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CREATING NEW FEDERAL JUDGESHIPS: THE SYSTEMATIC OR PIECEMEAL APPROACH

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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WEDNESDAY, NOVEMBER 16, 2005

UNITED STATES SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS, OF THE COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:30 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Jeff Sessions, Chairman of the Subcommittee, presiding.

Present: Senators Sessions and Schumer.

OPENING STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Chairman SESSIONS. The Subcommittee on Administrative Oversight and the Courts will come to order. I am pleased to convene this hearing to evaluate the process of creating new judgeships in the Federal judiciary, and specifically whether we should take a systematic or piecemeal approach to the process.

Senator Schumer expected to be with us, but he is caught in the Capitol now and I am not sure whether he will be able to get back. A further complication is that commencing about now we will have three stacked votes, which unfortunately will mean probably about a 45-minute interruption. I thought what I would do is make my opening statement now and maybe introduce our guests and then probably at that time we would take our break and have to return. I am sorry, but we are reaching the end of the session. There are a lot of important votes going on and there is just no way to avoid that at this time.

This Committee has not for some time addressed the expansion of the Federal judiciary and how we should proceed with it. So I am looking forward to hearing from our witnesses, all of whom have given generously of their time and dedicated a lot of personal hours to developing their well-researched opinions on the topics before us today.

A question might be why are we having this hearing. Well, the Constitution mandates that Congress oversee the administration of the judicial branch and create such inferior courts, quote, "as the Congress from time to time may ordain or establish." Using this constitutional provision as a premise, the first U.S. Congress passed the Judiciary Act of 1789 which established the Federal judiciary. It made no provision for the composition or procedure for the courts and left that for Congress.

The Act continues to be the mechanism from which Congress derives its authority to determine the proper size of the Federal judiciary and the optimum number of judges for the lower courts. When we strike the appropriate balance, we ensure the proper administration of justice and guarantee that all Americans have access to an efficient, fair judiciary, in accordance with our constitutional heritage. It is with this duty in mind that we convene today's hearing.

If a particular court's caseload becomes too heavy, it may be necessary for Congress to approve additional judgeships. Should this be our initial response, or should we first examine how judges are using the resources provided them and whether such use is effective? Overall, we know that increases are normal and natural in the evolution of judicial organization. So this hearing is not one condemning the use of increased judgeships as a tool, but one that knows they are not always the answer.

Congress recognized the need to create new judgeships when it authorized the creation of new Federal judgeships in the 2002 Department of Justice appropriation. Section 312 of that Act authorized eight new permanent district court judgeships and seven new temporary district court judgeships. We have not seen an increase in circuit judgeships for almost 15 years. The most recent addition occurred in 1990, and prior to that seats had not been added since 1984. Both the Eleventh Circuit and the Federal Circuit have seen no increase in seats since their respective creations in 1980 and 1982.

I would note that we have had chief judges from a number of the circuits tell us they don't want new judgeships; that they believe that the 10, 12, 13, 15 judges they have allows for the collegiality that they desire and they prefer to carry a heavy caseload rather than add appellate judges.

As of October 4, 2005, there were 49 vacancies in the Federal judiciary, which includes the U.S. Court of Appeals, district courts and the Court of International Trade. Currently, there are 19 nominees pending and 3 pending for future vacancies. These vacancies constitute 5.6 percent of the 875—871, according to DOJ—authorized judgeships in the Federal judiciary, and there are 15 future vacancies slated to open up. There is a distinct possibility that if we fill these vacancies expeditiously, the perceived need for new judges would be reduced.

I would just note that I believe this Subcommittee and the full Judiciary Committee need to be more affirmative in our evaluation of the Federal judiciary. We tend to have someone from a certain State, a Senator, believe that they have a crisis and they want a judge and they add one to some bill that is moving through the legislature. We had one bill recently that had one new judgeship added. When it finally passed the Senate, ten new judgeships had been attached to it in nine different States, and I am not sure those were consistent with the recommendations of the AOC in terms of priority and need.

So I think it is important for our Committee to do our homework, to be able to tell our fellow Senators that if you think you need a nominee, a new judgeship, we are working on that, we are evaluating it, and we have a fair and effective way to determine how

many judges are needed and we have got a priority list for that, and try to do it in a way that is most professional and effective.

According to the Administrative Office of United States Courts, in 2004 there were 60,505 cases filed in the United States courts of appeals, a 9.4-percent increase since 2000. Additionally, in the U.S. district courts there were 255,851 cases, a 2.6-percent decrease from 2000. Those were civil cases, and there were 70,746 cases filed, a 15-percent increase from 2000. So we have had an increase in criminal cases since 2000 and an actual decrease in civil filings since the year 2000.

Though Congress is the only body constitutionally authorized to create judgeships, it is the Judicial Conference, headed by the Chief Justice of the United States Supreme Court, that makes recommendations as to how many are needed. The Judicial Conference reviews needs biennially via a formal survey process. The most recent review was completed in March 2005 and it recommended the creation of 12 courts of appeals judgeships and 56 district court judgeships.

In making the recommendations, the Conference uses a formal survey process which involves six levels of review within the judiciary before it is transmitted to Congress. Those levels include judges of the court making the request—if judges indicate on the survey that additional seats are needed, the Judicial Conference will initiate a review to analyze all relevant factors—initial review of the survey results by the Subcommittee on Judicial Statistics of the Committee on Judicial Resources, reviewed by the judicial council of the circuit in which the court is located, and a second and final review by the subcommittee. The Subcommittee on Judicial Resources conducts a final review and passes recommendations on to the full committee. The whole Judicial Conference will review the recommendations before they are made to Congress. That is a pretty thorough review.

I suspect some of the requests for judges may be because there is a fear that we might get them this year, but if we don't ask for them this year, there might be some bad years in the years to come and we may not get them when we really do need them. But, regardless, it is a fairly rigorous process, I think, the courts go through to make those recommendations.

According to the Administrative Office, the cost for creating each circuit court judgeship is approximately $927,000 for the first year, with recurring costs averaging $818,000. They don't get paid that much, but there is a lot of cost in creating a circuit judgeship, as there is with a district judgeship. A district judgeship equates roughly to $1 million for the first year, with recurring costs of $886,000. I would like to know why the district is more expensive, but we will maybe ask that. So it is a serious responsibility for us not to propose more judgeships than are needed because the taxpayers expect us to get the maximum result for the dollars.

Between October 1995 and December 1998, my colleague, Senator Grassley, held a series of hearings addressing the needs of circuit judges for each circuit. During those hearings, we saw little consensus regarding the actual need for judges and whether the current statistical formulation utilized by the Conference is an ac-

curate means for calculating the appropriate number of judges for Federal courts.

In order to determine the caseload, the Conference assigns a weight to each type of case. Weighted filing statistics account for the different amounts of time district judges require in order to resolve the various types of civil and criminal actions. Though the Federal Judicial Center updated the case weights in 2004 on a national basis, weighted filings did not change significantly after their implementation.

A number of judges have raised concerns about the approach taken to determine the need for judgeships. For example, if we are willing to use this formula in order to increase the size of the courts, should we not also implement it to determine when a significant decline in case filings and consolidations would warrant a decrease in judgeships?

Some have even expressed concern that the formula is suspect, since it is virtually impossible to predict the degree of difficulty or time required to dispose of a case on the basis of case type. Another concern is that of collegiality. Judges like a smaller court whenever possible. If we continue to increase the number of judges on the Federal bench, it could have a negative impact on effective administration of courts and the uniformity of law.

In addition to the concerns associated with the process of creating new judgeships, I would like for this hearing to lead us into an informative discussion of the resources that are currently available and maybe underutilized. There are several methods currently in use that can be expanded to help alleviate some of the perceived concerns with caseload.

Among those are the use of senior judges, shared judgeships, inter-circuit and intra-circuit assignment of judges, and development of a process to recommend not filling vacancies or eliminating superfluous positions. Additionally, Judge Steele is here and he will testify about the role that U.S. magistrate judges play and how they can be used as a valuable resource in the disposition of cases.

These are important concerns, particularly since there are now pending several current pieces of legislation calling for the creation of a number of new judges at the appellate and district levels. I hope that this hearing will shed some light on the process and give this legislative body a broader perspective when taking steps to further the efficient administration of justice.

We have 5 minutes left on that vote, and according to Senate time that means a little more than 5 minutes, but not a lot. Since we are stacking votes, they tend to be a little tighter about it. So I will introduce our panel. We will have one panel today, which consists of four distinguished witnesses who have devoted time and energy in analyzing the state of our judiciary.

The witnesses on this panel, starting from my left, are Judge W. Royal Furgeson, U.S. District Judge for the Western District of Texas, and the Chairman of the Judicial Conference Committee on Judicial Resources; Judge William H. Steele, United States District Judge for the Southern District of Alabama and a former magistrate judge in Mobile; Ms. Robyn J. Spalter, President of the Federal Bar Association, and an attorney with the firm of Kluger, Peretz, Kaplan and Berlin, in Miami, Florida. Finally, we will hear

from Professor Marc Galanter, who is a Professor of Law and South Asian Studies at the University of Wisconsin at Madison and LSC Centennial Professor at the London School of Economics and Political Science.

When I get back, we will hear your opening statements and begin with Judge Furgeson. Again, let me apologize for having to interrupt this hearing. I should be back, I would say, in 45 minutes. That will be my goal. If Senators are not able to attend, their staff will be monitoring this. Your comments will be made a part of the record and it will help us establish a basis for making rational decisions about the size of our Federal judiciary.

So at this time we will take a recess for approximately 45 minutes.

[Recess.]

Chairman SESSIONS. The Subcommittee will come to order. I apologize again for having to do what they pay me to do, go vote. There are a lot of committees and a lot of activities, and they just have to call them when it is appropriate.

We are anxious to hear your comments. We would ask you to try to keep those to 5 minutes. Judge Royal, we would be delighted to hear from you first.

STATEMENT OF HON. W. ROYAL FURGESON, U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS, AND CHAIRMAN, COMMITTEE ON JUDICIAL RESOURCES, JUDICIAL CONFERENCE OF THE UNITED STATES, SAN ANTONIO, TEXAS

Judge FURGESON. Thank you so much, Mr. Chairman. Good afternoon, Mr. Chairman. My name is Royal Furgeson and I am a United States District Judge for the Western District of Texas sitting in San Antonio. I am also the Chair of the Judicial Conference Committee on Judicial Resources. I am honored to be here today, sir, to discuss the request of the Federal judiciary for new judgeships.

Before I do so, however, may I state that it is the policy of the judiciary to limit its growth to that number of new judgeships necessary to exercise appropriate Federal court jurisdiction. We certainly do not wish to grow for growth sake.

Also, while there have been new judgeships, as you mentioned, added to our system since 1990, that year, 1990, was the last year that a comprehensive judgeship bill was enacted. Since 1990, our caseloads have increased relentlessly. For example, district court filings have risen 40 percent and circuit court filings have risen 58 percent.

Finally, the Federal judiciary understands that our Federal Government has many funding demands, to include the need to finance our brave troops in Iraq and Afghanistan. Under the circumstances, we want you to know that we are doing our part to contain costs. There are numerous initiatives underway in the judiciary to look at how we can deal with escalating expenses. While these initiatives are ongoing and while they cannot be put in place overnight, you should be aware that we are mindful of the cost of every new judgeship and of our responsibility to work with the other branches of Government to be good stewards of our resources.

Taking all these matters into consideration, we are asking for 68 new judgeships, 12 at the circuit level and 56 at the district level. Let me briefly describe how we have arrived at these numbers.

First, there is a threshold caseload to begin the process. In our committee, we have developed a formula—you mentioned it—for evaluating district court dockets so that we can put all trial judges on equal footing through establishment of case weights. Our circuit courts also have a modified formula.

Second, while the formulas are important to the consideration of new judgeships, other factors must be weighed to arrive at a sound measurement of each court's judgeship needs, and you have mentioned that as well in your statement. Those include looking at the number of senior judges, their ages and level of activity; looking at magistrate judge assistance, and I am delighted that one of my esteemed colleagues, Judge Steele, is here today to talk about some innovations in regard to magistrate judge assistance in the courts.

We also look at geographical factors, unusual caseload complexity, temporary or prolonged caseload increases or decreases, and use of visiting judges. Our courts, when they begin this process, are asked to complete a comprehensive application that details all of these factors, and you mentioned that as well in your statement.

Third, when all of this information is gathered and thoroughly scrubbed, then it undergoes consideration and review at six different levels within the judiciary, and again you mentioned that in your opening statement. At the beginning of this process this time, the courts requested 80 additional judgeships, permanent and temporary. Through our review procedure, we reduced that number to 68, and of these 68, 15 are temporary—another indication of our conservative approach to new judgeships.

Incidentally, in addition to the 68 judgeships we are asking for, we are also asking that three temporary judgeships created in 1990 be made permanent and one created in 1990 be extended based upon trends in those particular courts.

Finally, and to reiterate, the long-range plan for the Federal courts specifically states that our judiciary is committed to controlling growth. Therefore, our request must be understood as an effort to accomplish this goal within the context of rising dockets. To that end, we are requesting far fewer judgeships than we might otherwise do.

Since 1964, we have taken a very rigorous approach to vetting our request for new judgeships. As you know, this approach has undergone change and has become more sophisticated and transparent. We hope that it provides you with the information and assurance that you and your Committee and the Congress need to give our request favorable consideration.

Mr. Chairman, thank you very much for holding this hearing and allowing me to testify, and by request of the Federal judiciary, we would ask that you introduce this judgeship proposal. I will be glad to answer your questions when the time comes.

[The prepared statement of Judge Furgeson appears as a submission for the record.]

Chairman SESSIONS. Thank you very much, Judge Furgeson, for those succinct remarks, and right on time.

Judge Steele, it is good to have you with us. I guess in the interest of full disclosure, Judge Steele worked for me for a period of time. He was a chief assistant district attorney for the Democratic-elected district attorney in Mobile for many years, and then I was able to hire him away. Then he went into private practice and then the judiciary, in a very competitive process, selected him to be a United States magistrate judge.

Judge, you served how many years?

Judge STEELE. Thirteen.

Chairman SESSIONS. Thirteen, and won the respect of people. I would note also that Judge Steele has had a special ability, I think, for management. As an Assistant United States Attorney, he helped come up with a plan that greatly improved the entire processing of criminal cases which the judges were delighted with, and the prosecutors were delighted, also, and I think the defense bar, also.

So, Judge Steele, it is a pleasure to have you with us today.

STATEMENT OF HON. WILLIAM H. STEELE, U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ALABAMA, MOBILE, ALABAMA

Judge STEELE. Thank you for that generous introduction, and thank you for the opportunity to address this Committee on the subject of the utilization of magistrate judges and to share our experience regarding the utilization of magistrate judges in the Southern District of Alabama.

By way of background, as you stated, I served as a magistrate judge in the Southern District of Alabama from 1990 until 2003, about 13 years. About two-and-a-half years ago, I was appointed and began serving as a United States district judge. Consequently, I have witnessed the benefits of the magistrate judges system both from a supporting role as a magistrate judge and in a supported role as a district judge.

Those are those who consider the Southern District of Alabama to be a pioneer district in the full utilization of magistrate judges. This development resulted from a set of unique circumstances which occurred in our district over a period of several years during the mid- to late 1990's.

At this time, the Southern District was authorized and had serving three district judges. Historically, the Southern District is a busy district, and given its proximity to the drug corridors of south Texas, south Florida and the Gulf of Mexico, it is a district that sees a significant number of drug cases.

Because criminal cases generally take priority over civil cases, and because of other considerations such as the Speedy Trial Act, it was necessary to move these cases through the criminal justice system as efficiently as possible. As a result of a number of factors affecting our district judges, including ill health, retirement, senior status and delay in replacing these judges, over the time the number of district judges in the Southern District of Alabama diminished from three active judges to one active judge. That judge found himself responsible for managing most, if not all, of the total criminal caseload, in addition to his own increasing civil caseload.

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As a result of these conditions and factors, our court began searching for ways to efficiently manage the civil and criminal dockets in an effort to avoid any substantial backlog and delay in the fair and effective administration of justice. For our district, the logical place to turn was to our magistrate judges.

As this crisis developed, the magistrate judges in the Southern District of Alabama were already serving in their traditional roles, and by traditional roles I mean that these judges were handling all of the Section 1983 prisoner litigation on report and recommendation; all of the Section 2254 habeas corpus on report and recommendation; all of the Social Security appeals on report and recommendation; all the preliminary criminal matters, such as arraignments, initial appearances, detention hearings, pre-trial conferences and discovery motions; all of the Central Violations Bureau cases, which include hunting and game violations, petty offenses and Assimilated Crime Act offenses; and all preliminary civil matters, such as discovery motions and the entry of scheduling orders.

In an effort to relieve the district judges so that they could manage the criminal docket and as much of the civil docket as possible, the magistrate judges were asked to take on additional responsibilities within the limits of their jurisdiction. This included handling a significant number of civil pre-trial conference, a substantial number of civil case settlement conferences, jury selection in almost all of the criminal and civil jury cases, and an automatic assignment of a significant part of the civil docket which I will describe briefly in just a moment.

In addition, a small number of civil dispositive motions—for example, summary judgment and motions to dismiss—were referred to the magistrate judges for entry of report and recommendations. And on a few occasions, the magistrate judges were called upon to take guilty pleas.

With regard to our automatic assignment of civil cases mentioned previously, pursuant to 28 U.S.C. Section 636(c), magistrate judges are authorized, with the consent of the parties, to exercise jurisdiction over all proceedings in jury and non-jury civil matters, and are authorized to order the entry of judgment in what may be called a consent case.

In an effort to relieve the district judges, and ultimately the one district judge, and with the goal of avoiding a backlog and delay in civil cases, our court implemented a system wherein 25 percent of the total civil docket was automatically assigned to the magistrate judges.

With the consent of the parties, a number of these cases were retained and disposed of by the magistrate judges, thus reducing the total civil caseload of the district judge.

As a result of this expanded utilization of magistrate judges, in the face of a shortage of district judges, our court was able to weather the storm and to achieve the goal of the fair and efficient administration of justice in the Southern District of Alabama.

Once again, thank you for the opportunity to address this Committee and I would be pleased to answer any questions that you might have.

[The prepared statement of Judge Steele appears as a submission for the record.]

Chairman SESSIONS. Thank you, Judge Steele.

An important part of the legal system are the attorneys who appear there and, Ms. Spalter, you represent the Federal Bar Association, which has a special interest in the Federal courts, and we are delighted to hear your perspective today.

STATEMENT OF ROBYN SPALTER, PRESIDENT, FEDERAL BAR ASSOCIATION, MIAMI, FLORIDA

Ms. SPALTER. Thank you, Mr. Chairman. As you said, I am President of the Federal Bar Association. I would like to thank you for inviting and welcoming the Federal Bar Association here today for this hearing. I would also like to compliment you, the Committee counsel and staff for working with the FBA to address this very vital issue.

I will not reiterate my written statement, but will rather try to discuss and summarize the highlights. But I would like to ask you, Mr. Chairman, at this time if I could request that written statement be included in the record of this hearing in its entirety.

Chairman SESSIONS. We would be pleased to and will be made a part of the record.

Ms. SPALTER. Thank you.

The Federal Bar Association has 16,000 members, made up of lawyers and judges. We are the premier nationwide bar association devoted exclusively to the practice and jurisprudence of Federal law and the vitality of the U.S. Federal court system.

We are here today to represent our members—lawyers and judges and parties they serve. We are here today to tell you why, on behalf of these Federal advocates and jurists, individuals and businesses they represent and serve, we strongly support the Judicial Conference's comprehensive request for new judgeships, both permanent and temporary.

I believe everyone in this room could easily agree that prompt and efficient administration of justice is an integral component of this great country in which we live. It is not just a goal, it is not just an aspiration. Rather, it is the bedrock of our Federal system of jurisprudence. In order to adhere to this principle, in order to ensure prompt and efficient administration of justice, the creation and maintenance of a sufficient number of judgeships in our Federal courts are critical.

The Federal Bar Association understands that there will be costs involved. We are cognizant of this. However, we believe that failure to create these judgeships now will bear its own cost, maybe not monetary, but critical nonetheless. Failure will cost us the integrity of and trust in our judicial system.

Mr. Chairman, the problem is the caseloads are so large that comprehensive action has become necessary now by this Congress. I am not going to go into detail on numbers because my co-speaker here, Judge Furgeson, has done so, but I want to point out a few.

Filings since 1990 have increased by approximately 40 percent or more in the district and circuit courts. Circuit court cases per three-judge panel have reached 1,127—more than ever in history. Criminal filings have increased by 77 percent, and since 1992

bankruptcy filings have increased by 18.3 percent. Now, that is the caseloads. The question is what has happened to the judgeships in that same period of time.

From 1990 to present, there have been zero new circuit court judges. From 1990 to 2000, there have been zero new district judges, and from 2000 to 2005 there have been 34 new district judges, but they were put in districts where there were crises and they had reached their tipping points.

But the Federal Bar is here and brings you another perspective, Mr. Chairman. We bring you a perspective from the ground, from the grass roots, from the lawyers practicing before this bench everyday, from the members of the bench trying to assure prompt and efficient administration of justice, and from our clients and citizens who believe in the system and just want to see it work promptly and efficiently.

The major complaint is that it takes too long to get a case through the system. Even cases that could be disposed of easily by dispositive motion are taking longer and longer and longer to get a hearing. It is for all of these reasons that the Federal Bar Association, in order to deliver to our members and those they serve and to fulfill our mission, the practice before and vitality of our Federal court system, that we assert that this is a priority, a national priority. Additional judgeships established now comprehensively must be done in order to ensure the prompt and efficient administration of justice.

Before I conclude, one related comment. The House is advancing proposals that tie together the addition of these judgeships and the reorganization of the Ninth Circuit. The Federal Bar Association believes strongly that these are two separate and distinct issues. Each has its own merits, arguments and justifications, and should be considered that way. We commend this Subcommittee for its approach toward bifurcating these two issues.

In conclusion, I think it is apropos to say justice delayed is justice denied. To ensure justice isn't denied, you must assure that it isn't unduly delayed. This can be accomplished by authorizing the adequate number of new judgeships as set forth in the Judicial Conference's well-thought-out recommendations. This will protect and assure the prompt and efficient administration of justice and it will ensure that justice is not denied.

[The prepared statement of Ms. Spalter appears as a submission for the record.]

Chairman SESSIONS. Thank you, Ms. Spalter.

Professor Galanter, we would be delighted to hear from you at this time.

STATEMENT OF MARC GALANTER, PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN, MADISON, WISCONSIN

Mr. GALANTER. I am very pleased to be here and have a chance to bring into this discussion some issues about the Federal judiciary that I think are very relevant.

I want to particularly point out that when we are talking about the number of judges, it is very important to say what are these judges doing. I am particularly concerned about whether judges are holding trials. If you will look, you will see that over the past 20

years there has been a dramatic decline in the number of civil trials. The green here are the bench trials and the red are jury trials. Both have declined. Actually, bench trials have declined more rapidly.

There is a similar movement in terms of criminal trials since 1990, which was mentioned before, at the time of the last major additions to the judiciary. You can see that half the trials have gone away. Now, there is a long-term decline in trials.

Chairman SESSIONS. Does that amount to about a reduction by half?

Mr. GALANTER. A reduction by half on the criminal side and actually two-thirds on the civil side, compared to, say, 1995, civil; 1990, criminal.

Now, there is a long-term decline. The percentage of cases that are getting to trial has been going down for a hundred years, and we can understand the reasons for that. But what is very striking is that since the middle-1980's the absolute number of trials has been falling and, as you can see, falling very, very rapidly. There is about one-third of the civil trials in the Federal courts that there were in the mid-1980's with fewer judges, and there are about half the criminal trials.

Now, this marks a fundamental change in judging, a shift away from trials to case management. And when we see these cases depart and we know that judges really work hard, the question is what are they doing. Well, they are not holding trials. Last year, in 2004—and I am sorry I don't have the charts for 2004, but I would like to put those in the records, if I may, along with the full paper on which this is based, if I may.

Chairman SESSIONS. We will accept that in the record.

Mr. GALANTER. Thank you.

Last year, the average judge in Federal court held about ten trials, or we could say there were about ten trials for every sitting judge. If we go back to, say, 1990, again a date that was mentioned here, the average judge was holding 40 trials. So we have gone from 40 trials per judge to 10 trials per judge in just 15 years. So something has really changed in the Federal judiciary that it seems to me this Committee might well want to concern itself with.

I should add that ten trials per year now is a pretty generous estimate for a number of reasons. It ignores the senior judges and magistrates, who are an increasing band who actually do quite a large number of those trials. It also is a count of those matters that got to a stage that the Administrative Office calls during or after trial, and that means a trial began. Actually, about 20 percent of those cases that get there end up settling before a verdict.

Finally, a trial is defined in the Federal system as a contested matter in which evidence is presented. So there is not only a theoretical possibility, but it actually happens that sometimes there is more than one trial in a case. You can have a *Daubert* hearing that is counted as a trial.

So when I say there are only 4,000 civil trials today, that is with all these caveats. So the number of trials per judge is very low by our historic standards, and I think this marks a kind of fundamental change in the Federal judiciary, a shift of resources from preparing for trial and conducting trials to case management, lead-

ing to non-trial dispositions, something that I hope this Committee will decide it would like to examine.

Thank you very much.

[The submission of Mr. Galanter appears as a submission for the record.]

Chairman SESSIONS. Professor Galanter, I believe you have a train to catch. Is that correct?

Mr. GALANTER. I do in a little while, yes.

Chairman SESSIONS. Well, I will ask you a few questions first.

Mr. GALANTER. I would appreciate that, sir.

Chairman SESSIONS. It says criminal defendants disposed of. Well, you have more multi-defendant cases today where four defendants may plead and the fifth goes to trial, but your chart says trials. Is it true that the aggregate number of trials are down? There is no confusion in that, is there?

Mr. GALANTER. Yes, the aggregate number of trials are down. Yes, there is that problem on counting on the criminal side. But this is the number of defendants who were tried, so that if five defendants are tried in the same case, that looks like five trials here, but it is not. So this again is a generous count of the number of trials.

Chairman SESSIONS. It might not be a generous count.

Judge Steele, are you looking at that number? If one defendant goes to trial, that counts as one trial, and if two co-defendants go to trial, that counts as two trials?

Mr. GALANTER. That is right.

Chairman SESSIONS. That is a generous count.

Mr. GALANTER. I didn't do the original counting. I am just using the records provided by the Federal office.

Chairman SESSIONS. Do you have the numbers for the number of days a judge is in trial?

Mr. GALANTER. I understand that the judiciary does compile these numbers, but I do not have them.

Chairman SESSIONS. I have heard a rumor that judges have actually made sure they swore in the jury before they took the guilty plea and counted it as a trial. Have you ever heard of that?

Mr. GALANTER. I haven't, but I am sure you hear much more about this than I do.

Judge FURGESON. Mr. Chairman.

Chairman SESSIONS. Please, yes, Judge Furgeson.

Judge FURGESON. I know I have tried multi-defendant cases. I don't recall on my statistics—for example, sometimes I have tried as many as 10 or 12. I don't recall those showing up as 12 trials. I recall those showing up as one trial for all 12. So I don't know if it is exactly right that you get a trial per defendant even if they are all tried together.

Mr. GALANTER. Well, let me say that the Administrative Office keeps multiple statistical tables, and in terms of measuring what a judge does it seems to me that table may very well count them differently. What I took was the public information released by the Administrative Office in which they say how many defendants were tried that year. So in some sense, it is a maximum number of trials that were held.

Now, they may not have given individual judges the benefit of those multiple defendants in counting what that individual judge did. But in the published statistics that they put out, they tell us that this is the number of defendants that were tried. So if we were to assume that every defendant had his or her own trial, we had about 3,500 in 2002.

Chairman SESSIONS. Judge Furgeson?

Judge FURGESON. Mr. Chairman, would you allow me to submit a letter—I would like to research this a little bit—submit a letter to you, with a carbon copy to the professor, just so—

Chairman SESSIONS. I think we should work on those numbers. But we do know that there is no doubt, Professor—is this correct—that the percentage of cases disposed of short of trial is reaching in the high 90s? Do you have that number?

Mr. GALANTER. Well, the percentage of cases that terminate in trial in the Federal courts is about 1.6 percent now. Forty years ago, it was 11 percent. Back when the Federal Rules were adopted in 1938, it was something over 18 percent. It is hard to go back beyond 1962, but somebody actually did it for 1938. So we are now at 1.5, 1.7 percent, something like that.

Chairman SESSIONS. And what does that say about the appeals that occur? I suspect that a number of the appeals are of agreed upon disputed questions that arise short of a trial, which presumably should be somewhat easier for the court of appeals to deal with than having to read hundreds of pages of transcripts and ten different issues raised on appeal.

Mr. GALANTER. Yes, I think it is true. The portion of appeals that are based on tried cases has been declining.

Chairman SESSIONS. It would have to be down. According to your numbers, if it goes from 11 percent to about 2, that is about four-fifths down. But the appeals are not down that much, so the appeals are coming through some mechanism.

Mr. GALANTER. That is right, through non-trial dispositions of various kinds.

Chairman SESSIONS. Summary judgments?

Mr. GALANTER. Summary judgments, motions to dismiss, et cetera.

Chairman SESSIONS. Judge Steele, do you have any thoughts about that chart?

Judge STEELE. I think it is essential to know whether we are counting trials or defendants because I have noticed a decline in the number of multi-defendant cases over the past 5 years. We are not getting the big drug importation cases in our district like we used to. So we are trying more single defendants. Back in 1990, we tried a lot of multi-defendant cases and that inflated the numbers. We may not be looking at the right information to make a decision.

Mr. GALANTER. Could I just add that in the large study that I am submitting here, there is one point at which we take all the criminal cases and divide them into drug, violence and fraud cases. The non-drug categories follow the same path of fewer and fewer trials as the drug ones. So there doesn't seem to be a big subject matter difference in this decline.

Chairman SESSIONS. You have to be careful, but I distinctly remember as a United States Attorney when the sentencing guide-

lines were passed that there were the most egregious, awful predictions of no settlements and every case would go to trial and the system would collapse. Well, it appears in one sense that the real decline in the cases began with the sentencing guidelines.

Mr. GALANTER. Oh, yes.

Chairman SESSIONS. Every situation is different, but if you go to trial and a judge could give you 25 years or probation and you weren't sure what the judge was going to give and you knew what the prosecutor was recommending, you might as well go to trial sometimes. So knowing the range that you are likely to get has apparently caused people to feel easier about pleas.

Judge Furgeson, your formulation takes into account the filings, regardless of whether it reaches trial, and a lot of cases sometimes are even voluntarily dismissed, consolidated, or simply disappear when the plaintiffs never follow through on their cases.

Would it be more accurate to base your recommendations on the number of cases that are ultimately decided by a judge or disposed of by the court?

Judge FURGESON. That is a good question, Mr. Chairman, and I would just somewhat talk to you about my experience, and I would welcome Judge Steele's experience, too. I find most of the filings that come into court initially take some amount of judge time. Even if there is a settlement somewhere down the line where it just goes off your docket, it takes some amount of judge time.

Also, it is very difficult sometimes—and that is why we re-did our weights—to take into consideration how much management time or effort needs to be spent in particular cases. When we re-did our case weighting, we found that complex civil cases like patent cases, for example, were beginning to take more time for a judge than other cases.

So we do try to take into consideration the fact that some cases will disappear from your docket and take very little time, and we do that through the effort to weight cases. Just to give you an example, student loan failure cases almost take no time at all. They will hit the docket and they will take almost no time at all. Those cases are weighted almost with a minuscule weight, very little weight at all. On the other hand, a patent case will hit your docket and take a lot of time and a lot of effort.

So we try to take into consideration the problem of filings and how different cases resolve themselves through the case weight process. That is a process that went through just about 3 years ago. We took over 300,000 court filings involving more than 100 judges and we went through this process of looking at the cases and trying to determine how better to weight them through the process. So it is true that some cases take much less time than others, but we tried to handle that through the weighting process.

Chairman SESSIONS. It strikes me that, as Professor Galanter proposed, it has become more of a challenge to a judge to manage. Some judges use magistrates more effectively than others, but managing those cases—and sometimes you have a crisis not where the caseload is particularly grievous, but it may be because the judge is not a good manager. So should the taxpayers be concerned that they are rewarding poor management or lack of hard work by filling judges where there is more of a backlog?

Judge FURGESON. Well, I appreciate that concern. The judiciary does a great deal to help judges with management. Of course, some judges come in from the practice. Some have been State court judges. Some, like Judge Steele, have been magistrate judges.

I am very impressed with what Judge Steele says about his management of cases and how the magistrates and the district judges work in his court. But I have a sense, Mr. Chairman, that through our efforts at education and commitment that we do have a judiciary that by and large manages their dockets and their cases well. I certainly do have that sense.

Chairman SESSIONS. Well, I think most do, but some are really good at it.

Judge FURGESON. Oh, there is no question.

Chairman SESSIONS. And a well-managed courtroom can do remarkable things, I think. We are just asking those questions because I think it is important to do so.

While we have had an increase in case filings since 1990, since 2000, I believe, we have had a 2.6-percent decrease in civil filings. You don't dispute that?

Judge FURGESON. No, sir. That is correct. The criminal side of the district bench is where the increases come from.

Chairman SESSIONS. Several judges testified before our Subcommittee when Chairman Grassley chaired this Subcommittee and they argued that a mechanical formulation is not the right way to decide the number of appellate judges, particularly.

Fifth Circuit Judge Higginbotham testified that a formulation indicating the need for 28 judges on the Fifth Circuit, quote, "simply defies common sense and lacks credibility," close quote, Judge Furgeson, particularly since the majority of those sitting on the Fifth Circuit opposed any additional judges.

The Eleventh Circuit has one of the highest caseloads in the country—I believe the highest—

Judge FURGESON. It does.

Chairman SESSIONS [continuing]. As does the Fifth, higher than the Ninth. They want seven new judges and we are prepared to consider giving them to them. But neither one are asking for more judges because they believe they could lose the uniformity and collegiality.

So let me ask you, Judge Furgeson, is it wise to recommend additional judgeships when the court does not want them?

Judge FURGESON. It is certainly not wise.

Chairman SESSIONS. The 12 appellate judges that you recommend are not in those circuits?

Judge FURGESON. They are not in Fifth and—

Chairman SESSIONS. Well, then, how come we are rewarding those who work less—

Judge FURGESON. Well, I am glad you ask that question.

Chairman SESSIONS [continuing]. And not saluting those who do more?

Judge FURGESON. First, let me say that one of my favorite judges is Judge Higginbotham. He is a bright and shining star on the Fifth Circuit and a remarkable judge and a remarkable person.

I think what does happen, Mr. Chairman, is that different regions of the country develop different court cultures. In fact, there

are different cultures within the bars of different regions of the country. What we do by asking the judges first to initiate these requests is we ask them if this is what they want to do.

It is true that neither the Eleventh nor the Fifth have asked for new judges, and it is true that they carry incredibly heavy workloads. I think some of it has to do with the fact that—and you have mentioned it and I am sure Judge Higginbotham mentioned that there is a great interest in collegiality; that you need to keep courts small, especially appellate courts, to develop that kind of collegiality.

There is also a strong view—and it is held in different degrees in different regions, but a strong view that the Federal court should not grow very much. And I think that is a sense among all Federal judges that we don't want to grow hurly burly or for growth sake, but there are sort of different views about where that cut-off is, especially in the courts of appeals.

I will just give you an example. For instance, the Second Circuit, the circuit of Senator Schumer, has asked for new judges and we have certainly concurred with that request. The Second Circuit, along with the Ninth, is really under siege right now with immigration appeals, and those two circuits are dealing in a much more thorough way and comprehensive way with a heavier immigration docket than any of the other circuits in the United States.

So we certainly see a real up-tick in cases for the Second and the Ninth, especially because of immigration issues. That is why, for example, we certainly concur with the request of the Second and Ninth Circuits for more appellate judges.

Chairman SESSIONS. I will recognize Senator Schumer, and I am glad he was able to do with us. I would just note that Senator Grassley introduced today, and I cosponsored a bill to eliminate the 12th seat on the D.C. Circuit. You all haven't recommended eliminating any judgeships, I see, but its caseload was about one-fourth the average of the others, certainly one-fourth of the busy circuits, and it continues to decline.

Do you agree that we should eliminate one seat there?

And I will say, Chuck, that the President and his crew wants to appoint another judge there and the only reason, I guess, they haven't is because Senator Grassley and I have objected. But I think we either ought to take off the books or fill it. So what is your thought about whether we need another judge for the Twelfth Circuit, at $1 million a year, approximately?

Judge FURGESON. For the D.C. Circuit, sir?

Chairman SESSIONS. Excuse me. The D.C. Circuit.

Judge FURGESON. Instead of giving my opinion, Mr. Chairman, could I say that an argument can certainly be made that the additional 12th seat on the D.C. Circuit should not be filled at this time, given the workload of that circuit. I think a very good argument can be made to that effect.

Chairman SESSIONS. Senator Schumer is a lawyer with great skill and expertise, and we appreciate his leadership on this Committee. I will recognize you at this time.

Senator SCHUMER. Well, thank you, Senator, and I want to apologize to you and to our witnesses. It is the last week of session, so

it is a busy week. I am on the Finance Committee. We have the tax bill on the floor and it has been busy, so I apologize.

I am going to give a few brief remarks and leave it at that, but I want to thank you—

Chairman SESSIONS. Chuck, the professor had a train to catch.

Don't feel bad about leaving whenever you need to, Professor Galanter.

Mr. GALANTER. Thank you.

Chairman SESSIONS. Thank you very much for your—

Senator SCHUMER. Are you taking Amtrak, Professor? We are trying to help you.

Chairman SESSIONS. We appreciate the train that comes through Mobile at 2 a.m. going east and 3 a.m. going west 3 days a week.

Senator SCHUMER. I hear Mobile is hopping at 2 a.m. and 3 a.m.

I want to thank you for having this hearing. I thank all of our witnesses for being here. It is very important in enacting laws to protect the rights of our citizens that we equip the lower Federal courts with sufficient judges to ensure that those rights are not empty rights.

I often used to argue—I am a tough on crime guy and what was creating such problems in terms of the courts and people not being sentenced—it wasn't so much the ideology of the judges, but in New York State we had a lot of judges who hardly did any work. In those days, back in the 1970's and early 1980's there was much less of an administrative court structure and it was more or less up to the judge, and they just let defendants delay and delay and delay and delay, and they would being arrested for new crimes. I guess we didn't adjudicate whether they actually committed them.

So we need to have courts that are efficient. We need to have enough judges. This is all very important. At the same time, this Congress is particularly aware in recent months of the need to control spending. In 1993, the Federal Judicial Center estimated an average of $18 million spent per judgeship over the lifetime span of a judge's tenure on the circuit court. That was 1993, so obviously the number is considerably higher now.

When Senator Grassley was Chairman of the Subcommittee in 1999, he concluded—and Senator Grassley would be very good at this; he is very thorough and he is frugal, and at the same time cares about justice—that Congress should expend funds to fill an existing vacancy or create a new judgeship, he said, only after a comprehensive determination has been made that filling a vacancy or creating a new judgeship is absolutely essential for the court to properly administer justice.

I, too, believe we have a duty to work with the Federal judiciary to find ways to improve efficiency. There may be ways to get the work done without creating a large number of additional judgeships, and we ought to try that first. Maybe it will work, maybe it won't.

Here are some things we could do. We could help the courts expand and strengthen their mediation and settlement programs. We could explore more effective uses of staff attorneys and law clerks. We could improve case management systems and technology. All of this has gotten better over the last decade, but there may be a ways to go.

Another way we can increase efficiency is to fill the existing vacancies, especially in the circuits and districts where the Judicial Conference has recommended additional judgeships. Two weeks ago, I was proud to sit here and nominate two very talented nominees—Joseph Bianco and Eric Vitaliano, who I recommended the President appoint to the Eastern District of New York. That is one of the districts the Conference has identified in need of judgeships. I am sure that these two nominees will be easily confirmed, and that is going to help.

But there are still more than 30 vacancies in which the President has yet to name a candidate, many of which are in circuits and districts identified by the Conference as under-staffed. The Conference, for instance, recommended seven in the Ninth Circuit; there are three vacancies there.

In the Central District of California, four additional judgeships were recommended. We have five present vacancies without a nominee. It is not the Congress's fault; it is really the President in not nominating. In the District of New Jersey, the Conference recommended an additional judgeship. We have two vacancies now. So we could move the process along and we ought to get the White House to fill the vacancies with a little more speed.

Finally, before I wrap up, I would like to say a word about the politics in the process. Judge Wilkinson, the former Chief Judge of the Fourth Circuit, a man I don't agree with on a lot of legal issues, in his law review article "The Drawbacks of Growth in the Federal Judiciary," points out some of the incentives, legitimate and illegitimate, to create new judgeships.

He writes that, quote, "There may be pressures on elected officials to shift the philosophical outlook of the Federal judiciary by adding more judges of the President's party." And I would just remind my colleague we had four vacancies on the D.C. Circuit that were not filled for years when President Clinton was nominating and the Senate was controlled by Republicans. And we didn't do that; we filled vacancies once President Bush came in. So I probably agree that that 12th vacancy should not be filled, but these vacancies were existing a very long time and I would say you could make a plausible argument that politics had something to do with it.

So, Mr. Chairman, of course, politics is an illegitimate reason to create new judgeships, and you and Senator Grassley and other Republican members of the Subcommittee, as well as, of course, our Chairman—we will apply the same principles in reviewing the Judicial Conference's request for new judgeships as we did when President Clinton was in the White House.

I thank the Chair. I am not going to ask questions. I will submit in some writing because I have got to get back to the other matters at hand, but I want to thank each of our witnesses—Judge Furgeson, Judge Steele and Ms. Spalter, as well as Professor Galanter. Thank you all for being here.

Chairman SESSIONS. Senator Grassley chairs the Finance Committee and all of us feel this pressure on cost. We want to do the very best for justice that we possibly can, but everybody in the world that I know is not being asked to do more for less, but actually is doing more for less, and that is a good thing.

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We have, of course, developed procedures through word processing that can be recalled from years before, rulings on certain matters. We have by and large two law clerks per district judge, three per circuit judge, I believe. So we have done a lot of things well.

And then I believe the judges deserve credit for seeing the decline in trials. I don't think that has occurred just totally without the judges' participation. I think judges are working harder to encourage disposition of cases. Judge DuBose, a magistrate judge, was here yesterday, and I asked her about the magistrate's role in case disposition. She volunteered that Judge Steele, when he was a magistrate judge, in every single meeting with the parties asked whether or not he could help them facilitate the settlement of the case.

Do you still do that, Judge Steele?

Judge STEELE. I do, yes.

Chairman SESSIONS. And do you think that sort of breaks down some of the hostility and can increase the likelihood of settlements?

Judge STEELE. Certainly, I think it does, and I think the offer of a magistrate judge to help settle a case in many cases will—

Chairman SESSIONS. When you say offer, you say to act as sort of a mediator?

Judge STEELE. Yes, act as a settlement conference judge or a mediator.

Chairman SESSIONS. Ms. Spalter, do you think that Federal judges are doing a better job from the lawyer's experience in facilitating mediation and settlement of cases?

Ms. SPALTER. I don't think there is any doubt about that, Mr. Chairman. I think you see more and more of that everyday. One, I think it is a good thing and the lawyers appreciate it, but I think there is part of it that is done because the caseload is so large that if we tried every case, you know, where would we be? We would never have the ability to get through the process.

Chairman SESSIONS. You are right about that.

Judge Steele, it does take some time from a judge's point of view to help facilitate settlement. I mean, it is not as if you don't spend any time on that subject, I guess it is fair to say.

Judge STEELE. Well, it, of course, takes time in discussing the issues with the lawyers and to find out what it is that is really at stake and where the hot-button issues are that need to be resolved. And then if a magistrate judge is conducting a settlement conference, it takes a considerable amount of time from that judge to actually hold the conference.

Chairman SESSIONS. With regard to magistrate judges, Judge Steele, in your experience, do you have any indication of how many other districts fully utilize the magistrate judges, and do you believe that that can lessen the caseload burden on the district judges if they are fully utilized?

Judge STEELE. To answer the first question, I don't have the numbers. I am sure the Administrative Office could produce those if requested. In answer to the second part of the question, yes, sir, the experience in the Southern District of Alabama was exactly that. By full utilization of magistrate judges, we were able to reduce the pressures and the workload of, at one time, our one dis-

trict judge so that that judge could do the things that he needed to do, which was to try criminal cases and some civil cases, and actually be more effective in his case management.

Chairman SESSIONS. But there is a privilege all Americans are given in Federal court that the fundamental issues are decided by an Article III lifetime-appointed Federal judge. Can you tell us what those basic standards are, what a magistrate can do and what a magistrate judge is not allowed to do?

Judge STEELE. Well, the jurisdiction of the magistrate judge is defined by 28 U.S.C. Section 636 and it allows a magistrate judge to do just about anything a district judge can do, except try criminal felony cases and sentence in a felony case. A magistrate judge is allowed to try civil cases, with the consent of the parties, under 636(c).

Chairman SESSIONS. But only with consent of the parties?

Judge STEELE. With consent, right, but the limits of the jurisdiction are defined by that statute and it was our intent not to expand the jurisdiction of the magistrate judges in our district, but to fully utilize them within the limits of that Congressionally given jurisdiction.

Chairman SESSIONS. Now that you will be assuming that Judge DuBose's confirmation will go forward—and she also was a magistrate judge, leaving you a vacancy in the magistrate judges' positions—I understand that you have made a decision about filling that vacancy. Would you share that with us—or the court has?

Judge STEELE. Well, the decision was not to fill the vacancy, and the decision was based on a number of factors, most of which are statistics-driven. We have experienced a decline in filings in our district and the crisis that we faced back in the mid-1990s when we went to four district judges is no longer upon us. So without the crisis, without the justification in terms of numbers, we didn't see fit to request that that position be filled. We want to leave it open, of course, in case our numbers come back up. And if they do and if we can justify it at that time, then we will ask that it be filled.

Chairman SESSIONS. Well, I thank you for being frugal with the taxpayers' money. Some may have found otherwise.

Judge Furgeson, do you have any thoughts about how many of the districts are fully utilizing the magistrates and how many are not? What about yours?

Judge FURGESON. I can only talk about my district, but in my district I think the district judges see the magistrate judges as their partners in moving the dockets, and the relationship between the magistrate judges and the district judges is a very close and cooperative one. I would be surprised if that weren't the case through most of the United States. Magistrate judges are highly qualified. They are selected through a very careful process.

Chairman SESSIONS. Would you point that out? I mean, it is a non-political review by the judges of the district court, is that not correct?

Judge FURGESON. Yes.

Chairman SESSIONS. Will you tell us how that works, generally?

Judge FURGESON. Certainly. What happens is once a vacancy comes up, a Committee is appointed to screen applicants, and it is normally a blue-ribbon Committee selected by all the judges in the

district. That Committee then takes applications. The applications come in, and we have had vacancies recently where 30, 40, 50 people have applied for the job.

Then the Committee does a very thorough job. This is all volunteer work by a bar committee, also with lay representatives. After they finish, they normally give a recommendation. And, Judge Steele, you can help me with this. I think they rate the top five people—

Judge STEELE. Top five prospects.

Judge FURGESON [continuing]. In order of preference. My experience has been that almost every time the district judges accept the number one nominee and that person, at least I have certainly found in my district, is normally a very accomplished either lawyer or State judge who is every bit the judicial officer of our district judges. And we embrace our magistrate judges and, as I say, make them full partners in our effort.

Chairman SESSIONS. Well, that certainly was not the role of the magistrate judge in the 1970s when I first was an Assistant United States Attorney. They were pretty much part-time jobs, often away from the main courthouse. They handled pre-trial criminal cases and motions, and set bail and things of that nature. But it has been a real revolution and I do think that Congress has a responsibility to ask before we fill a vacancy if perhaps that district could perform better if they utilized the magistrates completely.

A trial is a big thing. I think we have got to look hard at these numbers, what they really mean, and I do think that there is a fear on the part of the judiciary that if they don't ask for enough judges, we are probably going to give half, so you want to be sure you ask for enough, on the theory you are not going to get all you ask for. And you probably should start early because the sooner you start, it might be years before it ever gets filled and then caseloads go up and down.

But this decline in the number of cases actually going to trial, I do think makes a difference. Does that argue against—how many—

Judge FURGESON. Sixty-eight.

Chairman SESSIONS [continuing]. Sixty-eight judges, Judge Furgeson?

Judge FURGESON. Mr. Chairman, I don't believe it does because of the process we use. Remember, first, we weight the cases, and so we look at people who have elevated caseloads based upon the weighting factor, so we are comparing apples and apples. Then we ask the judges themselves to fill out a very comprehensive survey, and in that survey they have to talk about utilization of magistrate judges, utilization of visiting judges, utilization of senior judges. They have to go through and give us that information.

After that is initiated, it goes to our statistics subcommittee. They scrub it. It then goes to our judicial councils. And as you know, our judicial councils are populated by half appellate and half district judges, and they take a very careful look at those. Appellate judges are very careful about especially analyzing what district judge requests are. Then it comes back to the subcommittee, then to the full committee, and then to the Conference.

As I say, our goal is not for the Federal judiciary to grow at a rapid rate. Judge Steele is here and he can give you his opinion, but my opinion is the Federal judiciary thinks that we have a unique position in the Constitution. We want to be careful about the number of judges that we have in the Nation. We certainly don't want to have any more than we absolutely need.

I think there is a feeling in the judiciary that to add lots of judges in the system over time could diminish the special nature of the courts, and so I think we want to be very careful. That is why I think, for example, that you find a circuit like the Eleventh Circuit or like the Fifth that says we are carrying a very heavy workload, but we don't want to ask for judges.

I sit on a border court. We probably just on weighted case filings could ask for, I don't know, three, four or five more judges. We haven't asked for any. Our goal, again, is that we believe that it should be a very careful process and we have just decided we are going to stay where we are.

So I do believe our system of looking at formulas and then looking at conditions on the ground and scrubbing through a very careful vetting process brings us to a good number.

Chairman SESSIONS. Judge, when you see those numbers like 600 at the Eleventh Circuit or 500 for the Ninth—this is for the circuit now—those are weighted appeals, or not?

Judge FURGESON. I am glad you made that differentiation. We have weighted numbers on the district bench. We have talked to our appellate judges about how they think is the best way to look at their cases and the only adjustment they make in raw case numbers is with pro se cases. A pro se case is the equivalent of one-third of a case.

