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Trial by Jury or Judge: Which is Speedier?

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Trial by jury or judge: which is speedier?

An examination of federal civil cases indicates that while trials themselves may proceed more slowly before a jury, judge-trying cases last longer on the docket.

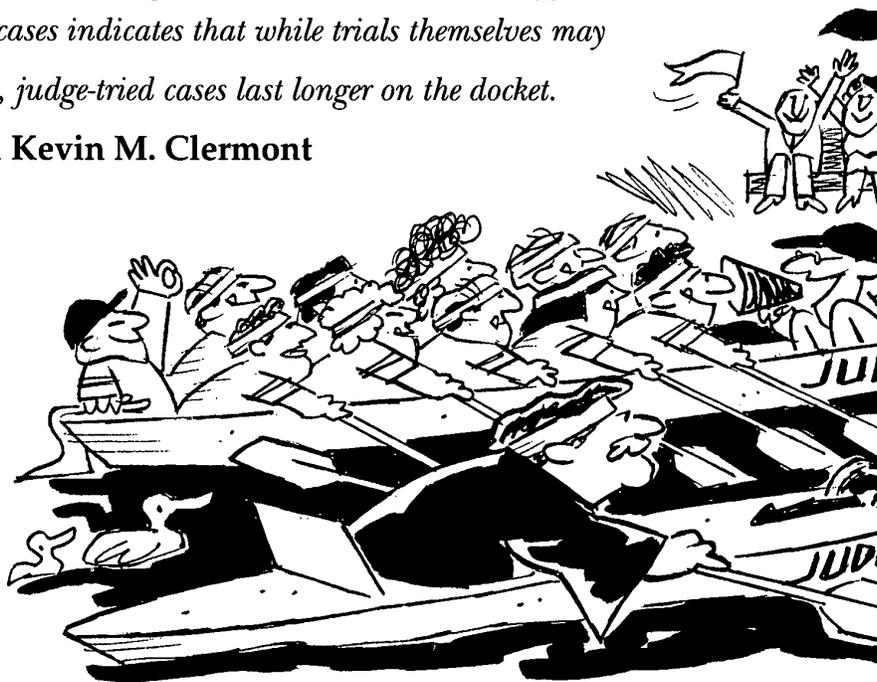
by Theodore Eisenberg and Kevin M. Clermont

Many take as a given that jury-trying cases consume more time than judge-trying cases. Judge Richard Posner of the Seventh Circuit, for example, opines:

Court queues are almost always greatest for parties seeking civil jury trials. This makes economic sense. Such trials are more costly than bench trials both because of jury fees (which...understate the true social costs of the jury) and because a case normally takes longer to try to a jury than to a judge.... Parties are therefore "charged" more for jury trials by being made to wait in line longer.¹

A close reading reveals that he is writing about both aspects of a jury's speed: how long the actual in-court trial lasts, as well as how long the litigants have to wait before and after trial.

Regarding the first measure of speed, Posner has quantified his observation that "a case normally takes longer to try to a jury than to a judge," stating: "The average federal civil jury trial in 1983 lasted 4.48 days, compared to 2.21 days for the average nonjury trial."² The available data gen-



steps of jury trial, such as jury selection and instructions, more than consume such savings as the possible streamlining of evidence for presentation to the jury.

So, it may very well be that commentators are correct in saying that jury trial is slower than judge trial in terms of *actual trial time*. As Professor Peter Schuck of Yale sums up: "Al-

though such data [comparing jury and judge and controlling for type of case] are lacking, the longer duration of jury trials probably does make them more costly. Still, it is hard to imagine that these marginal administrative costs of the jury system are large enough to affect significantly the debate over jury reform."⁶

As to the second measure, Posner

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erally agree that jury trials take about twice as long as judge trials, although admittedly trials on average are rather short so that the absolute difference is not great.³ Most of these studies do not control for the type of case but, instead, simply compare lengths of all jury trials and all judge trials. Nevertheless, rough attempts to control for the type of case confirm that jury trials take about twice as long.⁴ Certainly, most opinions agree that jury trials last longer.⁵ The theory is that the extra

