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JUDICIAL VACANCIES AND DELAY IN THE FEDERAL COURTS: AN EMPIRICAL EVALUATION

KIM DAYTON*

Federal judges are working longer hours and more days than ever before but, like Alice in Wonderland, they cannot run fast enough even to stay in the same place. . . . I have urged the President and the Senate to speed up the process [of filling judicial vacancies] and have urged sitting judges to give ample notice of their intention to resign or to take up senior status.

—The Honorable Warren E. Burger,
former Chief Justice, U.S. Supreme Court¹

INTRODUCTION: DEFINING THE PROBLEM

In his controversial speech before the American Bar Association in August 1991, former Vice President Dan Quayle argued that ours is a nation of too many lawyers and too much litigation.² One consequence of this so-called "litigation explosion," he claimed, was that "[o]nce in court, many litigants face excessive delays, some caused by overloaded court dockets, others by adversaries seeking tactical advantage."³ The Vice President's focus on

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¹ *Burger Says Vacancies Add to "Judicial Deficit,"* N.Y. TIMES, Dec. 30, 1985, at A14.

² For the full text of Vice President Quayle's speech, see *Text of Address by Vice President Dan Quayle at the Annual Meeting of the American Bar Association, Atlanta, Georgia*, Federal News Service, Aug. 13, 1991, available in LEXIS, News Library, ACRNWS File.

³ *Id.* The former Vice President's condemnation of our "litigious" society and of lawyers was hardly new. In 1913, one commentator lamented:

The lack of respect for the courts and for legal procedure induces the bringing of many frivolous questions into court and taking liberties with its processes which are encouraged by the indulgence of the courts. Though the responsibility is hard to locate in any one place, it is small wonder that the victim of the law's delays is losing respect for those who administer the law. He charges that our lawyers instead of advancing the usefulness of their profession are engaged in exploiting the infirmities of the law and of our legal procedure for their personal gain.

Grant Foreman, *The Law's Delays*, 13 MICH. L. REV. 100, 101 (1913).

lawyers as a principal source of the litigation crisis that purportedly grips the nation, predictably, was not well-received by the organized bar.⁴ In many respects, however, his speech reflected the conventional wisdom that there is an abundance of lawsuits and that courts take too long to dispose of the cases which are pending before them.⁵

In 1990, Congress enacted the Civil Justice Reform Act ("CJRA")⁶ as part of a broader package of judicial reform legislation addressing a wide range of perceived problems confronting the federal courts.⁷ The CJRA is premised on the notion that the delay and expense associated with federal civil litigation are unacceptable.⁸ It requires each federal district court to assemble an advisory group comprising representatives from the court's litiga-

⁴ See, e.g., Linda S. Mullinex, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 387 n.33 (1992) (collecting articles sampling bar's reaction to Quayle's criticism of legal profession); William Rakes, *Epilogue to Lawyer Bashing*, VA. L., Nov. 1992, at 10.

⁵ Among academics and other observers, debate continues as to whether a litigation "crisis" in fact exists. See generally WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991); Kim Dayton, *Case Management in the Eastern District of Virginia*, 26 U.S.F. L. REV. 445, 445-46 nn.1-2 (1992) [hereinafter Dayton, *Case Management*] (collecting authorities); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 890 n.4 (1991) [hereinafter Dayton, *Myth of ADR*] (same); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (attempting to dispel "discourse that depicts us in a lawsuit crisis").

⁶ 28 U.S.C. §§ 471-482 (Supp. 1992). For general discussions and criticisms of the CJRA, see, e.g., Dayton, *Myth of ADR*, *supra* note 5, at 947-52; Mullinex, *supra* note 4; Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115 (1991); Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507 (1992); Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49 (1992).

⁷ Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

⁸ The preamble to the CJRA assumes that a "problem" of cost and delay exists in the federal courts. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 102, 104 Stat. 5089, 5089 (congressional findings). Interestingly, nowhere in the CJRA did Congress expressly indicate how long was too long for the "average" case to pend, or what should be a court's median disposition rate for its civil caseload. In other words, according to Congress, what constitutes unacceptable "delay" as distinguished from what is inevitable given the nature of litigation? Is it safe to assume that Congress has decided that the current median filing-to-disposition time for civil cases of nine months is too long, or only that there are too many cases pending in the federal courts which are more than three years old? The legislative history of the CJRA does not mention that many federal courts have median disposition rates that fall substantially below the national average; nor does it suggest that these courts might be regarded as models for others gripped in the clutches of unacceptable, as opposed to unavoidable, delay. The so-called "Biden Report," which provided the impetus for enactment of the CJRA, see Mullinex, *supra* note 4, at 389 (discussing JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION (Brookings Institution 1989)), did not itself articulate clear standards for measuring delay. This omission can be only

tion constituencies,⁹ and through that group to undertake a rigorous self-examination of its docket and case management procedures. Each court must determine, among other things, whether unnecessary delay exists in the processing of its civil cases, and if so, what are the causes of, and solutions to, that delay.¹⁰ Based on this study and the recommendations of its advisory group, each federal district court was required to adopt, by no later than December 1, 1993, an "Expense and Delay Reduction Plan" designed to address, and ultimately resolve, the problem of unacceptable delay and expense.¹¹

How the federal courts solve the problem of delay depends in part on how we define the concept.¹² It is not enough to express vague dissatisfaction about the "pace" of civil litigation.¹³ One could, for example, measure delay in terms of how long a particular case, or the typical case, takes to wend its way through the system. One could say that delay occurs if a lawsuit needs attention from a judge—perhaps it is ready to be tried—and none is available to provide it. Alternatively, one could argue that delay exists if judicial resources are available, but the litigants are not yet willing or able to take advantage of them.

Solving the problem of delay, once defined, also depends on the causes of that problem. Commentators who write about the alleged litigation explosion and its institutional effects sometimes appear to attribute increasing delays primarily to increasing caseloads.¹⁴ As a matter of logic, it makes sense to assume that if

partly explained by the obvious fact that not all cases or caseloads are alike or can be expected to be processed in the same time or manner.

For an excellent critique of the politics underlying passage of the CJRA, see *id.* at 438 (suggesting that Congress, in enacting CJRA, was "preoccup[ie]d with protecting the special interests of business and insurance concerns," rather than with improving quality of justice in federal courts).

⁹ 28 U.S.C. § 478 (Supp. 1992).

¹⁰ *Id.* § 473.

¹¹ Judicial Improvements Act, Pub. L. No. 101-650, § 103(b)(1), 104 Stat. 5089, 5096 (requiring district courts to formulate civil justice expense and revision plan).

¹² *Cf.* REPORT OF THE ADVISORY GROUP UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE E. DIST. OF PA. 40 (1991) [hereinafter CJRA REPORT, E. DIST. OF PA.].

¹³ *But see* J. ADLER ET AL., THE PACE OF LITIGATION: CONFERENCE PROCEEDINGS (Rand Inst. for Civil Justice 1982) (expressing vague dissatisfaction with pace of civil litigation).

¹⁴ *See, e.g.*, Hon. Shirley M. Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971); Maurice Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349 (1972); *The Chilling Impact of Litigation*, BUS. WK., June 6, 1977, at 58.

a court has twice as many cases to dispose of in 1993 as it did in 1973, it will take longer in 1993 to dispose of each case, simply because the queue is now longer. The litigation "explosion," however, has been accompanied by increasing judicial "capacity" at both the state and federal levels. In the federal courts, for example, Congress has routinely created new judgeships, both district and appellate, as the number of cases and appeals filed in the federal courts has increased.¹⁵ The number of federal district judgeships now stands at 649,¹⁶ compared to the 400 which existed twenty years ago.¹⁷ As a result both of declining absolute filings in recent years and of recent increases in federal judicial capacity, the raw filings per judgeship in the federal district courts has, in general, decreased steadily since 1986.¹⁸ The per judgeship weighted caseload¹⁹ is down as well since that year.²⁰ Because of

¹⁵ See, e.g., Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 201-203, 104 Stat. 5089, 5098-5103 (adding 61 permanent and 13 temporary district judgeships); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 202, 98 Stat. 333, 347-48 (adding 58 district judgeships); Act of Oct. 20, 1978, Pub. L. No. 95-486, § 1(a), 92 Stat. 1629, 1630 (adding 118 district judgeships). For an explanation of the 1990 Act's creation of temporary judgeships, see Dayton, *Case Management*, *supra* note 5, at 451 n.22.

The Judicial Conference makes recommendations to Congress concerning the creation of new judgeships based on its calculations of judicial need within each district court. See generally GENERAL ACCOUNTING OFFICE, HOW THE JUDICIAL CONFERENCE ASSESSES NEED FOR MORE JUDGES (1993). The GAO uses filings per judgeship in excess of 400 cases as a threshold indicator of need. See S. REP. NO. 117, 95th Cong., 1st Sess. 10 (1977).

¹⁶ ADMIN. OFFICE OF THE U.S. COURTS, 1991 FEDERAL COURT MANAGEMENT STATISTICS 167 (1992) [hereinafter 1991 STATISTICS]. In this article, references to federal case management statistics for a particular year are to either the federal "statistical year" ("SY" (if 1991 or before) or the federal fiscal year (1992). Prior to October 1, 1992, the federal courts management statistics were compiled and reported annually for the statistical year beginning July 1 and ending the following June 30. For 1992, however, the reporting period was changed to coincide with the federal government's fiscal year, which runs from October 1 to September 30.

¹⁷ ADMIN. OFFICE OF THE U.S. COURTS, 1977 FEDERAL COURT MANAGEMENT STATISTICS 127 (1978) [hereinafter 1977 STATISTICS].

¹⁸ 1991 STATISTICS, *supra* note 16, at 167. For the period 1986-1991, raw filings per judgeship declined as follows: 1986, 491 filings/judgeship; 1987, 466 filings/judgeship; 1988, 467 filings/judgeship; 1989, 459 filings/judgeship; 1990, 437 filings/judgeship; 1991, 372 filings/judgeship). *Id.* (figures include civil and criminal felony filings); see also figure 2 at app.

¹⁹ The Administrative Office of the United States ("AO") uses a weighting formula which allows comparison of the district courts' caseloads based on their relative complexity.

Recognizing that each case filed does not require equal judicial attention, the district courts have participated in studies that have led to the development of case weights. A typical case has a weight of 1.0; a more complex case

these increases in judicial capacity to counter increased filings, it may be difficult to argue that increasing delays in some federal courts over the last two decades can generally be attributed in significant degree simply to the number of increased civil and criminal filings in the federal courts.²¹

receives a higher weight (e.g. asbestos personal injury with a weight of 1.5) and a case that demands little work by a judge, like student loan cases [sic] will have a lower than average weight (student loans, for example, have a weight of .03).

ADMIN. OFFICE OF THE U.S. COURTS, 1991 ANNUAL REPORT 97 (1992) [hereinafter 1991 AO ANN. REP.]; see William E. Foley, *An Analysis of the Workload of the Federal Courts*, in ADMIN. OFFICE OF THE U.S. COURTS, 1980 ANNUAL REPORT 290 (1981) (providing detailed discussion of weighted filings system); 1979 FEDERAL DISTRICT COURT TIME STUDY (Federal Judicial Center 1980) (same).

At least one CJRA advisory group, that of the District of Kansas, expressed doubts that the AO's current formula for weighting cases accurately reflects the amount of judicial resources required by different categories of cases. See REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE DIST. OF KAN. 5 n.3 (1991) [hereinafter CJRA REPORT, DIST. OF KAN.]. The AO has calculated a new weighted filings formula for use in FY 1993.

²⁰ The weighted caseload per judgeship is down since the mid-1980's, but significant disparities still exist in the weighted caseload of each district court. For example, in SY 1991, the mean weighted filings per judgeship was 386 cases. See 1991 STATISTICS, *supra* note 16, at 167. The Middle District of North Carolina had the lowest reported weighted filings figure that year, 218 cases per judgeship, and the Southern District of Georgia had the highest, at 686 per judgeship. See *id.* at 67, 165. The Southern District of Georgia's high weighted filings figure is attributable at least in part to the large number of "highly weighted" asbestos personal injury cases filed in the district. See 1991 AO ANN. REP., *supra* note 19 (reporting that 54% of S.D. Ga. civil caseload consists of asbestos personal injury cases).

It is worth noting that there has never been established any correlation between a district court's historical weighted filings and delay. The Southern District of Georgia, interestingly, with its traditionally heavy caseload, still has the lowest percentage of three-year old cases in the nation. See 1991 STATISTICS, *supra* note 16, at 165.

²¹ Federal judges and others have cautioned that the extent to which increasing caseloads in the federal courts can be addressed through creation of new judgeships is limited. The Federal Courts Study Committee, for example, has admonished that,

the federal courts cannot accommodate unlimited increases in the demand for their services in the way a business does. . . . The independence secured to federal judges by Article III is compatible with responsible and efficient performance of judicial duties only if federal judges are carefully selected from a pool of competent and eager applicants and only if they are sufficiently few in number to feel a personal stake in the consequences of their actions.

REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 6-7 (Apr. 2, 1990) [hereinafter FCSC REPORT]. *The Honorable Jon O. Newman of the United States Court of Appeals for the Second Circuit has argued that the size of the federal judiciary should not be permitted to grow beyond 1000 Article III judges. See Jon O. Newman, 1000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993); see also Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Ju-*

More recently, some observers have blamed delays on dramatically increasing criminal caseloads resulting from the so-called "war on drugs."²² There is no question that the war on drugs has had an impact on the federal courts: the number of criminal drug prosecutions (felony and misdemeanor) has more than tripled since 1981,²³ and the number of criminal defendants prosecuted per felony case has increased in recent years as well.²⁴ There were 8925 criminal trials (felony and misdemeanor) in the federal courts in 1991,²⁵ compared to 6542 in 1981,²⁶ and there has been a substantial increase in the number of lengthy criminal trials.²⁷ In addition, because of the demands of the Speedy Trial Act²⁸ and the Speedy Trial Clause of the Sixth Amendment,²⁹ which require that criminal cases be handled relatively expeditiously, these heavy criminal caseloads have consumed a substantial share of many courts' judicial resources.³⁰ Mandatory mini-

dicial System, 56 U. CHI. L. REV. 761, 763 (1989) (arguing, inter alia, that quality can be achieved by routinely replacing federal judges).

²² See generally Dayton, *Case Management*, *supra* note 5, at n.97 (collecting authorities); Hon. Diana E. Murphy, *The Concerns of Federal Judges*, 73 JUDICATURE 112 (1990) (discussing Judicial Improvements Act of 1990); *The Drugging of the Courts: How Sick is the Patient and What is the Treatment?*, 73 JUDICATURE 314 (1990) (transcript of panel discussion); GUIDANCE TO ADVISORY GROUPS APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 18 (Feb. 1991) (prepared for the Eastern District of Virginia) (unpublished) (on file with the author).

For discussions of the impact of drug prosecutions specifically on state courts, see, e.g., John A. Goerdts & John A. Martin, *The Impact of Drug Cases on Case Processing in Urban Trial Courts*, ST. CT. J., Fall 1990, at 4; John A. Martin, *Drugs, Crime, and Urban Trial Court Management: The Unintended Consequences of the War on Drugs*, 8 YALE L. & POL'Y REV. 117 (1990).

²³ 1991 AO ANN. REP., *supra* note 19, at 90, tbl. 8 (showing increase in number of drug-related criminal filings, excluding transfers, from 3732 cases in 1981 to 11,929 cases in 1991). Drug cases in 1991 represented about 25% of the criminal caseload, compared to about 12% in 1981. *Id.*

²⁴ The number of defendants prosecuted per felony case has increased between 1986 and 1991 from 1.4 to 1.6. 1991 STATISTICS, *supra* note 16, at 167.

²⁵ 1991 AO ANN. REP., *supra* note 19, at 95.

²⁶ ADMIN. OFFICE OF THE U.S. COURTS, 1981 ANNUAL REPORT 398 (1981) [hereinafter 1981 AO ANN. REP.].

²⁷ 1991 AO ANN. REP., *supra* note 19, at 95.

²⁸ Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3162, 3164 (1988 & Supp. 1992).

²⁹ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .").

³⁰ Among the courts most heavily burdened by the war on drugs are the Southern District of California, the Southern District of Texas, the Middle and Southern Districts of Florida, and the Southern District of New York. In some federal district courts, as many as 80% of all trials are criminal, compared to the national average of 45%. Michael Tackett, *Drug War Chokes Federal Courts, Assembly Line Justice Perils Legal System*, CHI. TRIB., Oct. 14, 1990, at C1; 1991 AO ANN. REP., *supra* note 19, at

imum sentences for many drug offenses³¹ and the peculiarities of the Federal Sentencing Guidelines³² have both decreased the incentives to plead guilty,³³ and greatly complicated the sentencing process, consuming more judicial resources and diverting limited court resources from the civil docket.³⁴ In light of these statistics, it is not surprising that many federal judges have publicly stated that the war on drugs has compromised their ability to manage their federal civil caseloads.³⁵

217. In 1981, 31% of all federal trials were criminal trials. 1981 AO ANN. REP., *supra* note 26, at 398.

The AO recently suggested that it is the federal criminal caseload which is responsible for SY 1991's increase in the national issue-to-trial figure for civil cases, from 14 months to 15 months. 1991 AO ANN. REP., *supra* note 19, at 96. An alternative explanation for this phenomenon is that the CJRA has placed pressure on district courts to terminate older cases on their dockets, increasing the median filing-to-disposition time for all civil cases terminated in 1991.

³¹ For a discussion regarding the impact of federal minimum drug sentencing, see *Conference on the Federal Sentencing Guidelines: Summary of Proceedings*, 101 YALE L.J. 2053 (1992).

³² See Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 176-79 (1991).

³³ See, e.g., W. John Moore, *Courting Disaster*, NAT'L J., Mar. 3, 1990, at 502, 505 ("[T]he number of criminal trials increases sharply as defendants face certain punishment for specific crimes whether they accept a plea bargain or play the equivalent of criminal law roulette by going to trial."); Tackett, *supra* note 30, at C1 ("[M]andatory minimum sentences take away the incentive to plea-bargain."). Under the Federal Sentencing Guidelines ("Guidelines"), which use a form of "real offense" sentencing, defendants who plead guilty receive, *at most*, a two-point downward adjustment in their offense severity rating. See Heaney, *supra* note 32, at 176-79. In many cases, this will not ensure a more favorable sentence than if the defendant went to trial. See *generally* 1 PRACTICE UNDER THE NEW FEDERAL SENTENCING GUIDELINES 78.16-23 (P. Bamberger & D. Gottlieb eds., 1990 and Supp. 1992) (discussing Guideline 3E1.1, Acceptance of Responsibility).

³⁴ See Moore, *supra* note 33, at 505 ("[D]etail work required by mandatory sentencing has sapped court resources."). The AO reports that the number of contested sentencing hearings has increased steadily since the Guidelines took effect. 1991 AO ANN. REP., *supra* note 19, at 96 (reporting 2753 contested sentencing hearings in 1991, increase of 12% over previous year).

Federal district judges have complained bitterly about the Guidelines, in part because they have virtually eliminated the discretionary aspects of sentencing, and in part because of the additional work they have created for the judiciary and its support staff. See *generally* Moore, *supra* note 33. In 1990, United States District Judge Lawrence Irving of the Southern District of California resigned in protest of the Guidelines and his heavy criminal workload. See Tackett, *supra* note 30, at C1.

³⁵ *A Drug-War Casualty: Federal Civil Practice*, N.J. L.J., Feb. 1, 1990, at 7 (remarks of Chief Judge John Gerry, D.N.J.); see, e.g., Moore, *supra* note 33, at 502 (quoting U.S. District Judge Judith N. Keep, S.D. Cal.); Murphy, *supra* note 22, at 114 n.1; *Interview: The Honorable Kimba Wood*, ANTI-TRUST, Summer 1991, at 13-14 (interview with U.S. District Judge Kimba Wood, S.D.N.Y.); see also Tony Mauro, *More Judges Key to Winning Drug War*, Gannett News Service, Jan. 1, 1990, avail-

One of the most frequently cited factors in the calculus of federal court delay, however, has been the level of judicial vacancies existing at the district court level.³⁶ Each federal district court in the nation is allocated a specific number of "judgeships," a number that is determined by Congress after consideration of the court's historic caseload and other factors.³⁷ A judicial vacancy arises in a federal district court when an active district judge takes senior status, resigns, or leaves the bench for any other reason.³⁸ The vacancy exists, and hence the judgeship remains officially unfilled, until a new district judge has been sworn in.³⁹ In addition to these "normally occurring" vacancies, judicial vacancies arise on paper whenever Congress increases judicial capacity in the district courts through the creation of new judgeships, as it has twice done during the last decade.⁴⁰

Inevitably, a time lapse exists between the occurrence of the vacancy and its satisfaction simply by virtue of the constitutional selection process itself, which requires nomination by the President and confirmation by Congress.⁴¹ The Federal Judicial Center once calculated that the average duration of a "normally occurring" judicial vacancy at the district court level was 10.3

able in LEXIS, News Library, ARCNWS File (discussing Chief Justice Rehnquist's claim that drug war has caused federal district judges to ignore their civil dockets).

³⁶ See REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE W. DIST. OF PA. (1993); REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE S. DIST. OF FLA. [hereinafter CJRA REPORTS, DIST. OF FLA.] (1991); REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE N. DIST. OF TEX. (1992); REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE DIST. OF ALASKA (1991) [hereinafter CJRA REPORT, DIST. OF ALASKA].

³⁷ For a discussion of how the Judicial Conference calculates judicial "need" within a district, see *supra* note 15.

³⁸ See generally Hon. Wilfred Feinberg, *Senior Judges: A National Resource*, 56 BROOK. L. REV. 409, 411-13 (1990) (discussing how vacancies occur and role of senior judges).

³⁹ This is true even if the vacancy is created when an active judge takes senior status but continues to maintain a full caseload, as is frequently the case. Feinberg, *supra* note 38, at 412-14. District judges are eligible to take senior status when their age plus years of service equal 80 (hence, "the rule of 80"). 28 U.S.C. § 371(c) (1988). They may continue to receive full salary and benefits upon taking senior status provided that they meet certain statutory requirements concerning their judicial workload. *Id.* § 371(f).

⁴⁰ See *supra* note 15.

⁴¹ U.S. CONST. art. II, § 2.

months.⁴² This resulted, from 1972 to 1986, in a mean adjusted vacancy rate⁴³ in the federal district courts of 5.6 percent of total district judge capacity.⁴⁴ During 1986 to 1991, the average duration of a judicial vacancy increased to 14.7 months,⁴⁵ and the unadjusted vacancy rate for all federal district courts combined averaged 8.3 percent of the total "available" judgeship months during that period.⁴⁶

It has become increasingly fashionable to attribute a significant part of what is deemed unacceptable backlog and delay to these judicial vacancies. Some federal judges have expressly blamed the delays in their own districts on high vacancy levels.⁴⁷ The final report of The Federal Courts Study Committee in 1990 chastized the executive branch and Congress for their failure to fill federal judicial vacancies promptly, implicitly suggesting that this failure has caused unnecessary delay.⁴⁸ A number of com-

⁴² Committee on Federal Courts, *Remedying the Permanent Vacancy Problem in the Federal Judiciary*, 42 REC. OF ASS'N OF B. OF N.Y. 386, 389-91 (1987) [hereinafter *Judicial Vacancies*].

⁴³ The "adjusted" vacancy rate accounts for the unusually—and some might argue, artificially—high vacancy rate that occurs immediately following the creation of additional judgeships by Congress. *See id.* (explaining actual versus adjusted vacancy rates and method for adjusting actual vacancy rate). In 1990, for example, Congress added 61 new permanent district judgeships and 13 temporary judgeships. *See supra* note 15. At the end of SY 1991, none of these newly created judgeships had been filled, and the vacancy rate for SY 1991 was reported by the AO to be 13.2%, compared to a 7.8% rate for SY 1990. The 1991 figure is obviously somewhat misleading, however, because the 1991 vacancy rate includes newly created judicial capacity that did not exist in SY 1990. By adjusting vacancy rates, the "vacancy bulge" is eliminated.

⁴⁴ *Judicial Vacancies*, *supra* note 42, at 391.

⁴⁵ Letter from David Sellars, Legislative and Public Affairs Division, Administrative Office, to Kim Dayton (Mar. 2, 1993) (calculating average days to fill vacancy) [hereinafter Sellars Letter] (on file with author).

⁴⁶ *See* 1991 STATISTICS, *supra* note 16, at 167 (calculating vacancy rate from judicial capacity and number of vacant judgeship months between 1986 and 1991). Judicial capacity in judgeship-months for the SY 1986 to 1991 was 6900 months from 1986-90 and 7418 months for 1991. The vacancy rates by percent for SY 1986-91 were: 1986 to 1990, 9.5%; 1987 7.0%; 1988, 7.0%; 1989, 5.4%; 1990, 7.8%; 1991, 13.2%. The large percentage increase in 1991's vacancy rate by percent was due in part to a "vacancy bulge" caused by the creation of additional judicial capacity on December 1, 1990. *See supra* note 43.

⁴⁷ *See, e.g.*, Tim Smart, *The Federal Courts Have a Drug Problem*, BUS. WK., Mar. 26, 1990, at 76 ("Federal judges say [problems of delay] would improve greatly if Congress and the White House created more judgeships and filled the approximately 60 seats on the bench that remain empty."); Jerry Urban, *Nominations of 6 Texans Put on Hold*, HOUS. CHRON., Oct. 7, 1992, at A17 (quoting Chief Judge Norman H. Black, S.D. Tex.).

