-427, at 2–5, 20–21 (revealing the extent of the Judicial Conference's influence over Congress's power to constitute the lower courts, and including Sen. John Cornyn's objections on behalf of his district to the Administrative Office's recommendations). Can it be that the speed and quality of justice is too high in those locations and we need to cut back? And what of the active judges in such a district, knocking themselves out to try the cases before them and help other courts as well? Each one must know that, should she falter or fail, it is the official policy of the Judicial Conference that her seat shall lie vacant and her courtroom go dark.

[73] *Conference Represents Federal Trial Judges*, Third Branch, June 2003, *available at* http://www.uscourts.gov/ttb/june03ttb/interview.html (quoting Hon. Irene M. Keeley).

III. Where are You Going, Habeas Corpus?

James Robertson's critically acclaimed work on habeas corpus, and the thorough analysis in Jonathan Shaw's "The War and the Writ," together explain the vicissitudes of the constitutionally guaranteed writ of habeas corpus in the years since September 11.[74] It is important to note that the decline of habeas had begun well before that day, however, and that it was significantly encouraged by the judiciary. Even Chief Justice William H. Rehnquist was highly critical of our habeas jurisprudence.[75] As a result of this and similar criticism,[76] Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which, under the guise of ordaining the jurisdiction of the lower federal courts, severely restricted access to the writ by those in government custody.[77] AEDPA likewise restricts, perhaps unconstitutionally, the right of those lower federal courts independently to interpret the Constitution.[78]

Congress, by adjusting the jurisdiction of the lower federal courts, can effectively strip disfavored classes from full access to justice, thereby restricting, if not extinguishing, cherished individual rights and liberties.[79] This is known as "rights stripping,"[80] a legislative technique

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[74] *See generally* James Robertson, *Quo Vadis, Habeas Corpus?*, 55 Buff. L. Rev. 1063 (2008); Jonathan Shaw, *The War and the Writ*, Harv. Magazine, Jan.–Feb. 2009, at 24.

[75] *See, e.g.*, Coleman v. Balkcom, 451 U.S. 949, 957–58 (1981) (Rehnquist, J., dissenting) (criticizing the habeas remedy as "endlessly draw[ing] out legal proceedings" and thus rendering the death penalty to be a virtual illusion).

[76] Verbal and political attacks on an independent federal judiciary are as old as the republic, and as healthy. *See generally* Mark R. Levin, Men in Black: How the Supreme Court is Destroying America (2005). We learn from our history, recoiling from extremism. Each generation must strike anew the balance between Congress, the President, and the Judiciary.

[77] Antiterrorism Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §§ 2244, 2253–2255, 2261–2266 (2000).

[78] *See* Evans v. Thompson, 524 F.3d 1, 1–5 (1st Cir. 2008) (Lipez, J., dissenting); *see also* Bradley v. Henry, 428 F.3d 811, 816 (9th Cir. 2005) (implying that the AEDPA, as interpreted, places unworkable restrictions on the federal courts' powers of review).

[79] As former House Majority Leader Tom DeLay once remarked, "We set up the courts. We can unset the courts." Miara v. First Allmerica Fin. Life Ins. Co., 379 F. Supp. 2d 20, 70 n.57 (D. Mass. 2005) (quoting Peter Wallsten, *2 Evangelicals Want to Strip Courts' Funds*, L.A. Times, Apr. 22, 2005, at A22.)

[80] In addition to the AEDPA, examples of "rights stripping" include its cousins, the Real ID Act of 2005, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *See* Pub. L. No. 109-13, § 106(a)(5), 119 Stat. 302 (2005); Pub. L. No. 104-208, § 505(B)(2), 110 Stat. 3009-546 (1996) (codified in scattered sections of 110 U.S.C.). Note that the Real ID Act is part of the much broader Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005).

that descends directly from bills proposed in the 1980s to strip federal courts of jurisdiction over abortion and busing.[81] As commentators have noted, "jurisdiction stripping" is, in effect, "rights stripping,"[82] because it removed the nuanced views of the 674 federal district judges from the rich common law tradition of evolutionary statutory interpretation, leaving the matter solely to appellate courts. While society has subsequently recoiled from stripping rights from women and minorities, it has had no such hesitancy concerning felons and aliens. Sadly, resort to this technique has become more frequent with the concomitant erosion of the very rights a truly independent judiciary was designed to protect.[83]

So it was that at the dawn of the new millennium, with the jury sidelined and marginalized, the judiciary seemed more interested in discussing recondite issues of law than in the robust but tedious process

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[81] *See* Note, *Powers of Congress and the Court Regarding the Availability and Scope of Review,* 114 HARV. L. REV. 1551, 1552 (2001).

[82] *See, e.g.*, Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts,* 16 HARV. C.R.-C.L. L. REV. 129, 129 n.1, 141 (1981) (arguing that such measures unduly burden constitutional rights). *Contra* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary,* 36 UCLA L. REV. 233, 261–69 (1988) (discussing study on parity of state and federal courts).

[83] *See* Gonzalez v. United States, 135 F. Supp. 2d 112, 115 n.5 (D. Mass. 2001), *aff'd,* Brackett v. United States, 270 F.3d 60 (1st Cir. 2001), *abrogated by* Johnson v. United States, 544 U.S. 295 (2005).

It is constitutional bedrock that "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III , § 1. There is but a single limit on Congress' broad powers to establish and disestablish inferior courts, expand or trim their jurisdiction, and move jurisdiction from one such court to another. That limit is the American jury. *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."); *Id.* amend. VII ("In Suits at common law . . . the right of trial by jury shall be preserved . . . ."). These constitutional commands necessarily require the existence of jury trial courts to give them effect.

Efforts to water down the plain language of the Constitution continue to this day. *See The Civil Jury, supra* note 27, at 1493–1503 (discussing proposals to limit the jury's role in complex civil cases); *see also* Note, *The Twenty Dollars Clause,* 118 HARV. L. REV. 1665, 1686 (2005) (suggesting that the United States has "outgrown" the philosophy undergirding the Seventh Amendment).

The jury, that most vital expression of direct democracy extant in the United States today, thus functions as a practical and robust limitation on congressional power. It is as crucial and central a feature of the separation of powers between the Legislature, the Executive, and the Judiciary as the Supreme Court. *See* Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines,* 38 U. MICH. J.L. REFORM 345, 377 (2005) ("[T]he jury can serve . . . as a structural protection within the constitutional scheme."). Indeed, within her proper fact-finding sphere, a juror is the constitutional equal of the President, a Senator or Representative, or the Chief Justice of the United States.

of hammering out unassailable findings of fact. Thus, the Great Writ was great no more.

IV. And Now . . . Torture

Under the Bush administration, for the first time in the history of our republic, the torture of prisoners[84] became an official instrument of state policy.[85] Neither the weakening of our jury system, the judicial disdain for fact-finding, nor the restrictions on habeas corpus were solely responsible for this development. Yet taken together, the cultural desuetude into which these essential elements of our governance had fallen were all key ingredients of this truly breathtaking shift in the American identity.

In vesting the "judicial power of the United States" in our court system, the Constitution commands, "[t]he trial of all crimes, except in cases of impeachment, shall be by jury."[86] There was a time when we meant it.[87] Military tribunals once encompassed only what was necessary to maintain our forces in the field, and swept within their ambit only those recognized offenses that harmed our combat operations.[88] For over two hundred years, through the "fiery trial" of the Civil War[89] and two cataclysmic World Wars, we survived and flourished, a beacon of

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[84] For an independent analysis of the extent to which torture by the United States has taken place in recent years, see International Committee of the Red Cross, *Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody*, WAS 07/76, Feb. 14, 2007, *available at* http://www.nybooks.com/icrc-report.pdf.

[85] I am not such an American exceptionalist as to suggest that individual Americans do not torture, rape, and kill in what they conceive is the national interest; clearly, we do. *See, e.g.*, Michael Bilton & Kevin Sim, Four Hours in My Lai 102–63 (1992) (detailing massacre of approximately four hundred civilians, and other atrocities by U.S. troops in the Vietnamese village of My Lai on March 16, 1968). General Sherman had it right when he said, "war is all hell." *See* Stanley P. Hirshson, The White Tecumseh: A Biography of General William T. Sherman 372 (1997). Until today, however, our national policy has always abhorred torture, and we have prosecuted those who have conducted it. *See generally* Paul Kramer, *The Water Cure*, New Yorker, Feb. 25, 2008, at 38 (recounting the public outcry, Congressional hearings, and courts martial related to water-boarding and other atrocities committed by U.S. soldiers in the Philippines between 1899 and 1902).

[86] U. S. Const. art. III, § 2, cl. 3 (capitalization altered from original).

[87] *See* Amar, *supra* note 35, at 236.

[88] Military tribunals should not be confused with military courts-martial. Although they can be used to prosecute similar things, the latter provides for trial by jury. *See generally* Joint Service Committee on Military Justice, Manual for Courts Martial United States (2008) (describing court martial procedures, as well as offenses that threaten success of the military mission, such as Spying, Aiding the enemy, and Espionage).

[89] *See generally* Carl Sandburg, The Fiery Trial (Dell Publ'g Co. 1959) (1948).

hope to all humankind, without a doctrine that concerned the treatment of "enemy combatants."

No more. Jack Goldsmith's brilliant book, *The Terror Presidency*, reveals the relative ease with which legal and constitutional constraints can be swept away in a time of fear and uncertainty simply by declaring a "new" status for those whom we fear the most.[90] Indeed, the heroes of our time are military lawyers such as Lieutenant Commander Charles Swift. Upon being assigned to defend one of the Guantanamo detainees he was told, "Your job is to plead him out." Swift replied, "My job is to be his lawyer, Sir."[91] Other heroes include the free press which brought the horrors of Abu Ghraib to light,[92] and the American people who, notwithstanding the equivocation of their leaders, well understood that waterboarding was torture.

This left Congress in a quandary, and it is in the resulting analysis of the laws that one can see just how far the debate has shifted, and how marginalized the lower federal courts have allowed themselves to become. Ultimately, Congress passed the Detainee Treatment Act (DTA) of 2005[93] and the Military Commissions Act (MCA) of 2006[94] with significant bipartisan majorities. These measures sought both to preserve national security by placing further limitations on habeas, and to refute the charge that we were officially engaged in the systematic torture of prisoners. Yet behind the carefully parsed language, circumlocutions, and strict limitations on judicial review,[95] remains a stark and sobering fact: for the first time in our nation's history, Congress has legislatively sanctioned the torture of prisoners.[96] This is

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[90] *See* JACK GOLDSMITH, THE TERROR PRESIDENCY 99–140 (2007) (discussing the Bush Administration's treatment of enemy combatants).

[91] Sabin Willett, My Worst Moment as a Lawyer, Remarks at Newburyport, Massachusetts Amnesty International meeting (Dec. 5, 2006), *available at* http://www.pegc.us/archive/Articles/willett_AI_20061205.pdf.

[92] One must also recognize the contributions of Al Jazeera, which, despite much overt propaganda, has displayed flashes of journalistic brilliance and brought home to us here in the United States how we are perceived in much of the world. HUGH MILES, AL JAZEERA: THE INSIDE STORY OF THE ARAB NEWS CHANNEL THAT IS CHALLENGING THE WEST 61 (2005) (noting that Al Jazeera has won several international journalism awards).

[93] Detainee Treatment Act (DTA), Pub. L. No. 109-148, div. A, tit. X, §§ 1001–1006, 119 Stat. 2680 (2005). The DTA was tacked onto a broad appropriations bill, the Department of Defense Appropriations Act of 2006.

[94] *See generally* Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 3930, 120 Stat. 2600.

[95] *See, e.g.*, *id.*

[96] *See* 151 CONG. REC. S12381, S12385, S12394, S12397 (daily ed. Nov. 4, 2005); JANE MAYER, THE DARK SIDE 321 (2008); *see also* H.R. REP. No. 109-89, at 524 (2005)

why it was necessary for President Obama, to his great credit, to issue an executive order against torture soon after taking office.[97]

Today, only that order stands between us and the official resumption of torture. To understand how that can possibly be, it is instructive to look at the legislative history of the DTA and MCA. Nowhere will you find mention of a jury,[98] nor do the acts concern themselves much with rigorous fact-finding. Indeed, the fact-finding courts are totally stripped of their usual jurisdiction and review is granted only to a single appellate court without fact-finding jurisdiction or apparatus.[99] Even this review appears to echo the administrative model in that the "facts" to be reviewed are those established by the executive.[100] This is so despite the fact that the very essence of habeas demands that the judiciary sort out the facts.[101] While the status of these acts was placed in limbo by *Boumedienne v. Bush*,[102] they may yet prove one of the enduring legacies of the Bush administration.

After all, why ought Congress exalt the American jury when the federal courts themselves seem to care so little about its contributions?[103] There is no reason for Congress to value the fact-finding skills and procedures of the lower federal courts unless those courts themselves recognize this as their core function. Congress may reasonably wonder why habeas should matter so much for foreign

(acknowledging and condemning the Pentagon's use of torture at Abu Ghraib and other detention facilities in the report on the National Defense Authorization Act for Fiscal Year 2006, which contained provisions nearly identical to DTA).

[97] *See* Exec. Order No. 13, 491, 74 C.F.R. 16 (Jan. 27, 2009).

[98] *See generally* 152 CONG. REC. S10349 (daily ed. Sept. 28, 2006) (debating the MCA); 151 CONG. REC. S12375 (daily ed. Nov. 4, 2005) (debating amendments to the DTA). I suppose this means these Acts are not intended to deal with those who have committed crimes against the United States, as "all crimes, save for Impeachment, shall be tried by jury." U.S. CONST., art. III, § 2, cl. 3. This procedure applies to all offenders, whatever their status or nationality.

[99] *See* MCA § 3930; DTA § 1005(e)(1)–(3), *invalidated by* Boumediene v. Bush, 128 S. Ct. 2229, 2271 (2008).

[100] *See, e.g.*, Social Security Act, 42 U.S.C. § 405(g) (2006).

[101] *See Boumediene*, 128 S. Ct. at 2271.

[102] *Id.* at 2274.

[103] The *Apprendi* line of cases may yet refute this assertion. *See* Apprendi v. New Jersey, 530 U.S. 446, 497 (2000); *see also* Cunningham v. California, 549 U.S. 270, 294 (2007); United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v. Washington, 542 U.S. 296, 314 (2004). Oddly, however, the emphatic reassertion of the jury's role in criminal cases applies with far less force in the federal courts for "practical" reasons. *Booker*, 543 U.S. at 248. This disjunction is fully explored in United States v. Kandirakis, 441 F. Supp. 2d 282, 286–89 (D. Mass. 2006).

detainees when it has so successfully limited it for domestic prisoners[104] and substituted the most pallid of imitations for alien immigrants.[105]

Conclusion

So the great work is laid before each of us—the work of insuring national security and, at the same time, preserving civil liberties. In a symposium featuring leading scholars on the laws of war and the proper response to terrorism, an Article on jury size, trial hours and domestic habeas issues may seem wide of the mark. It is not. I seek here to illustrate a truth so basic it may seem banal—a rend anywhere in the social fabric weakens our shared mantle everywhere. For most of us, these issues arise not in notorious cases, writs of certiorari, or sweeping constitutional decisions.[106] For us, rather, it is the quotidian attention to the rights, needs, and concerns of individual litigants, sometimes poised against the equal rights of society as a whole.

I have argued that the judiciary needs to get back to basics, in order better to explain to society the enormous values that are lost when the jury is sidelined, fact-finding marginalized, and the Great Writ derided. I posit that the lower federal courts are today ill-positioned to meet the compelling challenges of the Twenty-First century. No doubt others, equally concerned and well-informed, will disagree; so much the better, for robust debate is good for society. What we can no longer afford is a papering over of these differences with the bland assertion that all is well with the lower federal courts. It is not.

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104 *See, e.g.*, Gonzalez v. United States, 135 F. Supp. 2d 112, 121 (D. Mass. 2001), *aff'd*, Brackett v. United States, 270 F.3d 60 (1st Cir. 2001), *abrogated by* Johnson v. United States, 544 U.S. 295 (2005).

105 *See* Enwonwu v. United States, 199 F. App'x 6, 6–7 (1st Cir. Sept. 26, 2006).

106 In over thirty years of judicial service, I have presided over but two so-called "terrorist" cases. One, *United States v. Levasseur*, resulted in acquittal on the charge of seditious conspiracy after an 11 ½ month trial and 22 days of sequestered deliberations. *See generally* 699 F.Supp. 965 (D. Mass. 1988). The second, *United States v. Reid*, resulted in a guilty plea. *See* 214 F.Supp.2d 84, 87 (D. Mass. 2002).

It has long been the tradition in the federal district courts that the judge imposes a criminal sentence in open court with the offender present; the judge frequently explains the reasons for the sentence. *See generally* Jeffrey Brandon Morris, Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit 3–31 (2001); Peter G. Fish, Federal Justice in the Mid-Atlantic South: United States Courts from Maryland to the Carolinas, 1789–1835 (2002). My remarks in sentencing Reid presaged certain of the themes amplified here; they are set forth in App. C. *See* Transcript of Disposition, United States v. Reid, 214 F. Supp.2d 84, 87 (D. Mass. 2002) (Criminal No. 02-10013-WGY) (Jan. 30, 2003).

This much, however, I know is true: "You [die] when you [refuse] to stand up for right. You [die] when you [refuse] to stand up for truth. You [die] when you [refuse] to stand up for justice."[107] What's more, "liberty and justice for all"[108] *matter*—today as much as any time in our history. So when the death knell sounds for anyone's civil liberties, "never send to know for whom the bell tolls; it tolls for thee."[109] To me, Ronald Reagan may have said it best: "[f]reedom is a fragile thing and is never more than one generation away from extinction. It is not ours by inheritance; it must be fought for and defended constantly by each generation, for it comes only once to a people."[110]

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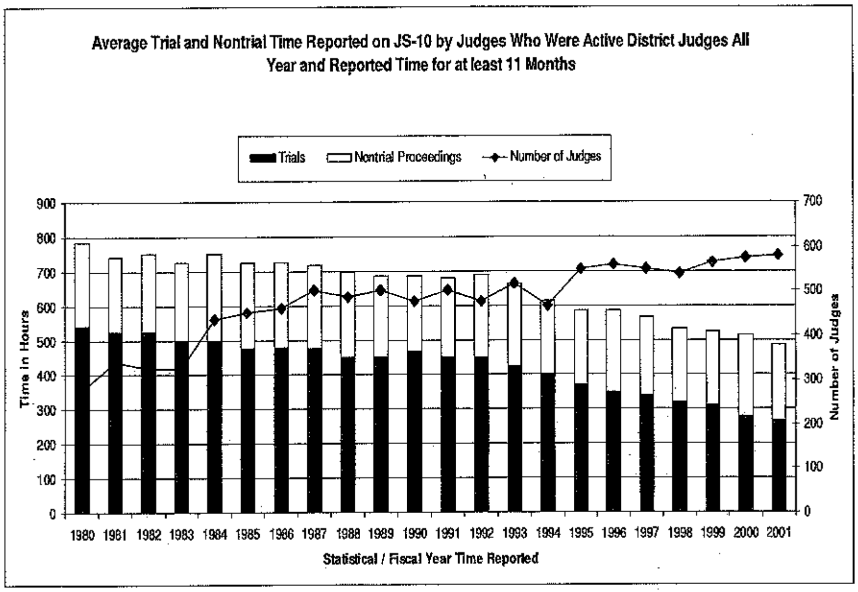
107 Martin Luther King, Jr., Sermon at Ebenezer (Nov. 5, 1967), *in* THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. (Clayborne Carson ed., 1998).

108 36 U.S.C. § 172 (2002) (the Pledge of Allegiance).

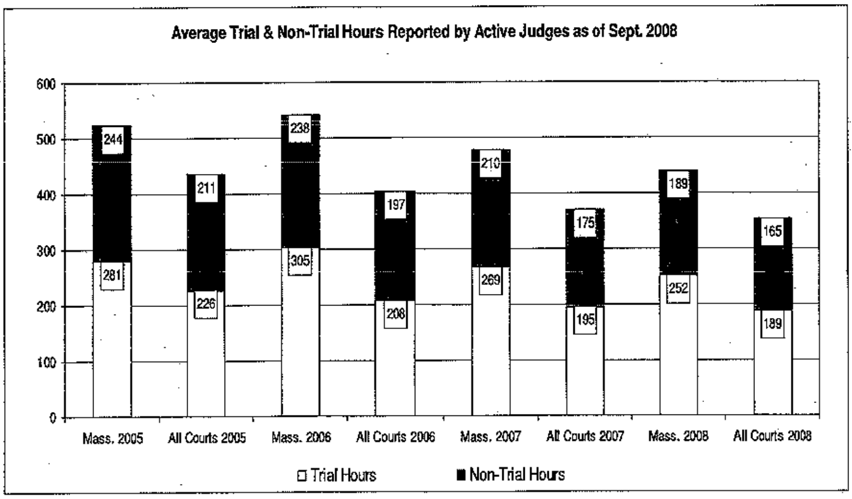
109 JOHN DONNE, 3 THE WORKS OF JOHN DONNE 575 (Henry Alford ed., 1839).