1. Posner, *Economic Analysis of Law* 582 (4th ed. 1992) (no footnotes omitted).

2. Posner, *The Federal Courts: Crisis and Reform* 130 n.1 (1985).

3. See, e.g., 1983 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 294 (in fiscal year 1983, median jury trial lasted three days, compared to one day for median nonjury trial, both rounded off); Kakalik and Ross, *Costs of the Civil Justice System* 37, 40, 68, 73 (1983) (similar results for both state and federal courts); Sipes and Oram, *On Trial: The Length of Civil and Criminal Trials* 8-9, 12-15 (1988) (in selected state courts in 1986, median jury trial lasted 13:30 hours, compared to 4:54 hours for median nonjury trial); cf. Wiggins and Breckler, *Management of Complex Civil Litigation*, in Kagehiro and Laufer eds., *Handbook of Psychology and Law* 77, 78 (1992) (over 96 percent of federal civil trials last nine or fewer days).

4. Zeisel et al., *Delay in the Court* 71-81 (2d ed. 1978) (by such techniques as asking participants in jury trials how long the same trial would have taken before a judge, researchers concluded that jury trials take 67 percent longer—not counting voir dire,

which would add about 22 percent more).

A good discussion of trial length appears in Bermant et al., *Protracted Civil Trials: Views from the Bench and the Bar* 69-70, 86 (1981). There are two measures of trial length: the usual measure of "trial days" counts the number of days on which proceedings in the trial took place, and the less familiar measure of "trial hours" counts the hours that those proceedings lasted. The proceedings that count generally include only actual time that the judge presides on the bench, thus excluding jury deliberations or opinion writing.

5. E.g., Desmond, *Juries in civil cases—yes or no?*, 47 *JUDICATURE* 219, 235 (1964) ("a typical personal injury case tried to a judge takes only half the time the trial of the same cause would consume before a judge and jury"); Landis, *Jury Trials and the Delay of Justice*, 56 *A.B.A. J.* 950, 950-951 (1970); cf. Bermant et al., *supra* n. 4, at 43-45 (survey results suggesting that judges are more convinced than lawyers of the rapidity of bench trial).

6. Schuck, *Mapping the Debate on Jury Reform*, in Litan ed., *Verdict: Assessing the Civil Jury System* 306, 318 (1993).



JERRY WARSHAW

assumes that “queues are almost always greatest for parties seeking civil jury trials.” Elsewhere he has clarified that queue means the “delay between the filing and final disposition of a legal claim.”⁷ Here he has no data, but he seems to have a fair amount of opinion support among observers of the legal system.⁸

It thus appears obvious to many that jury-tried cases also last longer *on the docket* than judge-tried cases. This, however, concerns an important point. The time a tried case has been pending on the docket is of vital interest to the litigants, their attorneys, and society at large.

In addition to incurring the psychological costs of uncertainty, the plaintiff’s recovery of damages or other relief usually must await entry of

judgment. The same is true of a determination’s benefits to the defendant, such as the freeing of tied-up property, the renewed ability to obtain credit, and the resolution necessary for sound planning, although most often the defendant is interested in putting off the day of reckoning. The receipt of attorneys’ fees similarly often depends on the case ending. The delayed outcome affects the value of recovery because of the law’s approach to the recovery of interest. Indeed, delay may affect the chances of recovery because evidence decays over time. Society cares about delay because of the effect of backlog on public perception of justice, or conversely because of the arguably beneficial effect of backlog on the settlement rate.

All considered, the difference in case duration may be more important than the couple of days’ difference in trial time.

Reality

But do jury-tried cases have a longer docket duration than judge-tried

cases? This question is vulnerable to an easy reality check. When any civil case terminates in a federal district court, the court clerk sends the Administrative Office of the U.S. Courts a form containing information about the case. From this the Federal Judicial Center and the Inter-university Consortium for Political and Social Research have made available to universities computerized data on all federal civil cases terminated in all federal district courts during fiscal years 1979-1994. The data include the subject matter of the case, the dates of filing and termination, and the procedural progress at termination, including whether the case was tried before jury or judge.