In other words, we will take all the pro se cases in a circuit on appeal. To make this easy, say there are 300 of them. They will count as 100 cases, and that is the only kind of adjustment we make at the appellate level and that is because in talking to our appellate judges, at least at this point, they think those are the only kind of adjustments that should be made in their caseload.

Chairman SESSIONS. Well, obviously, that is not correct, as we both know.

Judge FURGESON. I beg your pardon?

Chairman SESSIONS. Obviously, that is not an accurate way of doing business because you take a big asbestos class action or some of these cases, it should take a lot more, I would think. But I did notice that the Ninth Circuit is counting 6,000 immigration cases, that they have had an increase of 6,000 over the last so many years, but surely those are not as complex as many of the other cases. Surely, they are raising the same issues repeatedly there. Wouldn't you agree?

And as a practical matter, surely, on average, each case would take less time.

Judge FURGESON. Let me just put it this way, Mr. Chairman: I am a district judge. We are—

Chairman SESSIONS. I am asking you to judge the circuit judges. You have got a real opportunity.

Judge FURGESON. That is right. Thank you, Mr. Chairman, on the record. We are guided to a great extent by what our appellate

judges have told us. Now, I would think that you are exactly right that there are appeals and then there are appeals. What our circuit judges tell us is it all balances out.

Chairman SESSIONS. Well, that could be true.

Judge FURGESON. That is what they tell us.

Chairman SESSIONS. But in the Ninth Circuit, I think, as I recall from our previous hearing on whether it should be divided, the other cases are down. The increase is entirely immigration appeals. So I think that suggests less of a crisis.

They have a high caseload. You mentioned the Ninth Circuit. They are over 500 cases, where I think the Eleventh is 640 and the Fifth had more cases than the Ninth.

Judge FURGESON. I have got those numbers for you if you would like them for the record.

Chairman SESSIONS. If you have those numbers—

Judge FURGESON. I do, for the circuits.

Chairman SESSIONS. So they have a heavy caseload and we are trying to move legislation that would give them some new judges.

Judge FURGESON. Adjusted filings per panel—the Second Circuit, which is asking for two, right now has 1,164 cases. The Ninth Circuit has 1,225 cases. You have mentioned the Fifth, which has adjusted filings per panel of 1,227 cases, and the Eleventh which has adjusted filings per panel of 1,239 cases.

Chairman SESSIONS. They are pretty close together, according to those numbers.

Judge FURGESON. That is correct.

Chairman SESSIONS. That is per panel?

Judge FURGESON. Per panel, yes, sir.

Chairman SESSIONS. Well, the numbers we were using were per judge, I think.

Judge FURGESON. OK, and that would explain the difference.

Chairman SESSIONS. The 600, 500 range for those three circuits. I don't know what the level is at the Second.

Well, on the weighting, Judge Steele said he was on a panel, he told me earlier, on which they discussed the weighting and everybody had different ideas, but nobody came up with anything any better. Is that a fair summary of it, Judge?

Judge STEELE. I think so. I was a representative for my district for the Eleventh Circuit, and I think we had representatives from every district court in the Eleventh Circuit that met in Atlanta and participated in that weighting program. It was an open discussion about how cases should be weighted and I think the bottom line was that they produced a result which could be relied on. I think that was the bottom line.

Chairman SESSIONS. There is no serious concern by a large number of judges that the weighting system is clearly inaccurate or fails to meet its goals?

Judge STEELE. I don't sense that there is. That is my take on things.

Chairman SESSIONS. Judge Furgeson, do you have any thoughts about that? If the weighting system is wrong, then we have got a difficult problem.

Judge FURGESON. I agree with Judge Steele and I am glad Judge Steele participated in that process. We had, as I said, over 100

judges and we were looking at over 300,000 different events in our court system.

You know, to some extent the third branch is like the first branch, Mr. Chairman. We do get disagreements from time to time among each other, but I think there is a generally broad acceptance in the district courts of the weighting system and the legitimacy of the weighting system. That is at least my view.

Chairman SESSIONS. There is just no doubt about it. I mean, personally, we had just two judges and one was newly on the bench and within a few weeks he had to try a 7-week trial that I tried, and 2 weeks of full-time motions before. A big trial has got to be weighted more than a guilty plea or a small 1-day trial.

Do you think they fairly rate these big cases that are really extraordinary that can affect 6 months or maybe even a year of a judge's time?

Chairman SESSIONS. There is no question about it, and I am sure Judge Steele has the same experience. I have been in trial in one case for 11 weeks and it really wrecks your docket to be in a trial like that. Again, over time, more complex cases require that more complex trial attention, and I do think that is considered in the weighting formulas. I think it does balance out over time.

Chairman SESSIONS. Well, you could see a few more bigger cases, like class action that we passed that will have more of those going into Federal court, which I think is perfectly appropriate in these cases, as we designated them, that are utterly interstate. I mean, they involve perhaps every State in America. Any ruling rendered would impact the entire credit card system of this country or whatever it might be. I think it is appropriate.

I know the judges sometimes say, well, don't give us these cases. But I think those are good cases to go to Federal court, and you may see us give you more of that as time goes by. I believe in States' rights and their authority to handle the criminal cases, the murders, the rapes, the robberies that occur in their communities. But some of these matters involve companies that could be subjected to 50 different legal tests or whatever. So I think you could see more of that in the future.

Ms. Spalter, you mentioned increases in numbers of filings. I thought I heard you say from 1990, but I am not sure. What was the basis for your statement that the number of filings had increased?

Ms. SPALTER. Actually, it comes from the Judicial Conference's report, and I think I heard Judge Furgeson earlier say about the same number, about 40 percent.

Chairman SESSIONS. From 1990?

Ms. SPALTER. From 1990.

Chairman SESSIONS. Apparently, it peaks around 2000 and has decreased in some areas since then.

Well, this has been a very interesting hearing. It is a matter that we need to take seriously. Perhaps this Committee can figure a way to be affirmative in recommending to the full Senate how we should proceed, what vacancies should be filled and in what order. But this is the political branch, I have to tell you, and Senators are very clever sometimes. If all you need to do is approve a Federal

judge for them to get their vote, they might get a Federal judge approved, which we would like to reduce as much as possible.

And, frankly, as you can see from the number of judges that we have added, we haven't had too many, and I have felt that Arizona, Southern California and Southern Florida have clearly demonstrated a surge in case filings in the last 15 years and they have gotten most of the judges. Most of the judges that have been added have been in those districts that I think have the most serious need. There may have been some aberrational decisions made, but fundamentally most of the resources that we have put out, I think, have gone to districts in need.

Senators Grassley, Leahy and Hagel have statements that they have submitted for the record, and we will keep this record open for 1 week for additional submissions. And if you chose to submit anything during that time, you could.

Senator Grassley wanted to be here. He takes an interest in this. If he had been here, he might have asked you about your trips and your vacations. His theory was if you had so much work to do, why do you take these trips? But he is a patriot who has courts as one of his highest interests. He is managing the tax bill on the floor right now. Otherwise, he would be with us.

Do you have any other comments you would like to add at this time?

Judge FURGESON. Could I ask you a question, Mr. Chairman?

Chairman SESSIONS. Yes, Judge Furgeson.

Judge FURGESON. There was some controversy—that may not be the right word—there was just some question about how we count trials. I take it, though, that that is not a major issue here and there would be no necessity here for me to submit any papers on that. If you needed some more information—I just wasn't clear that the professor was absolutely correct about how we count trials, for example, if you have a multi-defendant case, if you count every defendant or not. So if there is no necessity of clearing up that little dispute, I won't make any submission on that.

Chairman SESSIONS. Well, we would be delighted if you have anything to offer on it. It does appear that you have more than a 50-percent decline in actual trials in criminal, and maybe more than that in civil, which does impact, I believe, how we evaluate the number of judges that should be added to the judiciary. But feel free to offer anything and you are not obligated to.

Judge FURGESON. And I do agree with the professor's overall point that there is clearly a decline in trials, and so this would be probably just a minor issue. And with your permission, I won't add anything to that.

Chairman SESSIONS. Would you like to briefly speculate why?

Judge FURGESON. I would be interested to hear my other panelists about that. I think there are several reasons. The Supreme Court had a trilogy of cases back in the early 1980's—I think it was the early 1980's—where they talked about a different view toward summary judgments.

When I first started practicing, it was like nobody grants summary judgments; you just don't grant them. The Supreme Court in the *Celotex* case and some of those other cases said, no, summary

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judgments are not disfavored; if there is an appropriate failure of proof, you need to grant summary judgments. And I think after that Federal courts began to grant more summary judgments. And those, by the way, are the basis for, as you suggested, some of the appeals that go up in the circuit.

I think, too, there has been a movement toward arbitration and mediation. Many large companies now when they sign contracts with each other put in binding arbitration requirements, and so that takes the cases out of the court.

Often, I will get a case that will be filed in my court and the other side will say, wait a minute, there is a binding arbitration clause in that case. So I will have to then stay the case, require arbitration, and then enter an order approving the arbitration after it is finished. That means no trial under any circumstances. So I think those are two of the reasons why.

There is a different mix of cases now. You know, cases are sometimes more complex and sometimes it is very difficult for those people to finally take the risk of going to trial in a really complex case. And sometimes it just depends on the jurisdiction. I used to handle the Pecos division way out in the middle of nowhere in Texas. I tried 25 or 30 jury trials a year out there. I mean, we were trying them right and left. I get to San Antonio and I am lucky to get, you know, ten jury trials a year. Sometimes, it has to do with the culture of a particular jurisdiction. So it is several different reasons and my panelists may have some other ideas about that.

Chairman SESSIONS. Those are interesting thoughts. I think all are very relevant.

Judge Steele, do you have anything to add?

Judge STEELE. I would agree with Judge Furgeson, and I might add also that I think better case management by district judges and by the court in its entirety is also responsible for a reduction in trials. I think we see that. We have early intervention in cases, or earlier intervention in cases with regard to settlement conferences, and just the fact that the cases are more closely managed and the discovery issues are resolved early on so that there is not this continuing battle about what is at stake in a case. The parties are able to see what the issues are and focus on the issues much earlier and then resolve them themselves in most cases.

With regard to criminal cases, I agree with you that I think the sentencing guidelines had a substantial effect on the number of criminal cases that would go to trial. But I also would be interested to see the long-term effect of the *Booker* v. *Fanfan* decision on that because I think in the Southern District of Alabama we are seeing more criminal cases go to trial right now, for a couple of reasons, but I think the defendants are more willing to roll the dice if they think they can later convince a judge that you don't have to follow the guidelines now and you can give me a break on the sentence. So I would be interested to see the long-term effect of that decision.

Chairman SESSIONS. I wouldn't be surprised about that. I won't ask you to comment, but one thing, I think, that occurred that almost never occurred in State court but I believe is occurring a lot in Federal court is partial summary judgment, where a judge will say, well, those causes of action—three of the six you have got are

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no good, there is no basis for those; we will go to trial on only those three.

Do you think that sometimes, Judge Steele, would facilitate settlement of the case?

Judge STEELE. Absolutely, and I have seen it time and time again where that decision by a district judge to eliminate certain claims forces settlement. You know, the parties start talking a little more seriously about what is at stake.

Chairman SESSIONS. As long as a plaintiff still has dreams that they might prevail.

Ms. Spalter, do you have any comments or thoughts on that?

Ms. SPALTER. I do, Mr. Chairman, if I might. I believe that one of the reasons we are seeing fewer trials is the rising costs of civil litigation. And it is interesting because I think part of the rising cost is attributable to the fact that it takes longer to get to trial and I think that is caused by the increase in the criminal cases, which, of course, statutorily require that they trump civil cases many times.

In fact, I have heard anecdotally in traveling just in my short time so far as President of the Federal Bar Association stories like that. I heard one just recently where a division of a district is short-handed and so, in fact, some cases in that division end up being tried by a judge in the division here. For instance, it happened to be the inland empire of California, and then they may get a magistrate assigned from Los Angeles. Well, the client is going to pay for that.

So there is a rising cost, in general, of this that is going to the clients, and I do think that rising cost then circles around and also is one of the reasons for the reduction in trials.

Chairman SESSIONS. You know, there was a real concern about the time the sentencing guidelines—I know it was a concern in the Southern District of Alabama when they were short of judges, but my impression is the case data does not show delayed disposition of cases across the board. Are there any numbers on that? Does either one of you know that?

Judge FURGESON. I do believe there are numbers and I think you are pretty much on. I don't believe nationwide there has been a big change from time of filing to time of disposition. Now, in some districts that may be different, especially districts which may get really heavily burdened with criminal cases. The Southern District of California would be one of them.

Chairman SESSIONS. Well, these are all very important issues. I would say this with certainty and with the greatest respect: I believe we have a marvelous Federal judiciary. I think they work hard and I think they work their staffs hard. I think they produce justice as well as we can produce it day after day, and I believe, from the Administrative Office on down, they have been encouraged to manage better. Better management has allowed the judiciary to handle more cases than they ever have before, and we would really be in a crisis today had that not happened if we were still disposing of cases as we did 25 years ago.

So we are interested in making sure that those districts that have the needs get them filled. We will be discussing that more and maybe we can get some done this year or next.

Thank you so much. If there is nothing further to come before our Subcommittee, we will stand in adjournment.

[Whereupon, at 4:49 p.m., the Subcommittee was adjourned.]

[Questions and submissions follows.]

QUESTIONS

QUESTIONS FOR PROF. GALANTER
FROM SEN. CHARLES E. SCHUMER

1. Do you think the Judicial Conference's formula for calculating judges' workload, based on weighted filings, without consideration of what happens to cases after they are filed, is an accurate measure of how burdened the judges are?

2. In 1990, Congress passed comprehensive legislation that created 85 new judgeships. Yet, according to your testimony and your charts, the number of trials has declined in the last 15 years. In your view, what are the reasons for and consequences of having fewer trials? Do you believe that this trend is bad for the administration of justice? If so, does this mean that expanding the judiciary does not, by itself, improve or streamline the administration of justice?

3. If judges are not "judging" cases, how are they spending their time? In your view, are judges spending their time productively? Would simply creating new judgeships change anything? Are there ways of increasing productivity and improving efficiency in the courts without creating new judgeships?

4. How does the trend of declining trials affect cases on appeal and the workload of the circuit courts?

QUESTION FOR MS. ROBYN SPALTER
FROM SEN. CHARLES E. SCHUMER

1. In your experience as a practitioner, does the trend of declining trials affect the administration of justice? Please explain.

QUESTIONS FOR JUDGE FURGESON
FROM SEN. CHARLES E. SCHUMER

1. You testified that the Judicial Conference's formula only weights cases on appeal if they are *pro bono*. Why doesn't the Conference take into account the complexity of cases on appeal, just as it does for cases in the district courts? For example, isn't it possible to distinguish between a single-issue immigration case and a multi-issue antitrust case? Please explain the reason behind the Conference's methodology in calculating judges' workload in the circuit courts.

2. Former Chief Judge of the Fourth Circuit, Judge Wilkinson, who testified before this Subcommittee in the late 1990s, argues in his law review article, "The Drawbacks of Growth in the Federal Judiciary," that expansion of personnel in the courts of appeals "will render the appellate process all but unworkable." He contends that creating new circuit court judgeships will have a negative effect on collegiality, which impacts the quality of decision-making, and will result in a loss of coherence in circuit law, which could increase litigation. He also points out that adding judges to the courts of appeals increases pressure to split up a circuit. He argues that "[s]maller, more numerous circuits will not only create more inter-circuit conflicts; they will also move federal law in a more parochial direction," which would undermine the interstate character of appellate review in the federal judicial system. Does the Judicial Conference study these issues in its biennial review? Are judges asked about collegiality, coherence in circuit law, and concern about circuit splits in the surveys? If so, how many judges share Judge Wilkinson's views?

SUBMISSIONS FOR THE RECORD

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

JUDGE W. ROYAL FURGESON, JR.
CHAIRMAN, COMMITTEE ON JUDICIAL RESOURCES

BEFORE

THE SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON

THE 2005 JUDGESHIP RECOMMENDATIONS OF THE JUDICIAL CONFERENCE OF UNITED STATES

November 16, 2005

STATEMENT OF JUDGE ROYAL FURGESON
BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

Mr. Chairman and members of the Subcommittee, I am Royal Furgeson, District Judge for the Western District of Texas and Chair of the Judicial Conference Committee on Judicial Resources. That Committee is responsible for all issues of human resource administration, including the need for Article III judges and support staff in the U.S. courts of appeals and district courts. I am here today to provide information about the judgeship needs of the courts and the process by which the Judicial Conference of the United States (the "Conference") ascertains those needs.

Every other year, the Conference conducts a survey of judgeship needs of all U.S. courts of appeals and U.S. district courts. The latest survey was completed in March 2005. Consistent with the findings of that survey and the deliberations of my Committee, the Conference is recommending that Congress establish 68 new judgeships in the courts of appeals and district courts. The Conference is also recommending that three temporary district court judgeships created in 1990 be established as permanent positions and that one temporary district court judgeship be extended for an additional five years. Appendix 1 contains the specific recommendation as to each court.

For many of the courts, the recommendations reflect needs developed since the last comprehensive judgeship bill was enacted, in 1990. Every two years since

then, the Conference has submitted to Congress recommendations on the number of additional Article III judgeships required in the judicial system.

Survey Process

In developing recommendations for consideration by Congress, the Conference (through its committee structure) uses a formal process to review and evaluate Article III judgeship needs. The Committee on Judicial Resources and its Subcommittee on Judicial Statistics manage these reviews; the final recommendations on judgeship needs are adopted by the Conference itself. Before a recommendation is transmitted to Congress, it undergoes consideration and review at six levels within the Third Branch, by: 1) the judges of the court making a request; 2) the Subcommittee on Judicial Statistics; 3) the judicial council of the circuit in which the court is located; 4) the Subcommittee, in a further and final review; 5) the Committee on Judicial Resources; and 6) the Judicial Conference. In the course of the 2005 survey, the courts requested 80 additional judgeships, permanent and temporary. Our review procedure reduced the number of recommended judgeships to 68.

In the course of each judgeship survey, all recommendations made in the prior survey are re-considered, taking into account the latest workload data, changes in the availability of resources, and adjustments to guidelines for evaluating requests. In some instances, this review prompts adjustments to previous recommendations.

Judicial Conference Standards

The recommendations developed through the review process described above (and in more detail in Appendix 2) are based in large part on a numerical standard based on caseload. These standards are not in themselves indicative of each court's needs. They represent the caseload at which the Conference may begin to consider requests for additional judgeships – the starting point in the process, not an end point.

Caseload statistics must be considered and weighed with other court-specific information to arrive at a sound measurement of each court's judgeship needs; circumstances that are unique, transitory, or ambiguous may result in an overstatement or understatement of actual burdens. The Conference process therefore takes into account additional factors, including:

- the number of senior judges, their ages and level of activity;
- magistrate judge assistance;
- geographical factors, such as the number of places of holding court;
- unusual caseload complexity;
- temporary or prolonged caseload increases or decreases;
- use of visiting judges; and
- any other factors noted by individual courts (or identified by the Statistics Subcommittee) as having an impact on resource needs.

Courts requesting additional judgeships are specifically asked about their efforts to make use of all available resources. (See Appendix 3.)

For example, the standard used by the Conference as its starting point in the district courts is 430 weighted filings per judgeship after accounting for the additional judgeships recommended. But the workload exceeds 430 per judgeship in all but one district court in which the Conference is recommending an additional judgeship. In all but three of those district courts, weighted filings were 500 per judgeship or higher. Ten courts exceeded 600 weighted filings per judgeship.

In the courts of appeals, the starting point used by the Conference is 500 adjusted filings per panel. In 2005, four circuits exceeded 1,000 adjusted filings per panel; even so, two of these courts did not request an additional judgeship. The case mix in the circuits in which additional judgeships are recommended differs significantly from the case mix in the circuit courts that did not request additional judgeships. For example, criminal and prisoner petition appeals were approximately 60 percent of all appeals filed in the Fifth and Eleventh Circuits (which did not seek additional judgeships), but only about 30 percent in the Second and Ninth Circuits (which did). The Second and Ninth Circuits have also experienced dramatic increases in appeals of decisions by the Board of Immigration Appeals. In each circuit court in which the Conference is recommending additional judgeships, the caseload levels substantially exceed the standard, and other factors bearing on workload have been closely considered.

In short, caseload statistics furnish the threshold for consideration, but the process entails a searching and critical look at the caseloads in light of many other considerations and variables, some of which are subjective and all of which are considered together.

New District Court Case Weights

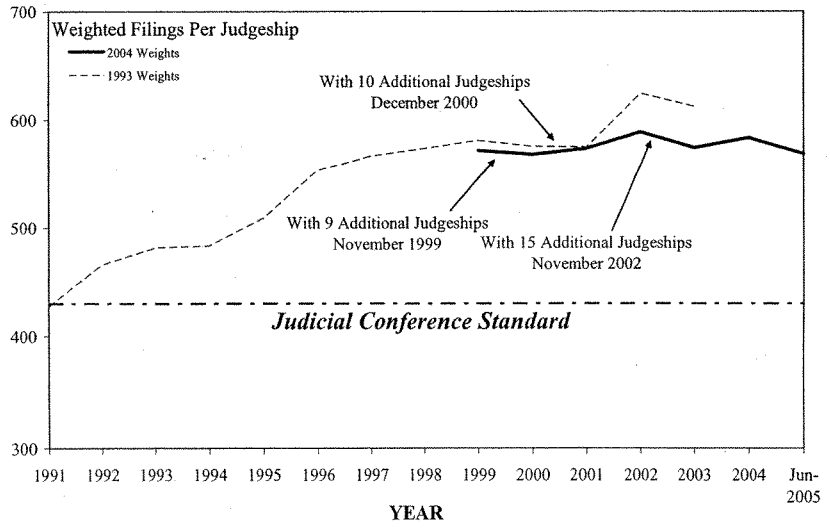
Case weights are a relative measure of the amount of judicial work required by different types of civil and criminal cases. In 2004, the Federal Judicial Center updated the district court case weights, and the judiciary adopted the new weights as the basis for calculating weighted filings in the district courts.

The previous case weights had been in place since 1993, and there was concern that many of the case weights were out of date due to changes in case law and case management procedures. The new weights were developed using an event-based approach that modeled the interaction between the events that occur during the life of a case (e.g., hearings, motions, trials) and the amount of time judges spend to accomplish those events. The study involved nearly 300,000 civil and criminal cases and the participation of more than 100 district judges from 89 courts. Overall, the new case weights are not substantially different from the old weights for many case types. There are instances, however, in which the differences are notable. For example, the case weights for complex civil litigation are significantly higher while the weights for some types of criminal cases are substantially lower. The Conference used weighted filings per authorized judgeship based on the new case weights to determine whether a court's caseload met the criteria for considering requests for additional judgeships.

Even with the additional district judgeships, the number of weighted filings per judgeship in the district courts has reached 531--well above the Judicial Conference standard for considering recommendations for additional judgeships. I have provided at Appendix 4 a more detailed description of the most significant changes in the caseload since 1991.

Although the national figures provide a general indication of system-wide changes, the situation in courts where the Conference has recommended additional judgeships is much more dramatic. For example, there are 10 district courts with caseloads exceeding 600 per judgeship. The district courts in which the Conference is recommending additional judgeships (viewed as a group) have seen a growth in weighted filings per judgeship from 427 in 1991 to 569 in June 2005--an increase of 33 percent (Chart 3).

Chart 3. Districts With Recommendations for Additional Judgeships



The national data and the combined data for courts requesting additional judgeships provide general information about the changing volume of business in the courts. The Conference's recommendations are not, however, premised on this data concerning courts as a group. Judgeships are authorized court-by-court rather than nationally; so the workload data most relevant to the judgeship recommendations are those that relate to each specific court in which the Conference is recommending an additional judgeship.

Appendix 1 contains summary information about the numbers of additional judgeships recommended by the Conference for each court. The Legislative Affairs staff of the Administrative Office of the U.S. Courts has previously provided to each member of the Judiciary Committee the detailed justifications for the additional judgeships in each court.

Over the last 20 years, the Judicial Conference has developed, adjusted, and refined the process for evaluating and recommending judgeship needs in response to both judiciary and congressional concerns. The Conference does not recommend (or wish) indefinite growth in the number of judges. The *Long Range Plan for the Federal Courts* (Recommendation 15) recognizes that growth in the judiciary must be carefully limited to the number of new judgeships that are necessary to exercise federal court jurisdiction. However, as long as federal court jurisdiction continues to expand, there must be a sufficient number of judges to properly serve litigants and justice. The Conference is perennially attempting to balance the need to control growth and the need to seek resources that are appropriate to the workload. In an

effort to implement that policy, we have requested far fewer judgeships than the caseload increases would suggest are now required.

On behalf of the Judicial Conference, I request that this Subcommittee give full and favorable consideration to the draft bill submitted by the Judicial Conference to establish 12 additional judgeships for the U.S. courts of appeals and 56 additional judgeships for the U.S. district courts.

The Vanishing Trial:
An Examination of Trials and Related Matters in Federal and State Courts*

*Marc Galanter***

Over the past generation or more, the legal world has been growing vigorously. On almost any measure--the number of lawyers, the amount spent on law, the amount of authoritative legal material, the size of the legal literature, the prominence of law in public consciousness--law has flourished and grown. It seems curious then to find a contrary pattern in one central legal phenomenon, indeed one that lies at the very heart of our image of our system--trials.

In the federal courts, the percentage of civil cases reaching trial has fallen from 11% in 1962 to 1.8% in 2002. In spite of a five-fold increase in case terminations, the absolute number of civil trials was 20% lower in 2002 than it was 40 years earlier. There was a major shift in the subject matter of trials from a majority of tort cases to a majority of civil rights and prisoner cases. On the criminal side, some 15% of criminal defendants were tried in 1962, but less than 5% in 2002. Again, in spite of rising numbers of defendants, the absolute number of trials was 30% lower in 2002 than in 1962.

In state courts, the data is less comprehensive, but the overall trends appear comparable. In both civil and criminal cases, the percentage of dispositions by trial has fell from 1976-2001. In states for which data was available over this period, jury trials fell from 2% of civil dispositions to 1% and from 15% to 5% of criminal dispositions. The absolute number of jury trials has been falling: in the courts of general jurisdiction in 22 states, there were 25,452 jury trials in 1976 and 18,923 jury trials in 2001, a 28% drop.

As trials diminish we find in their place increases in settlements, in disposition by summary judgment, and in diversion into Alternative Dispute Resolution.

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*Prepared for the Symposium on The Vanishing Trial
Sponsored by the Litigation Section of the American Bar Association
San Francisco, CA December 12-14, 2003

**John and Rylla Bosshard Professor of Law, University of Wisconsin,
Centennial Professor, London School of Economics and Political Science

The causes of this movement away from trials are multiple and it is difficult to specify the contribution of each. But the data enables us to discount several of the candidates that may come to mind. The fall in trials does not reflect a decline in the filing of cases. In the federal courts civil filings increased by a factor of five while trials fell by some 20%. Nor are there fewer cases of the sorts that are most trial prone (torts and civil rights, in the federal courts). The decline in trials seems to affect every category of cases. The decline of civil trials is not associated with an increase in criminal trials, although several developments in the criminal law (speedy trial acts, sentencing guidelines) may demand more judicial attention. Nor does the decline represent the constraints of a diminished stock of court resources. In most cases, the amount of court involvement is greater than it was. There are more cases filed per federal sitting federal district judge than were faced by their predecessors of forty years ago, but today's judges are supplemented by a greater array of auxiliaries. Expenditures on the federal courts have grown faster than their caseloads.

The more robust explanations seem to include increases in cost and risk that discourage parties from proceeding to trial, institutional changes in procedure that encourage such avoidance, and a corresponding shift in the ideology of judges, who increasingly view their role as dispute resolvers rather than adjudicators. These may in turn reflect fundamental changes in the organization of legal services and the way that legal professionals and parties view the legal process.

The consequences of the decline in trials are even more difficult to fathom than its causes. A central feature of the common law process (and of popular understanding of it) is shrinking while the legal system is expanding along every other dimension. The number of disputes increases and the amount of legal doctrine proliferates, but they are connected by means other than trial. If most outcomes reflect "bargaining in the shadow of the law," it appears that the portion of the shadow cast by formal adjudication may be shrinking.

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The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts

*Marc Galanter**

This article traces the decline in the portion of cases that are terminated by trial and the decline in the absolute number of trials in various American judicial fora. The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline. More startling was the 60 percent decline in the absolute number of trials since the mid 1980s. The makeup of trials shifted from a predominance of torts to a predominance of civil rights, but trials are declining in every case category. A similar decline in both the percentage and the absolute number of trials is found in federal criminal cases and in bank-

*John and Rylla Bosshard Professor of Law, University of Wisconsin–Madison, and Centennial Professor, London School of Economics and Political Science. Address correspondence to Marc Galanter, University of Wisconsin Law School, 975 Bascom Mall, Madison, WI 53706; e-mail msgalant@wisc.edu.

This study was prepared as a working paper for the ABA Litigation Section's Symposium on the Vanishing Trial, held in San Francisco, Dec. 12–14, 2003. The Vanishing Trials Project began with the initiative and support of Robert Clifford, then chair of the Litigation Section of the American Bar Association, continued with the support of his successor Scott Atlas, and came to fruition under the guidance of chair Patricia Refo. I would like to acknowledge the outstanding work of Angela Frozena, David Friebus, Adam Zenko, and Jennifer Grissom in compiling and preparing the data presented here. The project benefited from the generous assistance of Magistrate-Clerk Joseph Skupnewicz of the U.S. District Court for the Western District of Wisconsin, Jeffrey Hennemuth and Peter McCabe and their colleagues at the Administrative Office of the U.S. Courts, James Eaglin, Donna Stienstra, Joe Cecil, and their colleagues at the Federal Judicial Center, the staff of the Multi-District Litigation Panel, the West Publishing Co., and Brian Ostrom, Shauna Strickland, Paula Hannaford, and their colleagues at the National Center for State Courts. Thomas Cohen, Susan Haack, Tracie Moxley, Robert Peck, and Steven Schooner graciously supplied important information. Michael Morgalla of the University of Wisconsin Law Library provided indispensable bibliographic support. Theresa Dougherty moved the project forward with her usual proficiency. Patsy Englehard, Emily O'Keefe, and Marisa Joern of the staff of the ABA Litigation Section provided essential help in bringing the project to fruition. Above all, I am grateful to Stephan Landsman whose support, encouragement, and guidarce made the project happen and to the other scholars who joined us in addressing this topic.

In thinking about this topic, I had the benefit of presenting early versions in a session sponsored by the Civil Procedure Section of the Association of American Law Schools at the Association's meeting in Washington in January 2003 and to a meeting of New York area law and society scholars at New York Law School on May 2, 2003. Helpful feedback was elicited at later presentations to the Spring Meeting of the Center for Public Resources in New Orleans in April 2004 and to the Seventh Circuit Judicial Conference in Chicago in May 2004.

ruptcy cases. The phenomenon is not confined to the federal courts; there are comparable declines of trials, both civil and criminal, in the state courts, where the great majority of trials occur. Plausible causes for this decline include a shift in ideology and practice among litigants, lawyers, and judges. Another manifestation of this shift is the diversion of cases to alternative dispute resolution forums. Within the courts, judges conduct trials at only a fraction of the rate that their predecessors did, but they are more heavily involved in the early stages of cases. Although virtually every other indicator of legal activity is rising, trials are declining not only in relation to cases in the courts but to the size of the population and the size of the economy. The consequences of this decline for the functioning of the legal system and for the larger society remain to be explored.

I. THE NUMBER OF CIVIL TRIALS

This project reflects the growing awareness of a phenomenon that runs counter to the prevailing image of litigation in the United States. Over the past generation or more, the legal world has been growing vigorously. On almost any measure—the number of lawyers, the amount spent on law, the amount of authoritative legal material, the size of the legal literature, the prominence of law in public consciousness—law has flourished and grown.[1] It seems curious, then, to find a contrary pattern in one central legal phenomenon, indeed one that lies at the very heart of our image of our system—trials. The number of trials has not increased in proportion to these other measures. In some, perhaps most, forums, the absolute number of trials has undergone a sharp decline. A sense of the change can be gathered from Table 1, which charts the number of civil trials[2] in the federal courts by nature of suit at 10-year intervals from 1962 to 2002.[3]

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[1]Marc Galanter, Law Abounding: Legalisation Around the North Atlantic, 55 Mod. L. Rev. 1 (1992).

[2]The Administrative Office counts as a trial "a contested proceeding before a jury or court at which evidence is introduced" (AO, Form JS-10). The definition of trial varies in the state courts (see Table A-25 in the Appendix). In sorting out terminations, the AO's record-keeping category is cases terminated "during or after trial" so the number of trials counted includes cases that settle during trial. We use 1962 as our starting point because due to changes in record keeping then, it is the first year that is readily comparable to present-day figures.

[3]All federal figures are for fiscal years. Until 1992, the reporting period, or statistical year, ran from July through June (e.g., statistical year 1990 covered the period July 1, 1989 through June 30, 1990). In 1992, the Administrative Office of the U.S. Courts changed the court's statistical reporting period to conform to the federal government's standard fiscal year, October through September. So, for example, fiscal year 1993 covered the period October 1, 1992 through September 30, 1993. The 1992 data cover a 15-month time span (July 1991 through September 1992) to accommodate the conversion period (available at <http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/08429.xml>). The Administrative Office figures for 2003, which became available after the preparation of this article, do not mark any significant change in the trends reported here. The total number of civil trials in 2003 was 4,206, 8 percent fewer than in 2002.

As illustrated by Table 1, dispositions have increased by a factor of five—from 50,000 to 258,000 cases. But the number of civil trials in 2002 was more than 20 percent lower than the number in 1962—some 4,569 now to 5,802 then. So the portion of dispositions that were by trial was less than one-sixth of what it was in 1962—1.8 percent now as opposed to 11.5 percent in 1962.[4]

The drop in civil trials has not been constant over the 40-year period; it has been recent and steep. As Figure 1 shows, in the early part of our period, there was an increase in trials, peaking in 1985, when there were 12,529.[5] From then to now, the number of trials in federal court has dropped by more than 60 percent and the portion of cases disposed of by trial has fallen from 4.7 percent to 1.8 percent.

The Administrative Office's Table C-4, from which these figures are derived, is not a count of completed trials but of cases that arrive at the trial stage. A substantial portion of the cases that reach the trial stage terminate before the trial is completed (see Figure 3). In 1988, some 24 percent of all cases reaching trial were disposed of "during" trial—28 percent of jury trials and 19 percent of bench trials. By 2002, when the number of cases reaching the trial stage had fallen by 60 percent, the percentage disposed of "during" trial dropped to 18 percent, with little difference between jury and bench trials. As fewer cases managed to survive until the trial stage, those that began a jury trial were more resistant to being deflected from pursuing the trial through to its conclusion.

For purposes of Table C-4, a trial is defined as "a contested proceeding at which evidence is introduced." This includes classical trials, leading to judgment, but it also includes other proceedings, such as a hearing to determine the appropriateness of a temporary restraining order. The numbers derived from Table C-4 do not provide an exact count of classic trials, or of classic trials plus early "evidentiary" trials, or of terminations by judgment after trial, or of the number of trials conducted by district judges. But by telling us the number of cases in which a trial event commenced, they provide a useful indicator of the amount of trial activity as it changes from year to year and topic to topic.[6]

The decline in the rate of civil trials in the post-World War II federal courts continues and accentuates a long historic trend away from trial as the mode of

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[4]These figures are based on Table C-4 of the annual reports of the Administrative Office of the U.S. Courts, which counts cases that terminated "During and After Trial." Since some cases settle after trial has commenced, these figures overstate the number of completed trials. The degree of overstatement depends on the portion of commenced trials that end before judgment, due to settlement or other cause.

[5]Tables with the data underlying figures in the text are collected in the Appendix.

[6]Gillian Hadfield's Table 1 comparison of the C-4 table with several other counts of trials confirms that it is a plausible if inexact indicator of both the magnitude and year-to-year trends in trial activity. Gillian Hadfield, Where Have All the Trials Gone? Settlements, Nontrial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases, 1 J. Empirical Legal Stud. 705, 713 (2004).

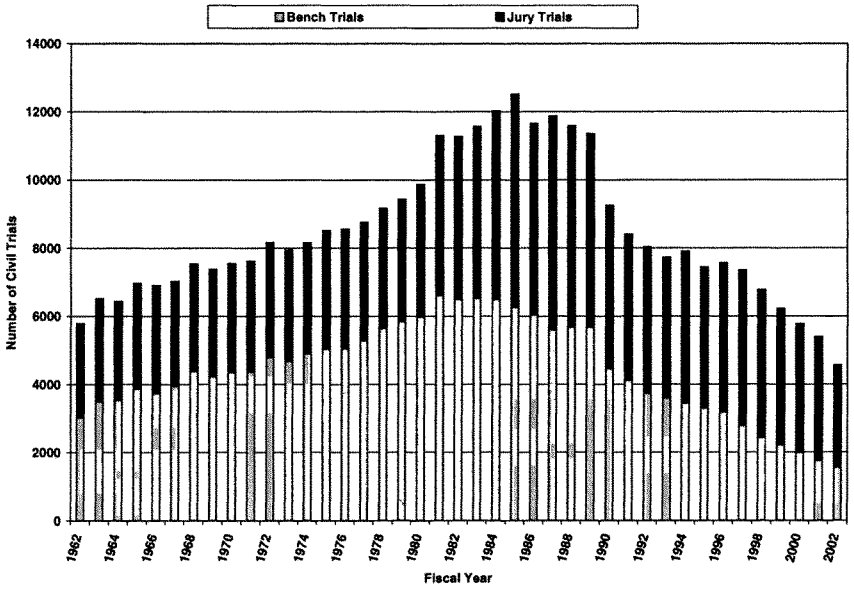
Table 1: Civil Trials in U.S. District Courts at 10-Year Intervals, 1962–2002

	Dispositions	*Jury Trials*	*Bench Trials*	*All Trials*	*Trials as % of Dispositions*	*Jury Trials as % of Dispositions*	*Bench Trials as % of Dispositions*	*Case Type as % of All Trials*	*Case Type as % All Jury Trials*	*Case Type as % of All Bench Trials*	*Jury Trials as % of All Trials*
1962											
Civil	50,320	2,765	3,037	5,802	11.5%	5.5%	6.0%	100.0%	100.0%	100.0%	47.7%
Torts	19,254	2,238	946	3,184	16.5%	11.6%	4.9%	54.9%	80.9%	31.1%	70.3%
Torts, diversity	12,353	1,834	342	2,176	17.6%	14.8%	2.8%	37.5%	66.3%	11.3%	84.3%
Contracts	14,981	303	818	1,121	7.5%	2.0%	5.5%	19.3%	11.0%	26.9%	27.0%
Contracts, diversity	4,529	279	474	753	16.6%	6.2%	10.5%	13.0%	10.1%	15.6%	37.1%
Prisoner	3,118	0	96	96	3.1%	0.0%	3.1%	1.7%	0.0%	3.2%	0.0%
Civil rights	317	11	42	53	16.7%	3.5%	13.2%	0.9%	0.4%	1.4%	20.8%
Labor	2,479	31	199	230	9.3%	1.3%	8.0%	4.0%	1.1%	6.6%	13.5%
I.P.	1,595	6	163	169	10.6%	0.4%	10.2%	2.9%	0.2%	5.4%	3.6%
1972											
Civil	90,177	3,361	4,807	8,168	9.1%	3.7%	5.3%	100.0%	100.0%	100.0%	41.1%
Torts	25,952	2,451	1,114	3,565	13.7%	9.4%	4.3%	43.6%	72.9%	23.2%	68.8%
Torts, diversity	15,232	1,997	409	2,406	15.8%	13.1%	2.7%	29.5%	59.4%	8.5%	83.0%
Contracts	18,200	507	1,203	1,710	9.4%	2.8%	6.6%	20.9%	15.1%	25.0%	29.6%
Contracts, diversity	9,361	480	821	1,301	13.9%	5.1%	8.8%	15.9%	14.3%	17.1%	36.9%
Prisoner	15,802	27	431	458	2.9%	0.2%	2.7%	5.6%	0.8%	9.0%	5.9%
Civil rights	5,023	116	651	767	15.3%	2.3%	13.0%	9.4%	3.5%	13.5%	15.1%
Labor	4,936	25	353	378	7.7%	0.5%	7.2%	4.6%	0.7%	7.3%	6.6%
I.P.	2,223	10	183	193	8.7%	0.4%	8.2%	2.4%	0.3%	3.8%	5.2%
1982											
Civil	184,835	4,771	6,509	11,280	6.1%	2.6%	3.5%	100.0%	100.0%	100.0%	42.3%
Torts	30,630	2,439	1,050	3,489	11.4%	8.0%	3.4%	30.9%	51.1%	16.1%	69.9%

Torts, diversity	19,085	1,913	391	2,304	12.1%	10.0%	2.0%	20.4%	40.1%	6.0%	83.0%
Contracts	59,977	890	1,492	2,382	4.0%	1.5%	2.5%	21.1%	18.7%	22.9%	37.4%
Contracts, diversity	22,457	856	1,112	1,968	8.8%	3.8%	5.0%	17.4%	17.9%	17.1%	43.5%
Prisoner	25,864	180	716	896	3.5%	0.7%	2.8%	7.9%	3.8%	11.0%	20.1%
Civil rights	14,821	707	1,456	2,163	14.6%	4.8%	9.8%	19.2%	14.8%	22.4%	32.7%
Labor	9,836	126	481	607	6.2%	1.3%	4.9%	5.4%	2.6%	7.4%	20.8%
I.P.	4,305	58	214	272	6.3%	1.3%	5.0%	2.4%	1.2%	3.3%	21.3%
1992											
Civil	230,171	4,279	3,750	8,029	3.5%	1.9%	1.6%	100.0%	100.0%	100.0%	53.3%
Torts	44,754	1,799	657	2,456	5.5%	4.0%	1.5%	30.6%	42.0%	17.5%	73.2%
Torts, diversity	32,279	1,422	257	1,679	5.2%	4.4%	0.8%	20.9%	44.7%	10.4%	84.7%
Contracts	52,006	745	768	1,513	2.9%	1.4%	1.5%	18.8%	17.4%	20.5%	49.2%
Contracts, diversity	22,746	679	564	1243	5.5%	3.0%	2.5%	15.5%	15.9%	15.0%	54.6%
Prisoner	44,247	359	696	1,055	2.4%	0.8%	1.6%	13.1%	8.4%	18.6%	34.0%
Civil rights	21,136	889	772	1,661	7.9%	4.2%	3.7%	20.7%	20.8%	20.6%	53.5%
Labor	15,557	82	252	334	2.1%	0.5%	1.6%	4.2%	1.9%	6.7%	24.6%
I.P.	5,491	84	96	180	3.3%	1.5%	1.7%	2.2%	2.0%	2.6%	46.7%
2002											
Civil	258,876	3,006	1,563	4,569	1.8%	1.2%	0.6%	100.0%	100.0%	100.0%	65.8%
Torts	49,588	782	289	1,071	2.2%	1.6%	0.6%	23.4%	26.0%	18.5%	73.0%
Torts, diversity	27,563	639	85	724	2.6%	2.3%	0.3%	15.8%	21.3%	5.4%	88.3%
Contracts	38,085	371	338	709	1.9%	1.0%	0.9%	15.5%	12.3%	21.6%	52.3%
Contracts, diversity	22,285	342	251	593	2.7%	1.5%	1.1%	13.0%	11.4%	16.1%	57.7%
Prisoner	56,693	292	199	491	0.9%	0.5%	0.4%	10.7%	9.7%	12.7%	59.5%
Civil rights	40,881	1,234	290	1,524	3.7%	3.0%	0.7%	33.4%	41.1%	18.6%	81.0%
Labor	15,864	69	121	190	1.2%	0.4%	0.8%	4.2%	2.3%	7.7%	36.3%
I.P.	7,872	120	65	185	2.4%	1.5%	0.8%	4.0%	4.0%	4.2%	64.9%

SOURCE: Annual Reports of the Administrative Office of the U.S. Courts, Table C-4.

Figure 1: Number of civil trials, U.S. district courts, by bench or jury, 1962–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2002).

disposing of civil cases. In 1938, the year that the Federal Rules of Civil Procedure took effect, 18.9 percent of terminations were by trial.[7] In his study of litigation in the St. Louis Circuit Court from 1820 to 1970, Wayne McIntosh observes:

> During the first 100 years of the study period, the percentage of cases culminating in a contested hearing or trial remained fairly steady (around 25 to 30 percent). After 1925, though, the average skirted downward into the 15 percent range. [Figures] . . . reveal that the shift from adjudication to bargaining is . . . wholesale and not restricted to any one issue.[8]

In a study of trial courts in two California counties at 20-year intervals from 1890 to 1970, Lawrence Friedman and Robert Percival found that trials in Alameda County dropped from 36 percent of the sampled civil cases in 1890 to 16.1 percent in 1970;

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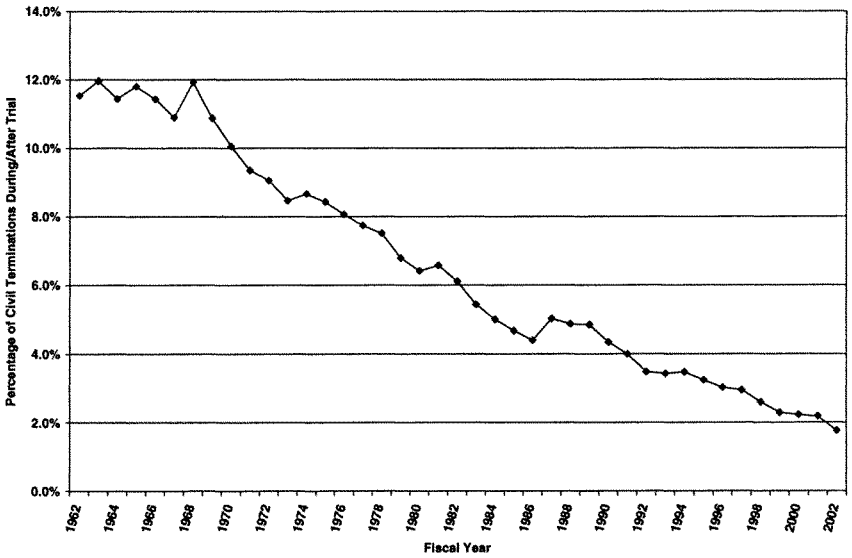
[7]Steven C. Yeazell, The Misunderstood Consequences of Modern Civil Process, 1994 Wis. L. Rev. 631, 633 n.3 (1994).

[8]Wayne McIntosh, The Appeal of Civil Law: A Political-Economic Analysis of Litigation 124, 126–28 (1990).

Figure 2: Percentage of civil terminations during/after trial, U.S. district courts, 1962–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2002).

and in rural San Benito County from 25.8 percent in 1890 to 10.7 percent in 1970.[9] In their study of civil litigation in Los Angeles Superior Court, Molly Selvin and Patricia Ebener compared samples of cases from the era before World War II (1915–1940) and the postwar era (1950–1979).

> We . . . observed changes in the method by which cases are terminated. More cases were disposed of by the court in the earlier sample than later, and 16 percent of these cases were tried. In the cases filed since 1950 more settled or were dismissed by the plaintiff. Fewer had court dispositions and very few were tried.[10]

A. Bench Trials and Jury Trials

In the course of the rise and then fall in the number of federal civil trials, the makeup of these trials changed. More of them are before juries and fewer are bench trials

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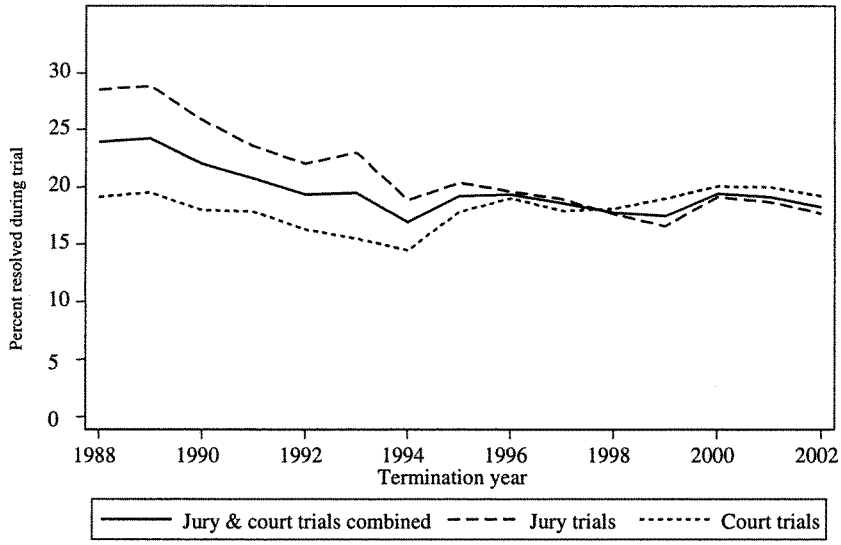
[9]Lawrence M. Friedman & Robert V. Percival, A Tale of Two Courts: Litigation in Alameda and San Benito Counties, 10 Law & Soc'y Rev. 267 (1975).

[10]Molly Selvin & Patricia A. Ebener, Managing the Unmanageable: A History of Civil Delay in the Los Angeles Superior Court 49, 50 fig. 2.13 (1984).

Figure 3: Percentage of civil cases reaching trial resolved during trial, U.S. district courts, 1988–2002.



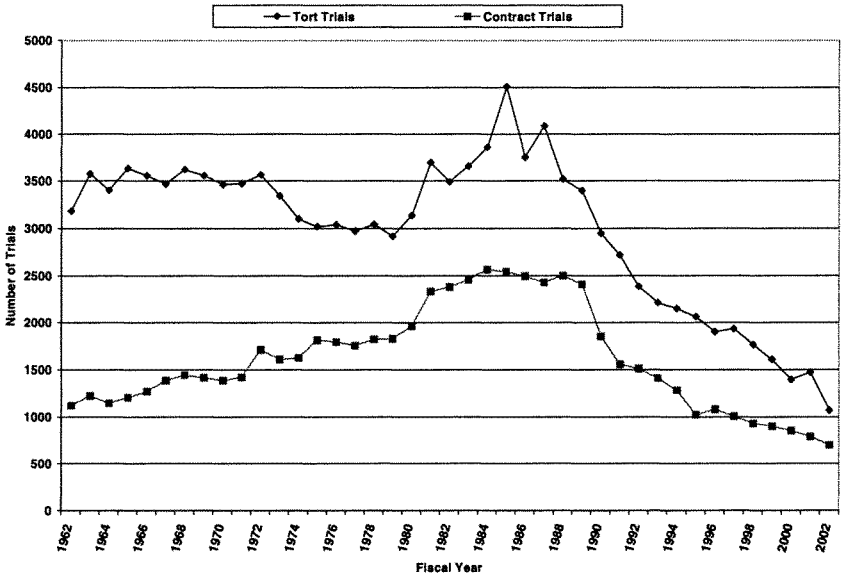
SOURCE: Federal Judicial Center.