110 Ronald Reagan, Governor of California, Inaugural Address (Jan. 5, 1967), *available at* http://www.reagan.utexas.edu/archives/speeches/govspeech/01051967a.htm.

Appendix A



Appendix B



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No.
02-10013-WGY

* * * * * * * * * * * * * * * * *		
UNITED STATES OF AMERICA *		
v. *		DISPOSITION (Excerpt)
RICHARD C. REID *		
* * * * * * * * * * * * * * * * *		

BEFORE: The Honorable William G. Young,
District Judge

APPEARANCES:

GERARD T. LEONE, TIMOTYH Q. FEELEY, COLIN G.K. OWYANG and GARY S. KATZMANN, Assistant United Sates Attorneys, 1 Courthouse Way, Boston, Massachusetts 02210

OFFICE OF THE FEDERAL DEFENDER (By Owen S. Walker, Esq., Tamar R. Birckhead and Elizabeth L. Prevett, Esq.), 408 Atlantic Avenue, Third Floor, Boston, Massachusetts 02210, on behalf of the Defendant

1 Courthouse Way
Boston, Massachusetts

January 30, 2003

THE COURT: Mr. Richard C. Reid, hearken now to the sentence the Court imposes upon you.

On Counts 1, 5 and 6 the Court sentences you to life in prison in the custody of the United States Attorney General. On Counts 2, 3, 4, and 7, the Court sentences you to 20 years in prison on each count, the sentence on each count to run consecutive one with the other. That's 80 years.

On Count 8 the Court sentences you to the mandatory 30 years consecutive to the 80 years just imposed.

The Court imposes upon you on each of the eight counts a fine of $250,000 for the aggregate fine of $2 million.

The Court accepts the government's recommendation with respect to restitution and orders restitution in the amount of $298.17 to Andre Bousquet and $5,784 to American Airlines.

The Court imposes upon you the $800 special assessment.

The Court imposes upon you five years supervised release simply because the law requires it. But the life sentences are real life sentences so I need not go any further.

This is the sentence that is provided for by our statutes. It is a fair and just sentence. It is a righteous sentence. Let me explain this to you.

We are not afraid of any of your terrorist co-conspirators, Mr. Reid. We are Americans. We have been through the fire before. There is all too much war talk here. And I say that to everyone with the utmost respect.

Here in this court where we deal with individuals as individuals, and care for individuals as individuals, as human beings we reach out for justice.

You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. Whether is it the officers of government who do it or your attorney who does it, or that happens to be your view, you are a terrorist. And we do not negotiate with terrorists. We do not treat with terrorists. We do not sign documents with terrorists. We hunt them down one by one and bring them to justice.

So war talk is way out of line in this court. You're a big fellow. But you're not that big. You're no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders.

In a very real sense Trooper Santiago had it right when first you were taken off that plane and [placed] into custody, and you wondered where the press and . . . TV crews were, and [he] said, "you're no big deal." You're no big deal.

What your counsel, what your able counsel and what the equally able United States Attorneys have grappled with, and what I have as honestly as I know how tried to grapple with, is why you did something so horrific. What was it that led you here to this courtroom today. I have listened respectfully to what you have to say. And I ask you to search your heart and ask yourself what sort of unfathomable hate led you to do what you are guilty and admit you are guilty of doing.

And I have an answer for you. It may not satisfy you. But as I search this entire record it comes as close to understanding as I know.

It seems to me you hate the one thing that to us is most precious. You hate our freedom. Our individual freedom. Our individual freedom to live as we choose, to come and go as we choose, to believe or not to believe as we individually choose.

Here, in this society, the very winds carry freedom. They carry it everywhere from sea to shining sea. It is because we prize individual freedom so much that you are here in this beautiful courtroom. So that everyone can see, truly see that justice is administered fairly, individually, and discretely.

It is for freedom's sake that your lawyers are striving so vigorously on your behalf and have filed appeals, [and] will go on in their . . . representation of you before other judges. We care about it. Because we all know that the way we treat you, Mr. Reid, is the measure of our own liberties.

Make no mistake, though. It is yet true that we will bear any burden, pay any price, to preserve our freedoms.

Look around this courtroom. Mark it well. The world is not going to long remember what you or I say here. Day after tomorrow it will be forgotten. But this, however, will long endure. Here, in this courtroom, and courtrooms all across America, the American people will gather to see that justice, individual justice, justice, not war, individual justice is in fact being done.

The very President of the United States through his officers will have to come into courtrooms and lay out evidence on which specific matters can be judged, and juries of citizens will gather to sit and judge that evidence democratically, to mold and shape and refine our sense of justice.

See that flag, Mr. Reid? That's the flag of the United States of America. That flag will fly there long after this is all forgotten.[111] That flag still stands for freedom. You know it always will.

Custody, Mr. Officer. Stand him down.

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[111] Well, perhaps not. I have recently been informed that on March 17, 2009, without discussion or debate, the Judicial Conference of the United States voted to advise the President that the next vacancy in this District ought to be left unfilled. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY REPORT: JUDICIAL CONFERENCE ACTIONS 5 (2009) (on file with author) (recommending to the President and the Senate "not to fill the existing judgeship vacancy in the District of Wyoming and the next judgeship vacancy occurring in the District of Massachusetts, based on the consistently low weighted caseloads in these districts."). Thus, should I be the next judge in this District to falter or fail, it is now the official policy of the Judicial Conference that this position ought sit vacant, the courtroom go dark, and the flag of the United States of America, which has flown so proudly in this courtroom for 24 years, be taken down.

WGY/ees
Enclosures

cc: Prof. Akhil Amar, Yale Law School
Hon. Joseph F. Anderson, Jr., District of South Carolina
Prof. Michell Beardslee, University of Miami Law School
Hon. Mark W. Bennett, Northern District of Iowa
Hon. Solomon Blatt, Jr., District of South Carolina
Prof. Steve Burbank, University of Pennsylvania Law School
Hon. Jeremy Fogel, Director, Federal Judicial Center
Hon. W. Royal Furgeson, Northern District of Texas
Prof. Marc Galanter, University of Wisconsin Law School
Prof. Jackie Gardina, Vermont Law School
Prof. Stephen Gensler, The University of Oklahoma College of Law
Hon. Nancy Gertner, and Prof. Harvard Law School
Hon. Julie Smith Gibbons, Sixth Circuit Court of Appeals, Chair, Budget Committee
Hon. Pat Higginbotham, Fifth Circuit Court of Appeals
Hon. Thomas F. Hogan, Office of the Director, AOUSC
Hon. D. Brock Hornby, District of Maine
Hon. Carolyn Dineen King, Fifth Circuit Court of Appeals
Prof. Douglas Kysar, Yale Law School
Dean David F. Levi, Duke University Law School
Prof. Arthur Miller, New York University Law School
Hon. Robert W. Pratt, Southern District of Iowa
Prof. Judith Resnik, Yale Law School
Jonathan Rose, Esq., Rules Committee Support Office
Hon. Lee H. Rosenthal, District of Texas Southern
Hon. David Bryan Sentelle, Chief Judge, District of Columbia Ciruit Court of Appeals, Chair, Executive Committee
Prof. Linda Simard, Suffolk University Law School
Prof. Jordan Singer, New England Law Boston
Hon. Jack B. Weinstein, Eastern District of New York
Catherine Whitaker, Acting Chief Statistics Division
Hon. Douglas Woodlock, District of Massachusetts, Committee on Judicial Resources
Hon. Bill Wilson, Eastern District of Arkansas
Supreme Court Fellows

APPENDIX A

ADDENDUM

This case is an example of managing for trial. Throughout this opinion, I have detailed the management decisions made by the Court to manage for trial. By "managing for trial," I mean only that I conceive of trial as the primary means provided by our constitution and laws for the fair and impartial resolution of legal disputes and that all litigants come to court seeking a prompt trial or the credible threat of a trial. See D. Brock Hornby, The Business of the U.S. District Courts, 10 Green Bag 2d 453, 461-62 (2007). This is called the trial model of district court business.

This is, however, the minority view. Today, it is the administrative model of the business of the district courts that holds sway. See Patrick E. Higginbotham, The Present Plight of the United States District Courts, 60 Duke L.J. 745, 747 (2010). The administrative model seeks the speedy, inexpensive (to the courts), and cost-efficient resolution of every case. Trials, being costly and inefficient, are disfavored. See generally Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924 (2000).

Both models require hands-on judicial management, of course, but their goals are significantly different. Under the trial model, the judge makes management decisions with an eye toward how the case is going to be tried. Settlement and mediation are constantly encouraged but the judicial function is seen as steering the case toward a prompt and fair trial. The choice to opt-out is left to the litigants. Under the administrative model, the primary goal is case resolution. Trial is an option, but usually a last resort.

These are not theoretical differences in management style. They are actual, palpably different approaches that lead to different institutional competencies and outcomes. The issue is **not** judicial management. Everyone agrees judicial management is necessary and beneficial. The issue, rather, is – as one astute commentator has so ably observed – how should district court judges be spending their time? Steven S. Gensler, Judicial Case Management: Caught in the Crossfire, 60 Duke L.J. 669, 689-697 (2010).

Today, the measures used by the Judicial Conference of the United States publicly to evaluate the performance of the 94 district courts all emphasize the administrative model. By omission (and in the case of one district, by direct action, see Judicial Conference of the United States, Preliminary Report: Judicial Conference Actions 4, March 15, 2011, (recommending that the President and the Senate not fill the next judgeship vacancy in the District of Massachusetts "based on the three-year low weighted caseload in that district"), these measures tend to undermine the operations of those courts that are actually the most productive of America's district courts.

It is appropriate, therefore, briefly to analyze how district judges are actually spending their time today and what the supremacy of the administrative model has wrought.

In short, how are we doing?

The answer: not very well at all.

Unfortunately, the administrative model of the district judge now in vogue places little or no value on the trial itself. Yet this aspect of our work - the trial itself (especially the American jury trial) - is the central and unique societal benefit that the district court judiciary contributes to our nation. Consider the views of three of the most knowledgeable judicial observers of our work:

The brilliant Judge Richard S. Arnold cuts directly to the bone:

> I think in the 20 years since I was a district court judge, we've seen a tremendous increase in volume, tremendous pressure to decide cases without thinking very much about them, tremendous pressures to avoid deciding cases. I mean, some judges will do almost anything to avoid deciding a case on the merits and find some procedural reason to get rid of it, coerce the parties into settling or whatever it might be.

Judge Richard Arnold, Mr. Justice Brennan and the Little Case, 32 Loy. L.A. L. Rev. 663, 670 (1999).

> How might reality television portray a federal "trial" judge in civil lawsuit garb? In an office setting without the robe, using a computer and court

administrative staff to monitor the entire caseload and individual case progress; conferring with lawyers (often by telephone or videoconference) in individual cases to set dates or limits; in that same office at a computer, poring over a particular lawsuit's "facts," submitted electronically as affidavits, documents, depositions, and interrogatory answers; structuring and organizing those facts, rejecting some or many of them; finally, researching the law (at the computer, not a library) and writing (at the computer) explanations of the law for parties and lawyers in light of the sorted facts.[25] For

[25] "Fact sorting" is a new concept. As Judge Hornby explains it, most fact sorting occurs in the summary judgment context. "Typically, [lawyers] present . . . information electronically, through the courts' electronic case filing system. The district judge or magistrate judge sorts these electronically-provided facts and determines which are undisputed and which facts matter, thus discarding other facts. . . ." Hornby, supra, at 460.

Whatever happened to fact-**finding**?

[F]act-finding is difficult. Exacting and time consuming it inevitably falls short of absolute certainty. More than any society in history, the United States entrusts fact-finding to the collective wisdom of the community. Our insistence on procedural safeguards, application of evidence rules, and our willingness to innovate are all designed to enhance impartial fact-finding.

Judicial fact-finding is equally rigorous. Necessarily detailed, judicial fact-finding must draw logical inferences from the record, and, after lucidly presenting the subsidiary facts, must apply the legal framework in a transparent written or oral analysis that leads to a relevant conclusion. Such fact-finding is among the most difficult of judicial tasks. It is tedious and demanding, requiring the entirety of the judge's attention, all her powers of observation, organization, and recall, and every ounce of analytic common sense he possesses. Moreover, fact-finding is the one judicial duty that may never be delegated to law clerks or court staff. Indeed, unlike legal analysis, many judges will not even discuss fact-finding with staff, lest the resulting conclusions morph into judgment by committee rather than the personal judgment of the duly constituted

> federal civil cases, the black-robed figure on the bench, presiding publicly over trials and instructing juries, has become an endangered species, replaced by a person in business attire at an office desk surrounded by electronic assistants.
>
> . . . .

> judicial officer.
>
> Fair and impartial fact-finding is supremely important to the judiciary.
>
> . . . .
>
> While trial court legal analysis is appropriately constrained by statutes and the doctrine of stare decisis, the true glory of our trial courts, state and federal, is their commitment to fair and neutral fact-finding. Properly done, facts found through jury investigation or judicial analysis truly are "like flint."
>
> Yet there has been virtual abandonment by the federal judiciary of any sense that its fact-finding processes are exceptional, or due any special deference. Federal district court judges used to spend their time on the bench learning from lawyers in an adversarial atmosphere, and overseeing fact-finding by juries or engaging in it themselves. This was their job and they were proud of it. Today, judges learn more reflectively, reading and conferring with law clerks in chambers. Their primary challenge is the proper application of the law to the facts - facts that are either taken for granted, or sifted out of briefs and affidavits, and, in the mode of the European civil justice systems, scrutinized by judges and clerks behind closed doors. While judges do talk to lawyers in formal hearings, these hearings can be short, and usually serve to test and confirm a judge's understanding rather than develop it.

William G. Young, A Lament For What Was Once and Yet Can Be, 32 B.C. Int. & Comp. L. Rev. 305, 312-314 (2009) (footnotes omitted). Truly, the eclipse of fact-finding foreshadows the twilight of judicial independence. See Seitz, 2011 WL 1377881 *1 n.2.

The affidavit is the Potemkin Village of today's litigation landscape. Purported adjudication by affidavit is like walking down a street between two movie sets, all lawyer-painted façade and no interior architecture.

> Trials have gone the way of landline telephones - useful backups, not the instruments primarily relied upon.
>
> . . . .
>
> Trials as we have known them . . . are not coming back.

Hornby, supra, at 462, 467-68 (footnotes omitted); see generally, Arnaud Lucien, Staging and the Imaginary Institution of the Judge, 23 Int'l J. for the Semiotics of L. 185 (2010).

> The faces of the United States district courts are fading. . . . Grants of summary judgment without any live appearance by counsel [are] commonplace, depriving trial attorneys of the opportunity to bring papers to life with oral argument. Instead, the papers [are] filed, and, some time later, a written order [is] issued. This is no lonely pixel. The phenomenon is fueled by the centrality of the motion for summary judgment, which has displaced the trial as the destination point for litigation. Today it is unlikely that a trial date will ever be set, and rarer still that a trial date will have any meaning to the court and hence to the parties. . . . On average, a U.S. district judge tries fourteen cases, civil and criminal, per year, which last an average of between four and five days. Therefore, the average district judge has nearly three hundred days each year with no trials. I highlight these figures not to suggest that these judges are not working but rather to inquire as to what type of work they are doing.
>
> . . . .
>
> In reality, trials are an increasingly small part of the daily routine of the federal trial courts. Most district courts now try very few civil or criminal cases - a documented phenomenon I will not rehearse here. One must keep this picture ever in mind because it is the most salient feature of the federal trial courts today - and as I see it, the manifestation of the illness I will discuss.
>
> . . . .
>
> I will argue that federal trial courts are now more like administrative agencies than trial courts in their present efforts to discharge their duty to decide cases or controversies, and that we are witnessing the death of an institution whose structure is as old as the Republic.
>
> . . . .

The proposition that trial courts should try cases seems a given, yet the reality is that federal district courts have moved so far from this task that it is an open question. At the outset I observed that many judges do not agree that conducting trials ought to be their primary function. Judges who subscribe to this philosophy hold trials only when they cannot persuade the parties to settle their case through mediation or through protracted delays before scheduling a trial. Such attempts at stalling as a means to provoke settlement provide one compelling explanation for the increase in time to trial even as trials have decreased in number. But a return to a model in which the principal work of the trial judge is to try civil and criminal cases need not take away from opportunities for litigants to privately elect methods to settle their disputes. Historically, setting a firm trial date and providing pretrial access to the presiding judge has produced a 90 percent settlement rate with a shorter time from trial to disposition.

. . . .

Conclusion

The present state of affairs makes plain that the federal district courts are not on the correct path. Returning to a trial model would be a significant step toward fulfilling the traditional expectations for the federal courts. Much of the present difficulty arose from seductive - but ultimately misguided - notions that there is a better way.

The United States district courts are the most vital judicial institution in this country. Their courageous history of protecting the constitutional rights of the disfavored and the downtrodden has earned their great prestige and solidified their venerable role in American governance. Federal trial courts cannot maintain this status if they become indistinguishable from state highway departments; but on the present trajectory, this is their destination. If this bleak picture comes to pass, life tenure cannot be defended, and Article III "trial" courts will become indistinguishable from the thousands of administrative law judges. Civil service is just over the horizon.

Patrick E. Higginbotham, The Present Plight of the United States District Courts, 60 Duke L. J. 745, 745-747, 761-762 (2010) (footnotes omitted). Actually, Judge Higginbotham is being generous in estimating 14 trials per year per active district judge. The most recent available figures reveal that the average active district judge tried 4.4 civil and 5 criminal cases to verdict in the 12 months preceding September 30, 2010. Data derived from Table C-12, "U.S. District Courts Trials and Trial Days Period Ended Sept. 30, 2010" and Table T-2, "U.S. District Courts Length of Civil and Criminal Trials Resulting in a Verdict or Judgment by District, for the 12 Month Period Ended Sept. 30, 2010 Civil Trials of Miscellaneous Cases."

Today the mantra is judicial management: management and more management. This is the distillate from the recent important conference on the Federal Rules of Civil Procedure held at Duke Law School. <u>See</u> Gensler, <u>supra</u>.

As I noted some years ago:

> Of course, most cases ought settle. Of course, we must embrace all forms of voluntary ADR. Of course, we must be skilled managers. But to what end? To the end that we devote the bulk of *our* time to those core elements of the work of the Article III trial judiciary - trying cases and writing opinions. We ought to remember, as the RAND study and all of its progeny confirm, the best case management tool ever devised is an early, firm trial date.
>
> The truth of the matter is that good management and traditional adjudication go hand in hand. We ought to confirm that basic truth, study how it is done, trumpet it, budget for it, and fight for it. The district court judiciary ought to be the nation's most vigorous advocates of our adversary system and the American jury. We fail at our own peril.

William G. Young, An Open Letter to U.S. District Judges, The Federal Lawyer, July 2003 at 30, 33.

As an institution, however, the federal judiciary no longer seems to place much value on trial productivity at all. See Leonard Post, Federal Tort Trials Continue a Downward Spiral, Nat'l L.J., Aug. 22, 2005, at 7 (quoting Professor Stephen Burbank as saying "federal judges now give more attention to case management and non-trial adjudication than they give to trials," and "it is quite clear that 'trial' judges ought to spend more time on that activity from which the[ir] name is taken.") Jurors - our constitutional partners in all that is decreed - rate but two passing mentions in the new Strategic Plan for the Federal Judiciary. Judicial Conference of the United States, Strategic Plan for the Federal Judiciary September 14, 2010, available at www.uscourts.gov/uscourts/FederalCourts/Publications/StrategicPlan2010/pdf. Trials are never mentioned. We assiduously measure district court efficiency and yearly rank all 94 district courts against these measures. See Administrative Office of the U.S. Courts, 2010 Federal Court Management Statistics, available at http://www.uscourts.gov/fcmstat/index.html.

Yet nowhere do we publicly measure **actual** productivity - the core work of the federal district judge, going out on the bench and actually trying our cases and engaging with litigants and the bar in the actual adjudicative process. As Judge Higginbotham noted years ago, the "Trials Completed" section of our Case Management Statistics is misleading and borders on the disingenuous. Patrick E. Higginbotham, So Why Do We Call Them Trial Courts?, 55 S.M.U. L. Rev. 1405, 1405-06 (2002). I make the same criticism in A Lament For What Was Once and Yet Can Be, supra.