Using this database, one can examine the average time from filing to termination after completed trial, and thereby determine whether jury-tried cases take longer than those tried to a district or magistrate judge.

One would not, however, want to look at widely disparate cases. The focus of the study reported here is on those cases in which litigants have a clear choice between judge and jury trial. Moreover, it is limited to case categories with reasonably large numbers of cases tried before judges and before juries; differences in case categories with small numbers are too tenuous to warrant serious statistical inquiry. Applying these criteria leaves the 13 ma-

7. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 445 (1973).

8. E.g., Sarky, *Civil Juries, Their Decline and Eventual Fall*, 11 LOY. L. REV. 243, 255-256 (1963) (semble); Bermant et al., *supra* n. 4, at 43-45 (survey results).

Table 1 Results by category
(categories in descending order of ratio of jury trials to judge trials)

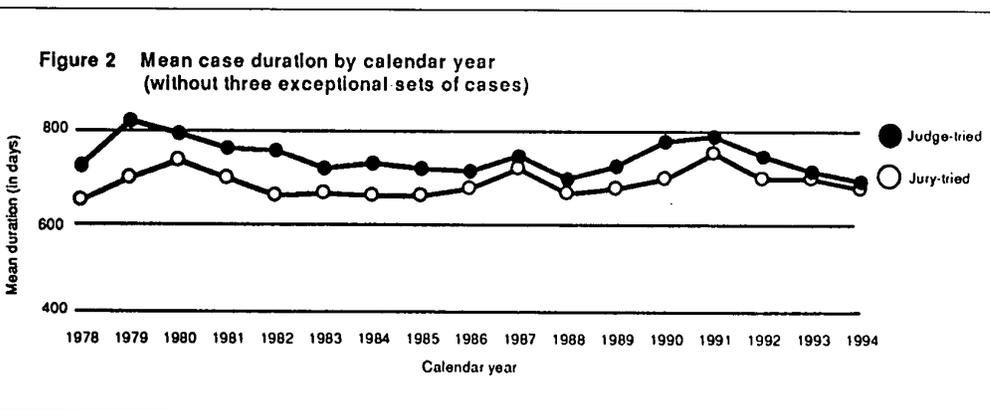
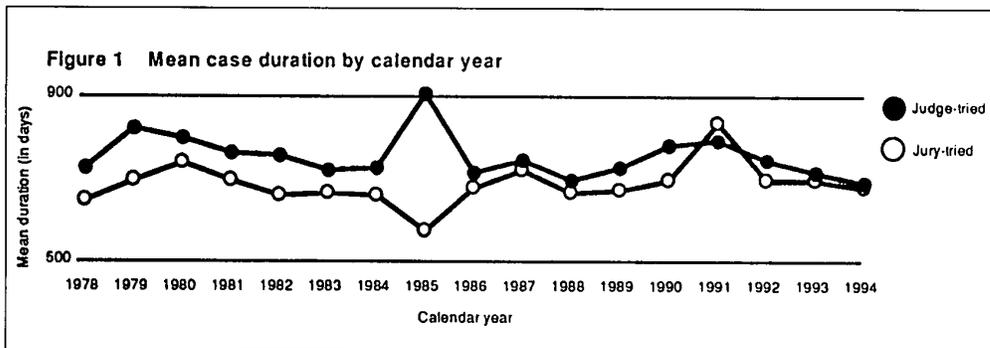
	Judge trial			Jury trial		
	Number of cases	Mean duration	Median duration	Number of cases	Mean duration	Median duration
Personal-injury						
Medical malpractice	115	668	595	1,249	685	602
Federal employers' liability	167	636	501	1,743	630	544
Product liability	1,236	1,087**	881	8,034	769**	667
Motor vehicle	903	597**	497	5,371	539**	453
Other personal injury	1,291	693**	562	6,052	627**	532
Assault, libel, slander	175	735	608	659	679	553
Airplane personal injury	198	972*	915	439	846*	657
Marine personal injury	1,938	787**	670	2,660	690**	598
Non-personal-injury						
Torts to land	285	849*	728	233	684*	588
Fraud	814	730	603	590	713	578
General contract	9,423	727	601	6,160	720	605
Torts to personal property	1,091	831**	699	658	687**	560
Negotiable instruments	978	673	521	272	714	584
Total	18,614	755**	619	34,120	678**	566