⁴⁸ FCSC REPORT, *supra* note 21, at 36 (remarking that committee "cannot overstate the importance of the executive and legislative branches' filling the vacancies

mentators,⁴⁹ including the former director of the Federal Judicial Center, Professor Leo Levin, have suggested that judicial vacancies are a principal component of delay.⁵⁰ Indeed, during and after the 1992 presidential election, the matter of judicial vacancies became a political issue as Republicans attacked the Democratic majority in Congress for its failure to confirm President Bush's judicial nominees, asserting that such partisanship was compromising the federal courts' ability to deal with their dockets.⁵¹

Not surprisingly, many of the advisory groups assembled under the CJRA became convinced that an important, possibly the most important, cause of unacceptable delay within their districts was the existence of judicial vacancies.⁵² A substantial number of

that exist today"). In recent years, Democrats have blamed the bulk of the delay in filling vacancies on the President's failure to promptly nominate candidates. Republicans, however, have blamed Congress for deliberately slowing down the confirmation process. *See infra* note 51. The AO's statistics suggest that, at least in the past decade, most of the time lapse between the occurrence of a vacancy and the confirmation of a new district judge is attributable to the executive branch although the congressional share has increased in the last couple of years. For example, in 1989, when 15 judicial nominees were eventually confirmed, the average number of days from vacancy to nomination was 627 (nearly two years), while the average number of days from nomination to confirmation was only 60 days. In 1992, when 66 nominees were confirmed, "executive" delay averaged 385 days, and "congressional" delay averaged 139 days. *See Sellars Letter, supra* note 45.

⁴⁹ *See, e.g.*, Victor Williams, *Solutions to Federal Judicial Gridlock*, 76 JUDICATURE 185 (1993); Feinberg, *supra* note 38, at 413.

⁵⁰ A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877, 882-84 (discussing problems of judicial vacancies).

⁵¹ *See, e.g.*, Urban, *supra* note 47, at A17 (quoting unnamed Republican who suggested that Democratically-controlled Senate Judiciary Committee was deliberately, for political reasons, delaying confirmation of Bush nominees); Helen Dewar & Bill McAllister, *As Election Day Nears, Confirmations Are Slowing*, WASH. POST, Sept. 16, 1992, at A19 (noting White House criticisms of congressional delay in confirming judicial nominees when Clinton victory was predicted in polls); *Politics and Federal Judgeships*, PLAIN DEALER, Dec. 7, 1992, at 10B (attacking post-election Congress for refusing to confirm President Bush's appointments). As noted earlier, the AO's data indicate that most of the delay in filling federal judicial vacancies stems from the delay in nominating new judges, rather than from delays in confirming the President's nominees. *See supra* note 48.

⁵² *See generally* REPORT OF THE TASK FORCE ON THE CIVIL JUSTICE REFORM ACT 2 (ABA 1992) ("The Advisory Committee reports generally acknowledge that some problems of cost and delay emanate from . . . the failure of Congress and the President to fill judicial vacancies and provide needed resources for our civil justice system."). For specific examples of the Advisory Groups' concerns about the relationship between judicial vacancies and delay, see REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE E. DIST. OF CAL. 52-53 (1991) [hereinafter CJRA REPORT, E. DIST. OF CAL.] (delay in selection and appointment of new judges "adversely affected the court's docket and its ability to timely resolve civil disputes");

the first thirty-four CJRA advisory groups to file reports blamed delay, at least in part, on the failure of the executive and legislative branches to fill vacancies in a timely manner.⁵³ Some groups, such as the Advisory Group for the Eastern District of Pennsylvania, speculated that the failure to fill vacancies meant that an insufficient number of judges were available to preside over civil cases that were ready for trial.⁵⁴

In reaching the conclusion that there was a correlation between judicial vacancies and delay, most advisory groups defined the vacancy problem in terms of absolute vacancies—the total vacant judgeship months over a particular time period⁵⁵—and then concluded, without much analysis, that had the vacancies been promptly filled, there would be considerably less unacceptable delay. The Report of the Advisory Group for the Eastern District of Pennsylvania is typical of this approach. The report states: “If we total the number of vacant judgeship months in this district over the last five years (1986 - 1990), the figure is almost exactly the equivalent of nine United States district judges sitting for one full year!”⁵⁶ The implication, of course, is that the absence of nine judges for one full year over a five-year period can a fortiori be expected to cause delay.

There is, to be sure, a certain surface appeal to the notion that judicial vacancies cause delay, or result in fewer trials. As Judge Wilfred Feinberg has pointed out, “[t]he number of judges in the federal system is relatively small, and in some courts within that system, very small. Thus, the impact of even one vacancy can be

FINAL REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE DIST. OF DEL. 47 (1991) [hereinafter CJRA REPORT, DIST. OF DEL.] (“The Advisory Group found unanimous agreement [that] filling the vacancies in the judgeships authorized for the court will reduce excessive delay in civil litigation.”); CJRA REPORT, DIST. OF KAN., *supra* note 19, at 48-49 (“[T]he principal causes of expense and delay in the District of Kansas have included . . . (8) the failure of the executive and congressional branches to act promptly to fill judicial vacancies on the court as they arise.”); REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE N. DIST. OF OHIO 6-7 (1991) [hereinafter CJRA REPORT, NORTHERN DIST. OF OHIO] (“The delays in filling vacancies has [sic] caused the Court to operate short staffed . . . The Advisory Group submits that regardless of the effectiveness of any delay and cost reduction plan adopted, such reforms may be adversely affected by the high rate of judicial vacancies.”).

⁵³ See, e.g., CJRA REPORT, DIST. OF DEL., *supra* note 52, at 49; CJRA REPORT, E. DIST. OF PA., *supra* note 12, at 50-51; CJRA REPORT, DIST. OF KAN. *supra* note 19.

⁵⁴ CJRA REPORT, E. DIST. OF PA., *supra* note 12, at 50.

⁵⁵ See, e.g., CJRA REPORT, E. DIST. OF CAL., *supra* note 52, at 52-53; CJRA REPORT, EASTERN DIST. OF PA., *supra* note 12, at 49-50.

⁵⁶ CJRA REPORT, E. DIST. OF PA., *supra* note 9, at 49-50.

great."⁵⁷ Judgeships have remained vacant on some courts for more than four years,⁵⁸ an extraordinary period of time by any measure. As noted, both vacancy rates and the average duration of a judicial vacancy appear to be on the rise.⁵⁹ In terms of "judicial hours" lost, the average vacancy rate of 8.3% over the last six years would seem to be quite substantial.⁶⁰ It would appear logical that a court with eleven judges is more efficient—and less prone to unacceptable delay—than that same court with only ten.

Nevertheless, a cynical observer might be tempted to question the recent finger pointing at judicial vacancy rates as a cause of increasing delays in the federal courts. As mentioned, judicial vacancies are inevitable. They have always existed at some level in the federal courts and always will; the constitutionally mandated selection process ensures as much. Few of the advisory groups which blamed district court delay on the vacancy problem considered whether their courts' vacancy rates had increased in recent years, or whether the problem of vacancies was more severe in their districts than in other, less congested courts.⁶¹ Many did not distinguish what one could call the "artificial" vacancies that result from the creation of additional judicial capacity from so called naturally occurring vacancies.⁶²

But if vacancies cause delay, we would expect that those courts whose vacancy rates historically have been higher than average might, as a consequence, be more delayed than other courts. In other words, we would expect to find some correlation between vacancy levels and degree of delay. Possibly, we might expect

⁵⁷ Feinberg, *supra* note 38, at 413 (citing *Judicial Vacancies*, *supra* note 42); see REPORT AND PLAN OF THE ADVISORY GROUP APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE DIST. OF THE V.I. 6 (1991) [hereinafter CJRA REPORT, DIST OF V.I.] ("The Virgin Islands are currently authorized to have two active judgeships. Both have been vacant for nearly two years . . .").

⁵⁸ See DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, 1992 Annual Report [hereinafter AO ANN. REP.].

⁵⁹ Based on 1992 AO statistics and FJC formula.

⁶⁰ See 1991 STATISTICS, *supra* note 16, at 167; cf. Feinberg, *supra* note 38, at 413 n.14 (suggesting that 75,000 judicial work hours were lost in 1987 due to vacancies) (citing *Judicial Vacancies*, *supra* note 42). As suggested below, it is somewhat misleading to characterize these work hours as truly "lost." See *infra* note 62 and accompanying text.

⁶¹ *But see* REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. CT. FOR THE E. DIST. OF VA. 47-50 (1991) (noting that, although vacancy rate in Eastern District of Virginia exceeded national average from 1976-90, this did not impair court's ability to manage its caseload).

⁶² See, e.g., CJRA REPORT, E. DIST. OF CAL., *supra* note 52, at 51-56.

small courts having few judges to be more adversely affected by a vacancy than larger courts having many judges to share the extra burden presumably caused by vacancies. We could assume that, once vacancies are filled in a particular court, thus eliminating a cause of delay, that court would show progress towards eliminating unnecessary delay.

This Article examines the relationship between federal district court judicial vacancies—whether caused by the executive branch's failure to timely nominate judges, Congress's failure to confirm presidential nominees, or some other reason—and delays in processing the civil caseload. The hypotheses tested are several configurations of the hypothesis "judicial vacancies cause delay."⁶³ The statistical method of analysis of covariance is used to test this hypothesis and thereby evaluate the degree to which delays, defined by reference to certain case management statistics, are correlated to vacancy rates in individual federal district courts, and within the federal system as a whole. My conclusions may be surprising to some. The data analyzed ultimately suggest that, whether vacancy rates are expressed in terms of absolute vacancies or as a percentage of judicial capacity and adjusting for differences among courts as to caseloads and other objective factors that might also cause delay,⁶⁴ there is no relationship between judicial vacancies and the traditional indicators that the Administrative Office of the United States Courts ("AO") has used to measure civil litigation delay in the district courts. Part I explains the data used in the analyses, discusses the methodology, and sets forth and explains the results. Part II offers some explanations for the lack of relationship that the data clearly showed, and some conjecture about the more probable causes of unacceptable delay that concededly exists in many federal courts today.

I. DATA AND METHODOLOGY

As Professor Levin suggests, there is something to be said for the idea that the best way to measure the effect of judicial vacan-

⁶³ Technically, the hypothesis tested is "no relationship between vacancies and delay"; the analyses tell us how confident we can be that this statement is true. *See infra* notes 65-81 and accompanying text.

⁶⁴ For example, filings per judgeship, measures of the criminal caseload, and other objective caseload factors are all treated as independent variables in the analysis of covariance. *See infra* notes 67-72 and accompanying text.

cies on delay is through a controlled study.⁶⁵ Notwithstanding this suggestion, it is important to recognize that one can learn something about the relationship between vacancies and delay through quantitative statistical analysis of currently available case management statistics. This method allows for an examination of historical trends and patterns, and for a comparison of courts which appear to be dissimilar. Analysis of covariance enables us to isolate the relationship of one case management variable to another, and to look for differences among the federal district courts with respect to particular case management variables. Thus, the method allows us to make certain judgments and draw certain conclusions about the claims regarding the role of vacancies in causing or contributing to delay.

A. *Research Data*

This study relies upon the case management statistics compiled and reported annually by the AO for each of ninety⁶⁶ federal district courts. Of the many statistics thus reported, nineteen variables were identified or calculated, which, when taken together, provide an objective picture of the caseload and case management profiles of each federal district court included in the study.⁶⁷ For purposes of discussion, each of these nineteen variables has been categorized as either a "structural" or an "administrative" variable. These descriptive terms distinguish between

⁶⁵ Levin, *supra* note 50, at 900-05. On the other hand, one could argue that a true controlled study of the effect of vacancies is impossible because such a study could only compare two different district courts. One can compare different courts by utilizing certain controlling objective factors, but other intangibles cannot be controlled. Moreover, if the legal culture of individual district courts is the most important factor in determining the extent of delay, as suggested below, then it would be impossible to draw any universal conclusions from a comparison of the effect of vacancies in two different courts.

⁶⁶ There are 94 federal district courts, including the four territorial courts of Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands. The four territorial courts were ultimately not included as part of the data analyzed because some relevant case management statistics for these courts were not reported by the AO during the time period covered by the study, and because their criminal caseloads have historically comprised a much larger percentage of their total caseload than in the other district courts.