We keep productivity data of course. We just choose not to share it publicly. As noted above, during the 12 months preceding September 30, 2010, the average active district court judge tried 4.4 civil cases and 5 criminal cases. During those same 12 months, that judge presided over evidentiary hearings for an average of 192 hours and was out on the bench in total an average of 372 hours.

> The results of our own indifference toward jury trials are already sadly apparent. Because we no longer seem very interested in using our courtrooms, we are losing them. Further, the institutional judiciary seems bent on dismantling the superb professional teams so essential to sustained trial operations. Somehow, we seem to be forgetting that the very reason for our judicial existence is to afford jury trials to our people pursuant to the United States Constitution. Ironically, our ability to control our dockets to avoid the quotidian details of daily jury trials and save ourselves instead for "really big" constitutional adjudication insures that such cases will come our way less frequently.
>
> . . . .
>
> Having set [our]selves adrift from [our] constitutional partner - the American jury - federal trial judges now find themselves bereft of the central wellspring of [our] moral authority. Public disparagement and Congressional disdain follow in the wake of this trend.

William G. Young, Vanishing Trials, Vanishing Juries, Vanishing Constitution, 40 Suffolk U. L. Rev. 67, 80-81 (2006) (footnotes omitted).

Suppose instead we were to rank our district courts on actual productivity data? At minimum, this would demonstrate that the institutional judiciary cares about such matters. I predict, moreover, that such a ranking would provide an enormous incentive for invigorating the trial model of adjudication and with it, the constitutional values a truly independent judiciary is designed to protect and advance. To that end, I set out here a listing of America's Most Productive Federal District Courts as derived from the official records of the Administrative Office of the United States Courts. These are the courts that occupy the top third (i.e. the top 31 spots out of the 94 district courts) in the composite ranking. We can all learn from these courts. These are the courts most deserving of our support - the courts we all ought be imitating. It is my hope that this exposition will promote genuine discussion addressing the fundamental issue - how ought Article III district judges be spending their time?

AMERICA'S MOST PRODUCTIVE

federal district courts

(ranked by court on the service of an average active district judge in that court)

1/1/09 - 12/31/09

District	Hours on Bench	Trial Hours	Civil Trials	Criminal Trials	Average	Productivity Ranking
Virgin Islands	9 th	3 rd	5 th	9 th	6.50	1st
Florida Southern	4 th	2 nd	15 th	7 th	7.00	2nd
Cal. Eastern	1 st	1 st	4 th	25 th	7.75	3rd
Iowa Southern	7 th	4 th	27 th	2 nd	10.00	4th
N.Y. Eastern	2 nd	6 th	13 th	22 nd	10.75	5th
Tennessee Western	8 th	11 th	16 th	12 th	11.75	6th
Nebraska	13 th	12 th	19 th	5 th	12.25	7th
Puerto Rico	5 th	8 th	9 th	32 nd	13.50	8th
Florida Northern	27 th	10 th	8 th	10 th	13.75	9th
N. Carolina East	29 th	29 th	2 nd	3 rd	15.75	10th
Tennessee Eastern	21 st	15 th	21 st	8 th	16.25	11th
Tennessee Middle	10 th	9 th	17 th	29 th	16.25	11th
Idaho	6 th	5 th	42 nd	19 th	18.00	12th
N.Y. Southern	3 rd	7 th	22 nd	40 th	18.00	12th
Illinois Central	20 th	22 nd	6 th	26 th	18.50	13th
Iowa Northern	15 th	14 th	40 th	6 th	18.75	14th
Montana	25 th	17 th	51 st	1 st	23.50	15th
Maryland	19 th	18 th	38 th	20 th	23.75	16th
Washington Western	18 th	16 th	28 th	33 rd	23.75	16th
South Dakota	31 st	24 th	38 th	4 th	24.25	17th
Virginia Eastern	33 rd	23 rd	33 rd	9 th	24.50	18th
Florida Middle	50 th	33 rd	1 st	17 th	25.25	19th
Kansas	28 th	21 st	27 th	29 th	26.25	20th
N.Y. Western	11 th	30 th	29 th	37 th	26.75	21st
New Mexico	35 th	34 th	22 nd	16 th	26.75	21st
Mississippi S.	38 th	13 th	19 th	39 th	27.25	22nd
Penna. Middle	32 nd	36 th	11 th	31 st	27.50	23rd
Texas Western	23 rd	44 th	33 rd	11 th	27.75	24th
Colorado	32 nd	26 th	13 th	42 nd	28.25	25th
Arkansas Eastern	53 rd	20 th	3 rd	38 th	28.50	26th
Illinois Northern	12 th	32 nd	32 nd	38 th	28.50	26th
Massachusetts	34 th	25 th	12 th	45 th	29.00	27th
N.Y. Northern	40 th	19 th	24 th	33 rd	29.00	27th
Illinois Southern	48 th	35 th	10 th	29 th	30.50	28th
Oregon	14 th	47 th	20 th	43 rd	31.00	29th
Penna. Eastern	26 th	38 th	36 th	27 th	31.75	30th
Connecticut	24 th	48 th	14 th	44 th	32.50	31st

APPENDIX B

AMERICA'S MOST PRODUCTIVE

federal district courts

(ranked by court on the service of an average district judge in that court)

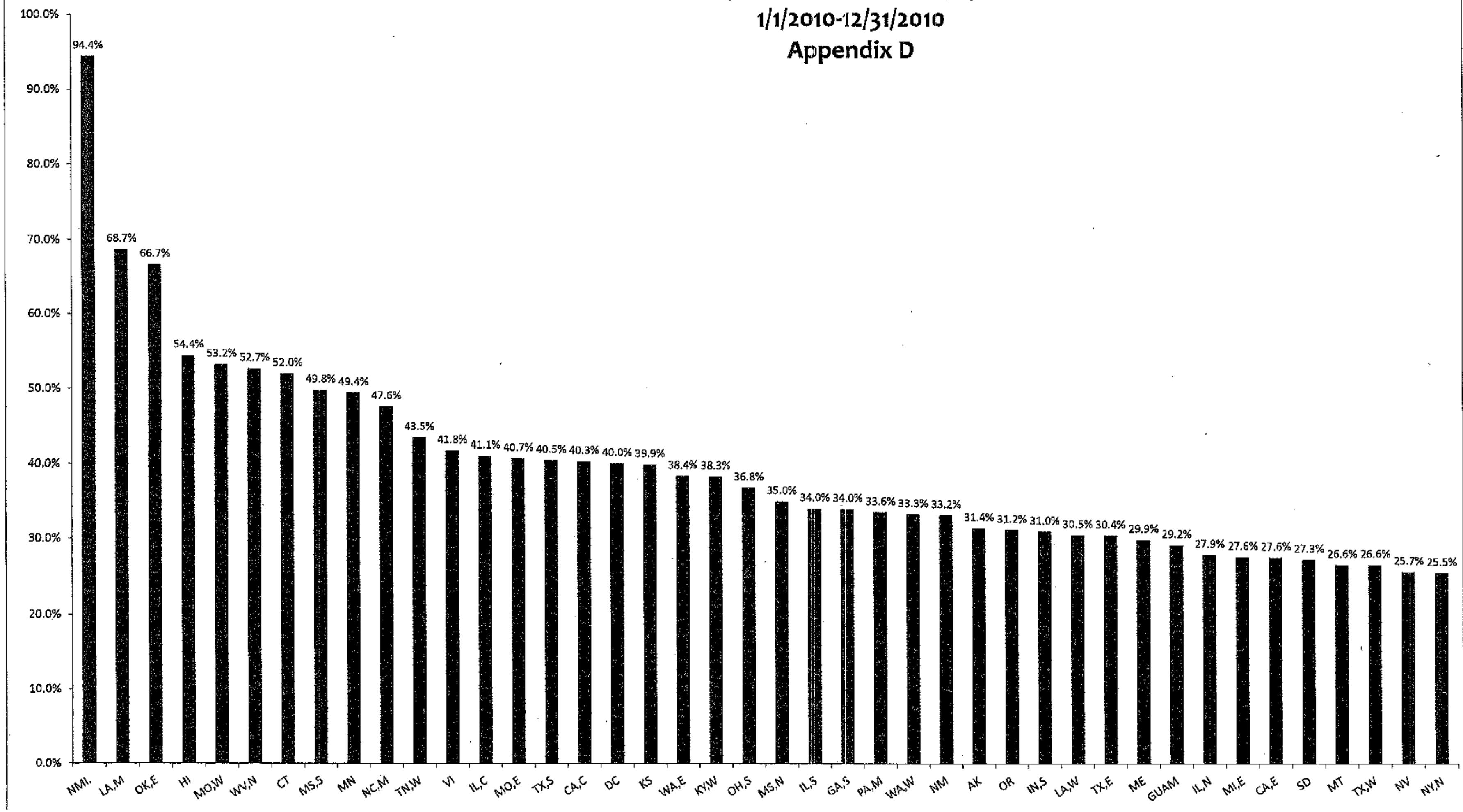
1/1/2010 - 12/31/2010

District	Hours on the Bench	Trial Hours	Civil Trials	Criminal Trials	Average	Productivity Ranking
New York Northern	6th	4th	1st	2nd	3.25	1 st
California Eastern	1 st	1 st	2 nd	25 th	7.25	2 nd
Florida Southern	3 rd	2 nd	9 th	16 th	7.5	3 rd
New York Eastern	2nd	3rd	3rd	32nd	10	4 th
Iowa Southern	18th	6th	11th	10th	11.25	5 th
Tennessee Eastern	11th	12th	9th	13th	11.25	5 th
Tennessee Western	10th	22nd	12th	11th	13.75	6 th
Idaho	8 th	13 th	14 th	21 st	14	7 th
Florida Northern	33 rd	11 th	16 th	3 rd	15.75	8 th
Texas Southern	13th	30th	18th	9th	17.5	9 th
Delaware	24 th	7 th	3 rd	42 nd	19	10 th
New York Southern	4th	9th	25th	38th	19	10 th
Arkansas Eastern	27 th	5 th	8 th	43 rd	20.75	11 th
Illinois Northern	5 th	18 th	15 th	45 th	20.75	11 th
Colorado	16 th	10 th	16 th	43 rd	21.25	12 th
Mississippi Southern	29th	8th	8th	40th	21.25	12 th
Virgin Islands	45th	23rd	11th	7th	21.5	13 th
South Dakota	21st	17th	48th	4th	22.5	14 th
Maryland	20th	21st	33rd	24th	24.5	15 th
Connecticut	14 th	25 th	16 th	44 th	24.75	16 th
Florida Middle	46 th	25 th	10 th	18 th	24.75	16 th
Texas Western	23rd	39th	33rd	6th	25.25	17 th
Massachusetts	31st	16th	17th	39th	25.75	18 th
Montana	36th	41st	29th	1st	26.75	19 th
Mississippi Northern	67th	15th	6th	21st	27.25	20 th
California Northern	25 th	14 th	26 th	45 th	27.5	21 st
Oklahoma Western	35th	31st	13th	31st	27.5	21 st
Penn. Eastern	22nd	32nd	28th	32nd	28.5	22 nd
Texas Eastern	60th	20th	5th	29th	28.5	22 nd
Ohio Southern	9th	28th	35th	46th	29.5	23 rd
Puerto Rico	12th	29th	32nd	46th	29.75	24 th
Alabama Southern	59 th	27 th	22 nd	12 th	30	25 th
Utah	7th	38th	26th	49th	30	25 th
Washington Western	30th	33rd	26th	34th	30.75	26 th
Arizona	32 nd	53 rd	32 nd	8 th	31.25	27 th
Kentuky Eastern	42nd	26th	39th	21st	32	28 th
Neveda	43rd	43rd	23rd	20th	32.25	29 th
Illinois Central	34 th	44 th	26 th	26 th	32.5	30 th
New Jersey	28th	24th	27th	51st	32.5	30 th
Kansas	41st	23rd	31st	36th	32.75	31 st
Nebraska	37th	46th	22nd	26th	32.75	31 st

Civil Cases Terminated During the Twelve Month Period Ended Dec. 31, 2010
Top 20 District Courts-Ranked by Court on Average Civil Cases Terminated With Court Action per Judgeship
(Land Condemnation Cases Omitted)
APPENDIX E

	Number of Authorized Judgeships	Total Civil Cases Filed By District During the Twelve Month Period Ending Dec. 31, 2010	Average of Total Civil Cases Filed by District per Judgeship	*Ranking* of Civil Case Filings per Judgeship	Civil Cases Terminated With No Court Action	Civil Cases Terminated With Court Action	Total Civil Cases Terminated By District During the Twelve Month Period Ending Dec. 31, 2010	Average of Civil Cases Terminated With Court Action per Judgeship	*Ranking* of Average of Civil Cases Terminated With Court Action Per Judgeship	Percent of Civil Cases Terminated With Court Action	Average of Civil Cases Terminated With No Court Action per Judgeship	*Ranking* of Average of Civil Cases Terminated With No Court Action per Judgeship	Percent of Civil Cases Terminated With No Court Action	Average of Total Civil Cases Terminated by District per Judgeship	Trial Productivity *Ranking*
Penn. Eastern	22	55,409	2518.6	1 st	621	84,443	85,064	3838.3	1 st	99.3%	28.2	75 th	0.7%	3866.5	22 nd
Louisiana Eastern	12	4,607	383.9	26 th	88	9,752	9,840	812.7	2 nd	99.1%	7.3	88 th	0.9%	820.0	69 th
California Eastern	6	5,818	969.7	3 rd	1534	4,034	5,568	672.3	3 rd	72.4%	255.7	2 nd	27.6%	928.0	2 nd
Florida Middle	15	7,718	514.5	6 th	435	7,693	8,128	512.9	4 th	94.6%	29.0	74 th	5.4%	541.9	16 th
Colorado	7	3,246	463.7	11 th	394	2,901	3,295	414.4	5 th	88.0%	56.3	48 th	12.0%	470.7	12 th
Alabama Northern	8	3,738	467.3	10 th	353	3,313	3,666	414.1	6 th	90.4%	44.1	61 st	9.6%	458.3	56 th
Florida Southern	18	8,650	480.6	9 th	827	7,392	8,219	410.7	7 th	89.9%	45.9	58 th	10.1%	456.6	3 rd
California Northern	14	6,170	440.7	14 th	1062	5,683	6,745	405.9	8 th	84.3%	75.9	36 th	15.7%	481.8	21 st
Georgia Northern	11	5,105	464.1	11 th	425	4,441	4,866	403.7	9 th	91.3%	38.6	67 th	8.7%	442.4	49 th
New York Western	4	1,820	455.0	12 th	381	1,612	1,993	403.0	10 th	80.9%	95.3	28 th	19.1%	498.3	37 th
Florida Northern	4	1,735	433.8	15 th	41	1,605	1,646	401.3	11 th	97.5%	10.3	86 th	2.5%	411.5	8 th
New Jersey	17	7,253	426.6	17 th	839	6,343	7,182	373.1	12 th	88.3%	49.4	54 th	11.7%	422.5	30 th
Michigan Western	4	1,737	434.3	15 th	173	1,478	1,651	369.5	13 th	89.5%	43.3	63 rd	10.5%	412.8	41 st
South Carolina	10	3,535	353.5	33 rd	337	3,433	3,770	343.3	14 th	91.1%	33.7	69 th	8.9%	377.0	40 th
Texas Northern	12	4,728	394.0	24 th	591	3,903	4,494	325.3	15 th	86.8%	49.3	55 th	13.2%	374.5	58 th
New York Eastern	15	6,236	415.7	19 th	1335	4,852	6,187	323.5	16 th	78.4%	89.0	31 st	21.6%	412.5	4 th
Indiana Southern	5	2,508	501.6	8 th	724	1,615	2,339	323.0	17 th	69.0%	144.8	9 th	31.0%	467.8	68 th
Alabama Middle	3	1,144	381.3	27 th	96	955	1,051	318.3	18 th	90.9%	32.0	70 th	9.1%	350.3	50 th
Minnesota	7	5,047	721.0	4 th	2098	2,146	4,244	306.6	19 th	50.6%	299.7	1 st	49.4%	606.3	48 th
Arkansas Eastern	5	3,158	631.6	5 th	406	1,518	1,924	303.6	20 th	78.9%	81.2	34 th	21.1%	384.8	11 th

Percent of Civil Cases Terminated with No Court Action
(District Courts > = 25%)
1/1/2010-12/31/2010
Appendix D



ANOTHER NAIL IN THE [TRIAL MODEL] COFFIN? WHETHER FEDERAL DISTRICT COURT VACANCIES PUSH ADJUDICATION TOWARD AN ADMINISTRATIVE MODEL

JAKE D. PUGH*

This Essay examines how, if at all, increasing judicial vacancies in federal courts affect the sitting judges' method of adjudication. More specifically, it asks whether the increased per-judge caseloads that result from vacancies necessitate an adjudicative shift from a trial-based model toward an administrative model. In conducting this investigation, the Essay considers multiple measures of trial-productivity through statistical analysis of data published by the Administrative Office of the U.S. Courts. The Essay concludes that the federal judiciary's resilient, cooperative nature has thus far enabled it to absorb the impact of vacancies without compromising its adjudicative approach.

I. INTRODUCTION

"I looked the mediator right in the eye and then I said . . . ."

That is how U.S. District Judge Joseph F. Anderson, Jr. envisions the keynote speaker at a trial advocacy event might have to begin a war story in the year 2049.[1] The message is clear:

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Judge Anderson worries that in a generation there will likely be few, if any, trials from which the keynote speaker might find her inspirational anecdote. If current trends emphasizing speedy adjudication and case management continue, Judge Anderson's concerns might be well founded. The portion of cases that result in trial has been falling for the greater part of a century.[2] In 1938, 19.9% of civil cases were terminated by trial.[3] By 1952, that number had fallen to 12.1%.[4] And in 2011, only 1.8% of terminated civil cases reached trial.[5] The same trend is evident from available criminal trials statistics. In 1997,[6] 15.2% of terminated criminal cases reached trial,[7] and by 2011, that number had dropped to 10.6%.[8] The various reasons for the decrease in trials have been written about at length,[9] and a thorough discussion of those reasons is beyond the scope of this Essay. Two contributing factors, however, are important for this Essay's purposes.

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[1] Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mozingo? A Trial Judge's Lament over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99, 120 (2010) ("Imagine, if you will, the keynote speaker of the South Carolina Bar's Trial Advocacy Program in the year 2049 who begins to relate a war story to the next generation of trial lawyers . . . .").

[2] *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1256, 1258-59 (2005) ("The decline may usefully be divided into two components: a long-term and gradual decline in the portion of cases that terminate in trial and a steep drop in the absolute number of trials during the past twenty years.").

[3] *Id.* at 1258.

[4] *Id.* at 1258-59.

[5] There were 303,158 civil terminations and only 5357 civil trials in fiscal year 2011. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE U.S. COURTS 19 (2011), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/ JudicialBusiness2011_Summary.pdf.

[6] 1997 is the earliest year for which the Administrative Office of the U.S. Courts publishes statistics on their website. *See Statistics: Judicial Business of the U.S. Courts*, U.S. COURTS, http://www.uscourts.gov/ Statistics/JudicialBusiness.aspx (last visited May 8, 2012) (displaying links to past reports along the left margin).

[7] In 1997, district courts completed 6814 criminal trials, ADMIN. OFFICE OF THE U.S. COURTS, TABLE C-7: U.S. DISTRICT COURTS CIVIL AND CRIMINAL TRIALS COMPLETED, BY DISTRICT DURING THE TWELVE MONTH PERIOD ENDING SEP. 30, 1997, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/1997/appendices/c07sep97.pdf, and terminated 44,800 total criminal cases. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE U.S. COURTS 4 (1997), http://www.uscourts.gov/uscourts/ Statistics/JudicialBusiness/1997/front/judbus.pdf. These calculations rely on the Administrative Office's "trials completed" statistics, which tally a broader range of proceedings than just traditional trials. *See infra* notes 29-30 and accompanying text. Thus, the actual percentage of cases going to trial is even less than these calculations reflect.

[8] In 2011, there were 79,839 criminal case terminations and 8453 criminal trials completed. JUDICIAL BUSINESS, *supra* note 5, at 17.

[9] *See, e.g.*, Galanter, *supra* note 2, at 1262-63, 72 (listing twelve "plausible explanations" for the decline in trials, but concluding that a recently more accelerated decline "is part of a much broader turn from law"); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 75-82 (2006).

