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# Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases under the Civil Justice Reform Act

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ADVERSE PUBLICITY AS A MEANS OF REDUCING  
JUDICIAL DECISION-MAKING DELAY: PERIODIC  
DISCLOSURE OF PENDING MOTIONS, BENCH TRIALS  
AND CASES UNDER THE CIVIL JUSTICE REFORM ACT

CHARLES GARDNER GEYH<sup>1</sup>

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In the spirit of full disclosure, I should indicate that my interest in the subject of this article is more than purely academic. I served as counsel to the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Administration of Justice from 1989 to 1991, where I staffed the Civil Justice Reform Act from its introduction to its passage. In the spring and summer of 1991, I served as Special Counsel to the Office of Legislative and Public Affairs of the Administrative Office of the United States Courts, where I assisted in the implementation of § 476; and in 1992 and 1993, I was retained as a consultant to the National Commission on Judicial Discipline and Removal to assess, among other things, the impact of § 476 in reducing decision-making delay.

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## I. INTRODUCTION

The flagship of the Civil Justice Reform Act is the expense and delay reduction plan, which each of the federal judicial districts has been required to develop and implement. These plans and their contents all but monopolized debate during the legislative process, and have all but monopolized commentary on the Act since its passage. Slipping by relatively unnoticed<sup>2</sup> was a new section 476 to title 28:

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<sup>2</sup>One notable exception to the lack of attention otherwise lavished upon § 476, is an insightful article by Professor R. Lawrence Dessem. See R. Lawrence Dessem, *Judicial*

### § 476. Enhancement of judicial information dissemination

(a) The Director of the Administrative Office of the United States Courts shall prepare a semiannual report, available to the public, that discloses for each judicial officer —

- (1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending;
- (2) the number of bench trials that have been submitted for more than six months and the name of each case in which such trials are under submission; and
- (3) the number and names of cases that have not been terminated within three years after filing.<sup>3</sup>

The modest objective of this article is to analyze § 476 in light of the purpose it was designed to serve, and to evaluate the performance of that section during the two years that it has been in operation. To do that, it is useful to begin by placing § 476 in the larger context of ongoing efforts to address and remedy indefensible decision-making delays. Section II will, therefore, summarize the causes of decision-making delay, dividing them among the defensible and the indefensible, and then review existing mechanisms for alleviating indefensible delay. The point worth underscoring is that while defensible delays—particularly delays occasioned by burgeoning caseloads—are undeniably the most significant source of decision-making delay, they are not the only source. Section 476 may properly be understood as the latest in a series of efforts to reduce indefensible delays—delays precipitated by nonstructural inefficiency, indecision, inertia, belligerence or disability.

Section III will track the development and implementation of § 476. While it is still too early to reach any firm conclusions as to the ultimate success of the section in reducing indefensible delay, preliminary findings are encouraging; delays are declining, and judges appear to be acknowledging that the impact of the section is salutary. Even at this early date, then, the evidence may be sufficient to justify Congress in lifting the sunset provision as it applies to § 476.

## II. DECISION-MAKING DELAY IN THE FEDERAL COURTS: LOOKING BEYOND THE CASELOAD CRISIS

### *A. Causes of Decision-Making Delay*

Decision-making delay, as a longstanding problem confronting the federal courts, has been discussed elsewhere—so much so, in fact, that no fashionably dressed court reform scholarship (including my own) is complete without a

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*Reporting Under The Civil Justice Reform Act: Look, Mom, No Cases!*, 54 U. PITT. L. REV. 687 (1993).

<sup>3</sup>28 U.S.C. § 476(a)(1)-(3) (1993).

tasteful accessory, around which the rest of the ensemble is frequently coordinated, highlighting delay-related crises within the federal courts.

### 1. Defensible Delay

In the category of defensible delay are grouped those causes that are beyond the judges' control, or that may otherwise be justified as necessary or appropriate. As indicated below, a variety of measures have been proposed or implemented to alleviate defensible delays. With the possible exception of provisions authorizing expanded use of alternative dispute resolution, however (which may serve to reduce caseload and overcome certain delay-inducing structural inefficiencies), the Civil Justice Reform Act attacks indefensible delay. A brief discussion of defensible delay is nevertheless appropriate, if only to place in context the Civil Justice Reform Act and the solutions it proposes.

#### *a. Excessive Caseload*

As suggested by the myriad of causes identified here, decision-making delay is in fact a relatively complex phenomenon. It is, however, frequently traced to a single cause: docket congestion resulting from a massive influx of cases. The Federal Courts Study Committee, for example, attributed the current "crisis of the federal courts" to a recent surge in criminal case filings. As a result, the average number of cases assigned to each judge has increased dramatically, and the average time it takes to process a case from filing to disposition has lengthened considerably.<sup>4</sup>

Delays occasioned by docket congestion are not, strictly speaking, beyond the judge's control. She can after all, decide fifty cases in the same time it would otherwise take to decide five, simply by reducing the amount of time devoted to each case. Nevertheless, such delays are clearly defensible, insofar as there is realistically a minimum quantity of time that must be devoted to each case to permit competent, conscientious and just decision-making.

Widespread acceptance of the proposition that decision-making delay is correlated to court workload has led many commentators to recommend either increasing the size of the federal judiciary or restricting case inflow, to alleviate delays.<sup>5</sup> To the extent that delay is attributable to workload, such

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<sup>4</sup>FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, at 46 (1990).

<sup>5</sup>*Id.* at 421. See also, RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM, 59-64 (1985); Robert Kastenmeier & Charles Geyh, *The Case in Support of Legislation Facilitating the Consolidation of Mass Accident Litigation: a View From the Legislature*, 73 MARQ. L. REV. 535, 543-46 (1990); Jon Newman, *1000 Judges—the Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (December-January 1993); Stephen Reinhardt, *Too Few Judges, Too Many Cases*, 79 A.B.A.J. (January 1993); Robert Stern, *Remedies for Appellate Overloads: the Ultimate Solution*, 72 JUDICATURE 103 (August-September 1988); Victor Williams, *Solutions to Federal Judicial Gridlock* 76 JUDICATURE 185 (December-January 1993).

recommendations may have merit. At the same time, to the extent that delay is attributable to causes other than workload, those other causes—and recommendations to address them—likewise deserve attention.

*b. Insufficient Numbers of Sitting Judges*

The rate at which a judicial district's docket moves is a function not only of the number of cases filed, but also of the number of judges available to hear those cases. To the extent that delays result from a paucity of available judges, such delays are beyond the control of the judiciary, and are thus defensible.

Shortfalls of judges may be attributable to an insufficiency of judgeships authorized for a given judicial district. Congress has, over the past several decades, periodically created additional judgeships to cope with the steady increase in federal court caseload.<sup>6</sup> Delays caused by an unmet need for the creation of additional judgeships, are thus cyclical, with problems being most acute in the years immediately preceding legislative reform.<sup>7</sup>

Shortages of judicial man and woman power are also frequently attributable to delays in the appointment of judges to fill existing vacancies.<sup>8</sup> As of October 1, 1993, for example, there were 107 district court vacancies, and only nine nominees.<sup>9</sup>

*c. Structural Inefficiency*

Some delays are attributable to inefficiencies inherent in the structure of the civil and criminal justice systems. Among the more controversial barriers to efficient adjudication are the procedural and jurisdictional impediments to

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<sup>6</sup>See Posner, *supra* note 5, at 353-57 (chronicling increases in size of the federal judiciary).

<sup>7</sup>In 1990, Representative Jack Brooks, Chair of the House Judiciary Committee, offered the following explanation in support of legislation culminating in the most recent creation of additional district court judgeships: "[S]ome district courts...with a large number of drug prosecutions have experienced a tremendous increase in their caseloads. This increase in drug caseloads has also had the unfortunate effect of backing up the civil docket in these districts as well. H.R. 5316 will provide much needed assistance for courts overrun by criminal cases." 136 CONG. REC. H8282, H8284 (daily ed. September 27, 1990).

