

Exorcising the Evil of Forum-Shopping

Kevin M. Clermont

Theodore Eisenberg

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Kevin M. Clermont and Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 Cornell L. Rev. 1507 (1995)
Available at: <http://scholarship.law.cornell.edu/clr/vol80/iss6/1>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

EXORCISING THE EVIL OF FORUM-SHOPPING

Kevin M. Clermont† & *Theodore Eisenberg*††

ABSTRACT

Most of the business of litigation comprises pretrial disputes. A common and important dispute is over where adjudication should take place. Civil litigators deal with nearly as many change-of-venue motions as trials. The battle over venue often constitutes the critical issue in a case.

The American way is to provide plaintiffs with a wide choice of venues for suit. But the American way has its drawbacks. To counter these drawbacks, an integral part of our court systems, and in particular the federal court system, is the scheme of transfer of venue "in the interest of justice." However, the leading evaluative articles criticize the scheme because of the supposedly high number of transfer motions and the costs they add to the litigation system. On this scanty basis, the authors call for abolishing transfer of venue.

Utilizing a database of the three million federal cases terminated over thirteen recent years, we take a closer look. Most importantly, we see that the plaintiffs' rate of winning drops from 58% in cases in which there is no transfer to 29% in transferred cases. This dramatic effect prevails over the range of substantively different types of cases. A big part of the most probable explanation for this drop is that plaintiffs are indeed forum-shopping, but that courts are transferring cases to more just courts, so that the decrease in the win rate reflects the fact that courts are stripping plaintiffs of unjust forum advantages. Statistical analysis supports this explanation and, at long last, demonstrates that forum does affect outcome.

Further examination of reported and unreported cases suggests that the burdens of operating the transfer scheme are small.

† Flanagan Professor of Law, Cornell University. The Federal Judicial Center originally collected the data used in this Article (federal court cases: 1979-1991). The Inter-university Consortium for Political and Social Research made the data available. Neither the Center nor the Consortium bears any responsibility for the analyses presented here. We would like to thank for their comments, Lily Kahng, Martin Wells, and the participants in the Conference on the Law and Economics of Litigation Reform at the Georgetown University Law Center on October 28-29, 1994; for his coding of the reported cases, John Marcoux; and for its computer and data support, the Cornell Institute for Social and Economic Research.

†† Professor of Law, Cornell University.

Thus, by revealing that transfer has the benefit of countering forum-shopping, and does so without undue burden, this study argues that preserving the transfer-of-venue scheme is a good policy choice.

INTRODUCTION

The name of the game is forum-shopping. In the American civil litigation system today, few cases reach trial. After perhaps some initial skirmishing, most cases settle. Yet all cases entail forum selection, which has a major impact on outcome.¹

Consider the individual case. The plaintiff's opening moves include shopping for the most favorable forum. Then, the defendant's parries and thrusts might include some forum-shopping in return, possibly by a motion for change of venue. Venue is worth fighting over because outcome often turns on forum. When the dust settles, the case does too—but on terms that reflect the results of the skirmishing. Thus, the fight over venue can be the critical dispute in the case.

Cumulate these tendencies systemically. Forum selection is very important not only to the litigator, but also to the office lawyer draft-

¹ “[F]orum-shopping, among both federal and state courts, [has become] a national legal pastime.” J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967). See generally Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553 (1989) (stressing benefits of forum-shopping). Remaining at the anecdotal level for the time being, we offer the following illustration from John MacCormack, *Remote Venue: Plaintiffs' Pick*, NAT'L L.J., Jan. 31, 1994, at 1, 1, 30:

Lost in a thorny sea of mesquite, huisache and prickly pear, nearer to Mexico than to any large American city, Duval County, Texas, occupies a peculiar warp of time and culture that is not often attractive to outsiders. Its isolation in deep South Texas and its harsh climate once prompted a jaded 19th century traveler to suggest, “There is nothing to do in this lonely land but drink and fornicate.”

And but for one peculiar modern development, this sour observation might still apply: Duval County, while still remote, poor and weighed down by its disreputable past, now enjoys a remarkable popularity among Texas plaintiffs' lawyers.

It falls south of what in Texas legal circles is called “the mesquite curtain,” a wandering geographical delineation known to induce apoplexy and dry heaves among insurance-company lawyers and defense lawyers. “You have sympathetic judges and unsophisticated juries. Speaking from painful experience, once a case gets venue down there, its value just explodes,” says a San Antonio defense lawyer who asked not to be named.