First, with growing caseloads, courts "increasingly lack the resources to hold many trials."[10] And second, perhaps as a result of higher caseloads, courts increasingly "embrace[] judicial management, which supplies greater incentives and opportunities for judges to dissuade parties from going to trial."[11]

A different problem facing the federal judiciary may exacerbate burdensome caseloads and accelerate the decline in trials. Currently, sixty-two federal district court judgeships sit vacant.[12] The vacancies represent nine percent of the total federal trial court capacity.[13] In eighteen districts, the Administrative Office of the U.S. Courts considers the continued vacancies and resulting burden on the court so dire as to be "Judicial Emergencies."[14] Moreover, the vacancy numbers have been increasing. In 2007, district court judgeships sat vacant for a number of months equivalent to thirty-one year-long vacancies, and in 2011, that figure increased to sixty-seven.[15] The reasons are many.[16] In some cases, increased scrutiny of nominees' political views might slow the process.[17] In other cases, purely partisan obstructionism might stifle the progress of confirmations. Political tension between the

[10] Galanter, *supra* note 2, at 1262.

[11] *Id.* at 1263.

[12] *Judicial Vacancies*, U.S. COURTS, http://www.uscourts.gov/JudgesAndJudgeships/ JudicialVacancies.aspx (last updated May 7, 2012).

[13] There are 677 Article III federal district court judgeships. *Federal Judgeships*, U.S. COURTS, http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx (last visited May 7, 2012).

[14] *Judicial Emergencies*, U.S. COURTS, http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ JudicialEmergencies.aspx (last updated May 7, 2012) ("A judicial emergency is defined as the following: . . . any vacancy where weighted filings are in excess of 600 per judgeship; any vacancy in existence more than 18 months where weighted filings are between 430 to 600 per judgeship; any court with more than one authorized judgeship and only one active judge.").

[15] JUDICIAL BUSINESS, *supra* note 5, at 32. The 2011 figure actually marks a significant improvement over 2010, in which there were eighty-eight vacancies. *Id.*

[16] *See* Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L. J. 527, 529-52 (1998) (discussing "origins and development of the problem of unfilled judicial openings").

[17] *See* CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 171-222 (2006) (discussing the prospective accountability the Senate increasingly demands in district court judge confirmation hearings). *But see* Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 488 (2012) ("Senate scrutiny, especially political scrutiny, is lighter for district court nominees.").

President and Senate (or even a minority of senators) may result in senators using procedural maneuvers to thwart or delay confirmations.[18] Regardless of the reasons for increased vacancies, only one simple point is necessary for this study: more judges can do more work and hear more cases. And as a corollary, courts with significant vacancies – that is, with potential new colleagues waiting for confirmation and unable to help shoulder the load – are more likely to be burdened by difficult caseloads.

The goal of this study is modest. It is not to analyze the shift from a trial model to an adjudicative model or to discuss the history or effects of that change. The goal is also not to suggest alternate means of adjudication or illuminate the perfect balance between efficiency and justice. Similarly, an in-depth analysis of the causes of and solutions to the judicial confirmation backlog is beyond the scope of this Essay. The goal of this study is to see whether significant vacancies in district courts have a tendency to push the sitting judges in those district toward a more administrative model of adjudication and away from a trial model. Will vacant judgeships necessitate a shift to an administrative model and a decrease in time-consuming trials, and will filled vacancies and decreased per-judge caseloads lead to more trials?

Part II discusses the vacancy statistics underlying this study and how they were chosen. It then outlines assumptions implicit in those statistics that might inhibit isolating any meaningful trends. Part III describes the adjudication statistics from which this Essay seeks to isolate trends. It discusses the origin and limits of the chosen data, presents the results obtained from comparing those statistics to vacancy data, and offers explanations for any observations.

[18] In a 2010 letter to Majority Leader Harry Reid and other senators, President Barack Obama wrote, "Despite the urgent and pressing need to fill these important posts, a minority of Senators has systematically and irresponsibly used procedural maneuvers to block or delay confirmation votes on judicial nominees – including nominees that have strong bipartisan support and the most distinguished records." Letter from President Barack Obama to Senators Harry Reid, Patrick J. Leahy, Mitch McConnell, & Jeff Sessions (Sept. 30 2010), *reprinted at*, http://thecaucus.blogs.nytimes.com/2010/10/01/obama-blasts-gop-for-stalling-judicial-nominations/.

Part IV concludes by considering macro-level explanations for the observed trends, or lack thereof.

II. THE STATISTICS AND METHODS

A. The Adjudication Data

This study uses official adjudication data published by the Administrative Office of the U.S. Courts. The Administrative Office keeps myriad statistics on the federal judiciary each year. Most are freely available to the public online at www.uscourts.gov.[19] Others are not published online, but rather are available through an internal U.S. Courts database.[20]

The expansive statistics kept on federal courts offer limitless possibilities for statistical analysis, but this Essay will focus only on the most core trial statistics. These are 1) the number of civil trials completed, 2) the number of criminal trials completed, 3) the number of hours spent on the bench at trial, and 4) the number of hours spent on the bench on other proceedings. These are essentially the same statistics that U.S. District Judge William G. Young, a strong advocate for a trial-based model of adjudication, uses in constructing his ranking of "America's Most Productive federal district courts."[21] In addition to those core measures of court productivity,

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[19] *See Statistics,* U.S. COURTS, http://www.uscourts.gov/Statistics.aspx (last visited April 16, 2012) ("This section of uscourts.gov provides statistical data on the business of the federal Judiciary. Specific publications address the work of the appellate, district, and bankruptcy courts; the probation and pretrial services systems; and other components of the U.S. courts.").

[20] I owe a special thanks to Elizabeth Sonnenberg, judicial assistant to U.S. District Judge William G. Young, for providing me with the crucial statistics that I could not otherwise access and without which this Essay would not have been possible.

[21] Unites States v. Massachusetts, No. 09-11623-WGY at 53 (D. Mass. May 4, 2011), *available at* http://pacer.mad.uscourts.gov/dc/opinions/young/pdf/united states v commonwealth-memorandum of decision.pdf ("To that end, I set out here a listing of America's Most Productive Federal District Courts as derived from the official records of the Administrative Office of the United States Courts. . . . We can all learn from these courts. These are the courts most deserving of our support – the courts we all ought be imitating."); *America's Most Productive Federal District Courts*: 1/1/2010 - 12/31/2010, http://www.lawsitesblog.com/wp-content/uploads/2012/02/Americas-Most-Productive-Courts-New.pdf. Three statistical categories are the same, but whereas the Productivity Rankings use overall "Hours on the Bench," this analysis uses hours for other (non-trial) proceedings. *Id.* For a discussion of the rankings and their impetus, see Kelly Rizzetta, *NY Northern District Court Hailed As Tops in Productivity,* LAW360 (Feb. 28, 2012, 7:20 PM),

other related statistics and permutations are useful for ascertaining the effects of judicial vacancies. To see how vacancies might affect individual remaining judges, this study also considers the statistics on a per-judge basis. This helps illuminate how much a retired judge's workload might be redistributed among continuing judges, and similarly how a new confirmation might relieve those judges. The study considers time-related statistics to determine whether vacancies affect the speed of adjudication. Statistics for the average length of time from filing to trial show not only how courts respond to vacancies, but also whether a trial-model of adjudication might become more difficult with an increased per-judge caseload. Statistics for time from filing to resolution of all cases approach the same inquiry from a broader context. Thus, case length statistics help elucidate whether the effects of vacancies, if any, materialize as delays rather than as different adjudicative outcomes.

B. The Vacancy Data as a Baseline

The key element for a study on the effect of judicial vacancies is the construction of the baseline dataset. This study's baseline dataset is the change of court staffing from one year to the next as a proportion of total judgeships.[22] As an example, take a district court that has ten statutory judgeships.[23] If in a particular year the court is fully staffed with all ten judgeships

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http://www.law360.com/legalindustry/articles/314126/ny-northern-district-court-hailed-as-tops-in-productivity; Kelly Rizzetta, *Judge Says There Should Be More Jury Trials*, LAW360 (Feb. 29, 2012, 6:53 PM), http://www.law360.com/articles/314736.

[22] The statistics for vacancies come from the Federal Court Management Statistics available on the uscourts.gov website. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS: SEPTEMBER 2011, http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/DistrictCourtsSep2011.aspx (select "All District Courts" from the dropdown list under "Select a Court to View Profile" and click "Go" to access a PDF with district-by-district statistics). The chart provides "Vacant Judgeship Months" for each federal district court for the 2006 through 2011 fiscal years (the "12-Month Periods Ending September 30"). *Id.* The data is presented as tenths of months that judgeships were vacant. *Id.* For example, if a district had two judgeships vacant during a fiscal year, one for the full year and the other only through November 15 (1.5 months), the chart for that district would report 13.5 vacant months.

[23] Examples of such districts are the Western District of Pennsylvania, the District of Maryland, and the District of South Carolina. *Id.*

filled, and in the following year only nine of those positions are filled, that would be a ten percent reduction in staff.[24]

To keep the study manageable and focus on years from which trends are more likely to be observable, the dataset is limited to consecutive years in which the staffing changed by at least ten percent of the total judgeships.[25] Importantly, a ten percent change in staffing can also occur when vacancies are reduced. Any effect that might become observable when a court is operating with a reduced number of judges presumably will be reversed when appointments and confirmations fill those vacant judgeships.

This construction of the dataset begs the question of whether the effect of judicial vacancies is nothing more than the effect of different caseloads. If that was true, then a much simpler approach would be to look at per-judge caseloads in each district and see what differing practices those districts have. The study could include all districts and would not need a carefully filtered dataset relying on comparisons of different years. Such a study would certainly be convenient and the core effect of changes in vacancies *is* a change in the affected court's per-judge caseload. The approach used in this Essay, however, is distinct and has important differences. Both studies might compare similar caseload differences, but when the increased caseload is due to a judicial vacancy, the composition of cases is more likely to be consistent. The compared points – the years before and after the vacancy, or vice versa – guarantee consistencies that make the comparison more valuable and help isolate the effect of the staffing

[24] Since the Administrative Office gives vacancies in total months, the difference from one year to the next will often be a fraction of a full year-long absence. *See id.*

[25] The example above satisfies this requirement, as would an 18 month increase in vacancies in a court that had fifteen judgeships. In that case, ten percent of the court is 1.5 judgeships, and those judgeships if unfilled would create 1.5 years or 18 months of vacancies.

A second requirement of the data is that the district court in question must have at least two judgeships. Given the goal of determining how created and filled vacancies affect other judges, data for a court whose single vacancy leaves no judges whom to study is not informative. The point has minimal effect, however, as the District of Northern Mariana Islands is the only court where this particular situation arose. *See* COURT MANAGEMENT STATISTICS, *supra* note 22.

change. Since the comparison is between two years of adjudication in the same court, the judges will mostly be the same, the local rules are unlikely to have changed significantly, changes in the caseload's composition will likely be negligible, and the culture of the local bar should be identical. Different jurisdictions are likely to have different local rules and different compositions of cases that would obscure any potential trends which could be tied to caseloads.

The study could consider caseload differences between two years in a single jurisdiction irrespective of vacancies, but this leads to a separate problem. Where the increase is a district-wide overall increase, then some new legal matter may account for the change (e.g., gulf oil spill litigation or foreclosure-related litigation). Such causes can distort the statistics in a way that caseload alone cannot account for. Undeniably, the same issue is equally true in consecutive years with vacancy changes, as used in this study, but in such jurisdictions the difference in caseload should at least in part be attributable to a change in staffing and not outside influences for which the study cannot account.

C. Assumptions and Other Considerations

Inherent in the data are a number of simplifications that make the capture of meaningful trends less likely. Perhaps the most important is that the judgeship numbers used to determine the change in court staffing do not account for senior status or magistrate judges. Senior status judges can represent a large portion of any given district, and their caseloads, though permitted to be smaller than that of active judges, contribute significantly to the court.[26] Similarly, magistrate judges can conduct trials and otherwise relieve the responsibilities of Article III

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[26] *See* 28 U.S.C. § 371(e) (providing that to meet the senior status service requirements based on courtroom participation alone, a judge must have a "caseload involving courtroom participation which an average judge in active service would perform in three months").

judges.[27] As a result, the calculation based on judgeships will often overestimate the increased burden that vacancies place on the court. This further reduces the likelihood of identifying a clear trend.

Another potential issue arises from having the dataset include staffing changes due to filled vacancies. The second year of such data-point will necessarily include a novice judge. The time the new judge takes to learn the ropes could potentially blunt whatever change might otherwise result from an additional judge being on the court. On the other hand, a first-year judge might be especially productive to make a good first impression, so there is no reason to conclude the new judge would contribute differently than a continuing judge. Even if a first-year judge's learning curve could account for a difference in productivity, the effect would not be observable for data points in which vacancies are created (i.e., years when a judge leaves). Since the effect is unclear and the majority of the data points are for created vacancies, the new-judge issue is likely inconsequential.

III. RESULTS AND ANALYSIS

A. Trials Completed Data

This study first considers how a vacancy change might affect the number of trials a judge completes. Years with higher vacancies will generally have a higher per-judge caseload, which in turn could influence the method of adjudication. If judges are inclined to respond to these higher caseloads by encouraging pre-trial disposition rather than potentially lengthy trials, a reduction in staffing might correlate with a decline in the per-judge trial numbers. The study considers data for civil and criminal trials separately as each carry unique implications and assumptions.

[27] *See infra* notes 55-56 and accompanying text.

1. Origin of Data

The Administrative Office of the U.S. Courts publishes an annual table providing the number of civil and criminal trials completed by each district, further dividing those trials into jury and non-jury.[28] The Administrative Office's statistics for "trials completed" are somewhat misnamed because in addition to traditional trials they also include the on-bench disposition of "other contested matters" for which judges take evidence.[29] This over-inclusion has been criticized as misleading,[30] but the distinction is not important for purposes of this paper so long as the trial numbers are inflated uniformly across jurisdictions. With no reason to presume otherwise, it is enough to note that "trials" as used in this study has a broader-than-traditional meaning. Other data-related problems, however, require more attention.

One problem arises in that the trial statistics include all trials within the district, but the vacancy statistics refer only to active status judgeships. The data does not differentiate between trials active status judges conduct and trials senior status or magistrate judges conduct. As discussed above, these other judges' inclusion in the statistics likely makes the percent change in staffing an overestimate, but here including trials by those judges could have the opposite effect. Because senior status judges have more control over their caseloads, in a sense they might serve

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[28] *See, e.g.*, ADMIN. OFFICE OF THE U.S. COURTS, TABLE C-7: U.S. DISTRICT COURTS CIVIL AND CRIMINAL TRIALS COMPLETED, BY DISTRICT DURING THE TWELVE MONTH PERIOD ENDING SEP. 30, 2010, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/ appendices/C07Sep10.pdf. This study uses data from Tables C-7 published in years 2006 through 2010 on the uscourts.gov website. *See Judicial Business*, *supra* note 6. This study uses the 2011 Table T-1, ADMIN. OFFICE OF THE U.S. COURTS, TABLE T-1: U.S. DISTRICT COURTS CIVIL AND CRIMINAL TRIALS COMPLETED, BY DISTRICT DURING THE TWELVE MONTH PERIOD ENDING SEP. 30, 2011, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/T01Sep11.pdf, which is simply a renumbered edition of the previous C-7 table, *see* JUDICIAL BUSINESS, *supra* note 5, at 35.

[29] *See* Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 S.M.U. L. REV. 1405, 1406 (2002) (providing "a word of caution because not all the record-keeping is transparent").

[30] *See, e.g.*, William G. Young, *A Lament For What Was Once and Yet Can Be*, 32 B.C. INT. & COMP. L. REV. 305, 317 (2009) ("[A] criminal case with a motion to suppress, a Daubert hearing, a genuine trial, and a sentencing hearing count as four 'trials,' as does a civil patent case with a preliminary injunction hearing, a Markman hearing, a genuine trial, and a separate damages hearing. As a result, the Administrative Office inflates the actual number of trials by approximately 33%. However much this may impress Congress, such imprecision renders the term "trial" essentially meaningless . . . .").

as a constant that could blunt the effects of vacancy-increased caseloads. The potential effect of magistrate judges is less clear, as their adjudicative trends could mirror those of the active status judges. What is clear is that magistrate judges' unaccounted-for presence in the trial statistics muddies the analysis.

Visiting judges pose another complication. In the twelve month period ending September 10, 2011, active status judges completed 152 trials in jurisdictions other than their own.[31] In the same year, visiting senior status judges completed 108 trials.[32] These visiting judge trials present a problem for this study because they are tabulated for trial counts in the cases' districts of origin. The trials-by-district data used in this study, therefore, falsely attributes visiting judge trials to the active status judges of the visited district. While the visiting judge trials are only a small fraction of total trials, visiting judges are apt to hear more trials in the vacancy-burdened districts considered in this study. Thus, these visiting judge trials may counteract effects of vacancies.

2. *Civil Trial Results*

Figure 1 shows the district-wide change in civil trials completed as relates to the change in court staffing from the previous year.[33] Both changes are expressed as percentages. The scatterplot indicates that changes in vacancies – even changes that increase or decrease the number of sitting judges by a third or more – do not have a predictable effect on the number of civil trials completed in a district. The result is surprising since one would intuitively expect a court with more judges to complete more trials.

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[31] *See* ADMIN. OFFICE OF THE U.S. COURTS, TABLE V-1: U.S. DISTRICT COURTS SERVICE PROVIDED BY AND RECEIVED FROM VISITING JUDGES DURING THE TWELVE MONTH PERIOD ENDING SEP. 30 2011, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/V01Sep11.pdf.

[32] *Id.*

[33] For the underlying data, see Appendix C-1.

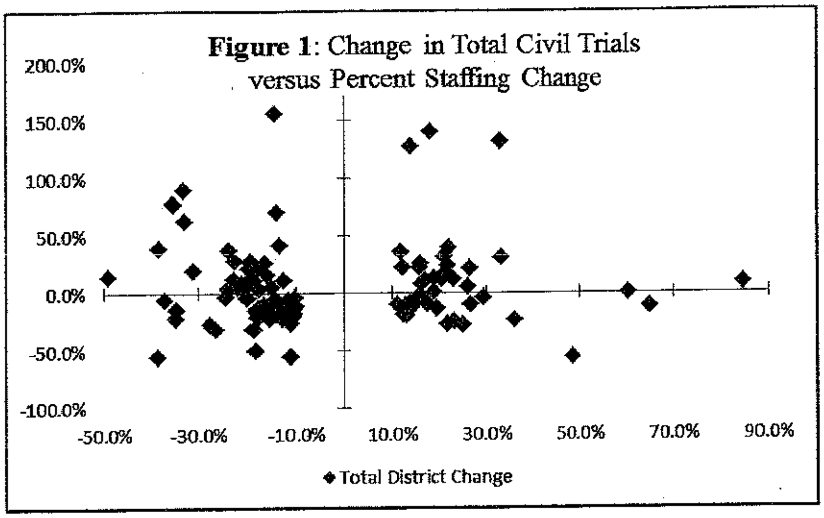
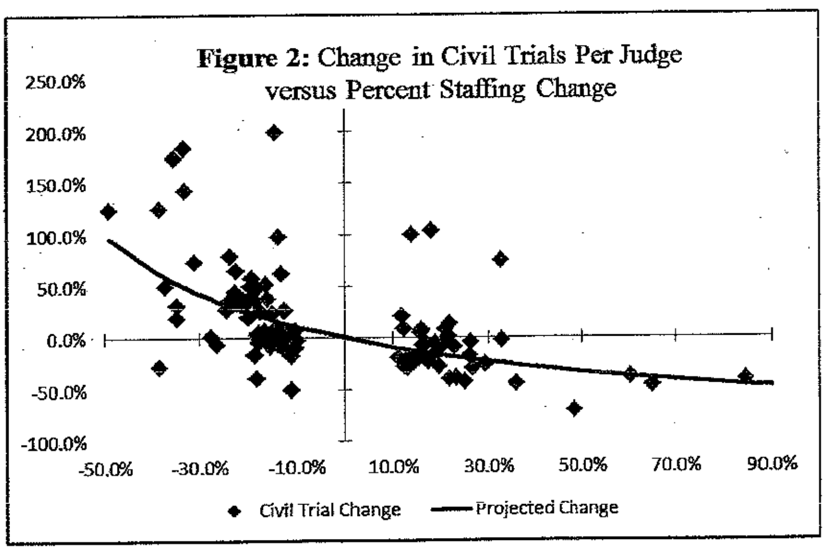


Figure 2 shows how changes in court staffing affect civil trial numbers on a per-judge basis. Like the vacancy numbers on which the staffing change numbers rely, the per-judgeship numbers were calculated based only on sitting active-status judges.[34] This calculation is likely an overestimate of the trials conducted by the district's active status judges because it ignores contributions from senior status judges, magistrate judges, and visiting judges, as discussed above.



