
Articles

Measuring Bench Presence: Federal District Judges in the Courtroom, 2008–2012

Jordan M. Singer* and Hon. William G. Young**

Abstract

In a companion piece, the authors argued for a more comprehensive model of federal district court productivity that included, among other things, a measure of each court’s capacity and commitment to provide procedural fairness to litigants. The authors further proposed a new procedural fairness metric called bench presence, a measure of the time that district judges spend adjudicating issues in an open forum.

This Article examines real-world bench presence data from the Administrative Office of the United States Courts. On the surface, the numbers are disappointing for those who view courtroom time as integral to procedural fairness protections. Specifically, the data reveal a decline

* Associate Professor of Law, New England Law | Boston.

** United States District Judge, U.S. District Court for the District of Massachusetts. The authors are grateful to Stephen Burbank, The Honorable Kevin Burke, Tigran Eldred, Lawrence Friedman, Pam Gagel, Steve Gensler, Bert Huang, Brittany Kaufmann, Rebecca Love Kourlis, Arthur Miller, Linda Mullenix, William Rubenstein, Louis Schulze, and the participants in workshops at William and Mary Law School, Albany Law School, and New England Law | Boston for helpful comments on earlier drafts. Elizabeth Sonnenberg provided invaluable research assistance and support. Any errors are ours alone. New England Law | Boston graciously provided a summer stipend to help complete much of the research in this piece.

in total courtroom hours in more than two-thirds of the federal district courts between FY 2008 and FY 2012, and an overall national decline in total courtroom hours of more than eight percent during that same period.

But there is encouraging news in the data as well. Strong levels of bench presence are not restricted to courts of a particular size, circuit, or docket composition, suggesting that there are no persistent structural barriers to any district court increasing the amount of time that its judges spend in the courtroom. In addition, there is only a weak correlation between a district court's average courtroom hours per judge and its average time to case disposition, indicating that district courts need not choose between efficiency and procedural fairness in addressing their caseloads. Based on these findings, the authors urge judges to increase courtroom hours in their own districts, and invite scholars and court administrators to further investigate the potential of the bench presence metric.

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I. INTRODUCTION

Think of a trial judge. What image comes to mind?

For most Americans, we strongly suspect that the immediate and dominant vision of the trial judge is that of a robed figure, on the bench, in the courtroom. For those not in the legal profession, this image is likely influenced by a combination of personal contact with the judicial system and depictions of judges in popular culture.¹ But even for those in the legal profession, who are much more likely to be aware of the work judges do outside of the courtroom, the instinctive conception of the trial judge is one presiding in open court.²

This image is pervasive, and with good reason. Like the iconic, blindfolded Lady Justice,³ the trial judge presiding over an open courtroom reflects our society's expectation of a fair and impartial judicial process. The anticipated characteristics of open court proceedings—solemnity, equal and dignified treatment of all parties, transparency, neutrality, and the opportunity for citizens to participate—mirror the procedural fairness guarantees to which American adjudication aspires. Simply put, the open courtroom symbolizes the best administration of justice that we as a society know how to provide.

Moreover, there is real substance behind that symbolism. In an open courtroom, the behaviors and values most closely associated with fair procedures are on full display. Observers can see for themselves the degree to which parties are treated impartially and respectfully, view the presentation of evidence and argument, and assess the trustworthiness of the decisionmaker. Based on these observations, citizens form assessments about the degree of procedural fairness afforded to the parties. These assessments in turn influence citizen beliefs about the quality of the adjudication the courts provide. Ultimately, those quality determinations directly shape the courts' social standing, legitimacy,⁴ and productivity.⁵

1. E.g., Hon. Jay William Burnett & Catherine Greene Burnett, *Ethical Dilemmas Confronting a Felony Trial Judge: To Remove or Not to Remove Deficient Counsel*, 41 S. TEX. L. REV. 1315, 1322 (2000); Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 690–91 (2004).

2. See Linda E. Carter, *Justice and Reconciliation on Trial: Gacaca Proceedings in Rwanda*, 14 NEW ENG. J. INT'L & COMP. L. 41, 44 (2007).

3. See generally JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 38–90 (2011).

4. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96 (2005).

5. See generally Hon. William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN ST. L. REV. 55 (2013) [hereinafter *Bench Presence*].

Given the ability of open court proceedings to grab hold of the public imagination and influence public evaluations about the quality of adjudication and the nature of the courts themselves, one might expect courtroom time to be closely monitored. And in fact, such time is carefully tracked in the federal district courts. Each federal district judge is required to submit a monthly report—previously the paper-based Form JS-10, now an automated form generated by the courts’ J-Net system—to the Administrative Office of the United States Courts (AO). The judge, through his or her courtroom deputy clerk, is asked to report the number of criminal and civil trials over which the judge presided that month, as well as the total hours the judge spent in trial or attending to other matters in open court.⁶ For trials, judges report both the number of separate trial days and the total number of trial hours, as well as the type of case and type of trial.⁷ All other proceedings that “require the presence of the judge and the parties” are tracked as a separate category, with the court noting the type of proceeding (arraignment, sentencing, probation hearing, motion hearing, pretrial conference, etc.) and the number of total procedural hours spent for each day of the month.⁸ The AO then compiles aggregate statistics and makes them available for internal use.⁹

These statistics carry enormous potential value. Because many aspects of procedural fairness in adjudication (such as dignified treatment of the parties and transparency in the presentation of argument and evidence) can only be experienced fully in open court, there is an obvious advantage to understanding how much time judges actually spend in the courtroom, and under what circumstances they do so. There is additional benefit to digging even deeper, and understanding the degree to which courtroom use differs across district courts, as well as the factors that drive the time allotted to courtroom activity.

To the best of our knowledge, however, the data collected by the AO have never been comprehensively analyzed, or even made available to the public as a matter of course. Rather, the Committee on Judicial Resources has foreclosed the sharing of the data on the ground that it would be “misunderstood.”¹⁰ We respectfully disagree with this assessment. Such a rich source of data, attentively handled, should be an

6. See FEDERAL JUDICIAL CENTER, CIVIL LITIGATION MANAGEMENT MANUAL 167 (2d ed. 2010); FORM JS-10, MONTHLY REPORT OF TRIALS AND OTHER COURT ACTIVITY [hereinafter FORM JS-10].

7. See FORM JS-10, *supra* note 6.

8. See *id.*

9. See *United States v. Massachusetts*, 781 F. Supp. 2d 1, 25 (D. Mass. 2011).

10. Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 89 (2006).

asset to the courts, helping them identify optimal approaches to conveying procedural fairness. That there is so much to unpack in the data is only more reason not to delay analysis any longer.

We initiate the process here, by focusing on a simple metric called bench presence. Bench presence measures the number of hours a federal district judge spends on the bench, presiding over the adjudication of issues in an open forum.¹¹ As we explain in more detail below, bench presence provides a rough but meaningful proxy for procedural fairness in adjudication by quantitatively capturing the degree to which the parties and the public are exposed to the court's practices and procedural safeguards. Bench presence also creates a useful baseline for more detailed questions about the administration of procedural justice, both by illuminating the conditions under which citizens are likely to form perceptions of procedural fairness, and by providing contextual background for other, more detailed, procedural fairness analyses.¹²

In Part II, we provide a fuller description of bench presence and its relationship to procedural fairness, adjudicative quality, and district court productivity. We then set out our methodology for calculating bench presence on a court-by-court basis.

Part III describes the current state of bench presence in the federal district courts. For those who believe in the power of the open court, the immediate situation is discouraging. Courtroom hours are in steady decline. More than two-thirds of the 94 federal district courts reported fewer hours in the courtroom in Fiscal Year (FY) 2012 than they did four years earlier. Total courtroom hours nationwide dropped more than eight percent during that same timeframe. Moreover, during that span, some district courts averaged fewer than 200 total courtroom hours per judge per year, the equivalent of less than one hour per judge per day.

At the same time, we can find no reason why the downturn should be permanent. Over the last five years, several district courts across the country have increased their courtroom hours. Moreover, a deeper analysis of the data suggests that per-judge courtroom hours are not restricted or predetermined by a district court's size, circuit, docket composition, level of judicial staffing, or commitment to speedy case resolution. Put another way, there appear to be no structural barriers to any district significantly and rapidly increasing the amount of time that its judges spend in open court. The allocation of courtroom time in every judicial district appears to be well within that district court's control.

Part IV briefly considers how courts, and court researchers, might move forward in light of these findings. Most immediately, we

11. See *Bench Presence*, *supra* note 5, at 58.

12. See *id.* at 94–97.

recommend that district courts embrace the substantial control they have over courtroom time, and look for logical opportunities to increase open court adjudication. Judges and researchers should also work together to refine the AO's data collection process so that future bench presence data can be understood and analyzed in greater detail. Finally, continued development of the bench presence metric should give rise to a more sophisticated and comprehensive measure of district court productivity—one that takes into account a court's ability to provide efficiency, accuracy, and procedural fairness to litigants and the public.

In the end, the data paint a picture in which courtroom time remains a relatively untapped resource. It need not be that way. We ascertain no structural impediments to every district court (and every district judge) spending more time on open court adjudication. Indeed, our analysis reveals an extraordinary potential to increase public exposure to procedural fairness in the courtroom. That commitment, of course, must come from each court and each judge. We hope this Article will encourage courts to reflect seriously on these opportunities and obligations.

II. BENCH PRESENCE DEFINED

A. *Bench Presence as a Proxy for Procedural Fairness*

Procedural justice is essential to the legitimacy of American adjudication.¹³ One reason is instrumental: “fair procedures . . . are perceived to produce fair outcomes.”¹⁴ Studies have repeatedly shown that even when a final outcome is unpopular or personally detrimental to a party, it is more likely to be accepted if the parties and the public believe that the process that led to that outcome was fair.¹⁵ Conversely, parties and the public are less likely to accept a case outcome, and are

13. See Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 142 (2011); *Bench Presence*, *supra* note 5, at 73–74.

14. Hon. Kevin Burke & Hon. Steve Leben, *The Evolution of the Trial Judge from Counting Case Dispositions to a Commitment to Fairness*, 18 WIDENER L.J. 397, 405 (2009).

15. See, e.g., Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994) (exploring abortion decisions); Tom R. Tyler, Jonathan D. Casper & Bonnie Fisher, *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. POL. SCI. 629, 640–41 (1989) (exploring cases involving criminal justice); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 120 (2000) [hereinafter Tyler, *Social Justice*].

less likely to be respectful of the law and legal authorities in the future, if they believe that a legal procedure was unfair or unfairly applied.¹⁶

Procedural fairness also matters because of its affective quality: the opportunity to engage in full and fair procedures confirms our place in the social groups with which we identify.¹⁷ More specifically, the opportunity to engage in the accepted procedures of the American civil and criminal justice systems confirms citizens' identities as valued members in American society, regardless of the outcome of those procedures.¹⁸ Therefore, even if an outcome is recognized as an accurate application of the relevant law to the relevant facts, it will not sit well with the public if the affected parties have not had the opportunity to engage in that "peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for the decision in [their] favor."¹⁹ Of course a fair and accurate outcome matters, but a fair process remains an independent requirement—perhaps an even more important one.²⁰ Procedural fairness, then, is seen as a necessary value both for generating fairer outcomes and for building public confidence in the judicial system's ability to generate those outcomes.