⁶⁷ The variables considered did not include "case mix" variables, which identify the composition of each individual district court's filing mix (i.e. the number and percent of tort cases, antitrust cases, habeas cases, etc.). Such a civil filing profile is compiled annually by the AO. The weighted filings variable was considered, however, providing some sense of the relative complexity of each federal court's overall caseload. See *supra* note 19.

case management statistics which are essentially unrelated to case management procedures and those which are affected, to some extent, by a court's case management practices. Structural variables are those over which a district court presumably has no control; the structural variables included in the database were: (1) total filings, (2) filings per judgeship, (3) number of authorized judgeships, (4) civil case filings per judgeship, (5) weighted filings per judgeship, (6) criminal felony cases per judgeship, (7) felony defendants per criminal case, (8) vacant judgeship months, and (9) vacancy rate by percent—the ratio of vacant months to total authorized judgeship months, or “judicial capacity,” per year.⁶⁸ Administrative variables are those case management statistics which are affected both by structural variables and by a particular court's management practices. Administrative variables included in the database were: (1) total terminations, (2) terminations per

⁶⁸ For SY 1986-90, the vacancy percent rate was calculated by multiplying the number of judgeships authorized for a particular court by 12 months, dividing that “judicial capacity in months” into the number of vacant judgeship months for that district reported by the AO for a particular year, and multiplying by 100. For example, at the end of SY 1990, the Eastern District of Virginia had nine authorized judgeships and reported 4.1 vacant judgeship months, for a percent vacancy rate of $(4.1/(9 \times 12)) \times 100$, or 3.8%. 1991 STATISTICS, *supra* note 16, at 70. For SY 1991, when a number of districts received additional judicial capacity on December 1, 1990 (i.e., with seven months remaining in the statistical year), see Judicial Improvements Act of 1990 § 203, the formula was $\text{vacant judgeship months}/((1990 \text{ judgeships} \times 12) + (\text{new capacity judgeships} \times 7))$. For courts such as the Eastern District of Virginia, which received an additional temporary district judgeship in SY 1991 under the Judicial Improvements Act, *id.* § 203(c)(13), the percent vacancy rate reflects, at least in part, an “artificial” vacancy stemming from the failure to fill newly-created judgeships, rather than from a naturally occurring vacancy. See *supra* notes 31-40 and accompanying text.

In the analysis, the absolute vacancy and vacancy percent variables were treated as category variables. For example, respecting the vacancy percent variable, all observations having a value of 0% were combined into a single category. Observations having a value of greater than 0% but less than 5% were combined into a second category, and so forth. Observations having a value of 35% or greater were combined. The 540 total observations produced nine vacancy percent category variables.

This study did not account for the possibility that lawyers may have tactical reasons to choose either a “fast” or “slow” court when deciding where to file a civil action, or may select or avoid a particular court because of its use of a particular case management device, such as mandatory ADR. Forum choice, however, occasionally may depend on such considerations. See generally Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 404-07 (1992) (discussing impact of “pace and cost of litigation,” as well as mandatory alternative dispute resolution techniques, on attorney decisions concerning removal of cases from state to federal court). If lawyers consider such factors when making forum choices, then it is inaccurate to assert that the structural variables are wholly unaffected by a court's management practices.

judgeship, (3) total cases pending at the close of the statistical year, (4) cases pending per judgeship at the close of the statistical year, (5) number of civil cases more than three years old, (6) percentage of civil cases more than three years old, (7) median filing-to-disposition time for a criminal case,⁶⁹ (8) median filing-to-disposition time for a civil case,⁷⁰ (9) median issue-to-trial time for a civil case,⁷¹ and (10) number of trials conducted per judgeship. Two additional category variables included in the model were "court" and "year."

B. Independent Variables

In an analysis of covariance, independent variables are those which are believed to affect dependent variables.⁷² All of the structural variables mentioned above and all but three of the administrative variables are independent variables in the model. The variables court and year, which are called category variables, are also independent variables.

C. Dependent Variables

Three administrative variables regularly reported by the AO are plainly indicative of at least some aspect of "delay": the median time in months for filing to disposition of a civil case, the median time from "issue to trial" in a civil case, and the percentage of civil cases in the district that are more than three years old. Although these variables are not the only measures of delay in the federal courts, they are the only ones that have been consistently reported annually by all federal district courts included in the

⁶⁹ This is the median number of months from filing date to either the sentencing date or the dismissal/acquittal date including excludable delays reported under the Speedy Trial Act. 1991 STATISTICS, *supra* note 16, at f.

⁷⁰ This is the median time from filing to disposition, on whatever grounds (default judgment, dismissal on the pleadings, summary judgment, jury verdict, etc.) for a civil case, expressed in months. 1991 STATISTICS, *supra* note 16, at f. In calculating the median filing-to-disposition time for each district court, the AO excludes five kinds of civil actions: land condemnations, prisoner petitions, deportation reviews, and actions by the federal government to recover overpayments and enforce judgments. "Excluding these cases gives a more accurate picture of the time it takes for a case to be processed in the Federal courts." *Id.* at 167.

⁷¹ This is the median time from "issue" (defined as the date on which an answer or response is filed) until the case goes to trial, expressed in months. 1991 STATISTICS, *supra* note 16, at f.

⁷² VANDERLYN R. PINE, INTRODUCTION TO SOCIAL STATISTICS 138, 164-66 (1977).

model.⁷³ These three administrative variables are the dependent variables in the model.

The relationship between vacancies and delay was considered using the two alternative measures of vacancy levels—absolute vacancies, expressed in terms of vacant “judgeship months,” and vacancy percent, defined as the ratio of vacant months to total judicial capacity (in months) for the district court in each year. As noted, there are considerable differences among districts in the number of allocated judgeships, ranging from one in the Eastern District of Oklahoma to twenty-eight in the Southern District of New York.⁷⁴ It is likely, as Judge Feinberg has suggested, that a relatively small absolute judicial vacancy rate—for example, five judgeship months—would have more serious consequences in a small district than in a large one.⁷⁵ Likewise, what seems to be a very large absolute vacancy rate—for instance, twenty-four months in a single statistical year—might actually represent a percentage vacancy rate that is relatively small. Thus, it seems important to inquire both whether there is a relationship between absolute vacancies and delay, and whether there is a relationship between the percent vacancy rate and delay.

For each variable relevant to the models except court and year, there were a total of 540 observations (ninety courts times six years).

D. Patterns of Delay in the Federal Courts

As a preliminary matter, it may be useful to know something about caseload and case management trends in the federal district courts over the time period covered by the study. Although the conventional belief is that the caseload burden on the federal judiciary continues to worsen, this is not an entirely accurate account

⁷³ Since September 30, 1991, the CJRA has required each district and senior judge to report certain information concerning the number of pending motions and submitted bench trials more than 180 days old. See, e.g., CIVIL JUSTICE REFORM ACT REPORT OF MOTIONS PENDING OVER SIX MONTHS, BENCH TRIALS SUBMITTED OVER SIX MONTHS, CIVIL CASES PENDING OVER SIX YEARS (AO Sept. 30, 1992) (copy on file with author). Such information clearly provides a measure of delay that is somewhat different than the measures offered by the three delay variables described. Although information concerning submitted pending motions and pending bench trials may ultimately prove to be extremely useful to researchers interested in identifying the causes of delay, at present the data are insufficient to incorporate into the models presented.

⁷⁴ 28 U.S.C. § 133(a) (Supp. 1992).

⁷⁵ Feinberg, *supra* note 38, at 413.

of the situation in the federal courts as a whole. For SY 1986-90 there were a total of 575 federal district judgeships authorized to the ninety-four federal district courts; the 1990 Judicial Improvements Act (which took effect December 1, 1990) created seventy-four permanent and temporary district judgeships which were counted as added in SY 1991. From 1986 to 1991, the total raw filings in the ninety-four federal district courts actually declined from 282,074 cases in 1986 to 241,420 cases in 1991, a decrease of 14.4% in total filings (see Figure 1) (all figures contained in appendix). The mean filings per judgeship during that period decreased from 491 cases to 372, and the mean weighted filings during that period decreased from 461 to 386 (see Figure 2).

Despite declining raw, per judgeship, and weighted filings from 1986 to 1991, however, the median time from filing to disposition remained unchanged over that period at nine months for all district courts, and the median time from issue to trial actually increased slightly from fourteen to fifteen months (see Figure 3). The percentage of all pending civil cases that were more than three years old increased from 7.9% in 1986 to 11.8% in 1991 (see Figure 4).

Thus, when the federal district courts are considered as a whole, there was a significant (14.4%) decrease in total federal court filings from 1986 to 1991, and also significant decreases in the per judgeship total and weighted caseloads (24% and 16% decreases, respectively) due to the combination of decreased filings and the addition of judicial capacity. Despite these decreases in filings, delays did not decrease by any measure during that time period, and actually increased as measured by the median issue to trial time and the percentage of civil cases over three years old.

The range of delay (again, as evidenced by the AO's three delay variables) among the ninety federal district courts studied was extremely broad during the relevant time period. The median time from filing to disposition of a civil case ranged from three months in the fastest district court in SY 1991⁷⁶ to twenty-three months in the slowest district court in SY 1988⁷⁷ (see Figure 5). The median time from issue to trial ranged from five months in the fastest court⁷⁸ to forty months in the slowest⁷⁹ (see Figure 6).

⁷⁶ See 1991 STATISTICS, *supra* note 16, at 107 (W.D. Wis.).

⁷⁷ See 1991 STATISTICS, *supra* note 16, at 151 (D. Utah).

⁷⁸ See 1991 STATISTICS, *supra* note 16, at 70 (E.D. Va.).

⁷⁹ See 1991 STATISTICS, *supra* note 16, at 125 (D. Alaska).

Finally, the percentage of three-year old cases ranged from .1% in the Southern District of West Virginia in 1991 to 45% in the Southern District of Iowa⁸⁰ (see Figure 7).

The question investigated in the study was whether the range of delay illustrated in Figures 5, 6, and 7 can be explained, even in part, by different judicial vacancy levels in the district courts over the past several years. Analysis of covariance enables us to answer this question despite the many differences among the district courts in their respective caseloads.

E. The Relationship between Vacancies and Delay

If judicial vacancies are a significant cause or component of federal court delay, as commentators and most of the CJRA advisory groups described above have claimed,⁸¹ one would expect delays to be the greatest in those districts having the greatest vacancy levels. If there were a relationship between vacancies and delay, we could predict, at least to some extent, delay based on vacancy levels. To test the hypothesis that "judicial vacancies cause delay," a general linear model was used to measure the effects, if any, that vacancies have on the three delay variables. The model simultaneously considers the effects of all the other independent variables mentioned above on the dependent variable vacancies—absolute and as a percentage of judicial capacity. The model thus isolates the extent to which delay is attributable solely to the independent variable in question.

Tables 1 and 2 show the results of six separate inquiries: First, what effect, if any, does the absolute vacancy rate have on median filing-to-disposition times, median issue-to-trial times, or the percentage of three-year-old cases? Second, what effect does vacancy percent have on these delay variables? Figures 8 through 13 illustrate the answers to these questions in graphic terms.

Table 1 shows the results of an analysis of covariance of the relationship between the three delay variables and vacancy rate as a percentage of total judicial capacity. Table 2 shows the results of an analysis of covariance of the relationship between the delay variables and absolute vacant judgeship months. The results are adjusted for all independent variables in the model.

⁸⁰ 1991 STATISTICS, *supra* note 16, at 107 (W.D. Wis.).

⁸¹ See *supra* notes 47-54 and accompanying text.

TABLE 1
LEAST-SQUARE MEANS AND THEIR STANDARD DEVIATIONS FOR THREE RESPONSE VARIABLES FOR EACH OF NINE VACANCY PERCENT CATEGORIES

Vacancy rate (by percent)	Months from filing to disposition (median), civil cases (1)		Months from issue to trial (median), civil cases (1)		Percentage of civil cases over three years old (2)	
	Mean	Standard deviation	Mean	Standard deviation	Mean	Standard deviation
00	9.99	0.105	16.25	0.199	7.77	0.231
00 <= 05	9.54	0.242	15.75	0.460	7.00	0.534
05 <= 10	9.49	0.230	15.98	0.437	7.38	0.508
10 <= 15	9.90	0.222	16.55	0.421	7.08	0.489
15 <= 20	9.92	0.254	15.73	0.488	8.32	0.561
20 <= 25	9.90	0.277	15.80	0.527	7.61	0.611
25 <= 30	9.80	0.462	16.32	0.876	7.50	1.017
30 <= 35	9.54	0.438	16.39	0.831	7.04	0.965
35+	8.99	0.522	17.35	0.990	3.24	1.150

(1) Means are not significantly ($P < 0.05$) different.

(2) The mean of the vacancy rate (by percent) for category 35+ is significantly ($P < 0.05$) smaller than all other means.