[34] $$\text{Civil Trials Per Judge} = \frac{\text{Total Civil Trials}}{\left(\text{Judgeships} - \left(\frac{\text{Vacant Months}}{12}\right)\right)}$$

The graph shows a slight trend demonstrating this per-judge compensation. Individual judges average more civil trials when vacancies reduce the number of sitting judges, and the judges average less civil trials during years in which new confirmations fill those vacancies. The simplification of attributing all civil trials to the active status judges does not undermine that trend. Properly distributing trials among not only active status judges, but also visiting, magistrate, and senior status judges would affect only the magnitude of the percent changes, not the direction of the change.[35]

The "Projected Change" line represents the expected change in the number of per-judge trials if in the second year the district had an identical number of total trials but redistributed them to the new number of judges.[36] In other words, the line represents a strictly redistributive ideal, in which all cases are handled in exactly the same way but are distributed differently to account for the new number of judges. If the result of a staffing change was not redistributive but instead (or also) was adjudicative, the data would likely not follow the Projected Change line. For example, if vacancy-driven caseload increases caused judges to shift away from a trial model to put more emphasis on speedier routes of disposition – the adjustment this paper hypothesizes – then the data on the left side of the graph would trend below the Projected Change line. In that case, remaining judges would take on some extra trials to compensate for the retired judge but would dispose of other suits in alternative ways.

The data in Figure 2 appears roughly to follow the trend of the Projected Change line, suggesting a primarily redistributive outcome. The many assumptions implicit in the data and

[35] This assumes that the numbers of senior status and magistrate judges who contribute to trials numbers does not change significantly from one year to the next. Visiting judges, on the other hand, likely *do* contribute disproportionally in years with greater vacancies. If significant enough, visiting judges' contribution could skew the numbers such that trials per judgeship appear to increase when actually the district's own judges carried out the same number of or even fewer trials on average. The relatively low number of visiting-judge trials minimizes the likelihood of such a scenario.

[36] For a more thorough explanation of the Projected Change line and the underlying calculations, see Appendix A.

the unpredictable nature of trial-loads, however, result in a plot that is highly scattered. It is not possible to conclude with certainty that adjudicative effects are not also at play.

3. *Criminal Trial Results*

Figure 3 shows the results for criminal trials.[37] As with civil trials, the plot is highly scattered with roughly equal numbers of courts experiencing increases and decreases in criminal trials. There is no appreciable trend indicating that a change in court staffing is predictive of a change in district-wide criminal trials completed.

Figure 3: Change in Total Criminal Trials versus Percent Staffing Change

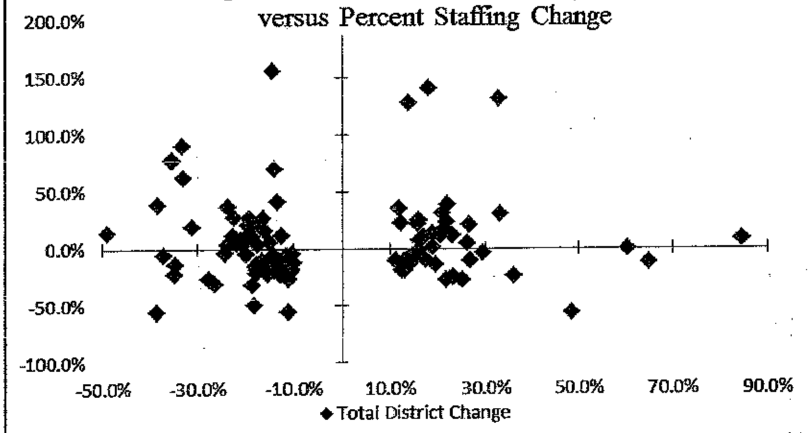
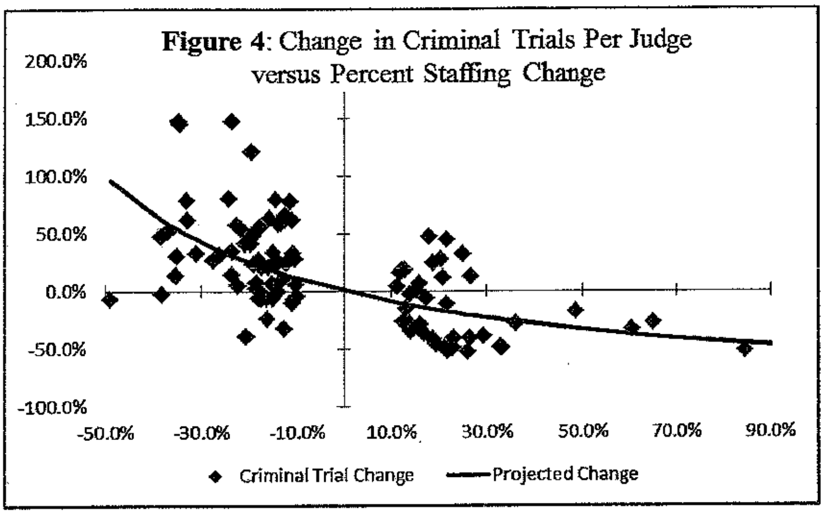


Figure 4 shows the criminal trial data rescaled to a per-judge basis. Again, the per-judge data takes account of vacancies and should not be confused with per-judgeship data. The overall district change data of Figure 3 is equivalent to per-judgeship data since the number of authorized judgeships does not change from one year to the next in any of this study's data points.

[37] For the underlying data, see Appendix C-2.



The criminal data in Figure 4 follows the same pattern as the civil data in Figure 2. It trends along the Projected Change line but scatters broadly around that purely redistributive ideal. One difference between Figure 2 and Figure 4 is that the latter seems to have fewer outliers. All the criminal trial data in Figure 4 roughly follows the Projected Change line, whereas the civil data in Figure 2 is less predictable.

Differences between the nature of civil and criminal filings help explain this trend. First, criminal filings are likely to be more uniform from year to year and less responsive to any change in a court's staffing or caseloads. Whereas plaintiffs might have some options as to when, where, or whether to file a civil suit, the federal prosecutors in a district's U.S. Attorney's Office are unlikely to alter the frequency of indictments. Crimes do not stop for the sake of busy courthouses. Moreover, criminal defendants' own decisions regarding trial are not apt to include any consideration of district vacancies or the assigned judge's caseload. Second, once criminal cases are filed, the Speedy Trial Act puts time limits on disposition and reduces the flexibility with which the courts can adjudicate the cases.[38] To comply with the act, judges must often prioritize criminal cases over civil cases.[39] Finally, judges might have more control over the mode of disposition in civil cases than in criminal cases. Judges can and often do encourage civil settlement,[40] but they are barred from participation in plea negotiations between the government and criminal defendants.[41] Each of these factors likely contributes to the apparently lower variance of the criminal trial data.

B. Hours on the Bench

1. Origin of Data

The Administrative Office of the U.S. Courts also collects and compiles data on both the number of hours that judges spends at trial and the numbers of hours that judges spent presiding over "other proceedings."[42] The trial-hour data includes the total combined hours on the bench for each district court.[43] The charts do not explicitly define what constitutes a "trial," but the

[38] Under the Speedy Trial Act, a criminal defendant's trial must commence within seventy days of the filing of the information or indictment, or the date the defendant appears before an officer of the court in which the charge is pending, whichever is later. 18 U.S.C. § 3161(c)(1).

[39] *See* Tobias, *supra* note 16, at 527 ("The Speedy Trial Act's requirement that criminal cases receive preferential treatment has precluded numerous district judges from conducting a single civil trial since 1995, while the district courts have a civil backlog of thousands of suits.").

[40] *See* Blake D. Morant, *The Declining Prevalence of Trials as a Dispute Resolution Device: Implications for the Academy*, 38 WM. MITCHELL L. REV. 1123, 1127 (2012) ("While settlement conferences are often voluntary, judges can exert extreme pressure that encourages parties to settle their disputes.").

[41] *See* FED. R. CRIM. P. 11(c)(1) ("An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. *The court must not participate in these discussions*." (emphasis added)).

[42] *See, e.g.*, ADMIN. OFFICE OF THE U.S. COURTS, TABLE C-12: U.S. DISTRICT COURTS TRIALS AND TRIAL DAYS FOR EACH PLACE OF HOLDING COURT DURING THE TWELVE MONTH PERIOD ENDING SEP. 30, 2010 (on file with author). This study considers hours data from years 2006 through 2010. The Administrative Office of the U.S. Courts compiles the statistics into Table C-12. The C-12 tables, however, are not available to the public on the U.S. Courts website. The tables necessary for this part of the study were graciously supplied by Elizabeth Sonnenberg. *See supra*, note 20.

[43] For years 2006, 2009, and 2010, Tables C-12 provided data for trial-days instead of trial-hours. *See, e.g.*, ADMIN. OFFICE OF THE U.S. COURTS, TABLE C-12: U.S. DISTRICT COURTS TRIALS AND TRIAL DAYS FOR EACH PLACE OF HOLDING COURT DURING THE TWELVE MONTH PERIOD ENDING SEP. 30, 2010 (on file with author). A note with the tables explains that "trial days are computed by dividing total trial hours (not shown) by 5.0 rounded up." *Id.* This study reverses the Administrative Office's computation (multiplying by 5.0) to restore a trial *hour* figure for these three years. The Administrative Office's original upward rounding introduces some error, but the

trial-hours data presumably is consistent with trials-completed statistics and thus include time spent presiding over not only traditional trials but also "other contested matters."[44] The category "other proceedings" would then include all other non-trial matters for which the judge is on the bench.[45]

2. *Hours at Trial Results*

Figure 5 shows the percent change of hours at trial versus the percent staffing changes for each of the district courts in this study.[46] The data is in terms of total hours for the district, not per-judge contributions. Like the court-wide trials-completed data in Figures 1 and 3, the plot is highly scattered. The data seems equally distributed to indicate increases and decreases in trial hours for all changes in staffing, so there is no clear trend showing that courts increase or decrease hours as a result of vacancy changes. Any strong conclusions are impossible with the small sample size, but the variance seems to be greater for decreases in staffing (created vacancies) than for increases (filled vacancies). If this is a true effect,[47] a possible explanation would be that courts can more easily adjust their case management to accommodate a newly appointed judge than they can to compensate for a vacancy.

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potential overstatement (which is at most five hours) is inconsequential given that the total hour figures for each district court are in the hundreds or thousands.

[44] *See supra*, notes 29-30 and accompanying text.

[45] Attempts to contact the Administrative Office of the U.S. Court to confirm these interpretations were unsuccessful.

[46] For the underlying data, see Appendix D-1.

[47] Figure 1 and Figure 3, showing total changes in civil and criminal trials, respectively, cast doubt on the meaningfulness of this observation. In those figures, any such effect is insignificant, if present at all.

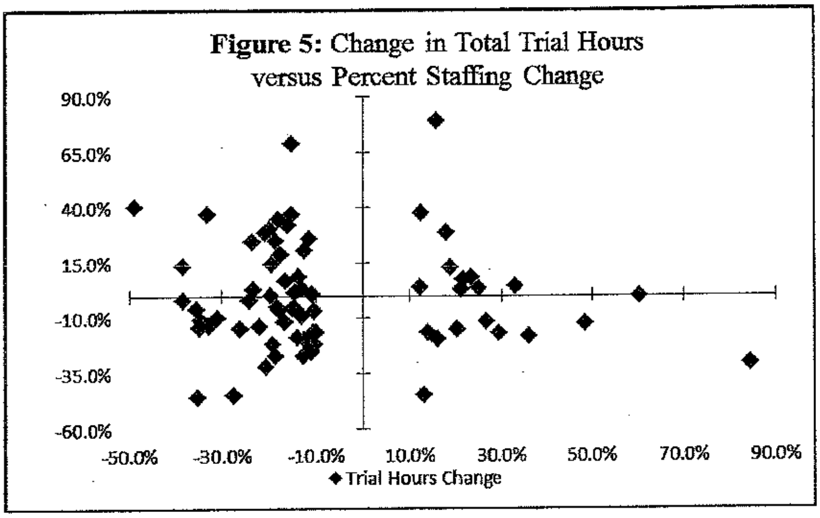

Figure 6 shows the same trial-hours data but adjusted to represent per-judge contributions. The data seems to follow the Projected Change line more closely than the corresponding graphs for civil trials completed (Figure 2) or criminal trials completed (Figure 4). This makes sense intuitively. One of the sources for variance for numbers of trials-completed is the inconsistent complexity of individual trials. As a result, trial lengths vary significantly and courts with long trials are apt to complete fewer trials in total. This variance is minimized in the trial-hours statistics: whether a judge spends his time on a few long trials or many short trials, the total trial-hours on the bench can still be the same.

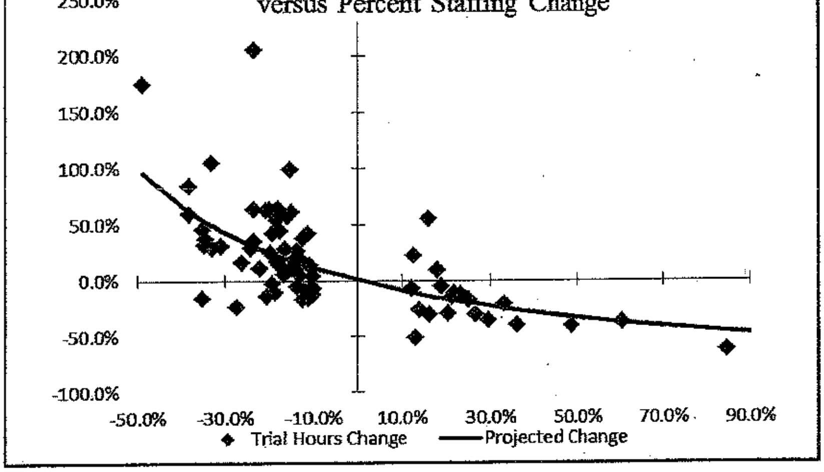

Figure 6: Change in Trial Hours Per Judgeship versus Percent Staffing Change

Figure 6 indicates little in the way of an adjudicative response to changes in court staffing. For the most part, regardless of increases or decreases in staffing, the scatterplot seems equally distributed above and below the Projected Change line. Again, the line represents the expected trial-hours if vacancy changes resulted strictly in a redistribution of caseloads and no changes in adjudicative approach. Perhaps, at the leftmost edge of the graph (indicating large negative changes in court staffing) a disproportionate number of points appear below the Projected Change line. This could represent courts' inabilities to compensate for large vacancy increases in a way that could sustain the amount of time previously dedicated to trials. While far from clear, the data might thus indicate a small shift from a trial-model of adjudication for those courts most heavily burdened by unfilled vacancies.

3. *Hours at Other Proceedings Results*

Figure 7 shows the change in district-wide hours judges spent on other proceedings versus the percent change in court staffing.[48] This graph is similar to the ones already shown in that the data is highly scattered as both positive and negative changes. Unlike previous graphs,

[48] For the underlying data, see Appendix D-2.

however, Figure 7 appears to show a slight upward trend in total other-hours as one looks across the graph from the largest decreases in staffing to the largest increases. This suggests that while courts might be able to maintain a preexisting level of trials and trial hours in the face of vacancies, the price paid might be a reduction in hours spent on other proceedings. This data cannot alone support that conclusion, but it does invite a more rigorous inquiry into the matter.

Figure 7: Change in Total Other-Hours versus Percent Staffing Change

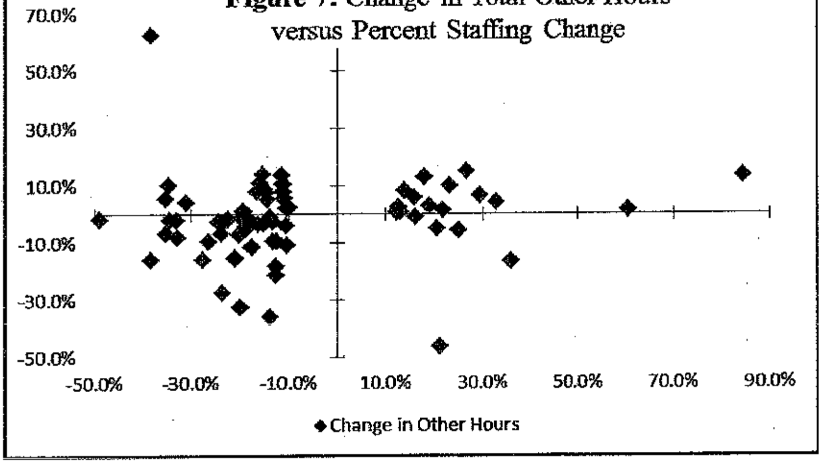

Figure 8 shows the other-hours data on a per-judge basis. The slight upward trend mentioned with regard to Figure 7 is evident here with respect to the Projected Change line. On the left, the data points are mostly below the line, showing that new vacancies might result in a mild shift away from time spent on other proceedings, rather than a redistribution of those proceedings. On the right, the data is mostly above the line, suggesting that with new confirmations and a reduced burden, judges might hear more matters or carry on the same proceedings longer than otherwise would have been the case. In real-world terms, the decreased burden which comes with a newly confirmed colleague might allow a judge to allocate more time to oral hearings for motions instead of deciding based only on the briefs.

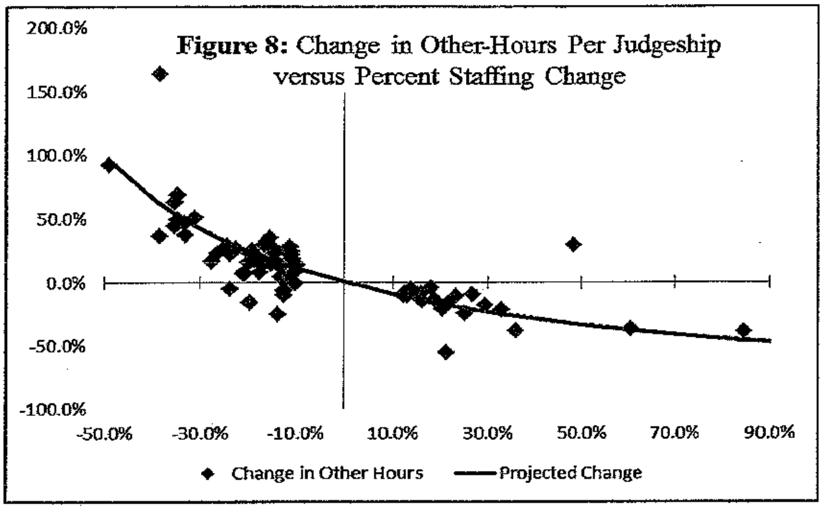

Figure 8: Change in Other-Hours Per Judgeship versus Percent Staffing Change

Despite this trend, the data as a whole shows much less variance about the Projected Change line than the corresponding data for trials and trial-hours. This is likely because where trials are highly inconsistent in both length and in occurrence, time spent on other proceedings is not. Cases might settle at the last minute and prevent a trial, but proceedings such as pre-trial conferences and arraignments will occur consistently. Likewise, such proceedings will not vary in length to nearly the extent that trials do. As a result, other-hours tends to be a consistent value for a given district from one year to the next, and the variance in the resulting scatterplot is tame in comparison to that of other measures this study has considered.

C. Length of Time From Filing to Resolution for Civil Cases

The time it takes district courts to resolve cases is not a measure that necessarily factors into a court's trial productivity.[49] Time-until-resolution has no direct relationship to where on the adjudicative-model/trial-model spectrum a court might fall. Nonetheless, a litigant surely would consider a court less productive if it allowed the litigant's active case to gather dust. And

[49] Judge Young, for example, does not include any length-related statistics in his trial productivity rankings. *See supra* note 21 and accompanying text.

no study of vacancies' effects would be complete without considering whether an increased number of vacancies slowed litigation.

1. Origin of Data

This section looks at two sets of data: the time from filing to disposition of civil trials[50] and the time from filing to disposition of all civil cases, irrespective of termination method.[51] This study considers only civil trials because the standardized time frames for criminal proceedings under the Speedy Trial Act would minimize any potential trend.[52] Since judges have more discretion in controlling the schedule for civil trials, any vacancy-related effect should be more prominent.

2. Time Until Disposition for Civil Trials Results

Figure 9 shows the change in time-until-disposition for civil trials plotted against the percent change in court staffing.[53] Because hours-until-trial data is already on a per-case basis and more easily compared across jurisdictions than other data in this study, the change is presented in terms of actual hours rather than as a percentage.