Researchers have identified four features of legal procedures that primarily contribute to perceptions about their fairness. The first is the opportunity for parties to participate in the process and allow their voices to be heard and acknowledged by the decisionmaker.²¹ The chance to tell one's story almost certainly contributes to the perceived legitimacy of the final outcome;²² some have argued that it also contributes to the

16. Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 439 (1992) [hereinafter Tyler, *Psychological Consequences*].

17. Neil Vidmar, *The Origins and Consequences of Procedural Fairness*, 15 LAW & SOC. INQUIRY 877, 890 (1991).

18. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 231–32 (1988).

19. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978).

20. See *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86–87 (1988) (holding that the district court incorrectly granted summary judgment against a defendant who had not been properly served, even though the defendant conceded that it lacked a meritorious defense); see also, e.g., Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49–57 (1976) (emphasizing the process values of dignity, equality, and tradition).

21. See Hollander-Blumoff, *supra* note 13, at 135; Michael S. King, *The Therapeutic Dimension of Judging: The Example of Sentencing*, 16 J. JUD. ADMIN. 92, 95 (2006) (discussing the elements of voice ("providing an environment where a person can present [his or her] case to an attentive tribunal"), validation ("acknowledgement by the tribunal that the case has been heard and taken into account"), and respect ("whether the judicial officer takes time to listen to the party").

22. See Hollander-Blumoff, *supra* note 13, at 135.

actual legitimacy of the outcome.²³ Participation is also valued for its own sake because it gives individuals a chance to make their own litigation choices.²⁴ Indeed, a variety of studies have shown that people value the opportunity to speak in adjudicative settings even when they believe that doing so will have no influence on the final decision.²⁵

The second contributor to perceptions of procedural fairness is neutrality. Neutrality is closely related to participation and voice: commentators have noted the psychological benefits that accrue from being “able to tell [one’s] story fully before a decisionmaker who is perceived as neutral, honest, and attentive.”²⁶ Moreover, neutrality connects directly to the legitimacy of the courts. As one scholar has noted, “impartiality is a crucial component of perceived fairness. . . . [W]hen people assess the procedural fairness of institutions, they are especially influenced by evidence of even-handedness, factuality, and the lack of bias or favoritism (neutrality)—in short, by impartiality.”²⁷

Trustworthiness, the third component of procedural fairness, itself has two dimensions. Instrumental trust concerns confidence in the predictability of a judge’s actions. To trust a judge is to say, “We have an implicit agreement that you will treat my case no differently than you would treat any other similarly situated case.”²⁸ Instrumental trust also bears heavily on the court’s institutional legitimacy.²⁹ Simply put, if

23. See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 280–81 (2004) (arguing that participating in an adjudicative proceeding confers “author[ship]” on the participant, in that the final outcome is necessarily influenced by the particular arguments that the litigant puts forward).

24. See Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 196 (1992) [hereinafter Bone, *Rethinking*] (arguing that “[t]he ‘day in court’ is often invoked in talismanic fashion”); Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 619–20 (1993) [hereinafter Bone, *Statistical Adjudication*].

25. See Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 12–13 (2007); Tyler, *Psychological Consequences*, *supra* note 16, at 441; Tyler, *Social Justice*, *supra* note 15, at 121.

26. Edward A. Amley, Jr., Note, *Sue and Be Recognized: Collecting § 1350 Judgments Abroad*, 107 YALE L.J. 2177, 2208–09 (1998) (quoting Naomi Roht-Arriaza, *Punishment, Redress, and Pardon: Theoretical and Psychological Approaches*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 13, 21 (Naomi Roht-Arriaza ed., 1995)).

27. James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 60 (2008) (internal citations omitted).

28. See *Bench Presence*, *supra* note 5, at 82.

29. See Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 11 (2003) (noting that “judicial authority might best be reconceived as a relationship of trust that courts forge with the American people”); Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 387 & tbl.5 (2001) (discussing survey data suggesting

people trust the motives of judicial authorities, they are more willing to participate in the adjudicative process³⁰ and more willing to accept judicial decisions.³¹ A second component of trustworthiness, motive-based trust, suggests that a judge is trustworthy when people can predict that his or her actions “will be motivated by a concern for [their] personal welfare.”³² That is, a judge earns motive-based trust when a party believes that the judge will make a good-faith effort to help (or at least not harm) her through the exercise of judicial authority.³³ Both instrumental and motive-based trust are fostered by openness and transparency. Courts that are transparent in their decision-making process,³⁴ and in the reasons given for their decisions,³⁵ are more likely to cultivate public trust.³⁶

A final element of procedural fairness is the degree to which every person in the courtroom is treated with dignity and respect.³⁷ Dignified treatment enhances the court’s legitimacy by showing that every participant to an adjudicatory proceeding is afforded the basic respect worthy of all human beings.³⁸ The government’s treatment of its citizens (through the courts or otherwise) has an important role in defining citizens’ views about their value in society, by shaping their feelings of security and self-respect.³⁹ Furthermore, in adjudications where individuals are singled out or where individual liberty or property is at risk (as in many criminal or administrative matters), litigant participation and litigant dignity are closely intertwined.⁴⁰

that “generalization to overall legitimacy judgments does occur and is shaped primarily by assessments of trustworthiness”).

30. John M. Greacen, *Social Science Research on “Procedural Justice”: What Are the Implications for Judges and Courts?*, JUDGES’ J., Winter 2008, at 41, 42.

31. TOM R. TYLER & YUEN J. HO, TRUST IN THE LAW 74 (2002).

32. *Id.* at 64.

33. *Id.* at 62.

34. See Hon. Jonathan Lippman, *William H. Rehnquist Award for Judicial Excellence Address*, 47 FAM. CT. REV. 199, 203 (2009).

35. See, e.g., Kathryn Hendley, *The Puzzling Non-Consequences of Societal Distrust of Courts: Explaining the Use of Russian Courts*, 45 CORNELL INT’L L.J. 517, 548 (2012) (noting that “some Russian judicial leaders have attributed the public’s lack of confidence in the [Russian] courts to the lack of transparency that has traditionally characterized th[os]e courts”).

36. See Tyler, *Social Justice*, *supra* note 15, at 122.

37. See *Bench Presence*, *supra* note 5, at 83–84.

38. See Bone, *Rethinking*, *supra* note 24, at 202; Bone, *Statistical Adjudication*, *supra* note 24, at 619–20; Hollander-Blumoff, *supra* note 13, at 139; Solum, *supra* note 23, at 262–63.

39. Tyler, *Psychological Consequences*, *supra* note 16, at 441.

40. See Bone, *Statistical Adjudication*, *supra* note 24, at 619–20; King, *supra* note 21, at 95.

These four dimensions of procedural fairness bear directly on the perceived quality of adjudication.⁴¹ Case outcomes that fail to meet constitutional or sociological standards of participation, neutrality, trustworthiness, or dignity are of a lower quality, even if the outcomes themselves are accurate.⁴² This effect on quality has a concomitant effect on the productivity of the trial courts because the productivity of public services (including court services) is a function of both the quality of services and the efficiency with which they are provided.⁴³ Accordingly, diminished perceptions of procedural fairness in adjudication are associated with diminished perceptions of the overall quality of adjudication and diminished district court productivity. Conversely, where confidence in procedural fairness is elevated, adjudicative quality and court productivity are likely to be elevated as well.⁴⁴

Procedural fairness is not easily measured. However, in the federal district courts, it is amenable to meaningful approximation through time spent in open court. Courtroom time is deeply intertwined with procedural fairness in two distinct ways. First, adjudication in open court directly enables several core characteristics of procedural fairness, like participation/voice, transparency, and dignified and equal treatment of the parties. Even where a judge is wholeheartedly committed to providing a fair and impartial process, if the parties are not afforded the opportunity to make their case in an open forum and have their arguments acknowledged directly by the judge, perceptions of procedural fairness may not reach their full capacity. Second, open court adjudication permits public monitoring. When the judge is on the bench, his or her treatment of the parties and their positions is on full display. A judge who is committed to treating every party impartially and with dignity provides a clear exhibition of that commitment in the open courtroom. Behind the scenes, by contrast, a judge with the same commitment to procedural justice has fewer opportunities to convey that he or she is trying to be fair.

We call the time that a judge spends presiding over adjudication of issues in open court *bench presence*. Bench presence, of course, is not a perfect proxy for procedural fairness. Even as it makes possible dignified and equal treatment of the parties, demonstrations of neutrality and trustworthiness, and fuller opportunities for participation, it does not guarantee them. But bench presence does not need to be a perfect

41. See *Bench Presence*, *supra* note 5, at 70 (describing procedural fairness as a necessary component of adjudicative quality).

42. See *id.* at 74–75.

43. See *id.* at 60–62.

44. See *id.*

measure to be an extremely useful one. If the qualities associated with procedural fairness are not present in the courtroom, bench presence at least allows the parties and the public to make that determination in a transparent and public setting. Moreover, formally measuring bench presence would place a value on courtroom activity in a way that always has been implicit, but never fully explicit. Bench presence, then, simultaneously enables the qualities of procedural fairness, permits for their continued review and inspection, and declares the district courts' commitment to public adjudication.

B. Calculating Bench Presence

In its most basic form, bench presence accounts for the amount of time that a judge spends in the open courtroom. While bench presence might be calculated for individual judges, we focus here on the mean level of bench presence for judges on an entire district court. We choose to examine each district court as a unit for several reasons. First, the level of the individual judge may be too fine-grained to be of much value: in any given time period, particular judges may experience docket anomalies which could potentially skew courtroom time, or may not be on the active bench for a full period. Second, because cases are randomly assigned within a district after they are filed, court-wide bench presence levels are more likely to influence a party's decision to file in a particular district. Finally, analyzing the data at the district court level makes possible comparisons between districts of the same size, geography, or docket composition.

1. Data Sources

The AO requires the courtroom deputy clerk for every active district judge and senior district judge to complete a JS-10 form on a monthly basis. The first part of the JS-10 form asks the clerk to identify each case in which a trial was held during that month and to report the total hours spent in trial on that case during the month to the nearest half-hour.⁴⁵ The second part of the form asks the clerk to identify the total number of hours spent on all other "non-trial" proceedings that require the presence of the judge and the parties.⁴⁶ The clerk is requested to state the number of proceedings that the judge held in a variety of categories—arraignments/pleas, sentencing hearings, motions, pretrial conferences, and grand jury proceedings—but is not asked to indicate the hours spent

45. FORM JS-10, *supra* note 6.

46. *Id.*

on each category.⁴⁷ Visiting district judges⁴⁸ complete a nearly identical form, the JS-10A, for the courts in which they provided visiting services during the relevant time period.