(see Figure 1). In 1962, there was a slight preponderance of bench trials, which grew until the early 1980s. Starting in 1990, the number of bench trials fell sharply, so that by 2002, jury trials made up almost two-thirds (65.8 percent) of all civil trials. Indeed, measuring against 1962, the number of bench trials has fallen by 49 percent from 3,037 to 1,563, while the number of jury trials has increased by 8.7 percent from 2,765 to 3,006. Jury trials fell precipitously in 2002 (by 17 percent from the 3,632 in 2001), nearing their 1962 level. In 2003, jury trials numbered 2,603, 5.9 percent below the 1962 total.

B. Torts Trials

Back in 1962, most federal civil trials involved torts: tort cases were 55 percent of all trials and 81 percent of all jury trials (see Table 1). By 2002, torts had dropped to just 23.4 percent of all trials and to 26 percent of jury trials. Where once 1 in 6 (16.5 percent) tort cases went to trial, this has dropped steadily so that now only 1 in 46 (2.2 percent) do. In part this reflects the arrival of mass settlements, for example, in Agent Orange, asbestos, breast implants (see discussion in Section IV). But since the drop in trial rates has been steady and prolonged, antedating the era of mass tort

Figure 4: Tort and contract trials, U.S. district courts, 1962–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2002).

settlements,[11] and since a comparable decrease appears in other kinds of cases as well, it presumably reflects other factors in addition to mass settlements.

C. Contracts Trials

Apart from torts, the largest set of trials in 1962 was in contracts—almost one-fifth (19.3 percent) of all trials, almost three-quarters of them bench trials (see Table 1). In 2002, contracts accounted for 15.3 percent of all trials, but now there are slightly more jury trials (53.0 percent) than bench trials. However, our beginning and end points hardly tell the story of contracts. There was a great surge of contract litigation starting in the 1970s, so that in the 1980s there were more contract than tort cases filed in the federal courts.[12] Although the percentage of contract cases terminated by trial fell, the number of contract trials increased from 1,121 in 1962 to 1,962 in

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[11]The timing of the onset of mass tort litigation is displayed in Table A-3 in the Appendix.

[12]Marc Galanter, Contract in Court, or Almost Everything You May or May Not Want to Know About Contract Litigation, 2001 Wis. L. Rev. 577 (2001).

1980, and peaked at 2,562 in 1984. However, contract trials fell precipitously during the 1990s to 700 in 2002—less than a third of the number of trials through the 1980s. There is no ground for suspicion that this reflects mass settlements. Something else is pushing these trial numbers down.

D. Civil Rights Trials

As contract and tort trials fell from comprising 74 percent of all trials in 1962 to 38 percent in 2002, what replaced them? Largely, it was civil rights: in 1962, there were only 317 civil rights dispositions; in 2002, there were 40,881. In 1962, civil rights accounted for less than 1 percent of all civil trials; in 2002, they were just over a third of all trials (1,543 of 4,569) and 41 percent of jury trials (1,234 of 3,006). This is particularly remarkable in light of the required diversion of many civil rights cases through the Equal Employment Opportunities Commission[13] and the readiness of courts to grant summary judgment in such cases.[14] For 30 years, even as the portion of cases tried has fallen, civil rights has remained the type of case most likely to reach trial: trials were 19.7 percent of all civil rights dispositions in 1970 and 3.8 percent in 2002.[15]

E. Prisoner Petitions

The other large new batch of trials is prisoner petitions. The prison population multiplied six times from 1962 (218,830) to 2001 (1,324,465). Together with the jail population of 631,240, there were almost 2 million total inmates in 2001.

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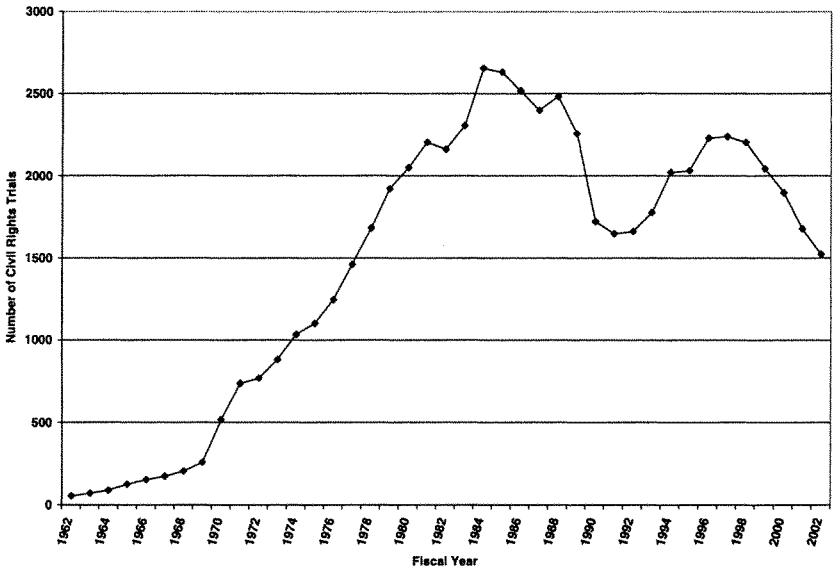
[13]Claimants with grievances under Title VII of the Civil Rights Act of 1964 or under the Americans with Disabilities Act must first submit them to the Equal Employment Opportunities Commission (EEOC). See 42 U.S.C. § 2000e-5 and 42 U.S.C. § 12117; see also 29 C.F.R. § 1601.6. Generally speaking, the EEOC then has a fixed time limit—usually 180 days—in which to investigate the claim, only after which may the claimant request a "notice of right to sue" enabling the party to commence a civil suit in federal or state court. 29 C.F.R. § 1601.28. If the EEOC determines that there are reasonable grounds to support the claim, then the EEOC may begin a conciliation process. If the EEOC is unsuccessful in securing a conciliation agreement, then the EEOC (or the Attorney General if a government respondent) may file a civil suit against the respondent in the complaint. 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.27. If the EEOC dismisses the charge, then the EEOC shall issue a notice of right to sue to the claimant. 29 C.F.R. §§ 1601.18 and 1601.28(3). Any inaction by the EEOC does not prevent de novo consideration of the claim in federal or state court. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798–99 (1973).

[14]An exploratory study of summary judgment activity in district courts at five-year intervals from 1975 to 2000 found notably higher rates in civil rights cases. Joe S. Cecil, Dean P. Miletech & George Cort, Federal Judicial Center, Trends in Summary Judgment Practice: A Preliminary Analysis 5 (2001).

[15]This seems to reflect the greater emotional intensity of civil rights disputes. A generation ago, Leon Mayhew reported that among respondents to a Detroit-area survey reporting serious problems, only a tiny proportion sought justice or legal vindication except for discrimination problems. Only 5 percent of respondents with serious problems connected with expensive purchases sought justice, as did 2 percent of those with neighborhood problems. However, 31 percent of those reporting discrimination problems sought justice. Leon Mayhew, Institutions of Representation, 9 Law & Soc'y Rev. 401, 413 (1975). Such disputes may entail assertions that discredit the identity of defendants, as well as plaintiffs.

Figure 5: Civil rights trials, U.S. district courts, 1962–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2002).

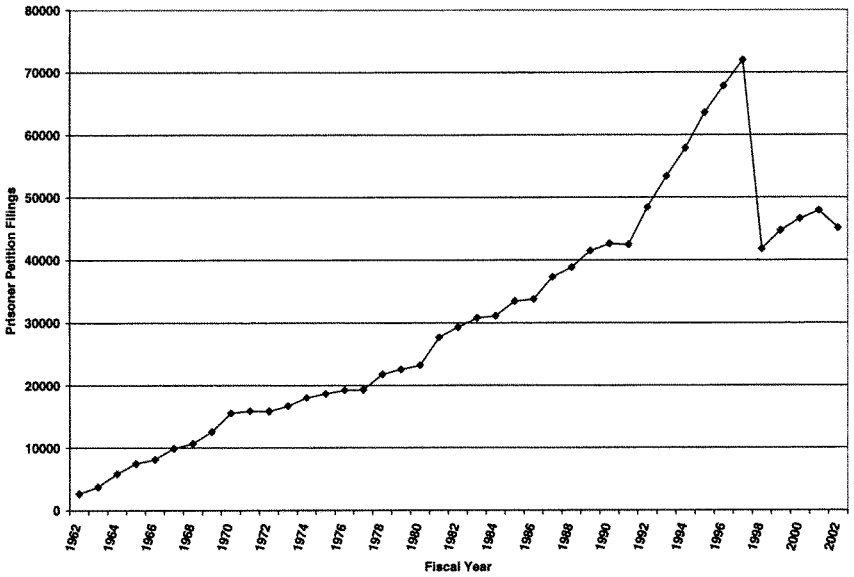
These numerous prisoners share with other Americans an increase in rights consciousness. America's love affair with imprisonment has multiplied this class of claimants, who have vexing grievances, unlimited time, few competing recreations, and very low opportunity costs (but very few resources for litigation).

The rate of prisoner petitions rose rapidly during the 1960s from 12 per 1,000 prisoners in 1962 to over 80 per 1,000 in the early 1970s (these figures are higher than Schlanger's (see Table 2) because they include habeas corpus as well as civil rights filings). But these petitions, unpopular with judges and politicians, have not kept pace with the growth of the prison population. The rate has been falling for 30 years to about 44 per 1,000 in 2001. In that time, there was a sharp decline in habeas corpus petitions from over 66 percent of the total in 1970 to 43 percent in 2002. Civil rights claims replaced habeas corpus as the largest category of prisoner cases in 1978 until such claims were curtailed by the Prison Litigation Reform Act of 1995 (PLRA).

The PLRA[16] was enacted to decrease the amount of prisoner litigation in the federal courts. Although it did not change much of the substantive law underlying

[16]Codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3636; 28 U.S.C. §§ 1346, 1915A, 1932; 42 U.S.C. §§ 1997–1997(h).

Figure 6: Prisoner petitions filed, U.S. district courts, 1962–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-2 (1962–2002).

prisoner claims, the PLRA changed both the procedures and remedies available to prisoners in federal courts.[17] The PLRA accomplishes this through three chief measures: (1) by requiring that inmates exhaust all available administrative grievance procedures before filing a claim in district court;[18] (2) by imposing filing fees and court costs on inmates, regardless of indigency;[19] and (3) by requiring that district courts review prisoner complaints before docketing, or as soon as practicable thereafter, and dismiss them if they "fail to state a claim upon which relief may be granted; or . . . seek monetary relief from a defendant who is immune from such relief."[20] The increased exhaustion and screening requirements are the strongest explanations for

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[17]Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1627 (2003) (noting that because most inmate claims are premised on constitutional law, Congress is unable to change substantive rules of decision).

[18]42 U.S.C. § 1997e(a). See also Schlanger, supra note 17, at 1649–54 (describing how exhaustion requirement deprives courts of ability to correct conduct when plaintiffs fail to exhaust administrative remedies).

[19]28 U.S.C. § 1915(b)(1)–(2) (describing filing fees); 28 U.S.C. § 1915(f)(2)(A) (imposing court costs).

[20]42 U.S.C. § 1997e(c)(1). The court may order dismissal "on its own motion or on the motion of a party."

Table 2: Inmate Population and Civil Rights Filings, U.S. District Courts, 1970–2001

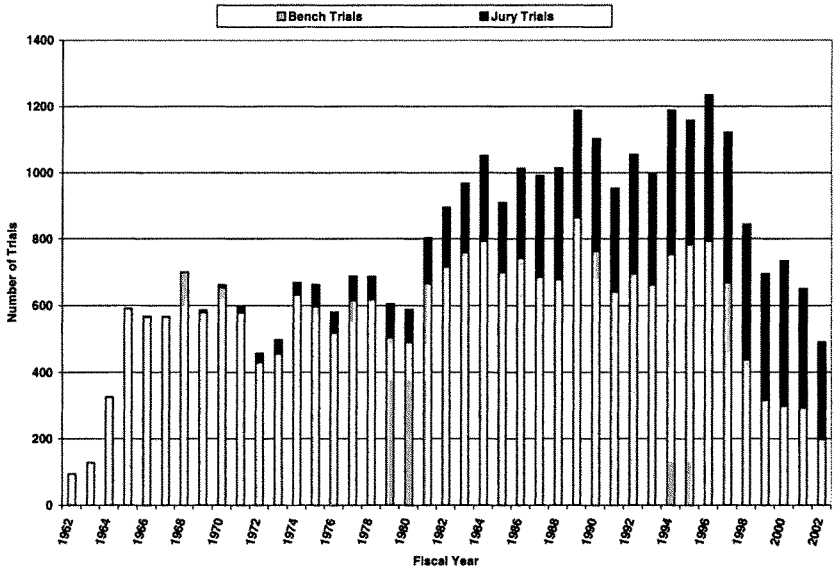
	Incarcerated Population (All Figures Are for People in Custody)				*Inmate Civil Rights Filing in Federal District Court*			
Fiscal Year of Filing	*Total*	*State Prison, Year End*	*Federal Prison, Year End*	*Jail, Mid-Year*	*Total*	*Nonfederal Defendants*	*Federal Defendants*	*Filings Per 1,000 Inmates (Estimates)*
1970	357,292	176,391	20,038	160,863	2,267	2,106	161	6.3
1971		177,113	20,948		3,163	2,949	214	(8.8)
1972		174,379	21,713		3,620	3,373	247	(10.2)
1973		181,396	22,815		4,646	4,233	413	(12.8)
1974		196,105	22,361		5,559	5,156	403	(14.7)
1975		229,685	24,131		6,523	6,004	519	(15.8)
1976		248,883	29,117		7,076	6,661	415	(16.2)
1977		258,643	30,920		8,335	7,810	525	(18.5)
1978	454,444	269,765	26,285	158,394	10,068	9,473	595	22.2
1979		281,233	23,356		11,681	11,094	587	(24.6)
1980	503,586	295,819	23,779	183,988	13,047	12,439	608	25.9
1981	556,814	333,251	26,778	196,785	16,302	15,483	819	29.3
1982	612,496	375,603	27,311	209,582	16,793	16,019	774	27.4
1983	647,449	394,953	28,945	223,551	17,485	16,719	766	27.0
1984	683,057	417,389	30,875	234,500	18,300	17,377	923	26.8
1985	744,208	451,812	35,781	256,615	18,445	17,560	885	24.8
1986	800,880	486,655	39,781	274,444	20,324	19,506	818	25.4
1987	858,687	520,336	42,478	295,873	22,005	21,231	774	25.6
1988	950,379	562,605	44,205	343,569	22,582	21,661	921	23.8
1989	1,078,935	629,995	53,387	395,553	23,647	22,580	1,067	21.9
1990	1,148,702	684,544	58,838	405,320	24,004	22,814	1,190	20.9
1991	1,219,014	728,605	63,930	426,479	24,331	23,355	976	20.0
1992	1,295,150	778,495	72,071	444,584	28,530	27,501	1,029	22.0
1993	1,369,185	828,566	80,815	459,804	31,679	30,614	1,065	23.1
1994	1,476,621	904,647	85,500	486,474	36,551	35,153	1,398	24.8
1995	1,585,586	989,004	89,538	507,044	39,008	37,649	1,359	24.6
1996	1,646,256	1,032,676	95,088	518,492	38,223	36,770	1,453	23.2
1997	1,743,643	1,074,809	101,755	567,079	26,132	25,002	1,130	15.0
1998	1,816,931	1,113,676	110,793	592,462	24,345	23,185	1,160	13.4
1999	1,893,115	1,161,490	125,682	605,943	23,705	22,566	1,139	12.5
2000	1,931,339	1,176,269	133,921	621,149	23,598	22,412	1,186	12.2
2001	1,955,705	1,181,128	143,337	631,240	22,206	20,973	1,233	11.4

SOURCE: Margo Schlanger, Inmate Litigation, 116 Harvard L. Rev., 1555, 1583 (2002).

the decrease in prisoner trials because both mechanisms serve to eliminate complaints before they reach the trial stage. The PLRA also imposes limits on damages and attorney fees, and allows for nonresponse by defendants without fear of admitting to the allegations.[21] Moreover, at the same time Congress passed the PLRA, it

[21]42 U.S.C. § 1997e(e) (no claims "for mental or emotional injury . . . without a prior showing of physical injury"); 42 U.S.C. § 1997e(d) (limits on attorney fees); 42 U.S.C. § 1997e(g) (waiver of reply).

Figure 7: Prisoner petition trials, U.S. district courts, by bench or jury, 1962–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2002).

imposed new restrictions on offices receiving federal legal funding, prohibiting them from representing inmates.[22]

The result is that the PLRA suppressed trials even more than it suppressed filings. Margo Schlanger estimates that from the mid-1990s until 2001, "[f]ilings are down about forty percent—but trials are down fifty percent."[23] The great surge of prisoner filings had driven the number of trials from 96 in 1962 to over 1,000 in 1984, peaking at 1,235 in 1996, and falling to 491 in 2002. The trials in 1962 were all bench trials. Prior to 1970, only a handful of prisoner trials were before juries, but the portion of jury trials grew, surpassing the number of bench trials in every year since 1999. In 2002, 59 percent of prisoner trials were before juries.

The rate of trials is low: at its peak in 1970, 4.5 percent of prisoner petition terminations were by trial; just 1 percent were by trial in 2002. From a mere 1.7 percent of trials in 1962, prisoner petitions made up one-sixth (16.3 percent) of all

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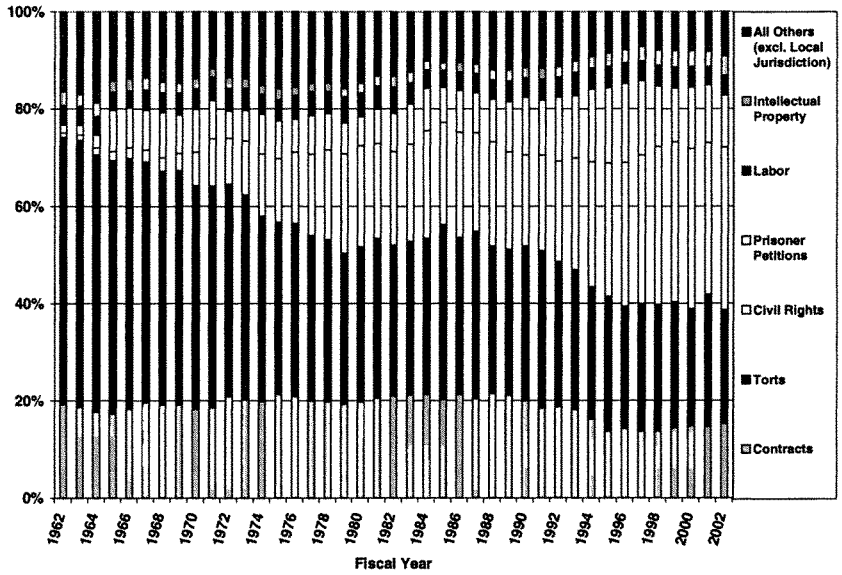
[22]See Schlanger, supra note 17, at 1632.

[23]Id. at 1643.

Figure 8: Case type as portion of civil trials, U.S. district courts, 1962–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2002).

trials and almost a quarter (24.7 percent) of all bench trials at their high point in 1996. Even after their suppression by the PLRA, they form 12.7 percent of trials: one out of every eight bench trials and almost one out of ten jury trials. The continued prominence of prisoner cases as a portion of trials reflects not only the growth in prison populations but also the greater decline in the rate of trials of other types of cases.

F. Trials in Other Kinds of Cases

Table 1 also includes two other composite categories each with a substantial number of trials: labor cases and intellectual property cases. As you can see, the same overall trends apply to them: a rise and then a recent fall in the number of trials; an ever-decreasing percentage of dispositions by trial; and a shift from a small to a substantial portion of jury trials. Of course, there are trials in other topics as well; they are shrinking even faster than these large categories. "Other" trials made up about 16 percent of total trials in 1962 and only 9 percent in 2002. Figure 8 sums up the changing subject-matter distribution of trials over the years.

G. Trials Before Magistrates

Could the apparent decline in trials reflect a shift in who is conducting the trials? The federal courts are also staffed by magistrate judges, who since 1979 are empowered to try cases if the parties consent to trial before the magistrate. The current system of magistrate judges was created by the Federal Magistrates Act of 1968.[24] It replaced the office of U.S. commissioner and conferred on magistrates three basic categories of judicial responsibility: (1) all the powers and duties formerly exercised by the U.S. commissioners;[25] (2) the trial and disposition of "minor" (i.e., misdemeanor) criminal offenses; and (3) "additional duties," including pretrial and discovery proceedings in civil and criminal cases, preliminary review of habeas corpus petitions, and services as a special master.[26] In 1976, Congress increased the scope of magistrate authority, further conferring on magistrates the ability to hear and determine any pretrial matters in civil or criminal cases (with eight listed exceptions).[27] In 1979, Congress authorized magistrates to try and enter final judgment in any civil case with the consent of the parties, and expanded trial jurisdiction to extend to all federal misdemeanors.[28] Amendments in 1996 clarified that review of final orders of a magistrate judge were limited to the courts of appeal, and further amendments in 2000 enlarged the class of criminal cases that magistrates could enter judgment on and granted magistrates civil and criminal contempt authority.[29]

The number of civil cases terminated by magistrate judges multiplied by five from some 2,452 in 1982 to 12,710 in 2002. The number of trials before magistrates rose from 570 in 1979 (the first year for which data is available) to 1,919 in 1996, but then fell steadily to 959 in 2002. (The fall continued in 2003, during which there were 867 magistrate trials.)

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[24]Codified at 28 U.S.C. §§ 604, 631–639 and 18 U.S.C. 3060, 3401–3402 (2003). The magistrate system was finally implemented nationwide in July 1971. At its inception, it consisted of 82 full-time magistrates, 449 part-time magistrates, and 11 combination bankruptcy/magistrates and clerks/magistrates. Peter G. McCabe, The Federal Magistrate Act of 1979, 16 Harv. J. on Legis. 343, 350–51 (1979). In 2002, there were 470 full-time magistrates, 59 part-time magistrates, and 3 "combination" magistrates. Administrative Office of the U.S. Courts, Annual Report of the Director 12 (2002).

[25]28 U.S.C. § 636(a)(1). For a brief history of commissioners, see Judicial Conference of the U.S., The Federal Magistrate System: Report of Congress by the Judicial Conference of the United States 1–2 (1981).

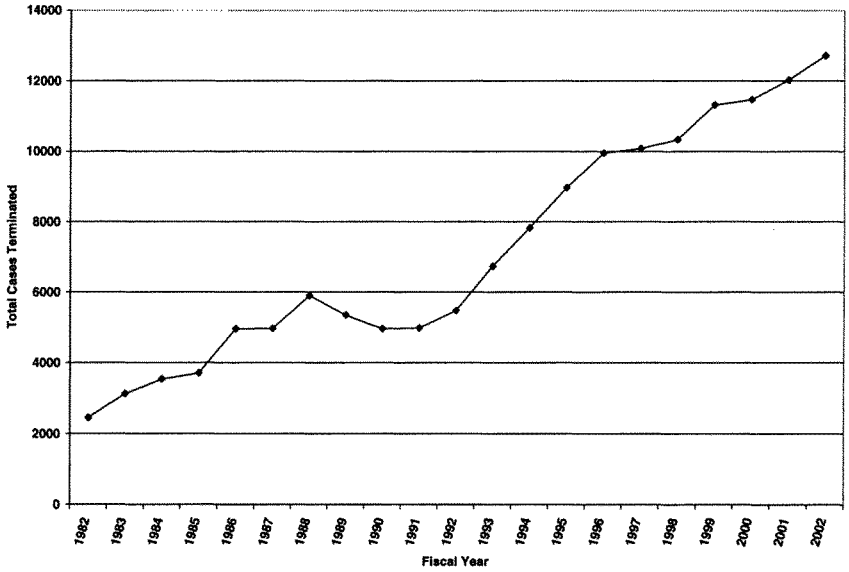
[26]28 U.S.C. § 636(b)(1).

[27]Pub. L. No. 94–577, 90 Stat. 2729 (1976) (codified at 28 U.S.C. § 636(b)). See also McCabe, supra note 24, at 351–55; Philip M. Pro & Thomas C. Hnatowski, Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System, 44 Am. U. L. Rev. 1503, 1505–07 (1995).

[28]Pub. L. No. 96–82, 93 Stat. 643 (1979) (codified at 18 U.S.C. § 3401 and 28 U.S.C. §§ 631, 636).

[29]Pub. L. No. 104–317, § 207, 110 Stat. 3847 (1996) (codified at 28 U.S.C. § 636) and Pub. L. No. 106–518, §§ 202, 203(b), 114 Stat. 2410 (2000) (codified at 28 U.S.C. §§ 636(a), (e)).

Figure 9: Total civil consent cases terminated by magistrate judges, U.S. district courts, 1982–2002.

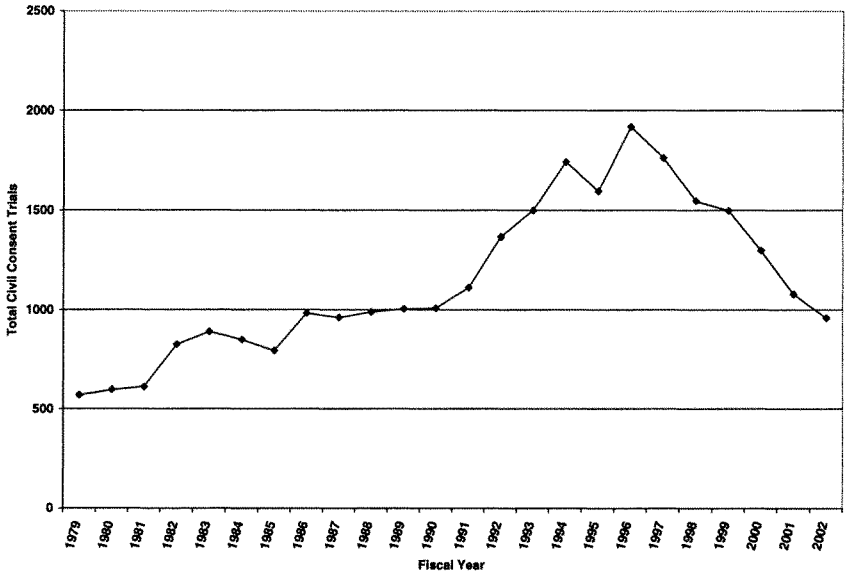


SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table M-5 (1982–2002).

The percentage of magistrate dispositions by trial has fallen. In 1982, the first year for which a computation is possible, one-third (33.6 percent) of all magistrate civil dispositions were by trial. But as the number of dispositions by magistrates increased, the portion tried has fallen, so that in 2002 only 7.5 percent were by trial.

Are these magistrate trials included in the number of trials listed in the AO's Table C-4, which sorts all the cases terminated in a given year by the procedural stage reached? In 2002, there were 4,569 civil cases terminated "during or after trial." From the AO's Table M-5 we learn that magistrates conducted some 959 civil trials during that year. Does this mean that (1) there were actually a total of 5,528 civil trials? Or does it mean (2) that more than a fifth of the 4,569 trials listed in Table C-4 were conducted by magistrates and the remainder by district judges? Actually, neither of these alternatives is accurate. The 4,569 trials listed in Table C-4 include the cases in which the trial was conducted by a magistrate, so (1) is false. Alternative (2) gives a rough idea of the amount of trial activity, but should not be taken literally. Recall that Table C-4 is a count of all terminated cases in which a trial occurred and that a

Figure 10: Total civil consent trials before magistrate judges, U.S. district courts, 1979–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table M-5 (1979–2002).

trial is defined as "a contested proceeding at which evidence is introduced." As noted above, this broad definition includes not only the classic trial leading to judgment, but other evidentiary hearings as well. A case counted as a trial in Table C-4 does not necessarily eventuate in a verdict or judgment. It may have settled during or after an early contested evidentiary hearing. Or it may have settled during or after a classic trial. Or a case may have more than one trial—for example, an early "trial" hearing and a classic trial. Table C-4 does not give us a count of trials, but rather a count of cases in which a trial has occurred (or at least begun). That trial may be before a district judge or before a magistrate. In cases where there is more than one trial event, it is possibly that one "trial" is before a magistrate and one is before a district judge.

Unfortunately, the magistrate disposition and trial data do not tell us about the types of cases (nature of suit) in which these dispositions and trials occur. Thus, we cannot specify the composition of magistrate trials and we do not know if this composition has changed over time and whether it parallels or complements the composition of trials before judges.

II. The Changing Character of Trials: Time and Complexity

As we busy ourselves counting trials, we should not overlook the possibility that what constitutes a trial may have changed over the years. Lawrence Friedman reminds us that in earlier eras trials were often brief and perfunctory.[30] The elaboration of procedure, the enlargement of evidentiary possibilities, and the increased participation of lawyers have made the trial more complex and refined than its remote ancestors. It is widely believed that within the period covered here, the cases that are tried have become more complex and consume larger investments of resources. Unfortunately, we do not have longitudinal data from the federal courts on such features as the amount of discovery, number of motions, number of lawyers, number of objections, number of witnesses, and so forth. Studies of other courts suggest that complexity, investment, and length of trial are connected. In their study of Los Angeles Superior Court, Selvin and Ebener note that from their earlier (1915–1949) to their later (1950–1979) period, the number of events in filed cases increased[31] as did the portion of cases with discovery[32] and that the length of trials "dramatically increased." "In the earlier sample of civil filings, 60 percent of the trials lasted no longer than one day. Since 1950, only 20 percent of all trials took one day or less."[33]

A Canadian study also suggests a connection between case complexity and the decline of trials. In Toronto from 1973 to 1994, the number of trials fell (both absolutely and as a portion of dispositions) while the number of plaintiffs per case, the number of motions per case, the number of defenses, and the length of time consumed by cases all increased.[34] As an overall indicator of complexity, the researchers measured the average physical bulk of the court files produced in cases commenced in every fifth year of their study. There were some 106 files per storage box of cases commenced in 1973–1974, but only 24 cases per (equally tightly-packed) box of cases commenced in 1988–1989.[35]

Few measures of complexity are available for cases in federal courts. There is data on the length of trials in federal courts. A larger portion of trials take longer

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[30]Lawrence Friedman, The Day Before Trials Vanished, 1 J. Empirical Legal Stud. 689 (2004).

[31]Selvin & Ebener, supra note 10, at 46.

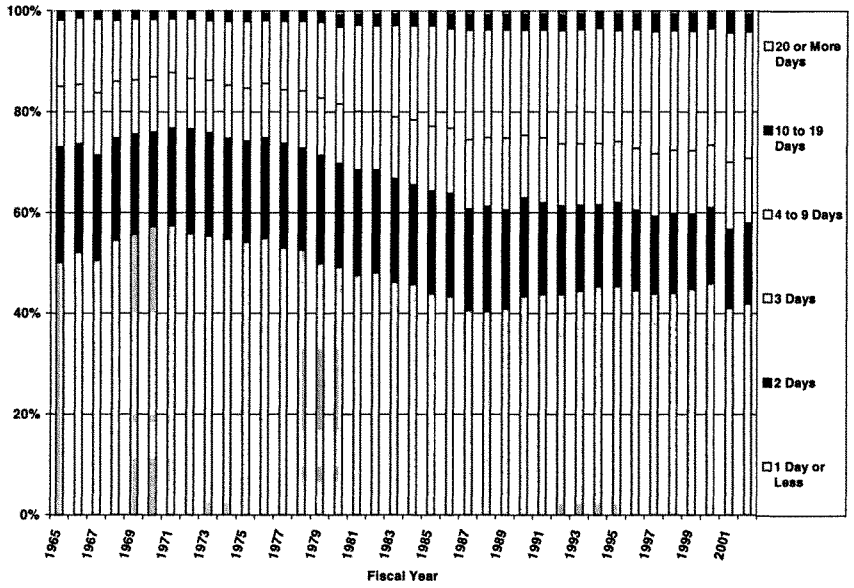
[32]Id. at 48.

[33]Id. at 49.

[34]John Twohig, Carl Baar, Anna Myers & Anne Marie Predko, Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto 1973–1994, in 1 Rethinking Civil Justice: Research Studies for the Civil Justice Review 77, 127, 119, 124, 131 (Ontario Law Reform Commission, 1996).

[35]Id. at 102.

Figure 11: Proportion of civil trials of a given length, U.S. district courts, 1965–2002.



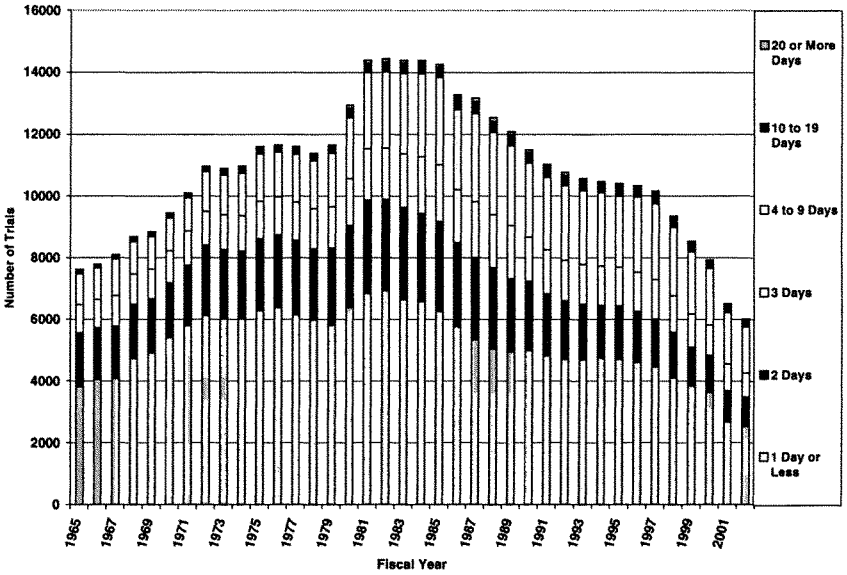
SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-8 (1965–2002).

(Figure 11). Civil trials that lasted four days or more were 15 percent of trials in 1965 and 29 percent of trials in 2002; trials of three days or more rose from 27 percent to 42 percent over the same amount of time. But as Figure 12 indicates, this shift to longer trials is produced by an increase in the number of the longest trials combined with a shrinking of the number of short trials.

Several studies suggest that the number and length of trials are connected with the size of verdicts, that is, with the amount at stake. If the decline in the number of trials involves the squeezing out of smaller cases, then we might expect shorter trials to become less frequent and a corresponding increase in the portion of longer trials and in the size of verdicts. Examining jury verdicts in Cook County, Illinois, and at several California sites in the 1980s, Mark Peterson observed:

> The trends over all cases suggest that the median jury award is related to the number of jury trials. Usually the median award moved in the opposite direction from changes in the number of trials: When the number of trials fell, the median increased; when the number of trials increased, the median decreased. This relationship suggests that the total number

Figure 12: Number of civil trials of a given length, U.S. district courts, 1965–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-8 (1965–2002).

of jury trials changed primarily because the number of smaller cases (*i.e.*, those that involved modest damages) increased or decreased at different times.[36]

Peterson's study was updated through 1994 by Eric Moller, who found that the number of jury trials fell in 11 of 15 sites—in many cases substantially. From 1985 to 1994, the number of verdicts in Los Angeles fell from 459 to 292; in San Francisco, 115 to 57; and in Cook County, Illinois, 699 to 468.[37] As fewer cases were tried, the size of verdicts increased. The causality here may run in both directions: not only would the settlement or abandonment of smaller cases tend to produce larger awards, but higher awards could provide greater inducements for defendants to avoid trial.

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[36]Mark Peterson, RAND Inst. for Civil Justice, Civil Juries in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois 29–31 (1987) (footnote omitted).

[37]Erik Moller, Trends in Civil Jury Verdicts Since 1985 tbl.2 (1996).

In recent data on the state courts of general jurisdiction in the nation's 75 most populous counties, the association of lower trial numbers with higher awards is more ambiguous.[38] From 1992 to 2001, the number of trials in these courts declined dramatically by 47 percent, but the amount awarded to winning plaintiffs underwent a striking decline overall: the median jury award fell 43 percent from $65,000 in 1992 to $37,000 in 2001.[39] But specific categories of cases displayed different patterns. For example, the number of product liability trials decreased by 76 percent, while the median jury award increased by 288 percent (from $140,000 to $543,000). However, premises liability trials decreased by 52 percent, while the median jury award fell by 17 percent (from $74,000 to $61,000). Rather than obeying a single hydraulic principle, specific kinds of cases seem to have distinctive careers.

Another factor that may be associated with cost and complexity is the length of time it takes a case to reach trial.[40] In 1963, the median time from filing to disposition by trial was 16 months; in 2002 the median time was over 20 months (see Figure 13). The time from filing to termination either with "no court action" or "before pretrial" has remained relatively constant over the years (six to seven months in the former; seven to eight months in the latter); however, the median time from filing to disposition "before or during pretrial" has fallen from 18 months in 1963 to only 13 months in 2002. Although the disposal of cases during pretrial has become more expeditious, cases proceeding to trial have been taking longer to move through the courts.

One measure of higher investment in tried cases that amplifies the stakes and complexity of trials is the burgeoning of "scientific jury selection" and a panoply of associated techniques involving mock trials, focus groups, and other devices for selecting juries and tailoring advocacy to them. From its beginnings in the early 1970s, the jury consulting industry has grown substantially. It was estimated that in 1982 there were about 25 jury consultants in the United States; in 1994 there were 10 times as many.[41] Another account concluded that in 1999 there were "over 700 people who call themselves jury consultants and over 400 firms offering these types

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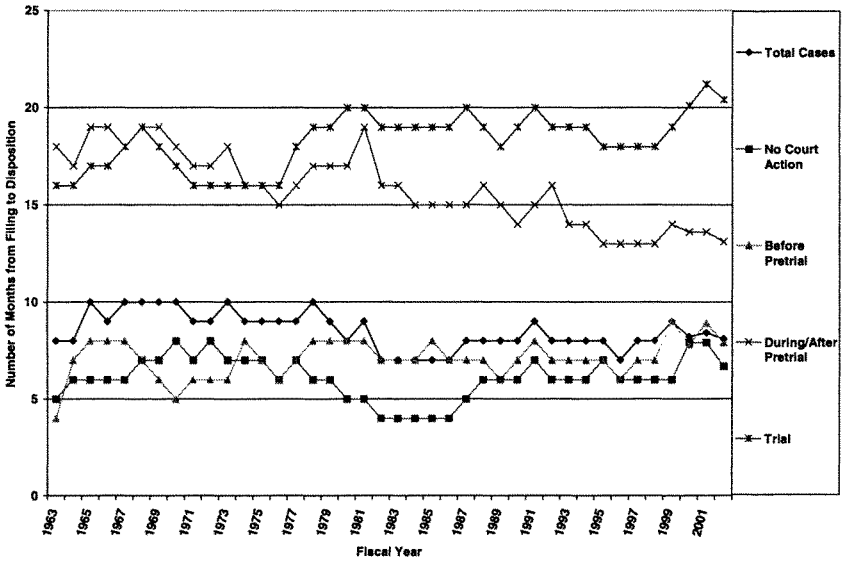
[38]Thomas H. Cohen & Steven K. Smith, Civil Trial Cases and Verdicts in Large Counties, 2001, 11–12 (Bureau of Justice Statistics Bulletin, Apr. 2004). The analysis is based on data from cases tried in the courts of 46 counties that represent a stratified sample of the nation's 75 most populous counties. These 75 counties contained 37 percent of the U.S. population in 2000. A thorough description of the sampling is available in the B.J.S. report available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf>. Thomas H. Cohen & Steven K. Smith, Civil Trial Cases and Verdicts in Large Counties, 2001, 11–12 (Bureau of Justice Statistics Bulletin, Apr. 2004).

[39]Id. at 9.

[40]Because the length of trial is relatively insignificant compared to the time between filing and commencement of trial, we use the time from filing to termination as a surrogate for the "wait for trial."

[41]Jeffrey Abramson, We the Jury 149 (1994).

Figure 13: Median time (in months) from filing to disposition of civil cases, by stage at which terminated, U.S. district courts, 1963–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-5 (1962–2002).

of service."[42] Revenues in 2000 were estimated at about $400 million.[43] The industry's growth during a period in which there are fewer and fewer jury trials may reflect the thinning of lawyers' trial experience. One consultant observes: "It's only going to get bigger, because more and more lawyers will get to be sixty years old, having tried only five or ten cases."[44]

III. FROM FILING TO TRIAL

Interestingly, although the number and rate of trials has fallen, judicial involvement in case activity—at least on some level—has increased. Although the portion of cases

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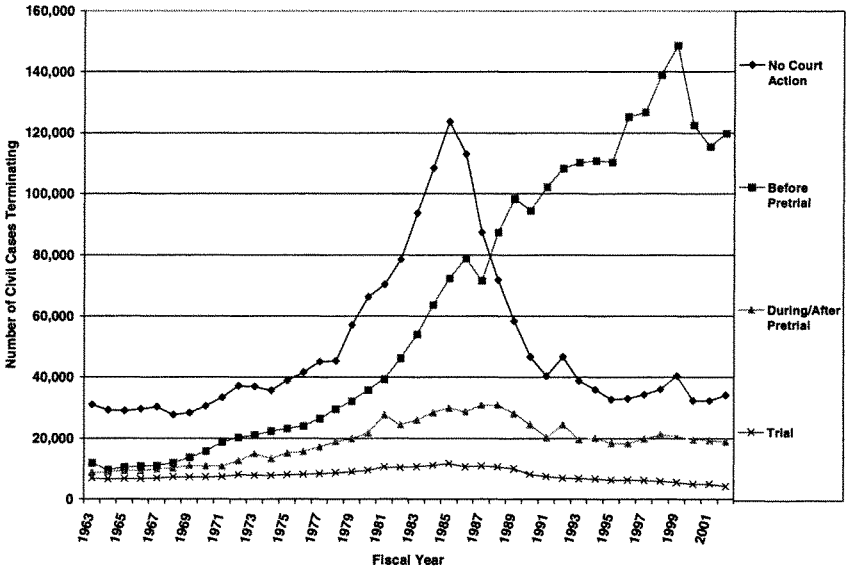
[42]Eric S. See, Jury Consultants and the Criminal Justice System 6 (2002).

[43]Neil J. Kressel & Dorit J. Kressel, Stack and Sway: The New Science of Jury Consulting 84 (2002).

[44]Id. at 57.

Figure 14: Number of civil cases terminating at each stage, U.S. district courts, 1963–2002.



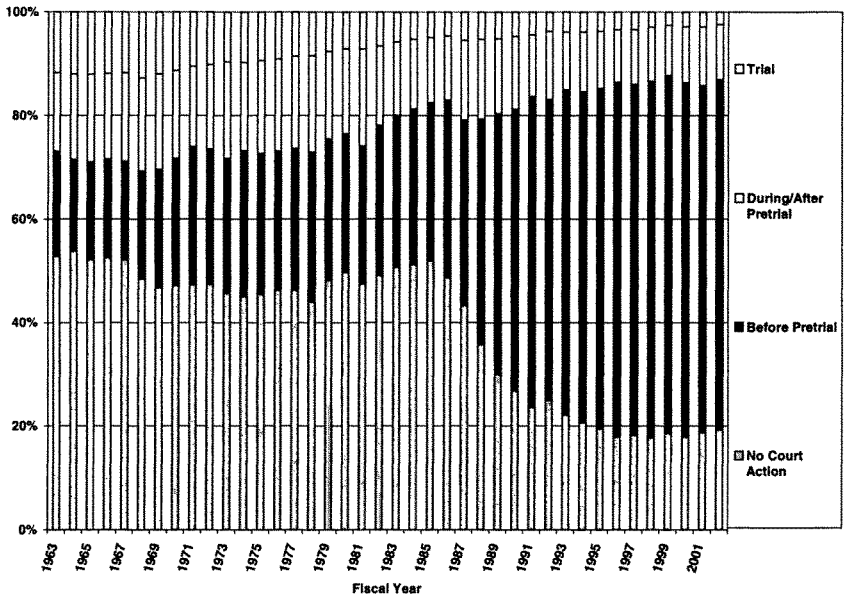
SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2002).

that terminate "during or after pretrial" has fallen only slightly from 15 percent in 1963 to 11 percent in 2002, the number of cases that terminated "before pretrial" (but with some type of court action) rose from 20 percent in 1963 to 68 percent in 2002. Clearly, courts are more involved in the early resolution of cases than they used to be.

Figure 15 shows the portion of cases that terminated at each stage of the process. In 1963, more than half (55 percent) terminated before the occurrence of any "court action." By 2002, only 19 percent terminated at this stage. The big change came in the late 1980s, when the number of cases moving into the "before pretrial" stage began a dramatic increase, so that today nearly 70 percent of cases terminate at this stage as opposed to some 20 percent in 1962.

This tells us that cases are departing the court at an earlier stage, but not how. Both popular speech and a great deal of scholarly discourse proceed as if the universe of disposition is made up of trial and settlement, so that a decline in trials must

Figure 15: Percentage of civil cases terminating at each stage, U.S. district courts, 1963–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2002).

mean an increase in settlements.[45] Analyzing dispositions in federal courts from 1970 to 2000, Gillian Hadfield concludes that settlements were actually "a smaller percentage of cases were disposed of through settlement in 2000 than was the case in 1970."[46] What increased as trials disappeared was not settlement, but nontrial adjudication. This is consistent with a documented increase in the prevalence of summary judgment. Comprehensive and continuous data are not available, but a Federal Judi-

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[45]The insufficiency of the trial/settlement model was pointed out by Herbert Kritzer, analyzing 1,649 cases in federal and state courts in five localities disposed of in 1978. Seven percent of these cases terminated through trial, but another 24 percent terminated through some other form of adjudication (arbitration, dismissal on the merits) or a ruling on a significant motion that led to settlement. Herbert M. Kritzer, Adjudication to Settlement: Shading in the Gray, 70 Judicature 161 (1986). On the attachment to the trial/settlement model in the law and economics literature, see Hadfield, supra note 6.

[46]Hadfield, supra note 6, at 705.

cial Center (FJC) study provides a glimpse of the change.[47] Comparing a sample of cases in six metropolitan districts over the period 1975–2000, the researchers found that the portion of cases terminated by summary judgment increased from 3.7 percent in 1975 to 7.7 percent in 2000.[48] Assuming that these districts were not grossly unrepresentative, we can juxtapose these figures with our data on trials. In 1975, the portion of disposition by trial (8.4 percent) was more than double the portion of summary judgments (3.7 percent), but in 2000 the summary judgment portion (7.7 percent) was more than three times as large as the portion of trials (2.2 percent).[49]

Analyzing the earlier studies of summary judgment activity and his own study of the Eastern District of Pennsylvania from 2000–2003, Stephen Burbank estimates that:

> the rate of case terminations by summary judgment in federal civil cases nationwide increased substantially in the period from 1960 and 2000, from approximately 1.8 percent to approximately 7.7 percent. There is evidence, however, that the termination rate—indeed, the rate of activity more generally—under this supposedly uniform rule ranes substantially in different ports of the country and in different types of cases.[50]

In the Eastern District of Pennsylvania, Burbank found that summary judgments increased from 4.1 percent to 4.7 percent of terminations from 2000 to 2003 while trials dropped from 2.5 percent to 1.0 percent.[51] Thus Burbank's figures, like those of the FJC, suggest that we have moved from a world in which dispositions by summary judgment were equal to a small fraction of dispositions by trial into a new era in which dispositions by summary judgment are a magnitude several times greater than the number of trials.[52]

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[47]Cecil, Miletich & Cort, supra note 14.

[48]Id. at 3. The six districts were E.D. Pa.; C.D. Cal.; D. Md.; E.D. La.; S.D.N.Y.; and N.D. Ill. Prisoner cases, Social Security cases, student loan repayment cases, and multi-district litigation cases were excluded from the sample.

[49]In other words, the ratio of summary judgment to trials rose from 0.44 to 3.5—about eight times as many summary judgments per trial. This comparison is only suggestive, since the trial data includes all districts, not just the six in the study. Also, the FJC study excluded several categories of cases from the total of dispositions, exclusions that are not matched in our trial data. A finer-grained comparison, limited to the six districts and the nonexcluded case categories, could not be done with the available published data.

[50]Stephen Burbank, Drifting Toward Bethlehem or Gomorrah? Vanishing Trials and Summary Judgment in Federal Civil Cases, 1 J. Empirical Legal Stud. 591, 593 (2004).

[51]Id. at 616.

[52]In a recent article, Professor Arthur Miller analyzes the doctrinal changes associated with the decline of trials, including the 1986 trilogy of Supreme Court cases that encouraged increased use of summary judgment. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby,

IV. CIVIL FILINGS

A. General

We have been talking about dispositions. Do these changing patterns of dispositions merely reflect changes in filings? Clearly, the decline in trials is not simply a reflection of the cases coming to the federal courts, for the number of trials has declined while the number of filings has increased fivefold. Nor is the decline in trials simply a function of the changing makeup of a docket with fewer of the types of cases that are most likely to get tried and more of the types that rarely go to trial. There are many more civil rights cases (the most trial-prone category) and no appreciable decline in the absolute number of torts cases (the next most trial prone). In 2002, these two categories together made up 37 percent of all district court filings and 35 percent of dispositions, down from 45.5 percent of filings and 38.8 percent of dispositions in 1962. Instead, we see the drop in trial rates occurring in every category, suggesting that the difference lies in what happens in court rather than in a change in the makeup of the caseload.

Filings are the most direct link between courts and the wider society, so they are the place where we can observe changes in this linkage. From 1962 to 1986, filings per million persons increased steadily from about 260 per million persons to four times that; then they fell for six years and then began to fluctuate in the same range—at more than three times the 1960s level (Figure 19).

Filings rose more quickly than the population, but they declined in relation to the size of the economy. Filings per billion dollars of gross domestic product peaked in the mid 1980s at more than twice their 1962 level, but by 2002 they had fallen part of the way back to their 1962 level (Figure 20).