TABLE 2
LEAST-SQUARE MEANS AND THEIR STANDARD DEVIATIONS FOR THREE RESPONSE VARIABLES FOR EACH OF NINE VACANCY PERCENT CATEGORIES

Vacancy rate (absolute)	Months from filing to disposition (median), civil cases (1)		Months from issue to trial (median), civil cases (1)		Percentage of civil cases over three years old (2)	
	Mean	Standard deviation	Mean	Standard deviation	Mean	Standard deviation
00	10.02	0.109	16.10	0.205	7.85	0.244
00 <= 06	9.58	0.175	15.59	0.327	7.21	0.389
06 <= 12	9.91	0.157	15.83	0.297	7.73	0.350
12 <= 18	9.24	0.316	16.47	0.592	6.50	0.703
18 <= 24	9.73	0.358	18.34	0.670	6.02	0.796
24 <= 30	9.94	0.601	17.92	1.126	6.24	1.338
30 <= 36	9.16	0.556	17.45	1.041	5.85	1.237
>36	9.70	0.836	17.40	1.567	8.66	1.862

(1) Means are not significantly ($P < 0.05$) different.

(2) The mean of the vacant months category ($18 < \leq 24$) is significantly ($P < 0.05$) larger than all other means.

Figures 8 through 13 illustrate the nature of the relationship between delay and judicial vacancies, and confirms that one cannot predict delay based on vacancy levels.

The results reported in the tables and the figures clearly show that there is no relationship between judicial vacancies and delay, at least to the extent that delay is legitimately measured by the three named delay variables. This indicates unequivocally that, whatever the cause of civil litigation delay in the federal courts may be, it is not caused by the judicial vacancies studied.

II. ANALYSIS OF RESULTS

The results detailed above raise two questions. Why is there no relationship between judicial vacancies and federal court delay? And what are the more likely causes of delay? As to the first question, there are several fairly simple explanations for the findings. First, many judicial vacancies are in a sense "artificial." As discussed above, the AO's judicial vacancy figures for a particular year are based not on the actual number of district judges carrying caseloads within a district court, but on how many months an authorized judgeship remains unfilled.⁸² The vast majority of "naturally occurring" judicial vacancies arise when an active district judge decides to take senior status.⁸³ Most of the time, the new senior judge maintains a full caseload for some period of time after acquiring that status, and often for many years.⁸⁴ In such circumstances, the district court has not lost a judge through an active judge's elevation to senior status—it has gained additional capacity. The appointment of a new active judge to fill the technical "vacancy" means that the court actually has an additional judge to share the caseload that exists at the time the vacancy is filled.⁸⁵ In view of this reality, one could argue that the so-called "judicial vacancies" figures are little more than an accounting tool that does not signify whether a district has sufficient judicial re-

⁸² See *supra* notes 36-46 and accompanying text.

⁸³ For example, at the close of FY 1992, there were 84 vacancies at the district court level, 26 of which (31%) were new capacity positions created on December 1, 1990. The remaining 58 vacancies were naturally occurring vacancies. 1992 AO ANN. REP., *supra* note 58.

⁸⁴ The AO has calculated that a senior district judge typically serves for more than 12 to 15 years before substantially reducing her caseload. Telephone Interview with Statistics Division, Administrative Office of the United States Courts (Mar. 16, 1994).

⁸⁵ See Feinberg, *supra* note 38, at 412-14 (citing examples of this phenomenon).

sources available to cope with its caseload. A similar argument could be made with respect to vacancies that result in the wake of congressional authorization of new judicial capacity in the federal courts.

The recent experience of the District of Kansas illustrates this phenomenon. In 1991, two of the court's active judges took senior status, creating what was counted by the AO as two judicial vacancies. Both of these new senior judges maintained full caseloads, however. Neither of the two judicial vacancies was filled during the remainder of the statistical year. In addition, a temporary judgeship in the District of Kansas authorized by the Judicial Improvements Act of 1990⁸⁶ also remained unfilled until early 1992. Thus, for SY 1991, the district reported a total of 14.5 vacant judgeship months, representing 21.6% of its reported judicial capacity for that statistical year,⁸⁷ yet the number of judges actually handling caseloads remained essentially the same throughout that period. As each vacancy was filled, the new judge was given a portion of the pending caseload and entered the rotation for receiving new cases. The last of the Judicial Improvements Act vacancies was filled in 1992, when the District of Kansas acquired three additional judges to share the total caseload of the court. Thus, although the official "per judgeship" caseload of the District of Kansas was reported by the AO for FY 1992 as the total pending caseload divided by six authorized judgeships, in reality the total caseload was distributed among twelve judges.⁸⁸

A second reason for the lack of a relationship between judicial vacancies and delay stems from the availability and widespread use of visiting judges. Here again, the role of senior judges is important. Article III judges, whether they be appellate or district judges, are entitled by federal law to sit on any court in the federal judiciary.⁸⁹ A district court that finds itself hard pressed to han-

⁸⁶ Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 203(c)(6), 104 Stat. 5089, 5101.

⁸⁷ 1991 STATISTICS, *supra* note 16, at 146. According to the formula described *supra* note 68, the district's judicial capacity for SY 1991 was (5 X 12) + (7 X 1), or 67 judge months.

⁸⁸ The caseload was not distributed equally among all these judges. For example, the entire pro se prisoner caseload was borne by two senior judges. Some senior judges had half-loads or less, and one senior judge served primarily in an administrative capacity.

⁸⁹ See 28 U.S.C. §§ 291-296 (1993). For a more complete discussion of these statutory provisions, procedures, and of some of the more controversial aspects surrounding the use of visiting judges, see Jill Weber Dean, Comment, *Visitors from the East:*

dle its caseload, for whatever reason, can call upon the judges of other districts or of the circuit courts of appeals to assist. A visiting judge—often a senior judge—might take on a particular case from which the judges of the district have recused themselves, or she might be assigned a particular group of cases that are ready for trial.

The contribution of these visiting judges to managing the overall federal district court caseload cannot be understated. Visiting judges are particularly important in alleviating the consequences of vacancies on a court's ability to hear cases which are ready to be tried. In 1991, visiting judges were responsible for 1,604 civil and criminal dispositions in the district courts, 710 of which were dispositions by trial.⁹⁰ Their role has been especially critical in courts facing case management problems that can be described most generously as "unique." The Northern District of West Virginia, for example, a federal district court whose civil docket has been deemed by some measures to be chronically delayed for the last decade or more, has made frequent use of visiting judges; in 1991, more than 70% of all trials held in that court were conducted by visiting judges.⁹¹ Visiting judges have assumed a similar role in some of the district courts that have been especially and disproportionately burdened by the "drug war" and its concomitant increase in the number of felony drug prosecutions.⁹² The availability of these visiting judges to these arguably overburdened courts undercuts the claim that judicial vacancies necessarily mean that fewer judges are available to try cases.⁹³

A Wisconsin Experiment in Controlling Federal District Court Caseloads Through the Use of Visiting Judges, 1988 WIS. L. REV. 241.

⁹⁰ L. Ralph Mechum, *1991 Annual Report of the Director, Activities of the Administrative Office, Judicial Business of the United States Courts*, in REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 97 (1991). Visiting judges sat by designation on more than 5000 appellate panels. *Id.*

⁹¹ See 1991 STATISTICS, *supra* note 16, at 72 (72 trials completed in district in SY 1991); 1991 AO ANN. REP., *supra* note 19, at 355 (52 trials completed in district by visiting judges in SY 1991).

⁹² In the Middle District of Florida, a district court which claims to have been especially burdened by the war on drugs, visiting judges presided at more than a third of the trials conducted in SY 1991. See 1991 STATISTICS, *supra* note 16, at 161 (374 cases tried in district); 1991 AO ANN. REP., *supra* note 19, at 359 (visiting judges tried 132 of all cases tried in district in SY 1991).

⁹³ This was, in essence, the claim of the CJRA advisory group for the Eastern District of Pennsylvania. CJRA REPORT, E. DIST. OF PA., *supra* note 12, at 50 ("The primary harm done by inadequate judge-power [resulting from judicial vacancies] is to render trial dates less than firm and less than credible.").

The District of the Virgin Islands, for example, actually substantially improved its civil case disposition rates over a period during which it was operating at an official 100% vacancy rate.⁹⁴

Some explanations for the lack of a relationship between judicial vacancies and delay cannot be empirically documented, but are a matter of common sense. Presumably the Judicial Conference has accounted for the inevitable fact of vacancies in deciding that a district court needs one judge for each 400 weighted filings per judgeship, and is aware that the adjusted vacancy rate has averaged over six percent in the last decade. It is likely that the existence of a vacancy is a fact well known to all active and senior judges on a particular court and inspires those judges to work harder during the period of the vacancy. Perhaps a vacancy encourages district courts to make fuller use of their magistrate judges in areas such as discovery management where the services of an Article III judge are generally not required.⁹⁵ It is conceivable that the existence of vacancies even discourages attorneys from filing certain kinds of cases in that district if they have a choice of forum.

If judicial vacancies cannot be blamed for the chronic delay that besets far too many of the federal district courts, what are the likely causes? One potential factor already mentioned is the increasing criminal caseloads.⁹⁶ Another possibility, one that Congress implicitly recognized when it passed the CJRA, is the lengthy disposition time associated with motions taken under advisement and submitted bench trials. There is little evidence that the complexity of such motions or bench trials justifies the time it

⁹⁴ See CJRA REPORT, DIST. OF V.I., *supra* note 57, at 5 ("The median time in months from issue to trial in 1991 was 32. This exhibits a substantial improvement from the 38 months median time of 1990. This decline is even more remarkable in light of the vacancy of all active judgeships in the Virgin Islands . . ."). As noted earlier, the District of the Virgin Islands was one of four territorial courts not included in the data analyzed in Part II due to their traditionally disproportionate number of criminal cases. See *supra* note 66.

⁹⁵ 28 U.S.C. §§ 631-639 (1993). For general discussions of the powers and roles of federal magistrate judges, see, e.g., Christopher E. Smith, *The Development of a Judicial Office: United States Magistrates and the Struggle for Status*, 14 J. LEGAL PROF. 175 (1989); J. Anthony Downs, Comment, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032 (1985); Brendan L. Shannon, Note, *The Federal Magistrates Act: A New Article III Analysis for a New Breed of Judicial Officer*, 33 WM. & MARY L. REV. 253 (1991).

⁹⁶ It is probable, however, that the criminal caseload, like vacancies, does not account to any significant degree for the range of delay in the federal courts discussed above.

takes some courts to resolve them, nor is there any reason to think that the time it takes to decide a motion correlates to the quality, fairness, or correctness of the ultimate result. Other possible causes of the delay include: a reluctance on the part of some judges to enforce local and national rules geared towards reducing delay; a bar that has grown accustomed to delay and lacks the impetus or incentive to change; the increasing preoccupation of some judges with alternative dispute resolution techniques; and, perhaps, the occasional less-than-diligent federal judge.

CONCLUSION

In suggesting that judicial vacancies really have nothing whatsoever to do with the so-called delay in the federal district courts, am I also arguing that the President and Congress need not be concerned with filling vacancies as they arise? Of course not. There is little justification for a President's failure to nominate a judicial candidate when a vacancy occurs, or for congressional inaction on a nomination that is unrelated to the need for careful scrutiny of a potential Article III judge. If the Judicial Conference and Congress have determined that a particular district court needs fifteen active judges to manage its current caseload, then the executive and legislative branches ought to act with dispatch to fulfill their respective roles and ensure that the district has fifteen active judges. The existence of technical vacancies may also pressure senior judges to maintain heavier caseloads than their status requires, or to exert a psychological pressure on active judges to work harder than they already do, and perhaps, should have to. It is costly to the federal government to pay the collateral expenses associated with bringing in visiting judges to satisfy needs caused by judicial vacancies. A number of advisory groups offered proposals for expediting the process of appointing Article III judges without sacrificing the quality of the federal judiciary,⁹⁷ and their suggestions ought to be given serious consideration.

On the other hand, there is little to be said in favor of accelerating the judicial appointments process—at the risk of confirming unqualified judicial nominees for lifetime tenure in the federal judiciary—solely to achieve the dubious benefit of adding a bit more

⁹⁷ See CJRA REPORT, DIST. OF ALASKA, *supra* note 36, at 74; CJRA REPORT, DIST. OF FLA., *supra* note 36, at 60-68.

judicial capacity to the federal bench. By focusing on the problem of judicial vacancies, many CJRA advisory groups—and some federal judges—have succeeded in shifting the blame for docket delays from what are more likely the prime causes of that problem. Presumably, this is not what Congress intended when it enacted the CJRA and commanded each court to review its docket and case management practices with a view towards reducing the expense and delay of federal civil litigation. As Professor Levin has suggested, the most important cause of “delay” in the federal courts may well be the entrenched attitudes of lawyers, litigants, and the judiciary about their respective roles in civil litigation.⁹⁸ In the analysis discussed above, the most important variable in predicting delay was “district.” This tells us something significant: that perhaps it is not, in the end, absolute or weighted caseloads, or judicial vacancies, or the number of civil trials a court conducts, which matter the most, but the personalities and character of a court and its judges themselves. These are not things that will be altered simply by the addition of new judicial resources.