The AO compiles the JS-10 and JS-10A data into composite spreadsheets every quarter. For purposes of calculating bench presence, the most important of these spreadsheets is Table T-8, known as the Total Hours Activity Report.⁴⁹ Table T-8 converts data from the JS-10 and JS-10A forms into aggregate statistics on criminal trials and related courtroom hours, civil trials and related courtroom hours, non-trial “procedural” hours, and types of procedural events for each district court.⁵⁰ Table T-8 itself is not generally distributed to the public,⁵¹ although some of the data contained in Table T-8 are publicly available in other forms.⁵²

Some aspects of the AO data are admittedly out of sync with ordinary public perceptions. For example, the JS-10 form defines a trial as any “contested proceeding before a court or jury in which evidence is introduced,”⁵³ heavily diluting the term’s traditional meaning.⁵⁴ This linguistic sleight of hand leads to a significant overcount of actual trials

47. *Id.*

48. Active and senior district judges may be designated to serve in other districts, usually where the requesting district faces a judgepower emergency brought on by a surge in filings, prolonged vacancy, extended illness, or where all resident judges in the district have recused themselves due to a conflict. JENNIFER EVANS MARSH, *THE USE OF VISITING JUDGES IN THE FEDERAL DISTRICT COURTS: A GUIDE FOR JUDGES & COURT PERSONNEL 1* (2003). Statutory provisions concerning the designation of visiting judges are set forth in 28 U.S.C. §§ 291–297 (2006 & Supp. V 2012).

49. Table T-8 was designated by the AO as Table R-11 until 2011. The tables are functionally identical, and we refer to them collectively as Table T-8 here.

50. Specifically, Table T-8 tracks the aggregate number of arraignments, sentencing hearings, motion hearings, pretrial conferences, grand jury proceedings, and supervised release hearings conducted by each district court within the relevant time frame. The hours spent on these proceedings are collectively grouped under the heading of Total Procedural Hours; there is no breakdown of hours by type of event.

51. The AO makes a variety of statistical tables available to the public as a part of its annual report. *See, e.g.*, STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, *JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2011 ANNUAL REPORT OF THE DIRECTOR* (2012) [hereinafter *JUDICIAL BUSINESS 2011*], *available at* <http://1.usa.gov/GIVsrq>. This public disclosure, however, does not include Table T-8 or any other table that expressly tracks courtroom hours.

52. *See, e.g.*, Table T-1: Civil and Criminal Trials Completed, by District, During the 12-Month Period Ending September 30, 2011, in *JUDICIAL BUSINESS 2011*, *supra* note 51, at 376–78.

53. FORM JS-10, *supra* note 6.

54. *See* Hon. William G. Young, *A Lament for What Was Once and Yet Can Be*, 32 B.C. INT’L & COMP. L. REV. 305, 317 (2009) (noting that the JS-10 definition of “trial” includes any disputed evidentiary hearing, including a hearing on a motion to suppress, a *Daubert* hearing, *Markman* hearing, sentencing hearing, preliminary injunction hearing, or separate damages hearing).

held in the federal district courts—perhaps by as much as one-third.⁵⁵ The JS-10 form also potentially inflates the number of non-trial hours spent in the open courtroom by commanding judges to report any case activity that requires the presence of the judge and the parties, “whether held in the courtroom or in chambers.”⁵⁶

Still, these formulations do not inhibit the meaningful calculation of bench presence. Even though the definition of “trial” is overbroad, the separation of courtroom time into trial hours and procedural hours gives a general sense of the nature of courtroom activity in each district court.⁵⁷ And because we do not rely on a count of trials as part of the bench presence calculation, those figures are of less concern here. The inclusion of activities held in chambers rather than the courtroom might be more problematic, in that such proceedings lack the transparency and public dimension found in open court hearings. At the same time, however, such events do embrace several of the core dimensions of procedural fairness, such as party participation, dignity, and trustworthiness. Because this “weak” form of bench presence shares more aspects of procedural fairness with open court proceedings than it does with other judicial tasks, we include it in our general measure, with the acknowledgement that it is more limited than trial or other open court proceedings.⁵⁸ Moreover, the data limitations identified here might be eliminated over time. Some modest changes in the way JS-10 data are collected—for example, by separating out actual trials from other evidentiary hearings, and reporting procedural hours by case type and actual procedural activity undertaken—would permit a more refined analysis of bench presence in the future.⁵⁹

2. Calculation Methodology

Our basic bench presence calculation is a function of two variables: the total courtroom hours logged in each district during a given period (TOTALHRS) and the number of active district judges in the district during the same period (ACTIVEJUDGES). Each district’s bench presence is simply the ratio of its TOTALHRS to its ACTIVEJUDGES.

TOTALHRS reflects the total courtroom hours reported by active district judges, senior district judges, and visiting judges—that is, any Article III judge sitting in the capacity of a federal district judge.⁶⁰ That

55. Young, *supra* note 10, at 88.

56. FORM JS-10, *supra* note 6.

57. *Bench Presence*, *supra* note 5, at 92.

58. *Id.* at 93.

59. *See id.*; *see also infra* Part IV.A.2.

60. Hours expended by magistrate judges, special masters, and the like are not included. The reason for this limitation is primarily practical. Magistrates and others

figure includes all reported criminal trial hours, civil trial hours, and procedural hours for each district on Table T-8.⁶¹ We make no distinction between “trial” hours and “procedural” hours for the purpose of calculating TOTALHRS because the judicial activities and behaviors that promote perceptions of procedural fairness—such as dignified treatment, transparency, and neutrality—may be present in *any* open court proceeding, not just a trial or evidentiary hearing.⁶²

We calculate ACTIVEJUDGES by subtracting the number of vacant judgeship years in a district from the number of congressionally authorized judgeships in that district during the same 12-month period.⁶³ District court vacancies are typically reported in terms of vacant judgeship months.⁶⁴ We divide that figure by 12 to determine vacant judgeship years for the district.⁶⁵ In districts that have experienced no vacancies during a 12-month period, ACTIVEJUDGES will equal the number of authorized judgeships. In other districts, the impact of vacancies is readily observed: in FY 2011, for example, the Southern District of New York experienced a reported 85.4 vacant judgeship months,⁶⁶ the equivalent of more than seven vacant judgeship years. These vacancies dropped the district’s ACTIVEJUDGES from a full complement of 28 to 20.883—a reduction in judgepower of more than 25 percent.

who are not Article III judges do not complete the JS-10 form, so their courtroom data are not tracked in the same manner as district judges. We recognize that magistrate judges can—and do—promote procedural fairness in the courtroom through behavior that is in many ways identical to that of district judges. Perhaps future data collection efforts will include the courtroom contributions of magistrate judges as well.

61. Despite our reservations about the JS-10 form’s definition, for purposes of explaining and analyzing the JS-10 data, we use the term “trials” in the same manner as the AO.

62. One of us has previously sliced the JS-10 data somewhat differently, examining individual district’s relative rankings with respect to trials, trial hours, and procedural hours. *See* *United States v. Massachusetts*, 781 F. Supp. 2d 1, 25 (D. Mass. 2011) (Young, J.).

63. 28 U.S.C. § 133 (2006 & Supp. V 2012) (enumerating the authorized judgeships for each federal district court contained within each state, the District of Columbia, and Puerto Rico); 48 U.S.C. § 1424b (2006) (same for Guam); 48 U.S.C. § 1614 (2006) (same for the Virgin Islands); 48 U.S.C. § 1821 (2006) (same for the Northern Mariana Islands).

64. *See generally* ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS, NATIONAL JUDICIAL CASELOAD PROFILE, <http://1.usa.gov/1ipF0cc> (last visited Oct. 28, 2013) [hereinafter 2012 NATIONAL JUDICIAL CASELOAD PROFILE].

65. By way of example, the District of Colorado has a reported 23.0 vacant judge months for the 12-month period of FY 2009. *See id.* at 79. This translated to 1.917 vacant judge-years. That figure was subtracted from the District of Colorado’s seven authorized judgeships, resulting in 5.083 active judges for FY 2009.

66. *See id.* at 11.

Dividing a district's TOTALHRS by its ACTIVEJUDGES yields TOTALHRS/JUDGE, the district's basic measure of bench presence. This per-judge measure is intended to equalize differences in the size of judicial districts, allowing for more meaningful comparisons between small districts with two or three active judges and large districts with 15 or more active judges. It also allows for individual districts to be compared across time, permitting one to examine the impact (if any) of a significant change in ACTIVEJUDGES in any given district over a specific period.

The inclusion of senior and visiting judges' contributions in TOTALHRS, but not in ACTIVEJUDGES, is intentional. Our interest here is in measuring the bench presence of each district court as an organization. Senior judges contribute to bench presence and its associated effects on procedural fairness in a manner that is indistinguishable from that of active judges.⁶⁷ Visiting judges similarly contribute to a court's bench presence with direct courtroom activity in the district and occasionally through videoconferences that reasonably approximate the courtroom experience.⁶⁸ Including the courtroom hours of senior and visiting judges therefore provides a more complete picture of the procedural fairness behaviors that a district court displays to litigants and the public. It is a reflection of the court's overall commitment to providing an open forum for adjudication, a commitment that is well within each court's (and each judge's) control.

Unfilled judicial vacancies on a district court, by contrast, are not within the court's control. A district court's number of authorized judgeships reflects Congress's assessment of the judgepower needed for each court to operate at acceptable levels. When an active district judge dies, resigns, retires, takes senior status, or otherwise leaves the bench, by definition the court is operating at a suboptimal level of judgepower. Yet there is no corresponding diminution in the court's docket or the public's level of expectation. Moreover, the court is powerless to fill the open judgeship on its own. By taking unfilled vacancies (in some

67. See Hon. Frederic Block, *Senior Status: An "Active" Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533, 545–46 (2007) (noting at least one district where senior judges "currently maintain[] on average a larger caseload than the court's active judges"); Wilfred Feinberg, *Senior Judges: A National Resource*, 56 BROOK. L. REV. 409, 412 (1990) ("In many districts and circuits, the work of senior judges has been indispensable to the proper conduct of judicial business. Seniors can be assigned to sit on a court when there are special problems that can be solved by the immediate availability of an experienced judge, such as emergencies caused by illness or by the need to comply with the Speedy Trial Act.").

68. See MARSH, *supra* note 48, at 15 (noting that while there are no formal limitations on the types of cases visiting judges may be assigned, "[m]any districts ask visiting judges to handle trial-ready cases"); *id.* at 23–24 (discussing one approach to videoconference hearings and trials in the District of Massachusetts).

instances, stubbornly persistent vacancies)⁶⁹ into account, the ACTIVEJUDGES measure captures the court's judgepower relative to congressionally determined optimal levels, and assures that district courts are not punished in a productivity assessment merely because other branches of government are slow to bring the court's judicial membership back to authorized levels. In brief, our bench presence metric rewards courts for adding judgepower creatively, but not for lacking the judgepower to which they are statutorily entitled.