<sup>8</sup>"Creating new judgeships is just one part of the solution to court overcrowding. The other necessary component is decisive action by the President to fill vacancies among existing judgeships. It is clear that neither this bill nor any other judgeship proposal will do much to ease the courts' caseload burden unless the President acts promptly to fill both the new positions and these current vacancies." 136 CONG. REC. H8282, H8284 (daily ed. September 27, 1990).

<sup>9</sup>THE THIRD BRANCH, v. 25, No. 10 at 8 (October, 1993).

comprehensive aggregation of related, mass-tort litigation,<sup>10</sup> but there are many others.<sup>11</sup>

Deciding whether to eliminate structural inefficiencies as a means to alleviate delay can be a dicey business, since the benefits of alleviating delay must be weighed against the cost of losing the benefits that the existing structure was designed to yield. Thus, for example, the benefit of delays avoided by legislation facilitating the aggregation of mass-tort litigation must be weighed against the cost of losing individualized, case-by-case adjudication under the current system.<sup>12</sup> In any case, such inefficiencies are "defensible", as I have defined the term, inasmuch as they are beyond the judges' control.

#### d. Case Complexity

A single, complicated piece of commercial litigation can all but monopolize a judge's time for years.<sup>13</sup> In addition, an infinite variety of complications such

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<sup>10</sup>Federal suits seeking damages against manufacturers, insurance carriers and others for injuries allegedly caused by the Dalkan Shield intrauterine device, or exposure to asbestos or Agent Orange, have collectively numbered in the hundreds of thousands. Kastenmeier & Geyh, *supra* note 5, at 548. These cases have succeeded in clogging a number of district courts, causing concomitant dispositional delay.

A wide range of suggestions have been offered to address the backlog and delay created by mass-tort litigation. Such proposals have taken a variety of tacks, including: modifying the rules of civil procedure relating to class actions, see Linda Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986) or joinder, see Richard Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT L. REV. 809 (1989); expanding diversity jurisdiction to accommodate related mass-tort actions while enhancing the ability of the multidistrict litigation panel to consolidate such actions, see Thomas D. Rowe & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7 (1986); Charles Geyh, *Complex Litigation Reform and the Legislative Process*, 10 REV. LITIG. 401 (1991); and creating specific federal question jurisdiction, see H.R. 231, 96th Cong., 1st Sess. (1979)(creating federal question jurisdiction over aviation accident litigation). See also Kastenmeier & Geyh, *supra* note 5, at 552. What these approaches have in common is an interest in improving the efficiency with which such litigation is handled as a means to alleviate delay.

<sup>11</sup>Indeed, any required process in excess of summary disposition is, in some sense, a structural "inefficiency" that generates delay.

<sup>12</sup>See, e.g., Robert Sedler and Aaron Twerski, *The Case Against All Encompassing Federal Mass-Tort Legislation: Without Gain*, 73 MARQ. L. REV. 76 (1989).

<sup>13</sup>The IBM and ATT antitrust cases represent two extreme examples. U.S. v. IBM, 618 F.2d 923 (2d Cir. 1980). U.S. v. ATT, 552 F. Supp. 131 (D.D.C. 1982), *aff'd. summarily sub nom.* Maryland v. U.S., 460 U.S. 1001 (1983). See also Frederick M. Rowe, *Antitrust in Transition: A Policy in Search of Itself*, 54 ANTITRUST L. J. 5 (1985); Stephen M. Axium, *AT&T and IBM: U.S. Actions Compute? The Settlement and Dismissal*, N.Y.L.J. (1982); Alan K. McAdams, *A Bad Move for All Concerned (Dropping the Antitrust Case Against IBM)*, L.A. DAILY J., May 17, 1984, at 4. John Adams Wettergreen, *AT&T and IBM: Reaping the Fruit of Business Freedom*, L.A. DAILY J., January 17, 1983, at 4. STEVEN FLANDERS & JOHN MCDERMOTT, OPERATION OF THE FEDERAL JUDICIAL COUNCILS 32 (1978) (observing that in a number of situations, a judge's entire docket had become backlogged by a single case).

as scheduling conflicts, protracted settlement negotiations, and the need for coordination with related litigation may legitimately delay otherwise uncomplicated cases. As with caseload, delays caused by the complexity of the case or other complications may be defended as the price to be paid for reasonable and just decision-making, and are, in any event, beyond the judge's control. Proposals to alleviate complexity-related delays often seek to do so indirectly by such measures as abolition of diversity of citizenship jurisdiction (thereby removing from the federal system much of the complex, time consuming, commercial litigation) or elimination of the structural barriers that impede efficient aggregation of related litigation, as discussed above.

## 2. Indefensible Delay

Of greater concern to the Civil Justice Reform Act, and hence to this article, is indefensible delay, which, like defensible delay, has a number of causes.

### *a. Nonstructural Inefficiency*

Delays attributable to a judge's own inefficiency may fairly be characterized as indefensible. While abject incompetence is rare, less than efficient case management is not. Indeed, the stated catalyst for the Brookings Institution Task Force report prompting introduction and passage of the Civil Justice Reform Act was that "(i)ncreasingly, all who participate in the judicial system—litigants, judges, and attorneys—are voicing complaints about its fairness and efficiency. In many courts, litigants must wait for years to resolve their disputes."<sup>14</sup>

A 1989 Harris poll commissioned by the Foundation for Change, suggested a link between delay and inefficient case management by judges:

The prevalent view is that the judge most controls the pace of litigation. About 3 out of 4 corporate counsel, 7 out of 10 public interest litigators, the majority of plaintiff's litigators and a near majority of defense litigators feel that judges are not forceful enough in their case management.<sup>15</sup>

A chief circuit judge made a related point in a recent interview with Thomas Willging and Jeffrey Barr, noting that "delays in discovery will delay the whole case."<sup>16</sup> The primary effect of insufficiently organized and aggressive case

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<sup>14</sup>REPORT OF A TASK FORCE OF THE BROOKINGS INSTITUTION, AND JUSTICE FOR ALL 1 (1989)[hereinafter AND JUSTICE FOR ALL].

<sup>15</sup>*The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings Before the Comm. on the Judiciary*, 101st Cong., 2d Sess. 98 (March 6 and June 26, 1990) (Study of Louis Harris and Associates, conducted for the Foundation for Change).

<sup>16</sup>Barr, counsel to the National Commission on Judicial Discipline and Removal, and Willging, a researcher with the Federal Judicial Center, collaborated in conducting interviews of several present and former chief circuit judges in the fall of 1992. They were gracious enough to furnish me with a partial transcription of their interviews, which I quote at various points in this article. Because the transcription is unpaginated,



management, concluded the Brookings Report, was that lawyers were enabled to abuse the discovery process, and thereby protract litigation and increase the attendant expense of adjudicating disputes in the federal courts.<sup>17</sup>

*b. Belligerence*

Delay can be motivated by spite. The judge may be disenchanted with the litigants or their lawyers, or frustrated by a burdensome statutory directive or annoyed by an order from an appellate court. And so the judge does nothing. While there is little evidence to suggest that belligerent delay is commonplace, there is evidence that it occurs. In *Hall v. West*, for example, the Fifth Circuit lost patience with a district judge who had delayed issuing school desegregation orders, observing that the district court's failure to act showed:

startling, if not shocking, lack of appreciation of the clear pronouncements of the Supreme Court and this Court . . . . His failure to respect these admonishments makes it reasonably clear that an order from us directing merely that he enter a judgment in the cases would mean simply that the case would be back here again. . . .<sup>18</sup>

*c. Indecisiveness*

Delays related to indecisiveness are not uncommon. To some extent, such delays are defensible. After all, deliberation is to be encouraged, and a hasty decision by an uncertain judge, made in the name of clearing her dockets, is obviously undesirable. On the other hand, the attributes that make for an outstanding lawyer as advocate are not necessarily the same qualities that make for an outstanding lawyer as judge. Occasionally, a lawyer will ascend the bench who finds the transition from advocacy to adjudication especially difficult. The net effect may be a judge so worried about her legacy or making a mistake that she becomes all but paralyzed by indecision.