The federal district courts have shown themselves to be remarkably flexible in dealing with the year-to-year fluctuations in individual judges’ caseloads, whatever their cause.⁹⁹ The lack of a relationship between judicial vacancies and delay implies other, far more important causes for the differences among district courts in how expeditiously a civil case can be expected to move through the system.

I submit that, more than the objective case management statistics, it the legal culture which develops within a district over the years that is most important. A district whose caseload is managed by the judges rather than the lawyers is likely to be less delayed, simply because many, perhaps most, lawyers have no incentive to reduce delay.¹⁰⁰ Attorneys who are forced to comply with the court’s rules and deadlines, and who are sanctioned when they do not, have fewer opportunities to extend cases unnecessarily. These are the issues about which the CJRA was or should be

⁹⁸ Levin, *supra* note 50, at 879.

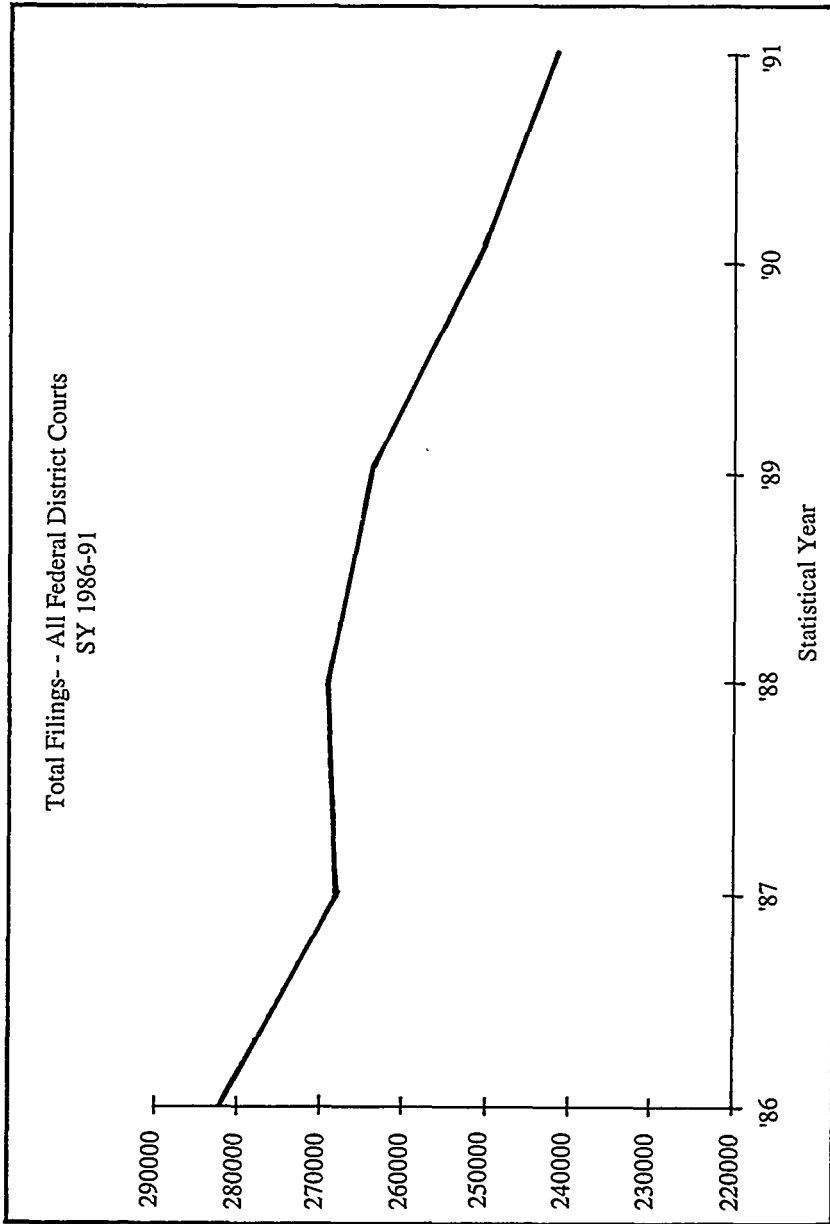
⁹⁹ “Ninety percent of court delay is administrative. . . . [a] lot of delay is self-inflicted.” Moore, *supra* note 33, at 507 (quoting George L. Gish, clerk of court for Detroit Recorder’s Court).

¹⁰⁰ A number advisory groups criticized or questioned this assumption. Anyone who has been a litigator knows, however, that there are often compelling monetary and other incentives to prolong litigation or delay settlements.

concerned. By exposing the fallacy of blaming delay in the federal courts on the problem of judicial vacancies, I aim to encourage a more serious dialogue about whether the patient really wants the medicine that true judicial reform of civil litigation practice and procedure in the federal courts will require.

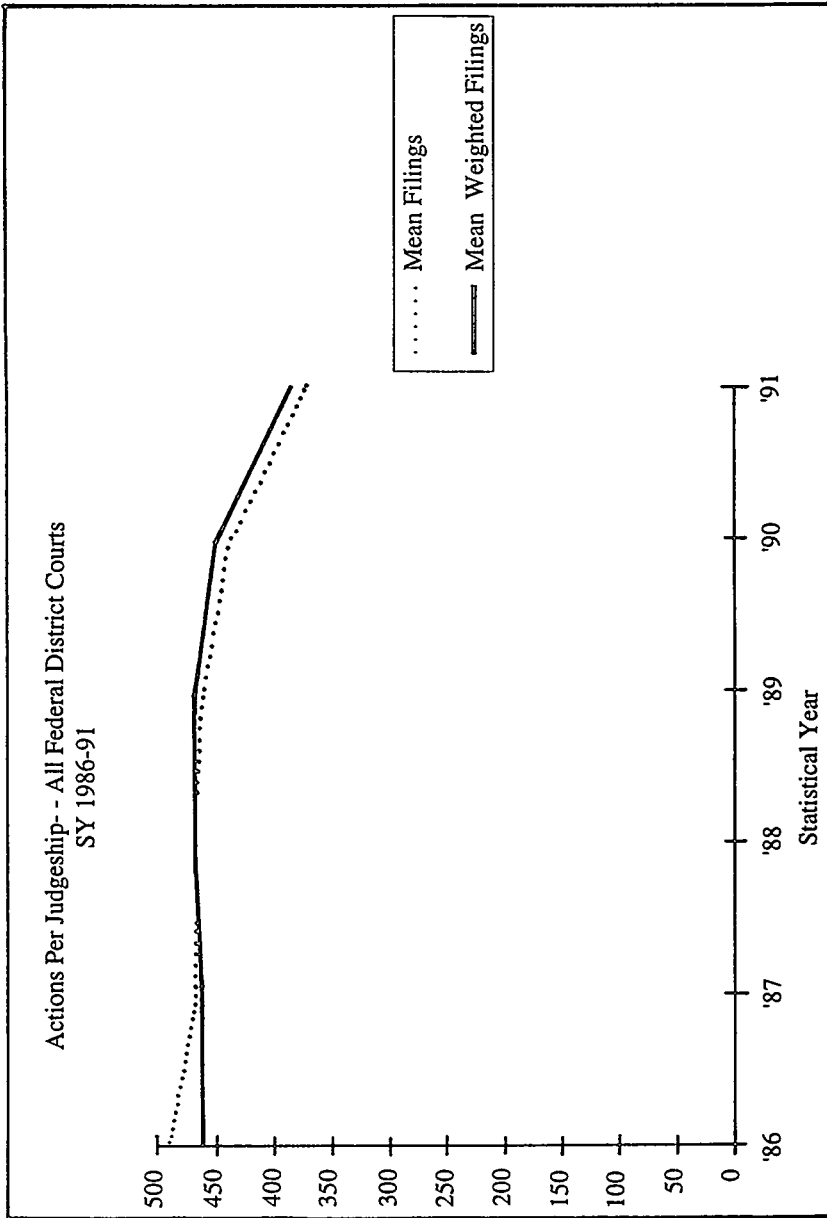
APPENDIX

Figure 1



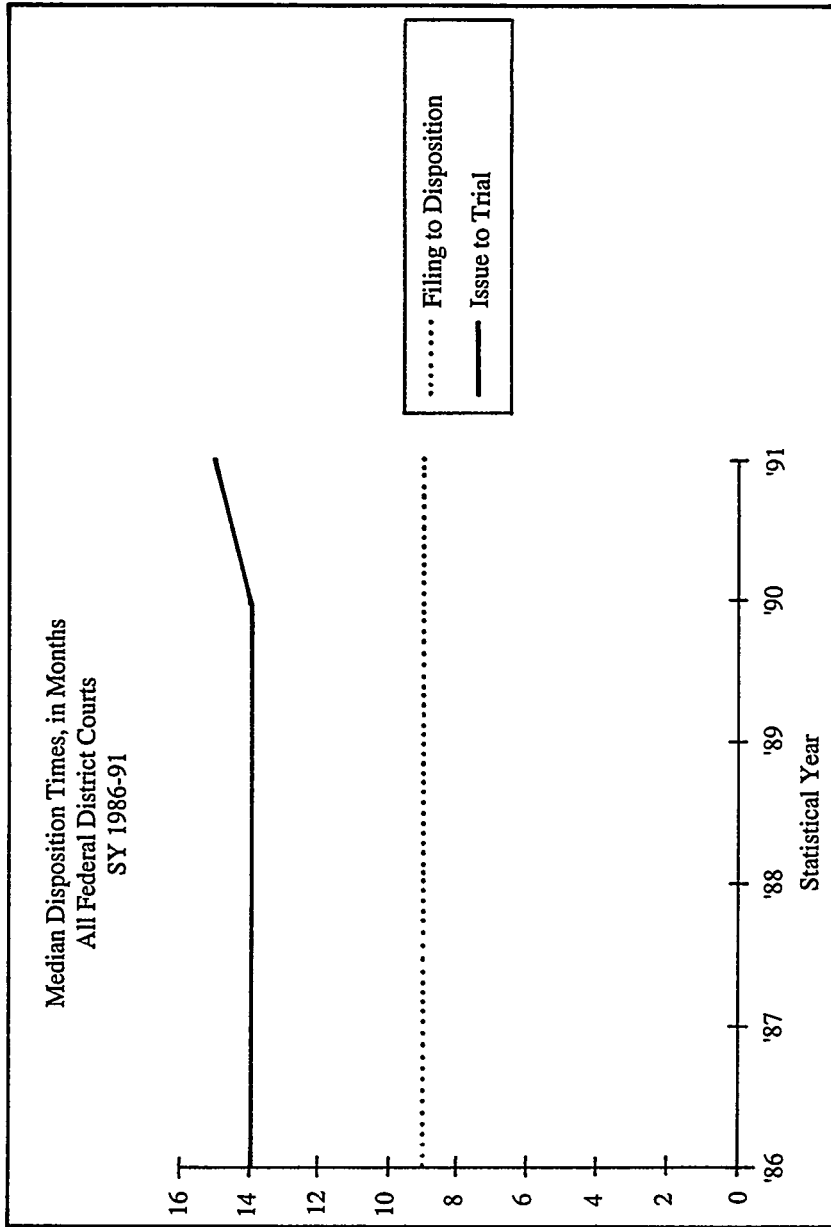
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Figure 2