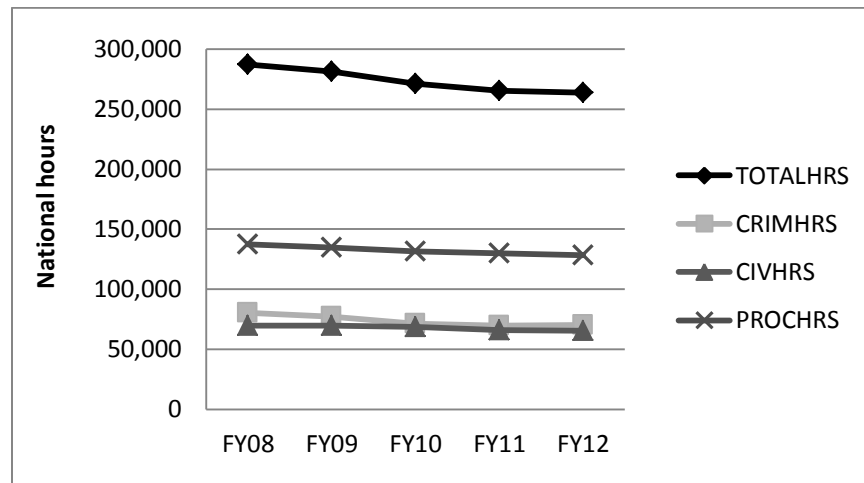
III. EXAMINING THE DATA

A. *The National Decline in Courtroom Hours*

We begin by examining the aggregate data for all 94 federal district courts for the last five fiscal years. One trend is clear: nationally, courtroom hours are in steady decline. As shown in Figure 1 below, total courtroom hours fell in every year included in our study, dropping from over 287,000 hours in FY 2008 to about 263,000 hours in FY 2012. Stated differently, federal district judges reported spending 24,000 *fewer* hours in the courtroom in 2012 than they did in 2008. This overall drop was reflected at the district court level: 66 of the 94 districts reported fewer total courtroom hours in FY 2012 than they did in FY 2008. The drop was also observed in each component of TOTALHRS: national criminal trial hours fell approximately 13 percent, and national civil trial hours and procedural hours each fell more than six percent. The steepest drop during the study period came between FY 2009 and FY 2010, when TOTALHRS plunged by nearly 10,000 hours nationwide.

69. On the recent vacancy crisis, see RUSSELL R. WHEELER, JUDICIAL NOMINATIONS AND CONFIRMATIONS AFTER THREE YEARS—WHERE DO THINGS STAND? (Jan. 13, 2012), *available at* <http://bit.ly/193on4R>.

FIGURE 1. Criminal trial hours, Civil trial hours, Procedural hours, and Total hours by Year, All Federal District Courts, FY 2008–2012



The national decline in courtroom hours was also reflected in per-judge bench presence measures. As shown in Table 1 below, the mean yearly national TOTALHRS/JUDGE fell substantially between FY 2010 and FY 2012 after slow growth the previous two years. The steepness of the recent drop is notable: from 2008 to 2011, the mean TOTALHRS/JUDGE never fell below 444 hours per judge, but in 2012 it declined to just over 430 hours per judge. Assuming ordinary workweeks and vacation schedules, 430 hours per year translates to less than two hours per day on the bench.⁷⁰ Increasingly, the business of the U.S. district courts is taking place behind closed doors.⁷¹

70. We assume here a 40-hour workweek with normal federal holidays and three weeks for vacation each calendar year. This translates to about 230 courthouse days a year.

71. See generally Brock D. Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2d 453 (2007).

TABLE 1. Mean hours per judge for all district courts, by category of proceeding, FY 2008–2012

| YEAR(S) | CRIMINAL TRIAL HRS | CIVIL TRIAL HRS | OTHER PROCEDURAL HRS | TOTAL |
|--------------------------------------|--------------------|-----------------|----------------------|---------------|
| 2008 | 124.50 | 108.34 | 213.20 | 446.04 |
| 2009 | 122.79 | 110.88 | 214.38 | 448.04 |
| 2010 | 119.48 | 114.43 | 220.23 | 454.12 |
| 2011 | 116.88 | 110.33 | 217.02 | 444.23 |
| 2012 | 114.15 | 106.80 | 209.54 | 430.49 |
| 2008–2012 (mean per year) | 119.64 | 110.12 | 214.82 | 444.58 |

One might be tempted to attribute the national decline in courtroom hours to the loss in judgepower stemming from the recent vacancy crisis. If each district court had its full complement of authorized judges, the overall judgepower of the district courts during any 12-month period would be 677 judge-years.⁷² Due to unfilled vacancies, however, in FY 2008 the number of active judge-years in the district courts was only 643.8. That number fell further to 627.8 judge-years in FY 2009, then plummeted to 597.7 judge-years in FY 2010 before recovering slightly (to 598.1 judge-years) in FY 2011. Put another way, in FY 2011 the federal district courts were operating with nearly 80 fewer active judges than they were entitled to by statute, and 45 fewer active judges than they had just three years earlier.

Fewer active judges logically might lead to fewer courtroom hours because there is less opportunity to place a judge in the courtroom. And indeed, the persistent decline in TOTALHRS between FY 2008 and FY 2011 mirrors a drop in active judges nationwide during that same period. But in FY 2012 the trends diverged: TOTALHRS continued to decline (by almost 2,000 hours from FY 2011 levels), even as the district courts experienced a considerable increase in the number of active judges.⁷³ If the problem were simply one of judgepower, some uptick in the national TOTALHRS figure for FY 2012 would have been realized. The existence of vacancies is therefore, at best, an incomplete explanation for the national slide in courtroom time.

72. See 2012 NATIONAL JUDICIAL CASELOAD PROFILE, *supra* note 64, at 1 (showing 677 authorized judgeships for the 94 federal districts).

73. Vacancies dropped in FY 2012 to a reported 768 judgeship months, meaning that the number of active judge-years nationally rose to 613 for that 12-month period. See *id.*

Even if the cause of declining courtroom hours cannot be easily identified, the consequences of that decline are evident. First, as described above, fewer judicial hours in the courtroom translate to fewer opportunities for the district courts to cultivate and display their commitment to procedural fairness. Even though judges work inside and outside the courtroom to provide fair processes and fair outcomes, without the regular presence of an open forum, many elements of procedural fairness (including transparency, dignity, and participation) are severely diminished. A second consequence flows from the first: because procedural fairness perceptions influence public assessments of the overall quality of adjudication, fewer courtroom hours may erode faith in the quality of services that the district courts provide. Third and again related, because adjudicative quality is an integral component of court productivity, a decline in courtroom hours may indicate a concomitant decline in the total productivity of the federal district courts. These consequences are potentially severe, and therefore warrant attention.

Fortunately, the AO data also contain some encouraging news for those committed to stemming the slide of TOTALHRS. While national numbers continue to fall, in a number of individual districts courtroom time is alive and well.⁷⁴ It may be possible to examine these specific districts to determine why they consistently achieve high levels of bench presence. Moreover, researchers can take advantage of the wide variation across districts in per-judge courtroom time to explore the characteristics of bench presence more fully. Looking at district-level data, we examine whether bench presence is substantially predetermined by factors outside of the courts' control, or whether courts (and individual judges) have the power and flexibility to increase their courtroom hours on their own. Based on a detailed review of the data, we find no structural barriers preventing courts from increasing their bench presence significantly and immediately.

B. Bench Presence at the District Court Level

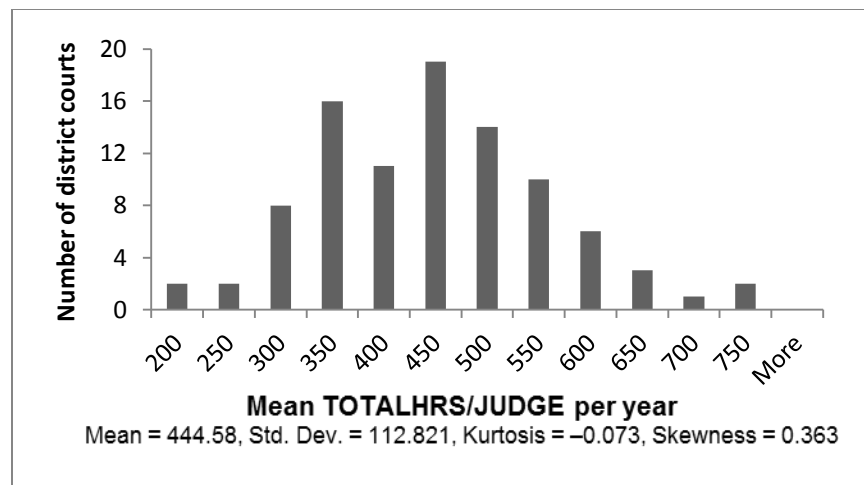
Bench presence levels, as measured by total courtroom hours per judge, vary substantially across districts. For the entirety of the five-year study period, district courts ranged from a low of 192.2 hours per judge

74. One example is the District of Colorado, which made a conscious choice to increase its bench presence by encouraging the reference of civil cases to magistrate judges for trial and not simply for settlement conferences. Significantly, this redeployment of resources did not adversely affect any of the efficiency measures on which district courts are evaluated. Interview with Hon. Marcia Krieger, Chief Judge, United States District Court for the District of Colorado (Nov. 2012).

per year in the Southern District of West Virginia to a high of 735.5 hours per judge per year in the Eastern District of California. Figure 2 shows the distribution of mean TOTALHRS/JUDGE in all 94 districts.

Table 2 sets out the 12 district courts with the highest mean yearly bench presence during the FY 2008–2012 period. As noted, the Eastern District of California far outpaced all other districts during this time. The Eastern District of New York is a distant second, with a mean annual bench presence of slightly more than 700 total hours per judge per year, followed by two more districts at about 650 total hours per judge per year. Table 2 also shows the z-score for each district's mean yearly total hours per judge, which is a measure of how many standard deviations that figure is above or below the national mean.

FIGURE 2. Distribution of mean total courtroom hours per judge for all district courts, FY 2008–2012



**TABLE 2. Mean TOTALHRS/JUDGE per year,
FY 2008–2012 (for courts with the highest mean
TOTALHRS/JUDGE per year)**

| COURT | MEAN TOTALHRS/JUDGE | Z-SCORE | CIRCUIT | AUTHORIZED JUDGES |
|------------|------------------------|---------|---------|----------------------|
| E.D. Cal. | 735.47 | 2.58 | 9 | 6 |
| E.D.N.Y. | 705.54 | 2.31 | 2 | 15 |
| S.D. Fla. | 658.46 | 1.90 | 11 | 18 |
| S.D.N.Y. | 645.25 | 1.78 | 2 | 28 |
| M.D. Tenn. | 611.54 | 1.48 | 6 | 4 |
| N.D. Ill. | 606.63 | 1.44 | 7 | 22 |
| D. Or. | 593.17 | 1.32 | 9 | 6 |
| M.D. Pa. | 591.97 | 1.31 | 3 | 6 |
| D. Utah | 590.97 | 1.29 | 10 | 5 |
| D. Colo. | 582.41 | 1.22 | 10 | 7 |
| W.D.N.Y. | 580.65 | 1.21 | 2 | 4 |
| D.P.R. | 557.88 | 1.00 | 1 | 7 |

The top 12 courts in bench presence are otherwise notably diverse. District courts of all different sizes, located in different circuits, and with different dockets all demonstrated the capacity and commitment to regularly adjudicate matters in open courtrooms.