* Means differ at <0.05 level
** Means differ at <0.00005 level

major tort and contract categories listed in Table 1.⁹

In those 13 categories, the mean judge-trying case spends 755 days on the docket, while the mean jury-trying case terminates in 678 days. Medians tell the same story: the median judge case took 619 days and the median jury case took 566 days.¹⁰

Figure 1 displays duration on the docket as a function of year. It tells the same story of lengthier judge-trying cases. The story becomes even more consistent after examining more closely the graph's spikes. In 1985 the Southern District of Ohio terminated many short Bendectin jury cases as a group,¹¹ while the Western District of Washington terminated many long judge cases against Boeing for an air crash.¹² Without those 2 of the 94 districts, the mean duration for 1985 is 713 days for judge-trying cases and 656 for jury. In 1991 the Eastern District of Texas disposed of many long asbestos jury cases.¹³ Without that one district, the judge-jury numbers for 1991 are 787



9. See Clermont and Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1135-1137 (1992) (explaining the criteria for refining the data set). The same 20 case categories are used here; the eight different product liability categories are again amalgamated into one; and cases in which the United States was defendant and hence for which no jury right existed are again eliminated (but for simplicity's sake, this time cases in which the datum of amount demanded was missing were not eliminated).

10. See the sidebar "Internet research" for details on the compilation of the data. It is noteworthy that the Administrative Office defines trial as "a contested proceeding in which evidence is introduced." See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, XI GUIDE TO JUDICIARY POLICIES AND PROCEDURES transmittal 64, at 11-22 (Mar. 1, 1985). This produces an overinclusiveness under the procedural progress codes used: case terminated after court trial and case terminated after jury trial. This overinclusiveness would tend to shorten the dura-

and 747 days. Figure 2 displays duration as a function of year, but without those three district-years. The spikes are gone, and the relative slowness of judge-tried cases is apparent.

Similar, although not identical, information was available in the pre-computerized age. The Administrative Office formerly published data on the median interval from filing to disposition of all civil cases in which a trial commenced.¹⁴ Figure 3, based on those data, shows that the story was ba-

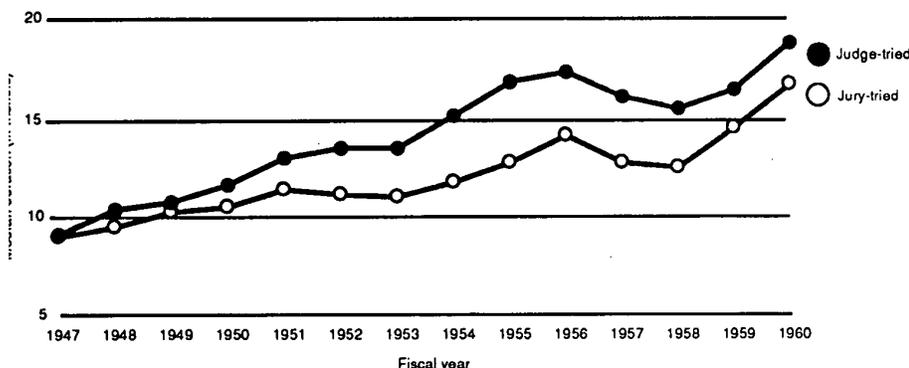
sically the same in the post-war period.