Several chief circuit judges spoke of indecision-related delays in their interviews with Barr and Willging: One interviewee described a judge "who was all backed up" with "stacks of cases."<sup>19</sup> The interviewer went on to explain that "the judge hesitated sending the opinions out, he was afraid he was wrong."<sup>20</sup> Said another chief judge: "This is a great problem in administering

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and preserves the anonymity of the judges interviewed, I am unable to identify the speaker or to report where in the transcript the statement was made when I quote a given judge. You will just have to trust me. Segments of Barr & Willging's interviews are reproduced in a report they submitted to the National Commission on Judicial Discipline and Removal. See, JEFFREY BARR & THOMAS WILLGING, ADMINISTRATION OF THE FEDERAL JUDICIAL CONDUCT AND DISABILITY ACT OF 1980 (1993).

<sup>17</sup>AND JUSTICE FOR ALL, *supra* note 14, at 67.

<sup>18</sup>335 F.2d 481, 484-85 (5th Cir. 1964).

<sup>19</sup>See BARR & WILLGING, *supra* note 16.

<sup>20</sup>*Id.*

the judiciary, delay. Not because those judges are lazy—often they work real hard—but because they have a perfectionist thing about letting go of cases."<sup>21</sup> A third chief circuit judge added that, "with delay, sometimes a judge just has trouble making up his mind."<sup>22</sup>

#### *d. Disability*

Delay is frequently a byproduct of infirmity. Judges who become sick or senile may have an understandably difficult time keeping abreast of their dockets.<sup>23</sup> Often times, decision-making delays constitute the first significant outward manifestation of disability. In describing a fairly typical episode, a chief circuit judge stated the following: "Once, a senior member of the bar, who I knew personally, complained informally about an elderly judge who had not acted on a matter two years under advisement. I took the judge to lunch several times and tried to get him to recognize these problems, but he wouldn't. Finally, I refused to certify him as a senior judge."<sup>24</sup>

#### *e. Sloth and Neglect*

The judiciary has always had to cope with what Professor Fish has referred to as "the perennial problems associated with lazy . . . judges."<sup>25</sup> Rarely can delays be attributed to unalloyed neglect or lethargy.<sup>26</sup> More often, this conclusion must be arrived at by a process of elimination: if the judge's cases are neither too numerous nor complex, and delays can not be ascribed to

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<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

<sup>23</sup>Professor Peter Fish reports on the efforts of one chief judge to coax the aged District Judge Mel Underwood, who "just was not doing much work," into retirement. PETER FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 412, 416 (1973). Similarly, one chief circuit judge, answering a questionnaire disseminated to past and present chief circuit judges by Professor Richard Marcus and me in our capacity as consultants to the National Commission on Judicial Discipline and Removal, reported two instances in which a judge's poor health resulted in delays. CHARLES GARDNER GEYH, *MEANS OF JUDICIAL DISCIPLINE OTHER THAN THOSE PRESCRIBED BY THE JUDICIAL DISCIPLINE STATUTE*, 28 U.S.C. § 372(c), at app. A, question 6 (1993)[hereinafter "GEYH REPORT"].

<sup>24</sup>See BARR & WILLGING, *supra* note 16.

<sup>25</sup>FISH, *supra* note 23, at 87.

<sup>26</sup>Professor Fish reported a 1936 episode, in which "all the judges of one district court in the Eighth Circuit threatened to leave for summer vacations simultaneously, thereby closing the court," a move prompting a rebuke from the Chief Justice and a consequent change in vacation plans on the part of the judges. *Id.* at 89-90. He also described Chief Justice Taft's reaction to a district judge, whose "failure to clear his docket or resign provoked the Chief Justice to threaten an ultimatum to him for 'his refusal to do any team work or to be interested in his work.'" *Id.* at 88.

structural or non-structural inefficiency, belligerence or disability, the inescapable conclusion may be that the judge is not working hard enough.<sup>27</sup>

### *B. Mechanisms for Addressing Indefensible Delays, and Their Effectiveness*

A variety of mechanisms are in place to alleviate indefensible decision-making delay, ranging from the very formal to the completely informal. It is interesting to note, that on average, the less formal mechanisms are by far the more effective.

#### 1. Formal Mechanisms

##### *a. The Judicial Conduct and Disability Act*

The Judicial Conduct and Disability Act provides an administrative mechanism within each of the circuits to process and act upon complaints of judicial misconduct and disability. The Act permits any person to file a written complaint, alleging that a district, bankruptcy or magistrate judge has "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts," or is "unable to discharge all the duties of office by reason of mental or physical disability."<sup>28</sup> Complaints so filed are reviewed by the chief circuit judge, who may dismiss those that are frivolous, merits-related or that otherwise allege conduct not prejudicial to judicial administration.<sup>29</sup> Proceedings not dismissible may nevertheless be "concluded," where appropriate remedial action has been taken.<sup>30</sup>

Matters neither dismissed nor concluded are referred to special investigative committees comprised of circuit and district judges, who in turn make recommendations to the circuit judicial council.<sup>31</sup> The council is authorized to take "such action as is appropriate," short of removing the judge from office.<sup>32</sup> Enumerated remedial options include reprimanding a judge privately or publicly, requesting that a judge voluntarily retire, certifying a judge as disabled, temporarily suspending a judge's caseload, or referring a matter to the Judicial Conference of the United States for further action.<sup>33</sup>

A straightforward reading of the Act would certainly seem to bring delay within its scope. Excessive, unjustified delay is, by definition, prejudicial to the "expeditious" administration of the courts' business. And it is hard to see how nonfrivolous complaints of delay could be dismissed as related to the merits

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<sup>27</sup> See, e.g., FISH, *supra* note 23, at 87.

<sup>28</sup> 28 U.S.C. § 372(c)(1)(1993).

<sup>29</sup> 28 U.S.C. § 372(c)(2)-(3)(1993).

<sup>30</sup> *Id.*

<sup>31</sup> 28 U.S.C. § 372(c)(4)(A)(1993).

<sup>32</sup> 28 U.S.C. § 372(c)(6)(1993).

<sup>33</sup> *Id.*

of the judge's decision, inasmuch as the conduct complained of is the complete absence of a decision, without regard to what the merits of such a decision may ultimately be.<sup>34</sup>

Moreover, complaints under the Act alleging unjustified decision-making delay are not uncommon. The Administrative Office of the United States Courts, for example, reports that in 1991, 359 complaints were filed, of which 54 alleged undue decisional delay or judicial neglect/incompetence.<sup>35</sup>

Despite the relative frequency of such complaints, and the apparent applicability of the Act, the Act has not proved to be an especially potent weapon in combatting delay. First, and perhaps foremost, conscientious lawyers who are in the best position to call legitimate problems of delay to the attention of the chief circuit judge are reluctant to do so. Asked if he would consider filing a complaint under the Act, in response to an episode of excessive delay, Alan Morrison, head of the Public Citizen Litigation Group, offered the following answer to the National Commission on Judicial Discipline and Removal:

No. I guess I never thought of actually using it at all . . . . [I]f I'm reluctant to file mandamus petitions . . . this would be even more of a problem for me because it suggests something ought to happen to the judge. And as a regular litigator in the federal courts, it's hard enough to file a mandamus petition. But this would be awfully difficult to do.<sup>36</sup>

The net effect is that many of the delay complaints that *are* filed are frivolous.

Even to the extent that competent, well-intentioned complaints are filed, they have received a chilly reception from chief circuit judges. The *Illustrative Rules Governing Complaints of Judicial Misconduct and Disability*, developed by a Special Committee of the Conference of Chief Judges, interpret the Act to exclude complaints of decisional delay in individual cases.<sup>37</sup> The questionnaire completed by present and former chief circuit judges reflects a similar sentiment. Of 25 judges expressing a view, only five stated that they do not ordinarily dismiss complaints of isolated decisional delay.<sup>38</sup> An additional four recognized complaints of habitual delay only, while the remaining 16 routinely dismissed complaints of delay for any of the following reasons: delay was not deemed prejudicial administration; it was related to the merits of a judicial ruling (insofar as complainants can file mandamus petitions challenging

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<sup>34</sup>Apparent illogic notwithstanding, delay complaints are frequently dismissed as merits-related. See *infra* notes 37-39 and accompanying text.