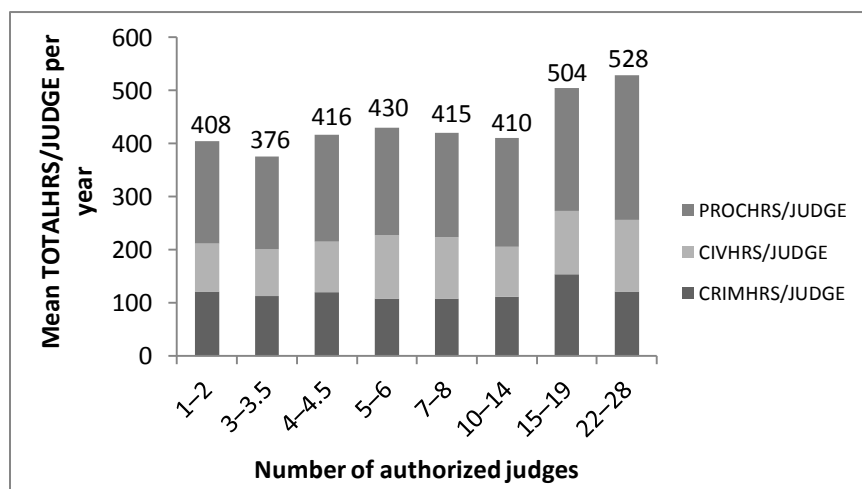
What is responsible for the success of the top bench presence courts, and why is there variation in bench presence across district courts more generally? The question is important because if bench presence is dependent on factors beyond each court's direct control (for example, its size or the nature of its docket), the ability to directly affect levels of courtroom time may be more restricted. On the other hand, if bench presence is not associated with such external considerations, courts should have more freedom and capability to alter their bench presence levels as they see fit. As a preliminary examination of this question, we looked at five structural characteristics of the district courts: (1) court size; (2) circuit affiliation; (3) weighted caseload; (4) docket composition; and (5) the nature of the court's judicial staffing.

1. Court Size

In theory, the size of a district court (as measured by the number of congressionally authorized judgeships) should be largely immaterial to its level of bench presence because bench presence is determined on a per-judge basis. Interestingly, however, larger courts as a group clearly outperformed both small and medium-sized courts. In fact, small courts as a group were the worst performers. Courts with fewer than five

authorized judgeships averaged less than 400 TOTALHRS/JUDGE each year, while courts with five to eight authorized judgeships averaged about 430 TOTALHRS/JUDGE per year, and courts with more than ten authorized judgeships averaged more than 470 TOTALHRS/JUDGE per year. Even when broken down into more precise groupings, larger courts on average had a considerably higher level of bench presence than their smaller counterparts. Districts with 15–19 authorized judgeships averaged a little over 500 TOTALHRS/JUDGE during the study period, and districts with 22 or more authorized judgeships averaged 528 TOTALHRS/JUDGE—over 100 hours more per judge than in smaller court groupings.

FIGURE 3. Mean total courtroom hours per judge by number of authorized judges per district, FY 2008–2012



Our analysis showed that one or two outliers were not responsible for the relatively higher level of bench presence among larger courts. Larger courts surpassed smaller courts both in median and mean rankings of TOTALHRS/JUDGE. Indeed, four of the six districts with the highest levels of bench presence during the FY 2008–2012 time frame—the Eastern District of New York, Southern District of Florida, Southern District of New York, and Northern District of Illinois—are among the largest courts in the country, with at least 15 authorized judgeships each.

Larger courts may have higher levels of bench presence on average because they can draw from a larger pool of potentially available judges to hold a hearing or trial. In a district with 15 or more authorized judges, for example, it is more likely that a judge will be immediately available

for an emergency hearing or to assist another judge whose trial calendar is full. By contrast, in a district with two or three authorized judges, it is less likely that at least one judge will be available at any given time for hearings or trials. This is a reflection of availability, not collegiality—although a judge’s willingness to “pitch in” by taking on additional courtroom proceedings when fellow judges are busy would certainly be expected to drive a district’s bench presence even higher. An alternative—and not inconsistent—explanation is that larger courts tend to be located in more heavily urban areas, where the relative accessibility of the courthouse, and perhaps the local legal culture, promote regular courtroom hearings.

While the trends in court size were unmistakable, we hasten to add that several districts with six or fewer authorized district judges nevertheless achieved high levels of bench presence during the study period. The Eastern District of California, Middle District of Tennessee, District of Oregon, Middle District of Pennsylvania, District of Utah, and Western District of New York—all districts with four to six authorized judges—each had a mean TOTALHRS/JUDGE of more than 100 hours above the national average for FY 2008–2012.⁷⁵

The generally stronger bench presence numbers exhibited by larger courts suggests to us that the availability of a larger pool of judges in a district can contribute positively to a district’s courtroom hours. At the same time, district size is plainly not dispositive. Smaller courts may not have access to the same judicial resources as their larger brethren, but even so, several small courts far exceed the national average for bench presence.

2. Circuit

We also reviewed mean levels of bench presence by circuit. Here the Second Circuit clearly stood out, with a yearly mean of more than 610 TOTALHRS/JUDGE across its six district courts. Three of the six districts in the Second Circuit placed among the top 11 districts nationally in yearly mean TOTALHRS/JUDGE, and five districts were in the top 30. We can discern no clear explanation for this strong circuit-wide performance, other than to note that all of the districts in the Second Circuit (save the District of Vermont) have been proactive in seeking out the services of visiting judges, including judges from outside the circuit.

The data trends were far less conclusive for other circuits. The Seventh Circuit placed second overall in mean yearly TOTALHRS/JUDGE. However, this figure was skewed by the strong

75. See *supra* Table 2.

performance of a single large district, the Northern District of Illinois. The median national bench presence rank for districts in the Seventh Circuit was 62. Likewise, the Tenth Circuit had three districts in the top 15 nationally, but also contained some districts with relatively low levels of bench presence. Other circuits saw similar variability. This suggests that as a whole, circuit affiliation is not a particularly useful mechanism for understanding the dynamics of bench presence at a district court level.

TABLE 3. Mean yearly TOTALHRS/JUDGE and mean and median district court rank, FY 2008–2012, by circuit

| CIRCUIT | NO. OF DISTRICTS | MEAN TOTALHRS/JUDGE per YEAR | CIRCUIT RANK | MEAN DIST. RANK | MEDIAN DIST. RANK |
|---------|------------------|------------------------------|--------------|-----------------|-------------------|
| 1 | 5 | 427.40 | 7 | 57 | 60 |
| 2 | 6 | 612.53 | 1 | 20.3 | 17 |
| 3 | 6 | 459.55 | 3 | 30.7 | 29 |
| 4 | 9 | 391.18 | 10 | 55.8 | 68 |
| 5 | 9 | 368.20 | 11 | 60.7 | 66 |
| 6 | 9 | 456.07 | 4 | 40.1 | 39 |
| 7 | 7 | 476.07 | 2 | 48.3 | 62 |
| 8 | 10 | 404.83 | 9 | 47.6 | 47 |
| 9 | 15 | 446.96 | 5 | 43.9 | 40 |
| 10 | 8 | 425.88 | 8 | 49.4 | 54 |
| 11 | 9 | 441.81 | 6 | 54.6 | 54 |
| DC | 1 | 355.09 | 12 | 65 | 65 |

3. Weighted Caseload

It is well accepted that some types of cases demand more judge time and court resources than others. Since the 1970s, the federal courts have assigned weights to each case-type in order to “indicate how much more or less time-consuming one type of case is compared to other cases.”⁷⁶ In 2003–2004, the Federal Judicial Center undertook an extensive new study of federal case weights, which took into account both the types of events that a judge must complete to process a case, and the amount of time typically required to accomplish those events.⁷⁷ The median case was assigned a weight of 1.00, and all other case types were assigned

76. FEDERAL JUDICIAL CENTER, 2003–2004 DISTRICT COURT CASE-WEIGHTING STUDY 1 (2005).

77. *Id.* at 1–2.

weights relative to that weight.⁷⁸ The weighted caseload of each district court is now reported each quarter as part of its Federal Court Management Statistics.⁷⁹ For the 12 months ending September 2012, the national average was 520 weighted filings per judge.⁸⁰ In that same period, the District of Delaware recorded the highest rate of weighted filings per judge with 1165⁸¹—more than double the national average. The District of Wyoming recorded the lowest rate of weighted filings per judge with 179⁸²—less than half the national average.⁸³

One might logically expect to see a close relationship between a court's per-judge weighted caseload and its level of bench presence. More complex cases are generally assumed to be more time-consuming, which in turn may necessitate a higher investment of courtroom time. Our study, however, found only a weak to moderate correlation between a district court's weighted caseload per judge and TOTALHRS/JUDGE ($r = 0.2816$ for FY 2012).⁸⁴ Indeed, a closer look reveals a number of districts with high levels of bench presence and a relatively low weighted caseload per judge, or vice versa. For example, the Eastern District of Texas, District of Minnesota, Southern District of Illinois, and Middle District of Florida all placed among the ten courts with the highest mean annual weighted caseloads per judge during the five-year study period, yet none of these districts were above the national average for bench presence in the same period. Conversely, the District of Wyoming and the Eastern District of Washington ranked 90th and 85th, respectively, in mean annual weighted caseload per judge during the study period, yet they were both among the top 15 districts for mean annual bench presence during the same time period. This suggests that while district courts may view complex or highly weighted cases as an opportunity to

78. *Id.* at 4.

79. Federal Court Management Statistics reflect courtwide data on caseload and case processing times. *See, e.g.*, 2012 NATIONAL JUDICIAL CASELOAD PROFILE, *supra* note 64. These statistics do not include data reported on the JS-10 form.

80. *Id.* at 1.

81. *Id.* at 14.

82. *Id.* at 86.

83. The AO does not calculate weighted filings for three districts: Guam, the Virgin Islands, and the Northern Mariana Islands.

84. The correlation coefficient r measures the relationship between two variables, and is expressed as a number between zero (no relationship) and one (a perfect linear relationship). As r increases, the relationship between the variables grows stronger. A positive correlation indicates that as one variable increases, the other variable also increases; a negative correlation indicates that as one variable increases, the other decreases. *See* WILLIAM D. BERRY & MITCHELL S. SANDERS, UNDERSTANDING MULTIVARIATE RESEARCH 10 (2000). Similar correlations to that reported above were found for FY 2011 ($r = 0.3626$), FY 2010 ($r = 0.3796$), FY 2009 ($r = 0.3865$), and FY 2008 ($r = 0.2743$). Throughout this Article, the p -value for any Pearson correlation coefficient r is <0.05 unless otherwise indicated.

increase courtroom time, a high weighted caseload is neither a necessary nor a sufficient condition for achieving strong levels of bench presence.

4. Docket Composition

While weighted caseload is intended to capture the overall time-intensiveness of a court's docket, it does not expressly concern itself with particular case types. To account for the possibility that specific types of cases influence bench presence levels, we compared each district's total hours per judge against the specific composition of its docket for the FY 2008–2012 period. The results paralleled the weighted caseload analysis, with no particular case types standing out as having a strong statistical relationship with a district's overall bench presence levels.

Ratio of civil to criminal filings. We began by tracking each district's ratio of civil to criminal filings. Calculating civil filings is fairly straightforward: the AO directly reports all civil case filings for each district, both in the aggregate and broken down into more than 30 case types.⁸⁵ Calculating the number of criminal filings is slightly more complex. Until FY 2011, the AO separately reported both the total number of criminal felony cases filed and the total number of criminal felony defendants charged in each district court each year, again broken down by type of felony.⁸⁶ Beginning October 1, 2011, however, the AO discontinued most of its reporting tables for felony cases, explaining that “single-case profiles often do not capture the characteristics and complexity of multi-defendant cases.”⁸⁷ In order to maintain the consistency of the criminal data throughout the five-year study period, we follow the AO's lead and focus exclusively on felony defendants, treating each reported felony defendant as a separate filing for purposes of docket analysis.