B. Class Actions

One particular sort of filing that deserves special mention is class actions. It is striking that the pattern of class-action filings, falling through the 1980s but rising steeply in the 1990s (depicted in Figure 21), is the mirror image of the pattern of the number of trials depicted in Figure 1. Class-action filings fall during the late 1970s and early 1980s when trial numbers reach unprecedented peaks; class-action filings rise from the mid 1990s when trial numbers are falling to unprecedented lows. When we disaggregate class actions by case type we see that this "U" represents two distinct

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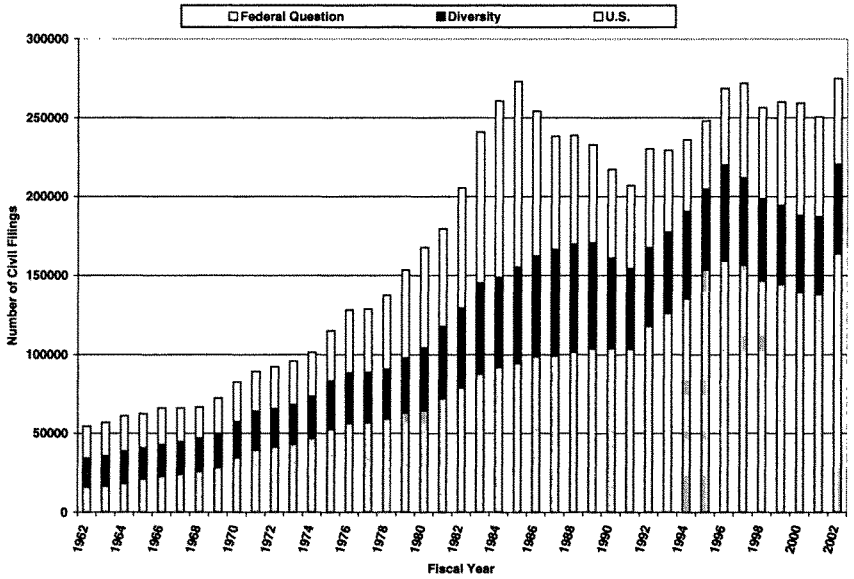
Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317. Arthur Miller, The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments, 78 N.Y.U. L. Rev. 982 (2003). The Federal Judicial Center study of the incidence of summary judgment provides no evidence that increases were concentrated in the aftermath of the trilogy. Stephen Burbank concludes that "[s]uch reliable empirical evidence as we have . . . does not support the claims of those who see a turning point in the Supreme Court's 1986 trilogy. Rather, that evidence suggests that summary judgment started to assume a greater role in the 1970s." Burbank, supra note 50, at 620.

Figure 16: Number of civil filings by jurisdictional basis, U.S. district courts, 1962–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-2 (1962–2002).

movements: the downward swing tracks the withering of civil rights class actions and the upward swing is driven by two major changes—a newfound willingness to permit tort class actions and a surge of securities class actions following Congress's 1995 attempt to curtail such cases.[53]

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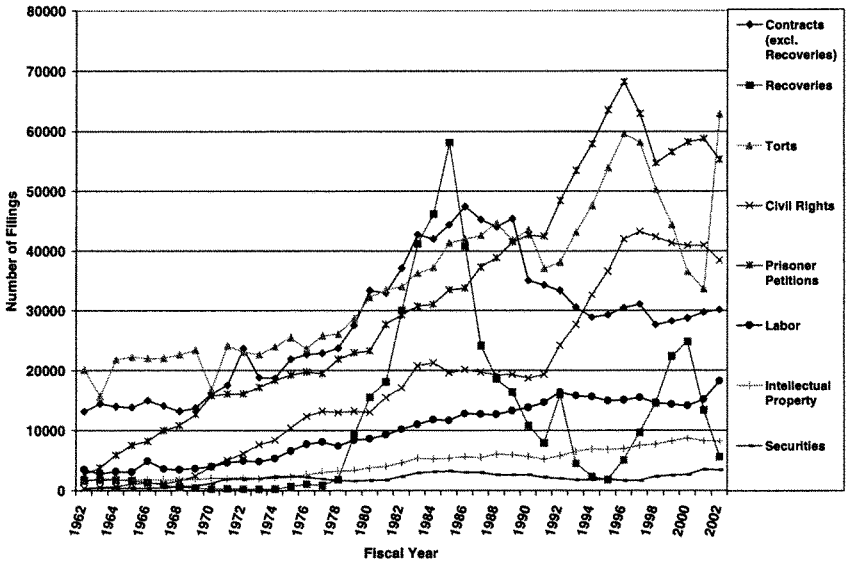
[53]In 1995, Congress passed the Private Securities Litigation Reform Act (PSLRA) (codified at 15 U.S.C. §§ 77k–78) to reform the process by which shareholders filed class-action securities lawsuits. The legislation imposed higher pleading standards, stricter guidelines for appointing lead plaintiffs, and automatic stays of discovery; reduced the availability of joint and several liability; and included "safe harbor" provisions that shelter predictive statements from liability so long as they are identified as such. See generally Harvey L. Pitt et al., Promises Made, Promises Kept: The Practical Implications of the Private Securities Reform Act of 1995, 33 San Diego L. Rev. 845, 847–51 (1996). The PSLRA further reduced incentives for plaintiff's attorneys (and consequently litigation) by requiring courts to make specific findings of compliance with Fed. R. Civ. P. 11—including imposing sanctions on frivolous litigants—and directing that any award of attorney fees not exceed a reasonable percentage of actual damages paid to the class. Id. at 890. Three years later, Congress passed the Securities Litigation Uniform Standards Act of 1998 in order to prevent litigants from simply changing forum and pursuing securities class-action lawsuits in state court so as to avoid the requirements of the PSLRA.

Figure 17: Number of civil filings by case type, U.S. district courts, 1962–2002.



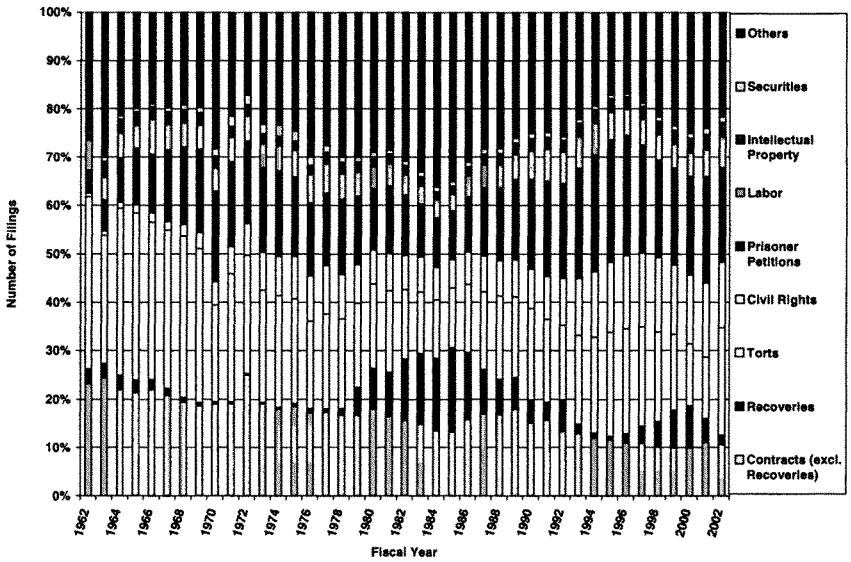
SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-2 (1962–2002).

Trials in class-action cases are quite rare.[54] The adjudication in class actions tends to occur at pretrial stages—rulings on certification of the class, discovery, motions to dismiss—or after settlement in fairness hearings. It has long been observed that the low trial rate in class actions reflects the high stakes that such cases represent for defendants. Recent developments suggest that corporate defendants, with the help of sections of the plaintiffs' bar, have learned to use the class-action device as an instrument to manage the risk of multiple claims. This provides a useful reminder that the rate of trials may reflect changing strategies by *defendants* as well as by plaintiffs.

There may be an indirect but important connection between class-action numbers and trial numbers: lawyers who file claims as class actions remove a large number of claims from the possibility of being tried individually and replace them with a much smaller number of cases in a category that very rarely eventuates in a trial. So when lawyers undertake to bundle claims in "high trial" areas like torts and

[54]Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L. Rev. 497, 567 (1991).

Figure 18: Case type as relative portion of civil filings, U.S. district courts, 1962–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-2 (1962–2002).

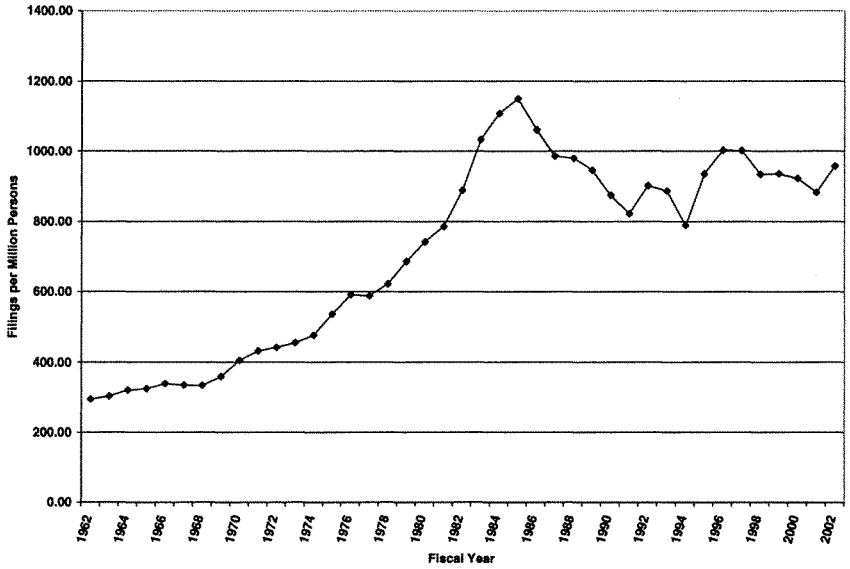
civil rights into class actions, we might expect fewer trials. Conversely, the withering of civil rights class actions may be reflected in the great surge of filings and trials in individual civil rights cases.

C. Multi-District Litigation

Another device for bundling large numbers of cases in the federal courts is transfer by the Judicial Panel on Multi-District Litigation (JPML). The JPML has its origins in the Coordinating Committee for Multiple Litigation for the United States District Courts, established in 1962 by Chief Justice Earl Warren to find a way to efficiently deal with more than 2,000 treble-damage antitrust actions, containing more than 25,000 claims for relief, filed in 36 district courts against heavy electrical equipment manufacturers.[55] To deal with these actions, the Committee introduced two major

[55]Robert A. Cahn, A Look at the Judicial Panel on Multidistrict Litigation, 72 F.R.D. 211 (1976). Although the Committee did not have jurisdiction over all the actions, it held national hearings on pretrial matters in which all parties and judges involved were invited to participate, after which it issued recommendations for adoption in the district courts.

Figure 19: Per capita civil filings, U.S. district courts, 1962–2002.



SOURCES: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-2 (1962–2002); Federal Reserve Bank of St. Louis <http://research.stlouisfed.org/fred2/data/POP.txt>.

innovations: (1) discovery was coordinated on a national basis, including the creation of a central document depository for use by all the parties; and (2) certain actions were transferred and consolidated for trial.[56] The overall impact of the Committee on this litigation was remarkable: only nine cases went to trial, and only five of those to judgment.[57] Based on that success, the JPML was established in 1968 as a way to coordinate national discovery in other multi-district litigations.[58]

Essentially, the JPML is authorized to transfer actions pending in two or more district courts "involving one or more common questions of fact" to a single district

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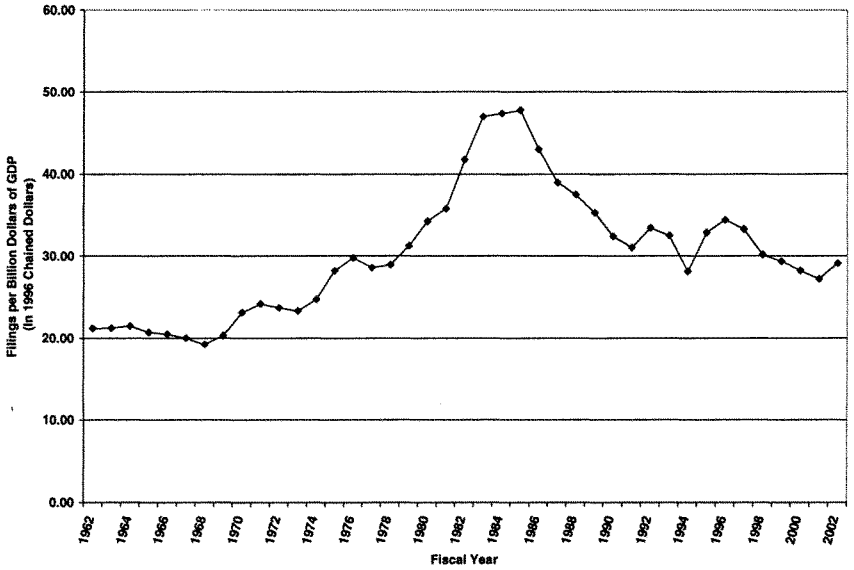
[56]Id. at 211–12; see also John T. McDermott, The Judicial Panel on Multidistrict Litigation, 57 F.R.D. 215 (1973).

[57]McDermott, supra note 56, at 215–16.

[58]The Panel consists by statute of seven federal judges, either district or circuit. Because Congress felt that existing mechanisms for consolidation and transfer were sufficient to eliminate the risk of multiple trials on the same issues, the authority of the Panel was limited to pretrial and other discovery proceedings. Id. at 216–17.

Figure 20: Civil filings per billion dollars of gross domestic product, U.S. district courts, 1962–2002 (in 1996 chained dollars).[a]



[a]"In January 1996, BEA [Bureau of Economic Analysis] replaced its fixed-weighted index as the featured measure of real GDP with an index based on chain-type annual weights. Changes in this measure of real output and prices are calculated as the average of changes based on weights for the current and preceding years. (Components of real output are weighted by price, and components of prices are weighted by output.) These annual changes are "chained" (multiplied) together to form a time series that allows for the effects of changes in relative prices and changes in the composition of output over time." U.S. Census Bureau, Statistical Abstract of the United States 433–34 (2003).

SOURCES: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-2 (1962–2002); 2003 Economic Report of the President, Table B-2.

court for consolidated or coordinated pretrial proceedings.[59] Transfer may be initiated either by motion of a party or by the panel on its own initiative.[60] In theory, once pretrial activity takes place, the cases are returned to their originating districts.[61]

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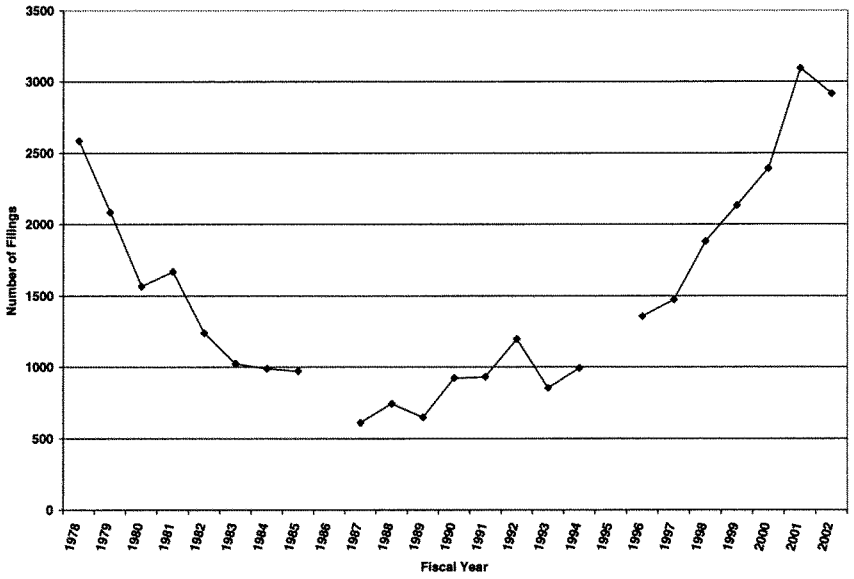
[59]28 U.S.C. § 1407(a).

[60]28 U.S.C. § 1407(c). Curiously, there is no appeal or review of panel orders denying transfer. 28 U.S.C. § 1407(e).

[61]When the JPML is either informed by the transferor court or "otherwise has reason to believe" that pretrial proceedings are complete, the panel may remand the actions back to the transferee courts for trial, though instances of this are rare. JPML R. P. 7.6 (2001).

Figure 21: Total class actions filed, U.S. district courts, 1978–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table X-5 (1978–2002).

But in fact, most cases are resolved at the MDL stage. "Experience shows that few cases are remanded for trial: most MDL is settled in the transferee court."[62] The percentage of cases remanded is typically in the low single digits. (See Appendix, Table A-14.)

The number of litigations (i.e., sets of cases) filed with the JPML has risen gradually over time (see Appendix, Table A-15), but there is no evident increase in the number of cases comprising them or the number that involve class-action allegations.[63] Nor is there any evident trend in the dominant subject matters, apart from the decline of anti-trust litigations and the increase in litigations that do not fall within the specified classifications.

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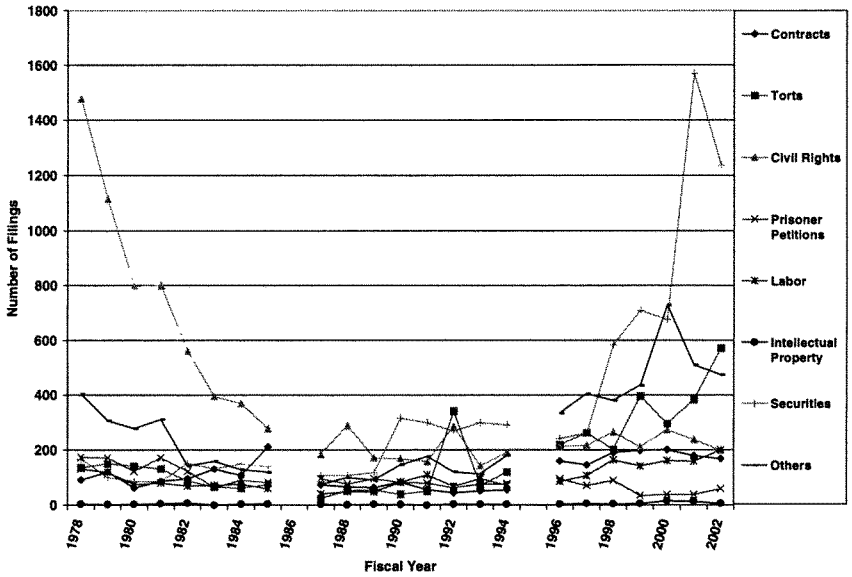
[62]Manual of Complex Litigation (Third) § 31.132 (1995).

[63]Because the following tables on multi-district litigation include information only on litigations "retired" (terminated) by the JPML, they do not include information on the two largest filings with the Panel: asbestos (106,069 cases) and breast implant litigations (27,526 cases).

Figure 22: Class-action filings by case type, U.S. district courts, 1978–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table X-5 (1978–2002).

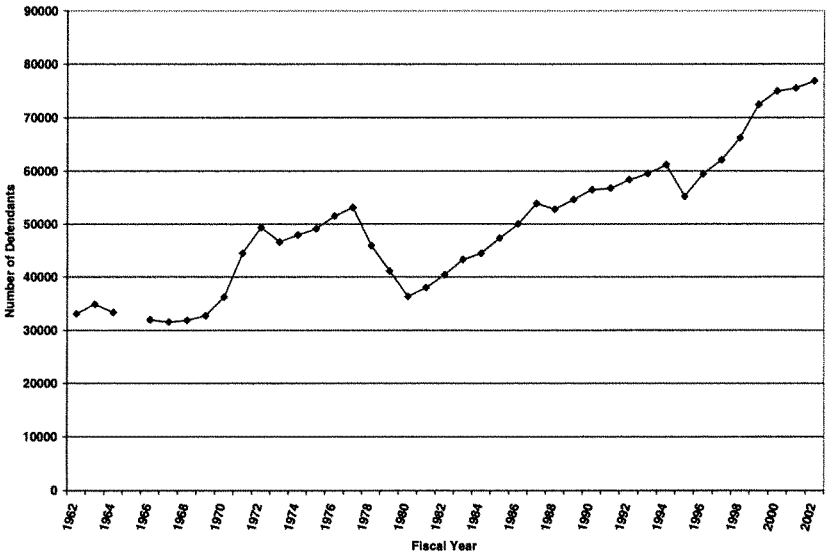
V. FEDERAL FORUMS APART FROM CIVIL LITIGATION

A. Criminal Cases and Trials

Some observers have suspected that the decline in civil trials is a response to increasing business on the criminal side of the federal courts. The criminal caseload (measured by the number of defendants) has risen, though more modestly than civil caseloads, from 33,110 in 1962 to 76,827 in 2002. This is about half the rate of increase on the civil side. The pressure to dispose of these cases expeditiously has increased due to the strictures of the 1974 Speedy Trial Act.[64] We occasionally do hear of courts refusing to try civil cases because of the press of criminal business, but one thing that has not happened is the occurrence of more criminal trials. Not only

[64]The Speedy Trial Act of 1974 (codified at 18 U.S.C. §§ 3161–3174) requires that criminal trials be held within 70 days of certain pretrial proceedings (e.g., filing of not guilty plea, consent to trial before magistrate), with certain enumerated exceptions made for permissible delay. Trials that have not commenced within the specified period of time may be dismissed on motion of the defendant; however, dismissal with or without prejudice is at the discretion of the court. 18 U.S.C. § 3162(a)(2).

Figure 23: Criminal defendant dispositions, U.S. district courts, 1962–2002.



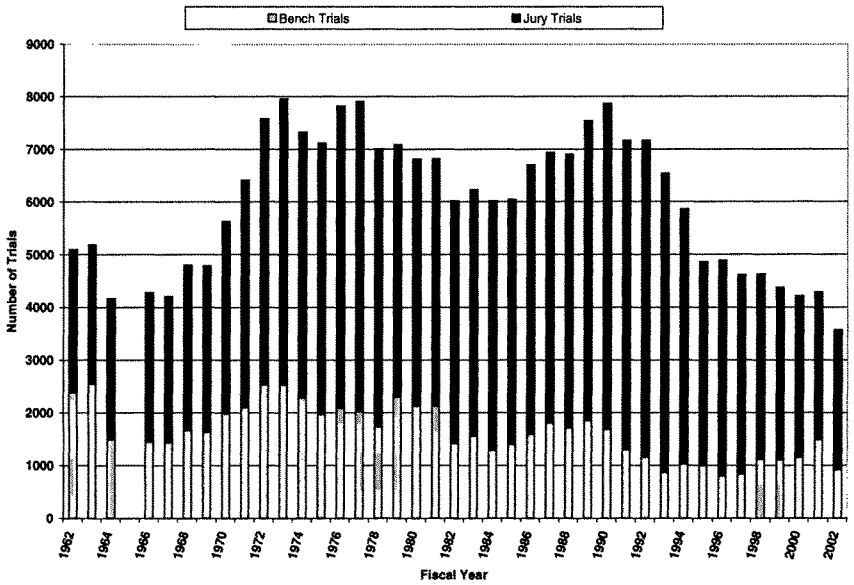
SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table D-4 (1962–2002).

are a smaller percentage of criminal dispositions by trial—under 5 percent in 2002 compared with 15 percent in 1962—but the absolute number of criminal trials has diminished: from 5,097 in 1962 to 3,574 in 2002, a drop of 30 percent.

Are the factors impelling fewer civil trials also at work on the criminal side? Or are there other reasons for the decline of criminal trials? One distinctive feature that may account for the decline in criminal trials is the implementation of determinate sentencing in the federal courts. The federal sentencing guidelines were created by the Sentencing Reform Act of 1984 and went into effect on November 1, 1987.[65] Essentially, they produce a determinate sentencing range by creating two values—a criminal history score based on past criminal conduct and an offense level based on

[65]It should be observed, however, that there were extensive constitutional challenges to the guidelines—for example, out of 293 judges rendering 294 decisions on the matter in 1988 (one judge upholding the guidelines only to overrule himself four months later), 115 decisions (39 percent) found the guidelines constitutional, while 179 decisions (61 percent) found the guidelines unconstitutional. Gregory Sisk, Michael Heise & Andrew C. Morriss, Charting the Influences of the Judicial Mind: An Empirical Study of Judicial Reasoning, 73 N.Y.U. L. Rev. 1377, 1430 (1998). Therefore, systemwide implementation cannot be supposed until at least January 1989, when the U.S. Supreme Court finally declared the guidelines constitutional in *Mistretta v. United States*, 488 U.S. 361 (1989).

Figure 24: Criminal defendants disposed of by bench and jury trial, U.S. district courts, 1962–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table D-4 (1962–2002).

the severity of the instant offense—and then use these values as axes to locate the appropriate sentencing range (expressed in months) on a grid known as the sentencing table.[66] Unless the court determines that a departure from the given sentencing range is warranted due to factors not adequately addressed by the guidelines, the court is bound by the limits of the guideline range. The sentence created is nonparolable, and the availability of good-time credit while in prison is limited, thus enhancing the determinacy and the severity of the guidelines.[67] The guidelines offer an incentive to avoid trial in the form of a criminal-offense-level reduction (one axis of the sentencing grid) for what is termed "acceptance of responsibility." Although proceeding to trial does not automatically disqualify an offender for the reduction,

[66]See generally, U.S. Sentencing Guidelines Manual (2002).

[67]Lucian B. Campbell & Henry J. Bemporad, An Introduction to Federal Guideline Sentencing 3 (5th ed. 2001).

the guidelines state that it is only in "rare situations" that the incentive can be preserved after exercising this option.[68]

Gauging the impact of the sentencing guidelines on the number of criminal trials in the federal courts is difficult because many other changes in the criminal justice system have taken place concurrently. Congress has enacted more statutes with mandatory minimum sentences and increased funding for law enforcement, while Department of Justice policies regarding plea and prosecution strategies have changed as well.[69] Although it is difficult to specify conclusions about the direct impact of the sentencing guidelines on trial rates, it is unmistakable that the number of criminal trials has decreased since the implementation of the guidelines. From 1962 to 1991, the percentage of trials in criminal cases remained steady between approximately 13 percent to 15 percent. However, since 1991, the percentage of trials in criminal cases has steadily decreased (with the exception of one slight increase of 0.06 percent in 2001): from 12.6 percent in 1991 to less than 4.7 percent in 2002.[70] That the guidelines contributed to this decline is consistent with the assumption that systemwide implementation of the guidelines did not take place until at least the beginning of the 1990s, due both to constitutional challenges and an overall period of adjustment.[71]

Early studies suggested that the presence of the guidelines increased the rate of trials. One study found that although the systemwide rate of trials remained virtually unchanged by 1990, there was an increase in trial activity for drug and firearms cases (where the penalties were most severe), but a decrease in the amount of trial activity for fraud and related cases.[72] Another early study noted a general increase in the amount of trial activity after the implementation of the guidelines,[73] and an ABA

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[68]See U.S. Sentencing Guidelines Manual § E1.1, application note 2 (suggesting that only when the defendant makes a constitutional challenge to a statute or challenges the applicability of a statute to his or her conduct does the defendant still qualify for the reduction with an appropriate showing of acceptance of responsibility).

[69]Terence Dunworth & Charles D. Weisselberg, Felony Cases and the Federal Courts: The Guidelines Experience, 66 S. Cal. L. Rev. 99, 111–13 (1992).

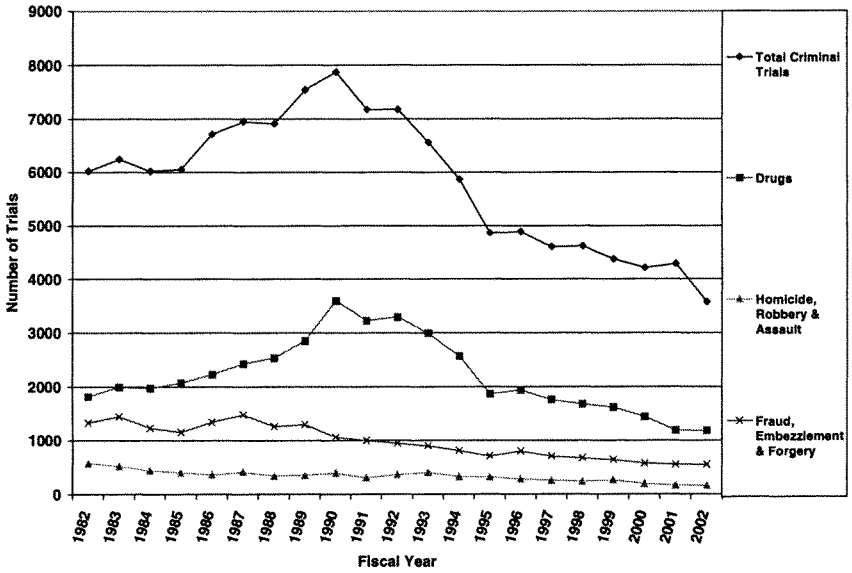
[70]There has also been a corresponding increase over this period of time in the number of criminal cases. Prior to 1986, the number of criminal defendant dispositions fluctuated between 30,000 and 50,000. Since 1986, there has been a general increase in the number of criminal defendant dispositions; rising from roughly 50,000 to over 76,000 in 2002 (see Figure 23).

[71]See Sisk et al., supra note 65.

[72]See generally, Dunworth & Weisselberg, supra note 69. "These relationships suggest that, with respect to trial rates, the additional number of guideline trials that result from the greater propensity for trial in drug cases appears to be offset by the fewer number of guideline trials that occur among FEC [Fraud, Embezzlement and Counterfeiting] and other felony convictions." Id. at 143.

[73]See generally, Gerald W. Heaney, The Reality of Guidelines Sentencing: No End to Disparity, 28 Am. Crim. L. Rev. 161, 175–76 (1991).

Figure 25: Number of criminal defendant dispositions by trial by case type—drugs, violent crimes, and fraud, U.S. district courts, 1982–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table D-4 (1982–2002).

survey of district court judges published in 1992 found that 73 percent of those who responded believed that the guidelines increased the number of trials.[74] However, a study published in 1991 by the U.S. Sentencing Commission found that there was no appreciable difference in the rate of trials due to the sentencing guidelines.[75]

Indeed, there was an increase in trial activity for drug cases from 1987 to 1990; the percentage of drug cases that went to trial increased from 16.1 percent to 18.6 percent (see Appendix, Table A-18). Meanwhile, trial rates for violent crimes (homicide, robbery, and assault) and fraud-related crimes (fraud, embezzlement, and forgery) either remained relatively consistent or decreased slightly: 18.7 percent to

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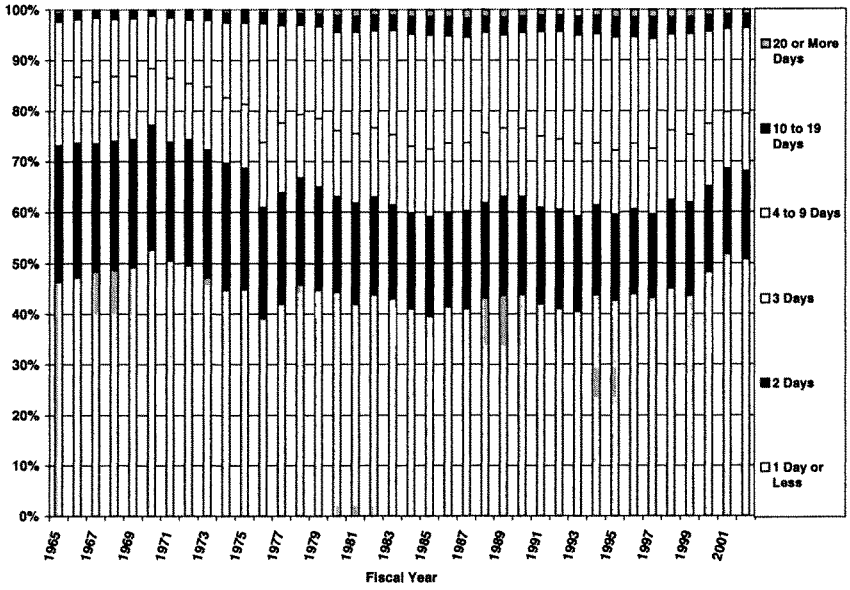
[74]Dunworth & Weisselberg, supra note 69 (citing Survey on the Impact of U.S. Sentencing Guidelines on the Federal Criminal Justice System, 1992 A.B.A. Sec. Crim. Just.).

[75]United States Sentencing Comm'n, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining 65–77 (1991). "[T]he rate of defendants' choosing to enter guilty pleas or stand trial has not changed appreciably as a result of guideline implementation." Id. at 77.

Figure 26: Proportion of criminal trials of a given length, U.S. district courts, 1965–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-8 (1965–2002).

19.1 percent in the former, 10.9 percent to 8.5 percent in the latter.[76] However, beginning in 1991, the total number of cases—drug cases included—that went to trial began to steadily decrease, as noted above. Drug trials as a percentage of total drug defendants fell to 10 percent in 1995 and only 4.1 percent in 2002; trials for violent crime defendants fell to 13.7 percent in 1995 and 6.6 percent in 2002; while trials for defendants accused of fraud-related offenses fell to 6 percent in 1995 and 4.2 percent in 2002.

There has been no noticeable increase in the length of federal criminal trials.[77] The number of trials longer than one day was lower in 2002 than at any point in the previous 30 years. The totals in Figures 26 and 27 differ from those in Figure 24

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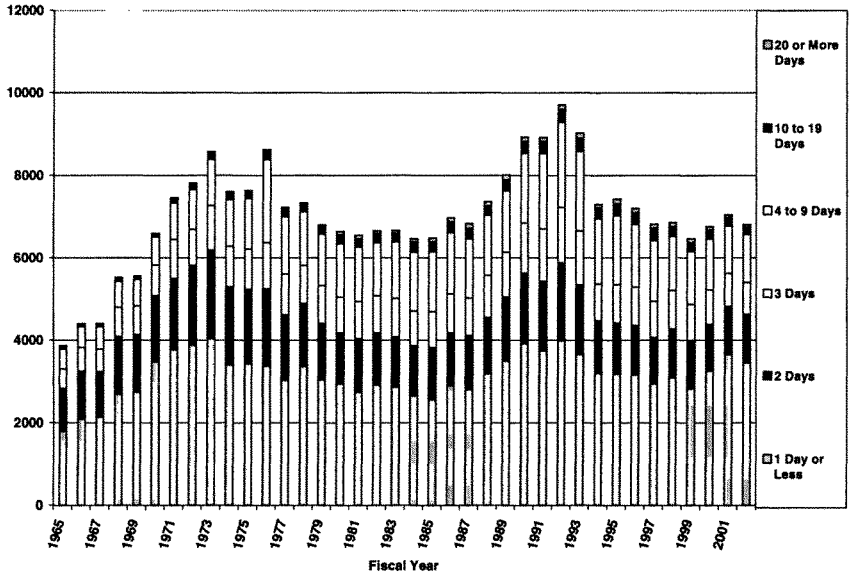
[76]The trial rate in fraud-related cases began to decline in 1990, as opposed to 1991 for the other two categories of crimes.

[77]Due to definitional differences, the number of trials reported on A.O. Table C-8 (Figures 26 and 27) is not the same as the number of defendant dispositions by trial reported on A.O. Table D-4 (Figure 24).

Figure 27: Number of criminal trials of a given length, U.S. district courts, 1965–2002.



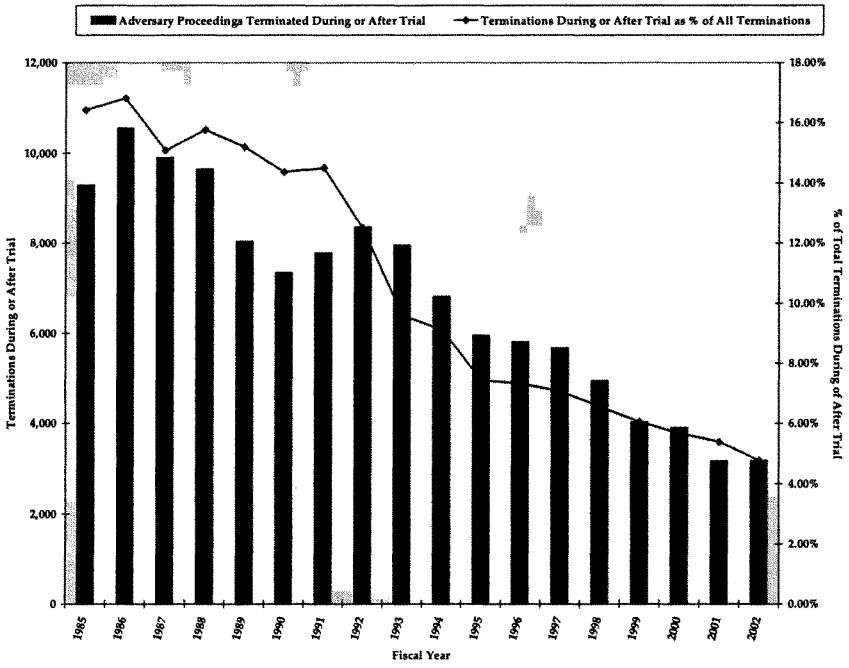
SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-8 (1965–2002).

because the latter is a count of defendants while the former count multiple defendant trials as single events. (See Figure 26.) Trials longer than three days make up a larger portion of all trials than they once did, but there are actually fewer of them than there have been since the early 1970s (Figure 27).

B. Bankruptcy

Our figures on the federal district courts do not include bankruptcy. The volume of bankruptcy filings is considerably larger than the volume of filings in the district courts and has been growing more rapidly (see Table A-20 in Appendix). However, while bankruptcy filings have multiplied, Elizabeth Warren's research indicates a shrinkage of trial activity that parallels those in the civil and criminal jurisdictions of the district courts. Professor Warren describes a modest increase in the number of adversarial proceedings from 1985 to 2002, but the portion of adversary proceedings terminated "during or after trial" fell from 16.4 percent in 1985 to 4.8 percent in 2002. In 1985, there were 9,287 trials in bankruptcy court; by 2002, there were

Figure 28: Adversary proceedings terminated during/after trial, U.S. bankruptcy courts, 1985–2002.



3,179—barely more than a third of the total in 1985.[78] Like their Article III brethren, bankruptcy judges preside over fewer trials: in 1985, the average was 37 trials; in 2002 it was about 10.[79]

C. Administrative Adjudication

A significant portion of all adjudication takes place not in the courts, but in various administrative tribunals and forums. The federal government had 1,370 administrative law judges in 2001—more than double the 665 authorized Article III district

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[78]Elizabeth Warren, Vanishing Trials: The Bankruptcy Experience, 1 J. Empirical Legal Stud. 913, 917 (2004).

[79]Id. at 929. The denominator is "authorized judgeships."

court judgeships.[80] An uncounted number of similar positions exist in the states. Further research should be undertaken to ascertain the amount and features of this administrative adjudication and whether there are trends that are related to those observed in courts. One provocative foray is the work of Steven L. Schooner, who documents a dramatic drop in protests and contract appeals connected to government procurement over the course of the 1990s. Protests at the General Accounting Office decreased by half over the course of the decade; cases docketed at the five largest agency boards of contract appeals fell to a third or less of their earlier peaks.[81] Again we see parallels to the drop in adjudication in the courts, but can only wonder if these agency forums are typical and how the declines in these various settings are related.

VI. COURT RESOURCES

The presence of larger caseloads, (presumptively) more complex cases, more elaborate pretrial proceedings, and longer trials invites us to imagine that the decline in trials is attributable to resource constraints that disable courts from conducting as many trials as they used to. The appeal of the resource explanation is highlighted by recent cuts in both federal and state courts.[82] Before embracing this view we should recall that in the 1980s a smaller number of district judges with fewer auxiliaries and more meager resources managed to conduct more that twice as many trials as their present-day counterparts. The trends are mixed, but it is difficult to conclude that there are fewer resources relative to demand, at least for the trial courts in the federal system. The number of Article III judges in the district courts has grown from 279 (of 307 authorized) in 1962 to 615 (of 665 authorized) in 2002. They were assisted

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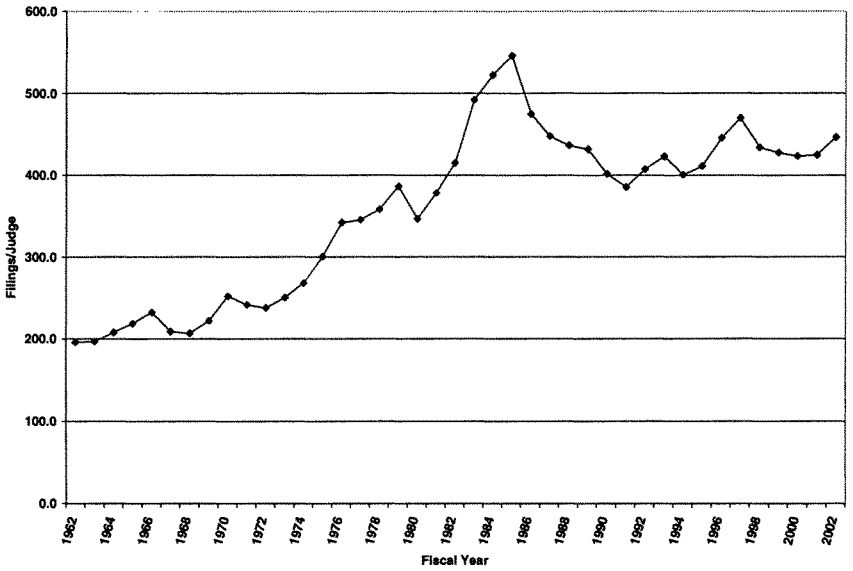
[80]Judith Resnik, Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts, 1 J. Empirical Legal Stud. 783, Appendix A (2004). In addition to administrative law judges, who enjoy some protections to ensure their independence, there are other administrative adjudicators in the federal government. In 1992, John H. Frye III estimated their number at 2,700, most of whom have duties in addition to adjudication. John H. Frye III, Survey of Non-ALJ Hearing Programs in the Federal Government, 44 Admin. L. Rev. 261, 263 (1992). The total caseload of the 83 major case types handled by these non-ALJ "presiding officers" analyzed by Frye was about 343,000 (44 percent immigration; 20 percent health and human services; 17 percent veteran affairs; 6 percent Coast Guard; 4 percent agriculture, etc.). Id. at 343.

[81]Steven L. Schooner, Fear of Oversight: The Fundamental Failure of Businesslike Government, 50 Am. U. L. Rev. 627, 644–47 (2001).

[82]Adam Liptak, Federal Judges Find Courts Short of Money to Pay Jurors, N.Y. Times, A14 (Aug. 1, 2003) (Judicial Conference urges judges to defer "noncritical civil trials" but quickly reverses itself); Molly McDonough, Federal Courts Cut Staff, Hours, (Mar. 19, 2004) available at <www.abanet.or/journal/ereport>; David L. Hudson, Jr., Cutting Costs . . . and Courts, A.B.A. J. 16 (Apr. 2003) (widespread cutbacks in state courts).

Figure 29: Civil filings per sitting judge, U.S. district courts, 1962–2002.



SOURCES: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-2 (1962–2002); Annual Report of the Director, Article III Judgeship Tables (1962–2002).

by 92 senior judges and more than 500 magistrates.[83] However, this increase has fallen short of the increase in caseload. Filing per sitting judge has more than doubled, from 196 in 1962 to 443 in 2002.

Concurrently, the number of non-Article III personnel and total expenditures grew more rapidly. In 1962, there were 5,602 nonjudicial personnel employed by the federal judiciary; in 1992 (the last year that figures were available), that number had grown to 25,947. Judicial expenditures increased from $246 million (1996 dollars) in 1962 to $4.254 billion (1996 dollars) in 2002.

So the decline in trials is accompanied by a larger judicial establishment of which judges form a smaller portion. In 1962 there were 18.9 nonjudicial employees for each Article III district court judge.[84] This fell slightly by 1972 (17.8) but jumped

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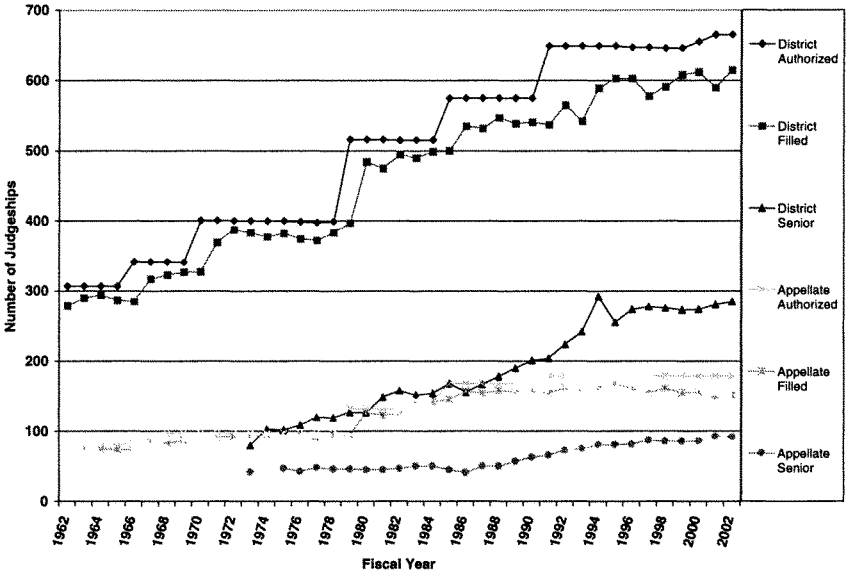
[83]The number of magistrates serving has not been reported since 1992, when there were 475 serving and 479 authorized (369 full time and 110 part time). Since then the number authorized has increased to 477 full time and 57 part time. Assuming that the ratio of filled to authorized positions has not declined radically, it seems safe to conclude that there are somewhat more than 500 magistrates serving in the district courts.

[84]"Other employees" here refers to the total number of employees minus judges, referees, magistrates, and U.S. Commissioners.

Figure 30: Article III judgeships, U.S. appellate and district courts, 1962–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Article III Judgeship Tables (1962–2002).

to 28.3 in 1982 and 45.9 in 1992. No figures are available after 1992, but the pattern of total spending by the judiciary suggests that the ratio is larger than ever.

Although the 1962 starting date was picked to maximize the comparability of data, it turns out to have an additional advantage—it lies at the very beginning of a set of momentous changes in the technology of legal work. Such technology had been fairly stable and unchanging since the turn of the last century, when legal work was reshaped by the telephone, the typewriter, comprehensive legal publication, and new research devices like digests and citators. Not much had changed by 1960; perhaps the only noticeable innovation in the first half of the century was the introduction of loose-leaf services. But starting in 1960, there was an accelerating succession of new technologies—photo-reproduction, computerization, fax machines, online data services, overnight delivery, electronic mail, teleconferencing, and so forth—that multiplied the amount of information that could be assembled and manipulated by legal actors. The lawyers who represent parties that appear in federal court work in larger entities, law firms or legal staffs, and come to the courts with enlarged capacities for record keeping, retrieval, and communication. The

Table 3: Non-Article III Judgeships and Other Federal Judicial Employees, 1962–2002

Fiscal Year	Total Non-Article III Judges	Magistrate					Bankruptcy				Other Employees[c]
		Total Auth.	Full-Time Auth.	Part-Time Auth.	Serving	U.S. Comm'rs	Auth.	Filled	Recalled (Serving)[a]	Other Officers[b]	
1962	884	—	—	—	—	694	—	—	—	190	5,602
1963	889	—	—	—	—	695	—	—	—	194	5,775
1964	902	—	—	—	—	706	—	—	—	196	5,818
1965	912	—	—	—	—	713	—	—	—	199	5,901
1966	914	—	—	—	—	708	—	—	—	206	6,002
1967	912	—	—	—	—	701	—	—	—	211	6,348
1968	917	—	—	—	—	700	—	—	—	217	6,518
1969	890	26	26	—	26	650	—	—	—	214	6,605
1970	867	518	61	457	28	629	—	—	—	210	6,741
1971	680	546	83	463	470	—	—	—	—	210	6,476
1972[d]	721	561	90	471	518	—	—	—	—	203	6,923
1973	715	567	103	464	514	—	—	—	—	201	7,400
1974	729	541	112	429	517	—	—	—	—	212	8,169
1975	662	487	133	354	452	—	—	—	—	210	8,9416
1976	674	482	150	332	450	—	—	—	—	224	10,07
1977	682	487	164	323	454	—	—	—	—	228	10,683
1978	687	487	176	311	455	—	—	—	—	232	11,116
1979	680	488	196	292	444	—	—	—	—	236	11,392
1980	674	488	204	284	439	—	—	—	—	235	12,730
1981	681	490	217	273	441	—	—	—	—	240	12,929
1982	687	483	223	260	451	—	—	—	—	236	14,032
1983	678	476	238	238	435	—	—	—	—	243	14,839
1984	681	457	253	204	447	—	0	45	*	234[e]	15,349
1985	668	467	272	195	440	—	232	*	*	228	16,231
1986	692	467	280	187	450	—	232	103	*	242	16,898
1987	703	467	292	175	451	—	284	216	*	252	17,963

Table 3: Continued

Fiscal Year	Total Non-Article III Judges	Magistrate					Bankruptcy				Other Employees[c]
		Total Auth.	Full-Time Auth.	Part-Time Auth.	Serving	U.S. Comm'rs	Auth.	Filled	Recalled (Serving)[a]	Other Officers[b]	
1988	745	470	294	176	452	—	284	280	15	293	19,298
1989	760	477	307	170	464	—	284	282	12	296	19,978
1990	779	483	323	160	476	—	291	289	13	303	21,022
1991	774	475	345	130	476	—	291	287	10	298	23,182
1992[b]	769	479	369	110	475	—	291	287	12	294	25,947
1993	*	483	381	102	*	—	326	324	12	—	*
1994	*	492	396	96	*	—	326	314	22	—	*
1995	*	498	413	85	*	—	326	315	23	—	*
1996	*	496	416	80	*	—	326	313	23	—	*
1997	*	508	429	79	*	—	326	313	22	—	*
1998	*	510	436	74	*	—	326	315	25	—	*
1999	*	518	447	71	*	—	326	306	29	—	*
2000	*	521	456	65	*	—	325	307	30	—	*
2001	*	532	470	62	*	—	324	312	30	—	*
2002	*	534	477	57	*	—	324	302	31	—	*

[a]Beginning in 1992 and dating back to 1988, information was kept on the number of recalled bankruptcy judges serving.