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[50] The Administrative Office of the U.S. Courts compiles length-until-trial statistics for civil trials in Table C-10. *See, e.g.*, ADMIN. OFFICE OF THE U.S. COURTS, TABLE C-10: U.S. DISTRICT COURTS - MEDIAN TIME INTERVAL FROM FILING TO TRIAL FOR CIVIL CASES IN WHICH TRIALS WERE COMPLETED, BY DISTRICT, DURING THE TWELVE MONTH PERIOD ENDING SEP. 30, 2010, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C10Sep10.pdf. The Administrative Office includes data only for districts that have completed at least ten civil trials. *Id.* This study considers length data for years 2006 through 2011. The 2011 table was renumbered as Table T-3 but is otherwise the same. *See* ADMIN. OFFICE OF THE U.S. COURTS, TABLE T-3: U.S. DISTRICT COURTS - MEDIAN TIME INTERVAL FROM FILING TO TRIAL FOR CIVIL CASES IN WHICH TRIALS WERE COMPLETED, BY DISTRICT, DURING THE TWELVE MONTH PERIOD ENDING SEP. 30, 2011, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/T03Sep11.pdf; JUDICIAL BUSINESS, *supra* note 5, at 35 (summarizing the new numbering system).

[51] The data for time from filing until disposition for all civil cases is published with the Federal Court Management Statistics. *See* COURT MANAGEMENT STATISTICS, *supra* note 22. As with the time-until-trial data, the years considered are 2006 through 2011. The study omits a data point for the Middle District of Louisiana from 2006 to 2007 as an unrepresentative outlier because the median trial length between those years went from 6.4 months to an astounding 127.6 months. *Id.*

[52] *See supra* note 38 and accompanying text.

[53] For the underlying data, see Appendix E-1.

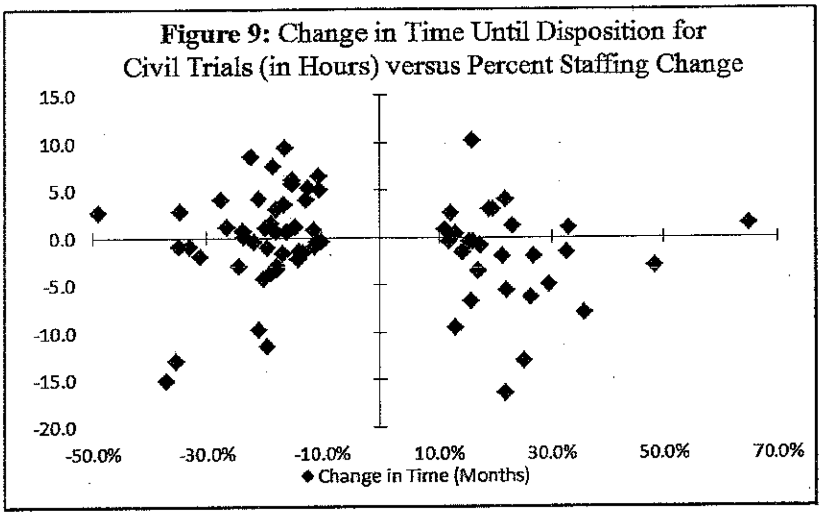
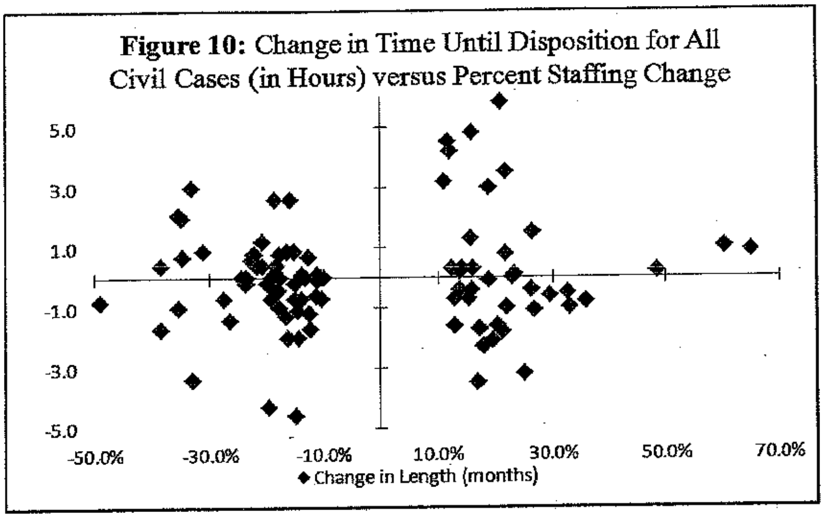


Figure 9 is highly scattered with no clear trends. It indicates that the creation and filling of district court vacancies has no impact on the length from filing until disposition for civil trials. It is worth noting, however, that the time spans under consideration will not have occurred entirely – or sometimes even primarily – in the year for which the trial is tabulated. To illustrate, consider a twelve-month trial that is completed early in the second year of one of the two-year data points in this study. That trial would be tabulated in the statistics for the second year even though the speed with which it was adjudicated might be more reflective of the court in the prior year. This carryover and misattribution makes the length-until-disposition statistics difficult to compare on a year-to-year basis within a single court, and may partially explain the lack of observable trends.

3. *Time Until Disposition for All Civil Cases Results*

Figure 10 shows the change in time-until-disposition for all civil cases as related to changes in court staffing.[54] Again, the change is presented in actual hours rather than as a percentage.

[54] For the underlying data, see Appendix E-2.



While one might expect less variance given that data for all civil cases utilizes a much larger sample size than data limited to trial-resolved cases, the data does not suggest such an effect. As with the time-until-trial data in Figure 9, the scatterplot in Figure 10 demonstrates no clear trends.

IV. CONCLUSIONS

The purpose of this study is not to conduct an exhaustive investigation but rather to see if vacancy changes resulted in any significant adjudicative effects and to suggest potential areas for further inquiry. While some data revealed a possibility that high vacancy numbers caused an adjudicative shift away from trials and hours on the bench, the effect was minimal and likely not statistically significant. Trying to isolate any per-judge effects of court vacancies perhaps asks too much of the data.

The effect on any particular judge is likely too subtle to isolate with such a small sample size and so many complicating factors. A more rigorous investigation would need to account for contributions from magistrate, senior status, and visiting judges. Such an investigation should also consider filing and termination numbers.[55] The effects of high vacancies might materialize as a growing backlog of filings rather than as a change in productivity as measured by output. The time-until-disposition statistics analyzed here would not necessary capture this backlog effect. Second, filing and termination statistics would help indicate whether courts were already operating at capacity when vacancies arose. An increase in caseload resulting from vacancies would likely not affect the adjudicative approach of a judge who is already completely overloaded. And finally, filing and termination numbers might give context to the statistics considered in this study by illuminating the overall allotment of judges' time. If a heavier caseload resulted in a judge working more hours overall, then the *portion* of time the judge spends on the bench could decrease even though the trial-hours or other-proceeding-hours numbers do not drop from the previous year. A shift from a trial-model of adjudication toward settlement and summary disposition, therefore, could still accompany an increase in absolute time on bench. A measure such as bench-time per case perhaps could account for these concerns.

The strongest message to take from this study is that federal courts and federal judges are resilient. Despite vacancies having more than doubled in the past five years and discussion of judicial emergencies, this study indicates that federal courts have thus far had an impressive ability to maintain their adjudicative standards. This is likely a result of the cooperative nature of the federal judiciary. Magistrate judges have taken on more and more responsibilities in recent years, helping lighten the load of Article III judges. The number of authorized magistrate judge positions has increased steadily from 553 in 2007 to 574 in 2011, with magistrate judges

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[55] Taking into account filings is particularly important because both civil and criminal filings have been steadily increasing over the past five years. Civil filings per judgeship have risen from 380 in 2007 to 427 in 2011. JUDICIAL BUSINESS, *supra* note 5, at 16. In the same time span, criminal filings per judgeship have risen from 132 to 152. *Id.* at 19. Given the coinciding increase in vacancies, the per-*judge* rise in filings is even more significant than the per-judgeship increase.

conducting 6359 trials in 2011.[56] The number of civil cases magistrate judges concluded with finality rose twelve percent from 2010 to 2011, the fourth consecutive year of increase.[57] Visiting judges also help redistribute manpower and lessen the impact of vacancies on any one district.[58] For example, in the Eastern District of California, which carries a notoriously heavy caseload, sixty-two active and senior status visiting judges combined to terminate 214 civil cases in 2011.[59]

The contributions of senior status judges (and retirement-age judges who retain active status) are perhaps the most important factor in sustaining productivity despite vacancies. Article III judges who are sixty-five or older are eligible to retire if their age and years in service combine to equal at least eighty.[60] Retired judges receive an annual pension equal to the full salary they were receiving at the time of retirement.[61] Alternatively, a judge with retirement eligibility can opt to take senior status[62] and retain office with what is generally a diminished caseload.[63] The option is becoming increasingly common, as the number of senior status judges

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[56] JUDICIAL BUSINESS, *supra* note 5, at 20. In total, magistrate judges completed 1,069,344 "judicial tasks" in 2011. *Id.* at 21.

[57] *Id.* at 22.

[58] Interestingly, the number of matters handled by visiting judges has declined markedly. Visiting judges terminated 8172 cases in 2007, *see* ADMIN. OFFICE OF THE U.S. COURTS, TABLE V-1: U.S. DISTRICT COURTS SERVICE PROVIDED BY AND RECEIVED FROM VISITING JUDGES DURING THE TWELVE MONTH PERIOD ENDING SEP. 30 2007, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2007/appendices/V01Sep07.pdf, but only 2077 matters in 2011, *see* ADMIN. OFFICE OF THE U.S. COURTS, TABLE V-1: U.S. DISTRICT COURTS SERVICE PROVIDED BY AND RECEIVED FROM VISITING JUDGES DURING THE TWELVE MONTH PERIOD ENDING SEP. 30 2011, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/V01Sep11.pdf. Perhaps as more courts become burdened with increasing filings and vacancies, judges have become less able to volunteer time outside their districts.

[59] ADMIN. OFFICE OF THE U.S. COURTS, TABLE V-1: U.S. DISTRICT COURTS SERVICE PROVIDED BY AND RECEIVED FROM VISITING JUDGES DURING THE TWELVE MONTH PERIOD ENDING SEP. 30 2011, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/ appendices/V01Sep11.pdf.

[60] *See* 28 U.S.C. § 371(c). A judge must also have a minimum of ten years in service. *Id.*

[61] *Id.* § 371(a) (providing that a retiring judge "shall, during the remainder of his lifetime, receive an annuity equal to the salary he was receiving at the time he retired").

[62] *Id.* § 371(b)(1) (providing that a judge "may retain the office but retire from regular active service").

[63] *See id.* § 371(e).

has increased by ten percent in the last five years.[64] Essentially, these senior status judges (and judges who, although of age, opt for neither senior status nor retirement) work for free, volunteering their time and expertise to sustain the important work of the increasingly overloaded judiciary. In 2010, this author witnessed that contribution first-hand while having the pleasure of serving as a summer intern for U.S. District Judge Solomon Blatt, Jr. Judge Blatt was eighty-eight years old at the time and still took a complete range of cases,[65] despite having become eligible for fully-paid retirement twenty-three years earlier. That year, Judge Blatt's contribution was no doubt essential to the continued functioning of his district, which had a quarter of its judgeships sitting vacant as it awaited a pair of confirmations.[66] The contributions of senior status judges such as Judge Blatt, visiting judges, and magistrate judges minimize the burden that vacancies place on federal trial courts and, as this study has indicated, allow business in the third branch to go on as usual.

[64] *See* JUDICIAL BUSINESS, *supra* note 5, at 32 (reporting 310 senior status judges in 2007 and 341 in 2011).

[65] Many senior status judges opt out of taking criminal cases. While Judge Blatt handled a reduced caseload, he did not request that his range of cases be otherwise altered.

[66] Judge Blatt is seated on the U.S. District Court for the District of South Carolina. In 2010, the district had 29.3 vacant months for ten authorized judgeships. COURT MANAGEMENT STATISTICS, *supra* note 22. The staffing changes in the District of South Carolina from both 2009 to 2010 and 2010 to 2011 are data points in this study.

Appendix A: The Projected Change Line.

The Projected Change line **PC** is calculated as a function of the percent staffing change **s**.

$$PC(s) = -\frac{s}{1+s}$$

Because **s** represents the fractional change in staffing, $1 + s$ will equal the fraction of the initial staff that remains in the second year. If **s** is negative, the fraction will be less than 1 and represent a decrease in the number of judges, and if **s** is positive, the fraction will be greater than 1 and represent an increase.

Since the calculations are in terms of percentages or fractions, the initial workload w_0 can be defined as 100% or 1. Dividing the initial workload by the second-year staffing fraction, $1 + s$, yields the total fractional workload in the second year.

$$w_2 = \frac{1}{1+s}$$

This calculation represents the total workload relative to the year before, whereas the graphs in this study display the percent change from the previous year. Because the initial workload was defined as $w_0 = 1$, the percent change is simply the relative total value minus 1. Thus, subtracting 1 and simplifying leads to the Projected Change line function.

$$PC = \frac{1}{1+s} - 1$$

$$PC = \frac{1}{1+s} - \frac{1+s}{1+s}$$

$$PC = \frac{1-(1+s)}{1+s}$$

$$PC = -\frac{s}{1+s}$$

Appendix B: Vacancy Change Baseline Data.

District	Years	Authorized Judgeships	Vacancies in Year A	Vacancies in Year B	Staffing Change
DNH	2006-2007	3	0.0	6.5	-18.1%
DRI	2006-2007	3	0.0	9.9	-27.5%
DPR	2006-2007	7	19.1	0.0	29.4%
DNY-N	2006-2007	5	6.6	14.0	-13.9%
DDE	2006-2007	4	0.0	9.5	-19.8%
DNJ	2006-2007	17	32.3	0.0	18.8%
DNC-M	2006-2007	4	7.9	23.3	-38.4%
DNC-W	2006-2007	5	18.7	11.3	17.9%
DWV-N	2006-2007	3	0.0	13.8	-38.3%
DLA-M	2006-2007	3	0.0	8.5	-23.6%
DMS-N	2006-2007	3	0.0	4.0	-11.1%
DMI-W	2006-2007	4	33.0	27.6	36.0%
DTN-M	2006-2007	4	0.0	7.0	-14.6%
DIA-S	2006-2007	3	0.0	4.0	-11.1%
DOK-N	2006-2007	3.5	12.0	4.0	26.7%
DWY	2006-2007	3	0.1	12.0	-33.1%
DGA-S	2006-2007	3	5.1	16.0	-35.3%
DNH	2007-2008	3	6.5	2.4	13.9%
DNY-N	2007-2008	5	14.0	21.6	-16.5%
DNC-M	2007-2008	4	23.3	2.4	84.6%
DNC-W	2007-2008	5	11.3	0.0	23.2%
DMS-N	2007-2008	3	4.0	0.1	12.2%
DMI-W	2007-2008	4	27.6	0.0	135.3%
DIN-N	2007-2008	5	0.0	11.0	-18.3%
DIN-S	2007-2008	5	0.0	6.2	-10.3%
DIA-S	2007-2008	3	4.0	0.0	12.5%
DWA-E	2007-2008	4	0.0	5.0	-10.4%
DWA-W	2007-2008	7	20.9	0.1	33.0%
DCO	2007-2008	7	0.0	20.4	-24.3%
DOK-W	2007-2008	6	10.0	0.0	16.1%
DUT	2007-2008	5	0.0	10.7	-17.8%
DGA-S	2007-2008	3	16.0	6.3	48.5%
DNY-N	2008-2009	5	21.6	12.0	25.0%
DNY-W	2008-2009	4	0.0	6.9	-14.4%
DVT	2008-2009	2	0.0	3.0	-12.5%
DPA-M	2008-2009	6	0.0	14.0	-19.4%
DNC-M	2008-2009	4	2.4	9.4	-15.4%
DSC	2008-2009	10	0.0	12.0	-10.0%

DWV-S	2008-2009	5	0.0	9.0	-15.0%
DTX-W	2008-2009	13	0.0	17.0	-10.9%
DWI-W	2008-2009	2	0.0	8.3	-34.6%
DAR-E	2008-2009	5	6.3	24.0	-33.0%
DAR-W	2008-2009	3	0.0	12.5	-34.7%
DMO-W	2008-2009	6	8.3	0.0	13.0%
DSD	2008-2009	3	2.0	14.0	-35.3%
DOR	2008-2009	6	0.0	9.1	-12.6%
DWA-E	2008-2009	4	5.0	14.6	-22.3%
DUT	2008-2009	5	10.7	0.0	21.7%
DGA-N	2008-2009	11	0.0	25.5	-19.3%
DGA-M	2008-2009	4	0.0	9.0	-18.8%
DGA-S	2008-2009	3	6.3	0.0	21.2%
DME	2009-2010	3	0.0	5.0	-13.9%
DNY-W	2009-2010	4	6.9	12.0	-12.4%
DPA-M	2009-2010	6	14.0	29.3	-26.4%
DNC-W	2009-2010	5	1.0	12.0	-18.6%
DSC	2009-2010	10	12.0	29.3	-16.0%
DWV-S	2009-2010	5	9.0	0.9	15.9%
DTX-S	2009-2010	19	7.0	32.2	-11.4%
DIL-N	2009-2010	22	18.5	51.0	-13.2%
DIL-C	2009-2010	4	0.0	14.9	-31.0%
DIN-S	2009-2010	5	2.9	14.8	-20.8%
DWI-W	2009-2010	2	8.3	12.0	-23.6%
DAR-W	2009-2010	3	12.5	24.0	-48.9%
DMN	2009-2010	7	0.0	11.1	-13.2%
DMO-E	2009-2010	8	3.0	17.1	-15.2%
DSD	2009-2010	3	14.0	0.7	60.5%
DCA-S	2009-2010	13	0.0	16.5	-10.6%
DHI	2009-2010	4	3.0	12.0	-20.0%
DOR	2009-2010	6	9.1	24.0	-23.7%
DOK-N	2009-2010	3.5	0.0	8.8	-21.0%
DUT	2009-2010	5	0.0	10.0	-16.7%
DWY	2009-2010	3	12.0	7.1	20.4%
DGA-N	2009-2010	11	25.5	44.3	-17.7%
DDC	2010-2011	15	45.0	24.2	15.4%
DME	2010-2011	3	5.0	12.0	-22.6%
DRI	2010-2011	3	12.0	7.0	20.8%
DNY-N	2010-2011	5	12.0	5.8	12.9%
DNY-S	2010-2011	28	31.9	85.4	-17.6%
DVI	2010-2011	2	0.0	8.9	-37.1%

DNC-M	2010-2011	4	12.0	2.5	26.4%
DNC-W	2010-2011	5	12.0	5.2	14.2%
DSC	2010-2011	10	29.3	11.6	19.5%
DLA-E	2010-2011	12	12.0	30.6	-14.1%
DLA-M	2010-2011	3	8.4	2.4	21.7%
DLA-W	2010-2011	7	8.4	0.0	11.1%
DMS-S	2010-2011	6	12.0	2.6	15.7%
DIL-C	2010-2011	4	14.9	20.3	-16.3%
DIN-N	2010-2011	5	7.3	0.0	13.9%
DIN-S	2010-2011	5	14.8	0.0	32.7%
DAR-E	2010-2011	5	19.1	12.0	17.4%
DAR-W	2010-2011	3	24.0	16.2	65.0%
DMN	2010-2011	7	11.1	2.5	11.8%
DAK	2010-2011	3	0.0	6.6	-18.3%
DAZ	2010-2011	13	1.9	29.5	-17.9%
DCA-E	2010-2011	6	12.0	2.5	15.8%
DHI	2010-2011	4	12.0	2.6	26.1%
DOR	2010-2011	6	24.0	13.0	22.9%
DCO	2010-2011	7	24.0	12.7	18.8%
DKS	2010-2011	6	0.0	10.9	-15.1%
DUT	2010-2011	5	10.0	20.9	-21.8%
DWY	2010-2011	3	7.1	2.2	17.0%
DGA-M	2010-2011	4	8.6	0.0	21.8%

Appendix C-1: Civil Trials Completed Data.