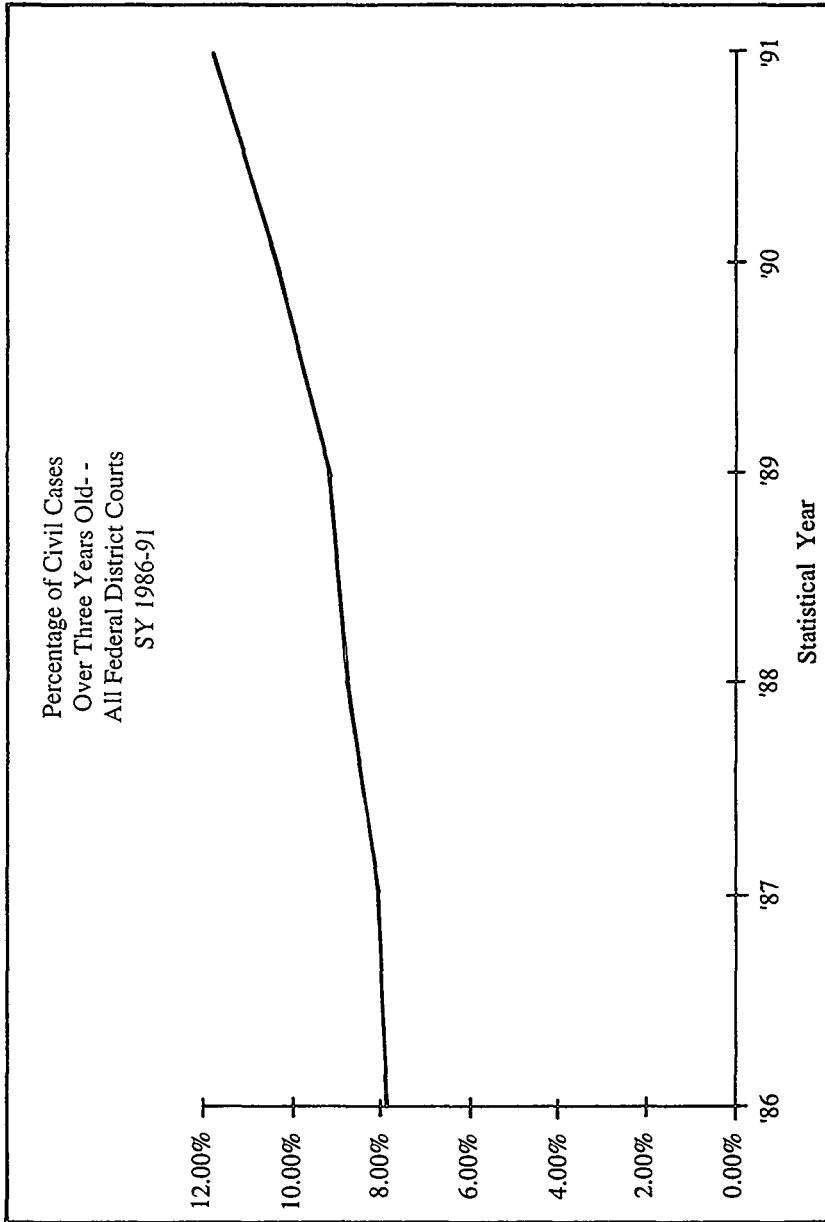
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Figure 3



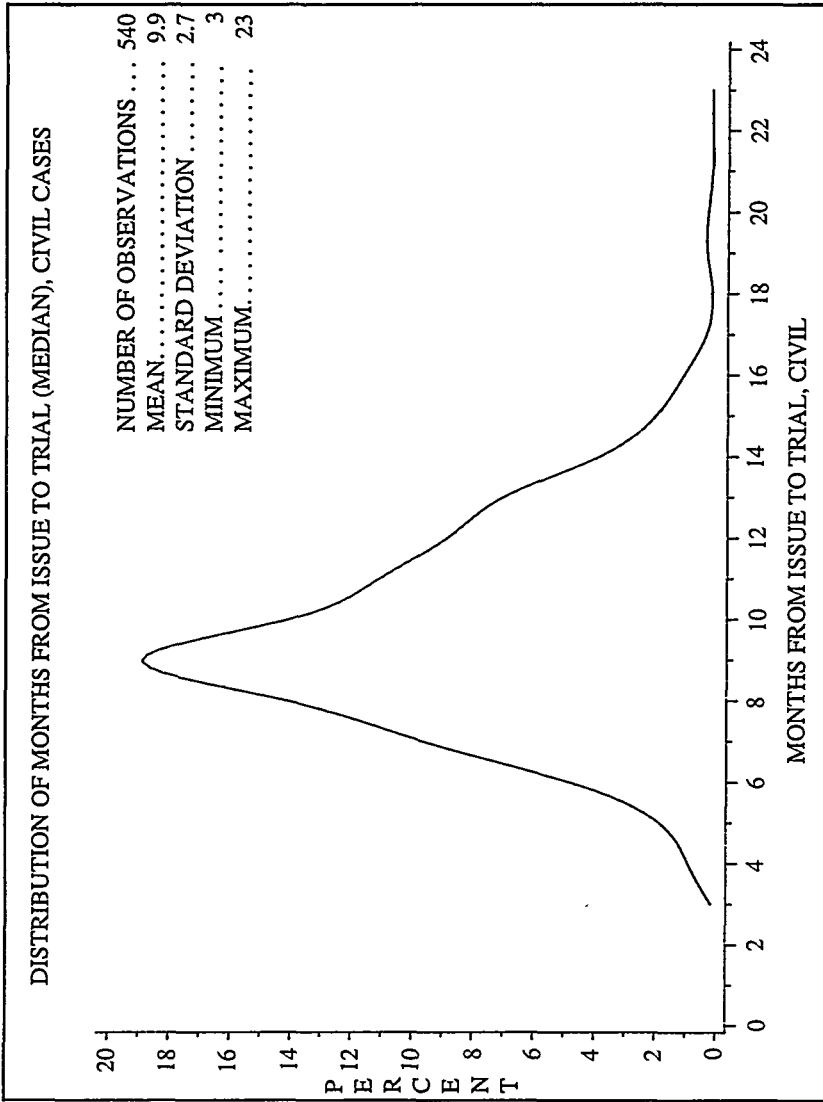
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Figure 4



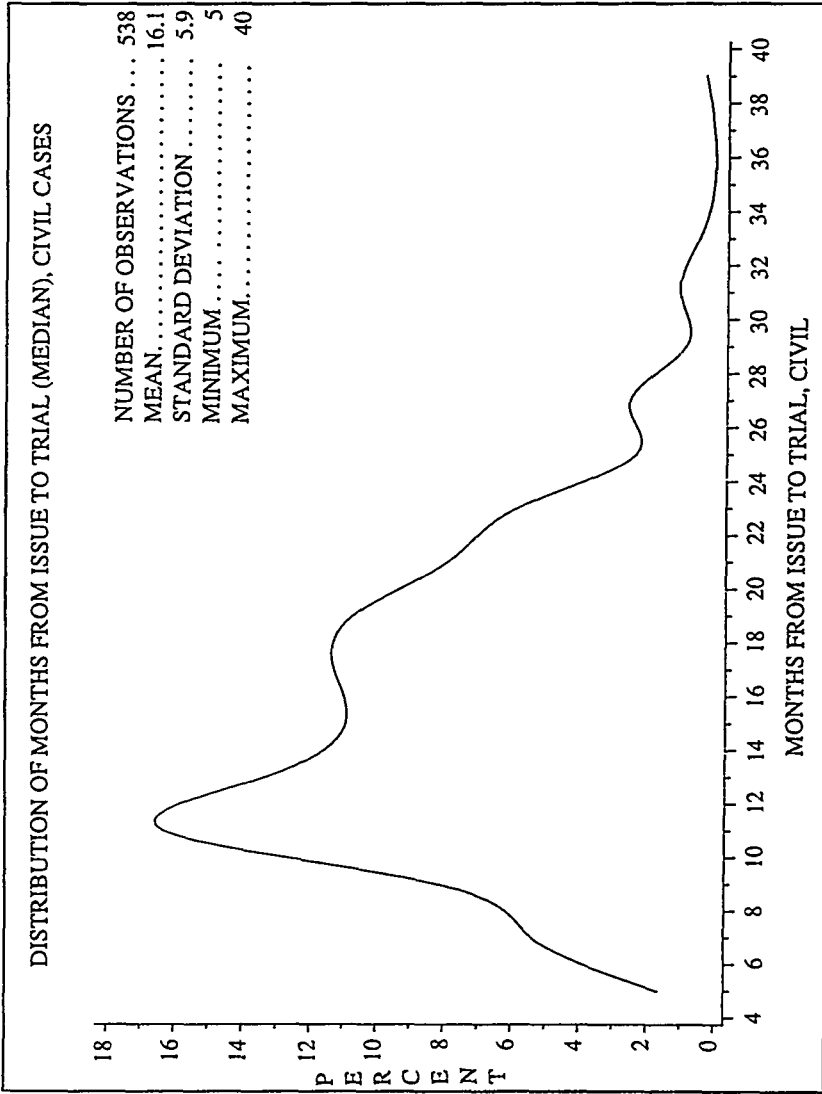
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Figure 5



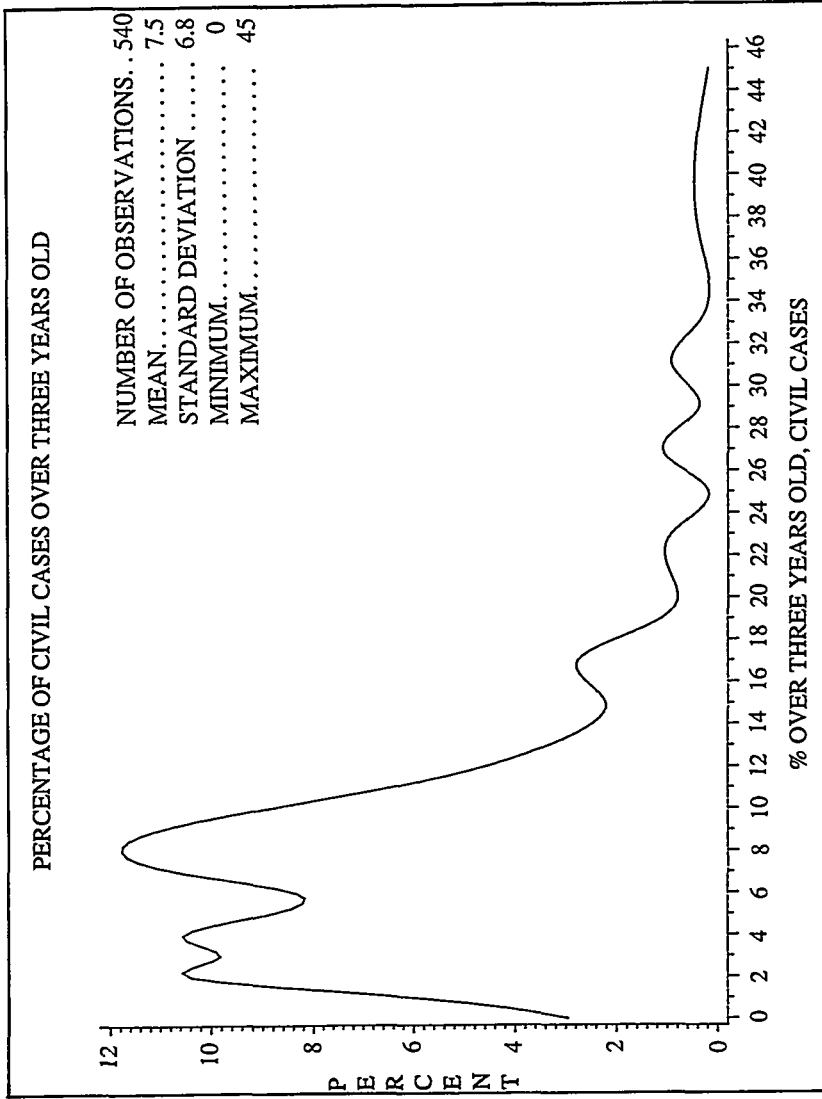
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Figure 6



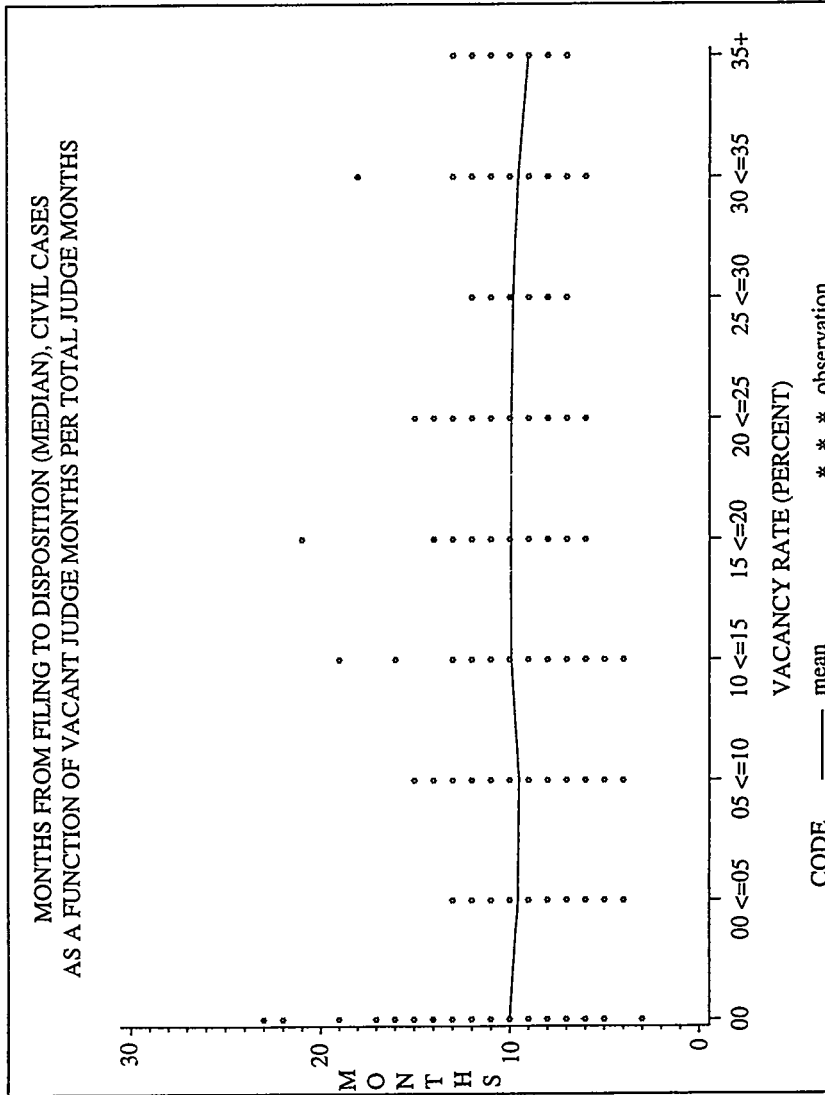
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Figure 7



