UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

CHARLES CLARK
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TO MEMBERS OF:

THE EXECUTIVE COMMITTEE and
THE BIDEN BILL COMMITTEE

Dear Judges:

I thought you would be interested in seeing this Executive Summary from a Rand Corporation report entitled "Statistical Overview of Civil Litigation in the Federal Courts."

Sincerely,

Charles

Enclosure

Executive Summary

This report presents an analysis of civil litigation in federal district courts, with particular emphasis on the time taken to dispose of cases filed in these courts between 1971 and 1986. The stimulus for the research derives from the persistent concern that litigation in the federal courts is a slow and expensive process, and one that is steadily worsening. Increases in the volume and complexity of civil cases, together with a deficiency of resources, are held by many to be responsible for such perceived problems.

Numerous articles and books have addressed the issue of federal district court costs and delays—most by decrying the situation and offering different approaches to its amelioration. For more than a decade, the United States Congress has also focused considerable attention on the issue—attention that culminated in 1988 with the passage of the Judicial Improvements and Access to Justice Act. Among other things, this act established the Federal Courts Study Committee, which was tasked with identifying the problems facing the federal courts and proposing solutions to them.

Yet despite the relatively high profile that these issues have assumed, empirically grounded analyses that might shed light on them have been uncommon. To a large extent, this has been due to a lack of relevant data. For instance, there has been a serious shortage of usable analytic information on the cost of litigation in the federal system. This has meant that the few studies of attorneys' fees and litigants' expenses that have been conducted have generally produced estimates of aggregated costs, usually on a cross-sectional basis, but few insights about cost trends. Consequently, the notion that costs are rising tends to rest on opinions, anecdotes, and general observations rather than on systematic documentation.

Similar obstacles once impeded the analysis of federal district court delay. Although the Administrative Office of the U.S. Courts has long maintained a centralized record-keeping system on federal cases, longitudinal analysis was constrained until recently by year-to-year variation in the information that was collected and by the form in which

that information was stored. However, the development in 1985 of the *Integrated Federal Courts Data Base* (IFCDB)—a computerized information system containing standardized records for all cases filed in the federal court system since the early 1970s—has made it possible to examine case-processing questions in greater detail than was feasible even as recently as five or six years ago.

The federal courts data base is particularly valuable to analyses of delay in that it identifies times to disposition for all federal cases, thus creating an opportunity to determine what changes, if any, have arisen in this measure during the last decade and a half. This is the task we undertake to perform in this report. We will also examine certain measures that seem intuitively likely to be associated with variation in disposition times: the size and growth of districts, the type of court action taken prior to disposition, case mixture, and the level of judicial resources. The federal district court system as a whole is examined first and is followed by an analysis of interdistrict variation.

THE DISTRICT COURT SYSTEM AS A WHOLE

Filing Trends: 1950–1986

A review of criminal, U.S. civil, and private civil filing trends shows that criminal filing volume in the district courts has fluctuated around an average of about 35,000 new cases per year, reaching a high of 49,000 in 1972 and a low of 29,000 in 1980. By 1986, filing volume had risen to more than 40,000. A substantial portion of this increase derived from drug-related cases. Between 1980 and 1986, for instance, the number of drug offense cases commenced annually rose from less than 3,200 to more than 7,800, representing about 40 percent of the total increase in criminal filings during the same period of time. Furthermore, this trend is continuing in more recent years. The forthcoming *1989 Annual Report of the Administrative Office of the U.S. Courts* will indicate that the annual number of drug case filings now exceeds 12,000. Because of the complexity of these cases, the growth in their numbers has been cited by many as a significant cause of congestion and delay in the federal courts.

U.S. civil filings numbered less than 23,000 per year in 1950 and remained relatively stable for the next two decades. In the 1970s, however, such filings more than doubled, and in the first half of the 1980s they almost doubled again. New cases in 1986 totaled 91,830.

The private civil caseload has grown more rapidly than either criminal or U.S. civil filings: there were 32,000 new private civil cases in

1950, 64,000 in 1970, and more than 161,000 in 1986. This growth was distributed across different types of cases, albeit at differing levels.

Despite the growth that has been observed in criminal and U.S. civil filings, particularly during the 1980s, it seems likely that deterioration in the district court system, as measured by lengthening time-to-disposition, is unlikely to be manifested by such cases, at least at the aggregate system level. This view rests on the following premises.