Following this methodology, nationally about 74 percent of reported filings in the federal district courts for FY 2008–2012 involved civil suits, and about 26 percent of reported filings involved criminal felony

85. See, e.g., Table C-3—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2011, in JUDICIAL BUSINESS 2011, *supra* note 51, at 131–36. One category of civil cases—habeas corpus petitions by alien detainees—was separately reported for the first time in 2011. Accordingly, we do not separately analyze these cases as part of our analysis, although we do include them in our overall civil case filing totals.

86. See, e.g., Table D-3 Cases—Criminal Cases Commenced, by Offense and District, During the 12-Month Period Ending September 30, 2011, in JUDICIAL BUSINESS 2011, *supra* note 51, at 218–23; Table D-3 Defendants—Criminal Defendants Commenced, by Offense and District, During the 12-Month Period Ending September 30, 2011, in JUDICIAL BUSINESS 2011, *supra* note 51, at 224–29.

87. *Statistics: Judicial Business of the U.S. District Courts 2012*, U.S. CTS., <http://1.usa.gov/1awzr9q> (last visited Oct. 28, 2013).

defendants. There is considerable variation in this breakdown across courts, with the Eastern District of Pennsylvania having the highest percentage of civil suits, at 97.6 percent of its docket,⁸⁸ and the District of Guam and the Western District of Texas having the lowest percentage of civil suits, at roughly 25 percent of their overall dockets.⁸⁹ Ultimately, however, the ratio of civil filings to criminal felony defendant filings within a district bore almost no relationship whatsoever to that district's mean TOTALHRS/JUDGE during the five-year study period. The correlation between the two variables was a remarkably low 0.00686.⁹⁰ This strongly suggests that a mere civil/criminal breakdown is not influential on a district's bench presence levels.

Influence of specific case or felony types. We also examined the composition of each district court's docket, broken down more finely by case type. As with districts showing high-weighted caseloads per judge, we hypothesized that higher numbers of complex or personally sensitive cases (like homicide, discrimination or personal injury matters) might be associated with higher levels of bench presence, on the theory that more court time was necessary and/or desirable in those cases. Accordingly, we counted the number of civil cases by case type and the number of criminal defendants by felony type in each district, and converted each raw number to a percentage of the district's overall docket.⁹¹ For example, in the District of Delaware, defendants charged with firearms-related felonies made up over 26 percent of the court's criminal docket, and private contract disputes made up about eight percent of the court's civil docket, between FY 2008 and FY 2012. We then examined the statistical correlation between the percentage of a case type (or defendant type) on the court's docket and the court's overall TOTALHRS/JUDGE. In the end, we found only a series of weak correlations, none stronger than -0.33261 for embezzlement felonies (indicating a weak-to-moderate inverse correlation with courtroom time) and 0.27824 for the catch-all civil category of "Other Private Cases."

88. The Eastern District of Pennsylvania's docket was swamped each year of the study by tens of thousands of new personal injury/product liability filings. *See, e.g.*, 2012 NATIONAL JUDICIAL CASELOAD PROFILE, *supra* note 64, at 16.

89. The Western District of Texas experienced very high levels of marijuana and reentry-related felonies in each year of the study period. *See id.* at 37.

90. P -value = 0.9476.

91. District-specific data for each year was obtained from Judicial Business of the U.S. Courts for each year of the study. Reports for FY 2008–2011 are available at <http://1.usa.gov/16i3PVk>. The report for FY 2012 was obtained directly from the AO. The data for each district were entered into a spreadsheet and summed to determine the composition of each district's composite docket for the five-year study period. Individual case or felony types were then calculated as a percentage of the composite docket for that district.

We also considered the impact of each district's share of the national total for each case type. Again, as an example, between FY 2008 and FY 2012, the District of Delaware handled 0.4 percent of all defendants charged nationally with federal firearms-related felonies, and handled 0.3 percent of all private contract cases filed nationally.⁹² And again, the statistical correlations between a court's national share of a case type and its overall TOTALHRS/JUDGE were generally weak. Most case types showed correlations below 0.2, and only three case types showed a correlation above 0.4: labor cases filed against the U.S. government ($r = 0.41715$), prisoner habeas petitions filed against private parties ($r = 0.44004$), and the catch-all category of "other violent" felonies ($r = 0.42497$). Some case types that might be considered courtroom-intensive, like civil rights, intellectual property, and homicide, all had correlations with TOTALHRS/JUDGE at 0.23 or lower.

Our findings here are modest, and we do not discount the possibility that a combination of more refined data and more sophisticated modeling might provide further insight into the relationship between bench presence and docket composition. Our preliminary examination here, however, finds no clear evidence that a glut or dearth of particular case types is related to a district court's level of bench presence. As with weighted caseload, a court's docket composition appears to present neither a barrier to nor a driving force for courtroom hours.

5. Judicial Staffing

Temporary anomalies in judicial staffing suggest another possible explanation for variations in bench presence across district courts. Because bench presence represents the number of courtroom hours expended by all judges in the district divided by the number of active district judges in the district, bench presence levels would rise either by adding courtroom hours from senior judges (increasing the numerator) or by lowering the number of active judges (decreasing the denominator), all else being equal. If an active judge takes senior status and the other branches are slow to fill the vacancy, the effect may be compounded: the new senior judge contributes to the district's total courtroom hours without counting as an active judgeship. Accordingly, if during the study period a district experienced atypically high ratios of senior judges to active judges or atypically high rates of unfilled vacancies, its

92. District-specific data were obtained and summed in the manner described in note 91 *supra*. Individual case or felony types were then calculated as a percentage of the total number of cases of that type filed nationally during the study period.

calculated bench presence may be temporarily and abnormally high. We therefore examined this possibility in more detail.⁹³

Drawing from biographical data,⁹⁴ we calculated the number of district judges with senior status in every district court for each year of the study period. Judges who took senior status after the start of a fiscal year or whose senior status terminated by retirement or death before the end of a fiscal year were counted for the part of the year in which they had senior status. Most districts had at least one senior judge for each year of the study; the largest courts often had more than a dozen. Nationally, in each year of the study there were between 167 and 192 senior judges on the bench, representing about 30 percent of the active judge total. In many districts, however, that percentage was higher; in fact, during the aggregate five-year study period, senior judges outnumbered active judges in 13 district courts.

Even though a much higher than average ratio of senior judges to active judges might be thought to contribute disproportionately to a district court's bench presence, we were able to discern no clear trend. Only four of the top 12 courts in bench presence for FY 2008–2012 were also among the top 12 in senior judge/active judge ratio. Conversely, several districts with the highest senior to active judge ratios were below the national average of 445 TOTALHRS/JUDGE in bench presence. Moreover, during the aggregate study period, the correlation between a district's TOTALHRS/JUDGE and its ratio of senior to active judges was only 0.3792. The availability of more senior judges in a district contributes to its bench presence, but by itself that availability cannot satisfactorily explain district-level bench presence variations.

When broken down by individual year, the correlation between the senior judge/active judge ratio and a court's bench presence level increased slightly, to around 0.5 for FY 2010, 2011, and 2012. Because

93. Contributions of visiting judges are also included in each district's TOTALHRS calculation, but we do not separately examine the impact of visiting judges here, for two reasons. First, the AO only reports the number of visiting judges for each district, and the number of cases terminated or trials held by the visitors. In addition, visitors handle only a small percentage of the overall workload of a district court. For each year of the study, visitors presided over the termination of less than one percent of all civil cases and criminal defendants nationally. This figure is certainly meaningful to the parties and courts that benefit from their service, but is negligible in explaining variations in bench presence levels.

94. The AO does not independently report the number of senior judges in a district for any given period, but the Federal Judicial Center does provide a database with basic biographical information on every federal district judge who has served since 1789. *See Export of All Data in the Biographical Directory of Federal Judges*, FED. JUD. CENTER, <http://1.usa.gov/17tC3WM> (last visited Oct. 29, 2013). Using that database, we created a spreadsheet of every judge who held senior status (as denoted by "Retirement from Active Service") in any federal district court between October 2007 and September 2012.

this period represented the height of the recent district court vacancy crisis, a renewed look at the vacancy rates in individual districts was warranted. Again, however, we found no meaningful relationship between a district court's vacancy rate and its level of bench presence. Indeed, only one of the top 12 bench presence courts—the Middle District of Pennsylvania—was also among the top ten districts for percentage of unfilled vacancies during the study period. None of the top four bench presence courts was even in the top 25 districts for unfilled vacancy rate.

C. *Bench Presence and Case Processing Time*

We also explored the relationship between bench presence and case processing. That relationship is particularly relevant because some commentators have suggested that time spent in the courtroom negatively affects a district's overall case-processing speed. This argument has two forms. First, some have argued that open court hearings are a clumsy and inefficient way of deciding motions because many motions can be resolved on the papers alone in less time and with equal accuracy.⁹⁵ Trials—especially jury trials—are argued to be even greater contributors to delay.⁹⁶ If taken seriously, the argument continues, bench presence would provide incentives for district judges to waste time in the courtroom on issues that can be dealt with faster outside the public view. The second argument is related: focusing on courtroom time is asserted to place an inordinate emphasis on trials and creates incentives for judges to push cases toward trial, when in fact the much more efficient resolution for many cases (at least from the point of docket control and caseflow management) is a plea bargain or civil settlement.⁹⁷

Despite these concerns, one early study of over 1,600 closed civil cases by the Civil Litigation Research Project at the University of Wisconsin (CLRP) found “no clear pattern” between the mode of

95. See Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 255 (2009) (describing, but not endorsing, the “widespread belief among both court of appeals and district court judges that oral argument is inefficient and consumes too much court time, without attendant benefit”).

96. See Thomas C. Yager, *Justice Expedited—A Ten-Year Summary*, 7 UCLA L. REV. 57, 69 (1960).

97. Certainly some within the district courts have taken the view that efficiency requires a constant judicial push for settlement. See, e.g., Mark R. Kravitz, *The Vanishing Trial: A Problem in Need of a Solution?*, 79 CONN. B.J. 1, 24–25 (2005). For an older and rather extreme version of this view, see generally FREDERICK B. LACEY, *THE JUDGE'S ROLE IN THE SETTLEMENT OF CIVIL SUITS* (1977).

disposition and overall processing time.⁹⁸ Nor did the CLRP data “reveal any consistent relationship between the frequency of trials and comparatively faster disposition times for cases going to trial.”⁹⁹

Our examination of court data for FY 2008–2012 similarly found no meaningful relationship between the time judges spend on the bench in a given district and that district’s median time to disposition for civil or criminal cases.¹⁰⁰ We first looked at the criminal side, comparing a district’s mean criminal trial hours per judge¹⁰¹ against the district’s median time from filing to disposition for felony criminal defendants. This yielded a very weak negative correlation of -0.0690 .¹⁰² A parallel comparison between a district’s mean civil trial hours per judge and the district’s median time from filing to disposition for civil cases yielded a very weak positive correlation of 0.0688 .¹⁰³ Simply put, there is essentially no statistical relationship between the time a district court spends presiding over trials or other evidentiary hearings, and the court’s overall time to disposition of those cases.