[b]Until 1978, positions in the bankruptcy courts were as referees; from 1978 until 1984 the bankruptcy courts were in transition.

[c]"Other employees" figure generated by subtracting all Article III, magistrate, and bankruptcy judges from total judicial employees.

[d]1972 was the first full year of the magistrate system.

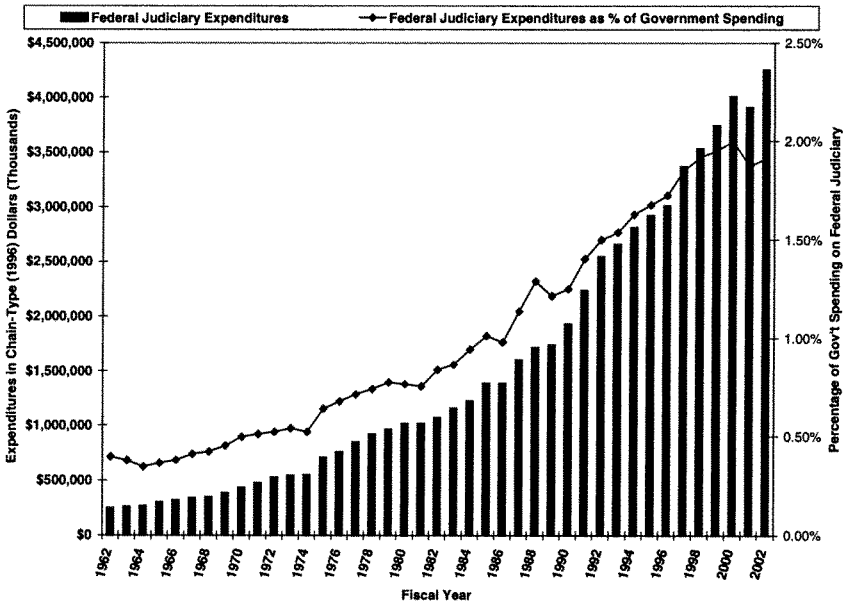
[e]This figure represents the total number of bankruptcy "judges" employed in a given year, including, presumably, the "filled" positions.

[f]After 1992, information was reported as of September 30 (previously reported as of June 30).

*Source information for data underlying figures is listed with the respective figures in the text.

SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Various Judgeship Tables (1962–2002).

Figure 31: Federal judiciary expenditures (in chain-type 1996 dollars) and federal judiciary spending as a percentage of government expenditures, 1962–2002.



SOURCE: Administrative Office of the U.S. Courts, Annual Report of the Director, Various Judgeship Tables and Expenditure Tables (1962–2002).

courts themselves enjoy a similar enhancement of capacity to record, find, examine, and disseminate information.

VII. TRIALS ON APPEAL

Theodore Eisenberg's pioneering exploration of the relationship between trials and appeals finds that tried cases in the federal courts are appealed at roughly four times the rate of cases terminated without trials.[85] Nevertheless, because there are so few tried cases, tried cases form only a small fraction of those appealed—about one in eight in the years 1987–1996. And as the proportion of tried cases falls, the portion of concluded appeals that are from trials falls and so does the absolute number of appellate decisions in tried cases.

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[85]Theodore Eisenberg, "Appeal Rates and Outcomes in Tried and Nontried Cases," 1 J. Empirical Legal Stud. 659 (2004).

Plaintiffs appeal at a higher rate than defendants in nontried cases; defendants appeal more against trial outcomes and they succeed at a higher rate than plaintiffs.[86] Tried cases are thus more likely to be subject to appeal than cases decided without trial and appealed tried cases are more likely to be reversed than appealed nontried cases.[87] What sorts of grounds are the basis for these reversals? Are cases that enter the law reports more likely to be those involving a trial? Or a reversal? Are these changing as the number of trials diminishes?

The body of reported cases continues to expand. In spite of restrictions on publication, the annual increment of published federal cases increased from 5,782 pages in 1962 to 13,490 pages in 2002, an increase of 133 percent.[88] Curiously, as the body of case law becomes ever larger, the presence of authoritative pronouncements of law at the peak of the hierarchy is thinned out. The Supreme Court of the United States decides fewer cases—less than half as many as 20 years ago—and its decisions are marked by less consensus.[89] So doctrine multiplies as decisive adjudication wanes.

VIII. OTHER FORUMS

A. The Number of Trials in State Courts

The great preponderance of trials, both civil and criminal, take place in the state courts. But data about the number, subject, and characteristics of state trials has been scarce and not readily comparable from one state to another. In their symposium paper, Brian Ostrom, Shauna Strickland, and Paula Hannaford of the National Center for State Courts have assembled an unprecedented bank of state trial data into comparable form.[90]

Table 4 shows the number of trials in the courts of general jurisdiction of 21 states (and the District of Columbia) that contain 58 percent of the U.S. population for the years 1976 to 2002. The data provide a picture of trends in the state courts that overall bear an unmistakable resemblance to the trends in federal courts we have

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[86]See also Kevin M. Clermont & Theodore Eisenberg, Appeal from Jury or Judge Trial: Defendants' Advantage, 3 Am. L. & Econ. Rev. 125 (2001); Eric Schnapper, Judges Against Juries—Appellate Review of Federal Civil Jury Trials, 1989 Wis. L. Rev. 237 (1989).

[87]Kevin M. Clermont & Theodore Eisenberg, Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instrument, 2002 U. Ill. L. Rev. 947, 967 (2002).

[88]Includes *Federal Reporter* and *Federal Supplement.*

[89]Philip Allen Lacovara. The Incredible Shrinking Court, Am. Lawyer 53 (Dec. 2003).

[90]Brian J. Ostrom, Shauna Strickland & Paula Hannaford, Examining Trial Trends in State Courts: 1976–2002, 1 J. Empiriral Legal Stud. 755 (2004). The definition of a trial differs from state to state. The definitions used by the various states are given in the Appendix, Table A-25.

Table 4: Civil Trials in Courts of General Jurisdiction in 22 States, 1976–2002*

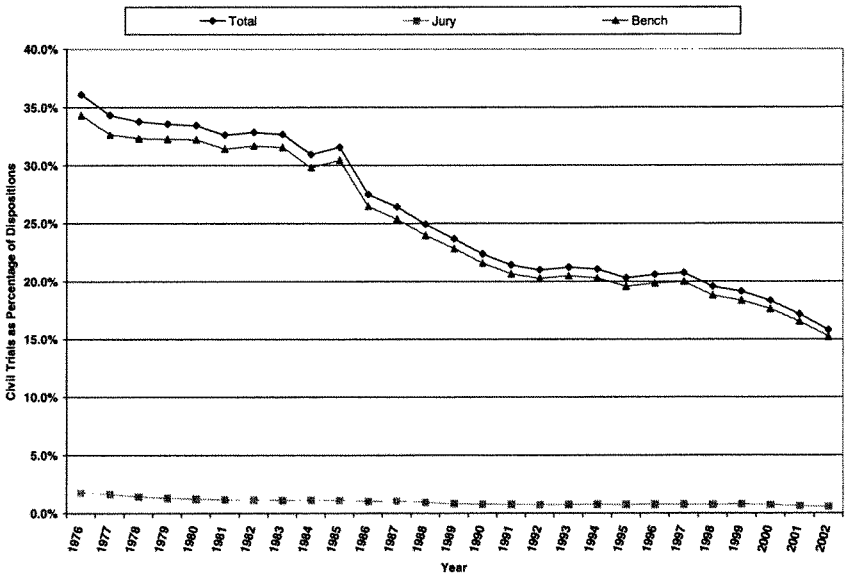
Year	*Total Dispositions*	*Jury Trials*	*Bench Trials*	*Total Trials*	*Trials as % of Dispositions*	*Jury Trials as % of Dispositions*	*Bench Trials as % of Dispositions*	*Jury Trials as % of All Trials*	*Bench Trials as % of All Trials*
1976	1,464,258	26,018	502,549	528,567	36.1%	1.8%	34.3%	4.9%	95.1%
1977	1,529,250	25,462	499,392	524,854	34.3%	1.7%	32.7%	4.9%	95.1%
1978	1,682,323	24,103	543,893	568,266	33.8%	1.4%	32.3%	4.2%	95.7%
1979	1,769,757	23,239	571,126	594,364	33.6%	1.3%	32.3%	3.9%	96.1%
1980	1,873,462	23,073	603,471	626,544	33.4%	1.2%	32.2%	3.7%	96.3%
1981	1,991,291	23,555	626,188	649,743	32.6%	1.2%	31.4%	3.6%	96.4%
1982	2,064,635	23,849	654,760	678,609	32.9%	1.2%	31.7%	3.5%	96.5%
1983	2,114,228	23,671	667,282	690,953	32.7%	1.1%	31.6%	3.4%	96.6%
1984	2,112,185	24,124	629,572	653,696	30.9%	1.1%	29.8%	3.7%	96.3%
1985	2,019,391	22,663	615,029	637,692	31.6%	1.1%	30.5%	3.6%	96.4%
1986	2,280,859	23,316	604,333	627,649	27.5%	1.0%	26.5%	3.7%	96.3%
1987	2,336,662	24,428	593,130	617,558	26.4%	1.0%	25.4%	4.0%	96.0%
1988	2,460,803	23,182	590,416	613,598	24.9%	0.9%	24.0%	3.8%	96.2%
1989	2,682,534	22,618	612,983	635,601	23.7%	0.8%	22.9%	3.6%	96.4%
1990	2,828,182	22,387	610,741	633,128	22.4%	0.8%	21.6%	3.5%	96.5%
1991	3,015,817	23,089	623,199	646,288	21.4%	0.8%	20.7%	3.6%	96.4%
1992	3,395,382	24,159	688,517	712,676	21.0%	0.7%	20.3%	3.4%	96.6%
1993	3,257,366	24,109	667,480	691,589	21.2%	0.7%	20.5%	3.5%	96.5%
1994	3,128,551	24,055	634,692	658,847	21.1%	0.8%	20.3%	3.7%	96.3%
1995	3,138,796	23,453	613,981	637,435	20.3%	0.7%	19.6%	3.7%	96.3%
1996	3,107,930	23,649	616,557	640,206	20.6%	0.8%	19.8%	3.7%	96.3%
1997	3,208,712	24,565	641,667	666,232	20.8%	0.8%	20.0%	3.7%	96.3%
1998	3,338,543	25,201	627,451	652,652	19.5%	0.8%	18.8%	3.9%	96.1%
1999	3,097,209	24,299	568,954	593,453	19.2%	0.8%	18.4%	4.1%	95.9%
2000	2,999,012	21,937	528,104	550,041	18.3%	0.7%	17.6%	4.0%	96.0%
2001	3,073,153	19,190	508,035	527,225	17.2%	0.6%	16.5%	3.6%	96.4%
2002	3,087,857	17,617	469,547	487,200	15.8%	0.6%	15.2%	3.6%	96.4%

*For the purposes of Tables 4, 5, 6, 7, and 8 and Figure 32, the District of Columbia and Puerto Rico are treated as states.

NOTE: The general jurisdiction courts of the following states are included in the yearly data: Alaska, Arizona, California, District of Columbia, Florida, Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, South Dakota, Texas, Vermont, Virginia, and Washington.

SOURCE: Ostrom, Strickland—Hannaford, 1 J. Empirical Legal Stud. 755 (2004).

Figure 32: Civil trials as percentage of dispositions in 22 state courts of general jurisdiction, 1976–2002.



SOURCE: Ostrom et al.

been examining. The portion of cases reaching jury trial declined from 1.8 percent to 0.6 percent of dispositions and bench trials fell from 34.3 percent to 15.2 percent. The absolute number of jury trials is down by one-third and the absolute number of bench trials is down 6.6 percent. These trends are illustrated in Figure 32.

Table 5 displays trials in the nine states (and Puerto Rico) that counted general civil trials (that is, tort, contract, and real property) separately from 1992 to 2002. In this set of states, we see an even more pronounced 44 percent drop in the absolute number of jury trials, while bench trials drop 21 percent. Here the fall in trials is accounted for in part by a fall in the number of dispositions, which decline by 21 percent. So the portion of cases disposed of by bench trials ends where it begins, at 4.3 percent, while jury trials fall from 1.8 percent to 1.3 percent of dispositions.

The pattern of decline is confirmed by another sampling of state court activity that provides a more precise picture of the parties, claims, and outcomes of trials. Under the sponsorship of the Bureau of Justice Statistics of the U.S. Department of Justice, the National Center for State Courts tracked the trial activity in state courts of general jurisdiction in the 75 most populous counties in the years 1992, 1996, and 2001. The researchers counted all the tort, contract, and real property trials (presumably, those that were resolved by trial, since we are given judgment amounts). In

Table 5: Contract, Tort, and Real Property Trials (Combined) in Courts of General Jurisdiction in 10 States, 1992–2002

Year	*Total Dispositions*	*Jury Trials*	*Bench Trials*	*Total Trials*	*Trials as % of Dispositions*	*Jury Trials as % of Dispositions*	*Bench Trials as % of Dispositions*	*Jury Trials as % of All Trials*	*Bench Trials as % of All Trials*
1992	633,170	11,224	26,972	38,196	6.0%	1.8%	4.3%	29.4%	70.6%
1993	568,251	10,536	30,519	41,055	7.2%	1.9%	5.4%	25.7%	74.3%
1994	523,312	10,112	34,350	44,462	8.5%	1.9%	6.6%	22.7%	77.3%
1995	500,146	9,634	34,004	43,638	8.7%	1.9%	6.8%	22.1%	77.9%
1996	484,171	9,749	30,705	40,454	8.4%	2.0%	6.3%	24.1%	75.9%
1997	492,523	9,896	28,827	38,723	7.9%	2.0%	5.9%	25.6%	74.4%
1998	492,248	9,502	27,848	37,350	7.6%	1.9%	5.7%	25.4%	74.6%
1999	481,618	9,002	24,278	33,280	6.9%	1.9%	5.0%	27.0%	73.0%
2000	457,982	8,137	24,944	33,081	7.2%	1.8%	5.4%	24.6%	75.4%
2001	500,192	7,235	21,215	28,450	5.7%	1.4%	4.2%	25.4%	74.6%
2002	498,649	6,329	21,398	27,727	5.6%	1.3%	4.3%	22.8%	77.2%

*General Civil is the combination of tort, contract, and real property rights cases.

NOTE: Percent totals may not equal due to rounding. The general jurisdiction courts of the following states are included in the yearly data: Arkansas, California, Florida, Hawaii, Minnesota, New Mexico, North Carolina, Washington, and West Virginia.

SOURCE: Ostrom, Strickland, & Hannaford (2004).

1992, there were 22,451 trials in these counties. In 2001, there were only 11,908, a 47 percent reduction. Tort trials were down 31.8 percent and contracts trials were down 61 percent. During these same years, tort trials in federal courts decreased by 37.6 percent and federal contract trials were down 47.7 percent.[91]

As we can see from the bottom row of Table 6, the attrition of trials in the decade covered was substantial in both state and federal courts, and across different case types. During this decade, state trials were decreasing at a greater rate than trials in federal courts, suggesting that the decline in trials is not driven by some factor peculiar to the federal courts, such as the increase in filings or appellate court endorsement of summary judgment.

On the criminal side, the trial rate has moved in the same direction in the state courts as in the federal courts. From 1976 to 2002, the overall rate of criminal trials in courts of general jurisdiction in the 22 states for which data is available dropped from 8.5 percent of dispositions to 3.3 percent. The decrease was similar in jury trials (from 3.4 percent to 1.3 percent) and bench trials (from 5.0 percent to 2.0 percent). Although dispositions grew by 127 percent in these courts, the absolute number of jury trials fell by 15 percent and of bench trials by 10 percent. The patterns of attrition resemble those in the federal courts, where criminal trials fell from 15.2 percent to 4.7 percent of dispositions in those years.

It might be supposed that the decline in the percentage of criminal trials reflects an increase in the proportion of lesser crimes and a decline in the presence of felonies, but Table 8 shows that in the 13 states that provide separate figures for felonies, trials as a portion of felony dispositions fell from 8.9 percent in 1976 to 3.2 percent in 2002. The absolute number of felony jury trials remained fairly constant, but in 2002 they made up only 2.2 percent of the larger number of felony dispositions, compared to 5.2 percent in 1976. The number of bench trials dropped substantially: in 2002, bench trials were only 1 percent of felony dispositions, down from 3.7 percent in 1976.

Although the state data is less comprehensive, it is sufficiently abundant to indicate that the trends in state court trials generally match those in the federal courts. In both there is a decline in the percentage of dispositions that are by jury trial and bench trial. In both there is a decline in the absolute number of jury trials and bench trials. In the federal courts, nonjury trials have declined even more dramatically than jury trials; in the state courts, it is jury trials that are shrinking faster.

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[91]Torts and contracts comprise practically the whole state trial docket but a declining sector of the trial docket in the federal courts. In 1992, tort and contract were 48.6 percent of federal trials, but by 2001 this had shrunk to 41.9 percent. (On the long-term shrinkage, see Figure 8.) Whether there was a comparable decline in the portion of state court trials in these subjects is unknown because both the Trial Court Network and the state counts of "general" civil trials are only of torts, contracts, and real property trials. In 1992, tort and contract accounted for 95.3 percent of the state court trials in the 75 counties. In 2001, this had increased to 97.87 percent of all trials. With the steeper decline in contract trials, tort trials were now two-thirds of all "general" trials, up from 51.9 percent in 1992.

Table 6: Attrition of Civil Trials in U.S. District Courts, in Two Sets of State Courts of General Jurisdiction, and in Bankruptcy Courts, 1992–2001

	All Trials			*Tort Trials*		*Contract Trials*		
	Fed	*75 Counties*	*10 States*	*Fed*	*75 Counties*	*Fed*	*75 Counties*	*Bankruptcy*
1992	8,029	22,451	38,196	2,385	11,660	1,513	9,744	8,353
1996	7,565	15,638	40,454	19,902	10,278	1,081	4,850	5,802
2001	5,400	11,908	28,450	1,471	7,948	792	3,698	3,160
Change 1992–2001	–32.7%	–47.0%	–25.5%	–37.6%	–31.8%	–47.7%	–61.0%	–62.2%

SOURCES: Table C-4 (federal); Thomas H. Cohen & Steven K. Smith, Civil Trial Cases and Verdicts in Large Counties, 2001 Bureau of Justice Statistics Bulletin, Apr. 2004 (75 counties); Ostrom et al. (10 states); Elizabeth Warren (bankruptcy).

Table 7: Criminal Trials in Courts of General Jurisdiction in 22 States (and District of Columbia and Puerto Rico), 1976–2002

Year	*Total Dispositions*	*Jury Trials*	*Bench Trials*	*Total Trials*	*Trials as % of Dispositions*	*Jury Trials as % of Dispositions*	*Bench Trials as % of Dispositions*	*Jury Trials as % of All Trials*	*Bench Trials as % of All Trials*
1976	1,222,972	42,049	61,382	103,881	8.5%	3.4%	5.0%	40.5%	59.1%
1977	1,270,769	42,593	46,252	88,845	7.0%	3.4%	3.6%	47.9%	52.1%
1978	1,303,583	39,335	47,232	86,567	6.6%	3.0%	3.6%	45.4%	54.6%
1979	1,398,504	38,242	45,071	83,313	6.0%	2.7%	3.2%	45.9%	54.1%
1980	1,549,416	38,703	53,961	92,664	6.0%	2.5%	3.5%	41.8%	58.2%
1981	1,681,439	39,615	53,328	92,943	5.5%	2.4%	3.2%	42.6%	57.4%
1982	1,755,429	40,583	48,098	88,681	5.1%	2.3%	2.7%	45.8%	54.2%
1983	1,798,427	39,921	50,914	90,835	5.1%	2.2%	2.8%	43.9%	56.1%
1984	1,841,318	38,150	49,848	87,998	4.8%	2.1%	2.7%	43.4%	56.6%
1985	1,933,439	38,557	46,686	85,243	4.4%	2.0%	2.4%	45.2%	54.8%
1986	2,031,079	39,019	46,124	85,143	4.2%	1.9%	2.3%	45.8%	54.2%
1987	2,154,238	39,324	46,162	85,486	4.0%	1.8%	2.1%	46.0%	54.0%
1988	2,245,898	39,520	47,908	87,428	3.9%	1.8%	2.1%	45.2%	54.8%
1989	2,402,465	44,971	59,802	104,773	4.4%	1.9%	2.5%	42.9%	57.1%
1990	2,418,363	46,271	63,420	109,691	4.5%	1.9%	2.6%	42.2%	57.8%
1991	2,508,408	47,518	56,543	104,061	4.1%	1.9%	2.3%	45.7%	54.3%
1992	2,503,835	46,722	58,494	105,216	4.2%	1.9%	2.3%	44.4%	55.6%
1993	2,534,210	44,730	64,383	109,113	4.3%	1.8%	2.5%	41.0%	59.0%
1994	2,469,446	43,447	61,107	104,554	4.2%	1.8%	2.5%	41.6%	58.4%
1995	2,527,505	41,794	57,520	99,314	3.9%	1.7%	2.3%	42.1%	57.9%
1996	2,650,122	42,385	57,938	100,323	3.8%	1.6%	2.2%	42.2%	57.8%
1997	2,677,410	43,661	57,806	101,467	3.8%	1.6%	2.2%	43.0%	57.0%
1998	2,786,415	41,646	63,138	104,784	3.8%	1.5%	2.3%	39.7%	60.3%
1999	2,776,537	40,985	62,090	103,075	3.7%	1.5%	2.2%	39.8%	60.2%
2000	2,773,175	38,966	63,769	102,735	3.7%	1.4%	2.3%	37.9%	62.1%
2001	2,762,261	37,438	57,348	94,786	3.4%	1.4%	2.1%	39.5%	60.5%
2002	2,780,440	35,664	55,447	91,111	3.3%	1.3%	2.0%	39.1%	60.9%

NOTE: The general jurisdiction courts of the following states are included in the yearly data: Alaska, Arizona, California, Delaware, District of Columbia, Florida, Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Missouri, New Jersey, North Carolina, Ohio, Pennsylvania, Puerto Rico, South Dakota, Texas, Vermont, and Virginia.

Table 8: Felony Trials in Courts of General Jurisdiction in 11 States (and District of Columbia and Puerto Rico), 1976–2002

Year	*Total Dispositions*	*Jury Trials*	*Bench Trials*	*Total Trials*	*Trials as % of Dispositions*	*Jury Trials as % of Dispositions*	*Bench Trials as % of Dispositions*	*Jury Trials as % of All Trials*	*Bench Trials as % of All Trials*
1976	416,888	21,767	15,222	36,989	8.9%	5.2%	3.7%	58.8%	41.2%
1977	415,881	21,084	12,783	33,867	8.1%	5.1%	3.1%	62.3%	37.7%
1978	425,629	19,845	11,711	31,556	7.4%	4.7%	2.8%	62.9%	37.1%
1979	441,777	19,697	11,061	30,758	7.0%	4.5%	2.5%	64.0%	36.0%
1980	470,263	19,905	10,345	30,250	6.4%	4.2%	2.2%	65.8%	34.2%
1981	538,507	21,448	10,426	31,874	5.9%	4.0%	1.9%	67.3%	32.7%
1982	587,537	22,470	11,081	33,551	5.7%	3.8%	1.9%	67.0%	33.0%
1983	600,602	22,478	12,249	34,727	5.8%	3.7%	2.0%	64.7%	35.3%
1984	594,649	20,403	10,029	30,432	5.1%	3.4%	1.7%	67.0%	33.0%
1985	622,814	20,454	9,632	30,086	4.8%	3.3%	1.5%	68.0%	32.0%
1986	674,471	21,443	11,505	32,948	4.9%	3.2%	1.7%	65.1%	34.9%
1987	751,896	22,034	11,090	33,124	4.4%	2.9%	1.5%	66.5%	33.5%
1988	796,786	21,771	10,773	32,544	4.1%	2.7%	1.4%	66.9%	33.1%
1989	801,483	22,954	11,082	34,036	4.2%	2.9%	1.4%	67.4%	32.6%
1990	802,938	23,959	11,462	35,421	4.4%	3.0%	1.4%	67.6%	32.4%
1991	841,309	24,044	8,689	32,733	3.9%	2.9%	1.0%	73.5%	26.5%
1992	851,180	24,245	8,371	32,616	3.8%	2.8%	1.0%	74.3%	25.7%
1993	857,004	23,378	10,622	34,000	4.0%	2.7%	1.2%	68.8%	31.2%
1994	845,813	22,734	13,323	36,057	4.3%	2.7%	1.6%	63.1%	36.9%
1995	865,612	22,802	12,902	35,704	4.1%	2.6%	1.5%	63.9%	36.1%
1996	876,205	23,331	11,571	34,902	4.0%	2.7%	1.3%	66.8%	33.2%
1997	902,395	24,397	11,245	35,642	3.9%	2.7%	1.2%	68.5%	31.5%
1998	905,505	22,268	10,636	32,904	3.6%	2.5%	1.2%	67.7%	32.3%
1999	904,895	22,244	8,630	30,874	3.4%	2.5%	1.0%	72.0%	28.0%
2000	901,793	21,937	9,697	31,634	3.5%	2.4%	1.1%	69.3%	30.7%
2001	921,820	20,664	10,663	31,327	3.4%	2.2%	1.2%	66.0%	34.0%
2002	933,319	20,557	9,695	30,252	3.2%	2.2%	1.0%	68.0%	32.0%

NOTE: Percent totals may not equal due to rounding. The general jurisdiction court(s) of the following states are included in the yearly data: Alaska, California, District of Columbia, Florida, Indiana, Kansas, New Jersey, North Carolina, Ohio, Puerto Rico, South Dakota, Texas, and Vermont.

B. The Number of ADR Proceedings

One of the most prominent explanations of the decline of trials is the migration of cases to other forums. Thomas Stipanowich has pulled together the elusive data about the prevalence and growth of ADR, including both court-annexed programs and free-standing forums (e.g., the American Arbitration Association, Center for Public Resources, JAMS).[92] To these we might add forums within organizations—so-called internal dispute resolution (IDR)—a category that overlaps the "free-standing" one to the extent that organizations retain these providers to administer or staff their programs.[93]

How much does ADR/IDR affect the trial dockets of the courts? Once cases are filed in court, they may be deflected into mediation or arbitration with the encouragement of the court. Much of the most visible ADR occurs not as an alternative to filing, but after a case is filed in court. Stipanowich reports that in 2001, some 24,000 cases were referred to some form of ADR in the federal courts. That would be about one-seventh of the number of dispositions that year.[94] How this affected the number or rate of trials remains to be learned. In 1992, arbitration accounted for only 1.7 percent of contract dispositions and 3.5 percent of tort dispositions in the state courts in the nation's 75 largest counties.[95]

Alternatively, claimants may pursue matters in noncourt forums without filing a case in court. They may do this either on their own volition or under the constraint of a mandatory arbitration clause. We know that a significant number of claims are kept out of the courts by such clauses, but we do not know how many. Data on the caseload of these free-standing forums is elusive. One of the oldest and best estab-

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[92]Thomas J. Stipanowich, ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution," 1 J. Empirical Legal Stud. 843 (2004).

[93]Lauren Edelman & Mark Suchman, When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law, 33 Law & Soc'y Rev. 941 (1999); Lauren B. Edelman, Howard S. Erlanger & John Lande, Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace, 27 Law & Soc'y Rev. 497 (1993).

[94]In 1989, the federal courts began the court-annexed arbitration program in selected districts. In the 10 selected districts, any civil case can be referred to arbitration if both parties consent or by court mandate in cases where the damages sought are less than $100,000. The arbitrator's decision is not binding; either party can file for trial within 30 days after the ruling. In 2002, the program attracted 3,965 cases, 7.8 percent of the civil filings in these districts. See Annual Report of the Administrative Office of the U.S. Courts 63 Table 5-12 (2002).

The Administrative Office does not publish figures on how many of these arbitrations are ultimately tried. In 1992, there were more than 7,000 cases referred to arbitration in this manner (17 percent of these districts' civil filings). See Annual Report of the Administrative Office of the U.S. Courts 64 (1992). The subsequent decline is attributed to the implementation of the Civil Justice Reform Act, which authorizes the use of other ADR techniques, primarily mediation. See Annual Report of the Administrative Office of the U.S. Courts 8 (1994).

[95]See Carol J. DeFrances & Steven K. Smith, U.S. Dep't of Justice, Bureau of Justice Statistics Special Report, Civil Justice Survey of State Courts 1992, Contract Cases in Large Counties 8.

lished of these is the American Arbitration Association (AAA). During the period that contract filings in federal court grew spectacularly, the AAA's Commercial Arbitration Docket underwent a corresponding growth from less than 1,000 cases in 1960 to 11,000 in 1988. In the 1990s, when contracts filings tumbled in both federal and state courts, the AAA docket remained steady and even began to increase late in the decade; by 2002 there were something over 17,000 of them.[96]

Overall, the caseload of ADR institutions remains small in comparison to that of the courts. A RAND Institute of Civil Justice study of Los Angeles estimated that the entire "private" caseload in 1993 was about one-twentieth of the caseload of the public courts (including small claims).[97] But recourse to ADR forums was growing rapidly while court caseloads were stable. Privately handled cases were larger: some 60 percent involved claims of $25,000 or more, while only 14 percent of public claims were that large. This implies that private dockets contained almost one-fifth of the large cases. Not all of these would necessarily have gone to court earlier, but we see here diversion of cases away from the courts that is of a magnitude that might contribute significantly to the decline of trials in public courts. Los Angeles boasted an atypically rich variety of private dispute handlers, so these findings are provocative rather than representative. They also alert us to refine our formulation of the vanishing trial phenomenon. As Stipanowich observes, several prominent sectors of arbitration have increasingly acquired features associated with public litigation—for example, securities arbitration has acquired an organized specialist bar, discovery, published decisions, and punitive damages.[98] In such instances, perhaps we should think of the relocation of trials outside public courts rather than the disappearance of trials.

IX. CAUSES AND CONSEQUENCES

A. Causes of the Trial Implosion

For a long time, the great majority of cases of almost every kind in both federal and state courts have terminated by settlement.[99] This reflects the exigencies of litigation, which lead parties to trade off the possibility of preferred outcomes for avoidance of

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[96]The data on caseloads is elusive, but there is reason to think the AAA represents a significant portion of all commercial arbitrations. Drahozal examined the franchise agreements of 75 of the largest franchisers and found that 34 (45 percent) had predispute arbitration clauses. See Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. Ill. L. Rev. 695, 726–27 (2001). Of these, 33 (97 percent) specified the AAA to administer the arbitration.

[97]Elizabeth S. Rolph, Erik Moller & Laura Petersen, Escaping the Courthouse: Private ADR in Los Angeles 17–18 (1994).

[98]Stipanowich, supra note 92, at 907.

[99]Marc Galanter & Mia Cahill, Most Cases Settle: Judicial Promotion and Regulation of Settlements, 46 Stan. L. Rev. 1301 (1994).

the costs and risks of proceeding through trial. It also reflects the architecture of the system, which has capacity to give full treatment to only a minority of the matters entitled to invoke it. Instead, it relies on a combination of cost barriers (not only out-of-pocket expenditures, but queues and risk) to induce parties to abandon claims or negotiate a settlement on the basis of the signals and markers that it generates. We would expect that as the population of claims increases more rapidly than the capacity of the system to provide full treatment, the portion receiving that treatment would decrease. What we are seeing since the late 1980s is not only a continuation in the shrinkage of *percentage* of cases that go to trial, but a shrinkage of the *absolute number* of cases that go to trial. The diminishment of the trial element in the work of the courts reflects and is entwined with many other changes. At the risk of underestimating the complexity of this process, let me attempt a rough foray into causes of the decline on the one hand and consequences of that decline on the other.

The first cluster of explanations are what might be called diminished-supply arguments, that is, that cases did not eventuate in trials because they did not get to court in the first place or, having come to court, they have departed for another forum. Not getting to court may be part of the explanation. Filings have been going down, especially in the state courts. This may reflect fewer unresolved grievances, or a change in estimations of cost and likely success by claimants or by lawyers who might have represented them.[100] But the declines in filings are more modest than the declines in trials. For example, in the 10 states in Table 5, the total number of cases (tort, contract, and real property) disposed of in 2002 (a rough indicator of the number of filings a year or two earlier) was down 21 percent from 1992, presumably leaving more resources for conducting trials in the remaining cases, but the number of trials in these states fell by 27 percent.

In any event, the diminished-supply explanation appears quite inapplicable to the federal courts. Filings dropped from their record high of 273,056 in 1985 (also the record year for trials) to a recent low of 207,094 in 1991 and since then have fluctuated mostly in the upper part of that range—approximately five times as great as filings in 1962. In comparison with the state data discussed above, federal filings rose by 19 percent from 1992 to a new record high in 2002 (Figure 17). During that decade, civil trials declined by 43 percent. Some observers have proposed that the drop in trials in federal courts is attributable to a shift of filings away from types of cases with high trial rates.[101] But civil rights and torts, the two most trial-prone categories, together comprised 39 percent of all filings in 1962 and 37 percent of a much larger total in 2002.

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[100]Steven Daniels & Joanne Martin, It Was the Best of Times, it Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas, 80 Tex. L. Rev. 1781 (2002).

[101]Wayne D. Brazil, Court ADR 25 Years After Pound: Have We Found a Better Way? Ohio St. J. on Disp. Resol. 93, 126 (2002).

A more persuasive line of argument is the diversion argument—that the claims and contests are there but they are in different forums. In the discussion of ADR above, we saw that there seems to be some substance to this, but it should be kept in mind that the decline in trials is very general, across the board, and is not confined to sectors or localities where ADR has flourished.

A third explanation might be called the economic argument, that is, that going to trial has become more costly as litigation has become more technical, complex, and expensive.[102] Rising costs of increasingly specialized lawyers, the need to deploy expensive experts,[103] jury consultants, and all the associated expenses have priced some parties out of the market. For those who can afford to play, the increased transaction costs enlarge the overlap in settlement ranges. More and more of the players in the legal arena are corporate actors who view participation in the legal arena in terms of long-term strategy. Increasingly, they regard much legal involvement as just another business input, one that must be subjected to cost controls. One part of such control is alternative sourcing—diverting what might have been in the courts into alternative forums.

Litigant strategizing about trials is affected by perceptions of their costs and outcomes and, in particular, by the perception that awards (and therefore risks) are increasing in size. As we noted earlier, the evidence about award size is mixed. As trial becomes more rare and more expensive, it makes sense that smaller cases would leave the field and awards in the fewer claims that go to trial and prevail would be higher.[104] The departure of smaller cases is compatible with the increasing length of trials, the increasing frequency of appeals, the relatively greater decline of bench trials, and with reports from Jury Verdict Research of constantly rising awards, reports whose representativeness is suspect on other grounds. Yet the 75 county studies provide substantial contrary evidence that awards may be falling rather than rising.

However, litigants respond not to what is happening in the courts but to what they *believe* is happening. The perception of higher awards complements the widespread view in defense circles that trials are not only expensive, but are risky because

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[102]On the increased costs of trial and the distributive consequences of those costs, see Gillian K. Hadfield, The Price of Law: How the Market for Lawyers Distorts the Justice System, 98 Mich. L. Rev. 953 (2000).

[103]Unfortunately, there is little longitudinal data on these features of litigation. A useful benchmark is provided by Sam Gross's report that in civil cases tried by juries in the California Superior Court in 1985 and 1986, experts testified in 86 percent of cases. Overall, the number of experts was 3.3 per case (3.8 in the cases in which experts appeared). Most experts, Gross found, were disputed by similar experts for the opposing side. Samuel R. Gross, Expert Evidence, 1991 Wis. L. Rev. 1113, 1119–20.

[104]Are they tried because they are big or big because they are tried? "Bigger" cases does not mean just the monetary stakes in the case at hand but cases in which more resources—more lawyer time, more discovery, more experts—are invested, usually, but not invariably, a function of the monetary stakes. Willingness to invest may reflect anticipated precedential effects, both doctrinal and projecting readiness to fight, as well as commitment to principles.

juries are arbitrary, sentimental, and "out of control," and reinforces strategies of settlement to avoid trial.[105] We know from several studies that the media are far more likely to report verdicts for plaintiffs and large awards than defendant verdicts, small awards, or the reduction or reversal of awards.[106] Notwithstanding occasional efforts to debunk some of the "litigation explosion" legends, the regular consumer of media reports would be badly misinformed about the number of product liability and medical malpractice cases, the size of jury awards, the incidence of punitive damages, and the regularity with which corporate defendants succeed in defeating individual claimants. Whatever the source of the skewed coverage, the audience receives the reassuring message that David generally manages to best Goliath, as well as the disturbing corollary that undeserving or spurious Davids are thick on the ground.[107] This pattern of media bias also suggests that the public greatly overestimates the number of trials and does not perceive the recent and drastic decline. This may well hold true for a very large section of legal professionals, as well.[108]

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[105]On the prevalence of such views, see John Lande, Failing Faith in Litigation? A Survey of Business Lawyers' and Executive Opinions, 3 Harv. Negot. L. Rev. 1 (1998).

[106]Steven Garber studied newspaper coverage of verdicts in product liability cases against automobile manufacturers decided from 1985 to 1996. Steven Garber, Product Liability, Punitive Damages, Business Decisions and Economic Outcomes, 1998 Wis. L. Rev. 237 (1998). He found that almost three-quarters of those verdicts were in favor of the defendant. However, newspapers reported just 3 percent of the defense verdicts, but 41 percent of verdicts for plaintiffs. Id. at 277. In other words, a verdict for the plaintiff is 12 times more likely to be reported than is a defense verdict. Consequently, in the reports that a conscientious and omnivorous newspaper reader would encounter, some four-fifths would have been verdicts for the plaintiff—roughly the opposite of the true percentage. Other studies have shown that the amounts won by plaintiffs and reported in newspapers and magazines are 10 to 20 times as large as the run of awards. Oscar Chase compared newspaper coverage of personal injury awards in New York with actual awards and discovered even larger discrepancies. Oscar Chase, Helping Jurors Determine Pain and Suffering Awards, 23 Hofstra L. Rev. 763 (1995). Another study found comparable discrepancies in the coverage of tort issues in five national magazines (*Time*, *Newsweek*, *Fortune*, *Forbes*, and *Business Week*) from 1980 to 1990. Donald S. Bailis & Robert J. MacCoun, Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation, 20 Law & Hum. Behav. 419, 436 (1996). Tort cases are not unique in provoking media distortion. A study comparing the outcomes of employment civil rights cases with coverage from 1990 through 2000 in six newspapers and four magazines found that plaintiffs won 85 percent of the time in media accounts but only 32 percent of the time in court, and that the average award presented in the media was "almost thirty times greater than what plaintiffs in federal district court were actually awarded." Laura Beth Nielsen & Aaron Beim, Media Misrepresentations: Title VII, Print Media and Public Perceptions of Discrimination Litigation, 15 Stan. L. & Pol'y Rev. 237, 251, 253 (2004).

[107]See also Marc Galanter, An Oil Strike in Hell: Contemporary Legends about the Civil Justice System, 40 Ariz. L. Rev. 717 (1998).

[108]Lawyers may know what is happening in their own corner of the legal world, but there is some evidence that lawyers do not have a very good grasp of the quantitative parameters of the legal system. In a study comparing South Carolina lawyers', doctors', and legislators' assessments of tort litigation patterns, lawyers overestimated the portion of awards for plaintiffs and the size of awards and were only marginally more accurate than other respondents. After publication of accurate information about the level of litigation and size of awards, lawyers' responses (along with those of doctors and legislators) did not become appreciably more

The diminished supply, diversion, and cost arguments focus on the assessments, incentives, and strategies of the parties. Another set of explanations focuses on institutional factors, on the courts themselves.[109] One such explanation is the notion that courts lack the resources to hold more trials. The increase in expenditure and in nonjudicial personnel throws some doubt on this. And the history suggests that with fewer judges and personnel and far less money, the federal courts 20 years ago were conducting more than twice as many civil trials. Even given an increase in mandatory noncivil matters and postulating increased complexity of cases, it seems doubtful that lack of court resources is a major constraint on the number of trials.

Courts are not only worked on by external forces, but are the site and source of changing institutional practice and of ideology that inspires and justifies that practice. Modern procedure has conferred on trial court judges broader unreviewed (and perhaps unreviewable) discretion.[110] This discretion has been used to shape a new style of judging, frequently referred to as managerial judging. "[T]he discretion of trial judges has expanded partly because of increased complexity but even more so from the multiplication of discretionary procedural, evidentiary and management decisions."[111] The expansion of managerial judging enlarges the discretion of trial judges and diminishes the control of appellate judges:

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accurate. Donald R. Songer, Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts, 39 S.C. L. Rev. 585, 597, 600 (1988). See also Roselle L. Wissler, Allan J. Hart & Michael J. Saks, Decisionmaking about General Damages: A Comparison of Jurors, Judges, and Lawyers, 98 Mich. L. Rev. 751, 811 (1999) (judges and lawyers systematically overpredict level of juror awards).

[109]Perched between resource and ideology arguments is the question of whether the requirements for expert testimony established by *Daubert v. Merrill Dow*, 509 U.S. 579 (1993), have made trial a less accessible and more expensive option.

[110]Yeazell, supra note 7. The enlarged freedom of lower courts was summed up succinctly by a Colorado Supreme Court Justice who observed that "[w]hile an appellate court may have the opportunity to reverse any individual trial judge once every few years, I know that trial judges, in their numerous workday rulings, reverse appellate courts every day." Gregory Kellam Scott, Judge-Made Law: Constitutional Duties and Obligations Under the Separation of Powers Doctrine, 49 DePaul L. Rev. 511, 517 (1999). A century ago, a similar observation was attributed to "Fighting Bob" Bowling, a Kansas City justice of the peace, who

> made a ruling in the trial of a case that was not acceptable to the attorney on one side, and he demurred to the decision of his Honor.
>
> "Your Honor, you are overruling the Supreme Court," said the lawyer.
>
> "I do that every day, my friend; sit down," replied the justice, and his decision was recorded.

Facetiae, 11 The Green Bag 599 (1899). Unlike Justice Scott's contemporary observation, the earlier one was labeled a joke, presumably because the justice of the peace's response was sufficiently surprising to serve as a punch line.

[111]Molot argues that "while judicial leeway in deciding legal questions may contribute to litigation uncertainty, this uncertainty pales in comparison to that generated by purely discretionary management decisions." Jonathan T. Molot, How Changes in the Legal Profession Reflect Changes in Civil Procedure, 84 Va. L. Rev. 955, 963 (1998).

> Managerial decisions involve a different, and more expansive, sort of discretion than purely legal decisions. For one thing, a judge's managerial decisions typically are insulated from appellate review, because they are interlocutory in nature, often are made off the record, and, in any event, typically are subject to a lenient "abuse of discretion" standard of review. But the difference between legal decisions and managerial ones runs much deeper. When "judges make legal decisions, the parties have an opportunity to marshal arguments based on an established body of principles. . . ." [M]anagerial discretion is different in nature. Judges deciding how to manage cases on their dockets have a wide array of tactics available and, indeed, choose to exercise their supervisory discretion in widely disparate ways, even when handling the same exact case.[112]

These institutional changes flow from and reinforce changes in judicial ideology. Trial judges are equipped with enhanced discretionary power in order to resolve cases and clear dockets. In the 1970s, as institutional pressures focused measures of judges' performance on their control over caseload, influential judges and administrators of the federal courts embraced the notion that judges were problem solvers and case managers as well as adjudicators. Training programs emphasized the role of the judge as mediator, producing settlements by actively promoting them.[113] This turn to judges as promoters of settlement and case managers was endorsed by the amendment of Rule 16 of the Federal Rules of Civil Procedure in 1983[114] and by the enactment of the Civil Justice Reform Act in 1990.[115]

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[112]Id. at 1004. On activism among trial judges, see Marc Galanter, Frank S. Palen & John M. Thomas, The Crusading Judge: Judicial Activism in Urban Trial Courts, 52 Cal. L. Rev. 699 (1979).

[113]Marc Galanter, A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States, 12 J. L. & Soc'y 1 (1985); Marc Galanter, The Emergence of the Judge as a Mediator in Civil Cases, 69 Judicature 257 (1986) (displacement of earlier view that judges should welcome settlement as a byproduct of their efforts to move cases toward trial). The ascendancy of the "trial as failure" view is traced in Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 925 (2000).

[114]In 1983, Federal Rule of Civil Procedure 16 was amended in response to criticisms that the pretrial conference under the original Rule 16 had become inefficient and ineffective in modern litigation. Fed. R. Civ. P. 16 Advisory Committee's Note (1983). Accordingly, the rule was revised to promote more pretrial management by judges in recognition of the fact that "[i]ncreased judicial control during the pretrial process accelerates the processing and termination of cases." Id. The amendments explicitly suggested that pretrial conferences be used by judges to "facilitat[e] the settlement of the case" and that "settlement or the use of extrajudicial procedures to resolve the dispute" be considered by the participants at the conference. Fed. R. Civ. P. 16(a)(5), (c)(7) (1983). Some language of the rule was later changed by the 1993 amendments to more directly recognize alternative means of settling litigation, including mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration. Fed. R. Civ. P. 16 Advisory Committee's Note (1993).

[115]The Civil Justice Reform Act (CJRA) of 1990 (codified at 28 U.S.C. §§ 471–482) required each of the 94 district courts to adopt a civil expense and delay reduction plan in order to improve the litigation process in its own district. Among other factors, each district was required to consider early intervention by a judicial officer in the case and the use of case-management conferences to explore settlement possibilities, as well as the referral of appropriate cases to alternative dispute resolution, including mediation, mini-trial, and summary jury trial. 28 U.S.C. § 473(a). Unlike the near-contemporaneous amendments of the Federal Rules of Civil Procedure, which contemplated systemwide uniform modification of practice, the CJRA promoted variation at the local level.

B. Trial Lawyers and Judges

As the number of judges and lawyers grows and the number of trials falls, the fund of trial experience of both judges and lawyers is diminished. The stock of judicial experience with trials is diminished. In 1962, there were 39 trials for each sitting federal district judge (18.2 criminal and 20.8 civil). Twenty-five years later in 1987, near the height of the boom in trials, there were 35.3 trials (13.0 criminal and 22.3 civil) for each sitting district judge. In 2002, there were just 13.2 trials (5.8 criminal and 7.4 civil) for each sitting district judge—roughly one-third as many as in 1962. It is not only district judges that are conducting fewer trials: Elizabeth Warren reports that trials per bankruptcy judge declined from about 37 per year in 1985 to 10 per year in 2002.[116]

These figures overstate the number of trials actually conducted by sitting district judges. We saw earlier that Table C-4 reported that in 2002 some 4,569 cases terminated "during and after trial." Table M-5 told us that the magistrates conducted 959 trials in that year. If every magistrate trial event occurred in a separate case and that case did not also include a trial conducted by a district judge, the total number of trials held by district judges in 2002 would be something like 3,610. But since there were some cases in which both a magistrate and a district judge presided over trials, the number of such cases should be added to the 3,610 to determine the number of trials conducted by district judges. Not all of these judges were sitting judges. Some trials were conducted by senior judges, a category whose numbers have grown more rapidly than the roster of sitting judges. In 1973, there were 80 senior district judges, one for every 4.8 sitting district judges; in 2002, there were 285 senior judges, one for every 2.2 sitting judges (Figure 33, Appendix Table A-23).

It is harder to track the shrinkage of trial experience among lawyers. During the 1962–2002 period, the number of lawyers roughly tripled. The number of lawyers per 100,000 persons grew from 160.4 in 1970 to 366.0 in 2002.

It seems undeniable that the average lawyer has less trial experience. But within that larger lawyer population, the stock of experienced trial lawyers is diminished. The membership of the Association of Trial Lawyers of America, which includes a very substantial portion of lawyers who regularly represent individual plaintiffs at trial, is at roughly the same level as in the early 1980s.[117] The rise of programs for training trial lawyers through simulations (e.g., NITA) suggests a corresponding shrinkage of opportunities for "on-the-job" training.

Kevin McMunigal argues that diminished trial experience results in an atrophy of advocacy skills that may both lessen future trials, as inexperienced lawyers are unwilling to undertake the risk of trial, and also distort settlements as lawyers without

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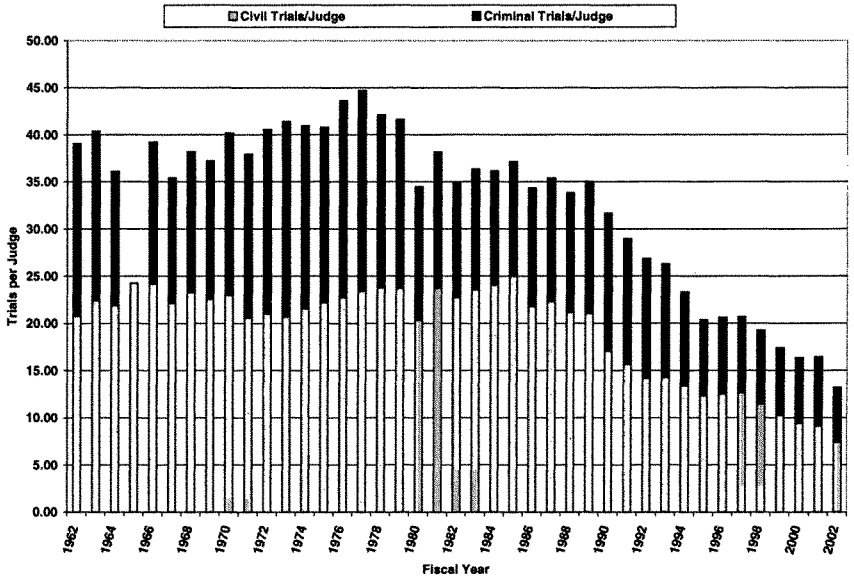
[116]Warren, supra note 78, at fig. 12.

[117]I base this observation on information supplied by Robert Peck.

Figure 33: Number of civil and criminal trials per sitting judge, U.S. district courts, 1962–2002.