First, speedy-trial considerations make it improbable that criminal cases experience delay to the same extent as civil suits. Such considerations almost certainly ensure that criminal cases receive judicial attention in a more timely manner than do civil suits when court resources—judges, courtrooms, and the like—are scarce. Thus, the effects of an increased federal district court criminal caseload, assuming for purposes of argument that such an additional burden exists, should be most visible on the civil side of the docket.

Second, the impact of those civil suits that involve the United States will also tend to be small because the growth in such filings stems almost entirely from cases that make only minor demands on the judiciary. For example, the United States filed more than 475,000 recovery and enforcement actions during the decade ending in 1986, and more than 40 percent of all the cases in which the United States was defendant from 1971 to 1986 involved social security claims. Many of these kinds of cases, however, require little or no judge time. Trials are similarly rare, accounting for less than one per thousand filings for recovery/enforcement actions and less than five per thousand for social security actions, and dispositions with no reported judge or magistrate activity of any kind are high—exceeding 80 percent in the case of all recovery/enforcement suits.

These considerations suggest that increases in time to disposition will be most evident in the private civil docket and that the focus of the research should thus be in that area. This is the approach we have taken in the balance of the report.

Time to Disposition for Private Civil Cases

Our analysis of systemwide statistics on disposition times for private civil suits indicated that the aggregate performance of the federal district courts was remarkably stable during the 1970s and 1980s despite a substantial increase in caseload during that period.

In the most general sense, this is conveyed by the fact that the number of terminated cases in any given year roughly equaled the number of filings in the previous year across the entire 16-year period of the study. Put another way, the termination rate has remained

proportionate to the filing rate, indicating that the district courts have kept pace with the filing increases that have occurred. If this were not so, and if time to disposition were lengthening, then the termination rate would by definition have slipped further and further behind the filing rate.

More refined breakdowns of the data shed light on this observation. In 1971, roughly 60 percent of all private civil cases reached disposition within one year of filing, compared with 22 percent within two years, 10 percent within three years, and 8 percent later than that. In 1986, the comparable percentages were 61, 23, 9, and 7, respectively. In the intervening years, small fluctuations occurred around these numbers.

Some variation in the pace of disposition was detected for different case types. Contract, real property, and tort cases got through the system more rapidly on average at the end of the study period than at the beginning, whereas the reverse was true for civil rights suits and for other actions based on statutes. Suits in the latter category, however, reached disposition more quickly than average in the early 1970s, and so the slowdown brought them in line with disposition times for other civil cases. By 1986, civil rights suits were comparable with torts on this measure, and other actions based on statutes were comparable with contract cases.

Notwithstanding such variation between case types, the general conclusion we draw from these statistics is that when the federal district courts were considered as a whole, the average time to disposition for private civil cases was about the same in 1986 as it was in 1971.

Method of Disposition for Private Civil Cases

It is, of course, possible—in principle, at least—for any court system to maintain stable time-to-disposition statistics by reducing the average level of court involvement in cases. As filings go up, for instance, the proportion of cases that receive court attention might go down. A relatively large number of low-demand cases could terminate quickly, thus leaving the overall performance measures relatively unchanged. This would be consistent with the argument that the stability observed in time to disposition has come at the expense of the opportunity to be heard in court.

To consider this issue, we classified private civil cases according to the type of court action taken prior to disposition: no reported activity, motions or pretrial conference but no trial, and trial or evidentiary hearing. Our analysis showed that roughly 40 percent of all private civil cases terminated without any reported court action during the 16-year period under study, and that year-to-year fluctuation around this number was modest. At the other end of the scale, the trial rate

declined from 10.9 percent of terminations in 1971 to 6.6 percent of terminations in 1986 (see Table 4.4). The proportion of cases terminating after motion or pretrial conference rose correspondingly.

The picture becomes somewhat more complex when different case types are considered. During the study period, the relatively low-demand path to disposition—termination with no court action—became less common for contract, real property, and tort cases but more common for civil rights suits and other actions based on U.S. statutes. The trial rate fell for all case types by roughly similar proportions, exhibiting about a one-third reduction.