<sup>35</sup>THE ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 117 (1992).

<sup>36</sup>*Hearings of the National Commission on Judicial Discipline and Removal* 133 (1992) (Statement of Alan Morrison, Esq.)

<sup>37</sup>ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY, Rule l(e) (1986).

<sup>38</sup>GEYH REPORT, *supra* note 23, at app. A, question 12.

decisional delays in the appellate courts); or it is simply an ineffective means for remedying delay.<sup>39</sup> In short, the disciplinary process has proven to be a disappointing vehicle for addressing decision-making delay.

*b. Circuit Judicial Council Orders*

Each circuit has a judicial council, comprised of circuit and district judges, which serves as the administrative and disciplinary head of the circuit. The council is authorized, among other things, to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit."<sup>40</sup>

Prior to 1980, each council was permitted, under its general ordermaking authority, to issue all orders necessary "for the effective and expeditious administration of justice within its circuit"—language identical to the standard established for imposing discipline under the Judicial Conduct and Disability Act. It is at least paradoxical, if not hopelessly baffling, to find that when this language appears in the Judicial Conduct and Disability Act, it has been read to exclude decisional delay, while when it appears in the judicial council ordermaking statute, it has been read to reach it.<sup>41</sup> From the councils' inception, their general order-making authority has been used to address decisional delay by calling judges to task for delays, suspending their caseloads, or reshuffling their dockets.<sup>42</sup> In the 1970s, Flanders & McDermott reported "several instances in which a council took action when a judge's docket became backlogged."<sup>43</sup> And in the 1992 survey of chief circuit judges, several indicated that judicial council orders had been employed to alleviate decision-making delay.<sup>44</sup>

Notwithstanding that the judicial councils have occasionally used their order-making authority to attack delay, it is a power that has been exercised only infrequently. The councils have long been criticized as "rusty hinges" of judicial administration.<sup>45</sup>

Explanations for council inertia are many. For instance, council action may be perceived as a threat to judicial independence.<sup>46</sup> Furthermore, the enabling

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<sup>39</sup>*Id.*

<sup>40</sup>28 U.S.C. § 332(d)(1) (1993).

<sup>41</sup>28 U.S.C. § 3329d)(1) (1993).

<sup>42</sup>FISH, *supra* note 23 at 401.

<sup>43</sup>FLANDERS & McDERMOTT, *supra* note 13, at 32.

<sup>44</sup>GEYH REPORT, *supra* note 23, at app. A, question 6.

<sup>45</sup>Peter Fish, *The Judicial Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203 (1970).

<sup>46</sup>*In Re Imperial "400" National, Inc.*, 481 F.2d 41 (3rd Cir. 1973), *cert. denied sub nom. Union Bank of Los Angeles v. Nolan*, 414 U.S. 880 (1973).

statute may offer insufficient guidance as to the scope of council authority.<sup>47</sup> As one commentator explained, councils are reluctant to "crack the whip" over their colleagues<sup>48</sup> and prefer informal persuasion to formal orders.<sup>49</sup> Whatever the explanation, chief circuit judges, when asked to assess the effectiveness of six mechanisms for remedying judicial neglect and delay ranked judicial council orders last, with only five of 19 judges characterizing it as an effective means of remedying delay.<sup>50</sup>

### *c. Mandamus*

Mandamus is the most conventional mechanism available to remedy excessive, decision-making delay, and there are many published cases in which courts of appeals have granted or threatened to grant<sup>51</sup> mandamus relief to end excessive delays.<sup>52</sup> It nevertheless remains a problematic device for combatting delay. First, lawyers are reluctant to file mandamus petitions for the same reason that they are reluctant to file disciplinary complaints against individual judges: they fear alienating the judge. As Alan Morrison explained to the National Commission on Judicial Discipline and Removal:

The case is sitting there not for days or weeks but for months, and in some cases years. For the lawyer [there are] nothing but bad choices . . . [I]n the end, there's nothing you can do save file a petition for writ of mandamus. And then what does that do? It may get you a decision, but not the one that you and your client want.<sup>53</sup>

Second, mandamus standards are exacting and extremely difficult to satisfy. Courts have referred to mandamus as a "drastic remedy,"<sup>54</sup> "reserved for really

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<sup>47</sup>See *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 85 n.6 (1970) (standing for the proposition that 28 U.S.C. § 332 is "not a model of clarity in terms of the scope of the judicial council's powers.")

<sup>48</sup>FISH, *supra* note 23, at 406-07.

<sup>49</sup>*Id.* at 413.

<sup>50</sup>GEYH REPORT, *supra* note 23, at app. A, question 13.

<sup>51</sup>It is not uncommon for a court to decline to issue a mandamus order despite its conclusion that grounds for mandamus exist. The reasoning for this conclusion is that the district judge is likely to end the delay without the need for a formal order. In describing the process to Barr and Willging, one chief judge stated: "You issue the usual order, say mandamus is an extraordinary remedy, you are confident the judge will take care of the matter in the immediate future. Invariably, the judge will take care of that case." BARR & WILLGING, *supra* note 16.

<sup>52</sup>See, e.g., *In re Funkhouser*, 873 F.2d 1076 (8th Cir. 1989); *Jones v. Shell*, 572 F.2d 1278 (8th Cir. 1978); *McClellan V. Young*, 421 F.2d 690 (6th Cir. 1970); *Hall v. West*, 335 F.2d 481 (5th Cir. 1964).

<sup>53</sup>HEARINGS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 123 (1992). (statement of Alan Morrison, Esq.)

<sup>54</sup>*Kerr v. United States*, 426 U.S. 394, 402 (1976).

extraordinary cases,"<sup>55</sup> amounting to a judicial 'usurpation of power.'"<sup>56</sup> These characteristics convey the sense of the stringency of mandamus requirements. As a result of these stringent standards, legitimate complaints of delay pursued under the Judicial Conduct and Disability Act and in mandamus proceedings may be rejected in both. One chief judge described the process as follows:

[C]omplaints occasionally raised delay, which I found difficult. In an individual case, the rules are clear it's no go, you file mandamus, even though the number of mandamuses granted is so minuscule you're not sure how practical an alternative that is.<sup>57</sup>

## 2. Informal Mechanisms

### a. Peer Pressure

Judges are no less susceptible to the influence of their colleagues than anyone else. As Judge Irving Kaufman wrote, "[p]eer pressure is a potent tool. It should not be underestimated because it is neither exposed to public view nor enshrined in law."<sup>58</sup> As Kaufman explains, "[a] judge who falls significantly behind in his work is coaxed—and usually effectively—to keep up. If he is not incompetent but merely exhausted, not lazy but simply overworked, a brief respite can be arranged by his colleagues and may prove sufficient."<sup>59</sup> To the extent that delay is a manifestation of a more permanent problem, peer pressure is a useful means to encourage retirement. In Kaufman's words:

[o]n occasion, close colleagues of an afflicted judge suggest that he retire. If necessary, other judges, attorneys, and even family members may approach the ailing jurist. Almost invariably he will acquiesce. . . . Distasteful it is, but highly effective. Few judges would long withstand the importunings of their peers. Even if the judge is slow to accept the suggestion of his brethren, this method is sure to accomplish his ouster faster than a formal procedure.<sup>60</sup>

An obvious limitation on peer pressure as a remedy for indefensible delay is its dependence for success upon uncontrollable variables: the collegiality of the given court, the responsiveness of the target judges, and the public spiritedness of their colleagues.<sup>61</sup> Not surprisingly, then, while 15 of 24 chief

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<sup>55</sup>*Ex Parte Fahey*, 332 U.S. 258, 260 (1947).