SOURCES: Administrative Office of the U.S. Courts, Annual Report of the Director, Tables C-4 and D-4 (1962–2002); Administrative Office of the U.S. Courts, Annual Report of the Director, Article III Judgeship Tables (1962–2002).

trial experience are less able to evaluate cases accurately.[118] The decline in the centrality of trial advocacy to lawyers' work (and its replacement by pretrial maneuver) is registered in the language used by practitioners: by the 1970s, lawyers described themselves as "litigators" in contradistinction to "trial lawyers."[119]

C. Consequences of the Trial Implosion

Every other part of the legal world grows: there are more statutes, more regulations, more case law, more scholarship, more lawyers, more expenditure, more presence in public consciousness. In all these respects the growth of the legal world outstrips that of the society or the economy. But trials are shrinking, not only in relation to

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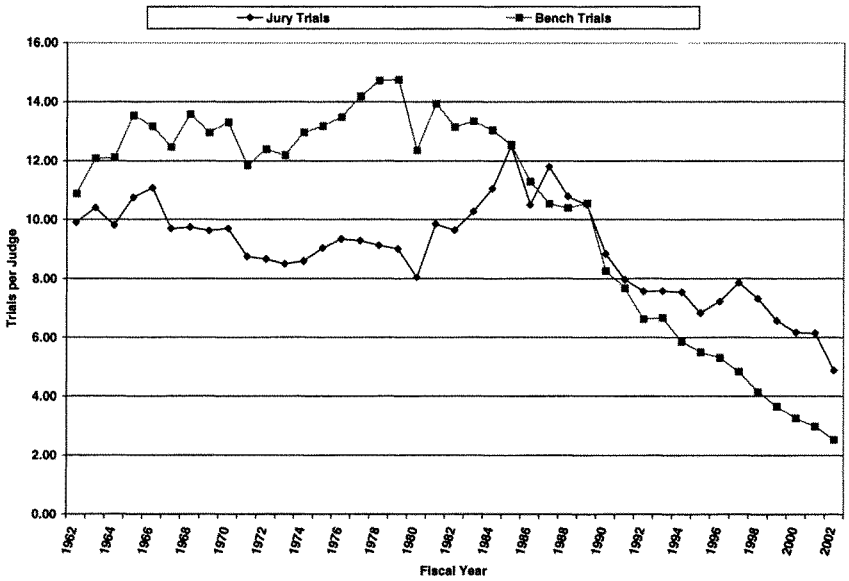
[118]Kevin C. McMunigal, The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers, 37 UCLA L. Rev. 833, 856–61 (1990).

[119]John H. Grady, Trial Lawyers, Litigators and Clients' Costs, 4 Litig. 5, 6 (1978).

Figure 34: Bench and jury civil trials per sitting judge, U.S. district courts, 1962–2002.



SOURCES: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2002); Administrative Office of the U.S. Courts, Annual Report of the Director, Article III Judgeship Tables (1962–2002).

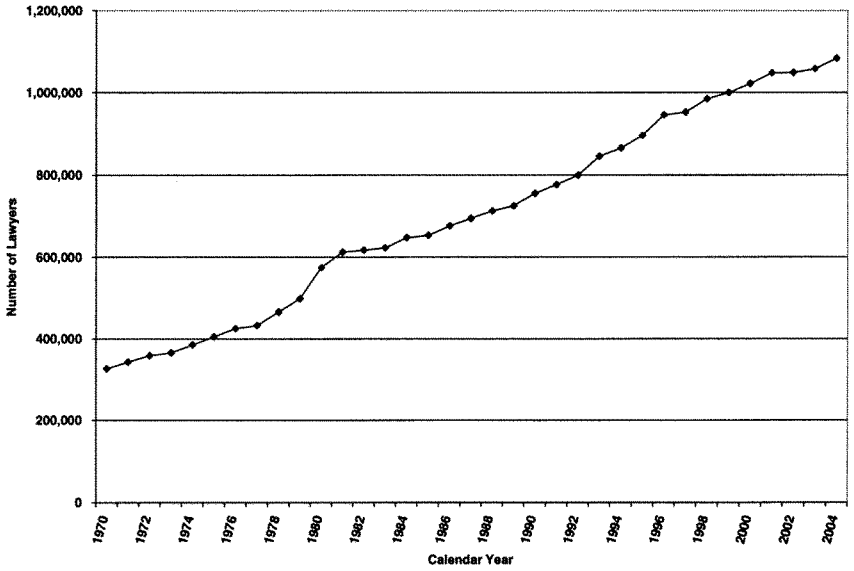
the rest of the legal world, but relative to the society and the economy. Figures 37 and 38 display the decrease in trials per capita in federal and state courts. From 1962 to 2002, federal trials per million persons fell by 49 percent; from 1976 to 2002, trials in 22 state courts of general jurisdiction fell by 33 percent.

Since the economy was growing more rapidly than the population, the number of trials per billion dollars of gross domestic product (GDP) has fallen more steadily and precipitously. By 2002 federal civil trials per billion of GDP were less than one-quarter as many as in 1962, even though spending on law as a portion of GDP had increased during that period.

What difference does it make? Aren't we just as well off with fewer trials?

Do fewer trials mean less law or worse law? Trials are not exactly an endangered species—at least for now. But their presence has diminished. In 2002, there were 20 percent fewer federal civil trials than in 1962 and about 30 percent fewer criminal trials. Trials as a portion of federal dispositions are a fraction of their earlier levels—roughly one-third for criminal cases and one-eighth for civil cases. Trends in

Figure 35: Approximate number of lawyers in the United States, 1970–2002.



SOURCE: American Bar Association, Market Research Department.

the state courts over the past quarter-century point to a comparable decline of trials there.

As trials shrink as a presence within the legal world, they are displaced from the central role assigned them in the common law. Although, as Lawrence Friedman observes, there was never a time when trial was the modal way of resolving civil cases,[120] common law procedure has been defined by the presence of this discreet plenary event, to which all else was prelude or epilog. But now we see a great elaboration of pretrial adjudication, of alternatives to trial, and of posttrial procedures. The number of disputes increases and the amount of legal doctrine proliferates, but they are connected by means other than trial.

The decline in trials may have some direct distributive effects. Eisenberg and Farber computed the win rates at trial and overall for various pairings of parties in nonpersonal injury diversity cases from 1986 to 1994.[121] They found that corporate

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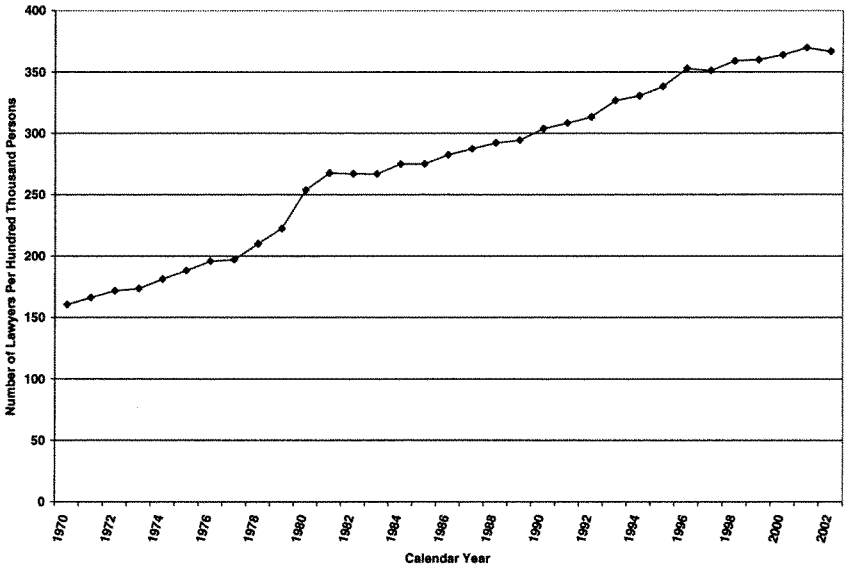
[120]Friedman, supra note 30.

[121]Theodore Eisenberg & Henry S. Farber, The Litigious Plaintiff Hypothesis: Case Selection and Resolution, 28 Rand J. Econ. 92 (1997).

Figure 36: Lawyers per capita in the United States, 1970–2002.



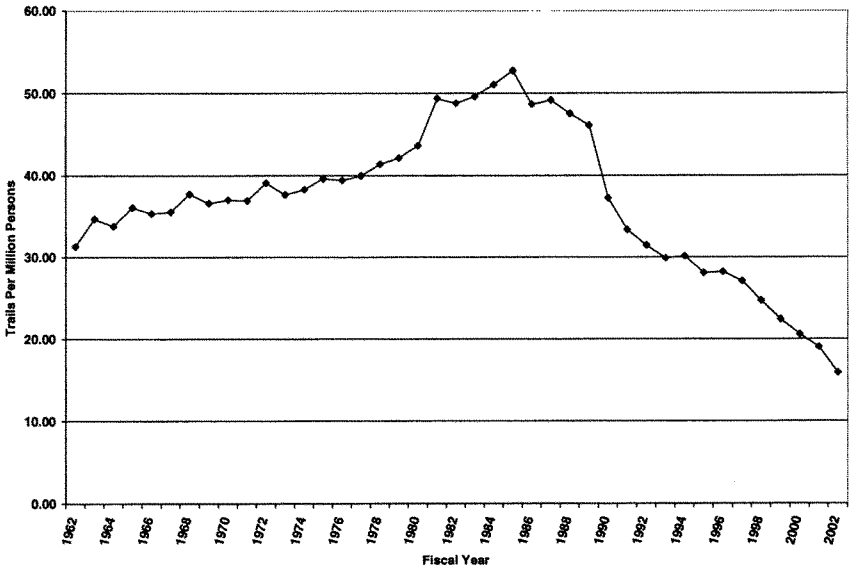
SOURCES: American Bar Association Marketing Department; Federal Reserve Bank of St. Louis <http://research.stlouisfed.org/fred2/data/POP.txt>.

parties were far more successful both as plaintiffs and defendants than were individual parties. Generally, in each pairing of party types, plaintiffs prevailed in settlement more frequently than they did at trial—with a single exception. That exception was when an individual plaintiff faced a corporate defendant; in that pairing, which went to trial at the highest rate, plaintiffs did better at trial. We do not know how much of this advantage remains after 10 more years of declining trials.

More generally, how is the character of the law changed by the absence of trials? Legal contests become more like those in the civil law, not a single plenary event, but a series of encounters with more judicial control, more documentary submissions, and less direct oral confrontation. Settlements entail "bargaining in the shadow of the law,"[122] so the influence of legal doctrine is present, but is thoroughly mixed with considerations of expense, delay, publicity and confidentiality, the state of the evidence, the availability and attractiveness of witnesses, and a host of other

[122]Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950 (1979); Marc Galanter, Justice in Many Rooms: Courts, Private Ordering and Indigenous Law, 19 J. Legal Pluralism 1 (1981).

Figure 37: Per capita civil trials in U.S. district courts, 1962–2002.



SOURCES: Administrative Office of the U.S. Courts, Annual Report, Table C-4 (1962–2002); Federal Reserve Bank of St. Louis <http://research.stlouisfed.org/fred2/data/POP.txt>.

contingencies that lie beyond the substantive rules of law. It is "the law" in its broad sense of process that casts the shadow, not merely its doctrinal core.

The signals and markers that provide guidance for settlements derive increasingly from pronouncements that are not connected with an authoritative determination of facts. What does this do to the clarity of signals? Are clear signals better than fuzzy ones?

Several studies suggest that in the absence of trials, the decision-making process of adjudication may get swallowed up by the surrounding bargaining process. This dissolution of legal standards is evident in Janet Cooper Alexander's description of securities class-action litigation as "a world where all cases settle." In such a world, "it may not even be possible to base settlement on the merits because lawyers may not be able to make reliable estimates of expected trial outcomes. . . . There is nothing to cast a shadow in which the parties can bargain."[123] Judges preside over routine settlements that reflect not legal standards but the strategic position of the repeat players.

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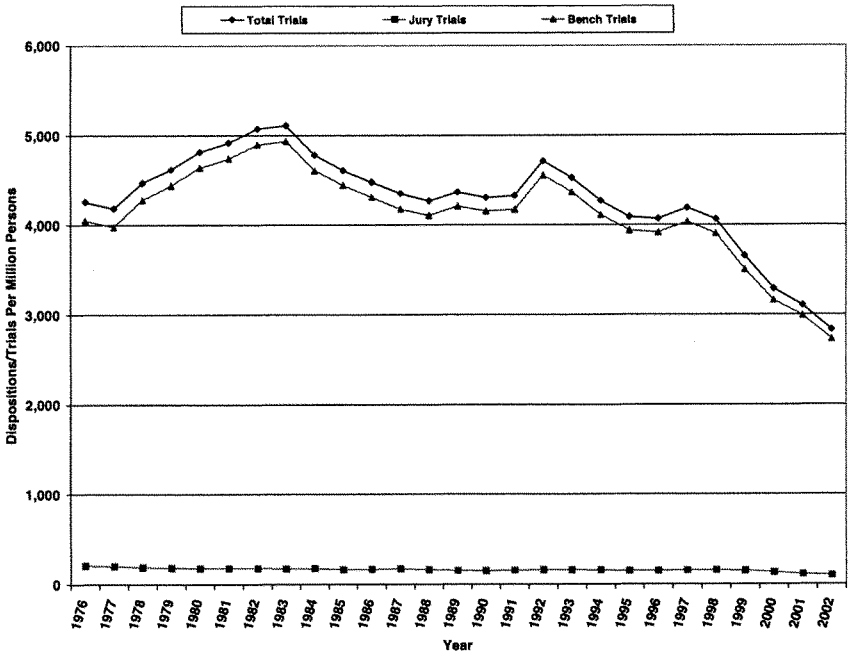
[123]See Alexander, supra note 54.

Figure 38: Per capita trials in courts of general jurisdiction in 22 states, 1976–2002.



SOURCE: Ostrom et. al.

> [B]ecause securities class actions rarely if ever go to trial, settlement judges, like lawyers, have little relevant experience to draw on other than their knowledge of settlements in similar cases . . . their role becomes not to increase the accuracy of settlements, but to provide an impetus to reach *some* settlement. In the absence of information about how similar cases fared at trial, settlement judges could be an important force in maintaining a "going rate" approach to settlements.[124]

Marygold Melli, Howard Erlanger, and Elizabeth Chambliss observed that in the child support arena they explored, there was a

> question of who is in fact casting the shadow of the law. The expectation of what a particular judge would set for child support had to be determined from the cases in his or her court—most of which involved settlement. The shadow of the law, therefore, was cast by the agreements of the parties. It seems that, rather than a system of bargaining

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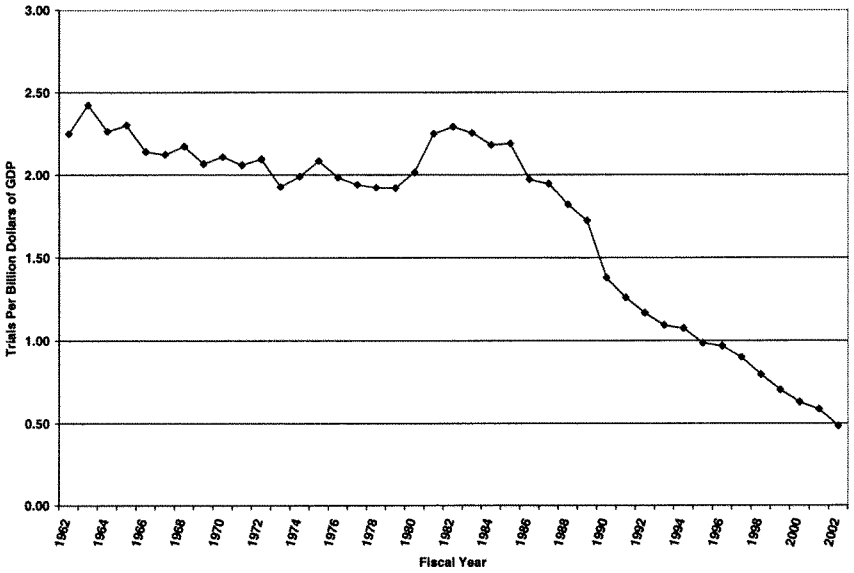
[124]Id. at 566.

Figure 39: Civil trials per billion dollars of gross domestic product, U.S. district courts, 1962–2002.



SOURCES: Administrative Office of the U.S. Courts, Annual Report, Table C-4 (1962–2002); 2003 Economic Report of the President, Table B-2.

> in the shadow of the law, divorce may well be one of adjudication in the shadow of bargaining.[125]

Judith Resnik found in the prevalence of consent decrees—in which judges (in effect) delegate official power to the negotiators before the bench—another example of the supposedly central and independent formal process of adjudication becoming subordinated to the supposedly penumbral process of bargaining that surrounds it.[126] In all these instances the absence of an authoritative determination of facts transforms adjudication into a spiral of attribution in which supposedly autonomous decisionmakers take cues from other actors who purport to be mirroring the decisions of the former.

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[125]Marigold S. Melli, Howard S. Erlanger & Elizabeth Chambliss, The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce, 40 Rutgers L. Rev. 1133, 1147 (1998).

[126]Judith Resnik, Judging Consent, 1987 U. Chi. Legal F. 43 (1987).

Indeed, the portion of the shadow cast by formal adjudication may be shrinking. Although the number of appeals has increased, the number subject to intensive full-dress review has declined. More appeals are decided on the basis of briefs alone, without oral argument.[127] Appellate courts decide many more of their cases without published opinions or without any opinion at all.[128] And increasingly they ratify what the courts below have done.

The decline of trials is occurring in a setting in which the amount of law is increasing rapidly. There are more federal regulatory statutes, more agencies, more staff, more enforcement expenditures, and more rules. A rough measure of the sheer quantity of rules may be derived from the number of pages added to the *Federal Register* each year: in 1960 there were 14,477 pages added; in 2002, 80,322 pages.[129] There were comparable increases in the amount of regulation by state and local government.

The corpus of authoritative legal material has grown immensely over our period. The amount of published commentary that glosses this authoritative material has grown apace. The number of law reviews has multiplied and the average output of each has grown.[130] The number of entries in the *Index to Legal Periodicals and Books* grew from 22,031 in 1982 to 382,428 in 2002.[131] Parallel to the growth of these scholarly sources was a proliferation of less formal channels of legal information.[132] The profusion of legal materials has outrun these printed sources.

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[127]In 2002, some two-thirds of appeals to U.S. circuit courts of appeal were decided without oral argument. Nancy Winkleman, Just a Brief Writer, 29(4) Litig. 50, 51 (2003).

[128]Lauren K. Robel, Caseload and Judging: Judicial Adaptations to Caseload, 1990 B.Y.U. L. Rev. 3 (1990); William M. Richman & William L. Reynolds, Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition, 81 Cornell L. Rev. 273 (1996); Mitu Gulati & C.M.A. McCauliff, On Not Making Law, 61 L. & Contemp. Probs. 157 (1998).

[129]This figure represents the gross addition for one year; some of it supplants or repeals earlier regulation and some is ephemeral. But making appropriate discounts for depreciation, it is clear that there has been a great increase in the "capital stock" of regulation. From 1961 to 1977, the number of pages in the *Federal Register* devoted to regulations increased from 14,000 to 66,000, with more than two-thirds of that growth occurring during the 1970s. Buhler, Calculating the Full Costs of Governmental Regulation (Office of the Librarian, *Federal Register*, 1978); Marc Galanter & Joel Rogers, Institute for Legal Studies, A Transformation of American Business Disputing? Some Preliminary Observations, Working Paper DPRP 10-3, Disputes Processing Research Program 55 (1991).

[130]Michael Saks found that between 1960 and 1985, the number of general law reviews in the United States increased from 65 to 186, while specialized reviews multiplied from 6 to 140. Michael J. Saks et al., Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart, 28 Suffolk U. L. Rev. 1163 (1994).

[131]These figures were obtained from the H.W. Wilson electronic version of the *Index to Legal Periodicals and Books.*

[132]In 1989, there were nearly 1,000 newsletters published in Washington (in addition to those published by the 3,200 Washington-based associations that mailed newsletters to their members). Weiss, If There's a Law, There's a Newsletter, N.Y. Times 10 (June 2, 1989).

Since their inception in 1973, online databases have multiplied access to legal materials.

What is the relation between this profusion of legal information and the shrinking number of trials? Apparently, of the increasingly more numerous reported cases, a smaller portion reflect adjudication in which there was a trial.[133] And the secondary literature, which in almost every subject continues to grow at an even faster rate than the number of reported cases,[134] presumably analyzes materials that are generated in nontrial formats. So we have a growth in the amount of legal doctrine that is increasingly independent of trials.

In a realm of ever-proliferating legal doctrine, the opportunities for arguments and decisions about the law are multiplied, while arguments and decisions become more detached from the texture of facts—at least from facts that have weathered the testing of trial.[135] The general effects of judicial activity are derived less from a fabric of examples of contested facts and more from an admixture of doctrinal exegesis, discretionary rulings of trial judges, and the strategic calculations of the parties.[136] Contests of interpretation replace contests of proof. Paradoxically, as legal doctrine becomes more voluminous and more elaborate, it becomes less determinative of the outcomes produced by legal institutions.

Again, it is necessary to emphasize that the vanishing trial phenomenon includes not only a decline in trials within the core legal institutions but also a diffusion and displacement of trial-like things into other settings—administrative boards, tribunals, ADR forums, and so forth. Although trials in court become less attractive and/or available to litigants, legal counters are invoked in more settings. In these other forums, public law is both extended and blurred; there is more legal flesh and less bones to give it shape. At the same time that courts are a declining site

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[133]Catherine Albiston, The Rule of Law and the Litigation Process: The Paradox of Losing by Winning, 33 Law & Soc'y Rev. 869 (1999).

[134]Galanter, supra note 12, at tbl. 12.

[135]On the other hand, in appellate proceedings courts are bombarded by factual arguments that are not contained in the trial record. For example, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, an amicus brief submitted by 16 large corporations relied on research commissioned and funded by one of their number, the Exxon Corporation, in the wake of a very large punitive award arising from the *Exxon Valdez* oil spill. Brief of Certain Leading Business Corporations as Amici Curiae in Support of Petitioner, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). A shift in sources is also reflected in judicial opinions. A study of the citations in published opinions found that the number of nonlegal sources (e.g., newspapers, general books) cited increased sharply after 1990, while citations of traditional legal secondary sources (e.g., law reviews, treatises) declined. Frederick Schauer & Virginia J. Wise, Nonlegal Information and the Delegalization of Law, 29 J. Legal Stud. 495 (2000).

[136]By "general effects" I refer to those effects of a legal decision beyond those in the case at hand. See Galanter, "The Radiating Effects of Courts" in Empirical Theories about Courts 117–42 (K. Boyum & L. Mather eds., 1983).

of trials, they are, at least potentially, an increasing site of supervisory oversight of the trial process elsewhere. As adjudication is diffused and privatized, what courts do is changing as they become the site of a great deal of administrative processing of cases, along with the residue of trials in high-stakes and intractable cases.

The consequences of these developments and the shape of the legal system to which they are leading remain hidden from us. If the continuation of the program of research begun in this collection were to bring these matters into clear view, we would be prepared to address the question raised by the following story.

> Sherlock Holmes and Dr. Watson go camping. After pitching their tent, they make a fire and enjoy a pleasant dinner and turn in for a good sleep before the next day's exertions. In the middle of the night, Holmes shakes Watson awake and says: "Watson, look up and tell me what you deduce!"
>
> Shaking himself awake, Watson says, "I see God's handiwork! The moon, millions of stars. If only a tiny fraction of them have planets like Earth, surely there must be life out there. What do you think it all means, Holmes?"
>
> "Watson, you fool! It means someone has stolen our tent!"

APPENDIX*

Table A-1: Civil Trials in U.S. District Courts, by Bench or Jury, 1962–2002 (Data Underlying Figure 1)

			U.S. Jurisdiction		*Federal Question*		*Diversity*	
Fiscal Year	*Bench Trials*	*Jury Trials*	*Bench Trials*	*Jury Trials*	*Bench Trials*	*Jury Trials*	*Bench Trials*	*Jury Trials*
1962	3,037	2,765	1,161	143	978	473	898	2,149
1963	3,505	3,017	1,321	181	1,112	447	1,072	2,389
1964	3,559	2,886	1,298	147	1,247	409	1,014	2,330
1965	3,885	3,087	1,318	122	1,541	485	1,026	2,480
1966	3,752	3,158	1,231	149	1,544	448	977	2,561
1967	3,955	3,074	1,245	142	1,619	428	1,091	2,504
1968	4,388	3,148	1,385	169	1,773	520	1,230	2,459
1969	4,238	3,147	1,373	123	1,754	523	1,111	2,501
1970	4,364	3,183	1,301	153	1,964	619	1,099	2,411
1971	4,381	3,240	1,205	137	2,077	608	1,099	2,495
1972	4,807	3,361	1,183	120	2,319	724	1,305	2,517
1973	4,684	3,264	1,110	110	2,363	739	1,211	2,415
1974	4,903	3,250	1,221	114	2,562	815	1,120	2,321
1975	5,051	3,462	1,108	121	2,675	966	1,268	2,375
1976	5,055	3,501	1,200	191	2,514	1,007	1,341	2,303
1977	5,290	3,462	1,209	119	2,790	1,066	1,291	2,277
1978	5,653	3,505	1,305	150	2,974	1,080	1,374	2,275
1979	5,857	3,576	1,427	133	3,109	1,265	1,321	2,178
1980	5,980	3,894	1,349	123	3,233	1,432	1,398	2,339
1981	6,623	4,679	1,548	166	3,461	1,688	1,614	2,825
1982	6,509	4,771	1,545	140	3,382	1,801	1,582	2,830
1983	6,540	5,036	1,466	146	3,516	1,914	1,558	2,976
1984	6,508	5,510	1,361	157	3,528	2,209	1,619	3,144
1985	6,276	6,253	1,396	141	3,254	2,581	1,626	3,531
1986	6,045	5,621	1,281	164	3,138	2,377	1,626	3,080
1987	5,611	6,279	1,172	170	2,923	2,547	1,516	3,562
1988	5,691	5,907	1,139	172	3,044	2,684	1,508	3,051
1989	5,690	5,666	1,284	206	2,920	2,528	1,486	2,932
1990	4,476	4,781	878	165	2,436	2,067	1,162	2,549
1991	4,127	4,280	900	184	2,247	1,855	980	2,241
1992	3,750	4,279	771	162	2,127	1,983	852	2,134
1993	3,619	4,109	714	156	2,094	1,988	811	1,965
1994	3,456	4,444	653	146	2,099	2,388	704	1,910
1995	3,316	4,122	622	139	2,059	2,265	635	1,718
1996	3,206	4,359	562	154	1,999	2,553	645	1,652
1997	2,801	4,551	462	196	1,785	2,588	554	1,767
1998	2,452	4,330	437	161	1,488	2,607	527	1,562
1999	2,225	4,000	410	158	1,328	2,413	487	1,429
2000	2,001	3,778	330	165	1,192	2,327	479	1,286
2001	1,768	3,632	346	160	1,002	2,077	420	1,395
2002	1,563	3,006	300	125	910	1,865	353	1,016

*Source information for data underlying figures in the text is given at the respective figures.

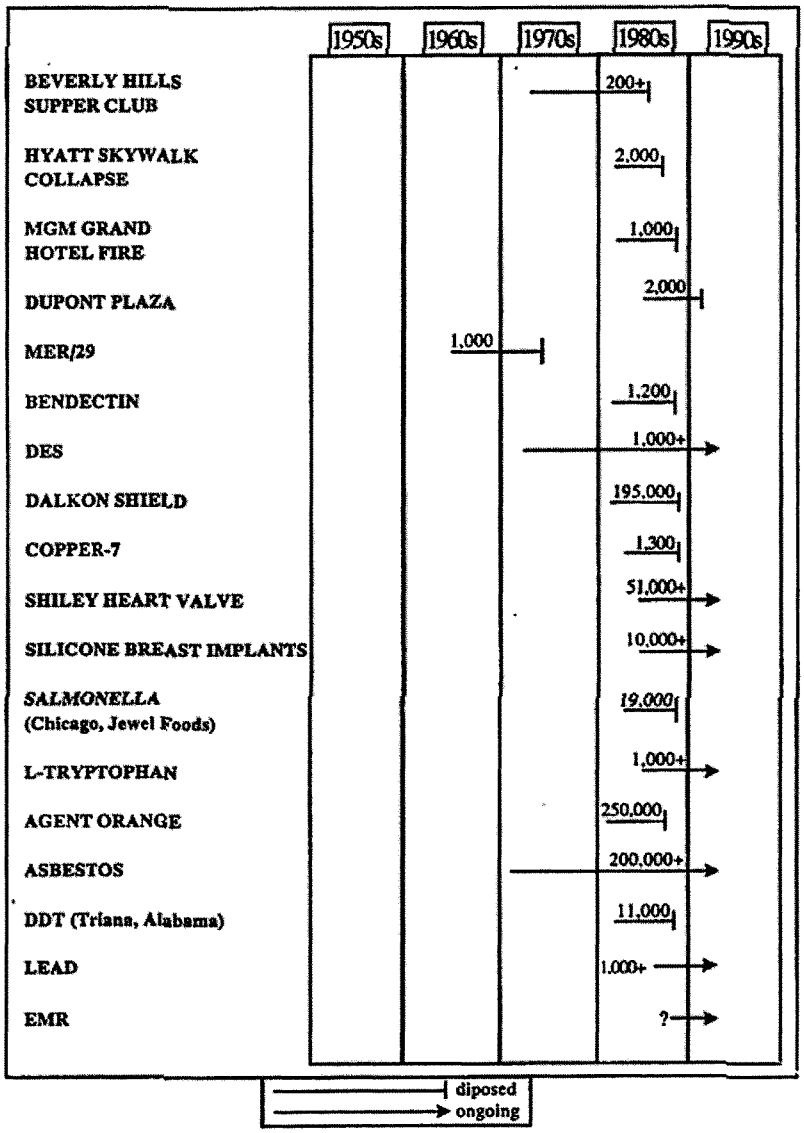
Table A-2: Percentage of Civil Terminations During/After Trial in U.S. District Courts, 1962–2002 (Data Underlying Figure 2)

		No Court Action		*Before Pretrial*		*During/After Pretrial*		*During/After Trial*	
Fiscal Year	*Total Dispositions*	*Number of Dispositions*	*% of Total Dispositions*	*Number of Dispositions*	*% of Total Dispositions*	*Number of Dispositions*	*% of Total Dispositions*	*Number of Dispositions*	*% of Total Dispositions*
1962	50,320	27,522	54.7%	9,502	18.9%	7,494	14.9%	5,802	11.5%
1963	54,513	29,181	53.5%	10,549	19.4%	8,261	15.2%	6,522	12.0%
1964	56,332	27,818	49.4%	13,581	24.1%	8,488	15.1%	6,445	11.4%
1965	59,063	27,842	47.1%	15,413	26.1%	8,836	15.0%	6,972	11.8%
1966	60,449	28,507	47.2%	16,141	26.7%	8,891	14.7%	6,910	11.4%
1967	64,556	29,588	45.8%	18,436	28.6%	9,503	14.7%	7,029	10.9%
1968	63,165	26,536	42.0%	19,255	30.5%	9,838	15.6%	7,536	11.9%
1969	67,914	26,614	39.2%	23,248	34.2%	10,667	15.7%	7,385	10.9%
1970	75,101	29,352	39.1%	27,778	37.0%	10,424	13.9%	7,547	10.0%
1971	81,478	32,265	39.6%	31,020	38.1%	10,572	13.0%	7,621	9.4%
1972	90,177	35,940	39.9%	33,819	37.5%	12,250	13.6%	8,168	9.1%
1973	93,917	36,008	38.3%	35,292	37.6%	14,669	15.6%	7,948	8.5%
1974	94,188	35,102	37.3%	37,292	39.6%	13,641	14.5%	8,153	8.7%
1975	101,089	38,212	37.8%	38,877	38.5%	15,487	15.3%	8,513	8.4%
1976	106,103	41,057	38.7%	40,311	38.0%	16,179	15.2%	8,556	8.1%
1977	113,093	44,026	38.9%	42,683	37.7%	17,632	15.6%	8,752	7.7%
1978	121,955	44,601	36.6%	48,487	39.8%	19,709	16.2%	9,158	7.5%
1979	138,874	59,389	42.8%	49,580	35.7%	20,472	14.7%	9,433	6.8%
1980	153,950	68,115	44.2%	53,648	34.8%	22,313	14.5%	9,874	6.4%
1981	172,126	71,573	41.6%	60,982	35.4%	28,269	16.4%	11,302	6.6%

Table A-2: Continued

Fiscal Year	Total Dispositions	No Court Action		Before Pretrial		During/After Pretrial		During/After Trial	
		Number of Dispositions	% of Total Dispositions	Number of Dispositions	% of Total Dispositions	Number of Dispositions	% of Total Dispositions	Number of Dispositions	% of Total Dispositions
1983	212,979	98,521	46.3%	75,788	35.6%	27,094	12.7%	11,576	5.4%
1984	240,750	113,065	47.0%	86,081	35.8%	29,586	12.3%	12,018	5.0%
1985	268,070	129,046	48.1%	95,434	35.6%	31,061	11.6%	12,529	4.7%
1986	265,082	121,870	46.0%	101,693	38.4%	29,853	11.3%	11,666	4.4%
1987	236,937	97,517	41.2%	95,167	40.2%	32,363	13.7%	11,890	5.0%
1988	237,634	79,254	33.4%	114,588	48.2%	32,194	13.5%	11,598	4.9%
1989	233,971	63,726	27.2%	129,410	55.3%	29,479	12.6%	11,356	4.9%
1990	213,020	51,451	24.2%	126,795	59.5%	25,517	12.0%	9,257	4.3%
1991	210,410	44,321	21.1%	136,562	64.9%	21,120	10.0%	8,407	4.0%
1992	230,171	34,956	15.2%	161,813	70.3%	25,373	11.0%	8,029	3.5%
1993	225,278	42,658	18.9%	154,458	68.6%	20,434	9.1%	7,728	3.4%
1994	227,448	39,734	17.5%	158,867	69.8%	20,947	9.2%	7,900	3.5%
1995	229,051	36,504	15.9%	165,805	72.4%	19,304	8.4%	7,438	3.2%
1996	249,832	36,752	14.7%	186,281	74.6%	19,234	7.7%	7,565	3.0%
1997	249,118	38,439	15.4%	182,714	73.3%	20,613	8.3%	7,352	3.0%
1998	261,669	39,721	15.2%	193,306	73.9%	21,860	8.4%	6,782	2.6%
1999	271,936	43,849	16.1%	200,428	73.7%	21,434	7.9%	6,225	2.3%
2000	259,046	43,245	16.7%	189,660	73.2%	20,362	7.9%	5,779	2.2%
2001	247,433	41,943	17.0%	180,074	72.8%	20,016	8.1%	5,400	2.2%
2002	258,876	41,550	16.1%	191,949	74.1%	20,808	8.0%	4,569	1.8%

Table A-3: The Onset of Mass Tort Litigation



SOURCE: Deborah R. Hensler & Mark A. Peterson, "Understanding Mass Personal Injury Litigation; A Socio-legal Analysis," 59 Brooklyn L. Rev. 961, 1062 (1993).

Table A-4: Tort, Contract, and Civil Rights Trials in U.S. District Courts 1962–2002 (Data Underlying Figures 4 and 5)

	Tort			*Contract*			*Civil Rights*		
Fiscal Year	*Total Trials*	*Bench Trials*	*Jury Trials*	*Total Trials*	*Bench Trials*	*Jury Trials*	*Total Trials*	*Bench Trials*	*Jury Trials*
1962	3,184	946	2,238	1,121	818	303	53	42	11
1963	3,575	1,125	2,450	1,225	899	326	71	55	16
1964	3,402	1,078	2,324	1,147	835	312	88	73	15
1965	3,634	1,123	2,511	1,206	885	321	125	97	28
1966	3,554	1,071	2,483	1,271	864	407	153	119	34
1967	3,470	1,049	2,421	1,386	984	402	173	131	42
1968	3,621	1,191	2,430	1,445	1,038	407	205	194	11
1969	3,555	1,122	2,433	1,418	1,000	418	258	192	66
1970	3,463	1,065	2,398	1,387	943	444	517	420	97
1971	3,473	1,017	2,456	1,422	962	460	736	645	91
1972	3,565	1,114	2,451	1,710	1,203	507	767	651	116
1973	3,343	1,019	2,324	1,610	1,111	499	881	741	140
1974	3,102	884	2,218	1,628	1,105	523	1,034	842	192
1975	3,019	872	2,147	1,817	1,252	565	1,101	851	250
1976	3,041	948	2,093	1,795	1,204	591	1,247	873	374
1977	2,974	898	2,076	1,756	1,151	605	1,462	1,074	388
1978	3,044	942	2,102	1,823	1,230	593	1,682	1,289	393
1979	2,919	897	2,022	1,829	1,224	605	1,922	1,459	463
1980	3,137	992	2,145	1,962	1,275	687	2,050	1,530	520
1981	3,698	1,168	2,530	2,334	1,482	852	2,203	1,572	631
1982	3,489	1,050	2,439	2,382	1,492	890	2,163	1,456	707
1983	3,658	1,101	2,557	2,457	1,483	974	2,306	1,529	777
1984	3,859	1,156	2,703	2,567	1,538	1,029	2,652	1,641	1,011
1985	4,506	1,100	3,406	2,541	1,511	1,030	2,629	1,529	1,100
1986	3,753	1,170	2,583	2,497	1,390	1,107	2,516	1,370	1,146
1987	4,089	999	3,090	2,431	1,340	1,091	2,398	1,230	1,168
1988	3,517	977	2,540	2,501	1,379	1,122	2,482	1,269	1,213
1989	3,400	938	2,462	2,411	1,361	1,050	2,257	1,088	1,169
1990	2,949	832	2,117	1,855	970	885	1,720	809	911
1991	2,719	771	1,948	1,558	874	684	1,648	803	845
1992	2,385	657	1,728	1,513	768	745	1,661	772	889
1993	2,214	636	1,578	1,412	724	688	1,776	753	1,023
1994	2,150	572	1,578	1,283	618	665	2,022	724	1,298
1995	2,063	586	1,477	1,023	510	513	2,032	668	1,364
1996	1,902	526	1,376	1,081	564	517	2,231	640	1,591
1997	1,935	460	1,475	1,009	473	536	2,239	539	1,700
1998	1,762	430	1,332	931	464	467	2,204	495	1,709
1999	1,609	445	1,164	902	436	466	2,043	447	1,596
2000	1,396	356	1,040	855	428	427	1,897	381	1,516
2001	1,471	320	1,151	792	387	405	1,677	301	1,376
2002	1,071	289	782	700	329	371	1,524	290	1,234

Table A-5: Prisoner Petitions Filed in U.S. District Courts, 1962–2002 (Data Underlying Figure 6)

		Motions to Vacate Sentence		*Habeas Corpus*		*Mandamus*		*Civil Rights*	
Fiscal Year	*Total*	*Filings*	*% of Total*	*Filings*	*% of Total*	*Filings*	*% of Total*	*Filings*	*% of Total*
1962	2,661	546	20.5%	2,115	79.5%	0	0.0%	0	0.0%
1963	3,727	595	16.0%	2,766	74.2%	366	9.8%	0	0.0%
1964	5,859	972	16.6%	4,413	75.3%	474	8.1%	0	0.0%
1965	7,488	1,244	16.6%	5,640	75.3%	604	8.1%	0	0.0%
1966	8,180	863	10.6%	6,180	75.6%	1,137	13.9%	0	0.0%
1967	9,909	958	9.7%	6,998	70.6%	1,953	19.7%	0	0.0%
1968	10,695	1,099	10.3%	7,376	69.0%	2,220	20.8%	0	0.0%
1969	12,562	1,444	11.5%	8,620	68.6%	2,498	19.9%	0	0.0%
1970	15,569	1,729	11.1%	10,563	67.8%	3,277	21.0%	0	0.0%
1971	15,883	1,335	8.4%	9,953	62.7%	1,470	9.3%	3,125	19.7%
1972	15,846	1,591	10.0%	9,256	58.4%	1,404	8.9%	3,595	22.7%
1973	16,733	1,722	10.3%	9,071	54.2%	1,353	8.1%	4,587	27.4%
1974	18,029	1,822	10.1%	9,336	51.8%	1,190	6.6%	5,681	31.5%
1975	18,638	1,690	9.1%	9,520	51.1%	822	4.4%	6,606	35.4%
1976	19,255	1,693	8.8%	9,238	48.0%	864	4.5%	7,460	38.7%
1977	19,294	1,921	10.0%	8,370	43.4%	770	4.0%	8,233	42.7%
1978	21,786	1,924	8.8%	8,749	40.2%	747	3.4%	10,366	47.6%
1979	22,562	1,907	8.5%	8,690	38.5%	771	3.4%	11,194	49.6%
1980	23,230	1,322	5.7%	8,442	36.3%	468	2.0%	12,998	56.0%
1981	27,655	1,248	4.5%	9,415	34.0%	519	1.9%	16,473	59.6%
1982	29,275	1,186	4.1%	9,963	34.0%	553	1.9%	17,573	60.0%
1983	30,765	1,311	4.3%	10,437	33.9%	541	1.8%	18,476	60.1%
1984	31,093	1,427	4.6%	10,240	32.9%	570	1.8%	18,856	60.6%
1985	33,455	1,527	4.6%	11,928	35.7%	553	1.7%	19,447	58.1%
1986	33,758	1,556	4.6%	10,719	31.8%	642	1.9%	20,841	61.7%
1987	37,298	1,676	4.5%	11,336	30.4%	589	1.6%	23,697	63.5%
1988	38,825	2,071	5.3%	11,734	30.2%	600	1.5%	24,420	62.9%
1989	41,472	2,526	6.1%	12,363	29.8%	626	1.5%	25,957	62.6%
1990	42,623	2,970	7.0%	12,784	30.0%	877	2.1%	25,992	61.0%
1991	42,452	3,328	7.8%	12,437	29.3%	645	1.5%	26,042	61.3%
1992	48,417	3,983	8.2%	12,803	26.4%	1,076	2.2%	30,555	63.1%
1993	53,436	5,379	10.1%	13,041	24.4%	1,083	2.0%	33,933	63.5%
1994	57,928	4,628	8.0%	13,349	23.0%	886	1.5%	39,065	67.4%
1995	63,544	5,988	9.4%	14,970	23.6%	907	1.4%	41,679	65.6%
1996	67,835	9,729	14.3%	16,429	24.2%	462	0.7%	41,215	60.8%
1997	71,966	11,675	16.2%	21,858	30.4%	798	1.1%	37,635	52.3%
1998	41,747	6,287	15.1%	20,897	50.1%	807	1.9%	13,756	33.0%
1999	44,718	5,752	12.9%	23,815	53.3%	1,068	2.4%	14,083	31.5%
2000	46,624	6,341	13.6%	24,941	53.5%	1,191	2.6%	14,151	30.4%
2001	47,909	8,644	18.0%	24,674	51.5%	1,156	2.4%	13,435	28.0%
2002	45,131	6,107	13.5%	23,862	52.9%	1,123	2.5%	14,039	31.1%

Table A-6: Prisoner Petition Trials in U.S. District Court, by Bench or Jury, 1962–2002 (Data Underlying Figure 7)

	Number			*Percentage*	
Fiscal Year	*Total*	*Bench*	*Jury*	*Bench*	*Jury*
1962	96	96	0	100.0%	0.0%
1963	129	129	0	100.0%	0.0%
1964	327	326	1	99.7%	0.3%
1965	592	592	0	100.0%	0.0%
1966	569	566	3	99.5%	0.5%
1967	568	566	2	99.6%	0.4%
1968	701	700	1	99.9%	0.1%
1969	586	580	6	99.0%	1.0%
1970	663	654	9	98.6%	1.4%
1971	600	580	20	96.7%	3.3%
1972	458	431	27	94.1%	5.9%
1973	498	457	41	91.8%	8.2%
1974	669	632	37	94.5%	5.5%
1975	664	598	66	90.1%	9.9%
1976	581	520	61	89.5%	10.5%
1977	689	615	74	89.3%	10.7%
1978	687	618	69	90.0%	10.0%
1979	605	506	99	83.6%	16.4%
1980	589	492	97	83.5%	16.5%
1981	804	667	137	83.0%	17.0%
1982	896	716	180	79.9%	20.1%
1983	968	760	208	78.5%	21.5%
1984	1,052	795	257	75.6%	24.4%
1985	910	700	210	76.9%	23.1%
1986	1,014	744	270	73.4%	26.6%
1987	992	685	307	69.1%	30.9%
1988	1,015	679	336	66.9%	33.1%
1989	1,188	866	322	72.9%	27.1%
1990	1,104	765	339	69.3%	30.7%
1991	953	642	311	67.4%	32.6%
1992	1,055	696	359	66.0%	34.0%
1993	996	663	333	66.6%	33.4%
1994	1,189	754	435	63.4%	36.6%
1995	1,158	785	373	67.8%	32.2%
1996	1,235	793	442	64.2%	35.8%
1997	1,122	670	452	59.7%	40.3%
1998	845	438	407	51.8%	48.2%
1999	696	318	378	45.7%	54.3%
2000	735	300	435	40.8%	59.2%
2001	650	294	356	45.2%	54.8%
2002	491	199	292	40.5%	59.5%

Table A-7: Case Type as Portion of Total Civil Trials in U.S. District Courts, 1962–2002 (Data Underlying Figure 8)

		Contracts		*Torts*		*Civil Rights*		*Prisoner Petition*		*Labor*		*Intellectual Property*		*All Others (ex. local jurisdiction)*	
Fiscal Year	*Total Trials*	*# of Trials*	*% of Total*	*# of Trials*	*% of Total*	*# of Trials*	*% of Total*	*# of Trials*	*% of Total*	*# of Trials*	*% of Total*	*# of Trials*	*% of Total*	*# of Trials*	*% of Total*
1962	5,802	1,121	19.3%	3,184	54.9%	53	0.9%	96	1.7%	230	4.0%	169	2.9%	949	16.4%
1963	6,522	1,225	18.8%	3,575	54.8%	71	1.1%	129	2.0%	255	3.9%	166	2.5%	1,101	16.9%
1964	6,445	1,147	17.8%	3,402	52.8%	88	1.4%	174	2.7%	240	3.7%	186	2.9%	1,208	18.7%
1965	6,972	1,206	17.3%	3,634	52.1%	125	1.8%	592	8.5%	260	3.7%	165	2.4%	990	14.2%
1966	6,910	1,271	18.4%	3,554	51.4%	153	2.2%	569	8.2%	240	3.5%	179	2.6%	944	13.7%
1967	7,029	1,386	19.7%	3,470	49.4%	173	2.5%	574	8.2%	297	4.2%	175	2.5%	954	13.6%
1968	7,536	1,445	19.2%	3,621	48.0%	205	2.7%	701	9.3%	308	4.1%	171	2.3%	1,085	14.4%
1969	7,385	1,418	19.2%	3,555	48.1%	258	3.5%	586	7.9%	334	4.5%	154	2.1%	1,080	14.6%
1970	7,547	1,387	18.4%	3,463	45.9%	517	6.9%	663	8.8%	317	4.2%	170	2.3%	1,030	13.6%
1971	7,621	1,422	18.7%	3,473	45.6%	736	9.7%	600	7.9%	362	4.8%	148	1.9%	880	11.5%
1972	8,168	1,710	20.9%	3,565	43.6%	767	9.4%	458	5.6%	378	4.6%	193	2.4%	1,097	13.4%
1973	7,948	1,610	20.3%	3,343	42.1%	881	11.1%	498	6.3%	366	4.6%	161	2.0%	1,089	13.7%
1974	8,153	1,628	20.0%	3,102	38.0%	1,034	12.7%	669	8.2%	338	4.1%	156	1.9%	1,226	15.0%
1975	8,513	1,817	21.3%	3,019	35.5%	1,101	12.9%	664	7.8%	374	4.4%	200	2.3%	1,338	15.7%
1976	8,556	1,795	21.0%	3,041	35.5%	1,247	14.6%	581	6.8%	414	4.8%	155	1.8%	1,323	15.5%
1977	8,752	1,756	20.1%	2,974	34.0%	1,462	16.7%	689	7.9%	435	5.0%	161	1.8%	1,275	14.6%
1978	9,158	1,823	19.9%	3,044	33.2%	1,682	18.4%	687	7.5%	418	4.6%	172	1.9%	1,332	14.5%
1979	9,433	1,829	19.4%	2,919	30.9%	1,922	20.4%	605	6.4%	502	5.3%	176	1.9%	1,480	15.7%
1980	9,874	1,962	19.9%	3,137	31.8%	2,050	20.8%	589	6.0%	491	5.0%	206	2.1%	1,439	14.6%
1981	11,302	2,334	20.7%	3,698	32.7%	2,203	19.5%	804	7.1%	531	4.7%	250	2.2%	1,482	13.1%

Table A-7: Continued

Fiscal Year	Total Trials	Contracts		Torts		Civil Rights		Prisoner Petition		Labor		Intellectual Property		All Others (ex. local jurisdiction)	
		# of Trials	% of Total	# of Trials	% of Total	# of Trials	% of Total	# of Trials	% of Total	# of Trials	% of Total	# of Trials	% of Total	# of Trials	% of Total
1982	11,280	2,382	21.1%	3,489	30.9%	2,163	19.2%	896	7.9%	607	5.4%	272	2.4%	1,471	13.0%
1983	11,576	2,457	21.2%	3,658	31.6%	2,306	19.9%	968	8.4%	495	4.3%	266	2.3%	1,426	12.3%
1984	12,018	2,567	21.4%	3,859	32.1%	2,652	22.1%	1,052	8.8%	454	3.8%	232	1.9%	1,202	10.0%
1985	12,529	2,541	20.3%	4,506	36.0%	2,629	21.0%	910	7.3%	431	3.4%	212	1.7%	1,300	10.4%
1986	11,666	2,497	21.4%	3,753	32.2%	2,516	21.6%	1,014	8.7%	445	3.8%	237	2.0%	1,204	10.3%
1987	11,890	2,431	20.4%	4,089	34.4%	2,398	20.2%	992	8.3%	463	3.9%	251	2.1%	1,266	10.6%
1988	11,598	2,501	21.6%	3,517	30.3%	2,482	21.4%	1,015	8.8%	453	3.9%	262	2.3%	1,368	11.8%
1989	11,356	2,411	21.2%	3,400	29.9%	2,257	19.9%	1,190	10.5%	474	4.2%	269	2.4%	1,355	11.9%
1990	9,257	1,855	20.0%	2,949	31.9%	1,720	18.6%	1,104	11.9%	367	4.0%	204	2.2%	1,058	11.4%
1991	8,407	1,558	18.5%	2,719	32.3%	1,648	19.6%	953	11.3%	365	4.3%	188	2.2%	976	11.6%
1992	8,029	1,513	18.8%	2,385	29.7%	1,661	20.7%	1,055	13.1%	334	4.2%	180	2.2%	901	11.2%
1993	7,728	1,412	18.3%	2,214	28.6%	1,776	23.0%	996	12.9%	369	4.8%	187	2.4%	774	10.0%
1994	7,900	1,283	16.2%	2,150	27.2%	2,022	25.6%	1,189	15.1%	340	4.3%	198	2.5%	718	9.1%
1995	7,438	1,023	13.8%	2,063	27.7%	2,032	27.3%	1,158	15.6%	328	4.4%	211	2.8%	623	8.4%
1996	7,565	1,081	14.3%	1,902	25.1%	2,231	29.5%	1,235	16.3%	318	4.2%	214	2.8%	584	7.7%
1997	7,352	1,009	13.7%	1,935	26.3%	2,239	30.5%	1,122	15.3%	301	4.1%	232	3.2%	514	7.0%
1998	6,782	931	13.7%	1,762	26.0%	2,204	32.5%	845	12.5%	290	4.3%	224	3.3%	526	7.8%
1999	6,225	902	14.5%	1,609	25.8%	2,043	32.8%	696	11.2%	271	4.4%	214	3.4%	490	7.9%
2000	5,779	855	14.8%	1,396	24.2%	1,897	32.8%	735	12.7%	241	4.2%	200	3.5%	455	7.9%
2001	5,400	792	14.7%	1,471	27.2%	1,677	31.1%	650	12.0%	198	3.7%	179	3.3%	433	8.0%
2002	4,569	700	15.3%	1,071	23.4%	1,524	33.4%	491	10.7%	189	4.1%	185	4.0%	409	9.0%