Figures 4 and 5 illustrate the absence of a meaningful connection between courtroom hours and time to resolution. Figure 4 plots each district court’s median time to disposition and mean trial hours per judge for criminal felony defendants for FY 2012. As shown, districts spending 50–100 courtroom hours per judge on criminal trials that year ranged widely in case disposition times, taking anywhere from 4.7 months to 14.7 months to resolve criminal felony cases on average. Districts averaging 150–200 courtroom hours per judge on criminal trials in the same year also ranged widely, taking anywhere from 4.6 to 16.6 months to resolve their cases. The absence of any meaningful linear relationship suggests that there is no inconsistency between spending many hours in the courtroom and providing swift resolutions to criminal matters.

98. Joel B. Grossman et al., *Measuring the Pace of Civil Litigation in Federal and State Trial Courts*, 65 JUDICATURE 86, 107 (1981).

99. *Id.*

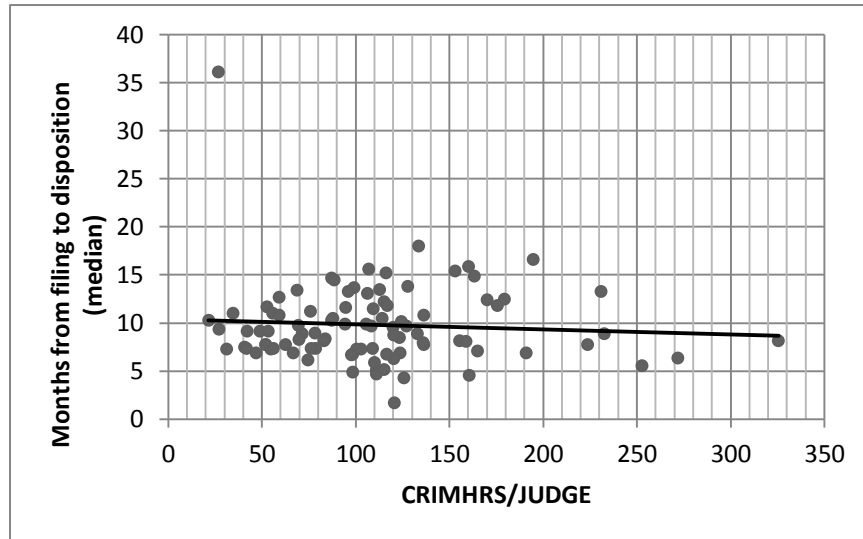
100. The AO reports each district’s average time from filing to disposition as a median time in months. *See, e.g.*, 2012 NATIONAL JUDICIAL CASELOAD PROFILE, *supra* note 64, at 1.

101. District judges report their criminal trial hours as a separate component of the JS-10 form. Recall that criminal “trial” in this context refers to any hearing at which evidence is adduced.

102. *P*-value = 0.51.

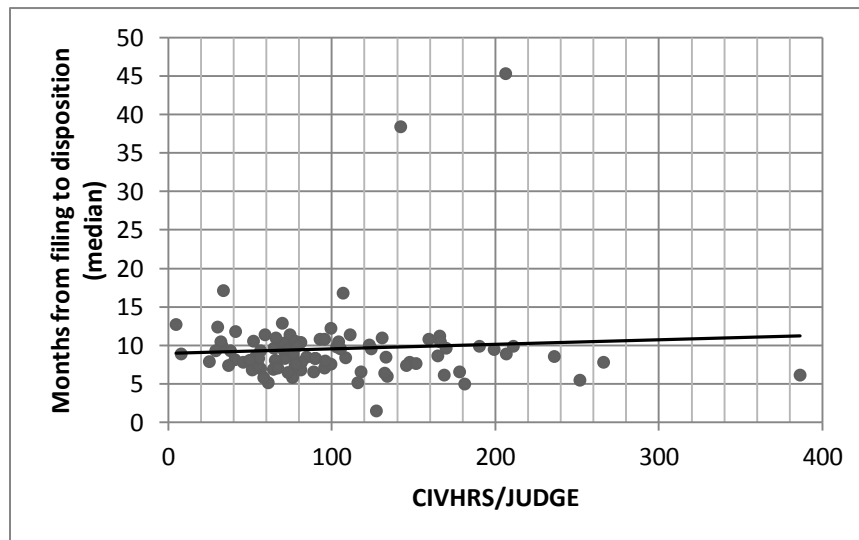
103. *P*-value = 0.51.

FIGURE 4. Criminal trial hours/judge versus median time to disposition for felony defendants, all district courts, FY 2012



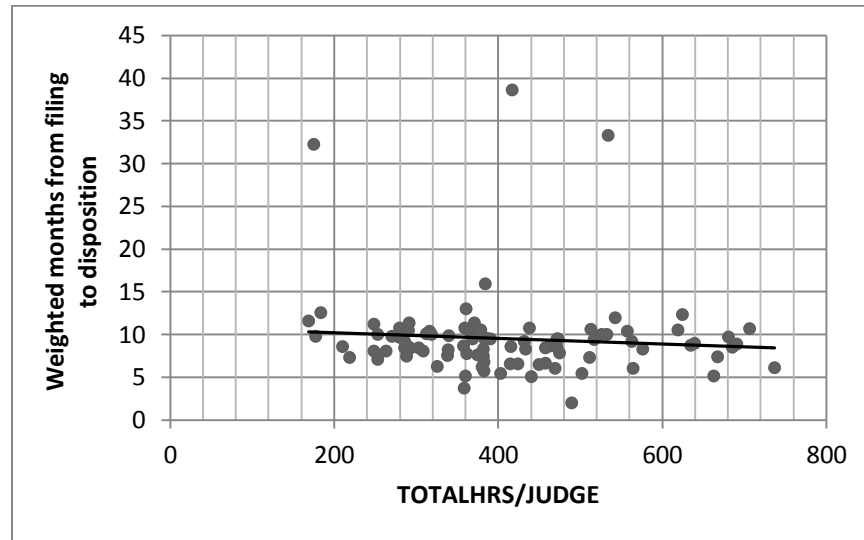
An examination of civil trial hours yields the same conclusion. As shown in Figure 5, the median time to resolution for civil cases in most district courts in FY 2012 hovered between eight and 12 months, regardless of how many hours the court's judges spent adjudicating civil trials in the courtroom. The strongest bench presence district spent almost 400 hours per judge on civil trials and evidentiary hearings in FY 2012, while managing to resolve civil cases in an average of 6.2 months. Thus, there appears to be no necessary tradeoff between bench presence and case processing speed. Many courts do well by both measures.

FIGURE 5. Civil trial hours/judge versus median time to disposition for civil cases, all district courts, FY 2012



Because procedural hours are not divided between civil and criminal cases in the AO data, we could not include them in Figures 4 and 5. However, procedural hours are plainly important both to a judge's courtroom time and to the potential impact on case-processing speed. We therefore attempted a more complete comparison by developing a composite time to disposition score (accounting for criminal and civil cases) for each district court. We then compared the composite time to disposition score to the court's overall levels of bench presence (including procedural hours). Because criminal and civil times to disposition are separately reported, we calculated the weighted average time to disposition for all cases by multiplying the median time to disposition for civil cases by the percentage of the court's docket that included civil cases, doing the equivalent calculation for criminal felonies, and adding the two together. We then compared each district's weighted time to disposition for all cases in FY 2012 to its TOTALHRS/JUDGE for FY 2012. The correlation was 0.0869, again a very weak number. Figure 6 shows the data as a scatterplot.

FIGURE 6. Total hours/judge versus weighted median time to disposition for all civil cases and felony defendants, all district courts, FY 2012



The lack of a direct relationship between bench presence and time to disposition suggests that courts can excel in both areas, and indeed Figures 4–6 point to a number of courts whose per-judge courtroom hours are relatively high and median time to disposition relatively low. Some previous studies, as well as a wealth of anecdotal evidence from district judges, have similarly concluded that the tradeoff between bench presence and time to disposition is a false one. For example, one 2009 study of nearly 8000 closed civil cases across eight federal district courts found that motions on disputed discovery that received an open court hearing were decided two-and-a-half weeks faster on average than similar motions with no hearing, an average drop in time of almost 30 percent.¹⁰⁴ The study similarly found that Rule 12 motions subjected to open court hearings were decided 15 days faster on average than equivalent motions without hearings, and summary judgment motions subjected to open court hearings were decided nearly four weeks faster on average than those without hearings.¹⁰⁵ These findings are consistent with the reflection of one federal district judge, who wryly explained, “I

104. INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 53 & tbl.12 (2009) [hereinafter CIVIL CASE PROCESSING].

105. See *id.* at 53–54, 54 tbls.13 & 14.

do not have enough time to *dispense* with oral argument. . . . It makes me more efficient and more effective.”¹⁰⁶

One reason for this efficiency may be that oral hearings allow the district judge to focus more precisely on specific arguments or areas of concern, allowing a decision more readily than if the parties were to submit several additional rounds of briefing.¹⁰⁷ Another reason is that the judge, after oral argument, may issue a decision from the bench, with a written opinion or order to follow. This practice deftly balances efficiency and transparency, by giving the parties immediate notice of the court’s decision while still obligating the court to give written reasons for that decision at a point in the near future. Furthermore, when the district judge holds a hearing and offers the parties guidance on the way he or she is likely to rule, the mere fact of that oral announcement may influence the timing and likelihood of settlement.¹⁰⁸ The 2009 study found that in nearly 25 percent of cases in which summary judgment was denied, the parties settled within 30 days after the motion was decided, and nearly 40 percent of such cases the parties settled within 90 days after the motion was decided.¹⁰⁹ Similar numbers were observed for court decisions on motions to dismiss.¹¹⁰ This may be because the court’s decision offers the parties valuable information on the perceived strength of their respective cases, which in turn may promote settlement without further court involvement.¹¹¹

The same efficiencies have also been identified when cases proceed to trial. As Judge Patrick Higgenbotham has observed:

Some critics argue that a jury is an unnecessary source of delay and expense. Despite claims by eminent jurists that jury trials are an important, if not the principal, cause of congested court calendars, I remain unconvinced. My experience both at the bar and on the bench leave me with precisely the opposite conclusion. The time expended properly writing findings of fact and conclusions of law, for example, far exceeds the time consumed by the charge conference.¹¹²

106. Kravitz, *supra* note 95, at 269–70 (emphasis added).

107. See Steven S. Gensler & Lee S. Rosenthal, *Managing Summary Judgment*, 43 LOY. U. CHI. L.J. 517, 556–57 (2012).

108. See *id.* at 548. This approach has been adopted by a number of federal district judges. Several judges in the Southern District of New York, for example, hold conferences with parties before summary judgment motions are filed, to offer informal feedback on the strengths and weaknesses of various claims. See *id.* at 553–54 (footnote omitted) (citation omitted).

109. CIVIL CASE PROCESSING, *supra* note 104, at 51–52.

110. See *id.* at 7.

111. *Id.* at 52.

112. Patrick E. Higgenbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 55 (1977).

Several studies lend support to Judge Higgenbotham's experience. One review of data from all federal district courts found that holding criminal trials had no significant effect on the time needed to resolve the case, and that the use of civil trials actually had a significant *positive* relationship to efficient case processing.¹¹³ In a 2007 survey by the Federal Judicial Center regarding the use of courtrooms, 67 percent of federal district judge respondents said it was "very" important to have their own courtrooms,¹¹⁴ and 56 percent said that sharing a courtroom with another district judge would have a detrimental impact on their own efficiency.¹¹⁵ Moreover, 90 percent of responding judges who had their own courtrooms at the time of the study said that sharing a courtroom would somewhat or greatly compromise their caseload management.¹¹⁶ Among federal district judges themselves, then, it would seem that ready access to a courtroom is an important component of efficient case management.