District	Years	Staffing Change	Civil Trials in Year A	Civil Trials in Year B	Per Judge Change	Overall Change
DAR-W	2009-2010	-48.9%	21	24	123.8%	14.3%
DNC-M	2006-2007	-38.4%	27	12	-27.8%	-55.6%
DWV-N	2006-2007	-38.3%	13	18	124.5%	38.5%
DVI	2010-2011	-37.1%	17	16	49.6%	-5.9%
DSD	2008-2009	-35.3%	9	16	174.7%	77.8%
DGA-S	2006-2007	-35.3%	22	39	173.9%	77.3%
DAR-W	2008-2009	-34.7%	27	21	19.1%	-22.2%
DWI-W	2008-2009	-34.6%	28	24	31.0%	-14.3%
DWY	2006-2007	-33.1%	10	19	184.2%	90.0%
DAR-E	2008-2009	-33.0%	40	65	142.4%	62.5%
DIL-C	2009-2010	-31.0%	31	37	73.1%	19.4%
DRI	2006-2007	-27.5%	26	19	0.8%	-26.9%
DPA-M	2009-2010	-26.4%	93	64	-6.5%	-31.2%
DCO	2007-2008	-24.3%	84	81	27.4%	-3.6%
DOR	2009-2010	-23.7%	38	52	79.3%	36.8%
DLA-M	2006-2007	-23.6%	34	35	34.8%	2.9%
DWI-W	2009-2010	-23.6%	24	25	36.3%	4.2%
DME	2010-2011	-22.6%	17	19	44.4%	11.8%
DWA-E	2008-2009	-22.3%	18	23	64.5%	27.8%
DUT	2010-2011	-21.8%	42	44	34.0%	4.8%
DOK-N	2009-2010	-21.0%	24	26	37.0%	8.3%
DIN-S	2009-2010	-20.8%	28	29	30.8%	3.6%
DHI	2009-2010	-20.0%	23	22	19.6%	-4.3%
DDE	2006-2007	-19.8%	39	43	37.5%	10.3%
DPA-M	2008-2009	-19.4%	77	93	49.9%	20.8%
DGA-N	2008-2009	-19.3%	104	132	57.3%	26.9%
DGA-M	2008-2009	-18.8%	44	30	-16.1%	-31.8%
DNC-W	2009-2010	-18.6%	28	31	36.1%	10.7%
DIN-N	2007-2008	-18.3%	29	35	47.8%	20.7%
DAK	2010-2011	-18.3%	4	2	-38.8%	-50.0%
DNH	2006-2007	-18.1%	13	11	3.3%	-15.4%
DAZ	2010-2011	-17.9%	83	65	-4.6%	-21.7%
DUT	2007-2008	-17.8%	44	38	5.1%	-13.6%
DGA-N	2009-2010	-17.7%	132	108	-0.6%	-18.2%
DNY-S	2010-2011	-17.6%	141	146	25.7%	3.5%
DUT	2009-2010	-16.7%	47	42	7.2%	-10.6%
DNY-N	2007-2008	-16.5%	34	43	51.5%	26.5%
DIL-C	2010-2011	-16.3%	37	32	3.3%	-13.5%

DSC	2009-2010	-16.0%	138	160	38.1%	15.9%
DNC-M	2008-2009	-15.4%	18	14	-8.1%	-22.2%
DMO-E	2009-2010	-15.2%	70	56	-5.7%	-20.0%
DKS	2010-2011	-15.1%	48	41	0.7%	-14.6%
DWV-S	2008-2009	-15.0%	19	20	23.8%	5.3%
DTN-M	2006-2007	-14.6%	64	57	4.3%	-10.9%
DNY-W	2008-2009	-14.4%	9	23	198.5%	155.6%
DLA-E	2010-2011	-14.1%	98	93	10.5%	-5.1%
DME	2009-2010	-13.9%	10	17	97.4%	70.0%
DNY-N	2006-2007	-13.9%	42	34	-6.0%	-19.0%
DIL-N	2009-2010	-13.2%	144	203	62.5%	41.0%
DMN	2009-2010	-13.2%	38	34	3.1%	-10.5%
DOR	2008-2009	-12.6%	49	38	-11.2%	-22.4%
DVT	2008-2009	-12.5%	9	10	27.0%	11.1%
DNY-W	2009-2010	-12.4%	23	20	-0.7%	-13.0%
DTX-S	2009-2010	-11.4%	158	148	5.7%	-6.3%
DMS-N	2006-2007	-11.1%	49	36	-17.3%	-26.5%
DIA-S	2006-2007	-11.1%	36	16	-50.0%	-55.6%
DTX-W	2008-2009	-10.9%	111	88	-11.0%	-20.7%
DCA-S	2009-2010	-10.6%	44	35	-11.0%	-20.5%
DWA-E	2007-2008	-10.4%	22	18	-8.7%	-18.2%
DIN-S	2007-2008	-10.3%	68	65	6.6%	-4.4%
DSC	2008-2009	-10.0%	157	138	-2.3%	-12.1%
DLA-W	2010-2011	11.1%	48	43	-19.4%	-10.4%
DMN	2010-2011	11.8%	34	46	21.0%	35.3%
DMS-N	2007-2008	12.2%	36	44	8.9%	22.2%
DIA-S	2007-2008	12.5%	16	13	-27.8%	-18.8%
DNY-N	2010-2011	12.9%	62	55	-21.4%	-11.3%
DMO-W	2008-2009	13.0%	67	54	-28.7%	-19.4%
DIN-N	2010-2011	13.9%	24	22	-19.5%	-8.3%
DNH	2007-2008	13.9%	11	25	99.5%	127.3%
DNC-W	2010-2011	14.2%	31	27	-23.7%	-12.9%
DDC	2010-2011	15.4%	70	65	-19.5%	-7.1%
DMS-S	2010-2011	15.7%	60	73	5.2%	21.7%
DCA-E	2010-2011	15.8%	61	60	-15.1%	-1.6%
DWV-S	2009-2010	15.9%	20	25	7.9%	25.0%
DOK-W	2007-2008	16.1%	27	29	-7.5%	7.4%
DWY	2010-2011	17.0%	19	21	-5.5%	10.5%
DAR-E	2010-2011	17.4%	52	47	-23.0%	-9.6%
DNC-W	2006-2007	17.9%	10	24	103.5%	140.0%
DNJ	2006-2007	18.8%	113	114	-15.1%	0.9%

DCO	2010-2011	18.8%	78	88	-5.1%	12.8%
DSC	2010-2011	19.5%	160	138	-27.8%	-13.8%
DWY	2009-2010	20.4%	17	19	-7.2%	11.8%
DRI	2010-2011	20.8%	13	17	8.2%	30.8%
DGA-S	2008-2009	21.2%	17	20	-2.9%	17.6%
DUT	2008-2009	21.7%	38	47	1.6%	23.7%
DLA-M	2010-2011	21.7%	33	24	-40.3%	-27.3%
DGA-M	2010-2011	21.8%	26	36	13.7%	38.5%
DOR	2010-2011	22.9%	52	58	-9.3%	11.5%
DNC-W	2007-2008	23.2%	24	18	-39.1%	-25.0%
DNY-N	2008-2009	25.0%	43	31	-42.3%	-27.9%
DHI	2010-2011	26.1%	22	23	-17.1%	4.5%
DNC-M	2010-2011	26.4%	19	23	-4.2%	21.1%
DOK-N	2006-2007	26.7%	29	26	-29.2%	-10.3%
DPR	2006-2007	29.4%	48	46	-26.0%	-4.2%
DIN-S	2010-2011	32.7%	29	67	74.0%	131.0%
DWA-W	2007-2008	33.0%	43	56	-2.1%	30.2%
DMI-W	2006-2007	36.0%	37	28	-44.4%	-24.3%
DGA-S	2007-2008	48.5%	39	17	-70.6%	-56.4%
DSD	2009-2010	60.5%	16	16	-37.7%	0.0%
DAR-W	2010-2011	65.0%	24	21	-47.0%	-12.5%
DNC-M	2007-2008	84.6%	12	13	-41.3%	8.3%
DMI-W	2007-2008	135.3%	28	25	-62.1%	-10.7%

Appendix C-2: Criminal Trials Completed Data.

District	Years	Staffing Change	Criminal Trials in Year A	Criminal Trials in Year B	Per Judge Change	Overall Change
DAR-W	2009-2010	-48.9%	21	10	-6.7%	-52.4%
DNC-M	2006-2007	-38.4%	84	76	46.9%	-9.5%
DWV-N	2006-2007	-38.3%	40	24	-2.7%	-40.0%
DVI	2010-2011	-37.1%	42	40	51.4%	-4.8%
DSD	2008-2009	-35.3%	75	55	13.3%	-26.7%
DGA-S	2006-2007	-35.3%	38	32	30.1%	-15.8%
DAR-W	2008-2009	-34.7%	13	21	147.5%	61.5%
DWI-W	2008-2009	-34.6%	10	16	144.6%	60.0%
DWY	2006-2007	-33.1%	26	31	78.3%	19.2%
DAR-E	2008-2009	-33.0%	74	80	61.3%	8.1%
DIL-C	2009-2010	-31.0%	71	65	32.8%	-8.5%
DRI	2006-2007	-27.5%	25	23	26.9%	-8.0%
DPA-M	2009-2010	-26.4%	118	114	31.2%	-3.4%
DCO	2007-2008	-24.3%	58	79	79.9%	36.2%
DOR	2009-2010	-23.7%	27	51	147.5%	88.9%
DLA-M	2006-2007	-23.6%	39	40	34.3%	2.6%
DWI-W	2009-2010	-23.6%	16	14	14.5%	-12.5%
DME	2010-2011	-22.6%	37	45	57.1%	21.6%
DWA-E	2008-2009	-22.3%	81	66	4.9%	-18.5%
DUT	2010-2011	-21.8%	54	65	53.9%	20.4%
DOK-N	2009-2010	-21.0%	52	58	41.1%	11.5%
DIN-S	2009-2010	-20.8%	112	54	-39.1%	-51.8%
DHI	2009-2010	-20.0%	31	35	41.1%	12.9%
DDE	2006-2007	-19.8%	22	39	121.0%	77.3%
DPA-M	2008-2009	-19.4%	99	118	48.0%	19.2%
DGA-N	2008-2009	-19.3%	161	161	23.9%	0.0%
DGA-M	2008-2009	-18.8%	32	28	7.7%	-12.5%
DNC-W	2009-2010	-18.6%	126	105	2.4%	-16.7%
DIN-N	2007-2008	-18.3%	107	111	27.0%	3.7%
DAK	2010-2011	-18.3%	26	20	-5.8%	-23.1%
DNH	2006-2007	-18.1%	22	28	55.3%	27.3%
DAZ	2010-2011	-17.9%	158	367	183.0%	132.3%
DUT	2007-2008	-17.8%	79	64	-1.4%	-19.0%
DGA-N	2009-2010	-17.7%	161	124	-6.5%	-23.0%
DNY-S	2010-2011	-17.6%	121	121	21.3%	0.0%
DUT	2009-2010	-16.7%	69	54	-6.1%	-21.7%
DNY-N	2007-2008	-16.5%	41	26	-24.0%	-36.6%
DIL-C	2010-2011	-16.3%	65	66	21.3%	1.5%

DSC	2009-2010	-16.0%	171	234	62.9%	36.8%
DNC-M	2008-2009	-15.4%	104	94	6.8%	-9.6%
DMO-E	2009-2010	-15.2%	38	43	33.4%	13.2%
DKS	2010-2011	-15.1%	125	100	-5.7%	-20.0%
DWV-S	2008-2009	-15.0%	57	51	5.3%	-10.5%
DTN-M	2006-2007	-14.6%	51	78	79.1%	52.9%
DNY-W	2008-2009	-14.4%	33	35	23.9%	6.1%
DLA-E	2010-2011	-14.1%	45	49	26.7%	8.9%
DME	2009-2010	-13.9%	43	37	-0.1%	-14.0%
DNY-N	2006-2007	-13.9%	30	41	58.7%	36.7%
DIL-N	2009-2010	-13.2%	111	153	58.9%	37.8%
DMN	2009-2010	-13.2%	46	44	10.2%	-4.3%
DOR	2008-2009	-12.6%	46	27	-32.8%	-41.3%
DVT	2008-2009	-12.5%	11	16	66.2%	45.5%
DNY-W	2009-2010	-12.4%	35	38	24.0%	8.6%
DTX-S	2009-2010	-11.4%	240	378	77.8%	57.5%
DMS-N	2006-2007	-11.1%	30	24	-10.0%	-20.0%
DIA-S	2006-2007	-11.1%	94	135	61.6%	43.6%
DTX-W	2008-2009	-10.9%	234	277	32.9%	18.4%
DCA-S	2009-2010	-10.6%	210	175	-6.8%	-16.7%
DWA-E	2007-2008	-10.4%	71	81	27.4%	14.1%
DIN-S	2007-2008	-10.3%	60	57	5.9%	-5.0%
DSC	2008-2009	-10.0%	198	171	-4.0%	-13.6%
DLA-W	2010-2011	11.1%	102	118	4.1%	15.7%
DMN	2010-2011	11.8%	44	57	15.9%	29.5%
DMS-N	2007-2008	12.2%	24	32	18.8%	33.3%
DIA-S	2007-2008	12.5%	135	112	-26.3%	-17.0%
DNY-N	2010-2011	12.9%	97	130	18.7%	34.0%
DMO-W	2008-2009	13.0%	94	90	-15.3%	-4.3%
DIN-N	2010-2011	13.9%	102	113	-2.7%	10.8%
DNH	2007-2008	13.9%	28	23	-27.9%	-17.9%
DNC-W	2010-2011	14.2%	105	78	-34.9%	-25.7%
DDC	2010-2011	15.4%	81	94	0.6%	16.0%
DMS-S	2010-2011	15.7%	76	60	-31.7%	-21.1%
DCA-E	2010-2011	15.8%	42	33	-32.2%	-21.4%
DWV-S	2009-2010	15.9%	51	63	6.6%	23.5%
DOK-W	2007-2008	16.1%	50	41	-29.4%	-18.0%
DWY	2010-2011	17.0%	57	42	-37.0%	-26.3%
DAR-E	2010-2011	17.4%	61	67	-6.4%	9.8%
DNC-W	2006-2007	17.9%	82	142	46.9%	73.2%
DNJ	2006-2007	18.8%	74	109	24.0%	47.3%

DCO	2010-2011	18.8%	95	66	-41.5%	-30.5%
DSC	2010-2011	19.5%	234	151	-46.0%	-35.5%
DWY	2009-2010	20.4%	37	57	27.9%	54.1%
DRI	2010-2011	20.8%	17	23	12.0%	35.3%
DGA-S	2008-2009	21.2%	39	24	-49.2%	-38.5%
DUT	2008-2009	21.7%	64	69	-11.4%	7.8%
DLA-M	2010-2011	21.7%	46	81	44.6%	76.1%
DGA-M	2010-2011	21.8%	36	21	-52.1%	-41.7%
DOR	2010-2011	22.9%	51	32	-49.0%	-37.3%
DNC-W	2007-2008	23.2%	142	104	-40.6%	-26.8%
DNY-N	2008-2009	25.0%	26	43	32.3%	65.4%
DHI	2010-2011	26.1%	35	21	-52.4%	-40.0%
DNC-M	2010-2011	26.4%	74	55	-41.2%	-25.7%
DOK-N	2006-2007	26.7%	49	70	12.8%	42.9%
DPR	2006-2007	29.4%	62	49	-38.9%	-21.0%
DIN-S	2010-2011	32.7%	54	37	-48.4%	-31.5%
DWA-W	2007-2008	33.0%	111	75	-49.2%	-32.4%
DMI-W	2006-2007	36.0%	49	48	-28.0%	-2.0%
DGA-S	2007-2008	48.5%	32	39	-17.9%	21.9%
DSD	2009-2010	60.5%	55	59	-33.1%	7.3%
DAR-W	2010-2011	65.0%	10	12	-27.3%	20.0%
DNC-M	2007-2008	84.6%	76	67	-52.2%	-11.8%
DMI-W	2007-2008	135.3%	48	38	-66.4%	-20.8%

Appendix D-1: Trial-Hours Data.

District	Years	Staffing Change	Trial Hours in Year A	Trial Hours in Year B	Per Judge Change	Overall Change
DAR-W	2009-2010	-48.9%	395.0	555.0	175.2%	40.5%
DNC-M	2006-2007	-38.4%	560.0	636.5	84.5%	13.7%
DWV-N	2006-2007	-38.3%	460.0	450.6	58.8%	-2.0%
DSD	2008-2009	-35.3%	747.8	705.0	45.7%	-5.7%
DGA-S	2006-2007	-35.3%	905.0	493.6	-15.7%	-45.5%
DAR-W	2008-2009	-34.7%	459.9	395.0	31.6%	-14.1%
DWI-W	2008-2009	-34.6%	368.8	330.0	36.8%	-10.5%
DWY	2006-2007	-33.1%	525.0	718.9	104.8%	36.9%
DAR-E	2008-2009	-33.0%	1377.6	1195.0	29.4%	-13.3%
DIL-C	2009-2010	-31.0%	955.0	860.0	30.6%	-9.9%
DRI	2006-2007	-27.5%	715.0	394.5	-23.9%	-44.8%
DPA-M	2009-2010	-26.4%	1295.0	1105.0	15.9%	-14.7%
DCO	2007-2008	-24.3%	2210.2	2165.2	29.4%	-2.0%
DOR	2009-2010	-23.7%	915.0	1140.0	63.3%	24.6%
DLA-M	2006-2007	-23.6%	285.0	665.2	205.5%	133.4%
DWI-W	2009-2010	-23.6%	330.0	340.0	34.8%	3.0%
DWA-E	2008-2009	-22.3%	741.9	640.0	11.1%	-13.7%
DOK-N	2009-2010	-21.0%	580.0	745.0	62.5%	28.4%
DIN-S	2009-2010	-20.8%	985.0	670.0	-14.1%	-32.0%
DHI	2009-2010	-20.0%	770.0	1005.0	63.1%	30.5%
DDE	2006-2007	-19.8%	885.0	886.5	24.9%	0.2%
DPA-M	2008-2009	-19.4%	1129.0	1295.0	42.4%	14.7%
DGA-N	2008-2009	-19.3%	3102.7	2435.0	-2.7%	-21.5%
DGA-M	2008-2009	-18.8%	672.5	490.0	-10.3%	-27.1%
DNC-W	2009-2010	-18.6%	870.0	1090.0	54.0%	25.3%
DIN-N	2007-2008	-18.3%	1027.9	978.0	16.5%	-4.9%
DNH	2006-2007	-18.1%	340.0	459.0	64.7%	35.0%
DUT	2007-2008	-17.8%	1024.1	958.4	13.9%	-6.4%
DGA-N	2009-2010	-17.7%	1635.0	1945.0	44.5%	19.0%
DUT	2009-2010	-16.7%	1030.0	910.0	6.0%	-11.7%
DNY-N	2007-2008	-16.5%	1077.7	1151.9	28.0%	6.9%
DSC	2009-2010	-16.0%	1440.0	1905.0	57.5%	32.3%
DNC-M	2008-2009	-15.4%	441.5	745.0	99.3%	68.7%
DMO-E	2009-2010	-15.2%	1140.0	1560.0	61.3%	36.8%
DWV-S	2008-2009	-15.0%	280.7	265.0	11.1%	-5.6%
DTN-M	2006-2007	-14.6%	1545.0	1569.0	18.9%	1.6%
DNY-W	2008-2009	-14.4%	922.5	870.0	10.1%	-5.7%
DME	2009-2010	-13.9%	455.0	370.0	-5.6%	-18.7%

DNY-N	2006-2007	-13.9%	990.0	1077.7	26.4%	8.9%
DIL-N	2009-2010	-13.2%	5070.0	5245.0	19.2%	3.5%
DMN	2009-2010	-13.2%	1265.0	1150.0	4.8%	-9.1%
DOR	2008-2009	-12.6%	1252.4	915.0	-16.4%	-26.9%
DVT	2008-2009	-12.5%	257.2	310.0	37.7%	20.5%
DNY-W	2009-2010	-12.4%	870.0	700.0	-8.1%	-19.5%
DTX-S	2009-2010	-11.4%	2895.0	3645.0	42.1%	25.9%
DMS-N	2006-2007	-11.1%	700.0	527.8	-15.2%	-24.6%
DIA-S	2006-2007	-11.1%	940.0	701.7	-16.0%	-25.4%
DTX-W	2008-2009	-10.9%	2643.3	2670.0	13.4%	1.0%
DCA-S	2009-2010	-10.6%	2320.0	1935.0	-6.7%	-16.6%
DWA-E	2007-2008	-10.4%	794.8	741.9	4.2%	-6.7%
DIN-S	2007-2008	-10.3%	1070.8	836.6	-12.9%	-21.9%
DSC	2008-2009	-10.0%	1723.2	1440.0	-7.1%	-16.4%
DMS-N	2007-2008	12.2%	527.8	547.6	-7.5%	3.8%
DIA-S	2007-2008	12.5%	701.7	964.6	22.2%	37.5%
DMO-W	2008-2009	13.0%	1815.2	1005.0	-51.0%	-44.6%
DNH	2007-2008	13.9%	459.0	384.2	-26.5%	-16.3%
DWV-S	2009-2010	15.9%	265.0	475.0	54.7%	79.2%
DOK-W	2007-2008	16.1%	1140.9	919.7	-30.6%	-19.4%
DNC-W	2006-2007	17.9%	670.0	861.0	9.0%	28.5%
DNJ	2006-2007	18.8%	4075.0	4586.8	-5.3%	12.6%
DWY	2009-2010	20.4%	635.0	540.0	-29.4%	-15.0%
DGA-S	2008-2009	21.2%	432.0	445.0	-15.0%	3.0%
DUT	2008-2009	21.7%	958.4	1030.0	-11.7%	7.5%
DNC-W	2007-2008	23.2%	861.0	932.0	-12.1%	8.2%
DNY-N	2008-2009	25.0%	1151.9	1190.0	-17.4%	3.3%
DOK-N	2006-2007	26.7%	625.0	551.7	-30.3%	-11.7%
DPR	2006-2007	29.4%	2485.0	2065.3	-35.8%	-16.9%
DWA-W	2007-2008	33.0%	1656.1	1728.6	-21.5%	4.4%
DMI-W	2006-2007	36.0%	625.0	511.4	-39.8%	-18.2%
DGA-S	2007-2008	48.5%	493.6	432.0	-41.1%	-12.5%
DSD	2009-2010	60.5%	705.0	705.0	-37.7%	0.0%
DNC-M	2007-2008	84.6%	636.5	441.5	-62.4%	-30.6%
DMI-W	2007-2008	135.3%	511.4	665.0	-44.7%	30.0%

Appendix D-2: Other Proceedings Hours Data.