Explanations

Explanations for this reality include the possibility that the judge-tried cases in the data set are more complex and time-consuming. Those judge-tried cases could take longer to get ready for trial. Cutting against this, however, are two immediate observations. First, the fact of lengthier judge-tried cases holds true when the data set is disaggregated by category. In 11 of the 13 categories,

as Table 1 shows, judge-tried cases take longer on average than jury-tried cases.¹⁵ In seven of those categories, the difference is statistically significant.¹⁶ That is, even as one progressively narrows the focus to more similar

Figure 3 Median case duration by fiscal year



tion of judge-tried cases. However, that does not create a major concern. First, the overinclusiveness is not extensive because the procedural progress codes are chronological in nature, and before these two culminating trial codes come seven other codes including motion before trial. Second, the effect of overinclusiveness was checked by examining disposition method codes: entry of a final judgment resulting from a decision by a judge during or after nonjury trial (16,638 cases with a mean of 761 days and a median of 625) and entry of a final judgment resulting from a verdict by a jury other than a directed verdict (31,844 cases with a mean of 659 days and a median of 548).

Looking only at those 13 categories is a first cut at controlling for type of case. This narrowed focus ensures against comparing apples to oranges. However, if one wanted to look at all federal civil cases terminated during fiscal years 1979-1994 after completed trials, one would see that the mean judge-tried case spends 741 days on the docket (the median of the 80,744 cases lasted 589 days), while the mean jury-tried case terminates in 714 days (the median of the 60,832 cases also lasted 589 days).

11. In 1985 the Southern District of Ohio reported 883 jury-tried product-liability terminations, with a mean duration of only 330 days. A massive joint jury trial on Bendectin accounted for approximately 844 of those cases. See *In re Bendectin Litig.*, 857 F.2d 290, 293, 295 (6th Cir. 1988) (however, trial court's count indicated only 818 Bendectin cases), *cert. denied*, 488 U.S. 1006 (1989).

12. In 1985 the Western District of Washington reported 169 judge-tried airplane-product-liability terminations, with a mean duration of 2419 days. The litigation reported by *In re Air Crash Disaster near Bombay, India on January 1, 1978*, 531 F. Supp. 1175 (W.D. Wash. 1982), terminated numerous cases in 1985 after a judge trial. See Witkin, *Judge Clears Boeing in Crash That Killed 213*, N.Y. Times, Nov. 1, 1985, at A8.

13. In 1991 the Eastern District of Texas reported 180 jury-tried asbestos-product-liability terminations, with a mean duration of 1636 days. The litigation reported by *Cimino v. Raymark Indus.*, 751 F. Supp. 649 (E.D. Tex. 1990), terminated approximately 168 cases in 1991 after jury trial. See *Asbestos*, Nat'l L.J., Jan. 21, 1991, at S3.

14. 1947-1960 ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS table C-5. The data exclude land condemnation, forfeiture, and habeas corpus cases and include only the districts having solely federal jurisdiction.

In 1947, when the median judge-tried case lasted 9.0 months and the median jury-tried case lasted 8.8 months, the tremendous number of short, judge-tried Office of Price Administration suits was beginning to diminish. After 1960, the Administrative Office stopped reporting comparable measurements of median duration for tried cases.

15. The only exceptions are medical malpractice and negotiable instruments, but neither of those exhibits a significant difference.

16. One can view Table 1 as exploring the hypothesis that judge-tried cases and jury-tried cases have the same mean duration. By convention, the hypothesis being tested is called the null hypothesis. Snedecor and Cochran, *STATISTICAL METHODS* 64 (8th ed. 1989). The reported significance levels, here calculated by t-test, are the probability of rejecting the null hypothesis when it is true. That is, the significance levels provide an inverse measure of the likelihood that the difference in durations shows a real difference rather than mere random variation. The smaller the significance level, the more surprised one would be to observe the difference in durations if the tested hypothesis (equality of durations) were true. *Id.* By arbitrary convention, results that are significant at or below the 0.05 level are described as statistically significant. E.g., Fienberg, ed., *THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS* 197 (1989).

Internet research

Most of the empirical observations for this article were made by using the "Judicial Statistical Inquiry Form" on the World Wide Web. It is available for all to use, at:

<http://teddy.law.cornell.edu:8090/questata.htm>

The user will find a form to fill out, specifying the user's statistical interests and desires.

In the first part of the form, the user focuses the data set. He or she can select certain case categories, calendar years, and federal districts. Further, the user can separate cases according to jurisdictional basis, how the case came into the district court, and whether the case was tried by judge or jury.