See also Laurie P. Cohen, *Lawyer Gets Investors to Sue GE, Prudential in Poor Border Town*, WALL ST. J., Nov. 30, 1994, at A1, A11 (similar raves for nearby Maverick County, where unemployment exceeds 23%, and median household income is \$12,500; where fewer than half the adults graduated from high school, and 93.5% speak Spanish at home; and where, according to the plaintiffs' lawyer, the judge “understands things and we understand him and the jurors are bountiful”). Leaving Texas for Alabama, we come to “Barbour County, an ordinary little county that has become nationally recognized as tort hell.” Gregory Jaynes, *Where the Torts Blossom*, TIME, Mar. 20, 1995, at 38, 38.

ing contracts with an eye toward possible future litigation. Not surprising, then, there exists an entire treatise devoted to the subject.² Once in litigation, the parties frequently dispute venue. Litigators deal with nearly as many change-of-venue motions as trials.³ Thus, forum selection is a critical concern of the legal system.

The law both creates this reality and attempts to alleviate it. The American way is to provide plaintiffs with a wide choice of venues. To offset the obvious drawbacks of this approach, the law provides as an integral part of our court systems, and in particular the federal court system, the scheme of transfer of civil venue "in the interest of justice."⁴

Because of transfer's intuitive appeal, most commentators approve of the device uncritically.⁵ Indeed, some reformers would broaden the transfer mechanism to substitute for the current law on judicial jurisdiction and venue.⁶ Yet, over the years, several articles have claimed to see an ugly reality behind transfer's abstract attractiveness and called for abolition of the mechanism.⁷

² ROBERT C. CASAD, *JURISDICTION AND FORUM SELECTION* (1988 & Supp. 1994).

³ There were about 11,000 federal civil trials per year during the period 1979-1991, but the trend over time is downward. For the number of change-of-venue motions, see *infra* part II.A.

⁴ The focus of this Article is 28 U.S.C. § 1404(a) (1988): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." See generally 15 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 3841-3855 (2d ed. 1986 & Supp. 1995). Other less important transfer statutes exist in the federal court system. See *infra* notes 44-49 and accompanying text. Transfer provisions exist in state court systems, but naturally have a much lesser significance than in a nationwide federal court system. See 77 AM. JUR. 2D *Venue* § 48 (1975).

⁵ See Edmund W. Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99, 99 (1965) ("[T]he section has received nearly unanimous praise from the commentators and the courts in light of its unexceptionable objectives of convenience and justice.").

⁶ E.g., Herbert J. Korbel, *The Law of Federal Venue and Choice of the Most Convenient Forum*, 15 RUTGERS L. REV. 607, 616-18 (1961); Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 626 (1991) (suggesting that the United States follow Australia's lead in relying exclusively on transfer); see also David E. Seidelson, *Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions*, 37 GEO. WASH. L. REV. 82, 84, 100 (1968) (proposing that plaintiff could employ nationwide service to lay venue for a federal cause of action in any district, subject to § 1404(a) transfer); cf. Arthur J. Keefe, *Twenty-Nine Distinct Damnations of the Federal Practice—and a National Ministry of Justice*, 7 VAND. L. REV. 636, 649 (1954) (proposing the substitution of § 1404(a) transfer for current venue restrictions). See generally Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 450 n.186 (1981) (evaluating such proposals).

⁷ David P. Currie, *The Federal Courts and the American Law Institute* (pt. 2), 36 U. CHI. L. REV. 268, 307-11 (1969); Kitch, *supra* note 5; cf. David E. Steinberg, *The Motion to Transfer and the Interest of Justice*, 66 NOTRE DAME L. REV. 443 (1990) (would severely restrict transfer).

In the leading article on transfer of venue under 28 U.S.C. § 1404(a), Professor Kitch concluded "that the cure is itself a serious disease."⁸ He saw the benefit of transfer as alleviating the hardship cases that derive from the wide choice of forums, but stressed, albeit in brief discussion, the cost of handling many difficult transfer motions. His empirical support consisted of the thirty-six transfer opinions that were decided from 1962 to 1963 and published in *Federal Supplement*.⁹ Kitch proposed that the legislature tighten the initial choice of forums and then eliminate the transfer mechanism.¹⁰

In a more recent commentary, Professor Steinberg concluded that the "facially reasonable" transfer mechanism is in practice "a cumbersome and costly procedure with few real beneficiaries."¹¹ His empirical basis for this assertion was information from the Administrative Office of the United States Courts (A.O.) indicating that, of late, the federal district courts were ordering more than three thousand transfers per year.¹² He proposed that the courts severely restrict the

⁸ Kitch, *supra* note 5, at 101.

⁹ See *id.* at 131 n.155, 137 n.180, 139 n.190.

¹⁰ Accord Currie, *supra* note 7, at 307 (it "costs altogether too much time and money" to handle the factually and legally complex motion to transfer). There is nothing necessarily wrong with Kitch's proposal to tighten the initial choice of forums, although it should have some motivation besides the supposed failure of the transfer mechanism. However, even after appropriate tightening of choice, transfer would still have a role. See generally Clermont, *supra* note 6, at 440-41, 450-51.