Table A-8: Total Civil Consent Cases Terminated by Magistrate Judges in U.S. District Courts, 1982–2002; Total Civil Consent Trials Before Magistrate Judges in U.S. District Courts, 1979–2002 (Data Underlying Figures 9 and 10)

		Civil Consent Trials	
Fiscal Year	*Civil Consent Cases Terminated*	*Number*	*% of Dispositions*
1979	—	570	—
1980	—	597	—
1981	—	611	—
1982	2,452	825	33.6%
1983	3,127	890	28.5%
1984	3,546	849	23.9%
1985	3,717	793	21.3%
1986	4,960	984	19.8%
1987	4,970	962	19.4%
1988	5,903	989	16.8%
1989	5,354	1,005	18.8%
1990	4,958	1,008	20.3%
1991	4,986	1,112	22.3%
1992	5,479	1,368	25.0%
1993	6,740	1,500	22.3%
1994	7,835	1,743	22.2%
1995	8,967	1,596	17.8%
1996	9,948	1,919	19.3%
1997	10,081	1,763	17.5%
1998	10,339	1,548	15.0%
1999	11,320	1,498	13.2%
2000	11,481	1,300	11.3%
2001	12,024	1,079	9.0%
2002	12,710	959	7.5%

Table A-9: Number and Proportion of Trials of a Given Length in U.S. District Courts, 1965–2002 (Data Underlying Figures 11 and 12)

Fiscal Year	Total	1 Day or Less		2 Days		3 Days		4 to 9 Days		10 to 19 Days		20 or More Days	
		Number	% of Total	Number	% of Total	Number	% of Total	Number	% of Total	Number	% of Total	Number	% of Total
1965	7,613	3,817	50.1%	1,748	23.0%	913	12.0%	997	13.1%	115	1.5%	23	0.3%
1966	7,783	4,065	52.2%	1,669	21.4%	914	11.7%	1,024	13.2%	81	1.0%	30	0.4%
1967	8,095	4,094	50.6%	1,686	20.8%	1,001	12.4%	1,178	14.6%	102	1.3%	34	0.4%
1968	8,688	4,744	54.6%	1,760	20.3%	974	11.2%	1,043	12.0%	129	1.5%	38	0.4%
1969	8,834	4,927	55.8%	1,748	19.8%	948	10.7%	1,063	12.0%	120	1.4%	28	0.3%
1970	9,449	5,417	57.3%	1,770	18.7%	1,029	10.9%	1,079	11.4%	122	1.3%	32	0.3%
1971	10,093	5,805	57.5%	1,947	19.3%	1,108	11.0%	1,073	10.6%	132	1.3%	28	0.3%
1972	10,962	6,128	55.9%	2,275	20.8%	1,100	10.0%	1,284	11.7%	140	1.3%	35	0.3%
1973	10,896	6,035	55.4%	2,231	20.5%	1,131	10.4%	1,286	11.8%	159	1.5%	54	0.5%
1974	10,972	6,019	54.9%	2,192	20.0%	1,148	10.5%	1,387	12.6%	178	1.6%	48	0.4%
1975	11,603	6,285	54.2%	2,327	20.1%	1,216	10.5%	1,538	13.3%	192	1.7%	45	0.4%
1976	11,656	6,400	54.9%	2,331	20.0%	1,254	10.8%	1,447	12.4%	155	1.3%	69	0.6%
1977	11,604	6,154	53.0%	2,411	20.8%	1,229	10.6%	1,564	13.5%	190	1.6%	56	0.5%
1978	11,389	5,993	52.6%	2,299	20.2%	1,294	11.4%	1,565	13.7%	181	1.6%	57	0.5%
1979	11,655	5,815	49.9%	2,507	21.5%	1,326	11.4%	1,740	14.9%	210	1.8%	57	0.5%

1980	12,951	6,382	49.3%	2,666	20.6%	1,517	11.7%	1,971	15.2%	307	2.4%	108	0.8%
1981	14,398	6,840	47.5%	3,032	21.1%	1,663	11.6%	2,460	17.1%	301	2.1%	102	0.7%
1982	14,433	6,949	48.1%	2,942	20.4%	1,669	11.6%	2,454	17.0%	321	2.2%	98	0.7%
1983	14,391	6,642	46.2%	2,984	20.7%	1,744	12.1%	2,595	18.0%	336	2.3%	90	0.6%
1984	14,374	6,586	45.8%	2,849	19.8%	1,840	12.8%	2,678	18.6%	349	2.4%	72	0.5%
1985	14,254	6,263	43.9%	2,912	20.4%	1,835	12.9%	2,827	19.8%	335	2.4%	82	0.6%
1986	13,276	5,763	43.4%	2,724	20.5%	1,710	12.9%	2,605	19.6%	393	3.0%	81	0.6%
1987	13,162	5,352	40.7%	2,654	20.2%	1,811	13.8%	2,851	21.7%	389	3.0%	105	0.8%
1988	12,536	5,058	40.3%	2,630	21.0%	1,711	13.6%	2,663	21.2%	367	2.9%	107	0.9%
1989	12,085	4,942	40.9%	2,378	19.7%	1,726	14.3%	2,587	21.4%	365	3.0%	87	0.7%
1990	11,502	4,996	43.4%	2,251	19.6%	1,430	12.4%	2,393	20.8%	347	3.0%	85	0.7%
1991	11,024	4,835	43.9%	1,999	18.1%	1,423	12.9%	2,347	21.3%	345	3.1%	75	0.7%
1992	10,756	4,704	43.7%	1,898	17.6%	1,321	12.3%	2,413	22.4%	328	3.0%	92	0.9%
1993	10,566	4,697	44.5%	1,801	17.0%	1,286	12.2%	2,391	22.6%	323	3.1%	68	0.6%
1994	10,473	4,758	45.4%	1,701	16.2%	1,274	12.2%	2,379	22.7%	313	3.0%	48	0.5%
1995	10,395	4,718	45.4%	1,732	16.7%	1,256	12.1%	2,288	22.0%	338	3.3%	63	0.6%
1996	10,343	4,609	44.6%	1,653	16.0%	1,276	12.3%	2,425	23.4%	317	3.1%	63	0.6%
1997	10,155	4,459	43.9%	1,561	15.4%	1,271	12.5%	2,449	24.1%	353	3.5%	62	0.6%
1998	9,349	4,116	44.0%	1,479	15.8%	1,174	12.6%	2,218	23.7%	297	3.2%	65	0.7%
1999	8,532	3,833	44.9%	1,268	14.9%	1,076	12.6%	2,017	23.6%	293	3.4%	45	0.5%
2000	7,933	3,639	45.9%	1,209	15.2%	976	12.3%	1,831	23.1%	238	3.0%	40	0.5%
2001	6,513	2,675	41.1%	1,022	15.7%	869	13.3%	1,665	25.6%	249	3.8%	33	0.5%
2002	6,015	2,527	42.0%	963	16.0%	774	12.9%	1,501	25.0%	210	3.5%	40	0.7%

Table A-10: Median Time (in Months) from Filing to Disposition of Civil Cases, Number and Percentage of Civil Case Terminating at Each Stage in U.S. District Courts, 1965–2002 (Data Underlying Figures 13, 14, and 15)

	Court Action													
	Total Cases		*No Court Action*			*Before Pretrial*			*During or After Pretrial*			*Trial*		
Fiscal Year	*Number of Cases*	*Median Time Interval (Months)*	*Number of Cases*	*% of Total Cases*	*Median Time Interval (Months)*	*Number of Cases*	*% of Total Cases*	*Median Time Interval (Months)*	*Number of Cases*	*% of Total Cases*	*Median Time Interval (Months)*	*Number of Cases*	*% of Total Cases*	*Median Time Interval (Months)*
1963	58,648	8	31,025	52.9%	5	11,907	20.3%	4	8,827	15.1%	18	6,889	11.7%	16
1964	54,303	8	29,232	53.8%	6	9,624	17.7%	7	8,931	16.4%	17	6,516	12.0%	16
1965	55,692	10	29,062	52.2%	6	10,509	18.9%	8	9,416	16.9%	19	6,705	12.0%	17
1966	56,397	9	29,624	52.5%	6	10,825	19.2%	8	9,253	16.4%	19	6,695	11.9%	17
1967	58,143	10	30,354	52.2%	6	11,051	19.0%	8	9,873	17.0%	18	6,865	11.8%	18
1968	57,271	10	27,772	48.5%	7	11,952	20.9%	7	10,224	17.9%	19	7,323	12.8%	19
1969	60,477	10	28,348	46.9%	7	13,783	22.8%	6	11,099	18.4%	19	7,247	12.0%	18
1970	64,571	10	30,567	47.3%	8	15,802	24.5%	5	10,902	16.9%	18	7,300	11.3%	17
1971	70,320	9	33,361	47.4%	7	18,727	26.6%	6	10,886	15.5%	17	7,346	10.4%	16
1972	78,092	9	37,107	47.5%	8	20,349	26.1%	6	12,618	16.2%	17	8,018	10.3%	16
1973	80,598	10	36,860	45.7%	7	21,042	26.1%	6	14,905	18.5%	18	7,791	9.7%	16
1974	79,101	9	35,640	45.1%	7	22,359	28.3%	8	13,393	16.9%	16	7,709	9.7%	16
1975	85,420	9	38,937	45.6%	7	23,239	27.2%	7	15,190	17.8%	16	8,054	9.4%	16
1976	89,623	9	41,560	46.4%	6	24,067	26.9%	6	15,799	17.6%	15	8,197	9.1%	16
1977	97,086	9	45,027	46.4%	7	26,518	27.3%	7	17,195	17.7%	16	8,346	8.6%	18

1978	102,488	10	45,222	44.1%	6	29,609	28.9%	8	18,976	18.5%	17	8,681	8.5%	19
1979	118,250	9	57,110	48.3%	6	32,223	27.2%	8	19,900	16.8%	17	9,017	7.6%	19
1980	133,394	8	66,329	49.7%	5	35,777	26.8%	8	21,798	16.3%	17	9,490	7.1%	20
1981	148,046	9	70,473	47.6%	5	39,376	26.6%	8	27,590	18.6%	19	10,607	7.2%	20
1982	159,496	7	78,534	49.2%	4	46,085	28.9%	7	24,452	15.3%	16	10,425	6.5%	19
1983	184,427	7	93,661	50.8%	4	54,057	29.3%	7	26,052	14.1%	16	10,657	5.8%	19
1984	211,548	7	108,411	51.2%	4	63,614	30.1%	7	28,499	13.5%	15	11,024	5.2%	19
1985	237,768	7	123,697	52.0%	4	72,447	30.5%	8	29,965	12.6%	15	11,659	4.9%	19
1986	231,380	7	112,934	48.8%	4	79,004	34.1%	7	28,752	12.4%	15	10,690	4.6%	19
1987	200,850	8	87,297	43.5%	5	71,686	35.7%	7	30,947	15.4%	15	10,920	5.4%	20
1988	200,754	8	71,873	35.8%	6	87,372	43.5%	7	30,908	15.4%	16	10,601	5.3%	19
1989	194,910	8	58,405	30.0%	6	98,306	50.4%	6	28,226	14.5%	15	9,973	5.1%	18
1990	173,834	8	46,628	26.8%	6	94,485	54.4%	7	24,563	14.1%	14	8,158	4.7%	19
1991	170,192	9	40,276	23.7%	7	102,177	60.0%	8	20,265	11.9%	15	7,474	4.4%	20
1992	186,416	8	46,682	25.0%	6	108,294	58.1%	7	24,507	13.1%	16	6,983	3.7%	19
1993	175,363	8	38,760	22.1%	6	110,224	62.9%	7	19,635	11.2%	14	6,744	3.8%	19
1994	173,636	8	35,925	20.7%	6	110,862	63.8%	7	20,128	11.6%	14	6,721	3.9%	19
1995	167,710	8	32,704	19.5%	7	110,289	65.8%	7	18,433	11.0%	13	6,284	3.7%	18
1996	182,983	7	33,030	18.1%	6	125,223	68.4%	6	18,400	10.1%	13	6,330	3.5%	18
1997	187,185	8	34,307	18.3%	6	126,767	67.7%	7	19,876	10.6%	13	6,235	3.3%	18
1998	202,073	8	36,017	17.8%	6	138,930	68.8%	7	21,189	10.5%	13	5,937	2.9%	18
1999	215,297	9	40,327	18.7%	6	148,644	69.0%	9	20,796	9.7%	14	5,530	2.6%	19
2000	179,360	8.2	32,350	18.0%	7.9	122,508	68.3%	7.8	19,474	10.9%	13.6	5,028	2.8%	20.1
2001	172,118	8.4	32,300	18.8%	7.9	115,405	67.0%	8.9	19,401	11.3%	13.6	5,012	2.9%	21.2
2002	176,960	8.1	34,098	19.3%	6.7	119,765	67.7%	7.9	18,892	10.7%	13.1	4,205	2.4%	20.4

Table A-11: Number of Civil Filings by Jurisdiction in U.S. District Courts, 1962–2002 (Data Underlying Figure 16)

		Federal Question Filings		*Diversity Filings*		*U.S. Filings*	
Fiscal Year	*Total Filings*	*Number*	*% of Filings*	*Number*	*% of Filings*	*Number*	*% of Filings*
1962	54,615	15,958	29.22%	18,359	33.62%	20,298	37.17%
1963	57,028	16,653	29.20%	18,990	33.30%	21,385	37.50%
1964	61,093	18,651	30.53%	20,174	33.02%	22,268	36.45%
1965	62,670	21,014	33.53%	20,005	31.92%	21,651	34.55%
1966	66,144	22,718	34.35%	20,245	30.61%	23,181	35.05%
1967	66,197	24,140	36.47%	20,464	30.91%	21,593	32.62%
1968	66,740	26,065	39.05%	21,009	31.48%	19,666	29.47%
1969	72,504	28,534	39.36%	21,675	29.89%	22,295	30.75%
1970	82,665	34,846	42.15%	22,854	27.65%	24,965	30.20%
1971	89,318	39,612	44.35%	24,620	27.56%	25,086	28.09%
1972	92,385	41,547	44.97%	24,109	26.10%	26,729	28.93%
1973	96,056	43,291	45.07%	25,281	26.32%	27,484	28.61%
1974	101,345	46,797	46.18%	26,963	26.61%	27,585	27.22%
1975	115,098	52,688	45.78%	30,631	26.61%	31,779	27.61%
1976	128,362	56,823	44.27%	31,675	24.68%	39,864	31.06%
1977	128,899	57,011	44.23%	31,678	24.58%	40,210	31.19%
1978	137,707	59,271	43.04%	31,625	22.97%	46,811	33.99%
1979	153,552	63,221	41.17%	34,491	22.46%	55,840	36.37%
1980	167,871	64,928	38.68%	39,315	23.42%	63,628	37.90%
1981	179,803	72,514	40.33%	45,444	25.27%	61,845	34.40%
1982	205,525	79,197	38.53%	50,555	24.60%	75,773	36.87%
1983	241,159	87,935	36.46%	57,421	23.81%	95,803	39.73%
1984	260,785	92,062	35.30%	56,856	21.80%	111,867	42.90%
1985	273,056	94,467	34.60%	61,101	22.38%	117,488	43.03%
1986	254,249	98,747	38.84%	63,672	25.04%	91,830	36.12%
1987	238,394	99,301	41.65%	67,071	28.13%	72,022	30.21%
1988	239,010	101,710	42.55%	68,224	28.54%	69,076	28.90%
1989	232,921	103,768	44.55%	67,247	28.87%	61,906	26.58%
1990	217,421	103,938	47.80%	57,183	26.30%	56,300	25.89%
1991	207,094	103,496	49.98%	50,944	24.60%	52,654	25.43%
1992	230,212	118,180	51.34%	49,432	21.47%	62,600	27.19%
1993	229,440	126,271	55.03%	51,445	22.42%	51,724	22.54%
1994	236,149	135,853	57.53%	54,886	23.24%	45,410	19.23%
1995	248,095	153,489	61.87%	51,448	20.74%	43,158	17.40%
1996	268,953	159,513	59.31%	60,685	22.56%	48,755	18.13%
1997	271,878	156,596	57.60%	55,278	20.33%	60,004	22.07%
1998	256,671	146,827	57.20%	51,992	20.26%	57,852	22.54%
1999	260,134	144,898	55.70%	49,793	19.14%	65,443	25.16%
2000	259,359	139,624	53.83%	48,626	18.75%	71,109	27.42%
2001	250,763	138,441	55.21%	48,998	19.54%	63,324	25.25%
2002	274,711	163,890	59.66%	56,824	20.69%	53,997	19.66%

Table A-12: Number of Civil Filings by Case Type as Relative Portion of Civil Filings in U.S. District Courts, 1962–2002 (Data Underlying Figures 17 and 18)

		*Contracts**		*Recoveries*		*Torts*		*Civil Rights*	
Fiscal Year	*Total Filings*	*Number*	*% of Total*	*Number*	*% of Total*	*Number*	*% of Total*	*Number*	*% of Total*
1962	54,615	13,144	24.1%	1,709	3.1%	20,124	36.8%	402	0.7%
1963	57,028	14,465	25.4%	1,781	3.1%	15,690	27.5%	531	0.9%
1964	61,093	13,983	22.9%	1,812	3.0%	21,843	35.8%	709	1.2%
1965	62,670	13,889	22.2%	1,640	2.6%	22,257	35.5%	1,123	1.8%
1966	66,144	14,990	22.7%	1,377	2.1%	22,033	33.3%	1,295	2.0%
1967	66,197	14,121	21.3%	937	1.4%	22,084	33.4%	1,195	1.8%
1968	66,740	13,252	19.9%	600	0.9%	22,663	34.0%	1,636	2.5%
1969	72,504	13,765	19.0%	498	0.7%	23,422	32.3%	2,453	3.4%
1970	82,665	16,143	19.5%	287	0.3%	16,810	20.3%	3,985	4.8%
1971	89,318	17,532	19.6%	357	0.4%	24,201	27.1%	5,138	5.8%
1972	92,385	23,683	25.6%	273	0.3%	23,111	25.0%	6,133	6.6%
1973	96,056	18,853	19.6%	246	0.3%	22,673	23.6%	7,679	8.0%
1974	101,345	18,760	18.5%	293	0.3%	23,975	23.7%	8,443	8.3%
1975	115,098	21,924	19.0%	679	0.6%	25,512	22.2%	10,392	9.0%
1976	128,362	22,732	17.7%	1,086	0.8%	23,659	18.4%	12,329	9.6%
1977	128,899	22,905	17.8%	865	0.7%	25,790	20.0%	13,252	10.3%
1978	137,707	23,743	17.2%	1,855	1.3%	26,135	19.0%	12,986	9.4%
1979	153,552	27,557	17.9%	9,252	6.0%	28,655	18.7%	13,251	8.6%
1980	167,871	33,351	19.9%	15,588	9.3%	32,196	19.2%	13,003	7.7%
1981	179,803	32,928	18.3%	18,160	10.1%	33,476	18.6%	15,484	8.6%
1982	205,525	37,122	18.1%	30,047	14.6%	34,004	16.5%	17,115	8.3%
1983	241,159	42,699	17.7%	41,213	17.1%	36,250	15.0%	20,827	8.6%
1984	260,785	41,971	16.1%	46,189	17.7%	37,227	14.3%	21,304	8.2%
1985	273,056	44,397	16.3%	58,159	21.3%	41,279	15.1%	19,657	7.2%
1986	254,249	47,443	18.7%	40,824	16.1%	41,979	16.5%	20,218	8.0%
1987	238,394	45,246	19.0%	24,199	10.2%	42,613	17.9%	19,785	8.3%
1988	239,010	44,037	18.4%	18,666	7.8%	44,650	18.7%	19,323	8.1%
1989	232,921	45,372	19.5%	16,452	7.1%	41,787	17.9%	19,378	8.3%
1990	217,421	35,045	16.1%	10,875	5.0%	43,561	20.0%	18,793	8.6%
1991	207,094	34,259	16.5%	7,932	3.8%	37,065	17.9%	19,340	9.3%
1992	230,212	33,365	14.5%	16,006	7.0%	38,105	16.6%	24,233	10.5%
1993	229,440	30,573	13.3%	4,518	2.0%	43,090	18.8%	27,655	12.1%
1994	236,149	28,893	12.2%	2,329	1.0%	47,595	20.2%	32,622	13.8%
1995	248,095	29,306	11.8%	1,822	0.7%	53,911	21.7%	36,600	14.8%
1996	268,953	30,469	11.3%	5,139	1.9%	59,610	22.2%	42,007	15.6%
1997	271,878	31,108	11.4%	9,677	3.6%	58,221	21.4%	43,278	15.9%
1998	256,671	27,689	10.8%	14,577	5.7%	50,328	19.6%	42,354	16.5%
1999	260,134	28,254	10.9%	22,403	8.6%	44,383	17.1%	41,304	15.9%
2000	259,359	28,763	11.1%	24,838	9.6%	36,539	14.1%	40,908	15.8%
2001	250,763	29,717	11.9%	13,406	5.3%	33,623	13.4%	40,910	16.3%
2002	274,711	30,177	11.0%	5,651	2.1%	62,870	22.9%	38,420	14.0%

*Contracts figures exclude recoveries. Recoveries are listed as a separate category.

Table A-12: Continued

	Prisoner Petitions		*Labor*		*IP*		*Securities*		*Other*	
Fiscal Year	*Number*	*% of Total*	*Number*	*% of Total*	*Number*	*% of Total*	*Number*	*% of Total*	*Number*	*% of Total*
1962	2,745	5.0%	3,479	6.4%	1,742	3.2%	273	0.5%	12,979	23.8%
1963	3,777	6.6%	2,804	4.9%	1,963	3.4%	513	0.9%	17,798	31.2%
1964	5,917	9.7%	3,187	5.2%	1,885	3.1%	439	0.7%	13,569	22.2%
1965	7,570	12.1%	3,105	5.0%	1,823	2.9%	460	0.7%	12,903	20.6%
1966	8,244	12.5%	4,932	7.5%	1,832	2.8%	419	0.6%	12,818	19.4%
1967	10,013	15.1%	3,614	5.5%	1,812	2.7%	546	0.8%	13,358	20.2%
1968	10,826	16.2%	3,518	5.3%	1,829	2.7%	689	1.0%	13,016	19.5%
1969	12,712	17.5%	3,721	5.1%	1,865	2.6%	796	1.1%	14,566	20.1%
1970	15,801	19.1%	3,999	4.8%	2,051	2.5%	1,211	1.5%	23,876	28.9%
1971	16,085	18.0%	4,663	5.2%	2,042	2.3%	1,962	2.2%	19,657	22.0%
1972	16,114	17.4%	4,987	5.4%	2,194	2.4%	1,919	2.1%	16,163	17.5%
1973	17,199	17.9%	4,861	5.1%	2,056	2.1%	1,999	2.1%	22,735	23.7%
1974	18,400	18.2%	5,390	5.3%	2,084	2.1%	2,378	2.3%	24,293	24.0%
1975	19,300	16.8%	6,617	5.7%	2,276	2.0%	2,408	2.1%	29,077	25.3%
1976	19,793	15.4%	7,743	6.0%	2,632	2.1%	2,230	1.7%	39,474	30.8%
1977	19,531	15.2%	8,139	6.3%	3,071	2.4%	1,960	1.5%	36,211	28.1%
1978	21,907	15.9%	7,461	5.4%	3,265	2.4%	1,703	1.2%	42,210	30.7%
1979	22,989	15.0%	8,404	5.5%	3,374	2.2%	1,589	1.0%	49,322	32.1%
1980	23,282	13.9%	8,640	5.1%	3,783	2.3%	1,694	1.0%	53,616	31.9%
1981	27,706	15.4%	9,300	5.2%	4,027	2.2%	1,768	1.0%	56,882	31.6%
1982	29,275	14.2%	10,227	5.0%	4,592	2.2%	2,376	1.2%	73,190	35.6%
1983	30,765	12.8%	11,033	4.6%	5,413	2.2%	2,915	1.2%	94,172	39.0%
1984	31,093	11.9%	11,821	4.5%	5,298	2.0%	3,142	1.2%	11,2071	43.0%
1985	33,455	12.3%	11,659	4.3%	5,412	2.0%	3,266	1.2%	11,7197	42.9%
1986	33,758	13.3%	12,839	5.0%	5,681	2.2%	3,059	1.2%	92,331	36.3%
1987	37,298	15.6%	12,746	5.3%	5,514	2.3%	3,020	1.3%	75,192	31.5%
1988	38,825	16.2%	12,688	5.3%	6,059	2.5%	2,638	1.1%	73,428	30.7%
1989	41,472	17.8%	13,328	5.7%	5,977	2.6%	2,608	1.1%	65,607	28.2%
1990	42,623	19.6%	13,841	6.4%	5,700	2.6%	2,629	1.2%	57,858	26.6%
1991	42,452	20.5%	14,686	7.1%	5,235	2.5%	2,244	1.1%	54,057	26.1%
1992	48,417	21.0%	16,394	7.1%	5,830	2.5%	2,002	0.9%	63,868	27.7%
1993	53,436	23.3%	15,820	6.9%	6,560	2.9%	1,793	0.8%	52,306	22.8%
1994	57,928	24.5%	15,662	6.6%	6,902	2.9%	1,810	0.8%	46,547	19.7%
1995	63,544	25.6%	14,954	6.0%	6,866	2.8%	1,906	0.8%	42,914	17.3%
1996	68,235	25.4%	15,073	5.6%	7,028	2.6%	1,704	0.6%	46,531	17.3%
1997	62,966	23.2%	15,508	5.7%	7,559	2.8%	1,669	0.6%	53,238	19.6%
1998	54,715	21.3%	14,650	5.7%	7,748	3.0%	2,358	0.9%	59,187	23.1%
1999	56,597	21.8%	14,372	5.5%	8,242	3.2%	2,563	1.0%	66,982	25.7%
2000	58,252	22.5%	14,142	5.5%	8,738	3.4%	2,678	1.0%	72,017	27.8%
2001	58,794	23.4%	15,195	6.1%	8,314	3.3%	3,538	1.4%	64,210	25.6%
2002	55,292	20.1%	18,285	6.7%	8,254	3.0%	3,465	1.3%	61,413	22.4%

Table A-13: Per Capita Civil Filings and Civil Filings per Billion Dollars of Gross Domestic Product (in 1996 Chained Dollars) in U.S. District Courts, 1962–2002 (Data Underlying Figures 19 and 20)

Fiscal Year	*Total Filings*	*United States Population (Millions)*	*Filings per Million of Population*	*Gross Domestic Product in Chain-Type (1996) Dollars (Billions)*	*Filings per Billion of GDP*
1962	54,615	185.2	294.83	2,578.9	21.18
1963	57,028	188.0	303.32	2,690.4	21.20
1964	61,093	190.7	320.42	2,846.5	21.46
1965	62,670	193.2	324.34	3,028.5	20.69
1966	66,144	195.5	338.27	3,227.5	20.49
1967	66,197	197.7	334.77	3,308.3	20.01
1968	66,740	199.8	334.02	3,466.1	19.26
1969	72,504	201.8	359.36	3,571.4	20.30
1970	82,665	203.8	405.52	3,578.0	23.10
1971	89,318	206.5	432.60	3,697.7	24.16
1972	92,385	208.9	442.21	3,898.4	23.70
1973	96,056	211.0	455.27	4,123.4	23.30
1974	101,345	212.9	475.95	4,099.0	24.72
1975	115,098	214.9	535.51	4,084.4	28.18
1976	128,362	217.1	591.27	4,311.7	29.77
1977	128,899	219.2	588.10	4,511.8	28.57
1978	137,707	221.5	621.77	4,760.6	28.93
1979	153,552	223.9	685.91	4,912.1	31.26
1980	167,871	226.5	741.31	4,900.9	34.25
1981	179,803	228.9	785.38	5,021.0	35.81
1982	205,525	231.2	889.11	4,919.3	41.78
1983	241,159	233.3	1,033.59	5,132.3	46.99
1984	260,785	235.4	1,107.91	5,505.2	47.37
1985	273,056	237.5	1,149.86	5,717.1	47.76
1986	254,249	239.6	1,060.97	5,912.4	43.00
1987	238,394	241.8	985.98	6,113.3	39.00
1988	239,010	244.0	979.63	6,368.4	37.53
1989	232,921	246.2	945.97	6,591.8	35.33
1990	217,421	248.7	874.37	6,707.9	32.41
1991	207,094	251.9	822.16	6,676.4	31.02
1992	230,212	255.2	902.04	6,880.0	33.46
1993	229,440	258.7	886.97	7,062.6	32.49
1994	206,544	261.9	788.58	7,347.7	28.11
1995	248,095	265.0	936.05	7,543.8	32.89
1996	268,953	268.2	1,002.99	7,813.2	34.42
1997	271,878	271.4	1,001.91	8,159.5	33.32
1998	256,671	274.6	934.62	8,508.9	30.17
1999	260,134	277.8	936.44	8,859.0	29.36
2000	259,359	281.0	923.06	9,191.4	28.22
2001	250,763	283.9	883.18	9,214.5	27.21
2002	274,711	286.8	957.72	9,439.9	29.10

Table A-14: Total Class-Action Filings and Class-Action Filings by Case Type in U.S. District Courts, 1978–2002 (Data Underlying Figures 21 and 22)

		Contracts		*Torts*		*Civil Rights*		*Prisoner Petitions*		*Labor*		*IP*		*Securities*		*Other*	
Fiscal Year	*Total Filings*	*Number*	*% of Total*	*Number*	*% of Total*	*Number*	*% of Total*	*Number*	*% of Total*	*Number*	*% of Total*	*Number*	*% of Total*	*Number*	*% of Total*	*Number*	*% of Total*
1978	2,586	91	3.5%	137	5.3%	1,477	57.1%	174	6.7%	132	5.1%	4	0.2%	167	6.5%	404	15.6%
1979	2,084	120	5.8%	150	7.2%	1,115	53.5%	172	8.3%	119	5.7%	2	0.1%	100	4.8%	306	14.7%
1980	1,568	63	4.0%	142	9.1%	798	50.9%	122	7.8%	75	4.8%	3	0.2%	87	5.5%	278	17.7%
1981	1,672	87	5.2%	132	7.9%	800	47.8%	171	10.2%	80	4.8%	5	0.3%	86	5.1%	311	18.6%
1982	1,238	96	7.8%	88	7.1%	560	45.2%	122	9.9%	70	5.7%	8	0.6%	151	12.2%	143	11.6%
1983	1,023	131	12.8%	66	6.5%	395	38.6%	65	6.4%	73	7.1%	0	0.0%	133	13.0%	160	15.6%
1984	988	108	10.9%	62	6.3%	369	37.3%	90	9.1%	77	7.8%	4	0.4%	149	15.1%	129	13.1%
1985	971	211	21.7%	76	7.8%	277	28.5%	82	8.4%	60	6.2%	5	0.5%	140	14.4%	120	12.4%
1986	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
1987	610	74	12.1%	25	4.1%	185	30.3%	96	15.7%	42	6.9%	4	0.7%	108	17.7%	76	12.5%
1988	742	66	8.9%	53	7.1%	288	38.8%	77	10.4%	49	6.6%	1	0.1%	108	14.6%	100	13.5%
1989	647	64	9.9%	55	8.5%	172	26.6%	96	14.8%	48	7.4%	3	0.5%	118	18.2%	91	14.1%
1990	922	83	9.0%	40	4.3%	169	18.3%	82	8.9%	84	9.1%	2	0.2%	315	34.2%	147	15.9%
1991	930	56	6.0%	51	5.5%	158	17.0%	79	8.5%	110	11.8%	0	0.0%	299	32.2%	177	19.0%
1992	1,196	45	3.8%	341	28.5%	286	23.9%	63	5.3%	68	5.7%	4	0.3%	268	22.4%	121	10.1%
1993	852	52	6.1%	69	8.1%	143	16.8%	77	9.0%	96	11.3%	3	0.4%	298	35.0%	114	13.4%
1994	991	55	5.5%	120	12.1%	192	19.4%	77	7.8%	73	7.4%	3	0.3%	290	29.3%	181	18.3%
1995	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
1996	1,356	161	11.9%	220	16.2%	213	15.7%	95	7.0%	86	6.3%	5	0.4%	241	17.8%	335	24.7%
1997	1,475	145	9.8%	262	17.8%	217	14.7%	71	4.8%	107	7.3%	7	0.5%	261	17.7%	405	27.5%
1998	1,881	190	10.1%	202	10.7%	265	14.1%	90	4.8%	164	8.7%	5	0.3%	584	31.0%	381	20.3%
1999	2,133	198	9.3%	396	18.6%	211	9.9%	36	1.7%	142	6.7%	6	0.3%	709	33.2%	435	20.4%
2000	2,393	201	8.4%	295	12.3%	273	11.4%	39	1.6%	162	6.8%	16	0.7%	677	28.3%	730	30.5%
2001	3,092	179	5.8%	382	12.4%	238	7.7%	39	1.3%	159	5.1%	14	0.5%	1,571	50.8%	510	16.5%
2002	2,916	168	5.8%	571	19.6%	199	6.8%	60	2.1%	200	6.9%	7	0.2%	1,237	42.4%	474	16.3%

Table A-15: Multi-District Litigation in U.S. District Courts, by Subject Matter, Five-Year Periods, 1968–2002

				Intellectual Property			*Tort*					
5-Year Periods Ending in Year	*Antitrust*	*Contract*	*Employment*	*Copyright*	*Trademark*	*Patent*	*Common Disaster*	*Air Disaster*	*Product Liability*	*Securities*	*Misc.*	*Total*
1972												
# of litigations	36	4	0	0	1	15	2	26	2	20	11	117
% of total	31%	3%	0%	0%	1%	13%	2%	22%	2%	17%	9%	
1977												
# of litigations	42	11	16	2	2	16	9	22	7	47	29	203
% of total	21%	5%	8%	1%	1%	8%	4%	11%	3%	23%	14%	
1982												
# of litigations	37	6	9	1	2	15	18	37	15	28	45	213
% of total	17%	3%	4%	0%	1%	7%	8%	17%	7%	13%	21%	
1987												
# of litigations	18	8	2	2	2	18	14	25	11	59	56	215
% of total	8%	4%	1%	1%	1%	8%	7%	12%	5%	27%	26%	
1992												
# of litigations	16	18	3	1	3	12	2	15	15	66	62	213
% of total	8%	8%	1%	0%	1%	6%	1%	7%	7%	31%	29%	
1997												
# of litigations	31	24	12	2	2	7	3	21	39	39	68	248
% of total	13%	10%	5%	1%	1%	3%	1%	8%	16%	16%	27%	
2002												
# of litigations	47	15	7	3	1	22	6	13	29	47	105	295
% of total	16%	5%	2%	1%	0%	7%	2%	4%	10%	16%	36%	
Total	227	86	49	11	13	105	54	159	118	306	376	1,504
Total %	15%	6%	3%	1%	1%	7%	4%	11%	8%	20%	25%	

SOURCE: Administrative Office of the U.S. Courts, Annual Reports, 1968–2002.

Table A-16: Multi-District Litigation Filings, 1968–2002

Order Date	# of Litigations Filed	# of Cases Involved	# of Litigations Filed w/ Class-Action Allegations	# of Cases Involved w/ Class-Action Allegations	% of Cases w/ Class-Action Allegations	# of Cases Remanded	% of Cases Remanded	# of Cases w/ Class-Action Allegations Remanded	# of Litigations Denied/ Withdrawn/ Mooted	# of Cases Denied/ Withdrawn/ Mooted
1968	9	841	2	546	65%	39	4.6%	0	1	24
1969	16	557	5	242	43%	15	2.7%	1	4	57
1970	25	730	4	157	22%	2	0.3%	0	11	144
1971	31	552	11	377	68%	14	2.5%	12	6	70
1972	36	712	14	274	38%	40	5.6%	18	9	42
1973	29	462	15	286	62%	23	5.0%	14	5	19
1974	37	746	13	160	21%	39	5.2%	13	12	85
1975	40	1,764[a]	13	234	13%	609[a]	34.5%	8	11	32
1976	49	777	18	296	38%	11	1.4%	9	18	151
1977	48	831	18	273	33%	41	4.9%	7	20	183
1978	41	1,932[b]	10	133	7%	1,314[b]	68.0%	0	18	71
1979	44	858	18	180	21%	95	11.1%	7	17	145
1980	42	729	10	107	15%	1	0.1%	0	28	545
1981	39	984	9	121	12%	10	1.0%	1	18	180
1982	47	2,275[c]	9	1,480[c]	65%	331[c]	14.5%	279	26	322
1983	39	701	6	272	39%	105	15.0%	86	18	96
1984	51	598	13	234	39%	13	2.2%	7	22	107

1985	48	2,291[d]	16	178	8%	59	2.6%	1	21	1,843[d]
1986	43	638	6	134	21%	25	3.9%	13	16	76
1987	34	1,216	13	584	48%	66	5.4%	9	11	40
1988	49	898	10	146	16%	11	1.2%	0	17	63
1989	29	605	8	264	44%	1	0.2%	1	13	57
1990	44	596	21	241	40%	8	1.3%	3	16	104
1991	41	849	19	223	26%	26	3.1%	1	15	94
1992	50	767	13	434	57%	14	1.8%	2	20	281
1993	36	327	19	266	81%	16	4.9%	16	10	44
1994	57	667	16	64	10%	7	1.0%	1	18	70
1995	46	816	18	255	31%	22	2.7%	1	16	71
1996	57	334	32	171	51%	2	0.6%	0	17	65
1997	58	466	31	336	72%	2	0.4%	2	18	125
1998	51	518	31	205	40%	0	0.0%	0	15	127
1999	62		35						17	62
2000	66		48						15	108
2001	52		37						13	49
2002	64		44						33	241

[a]Dalkon Shield: 1,136 cases involved/593 cases remanded.

[b]Swine Flu Immunizations: 1,605 cases involved/1,299 cases remanded.

[c]Benedictin: 1,189 cases involved/1,189 cases w/ class-action allegations/331 cases remanded.

[d]Dalkon Shield II: 1,680 cases involved/1,680 cases denied transfer.

SOURCE: Administrative Office of the U.S. Courts, Annual Reports, 1968–2002.

Table A-17: Criminal Defendant Dispositions and Criminal Defendant Dispositions by Bench and Jury Trial in U.S. District Courts, 1962–2002 (Data Underlying Figures 23 and 24)

		Total Trials		*Bench Trials*		*Jury Trials*	
Fiscal Year	*Total Defendants*	*Number*	*% of Defendants*	*Number*	*% of Defendants*	*Number*	*% of Defendants*
1962	33,110	5,097	15.39%	2,387	46.83%	2,710	53.17%
1963	34,845	5,187	14.89%	2,549	49.14%	2,638	50.86%
1964	33,381	4,172	12.50%	1,501	35.98%	2,671	64.02%
1965	—	—	—	—	—	—	—
1966	31,975	4,278	13.38%	1,463	34.20%	2,815	65.80%
1967	31,535	4,208	13.34%	1,449	34.43%	2,759	65.57%
1968	31,843	4,807	15.10%	1,668	34.70%	3,139	65.30%
1969	32,735	4,791	14.64%	1,635	34.13%	3,156	65.87%
1970	36,241	5,637	15.55%	1,993	35.36%	3,644	64.64%
1971	44,513	6,416	14.41%	2,103	32.78%	4,313	67.22%
1972	49,381	7,583	15.36%	2,537	33.46%	5,046	66.54%
1973	46,648	7,958	17.06%	2,534	31.84%	5,424	68.16%
1974	47,943	7,335	15.30%	2,293	31.26%	5,042	68.74%
1975	49,143	7,122	14.49%	1,977	27.76%	5,145	72.24%
1976	51,550	7,819	15.17%	2,095	26.79%	5,724	73.21%
1977	53,168	7,912	14.88%	2,027	25.62%	5,885	74.38%
1978	45,922	7,014	15.27%	1,739	24.79%	5,275	75.21%
1979	41,175	7,089	17.22%	2,309	32.57%	4,780	67.43%
1980	36,390	6,816	18.73%	2,134	31.31%	4,682	68.69%
1981	38,018	6,826	17.95%	2,133	31.25%	4,693	68.75%
1982	40,426	6,023	14.90%	1,430	23.74%	4,593	76.26%
1983	43,329	6,240	14.40%	1,567	25.11%	4,673	74.89%
1984	44,501	6,018	13.52%	1,296	21.54%	4,722	78.46%
1985	47,360	6,053	12.78%	1,409	23.28%	4,644	76.72%
1986	50,040	6,710	13.41%	1,600	23.85%	5,110	76.15%
1987	53,938	6,944	12.87%	1,817	26.17%	5,127	73.83%
1988	52,791	6,910	13.09%	1,720	24.89%	5,190	75.11%
1989	54,643	7,542	13.80%	1,863	24.70%	5,679	75.30%
1990	56,519	7,874	13.93%	1693	21.50%	6,181	78.50%
1991	56,747	7,171	12.64%	1,307	18.23%	5,864	81.77%
1992	58,373	7,176	12.29%	1,165	16.23%	6,011	83.77%
1993	59,544	6,550	11.00%	873	13.33%	5,677	86.67%
1994	61,157	5,866	9.59%	1,030	17.56%	4,836	82.44%
1995	55,250	4,864	8.80%	1,006	20.68%	3,858	79.32%
1996	59,478	4,890	8.22%	806	16.48%	4,084	83.52%
1997	62,053	4,611	7.43%	841	18.24%	3,770	81.76%
1998	66,235	4,621	6.98%	1,117	24.17%	3,504	75.83%
1999	72,438	4,379	6.05%	1,111	25.37%	3,268	74.63%
2000	74,950	4,215	5.62%	1,159	27.50%	3,056	72.50%
2001	75,519	4,292	5.68%	1,503	35.02%	2,789	64.98%
2002	76,827	3,574	4.65%	919	25.71%	2,655	74.29%

Table A-18: Number of Criminal Defendant Dispositions by Trial, by Case Type—Drugs, Violent Crimes, and Fraud in U.S. District Courts, 1962–2002 (Data Underlying Figure 25)

		Drugs				*Homicide, Robbery & Assault*				*Fraud, Embezzlement & Forgery*			
Fiscal Year	*Total Trials*	*Number of Trials*	*Number of Def. Dispositions*	*% Def. Dispositions at Trial*	*% of Trials per Total Trials*	*Number of Trials*	*Number of Def. Dispositions*	*% Def. Dispositions at Trial*	*% of Trials per Total Trials*	*Number of Trials*	*Number of Def. Dispositions*	*% Def. Dispositions at Trial*	*% of Trials per Total Trials*
1982	6,023	1,823	7,980	22.8%	30.3%	575	2,520	22.8%	9.5%	1,331	10,250	13.0%	22.1%
1983	6,240	1,997	9,164	21.8%	32.0%	521	2,283	22.8%	8.3%	1,446	11,918	12.1%	23.2%
1984	6,018	1,977	9,191	21.5%	32.9%	441	2,119	20.8%	7.3%	1,235	11,534	10.7%	20.5%
1985	6,053	2,076	11,177	18.6%	34.3%	403	2,112	19.1%	6.7%	1,157	11,416	10.1%	19.1%
1986	6,710	2,235	12,935	17.3%	33.3%	366	2,020	18.1%	5.5%	1,345	12,414	10.8%	20.0%
1987	6,944	2,428	15,084	16.1%	35.0%	415	2,218	18.7%	6.0%	1,482	13,561	10.9%	21.3%
1988	6,910	2,538	15,750	16.1%	36.7%	340	1,944	17.5%	4.9%	1,263	13,250	9.5%	18.3%
1989	7,542	2,849	16,834	16.9%	37.8%	355	1,951	18.2%	4.7%	1,297	12,715	10.2%	17.2%
1990	7,874	3,594	19,271	18.6%	45.6%	393	2,061	19.1%	5.0%	1,062	12,548	8.5%	13.5%
1991	7,171	3,228	19,226	16.8%	45.0%	309	2,223	13.9%	4.3%	1,001	12,125	8.3%	14.0%
1992	7,176	3,294	20,225	16.3%	45.9%	365	2,495	14.6%	5.1%	945	11,776	8.0%	13.2%
1993	6,550	2,994	21,557	13.9%	45.7%	405	2,577	15.7%	6.2%	899	12,455	7.2%	13.7%
1994	5,866	2,573	21,441	12.0%	43.9%	330	2,691	12.3%	5.6%	812	12,579	6.5%	13.8%
1995	4,864	1,871	18,772	10.0%	38.5%	323	2,357	13.7%	6.6%	712	11,826	6.0%	14.6%
1996	4,890	1,940	20,527	9.5%	39.7%	282	2,284	12.3%	5.8%	802	12,348	6.5%	16.4%
1997	4,611	1,768	21,834	8.1%	38.3%	258	2,448	10.5%	5.6%	711	12,888	5.5%	15.4%
1998	4,621	1,684	23,278	7.2%	36.4%	241	2,570	9.4%	5.2%	676	13,379	5.1%	14.6%
1999	4,379	1,625	26,560	6.1%	37.1%	265	2,672	9.9%	6.1%	641	13,435	4.8%	14.6%
2000	4,215	1,445	27,331	5.3%	34.3%	198	2,553	7.8%	4.7%	574	12,921	4.4%	13.6%
2001	4,292	1,196	27,991	4.3%	27.9%	166	2,430	6.8%	3.9%	552	12,565	4.4%	12.9%
2002	3,574	1,187	28,745	4.1%	33.2%	163	2,471	6.6%	4.6%	548	13,060	4.2%	15.3%

Table A-19: Number of Criminal Trials of a Given Length and Proportion of Trials of a Given Length in U.S. District Courts, 1965–2002 (Data Underlying Figures 26 and 27)

		1 Day or Less		*2 Days*		*3 Days*		*4 to 9 Days*		*10 to 19 Days*		*20 or More Days*	
Fiscal Year	*Total*	*Number*	*% of Total*	*Number*	*% of Total*	*Number*	*% of Total*	*Number*	*% of Total*	*Number*	*% of Total*	*Number*	*% of Total*
1965	3,872	1,799	46.5%	1,034	26.7%	466	12.0%	483	12.5%	63	1.6%	27	0.7%
1966	4,410	2,086	47.3%	1,165	26.4%	575	13.0%	503	11.4%	62	1.4%	19	0.4%
1967	4,405	2,134	48.4%	1,106	25.1%	542	12.3%	553	12.6%	49	1.1%	21	0.5%
1968	5,533	2,698	48.8%	1,401	25.3%	708	12.8%	625	11.3%	82	1.5%	19	0.3%
1969	5,563	2,750	49.4%	1,390	25.0%	695	12.5%	636	11.4%	73	1.3%	19	0.3%
1970	6,585	3,474	52.8%	1,615	24.5%	738	11.2%	682	10.4%	64	1.0%	12	0.2%
1971	7,456	3,774	50.6%	1,735	23.3%	937	12.6%	891	12.0%	93	1.2%	26	0.3%
1972	7,818	3,886	49.7%	1,929	24.7%	868	11.1%	978	12.5%	133	1.7%	24	0.3%
1973	8,571	4,047	47.2%	2,149	25.1%	1,071	12.5%	1,128	13.2%	145	1.7%	31	0.4%
1974	7,600	3,410	44.9%	1,892	24.9%	980	12.9%	1,128	14.8%	137	1.8%	53	0.7%
1975	7,633	3,433	45.0%	1,813	23.8%	967	12.7%	1,220	16.0%	163	2.1%	37	0.5%
1976	8,624	3,376	39.1%	1,890	21.9%	1,098	12.7%	2,026	23.5%	182	2.1%	52	0.6%
1977	7,222	3,034	42.0%	1,581	21.9%	995	13.8%	1,386	19.2%	182	2.5%	44	0.6%
1978	7,336	3,365	45.9%	1,532	20.9%	924	12.6%	1,295	17.7%	163	2.2%	57	0.8%
1979	6,799	3,048	44.8%	1,372	20.2%	919	13.5%	1,232	18.1%	174	2.6%	54	0.8%
1980	6,634	2,947	44.4%	1,239	18.7%	864	13.0%	1,290	19.4%	221	3.3%	73	1.1%
1981	6,542	2,745	42.0%	1,300	19.9%	895	13.7%	1,314	20.1%	203	3.1%	85	1.3%

1982	6,644	2,914	43.9%	1,271	19.1%	909	13.7%	1,272	19.1%	212	3.2%	66	1.0%
1983	6,656	2,866	43.1%	1,220	18.3%	928	13.9%	1,367	20.5%	205	3.1%	70	1.1%
1984	6,456	2,658	41.2%	1,211	18.8%	847	13.1%	1,429	22.1%	228	3.5%	83	1.3%
1985	6,475	2,566	39.6%	1,263	19.5%	865	13.4%	1,455	22.5%	239	3.7%	87	1.3%
1986	6,966	2,894	41.5%	1,286	18.5%	952	13.7%	1,475	21.2%	264	3.8%	95	1.4%
1987	6,823	2,806	41.1%	1,309	19.2%	916	13.4%	1,426	20.9%	249	3.6%	117	1.7%
1988	7,365	3,183	43.2%	1,376	18.7%	1,019	13.8%	1,457	19.8%	233	3.2%	97	1.3%
1989	8,017	3,511	43.8%	1,547	19.3%	1,084	13.5%	1,479	18.4%	282	3.5%	114	1.4%
1990	8,931	3,922	43.9%	1,714	19.2%	1,203	13.5%	1,693	19.0%	289	3.2%	110	1.2%
1991	8,925	3,755	42.1%	1,684	18.9%	1,262	14.1%	1,833	20.5%	293	3.3%	98	1.1%
1992	9,704	3,991	41.1%	1,887	19.4%	1,345	13.9%	2,061	21.2%	316	3.3%	104	1.1%
1993	9,026	3,663	40.6%	1,689	18.7%	1,290	14.3%	1,933	21.4%	333	3.7%	118	1.3%
1994	7,298	3,201	43.9%	1,281	17.6%	891	12.2%	1,573	21.6%	269	3.7%	83	1.1%
1995	7,421	3,173	42.8%	1,249	16.8%	939	12.7%	1,653	22.3%	297	4.0%	110	1.5%
1996	7,202	3,165	43.9%	1,200	16.7%	932	12.9%	1,518	21.1%	283	3.9%	104	1.4%
1997	6,814	2,945	43.2%	1,114	16.3%	885	13.0%	1,476	21.7%	293	4.3%	101	1.5%
1998	6,847	3,092	45.2%	1,183	17.3%	941	13.7%	1,298	19.0%	236	3.4%	97	1.4%
1999	6,461	2,826	43.7%	1,175	18.2%	868	13.4%	1,284	19.9%	219	3.4%	89	1.4%
2000	6,746	3,260	48.3%	1,135	16.8%	832	12.3%	1,227	18.2%	222	3.3%	70	1.0%
2001	7,045	3,657	51.9%	1,173	16.7%	794	11.3%	1,154	16.4%	201	2.9%	66	0.9%
2002	6,802	3,461	50.9%	1,173	17.2%	770	11.3%	1,152	16.9%	189	2.8%	57	0.8%

Table A-20: Number of Bankruptcy Filings

Bankruptcy statistics, by year, during the 12-month period ending December 31. Data from Administrative Office of the U.S. Courts, Tables F2 (total filings, total business filings, total business Chapter 13 filings, total nonbusiness filings), F2E (total joint business Chapter 13 filings), and F2F (total joint nonbusiness filings)

Year	*Total Filings*	*Total Business Filings*	*Total Business Chapter 13 Filings*	*Total Nonbusiness Filings*	*Total Joint Business Chapter 13*	*Total Joint Nonbusiness*
1980	331,264	43,694	4,268	287,570	NA	NA
1981	363,943	48,125	5,050	315,818	2,827*	139,231*
1982	380,251	69,300	7,647	310,951	NA	NA
1983	348,880	62,436	6,840	286,444	NA	NA
1984	348,521	64,004	7,015	284,517	NA	NA
1985	412,510	71,277	7,464	341,233	NA	NA
1986	530,438	81,235	8,512	449,203	NA	NA
1987	578,012	82,445	11,999	495,567	5,930	206,051*
1988	613,465	63,653	7,607	549,612	3,938	224,258
1989	679,980	63,227	8,089	616,753	4,161	245,969
1990	782,960	64,853	8,802	718,107	4,466	NA
1991	943,987	71,549	10,123	872,438	4,586	313,122
1992	971,517	70,643	11,439	900,874	5,387	333,786
1993	875,202	62,304	10,309	812,898	4,930	297,785
1994	832,829	52,374	9,238	780,455	4,152	272,002
1995	926,601	51,959	10,363	874,642	4,644	301,577
1996	1,178,555	53,549	11,031	1,125,006	4,988	395,688
1997	1,404,145	54,027	11,095	1,350,118	5,170	472,506
1998	1,442,549	44,367	8,221	1,398,182	3,793	471,758
1999	1,319,465	37,884	5,903	1,281,581	2,640	412,975
2000	1,253,444	35,472	5,494	1,217,972	2,489	385,715
2001	1,492,129	40,099	5,542	1,452,030	2,537	463,965
2002	1,577,651	38,540	5,361	1,539,111	2,370	496,705
2003**	1,611,268	37,548	5,404	1,573,720	2,371	496,682

*For 12-month period ending June 30, 1981. These data were gathered from Table F-3C (joint petition business bankruptcy numbers for 1981) and Table F-3D (joint petition nonbusiness bankruptcy numbers for 1981).