In the second part of the form, the user specifies the statistical operations to be performed. He or she can inquire about the number of cases, the time on the docket, the plaintiffs' win rate, and the amounts demanded and awarded. Most useful is the ability to display results by case category, federal district, trial mode, calendar year, jurisdictional basis, or case origin. For example, a user interested in time trends of frequency, duration, win rate, or amounts could simply choose "year" on the form as the basis of aggregation, so that all the results would be stated year by year.

Once these choices are submitted, the output is available in a matter of seconds.

This research tool is powerful and flexible, yet simple to use. In short, empirical research is within the reach of anyone.

—Theodore Eisenberg
and Kevin M. Clermont

Regression analysis

Table 1 clearly shows an effect of lengthier judge-tried cases in terms of time on the docket. Because so many of the case categories show the effect, the different mixes of case categories that constitute the judge and jury trial dockets could not explain all of it. Nevertheless, the difference in mixes of cases flowing to judges and juries suggests that other differences in the case inflow might contribute to, or even fully account for, the duration effect. The Administrative Office data permit uncovering some of those differences. To investigate the possibility that such

differences explain the empirical result, it is necessary to investigate judge or jury trial mode in fully tried cases while simultaneously holding the other case characteristics constant. Regression techniques permit this.

More precisely, time on the docket (the dependent variable) was explored as a function of the independent variable of primary interest (judge trial or jury trial) as well as of other independent variables contained in the Administrative Office data: the calendar year the case terminated, case category, the district in

which the case was tried, and the jurisdictional basis for the case's being in federal court.

The results (available from the authors) show that the judge/jury differences remain impressively big and statistically significant after controlling for year, category, district, and jurisdiction. The coefficient for judge trial indicates that, holding the other variables constant, a switch from jury trial to judge trial adds 46 days on the docket. The significance level is at or below 0.0005.

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cases, the fact of lengthier judge-tried cases still prevails in every category that shows a significant difference.¹⁷ Second, to the extent the stakes of a case correlate with a case's complexity, available data suggest that juries, not judges, hear the more complex set of cases. Both demands and awards of damages are higher in cases tried to juries than in cases tried to judges.¹⁸

A different explanation would be that, comparing overall queues, the judge trial calendar contains more cases, and more difficult cases, than the jury trial calendar. It is true that separate judge and jury calendars exist, although most further generalizations about calendar practice become impossible in the face of variations in local practice and judicial discretion.¹⁹ The calendar explanation falters, however, when one recalls that both queues are passing through the same judge, who could act to equalize speeds. It seems doubtful that judges are systematically, and so heavily, discriminating against *bench* trial in violation of their duty to manage their calendars by the principle that "what time there is of the court in view of the whole docket must be equitably distributed."²⁰

At any rate, both of these explanations are grievously damaged by this observation: in the 13 categories, the average case that terminates during (rather than after) a judge trial spends 660 days on the docket, while the analogous number for jury trial is 702 days.²¹ This difference tends to prove

that the delay in a case tried by a judge to completion is attributable to the period after commencement of trial.²² That is, cases in which trial commences, but in which voluntary or involuntary termination comes *during* trial, reach disposition at least as quickly before judges. Only cases that run through the *complete* course of trial and later judgment show the slowness of judge trial.

This observation about the judge trials starting no later than the jury trials is singularly helpful in analyzing the results.²³ It is the kind of observation,

rarely achieved in empirical analysis, that allows a final step in getting around the problem of controlling for type of case.²⁴ Whatever the type of case going through judge trial, rather than jury trial, that type sees a trial start at least as soon as the jury cases but sees a final disposition significantly later. Something is happening during or after judge trial—and remember that judge trial is shorter than jury trial in terms of actual trial time—to slow down the judge-tried cases in terms of time on the docket.

(continued on page 199)

17. Looking at single categories is a further cut, see *supra* n. 10, at controlling for type of case. See Sipes and Oram, *supra* n. 3, at 23-24. The next step would be multivariate regression, a statistical technique for holding case characteristics constant within each category. Such regression confirms our results, as described in the sidebar "Regression analysis."