District	Years	Staffing Change	Other Hours in Year A	Other Hours in Year B	Per Judge Change	Total Change
DAR-W	2009-2010	-48.9%	336.7	331.8	93.0%	-1.5%
DNC-M	2006-2007	-38.4%	534.2	450.3	36.9%	-15.7%
DWV-N	2006-2007	-38.3%	910.7	1482.0	163.9%	62.7%
DSD	2008-2009	-35.3%	529.7	560.0	63.4%	5.7%
DGA-S	2006-2007	-35.3%	724.3	676.1	44.2%	-6.7%
DAR-W	2008-2009	-34.7%	305.4	336.7	68.9%	10.2%
DWI-W	2008-2009	-34.6%	251.5	246.4	49.8%	-2.0%
DWY	2006-2007	-33.1%	682.4	669.8	46.8%	-1.8%
DAR-E	2008-2009	-33.0%	545.2	501.2	37.1%	-8.1%
DIL-C	2009-2010	-31.0%	863.0	899.9	51.2%	4.3%
DRI	2006-2007	-27.5%	609.1	513.2	16.2%	-15.7%
DPA-M	2009-2010	-26.4%	1316.7	1192.5	23.0%	-9.4%
DCO	2007-2008	-24.3%	1137.3	1107.8	28.6%	-2.6%
DOR	2009-2010	-23.7%	1840.3	1714.7	22.1%	-6.8%
DLA-M	2006-2007	-23.6%	678.8	492.8	-5.0%	-27.4%
DWI-W	2009-2010	-23.6%	246.4	238.8	26.8%	-3.1%
DWA-E	2008-2009	-22.3%	916.0	900.3	26.5%	-1.7%
DOK-N	2009-2010	-21.0%	415.7	351.5	7.0%	-15.4%
DIN-S	2009-2010	-20.8%	685.6	581.7	7.2%	-15.2%
DHI	2009-2010	-20.0%	542.2	503.7	16.1%	-7.1%
DDE	2006-2007	-19.8%	742.4	502.4	-15.6%	-32.3%
DPA-M	2008-2009	-19.4%	1330.8	1316.7	22.8%	-1.1%
DGA-N	2008-2009	-19.3%	1492.9	1507.7	25.2%	1.0%
DGA-M	2008-2009	-18.8%	391.2	374.8	17.9%	-4.2%
DNC-W	2009-2010	-18.6%	599.3	583.8	19.7%	-2.6%
DIN-N	2007-2008	-18.3%	889.7	855.2	17.7%	-3.9%
DNH	2006-2007	-18.1%	353.7	343.2	18.4%	-3.0%
DUT	2007-2008	-17.8%	1342.1	1312.5	19.0%	-2.2%
DGA-N	2009-2010	-17.7%	1507.7	1336.4	7.6%	-11.4%
DUT	2009-2010	-16.7%	1330.4	1437.7	29.7%	8.1%
DNY-N	2007-2008	-16.5%	867.2	839.3	15.9%	-3.2%
DSC	2009-2010	-16.0%	1564.9	1736.3	32.1%	11.0%
DNC-M	2008-2009	-15.4%	510.3	582.7	34.9%	14.2%
DMO-E	2009-2010	-15.2%	1250.4	1211.0	14.2%	-3.2%
DWV-S	2008-2009	-15.0%	538.5	587.4	28.3%	9.1%
DTN-M	2006-2007	-14.6%	958.3	1031.5	26.0%	7.6%
DNY-W	2008-2009	-14.4%	1203.6	1265.8	22.8%	5.2%
DME	2009-2010	-13.9%	424.9	421.1	15.1%	-0.9%

DNY-N	2006-2007	-13.9%	1350.5	867.2	-25.5%	-35.8%
DIL-N	2009-2010	-13.2%	6364.8	6209.5	12.4%	-2.4%
DMN	2009-2010	-13.2%	1444.9	1307.7	4.3%	-9.5%
DOR	2008-2009	-12.6%	2338.3	1840.3	-9.9%	-21.3%
DVT	2008-2009	-12.5%	432.0	354.1	-6.3%	-18.0%
DNY-W	2009-2010	-12.4%	1265.8	1148.3	3.6%	-9.3%
DTX-S	2009-2010	-11.4%	4407.2	5008.0	28.3%	13.6%
DMS-N	2006-2007	-11.1%	169.7	187.7	24.4%	10.6%
DIA-S	2006-2007	-11.1%	526.9	569.6	21.6%	8.1%
DTX-W	2008-2009	-10.9%	3151.9	3325.0	18.4%	5.5%
DCA-S	2009-2010	-10.6%	2747.6	2643.6	7.6%	-3.8%
DWA-E	2007-2008	-10.4%	896.5	916.0	14.1%	2.2%
DIN-S	2007-2008	-10.3%	761.2	679.4	-0.5%	-10.7%
DSC	2008-2009	-10.0%	1528.7	1564.9	13.7%	2.4%
DMS-N	2007-2008	12.2%	187.7	189.2	-10.2%	0.8%
DIA-S	2007-2008	12.5%	569.6	584.7	-8.8%	2.7%
DMO-W	2008-2009	13.0%	928.6	935.3	-10.9%	0.7%
DNH	2007-2008	13.9%	343.2	371.9	-4.9%	8.4%
DWV-S	2009-2010	15.9%	587.4	621.1	-8.8%	5.7%
DOK-W	2007-2008	16.1%	840.8	832.3	-14.8%	-1.0%
DNC-W	2006-2007	17.9%	553.5	626.1	-4.1%	13.1%
DNJ	2006-2007	18.8%	3906.6	4017.5	-13.4%	2.8%
DWY	2009-2010	20.4%	617.9	587.7	-21.0%	-4.9%
DGA-S	2008-2009	21.2%	1297.0	697.5	-55.6%	-46.2%
DUT	2008-2009	21.7%	1312.5	1330.4	-16.7%	1.4%
DNC-W	2007-2008	23.2%	626.1	688.6	-10.7%	10.0%
DNY-N	2008-2009	25.0%	839.3	792.8	-24.4%	-5.5%
DOK-N	2006-2007	26.7%	396.5	456.5	-9.1%	15.1%
DPR	2006-2007	29.4%	2173.6	2316.0	-17.7%	6.6%
DWA-W	2007-2008	33.0%	1447.5	1509.5	-21.6%	4.3%
DMI-W	2006-2007	36.0%	497.9	416.6	-38.5%	-16.3%
DGA-S	2007-2008	48.5%	676.1	1297.0	29.2%	91.8%
DSD	2009-2010	60.5%	560.0	568.8	-36.7%	1.6%
DNC-M	2007-2008	84.6%	450.3	510.3	-38.6%	13.3%
DMI-W	2007-2008	135.3%	416.6	836.6	-14.7%	100.8%

Appendix E-1: Time Until Disposition for Civil Trials Data (in Months).

District	Years	Staffing Change	Length in Year A	Length in Year B	Change in Length
DAR-W	2009-2010	-48.9%	15.0	17.6	2.6
DVI	2010-2011	-37.1%	49.8	34.7	-15.1
DGA-S	2006-2007	-35.3%	44.0	31.0	-13.0
DAR-W	2008-2009	-34.7%	16.0	15.0	-1.0
DWI-W	2008-2009	-34.6%	12.3	15.0	2.7
DAR-E	2008-2009	-33.0%	23.0	22.0	-1.0
DIL-C	2009-2010	-31.0%	31.0	29.0	-2.0
DRI	2006-2007	-27.5%	19.0	23.0	4.0
DPA-M	2009-2010	-26.4%	25.0	26.1	1.1
DCO	2007-2008	-24.3%	29.0	26.0	-3.0
DOR	2009-2010	-23.7%	27.0	27.7	0.7
DWI-W	2009-2010	-23.6%	15.0	15.1	0.1
DWA-E	2008-2009	-22.3%	29.5	38.0	8.5
DUT	2010-2011	-21.8%	33.3	32.9	-0.4
DOK-N	2009-2010	-21.0%	24.0	14.3	-9.7
DIN-S	2009-2010	-20.8%	28.0	32.1	4.1
DHI	2009-2010	-20.0%	20.0	15.6	-4.4
DDE	2006-2007	-19.8%	26.0	27.0	1.0
DPA-M	2008-2009	-19.4%	36.5	25.0	-11.5
DGA-N	2008-2009	-19.3%	30.5	29.4	-1.1
DGA-M	2008-2009	-18.8%	25.0	26.5	1.5
DNC-W	2009-2010	-18.6%	22.0	18.3	-3.7
DIN-N	2007-2008	-18.3%	21.5	29.0	7.5
DAZ	2010-2011	-17.9%	29.6	30.2	0.6
DUT	2007-2008	-17.8%	28.0	31.0	3.0
DGA-N	2009-2010	-17.7%	29.4	26.1	-3.3
DNY-S	2010-2011	-17.6%	33.6	30.6	-3.0
DUT	2009-2010	-16.7%	35.0	33.3	-1.7
DNY-N	2007-2008	-16.5%	40.5	44.0	3.5
DIL-C	2010-2011	-16.3%	29.0	38.5	9.5
DSC	2009-2010	-16.0%	21.0	21.6	0.6
DMO-E	2009-2010	-15.2%	19.8	25.9	6.1
DKS	2010-2011	-15.1%	20.1	25.7	5.6
DTN-M	2006-2007	-14.6%	25.4	26.5	1.1
DLA-E	2010-2011	-14.1%	20.1	17.8	-2.3
DNY-N	2006-2007	-13.9%	42.0	40.5	-1.5
DMN	2009-2010	-13.2%	27.0	25.4	-1.6
DOR	2008-2009	-12.6%	23.0	27.0	4.0
DNY-W	2009-2010	-12.4%	50.5	55.7	5.2

DTX-S	2009-2010	-11.4%	19.0	19.8	0.8
DMS-N	2006-2007	-11.1%	24.0	23.0	-1.0
DTX-W	2008-2009	-10.9%	18.0	17.5	-0.5
DCA-S	2009-2010	-10.6%	32.0	31.6	-0.4
DWA-E	2007-2008	-10.4%	23.0	29.5	6.5
DIN-S	2007-2008	-10.3%	24.0	29.0	5.0
DSC	2008-2009	-10.0%	21.5	21.0	-0.5
DLA-W	2010-2011	11.1%	24.1	24.9	0.8
DMN	2010-2011	11.8%	25.4	25.0	-0.4
DMS-N	2007-2008	12.2%	23.0	25.5	2.5
DNY-N	2010-2011	12.9%	44.7	45.1	0.4
DMO-W	2008-2009	13.0%	29.5	20.0	-9.5
DNC-W	2010-2011	14.2%	18.3	16.7	-1.6
DDC	2010-2011	15.4%	40.1	39.7	-0.4
DMS-S	2010-2011	15.7%	26.4	19.7	-6.7
DCA-E	2010-2011	15.8%	33.4	43.6	10.2
DOK-W	2007-2008	16.1%	15.0	14.5	-0.5
DWY	2010-2011	17.0%	15.2	11.7	-3.5
DAR-E	2010-2011	17.4%	23.3	22.4	-0.9
DNJ	2006-2007	18.8%	33.0	36.0	3.0
DSC	2010-2011	19.5%	21.6	24.6	3.0
DGA-S	2008-2009	21.2%	28.0	26.0	-2.0
DUT	2008-2009	21.7%	31.0	35.0	4.0
DLA-M	2010-2011	21.7%	48.2	31.8	-16.4
DGA-M	2010-2011	21.8%	25.9	20.3	-5.6
DOR	2010-2011	22.9%	27.7	28.9	1.2
DNY-N	2008-2009	25.0%	44.0	31.0	-13.0
DHI	2010-2011	26.1%	15.6	9.3	-6.3
DOK-N	2006-2007	26.7%	19.0	17.0	-2.0
DPR	2006-2007	29.4%	33.0	28.0	-5.0
DIN-S	2010-2011	32.7%	32.1	30.5	-1.6
DWA-W	2007-2008	33.0%	18.0	19.0	1.0
DMI-W	2006-2007	36.0%	36.0	28.0	-8.0
DGA-S	2007-2008	48.5%	31.0	28.0	-3.0
DAR-W	2010-2011	65.0%	17.6	19.0	1.4
DMI-W	2007-2008	135.3%	28.0	29.0	1.0

Appendix E-2: Time Until Disposition for All Civil Cases Data (in Months).

District	Years	Staffing Change	Length in Year A	Length in Year B	Change in Length
DAR-W	2009-2010	-48.9%	12.0	11.2	-0.8
DNC-M	2006-2007	-38.4%	11.0	9.3	-1.7
DWV-N	2006-2007	-38.3%	11.7	12.1	0.4
DVI	2010-2011	-37.1%	27.8	14.8	-13.0
DSD	2008-2009	-35.3%	12.5	11.5	-1.0
DGA-S	2006-2007	-35.3%	8.0	10.1	2.1
DAR-W	2008-2009	-34.7%	10.0	12.0	2.0
DWI-W	2008-2009	-34.6%	4.6	5.3	0.7
DWY	2006-2007	-33.1%	9.4	12.4	3.0
DAR-E	2008-2009	-33.0%	10.9	7.5	-3.4
DIL-C	2009-2010	-31.0%	9.9	10.8	0.9
DRI	2006-2007	-27.5%	8.9	8.2	-0.7
DPA-M	2009-2010	-26.4%	6.9	5.5	-1.4
DCO	2007-2008	-24.3%	6.9	6.9	0.0
DOR	2009-2010	-23.7%	11.1	10.9	-0.2
DLA-M	2006-2007	-23.6%	6.4	127.6	121.2
DWI-W	2009-2010	-23.6%	5.3	5.3	0.0
DME	2010-2011	-22.6%	6.9	7.5	0.6
DWA-E	2008-2009	-22.3%	8.1	8.9	0.8
DUT	2010-2011	-21.8%	8.0	8.4	0.4
DOK-N	2009-2010	-21.0%	9.6	10.8	1.2
DIN-S	2009-2010	-20.8%	9.4	9.8	0.4
DHI	2009-2010	-20.0%	9.1	8.9	-0.2
DDE	2006-2007	-19.8%	16.8	12.5	-4.3
DPA-M	2008-2009	-19.4%	7.6	6.9	-0.7
DGA-N	2008-2009	-19.3%	6.7	6.7	0.0
DGA-M	2008-2009	-18.8%	11.2	10.8	-0.4
DNC-W	2009-2010	-18.6%	5.0	7.6	2.6
DIN-N	2007-2008	-18.3%	10.6	11.0	0.4
DAK	2010-2011	-18.3%	8.7	9.1	0.4
DNH	2006-2007	-18.1%	8.7	8.3	-0.4
DAZ	2010-2011	-17.9%	7.2	8.0	0.8
DUT	2007-2008	-17.8%	9.5	8.5	-1.0
DGA-N	2009-2010	-17.7%	6.7	6.7	0.0
DNY-S	2010-2011	-17.6%	8.1	38.5	30.4
DUT	2009-2010	-16.7%	9.3	8.0	-1.3
DNY-N	2007-2008	-16.5%	12.6	13.5	0.9
DIL-C	2010-2011	-16.3%	10.8	8.8	-2.0

DSC	2009-2010	-16.0%	8.2	10.8	2.6
DNC-M	2008-2009	-15.4%	8.5	9.4	0.9
DMO-E	2009-2010	-15.2%	7.2	7.0	-0.2
DKS	2010-2011	-15.1%	8.7	8.0	-0.7
DWV-S	2008-2009	-15.0%	9.2	4.6	-4.6
DTN-M	2006-2007	-14.6%	10.2	9.1	-1.1
DNY-W	2008-2009	-14.4%	11.9	9.9	-2.0
DLA-E	2010-2011	-14.1%	33.2	22.7	-10.5
DME	2009-2010	-13.9%	6.8	6.9	0.1
DNY-N	2006-2007	-13.9%	13.3	12.6	-0.7
DIL-N	2009-2010	-13.2%	6.2	6.2	0.0
DMN	2009-2010	-13.2%	17.3	4.0	-13.3
DOR	2008-2009	-12.6%	10.4	11.1	0.7
DVT	2008-2009	-12.5%	8.4	7.2	-1.2
DNY-W	2009-2010	-12.4%	9.9	8.2	-1.7
DTX-S	2009-2010	-11.4%	6.9	6.3	-0.6
DMS-N	2006-2007	-11.1%	12.3	12.4	0.1
DIA-S	2006-2007	-11.1%	10.4	10.3	-0.1
DTX-W	2008-2009	-10.9%	8.3	8.3	0.0
DCA-S	2009-2010	-10.6%	6.0	6.0	0.0
DWA-E	2007-2008	-10.4%	8.1	8.1	0.0
DIN-S	2007-2008	-10.3%	9.9	9.2	-0.7
DSC	2008-2009	-10.0%	8.2	8.2	0.0
DLA-W	2010-2011	11.1%	10.6	13.8	3.2
DMN	2010-2011	11.8%	4.0	8.5	4.5
DMS-N	2007-2008	12.2%	12.4	16.6	4.2
DIA-S	2007-2008	12.5%	10.3	10.6	0.3
DNY-N	2010-2011	12.9%	12.4	10.8	-1.6
DMO-W	2008-2009	13.0%	8.1	7.4	-0.7
DIN-N	2010-2011	13.9%	8.2	8.4	0.2
DNH	2007-2008	13.9%	8.3	7.9	-0.4
DNC-W	2010-2011	14.2%	7.6	7.9	0.3
DDC	2010-2011	15.4%	7.9	7.2	-0.7
DMS-S	2010-2011	15.7%	8.1	9.4	1.3
DCA-E	2010-2011	15.8%	8.3	7.9	-0.4
DWV-S	2009-2010	15.9%	4.6	9.4	4.8
DOK-W	2007-2008	16.1%	8.0	8.3	0.3
DWY	2010-2011	17.0%	15.2	11.7	-3.5
DAR-E	2010-2011	17.4%	14.4	12.7	-1.7
DNC-W	2006-2007	17.9%	9.8	7.5	-2.3
DNJ	2006-2007	18.8%	33.0	36.0	3.0

DCO	2010-2011	18.8%	5.8	5.7	-0.1
DSC	2010-2011	19.5%	10.8	8.7	-2.1
DWY	2009-2010	20.4%	10.8	9.2	-1.6
DRI	2010-2011	20.8%	11.8	17.6	5.8
DGA-S	2008-2009	21.2%	10.3	8.5	-1.8
DUT	2008-2009	21.7%	8.5	9.3	0.8
DLA-M	2010-2011	21.7%	8.1	11.6	3.5
DGA-M	2010-2011	21.8%	10.6	9.6	-1.0
DOR	2010-2011	22.9%	10.9	10.9	0.0
DNC-W	2007-2008	23.2%	7.5	7.6	0.1
DNY-N	2008-2009	25.0%	13.5	10.3	-3.2
DHI	2010-2011	26.1%	8.9	8.5	-0.4
DNC-M	2010-2011	26.4%	8.3	9.8	1.5
DOK-N	2006-2007	26.7%	11.5	10.4	-1.1
DPR	2006-2007	29.4%	12.8	12.2	-0.6
DIN-S	2010-2011	32.7%	9.8	9.3	-0.5
DWA-W	2007-2008	33.0%	8.1	7.1	-1.0
DMI-W	2006-2007	36.0%	8.0	7.2	-0.8
DGA-S	2007-2008	48.5%	10.1	10.3	0.2
DSD	2009-2010	60.5%	11.5	12.5	1.0
DAR-W	2010-2011	65.0%	11.2	12.1	0.9
DNC-M	2007-2008	84.6%	9.3	8.5	-0.8
DMI-W	2007-2008	135.3%	7.2	8.4	1.2