<sup>56</sup>*Will v. United States*, 389 U.S. 90, 95 (1967).

<sup>57</sup>See BARR & WILLGING, *supra* note 16.

<sup>58</sup>Irving Kaufman, *Chilling Judicial Independence*, 88 YALE L. J. 681, 709 (1979).

<sup>59</sup>*Id.* at 708.

<sup>60</sup>*Id.* at 709.

<sup>61</sup>"The effectiveness of informal peer pressure in ridding the judiciary of disabled members is based substantially on the prevalence within the judiciary of an atmosphere of good faith and collegiality." *Id.* at 711. One chief circuit judge echoed these sentiments

judges responding to the questionnaire described peer pressure as a "somewhat effective" measure for remedying judicial neglect and delay, only 3 went so far as to describe it as "very effective," while one divided his answer between "somewhat and very effective," and the remaining 5 considered it "somewhat ineffective or ineffective."<sup>62</sup>

*b. Informal Chief Circuit Judge Communication*

Perhaps the single most frequently used means for coping with indefensible decision-making delay is communication from the chief circuit judge. As one chief circuit judge stated, "[i]nformal processes sometime[s] take a while, but work better. You could never get the judicial council to go in one direction to solve such a problem unless the Chief Judge had already done all he could informally."<sup>63</sup> In the words of another judge:

My primary attention was on delay in the decisional process . . . One judge had seven motions delayed over a year. I called him up. Delays in discovery will delay the whole case. So most of my action was informal talking to judges. It was very successful; the seven cases were disposed of in two weeks.<sup>64</sup>

A third judge expressed a similar view stating: "I would never identify a 372(c) complaint to handle delay. If a formal complaint is filed, then you have to handle it, but otherwise I'd keep delay informal."<sup>65</sup> "With delay," commented a fourth judge, "sometimes a judge just has trouble making up his mind. Often talking to the judge informally helps."

A related strategy is for the chief circuit judge to consult with the chief district judge, who can bring additional pressure to bear:

In one situation, a judge was not doing any work, was light years behind. My style was to call the Chief Judge of the district court and tell him this had been a building problem, it's time to act. The Chief Judge brought it up with the rest of the district court, which solved its own problem by reassigning the judge's cases. I never took it to the judicial council, that's self-defeating.<sup>66</sup>

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in an interview with Barr and Willging: "If it's a collegial court, you look for the most humane solution. If it's not a collegial court, I don't know what you do. If you have a court that's ideologically divided, then . . . the other judges in the elderly senior judge's voting bloc may want to prop him up on the bench." BARR & WILLGING, *supra* note 16.

<sup>62</sup>GEYH REPORT, *supra* note 23, at app. A, question 13.

<sup>63</sup>See BARR & WILLGING, *supra* note 16.

<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*



Chief circuit judges responding to the survey indicated a cumulative total of 85 to 92 disciplinary actions taken in response to evidence of misconduct or disability informally received between 1980 and 1992. In 77 to 80 of those instances, such actions included or were limited to informal communications from the chief circuit judge. The most frequently identified problem was decision-making delay.<sup>67</sup> Consistent with this finding is that 15 or 16 of 28 chief circuit judges considered informal actions by them or chief district judges to be very effective in remedying judicial neglect and delay, while an additional 10 or 11 characterized it as somewhat effective.<sup>68</sup>

The one significant problem with informal communications from the chief circuit judge is that target judges are free to ignore them—an infrequent, but recurrent phenomenon. Fish vividly describes an episode involving District Judge Mell Underwood:

He "just was not doing much work," and the chief . . . judge reported, "a number of mandamus cases were filed against him in our court." When presented with the unanimous council resolution urging him to retire from the bench, Underwood allegedly retorted that "they have no authority to remove me, and they've found that out. I told them to go to hell."<sup>69</sup>

While the Underwood affair occurred in the 1960s, the issue remains alive and well, as evidenced by the following remarks by a circuit judge to Barr and Willging: "You're dealing with judges who don't have to do anything except withstand impeachment. If you tell a judge to do something and the judge says go to hell, how do you enforce it?"<sup>70</sup> One chief circuit judge expressed a similar concern during his interview with Barr and Willging:

The biggest problem was on my own court. There was no difficulty in talking to district judges about a problem. But on the appeals court, one or two judges didn't get their work out. Every circuit has judges like that. If you mention it, your peers resent that, it's very sensitive, they're recalcitrant to do anything about it.<sup>71</sup>

Added another chief circuit judge, in a related vein:

This is a great problem in administering the judiciary, delay . . . You can talk to them until you're blue in the face, it doesn't help. Occasionally talking helps, but not for the really chronic ones. So, with

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<sup>67</sup>BARR & WILLGING, *supra* note 16, at app. A, question 6.

<sup>68</sup>*Id.* at app. C, question 13.

<sup>69</sup>FISH, *supra* note 23, at 412.

<sup>70</sup>See BARR & WILLGING, *supra* note 16.

<sup>71</sup>*Id.*

the consent of the court, you say take a year off and catch up. Some of these judges keep volunteering for things and nothing gets done.<sup>72</sup>

*c. Publicity and Public Accountability*

Chief circuit judges thwarted in their efforts to resolve disciplinary problems informally by target judges unwilling to take such informal overtures seriously have long recognized the value of publicity and going to the press. Fish, discussing the informal coercive mechanisms available to the judicial councils, as contemplated by the Framers of the Administrative Office Act of 1939, writes:

Publicity within the legal guild offered another acceptable technique. "Just turning the light of day on the judges probably in most instances would be all that is required." Peer group ostracism would do the rest. So thought Arthur Vanderbilt, who told the Senate Judiciary Committee that "no judge likes to have the fact that he is not abreast of his work held up to public notice."<sup>73</sup>

Judge Underwood, who at last report had responded to his Judicial Council's call for his retirement by suggesting that its members visit the underworld,<sup>74</sup> ultimately capitulated when the matter was publicized. As the chief circuit judge involved described the situation:

We kept after him, and the largest newspaper in Ohio with statewide circulation published some accounts concerning the way he was handling his work, and he finally called me up and said his name had been 'dragged down in the mud far enough,' and that he would retire, and he did retire.<sup>75</sup>

Judge Kaufman points out that rarely will a judge disregard the importunings of his colleagues as cavalierly as did Underwood, precisely because of the risk that the episode would be publicized. "[O]pen activism is rarely necessary," explains Kaufman. "Few judges are willing to risk public attention by persistently rejecting their colleagues' overtures."<sup>76</sup>

Chief circuit judges underscored the significance of adverse publicity in their interviews with Barr and Willging. As one judge stated, "the threat of newspaper coverage is a big deterrent. Every judge worries about something coming out in the newspaper." Another chief judge reported informally securing a miscreant judge's promise to reform in exchange for the chief judge's promise "not to publicize the matter." And in the questionnaire completed by

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<sup>72</sup>*Id.*

<sup>73</sup>*Id.* at 52.

<sup>74</sup>*Id.*

<sup>75</sup>FISH, *supra* note 23, at 416 (quoting Judge Paul Weick).

<sup>76</sup>Kaufman, *supra* note 58, at 709.

chief circuit judges, one specifically listed "newspaper articles" as a very significant deterrent to judicial misconduct.<sup>77</sup>

It is this concern over adverse publicity, that § 476 seeks to exploit by publishing data disclosing which judges are behind in their work, and to what extent. At this juncture, it may be useful to turn to a discussion of § 476, its development and implementation.