A number of factors might have led to the declining frequency of trials. One possibility is that it is a consequence of changes in judicial behavior. For example, increased judicial management—in the form of more rapid responses to motions, prompt scheduling of hearings, or greater pressure to settle before trial—could have deflected an increasing proportion of cases from the trial path. Another is that attorneys and litigants were deterred from trial by the expectation of delay—even though greater delay has not actually occurred for most cases. Yet another is that there has been a disproportionate increase in cases for which trial was never a serious likelihood.

There may well have been other explanations for the change. However, it is impossible to sort out the influence of any of these factors without more data than were available to us. Therefore, we draw no definitive conclusions here about their relative effect, or indeed whether they had any effect at all.

ANALYSIS OF DISTRICTS

Interdistrict Variation in Size, Growth, and Time to Disposition

In 1986, there were 94 district courts in the federal judicial system. Private civil filings in these courts varied considerably, ranging from 8,882 in the southern district of New York to 17 in the Northern Marianas Islands. The 232 cases filed in the district of Vermont constituted the smallest number from any U.S. state.

The relative size of districts has changed little over time. Seven of the ten biggest 1986 districts, for example, were also in the top ten in 1971; the other three were in the top 20. At the small end of the scale, 18 of the 20 smallest districts in 1986 were also in the smallest 20 in 1971. Similar patterns emerge in the intervening years.

Despite this stability with respect to relative filing magnitude, districts have experienced different rates of filing growth. All but two of

the ten largest districts, for example, grew more slowly than the system as a whole during the 1970s and 1980s, some by a considerable margin. Consequently, these large districts now account for a smaller proportion of civil filings than they once did, comprising 34.5 percent of all private civil filings in 1986 compared with 43.3 percent in 1971.

The previously documented stability in systemwide time to disposition masks considerable interdistrict variation in processing speed. In SY86, for example, there were some districts in which more than 80 percent of all private civil filings were terminated in less than a year. In other districts, the corresponding percentage was below 40. At the other end of the time-to-disposition continuum, subsuming cases taking more than three years, the percentage in a few districts was more than 20 but in a number of others was less than two.

Fast, Slow, and Average Districts

In attempts to isolate the factors that might be associated with interdistrict disparities in speed of case processing, we selected 30 districts for more detailed examination. Districts were chosen on the basis of median times to disposition between SY71 and SY86: the ten districts with the lowest and most stable medians across the 16 years were selected for what was designated the fast group; the ten with the highest and most stable medians were placed in the slow group; and ten average districts were chosen for purposes of comparison. All districts in the fast group had median times to disposition of six months or less; those in the slow group had medians of 12 months or more; and districts in the average group had medians of nine months, which is the same as the systemwide figure.

Differences between the three groups were then analyzed along a variety of dimensions:

- the U.S. civil and criminal caseload;
- the mix of private civil cases;
- court action taken prior to termination; and
- the number of judges in relation to the caseload.

In general, we expected the fast and slow groups of districts to differ on one or more of these measures in ways that would be consistent with their demonstrated variation in processing times. Slow districts, for instance, might have more difficult cases, more time-consuming court events, fewer judicial resources in relation to caseload, and the like.

In fact, the three groups of districts proved quite similar on most measures. What variation was found tended for the most part to be counterintuitive. U.S. civil suits, for instance, which on average

require less judge time per case than do private civil suits, represented a somewhat greater proportion of the caseload in slow districts than in fast. The number of weighted filings per judge, a statistic that is used by the Judicial Conference of the United States to support judgeship requests made to Congress, was higher in the fast districts than in the slow districts. The average number of terminations per judge after trial, conference, or motion was higher as well.

The only area in which the slow districts outdistanced the fast in terms of factors that might induce delay involved the mix of private civil cases. Torts and civil rights suits, which are considered to be among the more demanding types of cases filed in district courts, were found to constitute a greater proportion of the private civil caseload of the slow group. If torts and civil rights suits really are more demanding case types, their prevalence in slow districts is what would be expected. However, the magnitude of that difference does not seem to be sufficient to explain the observed variation in case-processing times. And, as noted above, independent measures that supposedly take case-mix variation into account—the weighted caseload and the number of trials, conference, and motions per judge, for example—do not indicate workload differences between the groups.

Furthermore, even the cases that are believed to make the lowest demand on the courts—those based on statutes and contract actions—are processed more slowly in the slow districts than are the highest-demand cases in the fast districts.