¹¹ Steinberg, *supra* note 7, at 523.

¹² See *id.* at 446 n.11 (citing Letter from Charles D. Gentry, Assistant Chief, Statistical Analysis and Reports Division, Administrative Office of the United States Courts, to David E. Steinberg (Mar. 8, 1990), supplying data for 1985-1989, and citing Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 680 & n.16 (1984), for transfer statistics from 1975-1982); cf. PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1141 n.12 (2d ed. 1973) (providing similar data for 1968-1970); Letter from Charles D. Gentry, Assistant Chief, Statistics Division, Administrative Office of the United States Courts, to Kevin M. Clermont (Sept. 20, 1994) (on file with authors) (providing similar data for other years). In the table below, we combine data from these various sources, and we correct the numbers for 1985-1989 to remove Professor Steinberg's mistaken inclusion of proceedings under 28 U.S.C. § 1407. The data represent the number of transfers during the fiscal year ending on June 30 of that year:

FISCAL YEAR	NUMBER OF TRANSFERS	FISCAL YEAR	NUMBER OF TRANSFERS
1968	790	1982	2445
1969	869	1983	2867
1970	1115	1984	2870
1971	1224	1985	3058
1972	1526	1986	3099
1973	1236	1987	3448
1974	1645	1988	3847
1975	1836	1989	3477
1976	2016	1990	3831
1977	1712	1991	4037
1978	1909	1992	4134
1979	1763	1993	3991
1980	2120	1994	4094
1981	2435		

The A.O. compiled this information from its filing tapes and predecessor databanks, counting district court cases that originated each year by transfer from another district.

transfer mechanism.¹³

In the classic Hart and Wechsler casebook on federal courts, however, Professor Shapiro observed that the only empirical information then available—the seemingly high number of transfers per year—is not at all disturbing in itself:

This figure was slightly more than 1% of the total number of civil cases commenced in the district courts during this period. There is no indication, however, of how many transfer motions were denied or how many of those granted were contested in the district courts or in proceedings for appellate review.

. . . Don't we have to have such empirical data before any well-informed judgments about the utility of transfer can be made?¹⁴

Indeed, the number of transfers may indicate a considerable need for this mechanism. It could bestow benefits in the form of undoing abusive forum selection by plaintiffs, as well as possibly inducing appropriate forum selection initially in order to avoid a motion to transfer.

This Article provides some empirical information on benefits and costs of transfer, before concluding in favor of preserving the transfer-of-venue scheme.

I

BENEFITS

A. Empirical Observation of Transfer Effect

1. *Overall Effect*

The most striking result that our more comprehensive data set yielded is the dramatic drop in plaintiffs' rate of winning after transfer of venue. In recent federal civil cases, the plaintiff wins in 58% of the

These would predominantly, but not exclusively, comprise § 1404(a) transfers. See *infra* text accompanying notes 46-53. The numbers in this Article differ somewhat, lagging behind these numbers, because we are working from the publicly available A.O. termination tapes, which compile information on the cases terminated in that year rather than on the cases filed during the particular year.

Professor Steinberg also noted that over one hundred transfer opinions are published each year, although his methodology for avoiding overinclusion is not entirely apparent. Steinberg, *supra* note 7, at 464 & n.112; see CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 44, at 279 (5th ed. 1994) ("Section 1404(a) has given rise to a veritable flood of litigation. Probably no issue of adjective law gives rise to so many reported decisions, year after year, as does this seemingly simple statute.").

¹³ Oddly, while faulting the costs of transfer, Professor Steinberg principally attacked the courts' transfer opinions for considering many varied factors that seemed to get different weights in different situations, although one would expect and even desire such decisionmaking under a discretionary, individualized, all-things-considered standard such as § 1404(a)'s transfer "in the interest of justice." At any rate, his proposal was for courts to decide transfer motions usually by considering only the location of the preponderance of relevant witnesses and documents.

¹⁴ PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1746 & n.18 (3d ed. 1988).

nontransferred cases that go to judgment for one side or the other, but wins in only 29% of such cases in which a transfer occurred.

Our comprehensive data set derives from all the available computerized data gathered by the A.O., which cover the fiscal years 1979-1991.¹⁵ When any civil case terminates in federal district court, the court clerk transmits a form to the A.O. that provides information about the case. The form includes data regarding the nontransfer or transfer origin of the case; the subject matter; the jurisdictional basis; the amount demanded; the dates of filing and termination; the procedural progress of the case at termination; the method of disposition; and, when a judgment was entered, who prevailed and any amount awarded in damages. The form distinguishes among many subject matter categories, including branches of tort, contract, and other areas of law. Nevertheless, the A.O. data do not contain many things one would like to know, such as the occurrence of transfer motions made but denied.