### III. DEVELOPMENT AND IMPLEMENTATION OF § 476

#### A. Development

The idea for § 476 originated in 1988 and 1989, with a task force on civil justice reform convened by the Brookings Institution, at the suggestion of Senator Joseph Biden, Jr., Chair of the Senate Committee on the Judiciary.<sup>78</sup> A task force cosponsor, the Foundation for Change, commissioned Lou Harris and Associates to poll judges, lawyers and litigants on matters related to the task force's work. Harris's findings included that:

A majority of all groups—including federal judges—favor increasing judicial accountability by requiring each court to make publicly available each year the average length of cases, weighted by type of case, under each federal judge. Further, a majority favor a requirement that judges make publicly available in the courthouse all civil cases which have been pending for a year or more . . . .<sup>79</sup>

The task force report, published in 1989, recommended first and foremost, that all federal district courts be directed by statute to develop and implement a "Civil Justice Reform Plan."<sup>80</sup> Included in such a plan, added the task force, should be a provision for "the regular publication of pending undecided motions and caseload progress."<sup>81</sup> Specifically, the task force recommended that the Administrative Office of the U.S. Courts be directed to publish quarterly reports listing the motions pending before each judge for over 30, 60, and 90 days, and all succeeding 30-day increments. It further recommended that the courts "report data for each judge indicating the aging of his or her

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<sup>77</sup>GEYH REPORT, *supra* note 23, at app. A, question 2.

<sup>78</sup>*Federal Courts Study Comm. Implementation Act, and Civil Justice Reform Act: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 293 (Sept. 6, 1990) [hereinafter *House Hearings*](House Judiciary Comm. Report on the Civil Justice Reform Act).

<sup>79</sup>*The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings Before the Comm. on the Judiciary of the United States Senate*, 101st Cong., 2d Sess. 91, 159 (March 6 and June 26, 1990) [hereinafter *Senate Hearings*] (*Procedural Reform and the Civil Justice System*, a Study Conducted for the Foundation for Change, Inc.).

<sup>80</sup>*Id.* at 438.

<sup>81</sup>*Id.* at 453.

caseload."<sup>82</sup> The task force concluded: "We believe that substantially expanding the availability of public information about caseloads by judge will encourage judges with significant backlogs in undecided motions and cases to resolve those matters and to move their cases along more quickly."<sup>83</sup>

In January, 1990, Senator Biden introduced S. 2027, implementing task force recommendations.<sup>84</sup> Included in the bill were new sections 471(b)(13) and 475(b)(1) to title 28, which implemented, essentially verbatim, those recommendations relating to publication of case and motion delays. Section 471(b)(13) provided for the development of Civil Justice Expense and Delay Reduction plans, which were to include, among other things, "[p]rocedures for the regular publication of pending undecided motions and caseload progress for each individual judge to enhance judicial accountability."<sup>85</sup> Section 475(b)(1), in turn, provided for improved automation, so as to:

make available to the public a quarterly report listing all pending submitted motions before each judge that are unresolved for more than 30, 60, and 90 days, and all succeeding 30-day increments. Such report shall include data for each judge of the district indicating the aging of his or her caseload in each of the tracking categories developed by the district under its civil justice expense and delay reduction plan . . . .<sup>86</sup>

Reaction to the "Biden bill" from the federal bench was swift and negative. Central to the judiciary's objections was the perception that the expense and delay reduction plans called for in the legislation interfered unjustifiably with district judges' case management prerogatives.<sup>87</sup> In response, Senate staff met with a special task force of the Judicial Conference over the course of the succeeding five months in an effort to resolve their differences.<sup>88</sup>

The result was S. 2648, introduced in May, 1990. It reflected a number of significant changes from S. 2027, including more relaxed provisions relating to publication of case delay information. What was now § 473(a)(7) provided for "enhancement of the accountability of each judicial officer" through the publication of semiannual, rather than quarterly reports, disclosing the number of motions pending over six months, rather than 30 days, together with the

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<sup>82</sup>*Id.*

<sup>83</sup>*Id.*

<sup>84</sup>S. 2027, 101st Cong., 2d Sess. (1990).

<sup>85</sup>136 CONG. REC. S414 (daily ed. January 25, 1990).

<sup>86</sup>S. 2027, 101st Cong., 2d Sess. § 3 (1990).

<sup>87</sup>*See, Senate Hearings, supra* note 79. "[T]here has been a strong reaction that the bill is extraordinarily intrusive into the internal workings of the Judicial Branch. . . . Many thoughtful federal judges are very, very uneasy about the signals this bill sends of legislative incursion—albeit well-meaning—in the judicial arena and what it portends for the future." *Id.* at 221 (statement of Judge Aubrey Robinson).

<sup>88</sup>*Id.* at 309-10.

number of bench trials submitted more than six months "and the number of cases that have not been terminated within three years of filing."<sup>89</sup>

Notwithstanding the changes reflected in S. 2648, the bill continued to require each district court to develop expense and delay reduction plans including certain mandatory components, and the Judicial Conference continued to oppose the bill on essentially the same grounds as it opposed S. 2027.<sup>90</sup> With respect to § 473(a)(7), its concern was twofold: 1) that the "artificial deadlines" created by the reporting system can have "untoward effects" on "the quality of judicial work and on the morale of the conscientious;"<sup>91</sup> and 2) that motions, bench trials and cases may be delayed for good reasons, or reasons beyond the judge's control, and that simply reporting the raw number of motions, trials and cases delayed could thus be misleading.<sup>92</sup>

It was now the House of Representatives' turn. At Senator Biden's request, House Judiciary Committee Chairman Jack Brooks introduced a companion bill identical to S. 2027 in January, 1990 (H.R. 3898). Hearings on the bill were held in September, 1990.<sup>93</sup> The resulting version of H.R. 3898, approved by the House Judiciary Committee, included one change of overriding significance: the contents of the expense and delay reduction plans were made wholly discretionary with the district courts, thereby overcoming the Judicial Conference's primary objection to the Biden bill.<sup>94</sup>

Other changes were made as well, including the addition of a new section 476—the case and motion delay publication provision ultimately enacted into law. Section 476 included three changes from S. 2648's § 473(a)(7): 1) to

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<sup>89</sup>S. 2648, 101st Cong. 2d Sess. § 473(a)(7) (1990).

<sup>90</sup>*Senate Hearings, supra* note 79, at 348 (testimony of Judge Robert Peckham) ("The legislation would represent unwise legislative intrusion into procedural matters that are properly the province of the judiciary," and "[t]he mandatory nature and the rigidity of some of the provisions of the bill would impair judges' ability to manage the dockets most effectively . . .").

<sup>91</sup>*Id.* at 340 (testimony of the Honorable Robert Peckham).

<sup>92</sup>*House Hearings, supra* note 78.

<sup>93</sup>*Id.*

<sup>94</sup>*Id.* at 287. Unlike S. 2648, which had provided that "[a] civil justice expense and delay reduction plan developed and implemented under this chapter shall include provisions applying the following principles and guidelines . . ." (*Senate Hearings, supra* note 79, at 554), H.R. 3898, as marked up by the House Judiciary Committee, provided that "[a] civil justice expense and delay reduction plan developed and implemented under this chapter may include provisions applying the following principles and guidelines . . ." H.R. 3898, 101st Cong., 2d Sess. § 473 (1990). As the House Committee explained: "The Committee has considered and rejected making inclusion of these criteria mandatory. Such an approach is objectionable to the judicial branch, and the Committee is unwilling to impose the Congress' view of proper case management upon an unwilling judiciary." *House Hearings, supra* note 78, at 297-98 (Judiciary Committee Report).

preserve the mandatory character of the provision, it was made a freestanding requirement, independent of the expense and delay reduction plan (the contents of which were now completely discretionary with the district courts);<sup>95</sup> 2) at the suggestion of Alan Morrison, Director of the Public Citizen Litigation Group, the provision was revised to require the names of the cases, bench trials and motions delayed—not just their total number;<sup>96</sup> and 3) characterization of the provision as designed to enhance judicial "accountability" was deleted at the urging of the Judicial Conference, which found the reference insulting.<sup>97</sup>

The Judicial Conference initially raised the same objections to H.R. 3898 § 476 that it had raised to S. 2648 § 473(a)(7), and emphasized that lists of pending motions, trials and cases, unaccompanied by further explanation, "would be quite unfair and misleading," given that there could be any number of legitimate reasons for the delays.<sup>98</sup> The House Committee Report responded to those objections by noting that "nothing in this section should prohibit or discourage the inclusion of an explanation for why a particular matter has properly remained on the docket for a longer than usual period of time."<sup>99</sup> Ultimately, the Judicial Conference withdrew its objections after the legislation, as passed by the House, revised by the Senate, and reapproved by the House

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<sup>95</sup>*House Hearings, supra* note 78, at 288.