Finally, we note that the case-processing speed of the fast districts is not achieved at the expense of procedure. The proportion of quickly terminated cases in the fast group that had pretrial conferences or trials, for example, was twice that of the slow group, even though the overall proportion of terminations by trial was somewhat higher in the latter than in the former.

The conclusion we draw from the analysis of differences is that none of the measures we were able to consider bore a substantial relationship to the disparity in processing time between groups. This left us unable to answer the critical question: why are the slow districts slow, and why are the fast districts fast?

We must note, however, that the district courts do not operate in a vacuum; they are part of a system that includes litigants and attorneys as well as other components. These elements of the system both interact with and influence each other. For example, the timetable on which attorneys work and the manner in which they manage their cases seem likely to affect the courts in ways that the courts do not control.

Consequently, the observed variation in case-processing speed may have determinants that are completely outside the court system. If so, it is not surprising that we have not detected such determinants in this study.

FUTURE RESEARCH POSSIBILITIES

How might further research into this issue proceed? In our view, there are three principal areas of inquiry on which attention should be focused:

- the development of better and more complete information on what actually takes place during the life of each case;
- the achievement of a greater understanding of the management practices and philosophy of the circuits, districts, and judges sitting in each district; and
- the practices and procedures that attorneys in the federal bar follow in each district.

More information on case-related events is needed because the data available at present do not capture all facets of the caseload with which districts must contend. For instance, we cannot discern the event structure of cases on the basis of the IFCDB in its current form. By this we mean that we cannot determine how many motions, conferences, and the like took place in each case or ascertain how much judge time such activities consumed.

Therefore, the actual workload of the cases in the fast and slow districts—or in any districts—cannot be dependably calculated. It is not beyond the realm of possibility that cases in the two groups have significantly different event structures that are not captured by the current case-weighting system. An initial step toward greater understanding of variation in district performance could be taken if such information were available. To some extent, the judicial time study that is currently being conducted by the Federal Judicial Center could fill this gap; in it, judges are reporting the time spent on specific events in cases that are included in the study, and each study case is being followed from filing to termination. Since all districts in the federal court system are being included in the survey, a comprehensive picture of events and time needed for them might result.

A new study of federal court management practices and philosophies is needed because of the obvious relevance of such factors to any analysis of the way cases proceed through the system. In a sense, this is a call for a reprise of the Federal Judicial Center's examination of case management and court management, which focused on SY74 data

and was published in 1977.[1] That study, which looked at six district courts in some detail and examined four others in a more cursory fashion, resulted in a set of recommendations concerning ways in which judges and districts could improve performance and speed. Although it is not clear which, if any, judges and districts have adopted these recommendations, we suggest that a similar study be undertaken now, but with an expanded number of courts and with a focus on longer-term trends. Such an assessment would be especially timely given the existence and mandate of the Federal Courts Study Committee established by Congress in 1988.

An expanded study would also be more feasible at present than it was in the mid-1970s for at least two reasons. First, the computerized data base of the Administrative Office, which was used in this report, now has 15 more years of data than it did at the time the district court study series was undertaken. In addition, the data for each year have a standard structure that facilitates longitudinal analysis. Second, the current judge-time survey being conducted by the Federal Judicial Center will provide better information, albeit on a cross section of cases, on what judges actually do than has ever been available before. Therefore, it may be possible to link a court management study with these two data bases in a way that will reduce the data-collection burden that hampered the 1977 court management study.

Because it is not clear that complete responsibility for fast or slow case processing rests with the court, information must be developed on the practices and procedures of the federal bar in districts included in an in-depth study of case and court management. As discussed above, local norms of attorney behavior with respect to continuances, adherence to court-established timetables, and the like will differ from district to district and may affect case-processing times. Regrettably, the extent to which this might be so cannot be determined from the IFCDB as it is currently constituted. For example, although the proportions of cases terminated after pretrial conference are roughly similar in slow and fast districts, the age of such terminations tends to be much higher in slow districts than in fast districts. But is this attributable to time-lag differences between the filing and scheduling of conferences or to time-lag differences between the scheduling of conferences and settlement (or other disposition)? Currently available data cannot tell us. If the former is the case, then the difference in delay might be under the influence of the court. If the latter holds true, the delay may reflect the pace at which attorneys and parties in the case have proceeded.

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[1]S. Flanders, *Case Management and Court Management in United States District Courts*, District Court Study Series FJC-R-77-6-1, Federal Judicial Center, Washington, D.C., 1977.