D. *Summing Up*

Taken together, our findings strongly suggest that bench presence is neither static nor predetermined. Structural characteristics of each district such as size, staffing, and docket composition are at best weakly correlated to bench presence levels—suggesting that these characteristics provide no limit or cap on a district's ability to provide ample courtroom time. Nor is there any requisite tradeoff between bench presence and efficient case processing time. Rather, courts and individual judges appear to have significant control over the time they spend in the courtroom. We explore the consequences of that conclusion below.

IV. NEXT STEPS IN IMPLEMENTATION AND RESEARCH

In this Part, we briefly set out an agenda for continued research on, and implementation of, bench presence in the federal district courts. In the immediate term, there is a need for three concurrent and complementary projects, requiring leadership from three different groups. Judges should strive to increase the availability of courtroom hours in their own districts. Court administrators should work to expand and refine data collection on courtroom hours so that the contours of bench presence can be better understood. Finally, scholars should

113. See Robert W. Gillespie, *The Production of Court Services: An Analysis of Scale Effects and Other Factors*, 5 J. LEGAL STUD. 243, 254 (1976).

114. FEDERAL JUDICIAL CENTER, *THE USE OF COURTROOMS IN U.S. DISTRICT COURTS* 54 (2008).

115. *Id.* app. 11, tbl.B.8.

116. *Id.* at 55.

continue to study the qualities and causes of bench presence. Meaningful progress on each of these near-term projects will support a larger and longer-term goal: incorporating a refined bench presence metric into a broad and comprehensive measure of federal district court productivity.

A. *Improving Bench Presence Theory and Practice*

1. Increasing Courtroom Hours

For those who believe, as we do, that courtroom time offers unparalleled opportunities to build public confidence in the court's procedural fairness guarantees, the national downturn in courtroom hours is deeply disconcerting. In FY 2012, the federal district courts had more than 350,000 filings but opened their courtroom doors for only 263,000 hours. Total courtroom hours nationally have plummeted by more than eight percent over the last five years. Overall levels of bench presence for FY 2008–2012 are underwhelming, averaging just 430 total hours per judge per year. Whatever the optimum level of bench presence may be, it must be higher than what we are currently witnessing.

Courts and individual judges must remind themselves that bench presence matters. It matters to litigants, who demand an open forum in which to tell their stories and participate as equals in the adjudicative process. It matters to the public, for whom the ability to observe trustworthy and impartial judging still resonates deeply. It matters to advocates, who seek out opportunities to address a decisionmaker face-to-face. And it should matter to judges themselves, for whom the open court represents a chance to demonstrate a public commitment to procedural justice.

If courtroom hours were significantly affected by factors outside of a district court's control, calling for judges to increase their bench presence by their own volition would be folly. Our analysis, however, has not identified any such factors. Indeed, none of the key structural characteristics that might be thought to influence a district court's bench presence—size, circuit, weighted caseload, or docket composition—appear to bear any particularly strong relation to bench presence. Levels of judicial staffing seem to be more closely related, but are hardly dispositive. Furthermore, a court's overall rate of case processing does not bear any relation to its level of bench presence. While additional analysis is welcomed, bench presence shortages appear to be well within the direct power of courts and judges to remedy.

At a minimum, the federal district courts should aim to reverse the national downturn in courtroom hours and commit themselves to adjudicating more issues in open court. This does not mean that every

issue and every case requires courtroom treatment, but rather that judges should be amenable to hearing more disputes in an open forum. It is true that district judges expend hundreds of thousands of hours each year behind the scenes to assure impartiality, even-handedness, and transparent decisionmaking, but those efforts simply cannot have the same effect as when they take place in the courtroom. Courtroom time provides the rich soil for procedural fairness in adjudication to flourish, by allowing the parties and the public to view directly the judge's efforts at securing procedural protections.

2. Refining Data Collection

A second practical reform is to collect more detailed data on courtroom time. Given that the JS-10 form was not originally designed for a sophisticated bench presence analysis, it does an admirable job of providing information relevant to that inquiry. Adding even slightly more specificity in data collection, however, would vastly expand the analytical possibilities and allow courts and researchers to better appreciate the dynamics of bench presence. For example, separating hours spent on actual trials (jury or bench) from hours spent on other evidentiary hearings would give a more accurate and realistic sense of the time judges actually spend in trial. Similarly, separating hours spent adjudicating issues in the courtroom from those spent in chambers would clarify the degree to which the public is exposed to the procedural protections of live hearings and conferences. In the same vein, requesting that procedural hours be broken down by type of procedure would give a more precise sense of how long judges typically spend on different types of hearings—a question bearing directly on the calculation of a judge's (and court's) weighted caseload.

Some effort would be required on the part of court administrators to improve the existing data collection model, but it need not be overwhelming. The fact that the JS-10 form is now automated would make it easier still for the AO (perhaps with the assistance of district court clerks) to make appropriate adjustments. Individual chambers would have to parse out the specifics of courtroom time a bit more finely than before, but in the end we believe that the increased burden would be minimal in relation to the institutional benefits of such rich data.

3. Understanding Bench Presence

Finally, scholars should seize the opportunity to understand more fully the causes and characteristics of bench presence. What has contributed to the recent decline in courtroom hours? What are the consequences of that decline? How are courtroom hours more generally

connected to other time and resource demands that are imposed on the federal district courts? If structural factors are not responsible, why is courtroom time so variable across districts? Our analysis of the last five years suggests that variations in bench presence across districts do not correlate in more than a limited way to structural characteristics outside of the courts' control. Size, circuit, weighted caseload, docket composition, and judicial staffing may all play some part, but none appears even remotely dispositive. Something else must be fueling that variation.

We suspect that bench presence is driven by the internal culture of each district court. Court culture has been offered as an explanatory variable for a variety of other observable court metrics, including the pace of case processing¹¹⁷ and the rate of opinion writing.¹¹⁸ Other studies have identified a number of factors that contribute to the culture of individual courts, including a strong leadership presence from the chief judge, carefully articulated goals, the ready availability of accurate information, and strong internal communication.¹¹⁹ A strong court culture of open court adjudication might also stem from less articulable factors, including the simple expectation by the bench and bar that hearings and trials will be the rule rather than the exception.¹²⁰ The specific factors that create and sustain an ethos of regular courtroom adjudication are not easily discernible from our raw statistics, but the issue is plainly worthy of further study. Understanding the extent and influence of cultural drivers might also open the door to new insights about the prospect of increasing courtroom time nationally in the future.

Scholars might also pursue research into the characteristics of bench presence. How does courtroom time influence the routine of each judge, his or her staff, and the clerk's office? How does courtroom time bear on public perceptions of each judge and each court? To what extent does the use of courtroom time differ across courts and judges? These questions relate not just to quantitative opportunities to promote and demonstrate procedural fairness, but also to the essence and complexion of those opportunities in each district court. Such inquiries lie at the

117. See, e.g., THOMAS CHURCH, JR. ET AL., *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* 5 (1978); CIVIL CASE PROCESSING, *supra* note 104, at 72–75; Richard Hoffman & Barry Mahoney, *Managing Caseflow in State Intermediate Appellate Courts: What Mechanisms, Practices, and Procedures Can Work to Reduce Delay?*, 35 IND. L. REV. 467 (2002).

118. See David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 699 (2007).

119. See Hoffman & Mahoney, *supra* note 117, at 498–503 (identifying factors).

120. See, e.g., CIVIL CASE PROCESSING, *supra* note 104, at 77 (noting the power of expectations as they relate to the speed of case processing in two federal district courts).

intersection of court administration, social psychology, and public policy, and are ripe for exploration in the coming years.

B. Constructing a More Complete Productivity Measure

Working concurrently and cooperatively, judges, scholars, and court administrators can rapidly develop bench presence, both in theory and in practice. While a different group must assume leadership for each of the projects we describe above, the projects themselves are closely intertwined and will draw mutual benefit from their parallel development. Scholarly study of bench presence may suggest to judges new ways to increase courtroom access. Improvements in data collection may help judges and scholars to identify more precisely the factors that correlate and contribute to bench presence. And augmenting courtroom hours will provide more extensive data for administrators and scholars to review.

Advancement of these projects also enhances the possibility of one day measuring district court productivity, a longer-term enterprise that places bench presence in its fuller context. As we have discussed in detail elsewhere, the productivity of a district court is a function of its ability to provide services to the public that are at once efficient, accurate, and procedurally fair.¹²¹ Because it both reflects and enables procedural fairness at the district court level, bench presence is an important component in evaluating the overall quality of adjudication. As an independent metric, bench presence offers valuable information about the degree to which parties and the public are directly exposed to the court's procedural fairness protections. Furthermore, in combination with measures of accuracy, bench presence may influence citizen perceptions of the overall quality of adjudication in the federal district courts. All other things being equal, an adjudicative outcome is likely to be seen as superior if the process leading to the outcome was transparent, trustworthy, and dignified rather than poorly justified or mysterious.

The comprehensive measurement of district court productivity is still in its infancy, both with respect to developing accepted metrics for all the constituent components of productivity, and with respect to raising broad awareness and support for productivity measurement. More refined data, combined with a better understanding of the nature of bench presence and courtroom activity, will only increase the value of bench presence as a valuable metric. More importantly, continued development and awareness of bench presence, and the sense of

121. See *Bench Presence*, *supra* note 5, at 75.

procedural justice that it fosters, will enhance the experience of parties and the public, and the legitimacy of the courts.

V. CONCLUSION

This Article represents the first quantitative exploration of bench presence in the federal district courts. The data, collected by the Administrative Office of the United States Courts for Fiscal Years 2008 through 2012, suggest that courtroom time is an underutilized asset in most district courts. While the top courts averaged more than 700 courtroom hours per active judge each year, the national average was less than 450 hours per year, with many courts demonstrating significantly lower levels of courtroom time. By themselves, these initial figures say nothing about the optimum level of bench presence on a court. However, the numbers do provide both a baseline for future research and a starting point for a meaningful discussion about how federal district judges should be allocating their time between the courtroom and chambers.

From a research perspective, the data create a benchmark for ongoing examination into the nature and dynamics of judicial time in the open courtroom. Further study might build on these data by exploring emerging trends over time, digging deeper into the numbers to seek out hidden or unexpected influences on bench presence, and examining districts with sustained high levels of bench presence to determine the influence (if any) of court culture and local legal culture. Bench presence might also profitably be used in combination with other research tools to gain a better measurement of procedural fairness and productivity in the federal district courts.

Beyond the opportunities for empirical research and measurement, we hope that the initial bench presence data presented here will spur a robust discussion of the federal district courts' obligation to provide courtroom time to parties and the public. If, as our data suggest, there are no systemic barriers to higher levels of bench presence nationwide, it is incumbent upon the federal courts to ask themselves whether they are doing enough to meet their traditional and constitutional obligations to provide public forums for dispute resolution. This is not an easy question, but it is a necessary one. Judges, court administrators, attorneys, and citizens should make their voices heard. The vitality of the courts' legitimacy and societal role may depend on it.