<sup>96</sup>*Senate Hearings, supra* note 79, at 474, 475-76 (letter from Alan Morrison to Jeffrey Peck, June 13, 1990):

[w]e believe that the requirement should be expanded to include a listing of each case falling within each category . . . There are two principle reasons why it is important that more than numbers be submitted. First, there is no way for outsiders to determine whether the numbers are accurate unless the cases are listed. . . . Second, some cases may be extraordinarily complicated and others may be simple, yet the delays may be the same . . . [I]n order to make some possible assessment of the justification, or lack thereof, for particular delays, the names of the cases must be made available.

*Id.*

The House Committee report adopted Morrison's explanation in making the change: "By identifying the names of the cases, the public can better assess whether the time frame associated with deciding the motion, adjudicating the trial or disposing of the cases was reasonable. *House Hearings, supra* note 78, at 302.

<sup>97</sup>*House Hearings, supra* note 78, at 133 (testimony of the Honorable Robert Peckham):

By entitling this section '[e]nhancement of judicial accountability through information dissemination' the drafters of this legislation imply that there is a shortfall in judicial accountability and that it is sufficiently significant to warrant being highlighted and addressed in a federal statute. We would badly disserve the hundreds of federal judicial officers who work extraordinarily long hours in order to provide the highest quality judicial services if we failed to record how hurtful these implications have been.

*Id.*

<sup>98</sup>*House Hearings, supra* note 78, at 134-35 (testimony of Robert Peckham).

<sup>99</sup>*Id.* at 302.

retained the non-binding character of the expense and delay reduction plan contents.<sup>100</sup>

## B. Implementation

### 1. Preliminary Results

There is evidence to indicate that § 476 is having the desired effect. Numerous reports were published by the legal press in the wake of the first semiannual report, issued for the period ending September 30, 1991. Such reports frequently listed judges and the number of delayed motions, trials and cases corresponding to each, and identified the judges with the most serious delays in the district.<sup>101</sup> Several newspapers published followup articles reporting the results of the second semiannual report, issued for the period ending March 31, 1992, and comparing the delays listed in the first reports to those in the second, in an effort to track the progress of judges within the papers' districts.<sup>102</sup> A number of those articles attributed particular delays to

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<sup>100</sup>136 CONG. REC. H8263 (daily ed. September 27, 1990) (statement of Rep. Kastenmeier) In its final form, the legislation called for all judicial districts to develop expense and delay reduction plans, with no specific requirements as to content. In addition, however, the Act called for a pilot program, in which ten participating districts would develop plans in conformity with specified principles and guidelines that were merely suggested for other districts. Judicial Improvements Act of 1990, Pub. L. 101-650, § 105; 28 U.S.C. § 473 (Supp. 1993).

<sup>101</sup>Robert Elder, Jr., *Congress Catches Heat For Federal Court Woes; Texas Districts Want More Money, Less Meddling*, TEX. LAW., Jan. 27, 1992, at 4; Andrew Holding, *Burns Leads State's Federal Bench in Overdue Motions; Rulings Awaited in 44 Cases For More Than Six Months*, THE CONN. L. TRIB., Dec. 23, 1991/Dec. 30, 1991, at 2; Gordon Hunter, *Judges Clog Federal Docket; Bench Trial Rulings, Pending Motions Pile Up In Texas Courts*, TEX. LAW., Nov. 18, 1991, at 1; *Judge Penn's Backlog*, THE WASH. POST, Jan. 15, 1992, at A22; Howard Mintz, *Federal Judges Report Few Calendar Delays; Only 4 of 19 Report Matters Pending Past 6 Months*, THE RECORDER, Nov. 15, 1991, at 1; Howard Mintz, *Few Tardy Motions, District Judges Report*, THE RECORDER, June 30, 1992, at 2; Howard Mintz, *Jensen and Patel Have Largest Civil Backlogs; Report Lists Federal Cases Pending More Than 3 Years*, THE RECORDER, Dec. 20, 1991, at 1; Howard Mintz, *Northern District Judges Trim Backlog of Old Cases*, THE RECORDER, July 28, 1992; Allyson L. Moore, *U.S. Court Still Crowded After All These Years*, N.J.L.J., Apr. 25, 1991, at 1; Allyson L. Moore, *U.S. Judges in N.J. Moving Cases on Time*, N.J.L.J., Dec. 5, 1991, at 1; Gary Sturgess, *Two Tardy Judges Are Late Yet Again*, LEGAL TIMES, Dec. 2, 1991, at 7; Saundra Torry, *Judge Designated D.C. Federal Courts Chief Has Backlog of 70 Cases*, THE WASH. POST, Jan. 11, 1992, at B1.

<sup>102</sup>Gordon Hunter, *The Slowpoke Report: Part II; As of September 30, 1991*, TEX. LAW., January 27, 1992 (following up on *Texas Judges Clog Federal Docket*, November 18, 1991, at 1, listing the number of motions and bench trial rulings pending in each Texas judge's court longer than six months; also lists the number of civil cases pending longer than three years); Howard Mintz, *Few Tardy Motions, District Judges Report*, THE RECORDER, June 30, 1992 (concluding that the act is having some effect, based on a comparison of the first and second reports); Howard Mintz, *Northern District Judges Trim Backlog of Old Cases*, THE RECORDER, July 28, 1992 (examining the backlogs of the 19 active and senior judges in the Northern District of California, who reported 350 cases pending for more than 3 years as of March 31, compared with 398 cases in September 1991; discussing results of particular judges); John Flynn Rooney, *Two Top Court's Motions Pending Report*,

causes outside the judge's control, suggesting a certain level of sensitivity for the Judicial Conference's concern that the numbers themselves tell only part of the story.<sup>103</sup>

The Administrative Office of the United States Courts reported that between the first and second semiannual reports, the number of motions pending over six months declined by 7%;<sup>104</sup> the number of bench trials submitted for more than six months declined by 3%;<sup>105</sup> and the number of cases over three years old declined by 5%.<sup>106</sup> Between the second and third semiannual reports, motions pending more than six months increased by 7%,<sup>107</sup> while bench trials submitted over six months declined by an additional 22% and cases over three years dropped by another 7%.<sup>108</sup>

Chief circuit judges appear to be genuinely enthusiastic about the potential for § 476 to reduce unjustified delay. Nineteen of twenty chief judges expressing an opinion characterized § 476 as a "very effective" or "somewhat effective" measure for remedying judicial neglect and unjustified delays.<sup>109</sup> As compared to five other mechanisms for alleviating unjustified delay, including discipline under the Judicial Conduct and Disability Act, orders of the circuit judicial councils, informal chief circuit judge action, mandamus, and peer pressure, § 476 was regarded as the most effective, on average.<sup>110</sup>

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CHICAGO DAILY LAW BULLETIN, March 1, 1993, at 1 (comparing the results of local Chicago area judges. Although there is some indication that the backlog became worse, this is attributed to outside factors); Bruce Vielmetti, *U.S. Courts Slow But Needn't Be, Report Suggests*, ST. PETERSBURG TIMES, February 15, 1993, at 8 (comparing reports in Tampa Bay area, and concluding that while judges carry a caseload greater than average, the reports are encouraging).

<sup>103</sup>Howard Mintz, *Northern District Judges Trim Backlog of Old Cases*, THE RECORDER, July 28, 1992 (identifying complex litigation and public interest law suits as two factors contributing to delays since the late 1970s, early 1980s, and discussing the particular suits contributing to the docket problems of judges Orrich and Jensen); John Flynn Rooney, *Two Top Court's Motions Pending Report*, CHI. DAILY L. BULL., March 1, 1993, at 1 (attributing delays to judges constantly being in trial, to motions being transferred to other judges, and to cases being referred to magistrate judges for reports).