**For 12-month period ending March 2003.

SOURCE: Elizabeth Warren, "Vanishing Trials: The Bankruptcy Experience," 1 J. Empirical Legal Stud. 913, 917 (2004).

Table A-21: Adversary Terminations, U.S. Bankruptcy Courts, 1985–2002 (Data Underlying Figure 28)

Year	*Total Terminations*	*Adversary Proceedings Terminated During or After Trial*	*Adversary Proceedings Terminated During or After Trial as % of All Terminations*
1985	56,562	9,287	16.42%
1986	62,733	10,545	16.81%
1987	65,603	9,901	15.09%
1988	61,160	9,642	15.77%
1989	52,802	8,031	15.21%
1990	51,004	7,334	14.38%
1991	53,558	7,772	14.51%
1992	66,791	8,353	12.51%
1993	82,710	7,942	9.60%
1994	74,665	6,807	9.12%
1995	79,970	5,945	7.43%
1996	79,165	5,802	7.33%
1997	80,083	5,662	7.07%
1998	75,359	4,943	6.56%
1999	66,467	4,019	6.05%
2000	68,573	3,893	5.68%
2001	58,632	3,160	5.39%
2002	66,508	3,179	4.78%

Table A-22: Civil Filings per Sitting Judge in U.S. District Courts, 1962–2002 (Data Underlying Figure 29)

		Civil Filings	
Fiscal Year	*Sitting District Court Judges**	*Total*	*Filings/Sitting Judge*
1962	279	54,615	195.8
1963	290	57,028	196.6
1964	294	61,093	207.8
1965	287	62,670	218.4
1966	285	66,144	232.1
1967	317	66,197	208.8
1968	323	66,740	206.6
1969	327	72,504	221.7
1970	328	82,665	252.0
1971	370	89,318	241.4
1972	388	92,385	238.1
1973	384	96,056	250.1
1974	378	101,345	268.1
1975	383	115,098	300.5
1976	375	128,362	342.3
1977	373	128,899	345.6
1978	384	137,707	358.6
1979	397	153,552	386.8
1980	484	167,871	346.8
1981	475	179,803	378.5
1982	495	205,525	415.2
1983	490	241,159	492.2
1984	499	260,785	522.6
1985	500	273,056	546.1
1986	535	254,249	475.2
1987	532	238,394	448.1
1988	547	239,010	436.9
1989	539	232,921	432.1
1990	541	217,421	401.9
1991	537	207,094	385.6
1992	565	230,212	407.5
1993	542	229,440	423.3
1994	589	236,149	400.9
1995	603	248,095	411.4
1996	603	268,953	446.0
1997	578	271,878	470.4
1998	591	256,671	434.3
1999	608	260,134	427.9
2000	612	259,359	423.8
2001	590	250,763	425.0
2002	615	274,711	446.7

*Number of sitting district court judges does not include senior judges.

Table A-23: Article III Judgeships in U.S. Appellate and District Courts, 1962–2002 (Date Underlying Figure 30)

			Appellate			*District*			
Fiscal Year	*Total Auth.*	*Total Filled*	*Auth*	*Filled*	*Senior*	*Auth*	*Filled*	*Senior*	*Spending in $ (1,000s)*
1962	385	353	78	74	*	307	279	*	$55,943
1963	385	366	78	76	*	307	290	*	$59,692
1964	385	369	78	75	*	307	294	*	$62,340
1965	385	361	78	74	*	307	287	*	$71,861
1966	430	358	88	73	*	342	285	*	$78,510
1967	430	402	88	85	*	342	317	*	$86,046
1968	439	406	97	83	*	342	323	*	$92,105
1969	438	414	97	87	*	341	327	*	$106,319
1970	498	416	97	88	*	401	328	*	$126,518
1971	498	462	97	92	*	401	370	*	$145,957
1972	497	480	97	92	*	400	388	*	$168,145
1973	497	477	97	93	42	400	384	80	$183,152
1974	497	473	97	95	*	400	378	103	$200,896
1975	497	479	97	96	47	400	383	102	$283,016
1976	496	469	97	94	43	399	375	109	$321,008
1977	495	460	97	87	48	398	373	120	$381,433
1978	496	479	97	95	46	399	384	119	$442,525
1979	648	491	132	94	46	516	397	127	$503,180
1980	648	610	132	126	45	516	484	126	$578,761
1981	648	598	132	123	45	516	475	149	$633,790
1982	647	620	132	125	47	515	495	158	$709,254
1983	659	630	144	140	50	515	490	152	$796,044
1984	659	641	144	142	50	515	499	154	$875,104
1985	743	646	168	146	45	575	500	168	$1,021,680
1986	743	692	168	157	41	575	535	156	$1,044,347
1987	743	687	168	155	50	575	532	167	$1,241,487
1988	743	705	168	158	50	575	547	178	$1,375,980
1989	743	695	168	156	57	575	539	190	$1,448,258
1990	743	699	168	158	63	575	541	201	$1,668,820
1991	828	692	179	155	66	649	537	204	$2,004,661
1992	828	727	179	162	73	649	565	224	$2,337,402
1993	828	701	179	159	75	649	542	242	$2,497,713
1994	828	750	179	161	81	649	589	292	$2,703,890
1995	828	771	179	168	81	649	603	255	$2,867,539
1996	826	764	179	161	82	647	603	274	$3,014,847
1997	826	733	179	155	87	647	578	278	$3,436,326
1998	825	753	179	162	86	646	591	276	$3,646,481
1999	825	763	179	155	86	646	608	273	*
2000	834	768	179	156	86	655	612	274	$4,283,751
2001	844	737	179	147	93	665	590	281	$4,274,481
2002	844	767	179	152	92	665	615	285	$4,707,555

Table A-24: Federal Judiciary Expenditures and Federal Judiciary Spending as a Percentage of Government Expenditures, 1962–2002 (Data Underlying Figure 31)

Fiscal Year	*Gross Domestic Product in Current Dollars (Thousands)*	*Gross Domestic Product in Chain-Type (1996) Dollars (Thousands)*	*Federal Judiciary Expenditures in Current Dollars (Thousands)*	*Federal Judiciary Expenditures in Chain-Type (1996) Dollars (Thousands)*	*Federal Judiciary Expenditures as % of GDP*	*Total Government Spending (Billions)*	*Federal Nondefense Spending (Thousands)*	*Federal Judiciary Expenditures as % of Government Spending*
1962	$586,500,000	$2,579,200,000	$55,943	$246,011	0.010%	14.1	$14,100,000	0.40%
1963	$618,700,000	$2,691,200,000	$59,692	$259,643	0.010%	15.8	$15,800,000	0.38%
1964	$664,400,000	$2,846,700,000	$62,340	$267,095	0.009%	18.0	$18,000,000	0.35%
1965	$720,100,000	$3,029,500,000	$71,861	$302,318	0.010%	19.7	$19,700,000	0.36%
1966	$789,300,000	$3,228,300,000	$78,510	$321,104	0.010%	20.7	$20,700,000	0.38%
1967	$834,100,000	$3,308,700,000	$86,046	$341,317	0.010%	21.0	$21,000,000	0.41%
1968	$911,500,000	$3,467,100,000	$92,105	$350,342	0.010%	21.8	$21,800,000	0.42%
1969	$985,300,000	$3,571,300,000	$106,319	$385,353	0.011%	23.5	$23,500,000	0.45%
1970	$1,039,700,000	$3,579,100,000	$126,518	$435,518	0.012%	25.5	$25,500,000	0.50%
1971	$1,128,600,000	$3,698,000,000	$145,957	$478,234	0.013%	28.6	$28,600,000	0.51%
1972	$1,240,400,000	$3,899,500,000	$168,145	$528,59	0.014%	32.2	$32,200,000	0.52%
1973	$1,385,500,000	$4,123,600,000	$183,152	$545,095	0.013%	33.9	$33,900,000	0.54%
1974	$1,501,000,000	$4,101,100,000	$200,896	$548,896	0.013%	38.5	$38,500,000	0.52%
1975	$1,635,200,000	$4,085,000,000	$283,016	$707,010	0.017%	44.2	$44,200,000	0.64%
1976	$1,823,900,000	$4,312,900,000	$321,008	$759,064	0.018%	47.4	$47,400,000	0.68%
1977	$2,031,400,000	$4,512,300,000	$381,433	$847,252	0.019%	53.5	$53,500,000	0.71%

1978	$2,295,900,000	$4,761,400,000	$442,525	$917,721	0.019%	59.8	$59,800,000	0.74%
1979	$2,566,400,000	$4,912,800,000	$503,180	$963,208	0.020%	65.0	$65,000,000	0.77%
1980	$2,795,600,000	$4,900,300,000	$578,761	$1,014,480	0.021%	75.6	$75,600,000	0.77%
1981	$3,131,300,000	$5,020,600,000	$633,790	$1,016,178	0.020%	84.0	$84,000,000	0.75%
1982	$3,259,200,000	$4,918,900,000	$709,254	$1,070,411	0.022%	84.5	$84,500,000	0.84%
1983	$3,534,900,000	$5,132,800,000	$796,044	$1,155,865	0.023%	92.0	$92,000,000	0.87%
1984	$3,932,700,000	$5,504,900,000	$875,104	$1,224,950	0.022%	92.8	$92,800,000	0.94%
1985	$4,213,000,000	$5,717,200,000	$1,021,680	$1,386,457	0.024%	101.0	$101,000,000	1.01%
1986	$4,452,900,000	$5,912,000,000	$1,044,347	$1,386,547	0.023%	106.5	$106,500,000	0.98%
1987	$4,742,500,000	$6,113,100,000	$1,241,487	$1,600,267	0.026%	109.3	$109,300,000	1.14%
1988	$5,108,300,000	$6,367,900,000	$1,375,980	$1,715,258	0.027%	106.8	$106,800,000	1.29%
1989	$5,489,100,000	$6,592,000,000	$1,448,258	$1,739,231	0.026%	119.3	$119,300,000	1.21%
1990	$5,803,200,000	$6,706,600,000	$1,668,820	$1,928,603	0.029%	133.6	$133,600,000	1.25%
1991	$5,986,200,000	$6,676,600,000	$2,004,661	$2,235,848	0.033%	142.9	$142,900,000	1.40%
1992	$6,318,900,000	$6,879,600,000	$2,337,402	$2,544,803	0.037%	156.0	$156,000,000	1.50%
1993	$6,642,300,000	$7,062,600,000	$2,497,713	$2,635,729	0.038%	162.4	$162,400,000	1.54%
1994	$7,054,300,000	$7,347,500,000	$2,703,890	$2,816,259	0.038%	165.9	$165,900,000	1.63%
1995	$7,400,500,000	$7,543,900,000	$2,867,539	$2,923,077	0.039%	170.9	$170,900,000	1.68%
1996	$7,813,200,000	$7,813,200,000	$3,014,847	$3,014,847	0.039%	174.6	$174,600,000	1.73%
1997	$8,318,400,000	$8,159,300,000	$3,436,326	$3,370,599	0.041%	185.6	$185,600,000	1.85%
1998	$8,781,500,000	$8,509,300,000	$3,646,481	$3,533,412	0.042%	190.1	$190,100,000	1.92%
1999	$9,268,600,000	$8,853,400,000	$3,917,200	$3,741,714	0.042%	200.7	$200,700,000	1.95%
2000	$9,872,900,000	$9,296,600,000	$4,283,751	$4,007,626	0.043%	214.3	$214,300,000	2.00%
2001	$10,224,900,000	$9,344,700,000	$4,274,481	$3,906,490	0.042%	228.2	$228,200,000	1.87%
2002	$10,446,200,000	$9,439,900,000	$4,707,555	$4,254,068	0.045%	246.3	$246,300,000	1.91%

Table A-25: Definitions of Bench and Jury Trials for Selected State Courts

Alaska	Jury and bench trials are counted if tried to judgment.
Arizona	A jury trial is counted when the voir dire examination of the panel begins. A bench trial is counted when the first witness is sworn.
Arkansas	A jury trial is counted when the jury is sworn. A bench trial is counted when an opening statement or the introduction of evidence occurs.
California	A jury trial is counted when the jury is empaneled. A bench trial is counted when an opening statement or the introduction of evidence occurs.
Delaware	A jury trial is counted when the jury is empaneled. A bench trial is counted when an opening statement or the introduction of evidence occurs.
District of Columbia	Civil jury and bench trials are counted if tried to verdict or decision. A criminal jury trial is counted when the jury is empaneled. A criminal bench trial is counted when the first witness is sworn or the introduction of evidence occurs.
Florida	A jury trial is counted when the jury is empaneled. A bench trial is counted when an opening statement or the introduction of evidence occurs.
Hawaii	A jury trial is counted when the jury is empaneled. A bench trial is counted when an opening statement or the introduction of evidence occurs.
Indiana	Jury and bench trials are counted if tried to verdict or decision.
Iowa	A jury trial is counted when the jury is sworn. A bench trial (contested) is counted when the first witness is sworn.
Kansas	A jury trial is counted when the jury is empaneled. A bench trial is counted if the case is contested (an attorney appears in opposition).
Maine	A jury trial is counted with the beginning of voir dire. A bench trial is counted when opening arguments occur.
Maryland	A jury trial is counted when the jury is sworn. A bench trial is counted when an opening statement or the introduction of evidence occurs.
Massachusetts	A jury trial is counted when the jury is sworn. A bench trial is counted when an opening statement or the introduction of evidence occurs.
Michigan	Jury and bench trials are counted if tried to verdict or decision.
Minnesota	A jury trial is counted when the jury is sworn. A bench trial is counted when the first witness or evidence is introduced.
Missouri	Jury and bench trials are counted after the presentation of evidence on the merits has begun, and the judge or jury renders a verdict.
New Jersey	Jury and bench trials are counted if tried to verdict or decision.
New Mexico	Jury and bench trials are counted when a decision is rendered.
North Carolina	A jury trial is counted when the jury is empaneled. A bench trial is counted when an opening statement or the introduction of evidence occurs. However, there is no jurisdiction for criminal nonjury trials.
Ohio	A jury trial is counted when the jury is sworn. A bench trial is counted when the first witness is sworn.
Pennsylvania	Jury and bench trials are counted when the verdict is rendered.
Puerto Rico	Current trial definitions are unknown.
South Dakota	A jury trial is counted when the jury is sworn/empaneled. A bench trial is counted when an opening statement or the introduction of evidence occurs. Hearing dispositions are also included in the count of bench trials.
Texas	Jury and bench trials are counted when an opening statement or the introduction of evidence occurs. Guilty pleas in criminal cases after the start of bench trials are counted as trials.

Table A-25: Continued

Vermont	Jury and bench trials are counted if tried to verdict or decision.
Virginia	A jury trial is counted when the jury is empaneled and sworn. A bench trial is counted when an opening statement or the introduction of evidence occurs.
Washington	A jury trial is counted when the jury is sworn. A bench trial is counted when the first witness is sworn.
West Virginia	A jury trial is generally counted when the jury is selected and sworn. A bench trial is counted when an opening statement or the introduction of evidence occurs.

SOURCE: Ostrom, Strickland & Hannaford (2004).

Table A-26: Number of Civil and Criminal Trials per Sitting Judge in U.S. District Courts, 1962–2002 (Data Underlying Figure 33)

		Civil Trials		*Criminal Trials*	
Fiscal Year	*Sitting District Court Judges**	*Total*	*Trials/Sitting Judge*	*Total*	*Trials/Sitting Judge*
1962	279	5,802	20.80	5,097	18.27
1963	290	6,522	22.49	5,187	17.89
1964	294	6,445	21.92	4,172	14.19
1965	287	6,972	24.29	—	—
1966	285	6,910	24.25	4,278	15.01
1967	317	7,029	22.17	4,208	13.27
1968	323	7,536	23.33	4,807	14.88
1969	327	7,385	22.58	4,791	14.65
1970	328	7,547	23.01	5,637	17.19
1971	370	7,621	20.60	6,416	17.34
1972	388	8,168	21.05	7,583	19.54
1973	384	7,948	20.70	7,958	20.72
1974	378	8,153	21.57	7,335	19.40
1975	383	8,513	22.23	7,122	18.60
1976	375	8,556	22.82	7,819	20.85
1977	373	8,752	23.46	7,912	21.21
1978	384	9,158	23.85	7,014	18.27
1979	397	9,433	23.76	7,089	17.86
1980	484	9,874	20.40	6,816	14.08
1981	475	11,302	23.79	6,826	14.37
1982	495	11,280	22.79	6,023	12.17
1983	490	11,576	23.62	6,240	12.73
1984	499	12,018	24.08	6,018	12.06
1985	500	12,529	25.06	6,053	12.11
1986	535	11,666	21.81	6,710	12.54
1987	532	11,890	22.35	6,944	13.05
1988	547	11,598	21.20	6,910	12.63
1989	539	11,356	21.07	7,542	13.99
1990	541	9,257	17.11	7,874	14.55
1991	537	8,407	15.66	7,171	13.35
1992	565	8,029	14.21	7,176	12.70
1993	542	7,728	14.26	6,550	12.08
1994	589	7,900	13.41	5,866	9.96
1995	603	7,438	12.33	4,864	8.07
1996	603	7,565	12.55	4,890	8.11
1997	578	7,352	12.72	4,611	7.98
1998	591	6,782	11.48	4,621	7.82
1999	608	6,225	10.24	4,379	7.20
2000	612	5,779	9.44	4,215	6.89
2001	590	5,400	9.15	4,292	7.27
2002	615	4,569	7.43	3,574	5.81

*Number of sitting district court judges does not include senior judges.

Table A-27: Number of Bench and Jury Civil Trials per Sitting Judge in U.S. District Courts, 1962–2002 (Data Underlying Figure 34)

		Jury Trials		*Bench Trials*		*Total Trials*	
Fiscal Year	*Sitting District Court Judges**	*Total*	*Trials/Sitting Judge*	*Total*	*Trials/Sitting Judge*	*Total*	*Trials/Sitting Judge*
1962	279	2,765	9.91	3,037	10.89	5,802	20.80
1963	290	3,017	10.40	3,505	12.09	6,522	22.49
1964	294	2,886	9.82	3,559	12.11	6,445	21.92
1965	287	3,087	10.76	3,885	13.54	6,972	24.29
1966	285	3,158	11.08	3,752	13.16	6,910	24.25
1967	317	3,074	9.70	3,955	12.48	7,029	22.17
1968	323	3,148	9.75	4,388	13.59	7,536	23.33
1969	327	3,147	9.62	4,238	12.96	7,385	22.58
1970	328	3,183	9.70	4,364	13.30	7,547	23.01
1971	370	3,240	8.76	4,381	11.84	7,621	20.60
1972	388	3,361	8.66	4,807	12.39	8,168	21.05
1973	384	3,264	8.50	4,684	12.20	7,948	20.70
1974	378	3,250	8.60	4,903	12.97	8,153	21.57
1975	383	3,462	9.04	5,051	13.19	8,513	22.23
1976	375	3,501	9.34	5,055	13.48	8,556	22.82
1977	373	3,462	9.28	5,290	14.18	8,752	23.46
1978	384	3,505	9.13	5,653	14.72	9,158	23.85
1979	397	3,576	9.01	5,857	14.75	9,433	23.76
1980	484	3,894	8.05	5,980	12.36	9,874	20.40
1981	475	4,679	9.85	6,623	13.94	11,302	23.79
1982	495	4,771	9.64	6,509	13.15	11,280	22.79
1983	490	5,036	10.28	6,540	13.35	11,576	23.62
1984	499	5,510	11.04	6,508	13.04	12,018	24.08
1985	500	6,253	12.51	6,276	12.55	12,529	25.06
1986	535	5,621	10.51	6,045	11.30	11,666	21.81
1987	532	6,279	11.80	5,611	10.55	11,890	22.35
1988	547	5,907	10.80	5,691	10.40	11,598	21.20
1989	539	5,666	10.51	5,690	10.56	11,356	21.07
1990	541	4,781	8.84	4,476	8.27	9,257	17.11
1991	537	4,280	7.97	4,127	7.69	8,407	15.66
1992	565	4,279	7.57	3,750	6.64	8,029	14.21
1993	542	4,109	7.58	3,619	6.68	7,728	14.26
1994	589	4,444	7.54	3,456	5.87	7,900	13.41
1995	603	4,122	6.84	3,316	5.50	7,438	12.33
1996	603	4,359	7.23	3,206	5.32	7,565	12.55
1997	578	4,551	7.87	2,801	4.85	7,352	12.72
1998	591	4,330	7.33	2,452	4.15	6,782	11.48
1999	608	4,000	6.58	2,225	3.66	6,225	10.24
2000	612	3,778	6.17	2,001	3.27	5,779	9.44
2001	590	3,632	6.16	1,768	3.00	5,400	9.15
2002	615	3,006	4.89	1,563	2.54	4,569	7.43

*Number of sitting district court judges does not include senior judges.

Table A-28: Approximate Number of Lawyers in the United States and Lawyers per Capita in the United States, 1970–2002 (Data Underlying Figures 35 and 36)

Calendar Year	*Number of Lawyers*	*Lawyers per 100,000*
1970	326,842	160.4
1970	342,980	166.1
1972	358,520	171.6
1973	365,875	173.4
1974	385,515	181.1
1975	404,772	188.4
1976	424,980	195.8
1977	431,918	197.0
1978	464,851	209.9
1979	498,249	222.5
1980	574,810	253.8
1981	612,593	267.6
1982	617,320	267.0
1983	622,625	266.9
1984	647,575	275.1
1985	653,686	275.2
1986	676,584	282.4
1987	695,020	287.4
1988	713,456	292.4
1989	725,579	294.7
1990	755,694	303.9
1991	777,119	308.5
1992	799,760	313.4
1993	846,036	327.0
1994	865,614	330.5
1995	896,140	338.2
1996	946,499	352.9
1997	953,260	351.2
1998	985,921	359.0
1999	1,000,440	360.1
2000	1,022,462	363.9
2001	1,048,903	369.4
2002	1,049,751	366.0

Table A-29: Per Capita Civil Trials and Civil Trials per Billion Dollars of Gross Domestic Product in U.S. District Courts, 1962–2002 (Data Underlying Figures 37 and 39)

Fiscal Year	*Number of Trials*	*U.S. Population (Millions)*	*Trials per Capita (per Million)*	*GDP (Billions in 1996 Chain-Type Dollars)*	*Trials per Billion $ of GDP*
1962	5,802	185.2	31.32	2,578.9	2.25
1963	6,522	188.0	34.69	2,690.4	2.42
1964	6,445	190.7	33.80	2,846.5	2.26
1965	6,972	193.2	36.08	3,028.5	2.30
1966	6,910	195.5	35.34	3,227.5	2.14
1967	7,029	197.7	35.55	3,308.3	2.12
1968	7,536	199.8	37.72	3,466.1	2.17
1969	7,385	201.8	36.60	3,571.4	2.07
1970	7,547	203.8	37.02	3,578.0	2.11
1971	7,621	206.5	36.91	3,697.7	2.06
1972	8,168	208.9	39.10	3,898.4	2.10
1973	7,948	211.0	37.67	4,123.4	1.93
1974	8,153	212.9	38.29	4,099.0	1.99
1975	8,513	214.9	39.61	4,084.4	2.08
1976	8,556	217.1	39.41	4,311.7	1.98
1977	8,752	219.2	39.93	4,511.8	1.94
1978	9,158	221.5	41.35	4,760.6	1.92
1979	9,433	223.9	42.14	4,912.1	1.92
1980	9,874	226.5	43.60	4,900.9	2.01
1981	11,302	228.9	49.37	5,021.0	2.25
1982	11,280	231.2	48.80	4,919.3	2.29
1983	11,576	233.3	49.61	5,132.3	2.26
1984	12,018	235.4	51.06	5,505.2	2.18
1985	12,529	237.5	52.76	5,717.1	2.19
1986	11,666	239.6	48.68	5,912.4	1.97
1987	11,890	241.8	49.18	6,113.3	1.94
1988	11,598	244.0	47.54	6,368.4	1.82
1989	11,356	246.2	46.12	6,591.8	1.72
1990	9,257	248.7	37.23	6,707.9	1.38
1991	8,407	251.9	33.38	6,676.4	1.26
1992	8,029	255.2	31.46	6,880.0	1.17
1993	7,728	258.7	29.87	7,062.6	1.09
1994	7,900	261.9	30.16	7,347.7	1.08
1995	7,438	265.0	28.06	7,543.8	0.99
1996	7,565	268.2	28.21	7,813.2	0.97
1997	7,352	271.4	27.09	8,159.5	0.90
1998	6,782	274.6	24.70	8,508.9	0.80
1999	6,225	277.8	22.41	8,859.0	0.70
2000	5,779	281.0	20.57	9,191.4	0.63
2001	5,400	283.9	19.02	9,214.5	0.59
2002	4,569	286.8	15.93	9,439.9	0.48

Table A-30: Per Capita Trials in Courts of General Jurisdiction in 22 States, 1976–2002 (Data Underlying Figure 38)

Year	*Total Population*	*Total Dispositions*	*Jury Trials*	*Bench Trials*	*Trials per Million Persons*	*Jury Trials per Million Persons*	*Bench Trials per Million Persons*
1976	124,140,528	1,464,258	26,018	502,549	4,259	210	4,050
1977	125,505,423	1,529,250	25,462	499,392	4,182	203	3,979
1978	127,061,751	1,682,323	24,103	543,893	4,469	190	4,279
1979	128,694,830	1,769,757	23,239	571,126	4,618	181	4,438
1980	130,059,872	1,873,462	23,073	603,471	4,816	177	4,639
1981	132,110,916	1,991,291	23,555	626,188	4,919	178	4,740
1982	133,684,935	2,064,635	23,849	654,760	5,076	178	4,897
1983	135,207,203	2,114,228	23,671	667,282	5,111	175	4,936
1984	136,729,506	2,112,185	24,124	629,572	4,782	176	4,606
1985	138,373,532	2,019,391	22,663	615,029	4,608	164	4,444
1986	140,190,926	2,280,859	23,316	604,333	4,477	166	4,311
1987	141,981,568	2,336,662	24,428	593,130	4,349	172	4,177
1988	143,768.90	2,460,803	23,182	590,416	4,267	161	4,106
1989	145,641,614	2,682,534	22,618	612,983	4,365	155	4,210
1990	147,134,858	2,828,182	22,387	610,741	4,304	152	4,152
1991	149,448,749	3,015,817	23,089	623,199	4,326	155	4,171
1992	151,252,580	3,395,382	24,159	688,517	4,710	160	4,551
1993	152,894,370	3,257,366	24,109	667,480	4,523	158	4,365
1994	154,404,590	3,128,551	24,055	634,692	4,266	156	4,111
1995	155,896,258	3,138,796	23,453	613,981	4,089	150	3,938
1996	157,413,542	3,107,930	23,649	616,557	4,067	150	3,917
1997	159,082,511	3,208,712	24,565	641,667	4,188	154	4,033
1998	160,727,242	3,338,543	25,201	627,451	4,061	157	3,904
1999	162,333,836	3,097,209	24,299	568,954	3,655	150	3,506
2000	167,235,347	2,999,012	21,937	528,104	3,290	131	3,159
2001	169,874,724	3,073,153	19,190	508,035	3,103	113	2,990
2002	171,974,667	3,087,857	17,617	469,547	2,832	102	2,730

UNITED STATES SENATOR • IOWA
CHUCK GRASSLEY

http://grassley.senate.gov
grassley_press@grassley.senate.gov

Contact: Jill Kozeny, 202/224-1308
Beth Pellett, 202/224-6197
Dustin Vande Hoef, 202/224-0484

Prepared Statement of Senator Chuck Grassley of Iowa
Judiciary Subcommittee Hearing
"Creating New Federal Judgeships: the Systematic or Piecemeal Approach"
Wednesday, November 16, 2005

Mr. Chairman, I'm pleased that you're holding this hearing today. We all want to improve the federal judiciary. But with respect to the creation of new judgeships, I think that the Judiciary Committee should proceed with caution, and thoroughly assess that there is a true need to expand the judiciary with permanent judgeships. It's important that we look at the allocation of federal judgeships in a careful and systematic way.

Several years ago, when I was the Chairman of this Subcommittee, I conducted a series of oversight hearings to examine the proper allocation of federal judgeships. Those hearings stemmed from a first-ever congressional survey of Article III judges - both district court and appellate court judges - which I sent out in early 1996. More than 68 percent of all circuit judges at the time voluntarily responded to this questionnaire, and I thought it provided invaluable insight to the workings and specific challenges facing the federal judiciary.

My study found that judges were ambivalent regarding the prospect of growth in the federal courts. Specifically, the study found that some judges believed that additional positions should be authorized to keep up with an increasing caseload, or else the quality of justice would be diminished because of inordinate delays in judicial decision-making.

Other judges believed that an open-ended expansion of the federal judiciary would create longer delays in decision-making, and that organizational and other efficiencies could be found to deal with the workload. Those judges believed that "an expanded judiciary can only have serious detrimental long-term effects on court collegiality and the consistency and quality of opinion-making."

I tend to agree with this latter group of judges - serious efforts should be made to control an un-checked growth of the federal judiciary. Smaller courts create a collegial atmosphere and generally maintain a more stable rule of law. Open-ended growth of the federal judiciary is neither feasible, nor desirable.

Moreover, I believe that the judgeships requests submitted to Congress by the Administrative Office of the Courts have a tendency to be over-inflated. The use of mechanical formulas as a benchmark for federal judgeship needs has significant drawbacks. For example, the appellate formula for the most part does not distinguish between cases which consume a large quantity of judge time from cases that are not time-consuming. The formula does not take into account issues such as case disappearance, consolidation, and case law maturity. It also does not formally factor the court's senior judges' actual workload, or the workload of visiting judges.

In addition, the caseload numbers do not take into account court and case management techniques and practices that could be implemented to promote efficiencies, produce cost savings, and diminish caseload pressure.

For example, circuits requesting new judgeships should seriously evaluate how much time is spent by their judges on non-case related travel and non-case related activities, such as seminars and judicial conference events. Efficiencies may be achieved through studies of settlement and mediation program eligibility requirements or the timing of these programs during the court process, the use of temporary judgeships and 2 judge panels, as well as screening programs, en banc hearings and oral argument case management practices.

My study concluded that Congress should not act to fill vacancies or create new judgeships in a specific court of appeals until the following criteria are met - 1) there is a consensus among the judges of the court on the need to fill the vacancy or create new judgeships; 2) the court's caseload justifies this consensus; and 3) the court has made every effort to identify and use all available efficiencies and court management techniques to avoid the need for filling the vacancy or adding new judgeships.

I feel the same way today. Congress needs to act responsibly before creating new judgeships. Congress needs to carefully evaluate the actual needs of the judiciary and its caseload, and if Congress determines that there is not need, then it should leave vacancies unfilled or even permanently eliminate permanent judgeship seats.

For example, there is ample evidence that there is no need for a 12th seat on the District of Columbia Circuit because of its declining caseload. So today, I am reintroducing the Grassley/Sessions bill to eliminate the 12th seat on the District of Columbia Circuit.
Again, I want to thank Chairman Sessions for taking an interest in this issue and for holding this important hearing. I look forward to working with the Subcommittee to improve the federal judiciary and the administration of justice.

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Hearing Statement of Senator Chuck Hagel

U.S. Senate Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts

November 16, 2005

Chairman Sessions and Ranking Member Schumer, thank you for holding this hearing regarding the best approach to creating new federal judgeships.

I would like to convey to the Subcommittee the urgent need for an additional permanent federal district court judgeship in the District of Nebraska. Currently, Nebraska has only 3 district court judgeships. Those three judges carry one of the highest caseloads in the county. Before the Judicial Conference revised its weighting system last year, the District of Nebraska had the second highest caseload in the country.

Even after the Conference revised its weighting system, Nebraska has the 7th highest caseload at 645 cases per judge. Our judges work very hard to provide justice to Nebraskans; they terminated 668 cases per judge during 2004, well above the national average for case terminations of 469.

Nonetheless, justice is being delayed and denied to citizens of Nebraska. Criminal cases comprise 37 percent of case filings in Nebraska – double the national average. A rising number of federal drug prosecutions related to methamphetamine have contributed to the heavy case load for the Nebraska District Court. Because of Constitutional due process requirements, these criminal cases must be dealt with before civil cases. Parties to civil cases must wait on average a year and a half for a trial.

Nebraska's court is in this dire situation because a temporary judgeship that had existed since 1990 expired in May of 2004. I had worked toward extending that judgeship since 1999, to no avail; Congress has failed to act on this vital matter.

This year, on the first day that legislation could be introduced in the Senate, with my Nebraska colleague Senator Ben Nelson, I introduced a bill to restore this lost judgeship, S.130. In addition, I have filed floor amendments to restore this judgeship twice this year. I am committed to restoring this important judgeship and I ask that the Judiciary Committee include my legislation in any bill that creates or extends any federal judgeships. I look forward to working with the Judiciary Committee to pass legislation that will provide relief to the Nebraska District Court as soon as possible.

Thank you Chairman Sessions.

Statement of Senator Patrick Leahy

Subcommittee on Administrative Oversight and the Courts

"Creating New Federal Judgeships: The Systematic or Piecemeal Approach"

November 16, 2005

The creation of new lifetime appointments to the Federal bench is a serious matter. I remember a time in the 1990s when we faced a serious crisis in the districts along our southern border. Judges in those southern districts faced crushing caseloads, yet the Republican-led Congress refused to consider creating new judgeships that they viewed as contrary to their political interests. At the very end of President Clinton's second term of office we finally were able to pass legislation creating 10 and then nine additional judgeships. They were created late in President Clinton's second term and many were, in fact, filled by nominees by his successor.

When I was Chairman of this Committee, I set partisanship aside and pushed through a total of 20 new judgeships in several districts facing daunting caseloads. I acted when a Republican President occupied the White House, a Republican President who was refusing to work with the Senate on judicial nominations and who was the most unilateral and aggressive Executive in connection with nominations in recent history. We have already created more judgeships for President Bush than Republicans allowed be created in the eight years of both terms of President Clinton.

The Judicial Conference's most recent proposal to create many more additional judgeships is not unusual. However, it comes at a time when fiscal considerations must also be recognized. Many Senators, on both sides of the aisle, have recently given speeches on the Senate floor and appeared on Sunday morning talk-shows to emphasize the importance of getting our financial house in order. At a time when the Third Branch is undergoing major budget cuts and the nation is coping with the mounting costs of war, rebuilding regions of our nation devastated by natural disasters, and a growing deficit, I find it revealing that Republicans who opposed judgeships during President Clinton's terms are now unconcerned about the substantial costs that would be imposed.

I have been disappointed in the budgetary treatment of the Third Branch, and I have fought against reductions in their pay. I have introduced legislation to restore important cost-of-living adjustments that should have been awarded to federal judges because I am concerned about our ability to retain the judges we have.

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STATEMENT OF

ROBYN SPALTER
PRESIDENT
FEDERAL BAR ASSOCIATION

BEFORE

THE SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON

CREATING NEW FEDERAL JUDGESHIPS: THE SYSTEMATIC OR PIECEMEAL APPROACH

NOVEMBER 16, 2005

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Chairman Sessions and Members of the Subcommittee:

I am Robyn Spalter, President of the Federal Bar Association. Thank you for convening this hearing and inviting me to appear today on behalf of the 16,000 lawyers and judges who comprise the Federal Bar Association, as well as the parties they serve. Ours is the premier nationwide bar association devoted exclusively to the practice and jurisprudence of federal law and the vitality of the United States federal court system.

The creation and maintenance of a sufficient number of judgeships in our federal courts are critical to the assurance of the prompt and efficient administration of justice. That is why we endorse the recommendations of the Judicial Conference of the United States for the comprehensive creation of 12 judgeships in the United States courts of appeal, 56 judgeships in the United States district courts, as well as 24 judgeships in the United States bankruptcy courts.

We support the creation of new judgeships necessary to exercise federal court jurisdiction with the full understanding that there will be costs involved. We are as interested as the Congress in assuring that the federal courts maximize the use of their resources to avoid the creation of additional judgeships as much as possible. We also believe that the federal courts need to continue to create efficiencies through the continuing use of a range of measures, including: temporary rather than permanent judgeships; shared judgeships; intercircuit and intracircuit assignment of judges; alternative dispute resolution; and technological advances to permit the assistance of judges in other districts or circuits without the need to travel.

We believe that the caseloads are so large and overwhelming in several judicial circuits and a considerable number of judicial districts that Congress should undertake a comprehensive, systematic approach toward the establishment of judgeships. This not the time for minor, piecemeal changes. As you know, the last comprehensive federal judgeships bill was enacted by Congress in 1990 and provided most, if not all, of the judgeships requested by the Judicial Conference. The Federal Judgeship Act of 1990 (Public Law 101-650) established 11 additional judgeships for the courts of appeals and 74 additional judgeships (including 13 temporary) for the district courts. Since that time, no judgeship has been created for the courts of appeals, and 34 district judgeships have been added to respond to particular problems in certain districts.* Yet caseloads in both the appellate courts and district courts have increased dramatically in the past 15 years.

Accordingly, the Judicial Conference of the United States, the policy-making body of the federal judiciary, in March 2005, recommended that Congress establish 12 new judgeships in five courts of appeals and 56 new judgeships in 29 district courts. The Conference also recommended that 3 temporary district court judgeships created in 1990 be established as permanent positions, and that one temporary district court judgeship created in 1990 be extended for an additional five years. These recommendations were based upon an exhaustive biennial review by the Judicial Conference of court caseloads and other factors to assure the adequacy of the delivery of civil and criminal justice in the federal court system.

* Congress has created 34 new district court judgeships since Fiscal Year 2000. As part of the Judiciary's appropriations for Fiscal Years 2000 and 2001, and as part of the Department of Justice's authorization legislation in Fiscal Year 2003, Congress created 9, 10 and 15 judgeships respectively. However, five temporary judgeships have lapsed, including two in 2004.

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The Judicial Conference review showed that filings in the circuit courts of appeals since 1990 have grown significantly – by 46 percent – while district court case filings rose 39 percent (civil cases were up 33 percent and criminal felony cases grew by 77 percent). The national average circuit court caseload per three-judge panel has reached 1,127 cases -- the highest level ever. These numbers are dramatic because no additional judgeships have been created for the courts of appeals in the last 15 years. Despite the piecemeal addition of district judgeships over the last fifteen years, the average weighted filings rose to 529 per judgeship in 2004, a level that is 23 percent above the Judicial Conference's standard for considering recommendations for additional judgeships.

The number of criminal cases pending in the district courts has been continually increasing. Criminal felony case filings have increased 77 percent since 1991, and the number of criminal felony defendants is 57 percent higher. The largest increase, by far, has been due to heightened law enforcement activities on the southern border, causing immigration filings to rise from 2,000 in 1991 to 16,727 in 2004.

In February 2005, the Judicial Conference recommended the authorization of 47 additional bankruptcy judgeships (17 temporary and 30 permanent) in 31 judicial districts. The Conference also recommended converting three existing temporary bankruptcy judgeships into permanent judgeships. The Bankruptcy Abuse Prevention and Consumer Protection of 2005 (Pub. L. No. 109-8) authorized 28 additional temporary bankruptcy judgeships (only 23 of which were included in the Conference's February 2005 recommendation) and extended two of

the three existing temporary judgeships that the Conference recommended for conversion.

We are appreciative of the actions that Congress undertook in bringing relief to those districts in which additional bankruptcy judgeships were created. However, the actions of the Congress in authorizing additional bankruptcy judgeships were based upon the Conference's 1999 recommendation, which has been superseded by subsequent Conference recommendations. The 18 judicial districts not included in the bankruptcy act's provisions still operate under the strain of significantly increased caseloads. Moreover, a significant increase in bankruptcy litigation (including motions practice, adversary litigation and appeals) is likely to arise under the new terms of the bankruptcy act, as well as from the anticipated national increase in activity in the bankruptcy courts brought by the new airline bankruptcy cases and the devastating effects of Hurricanes Katrina and Rita in the Gulf Coast region. This will bring greater burden to a significant number of bankruptcy courts that already are straining at the seams. As the Judicial Conference has pointed out, since the authorization of additional bankruptcy judgeships in 1992, bankruptcy weighted case filings per authorized judgeship have increased 18.3 percent.

All of this helps to put the national perspective on the need for additional judgeships into perspective. However, the Judicial Conference's recommendations for circuit, district and bankruptcy judgeships are not premised on national trends and aggregate data. They are based on specific needs of each judicial district on a court-by-court basis. The situation in courts where the Conference has recommended additional judgeships, in fact, is much more dramatic than indicated by national totals.

With this in mind, the perspective I particularly bring before you today represents the views of lawyers appearing before the federal bench, especially those in circuits and districts where additional judgeships have been recommended by the Judicial Conference. While this perspective may be less data-driven and more subjective than the outlook of the Judicial Conference, my viewpoint is based upon the real-world experience of lawyers and judges whose professional life revolves around advocacy and the search for justice in the federal courthouse.

Our members in circuits and districts where judgeships have been requested by the Judicial Conference are becoming increasingly frustrated by the substantial delays that are occurring in the disposition of civil and criminal cases. They believe that these growing delays are principally due to inadequate numbers of judges to address the growing dockets of cases. The significant increase in criminal cases undoubtedly has increased the workload burdens of judges in the adjudication of criminal motions, trials and sentencings. Civil practitioners are frustrated, yet understand, that criminal cases take priority over the hearing of civil cases, contributing to the extended period of time it sometimes takes to get civil motions decided and civil cases tried.

Our members tell us time and again of their respect for the diligence and hard work of their federal judges to attempt to hear and decide cases in a timely manner. But there are limits on how much the bench can accomplish with existing resources. The problem is simply that there are not enough judges. That is why we believe that Congress should promptly exercise its Constitutional authority to create additional circuit, district and bankruptcy judgeships consistent with the

recommendations of the Judicial Conference – not incrementally, but comprehensively, and now.

Finally, we are aware of the House proposal to consider together two very important issues that are separate and distinct: the federal judiciary's recommendations for the creation of new additional federal judgeships, and the legislative proposal to reorganize the Ninth Circuit Court of Appeals through the creation of a new Twelfth Circuit. We believe that the establishment of the additional 68 judgeships and the reorganization of the Ninth Circuit are two entirely different issues, embodying separate and distinct considerations. We commend the Subcommittee for its approach toward bifurcating these two issues, separately considering each of them on their own merits.

The creation and maintenance of a sufficient number of judgeships in our federal courts are critical to the assurance of the prompt and efficient administration of justice. It is not trite to underscore the refrain that "justice delayed is truly justice denied." It is time to provide for the efficient working of justice everywhere in the United States by authorizing the comprehensive creation of adequate numbers of judgeships in the federal circuit, district and bankruptcy courts, as recommended by the Judicial Conference. In conclusion, we strongly support and urge the comprehensive creation of these judgeships now.

Thank you, Mr. Chairman, for the opportunity to testify on behalf of the Federal Bar Association before your subcommittee today.

TESTIMONY OF U. S. DISTRICT JUDGE WILLIAM H. STEELE
BEFORE THE SUB-COMMITTEE ON JUDICIAL ADMINISTRATION
NOVEMBER 16, 2005

Thank you for this opportunity to address the committee on the topic of the utilization of magistrate judges, and more specifically on the utilization of magistrate judges in the Southern District of Alabama. By way of background, I served as a Magistrate Judge in the Southern District of Alabama from 1990 until 2003. In 2003, I was appointed and began serving as a United States District Judge; consequently, I have witnessed the benefits of the magistrate judges' system both from a supporting role and in a supported role.

The Southern District of Alabama is considered to be a pioneer district in the full utilization of magistrate judges. This was an evolution that resulted from a set of unique circumstances which occurred in our district over a period of several years. During the mid to late 90's, the Southern District was authorized and had serving three district judges. Historically, the Southern District is a busy district, and given its proximity to the drug corridors of South Texas, South Florida, and the Gulf of Mexico, it is a district which has handled a significant number of drug cases. Because criminal cases generally take priority over civil cases, and because of the Speedy Trial Act, it was necessary to move these criminal cases through the system as quickly as possible.

As a result of a number of factors affecting our district judges including ill health, retirement, senior status, and the delay in replacing these judges, over time, the number of district judges in Southern District of Alabama diminished from three active judges to one active judge. That judge was then responsible for managing most, if not all, of the total criminal case load in addition to his own civil case load. As a result of these conditions and factors, the Court began

looking for ways to efficiently manage the civil and criminal dockets so as to avoid any substantial backlog and delay in the efficient administration of justice. For our district, the logical place to turn was to the magistrate judges.

At the time of our crisis, the magistrate judges in the Southern District of Alabama were already serving in their traditional roles. By traditional roles, I mean that these judges were handling all of the § 1983 prison litigation (conditions of confinement) on report and recommendation, all of the § 2254 habeas cases on report and recommendation, all of the social security appeals on report and recommendation, all of the preliminary criminal matters (arraignments, initial appearances, detention hearings, pretrial conferences, and discovery motions), all of the central violations bureau cases (hunting and game violations, petty offenses, and assimilated crimes act offenses), and all preliminary civil matters (discovery motions and the entry of scheduling orders). In order to relieve the district judges so that they could manage the criminal docket and as much of the civil docket as possible, the magistrate judges were asked to take on additional responsibilities which included handling a significant number of civil pretrial conferences, a substantial number civil case settlement conferences, jury selection in almost all of the criminal and civil jury trial cases, and an automatic assignment of a significant part of the civil docket. In addition, a small number of civil dispositive motions (summary judgment, and motions to dismiss), were referred to the magistrate judges for entry of a report and recommendation, and, on a few occasions, the magistrate judges were called upon to take guilty pleas.

Pursuant to 28 U.S.C. § 636(c), magistrate judges are authorized, with the consent of the parties, to exercise jurisdiction over all proceedings in jury or non-jury civil matters, and may order the entry of judgment in a "consent" case. In an effort to relieve the district judges (and

ultimately the one district judge) in our district, our court implemented a system wherein 25 percent of the total civil docket was automatically assigned to the magistrate judges. With the consent of the parties, a number of these cases were retained and disposed of by the magistrate judges, thus reducing the total civil case load of the district judge.

As a result of this expanded utilization of magistrate judges, our court was able to weather the storm and to efficiently and effectively administer justice in the Southern District of Alabama.