18. See Clermont and Eisenberg, *supra* n. 9, at 1177 (mean demand higher in jury-tried cases for all but one of the 13 case categories; mean award higher in jury-tried cases for eight of 13 categories; median award higher in jury-tried cases for all but one of the 13 categories); *id.* at 1164-1166 (explaining that more than jury generosity underlies these figures); cf. *infra* n. 22 (regression analysis).

19. See 5 Moore, MOORE'S FEDERAL PRACTICE ¶40.02[1] (2d ed. 1995); 9 CYCLOPEDIA OF FEDERAL PROCEDURE §31.07 (rev. 3d ed. 1993).

20. Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701, 708 (1927).

21. There were 4245 terminations during judge trial and 13,060 during jury trial; as measured by t-test, the difference in mean duration is highly significant, at <0.00005. In a regression for terminations during trial (which controlled for year, case category, district, and jurisdictional basis), judge trial has a coefficient of -58.43, with significance level at <0.0005. All this confirms that truncated judge trials conclude more quickly than truncated jury trials.

However, there is again the concern with the Administrative Office's overinclusive definition of

trial. See *supra* n. 10. Here the numbers were checked by also examining only those cases terminated during trial by entry of a final judgment for plaintiff or defendant. For them, on average, the 1496 judge-tried cases lasted 640.6 days, while the 4411 jury-tried cases lasted 640.8 days.

22. In a full regression combining terminations during and after trial, the coefficients for during-judge-trial, during-jury-trial, and after-judge-trial are -48.02, 15.91, and 48.69, all with significance level at <0.0005. When also controlling for amount demanded in thousands of 1994 dollars (which drops the number of cases to 45,472), these coefficients become -39.80, 22.59, and 38.88 (while the coefficient for amount demanded is 0.003), all with significance level at <0.0005.

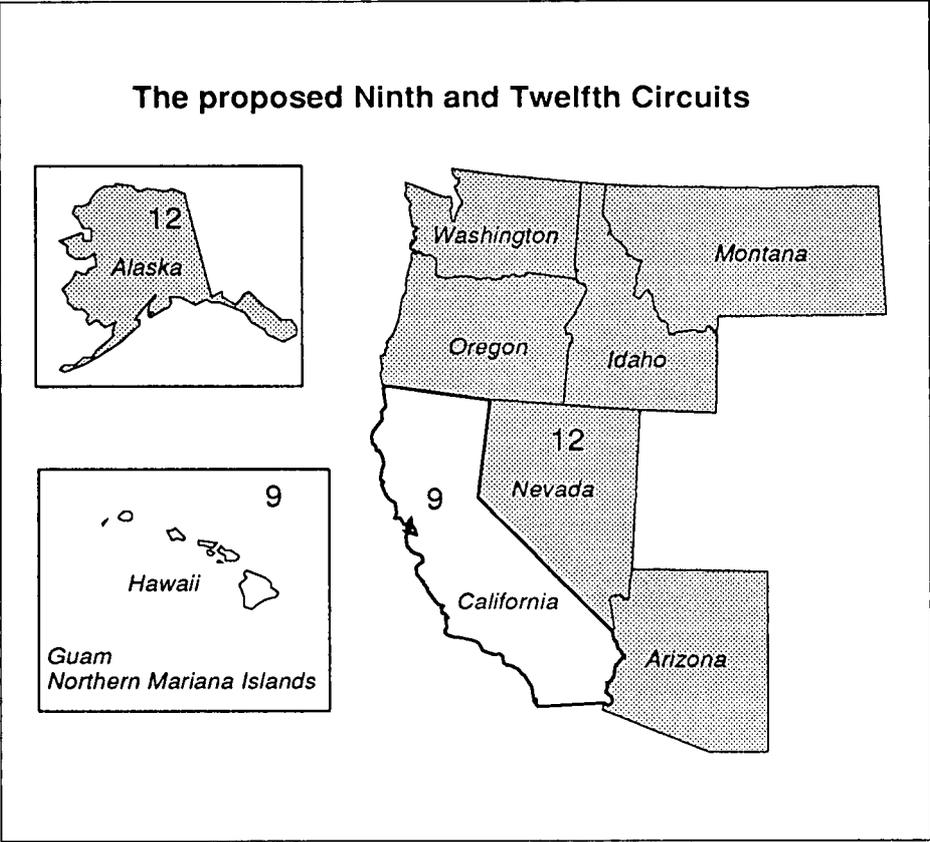
The positive coefficients for terminations during jury trial suggest that cases so terminated tend to be long and complex. This prevents putting too much reliance on the midtrial comparison. The consistently negative coefficients for terminations during judge trial, however, suggest that judge-tried cases are not reaching trial later than jury cases. Yet terminations after judge trial do come significantly later than after jury trial.