<sup>104</sup>ADMINISTRATIVE OFFICE OF THE U.S. COURTS, CIVIL JUSTICE REFORM ACT REPORT OF MOTIONS PENDING OVER SIX MONTHS, *Bench Trials Submitted Over Six Months Civil Cases Pending Over Three Years* 5 (March 31, 1992).

<sup>105</sup>*Id.*

<sup>106</sup>*Id.* at 6.

<sup>107</sup>It is interesting to note that the so-called "pilot" districts, which adopted expense and delay reduction plans conforming with the principles and guidelines specified in the Civil Justice Reform Act, experienced a 10% decrease in the number of motions pending during the same period. *Civil Justice Reform Act Reports Show Drop in Backlog*, THE THIRD BRANCH, March 1993, at 6.

<sup>108</sup>*Id.*

<sup>109</sup>GEYH REPORT, *supra* note 23, at app. A, question 13.

<sup>110</sup>*Id.*



It is, of course, possible to argue that a judge embarrassed into action by case lists published pursuant to § 476 may reduce her backlog at the expense of reasoned and reflective decision-making. One might fairly assume that such a problem would be of special concern to the judges themselves. Indeed, the "untoward effects" that § 476 might have on "the quality of judicial work" was one of the Judicial Conference's primary objections to the provision at the time it was being considered by Congress.<sup>111</sup> Such a concern is, however, to a considerable extent dispelled by the results of the questionnaire, which reflect a high degree of satisfaction with § 476 by chief circuit judges—all of whom are members of the Judicial Conference, who together constitute half of the Conference's membership,<sup>112</sup> and who, as Conference members, had objected to the provision two years previously.

## 2. Complicating Factors

Assessing the impact of § 476 on delay is complicated by a variety of factors, some suggesting that the impact of § 476 may be even greater than reported, others suggesting that the impact may be less than reported, and still others suggesting that its impact is unclear.

### *a. Section 476's impact may be understated because the data do not reflect delays eradicated before the first report was filed*

The possibility that much of the indefensible delay that the section sought to eradicate was eradicated between the time that the law was passed and the first semiannual report was published suggests that the impact of § 476 was even greater than reported. Alan Morrison offered anecdotal support for this possibility in his testimony before the National Commission on Judicial Discipline and Removal:

(P)ublic disclosure. . . appears to be having an effect. And I say appears to, because there is a coincidental event related to me by a colleague who said that shortly before the 30th of September last year he received opinions in three cases from three different judges, all of which had been awaiting decision for—I don't remember the period, but something between a year and a half and two years. And when I pointed out to him that the 30th of September was the bewitching hour after which the cases would have to go on the tardy sheet, he suddenly realized how this great coincidence had happened at once.<sup>113</sup>

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<sup>111</sup>See *supra* note 91 and accompanying text.

<sup>112</sup>28 U.S.C. § 331 (1988).

<sup>113</sup>HEARINGS BEFORE THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 223 (1992) (Testimony of Alan Morrison, Esq.).

*b. Section 476's impact may be understated because the reports do not supply all information required by the statute*

Most readily available copies of the semiannual reports prepared by the Administrative Office of the United States Courts do not list case names, as required by the Act.<sup>114</sup> Thus, if two successive, semiannual reports list a particular judge as having 25 motions pending more than six months, it is impossible to tell whether the 25 motions listed in the second report are the same as those listed in the first, or are 25 new motions. The net effect of failing to identify cases by name, then, is that one cannot distinguish between the judge with 25 motions all languishing over a year, and the judge with 50 motions all decided within a year. That, in turn, leaves the press and public ill-equipped to assess whether the judge in question should be criticized for failing to decide motions more expeditiously, or applauded for coping as best she can with a burdensome docket.

*c. Section 476's impact may be overstated to the extent that the deterrent effect of adverse publicity diminishes over time*

The foregoing concern implies that the impact of § 476 in reducing delay might be even greater if it were implemented with stricter adherence to statutory requirements. On the other hand, one could argue that the utility of the statute will diminish over time, as semiannual reports become more routine and less newsworthy, and the judge's initial embarrassment at having her backlogs published tapers off. Nevertheless, one may fairly assume that in extreme cases, at least, delays will continue to attract the attention of the legal press, which will, in turn continue to cause the desired chagrin among the judges in question.

*d. Section 476's impact may be obscured by a host of independent variables affecting case flow*

It bears reemphasis that the bulk of variables contributing to decisional delay are outside the judges' control.<sup>115</sup> Semiannual increases or declines in the backlog of any given judge will obviously be affected by such factors as the number, nature, and timing of cases and motions filed, whether there are unfilled judicial vacancies in the district, and whether cases have been transferred to the district by the multidistrict litigation panel.<sup>116</sup>

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<sup>114</sup>GEYH REPORT, *supra* note 23, at app. C.

<sup>115</sup>See *supra* Section II. A.

<sup>116</sup>*Civil Justice Reform Act Reports Show Drop in Backlog*, THE THIRD BRANCH, March 1993, at 6.

*e. Section 476's impact may be obscured by litigants "forum shopping" for venues with less congested dockets*

While the immediate effect of publishing a judge's pending motions, bench trials and cases may be to embarrass her into keeping abreast of her docket, it also furnishes litigants and their lawyers with information that may assist them in choosing among available venues for filing suit. Thus, lawyers interested in obtaining early trials for their clients have examined § 476 case lists, and selected venues with fewer reported delays.<sup>117</sup> If such a practice becomes widespread, one effect could be to increase systemic efficiency by allocating work more evenly among judicial districts. A second, more troubling effect could be to reward inefficient districts by allocating a disproportionately greater volume of work to their more efficient counterparts. At least to the extent that inequitable caseload shifts occur between districts within a the same circuit,<sup>118</sup> however, circuit judicial councils and chief judges are in a position to monitor the problem and respond, by pressuring less productive districts and relieving overworked ones.<sup>119</sup> Even so, such forum shopping would obscure the ultimate impact of § 476 in any given district.

#### IV. CONCLUSION

Section 476 of the Civil Justice Reform Act, which requires semiannual publication of motions, bench trials and cases pending longer than a specified time, should be greeted with guarded optimism. The threat of adverse publicity has been a time honored means for chief circuit judges to reduce indefensible decision-making delays among judges within the circuit. In enacting the Civil Justice Reform Act, Congress recognized what chief circuit judges have long appreciated: that men and women capable and honorable (and political) enough to be appointed to the federal bench will wish to avoid the embarrassment that would accompany publicized reports implicitly criticizing their productivity. Notwithstanding a variety of factors complicating the assessment of whether § 476 is having the desired effect in practice, there is reason to believe that it is: delays have declined over the course of three reporting periods, and the judges who administer the federal courts are satisfied with its operation.

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<sup>117</sup>Andrew Houlding, *Burns Leads State's Federal Bench in Overdue Motions; Rulings Awaited in 44 Cases for More Than Six Months*, CONN. L. TRIB., December 23-30, 1991, at 2 (indicating that the practical effect of § 476 will be felt more in states with multiple districts, where multiple venue choices are possible). Brenda Sapino, *Airline Case an All-Star Showdown; Plaintiffs Raced to Keep Anti-Trust Case Close to Home*, TEX. LAW., July 6, 1992, at 1 (explaining that a lawyer's decision to file suit in Galveston, rather than Houston, was based on data disseminated pursuant to § 476, which suggested that the case would be adjudicated more promptly in Galveston).

<sup>118</sup>As reflected in the articles cited in the preceding footnote, the venue choices confronting a litigant will routinely be between districts within the same state. Houlding, *supra* note 117, at 2; Sapino, *supra* note 117, at 1.

<sup>119</sup>See *supra* Sections II.B.1.b. and II.B.2.b.