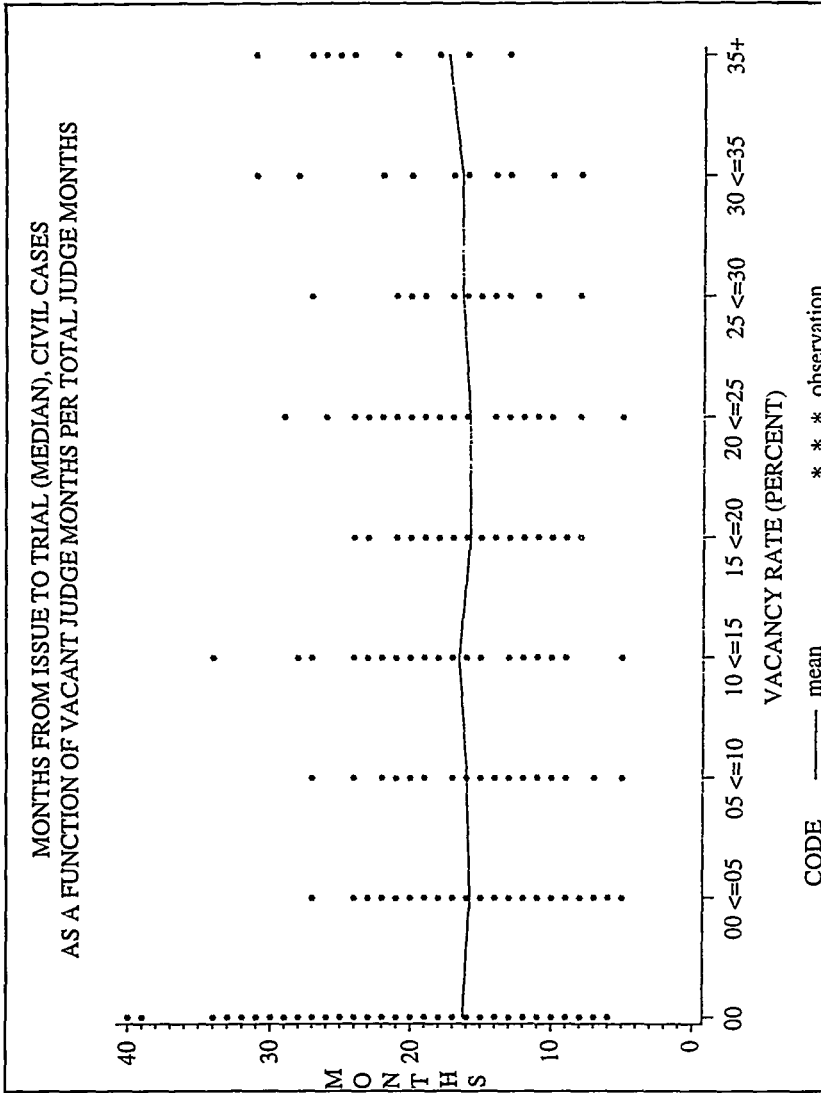
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Figure 8



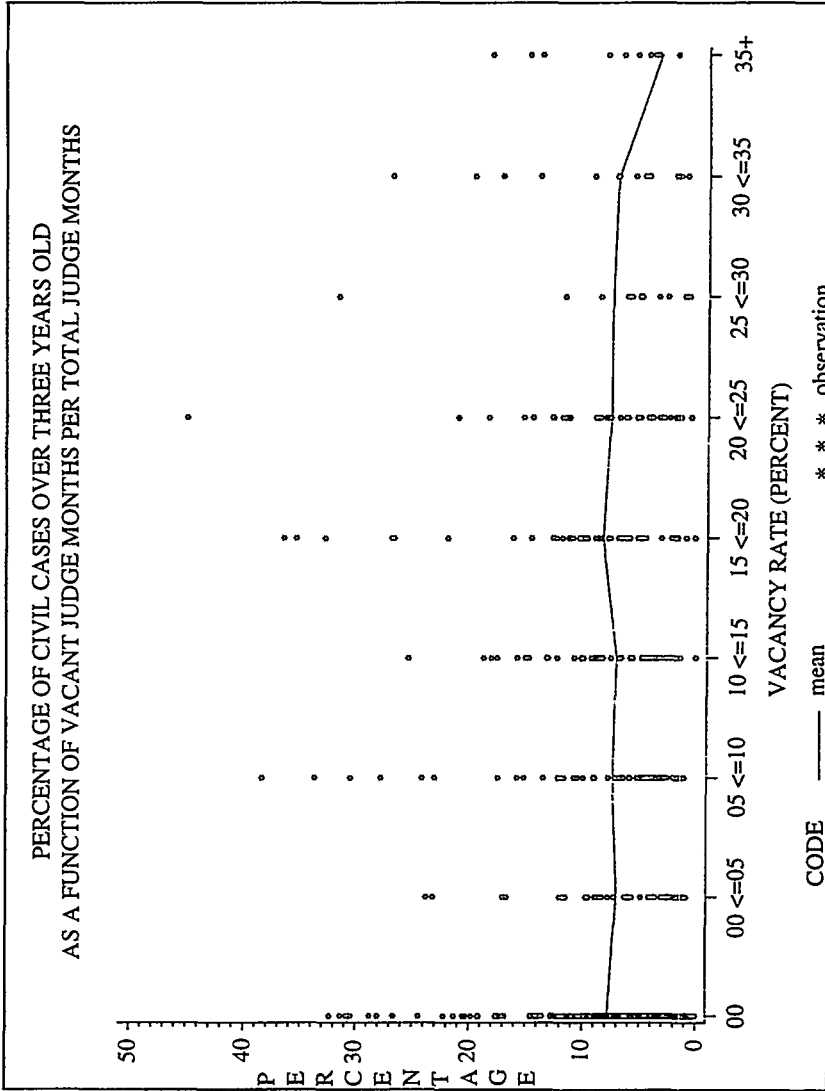
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Figure 9



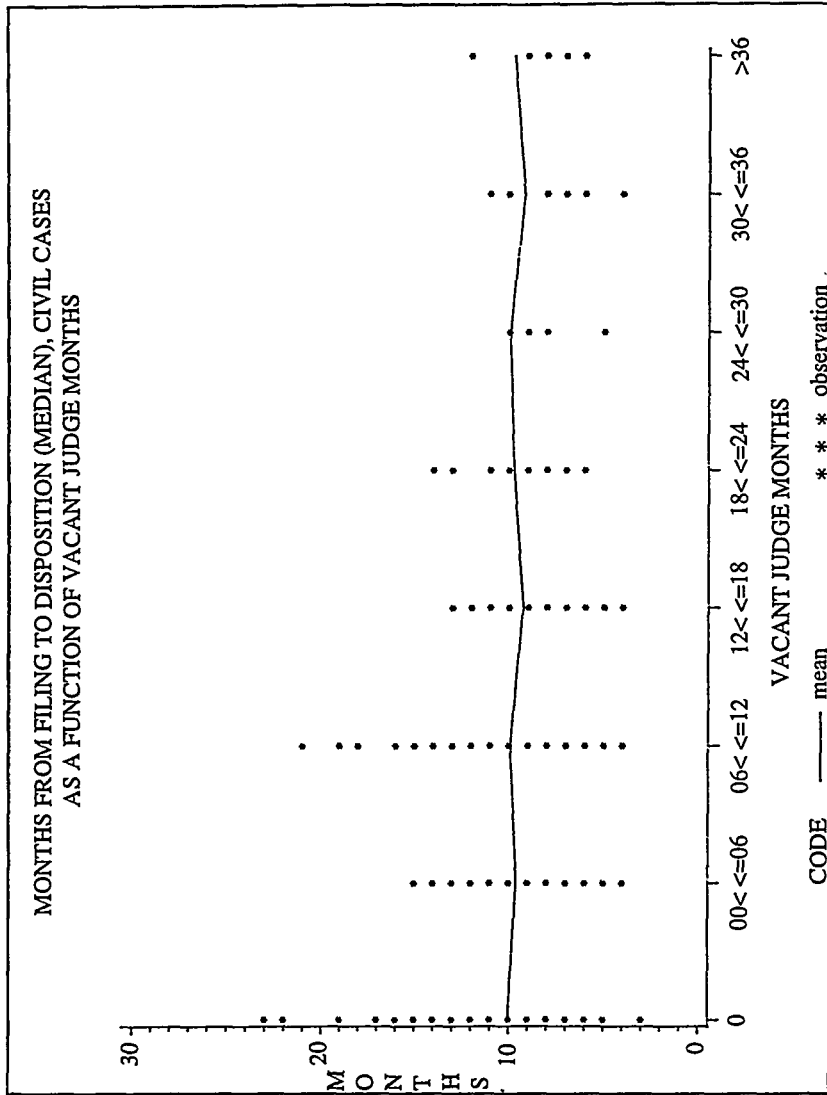
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Figure 10



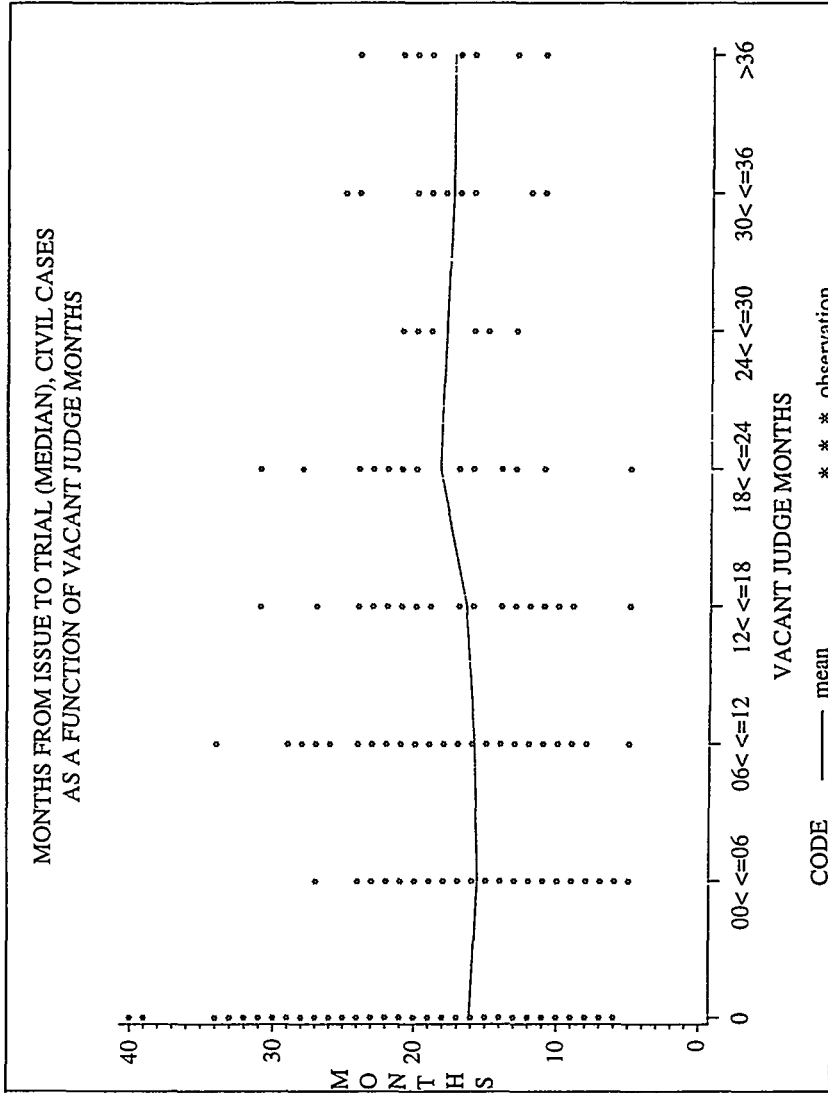
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Figure 11



APPENDIX

Figure 12



APPENDIX

Figure 13