23. See also, e.g., 1993 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ON JUDICIAL BUSINESS OF THE UNITED STATES COURTS at A1-102 (median interval from issue to trial in civil cases in which trial was completed in fiscal year 1993 was 15 months for judge trials and 16 months for jury trials).

24. See *supra* n. 17.

It is unclear how the second session of the 104th Congress will treat S.956. The bill's advocates are attempting to enlist the support of senators who are not members of the Judiciary Committee. Much could depend on Senator Feinstein's efforts, primarily whether she can forge an effective coalition that favors a national assessment of the appellate system. Should Senator Feinstein be unable to do so, resolution of the circuit-splitting issue may depend on her willingness to filibuster, whether Republicans can secure needed votes for cloture, and how much senators from the other 41 states will defer to senators who represent the nine states in the Ninth Circuit. If the Senate approves S.956, prospects for passage in the House will depend substantially on Representative Henry Hyde (R-Illinois), chair of the Judiciary Committee, Representative Carlos Moorhead (R-California), chair of the Judiciary subcommittee with responsibility for the bill, and California members of the House. ⚖️

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Trial by jury or judge: which is speedier? (continued from page 180)

The most probable explanation is that the actual trial and eventual decision by a judge are more prone to interruption and delay than the jury process. Others have observed this judicial tendency. Some lawyers have noted a "source of protraction in bench trials: the irregular or discontinuous scheduling of trial dates to meet the convenience of the judge but not the lawyers. These lawyers complained that the absence of a jury allows judges to start and stop the pro-

ceedings too easily."²⁵ Many commentators have also noted the judges' practice of postponing decision for an extended period.²⁶ Judge Prentice Marshall estimated the delay at "months" and attributed it to the diversion of other duties.²⁷ As Judge William Palmer put it:

Even if a judge announces his decision from the bench, written findings, conclusions and judgment nearly always must be prepared, and the work of preparing them may require not hours, but days. And if a cause is taken under submission by the judge to await the preparation and filing of briefs by counsel, their work on them, the judge's study of them, his research, and his work defining and announcing his decision may require considerably more time off the courtroom stage than would be equivalent to the excess of trial time by jury over that by judge. For very simple cases, it is true, no doubt, that trial by jury takes more time than trial by judge, but in

the overall functions of a large metropolitan court, frankly I do not know whether time would be saved if jury trials were abolished and every case were tried by only a judge.²⁸

In assessing the speed of trial by jury versus trial by judge, one must consider both the length of the actual trial and also the total time from filing to termination of the case. The actual trial may proceed more slowly before a jury than before a judge, because of extra procedural steps. Yet, contrary to intuition, jury-tried cases last less long on the docket than judge-tried cases, probably because the press of other duties leads judges to interrupt the trial and postpone eventual decision. Thus, reformers who seek to speed up civil litigation by eliminating the jury should consider other time-saving measures. ⚖️

25. Bermant et al., *supra* n. 4, at 45.
 26. See *id.*; Bledsoe, *Jury or Nonjury Trial—A Defense Viewpoint*, 5 AM. JUR. TRIALS 123, 141-142 (1966); Marshall, *A View from the Bench: Practical Perspectives on Juries*, 1990 U. CHI. LEGAL F. 147, 155-156; Palmer, *On Trial: The Jury Trial*, 20 F.R.D. 65, 78 (1958).
 27. Marshall, *id.* at 156.
 28. Palmer, *supra* n. 26, at 78.