The Appendix shows win rates in nontransferred and transferred cases of every category in use, aggregated across all ninety-four federal districts for thirteen fiscal years. To be precise, the win rate is the fraction of plaintiff wins among judgments for either plaintiff or defendant. Judgments comprise much more than trial outcomes: For A.O. purposes, judgments might be the result of adjudication, consent, or default, but they normally do not include voluntary dismissals or dismissals for lack of prosecution. For our purposes, we further narrowed judgments to include only those cases in which the database indicates a win by plaintiff or defendant, excluding outcomes favorable to both or to an unknown party.

In sum, the database comprises 2,804,640 terminations of federal civil cases. These yielded 985,312 nontransfer judgments and 9,389 transfer judgments. The win rate drops from 57.97% when the case is not transferred to 29.26% when transfer is granted.

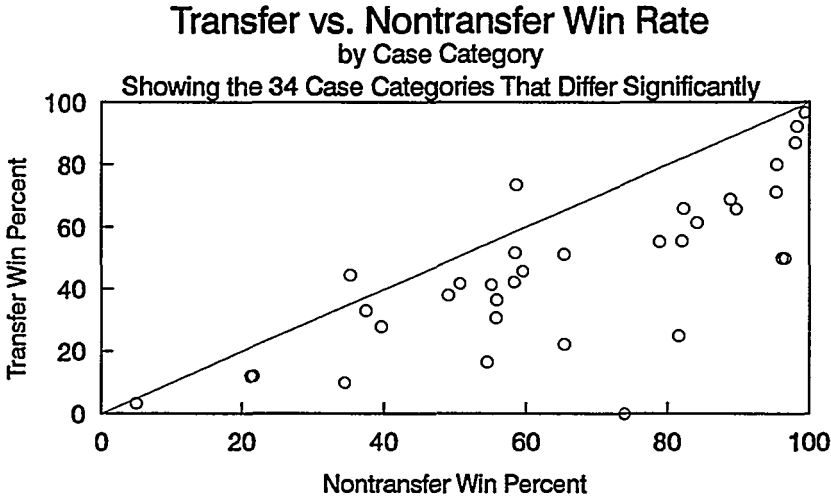
2. Case Categories

A reader skeptical of the effect of transfer might hypothesize that the difference in win rates derives solely from the coincidence of certain categories' having both many transfers and low win rates regardless of transfer status. Figure 1, however, shows the win rate declining after transfer in thirty-two of the thirty-four categories that show a statistically significant difference at the level of $p < 0.1$.¹⁶ (Each point

¹⁵ For a fuller description of the database, see Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1133-34 (1992).

¹⁶ The two exceptional categories are "antitrust," which is #410, and "bankruptcy transfer rule 915(b)," which is #421.

below the diagonal line represents a case category in which the non-transfer win rate is higher than the transfer win rate.)



Source: Administrative Office Data, 1979-1991

Figure 1

So, the decline in win rate is not simply a result of those categories with many transfers also having low win rates; moreover, when transfer affects win rate, its effect is overwhelmingly negative. Thus, although the overall drop from 58% to 29% gives an exaggerated sense of the magnitude of the transfer effect, the effect nevertheless appears to be real.

The antitrust category involves groups of strong cases being transferred to join pending related cases, as well as the usual transfer to cure forum-shopping. By going into the database to look at case names and characteristics, we were able to discern related cases. We then eliminated related groups of three or more nontransfer or transfer judgments. Consequently, the antitrust nontransfer and transfer win rates dropped from 35.21% and 44.62%, respectively, to 30.36% and 31.86%. The latter two rates differ insignificantly.

The specialized bankruptcy category should be disregarded. The A.O. has discontinued that code. The category represented transfers from the bankruptcy court to the district court because of lack of subject-matter jurisdiction. District court clerks were probably miscoding these cases as originating by § 1404(a) transfer. Further proof that most of these cases involved miscoding, rather than § 1404(a), lies in the percentage of cases transferred: for category #421 the transfer rate was 16.92%, which is well more than triple the rate in the next highest ordinary category.

The only other category with a transfer rate over 5% is "insanity," which is #920. Its transfer rate is 24.51%; however, the category's nontransfer and transfer win rates do not differ significantly. Insanity is one of a group of categories called local questions, which includes ##910, 920, 930, 940, 990, and 992. These categories involve actions in territorial courts and are based on local law. Being highly distinctive, they not surprisingly yield some unusual statistical results. As for the small category of insanity cases in particular, the cases, both nontransfer and transfer, almost exclusively terminated during 1978-1984 in the District of the Virgin Islands.

B. Probable Explanation of Transfer Effect

The situation is as follows: Plaintiffs select a favorable forum. Courts transfer "in the interest of justice" to a presumably superior forum. The applicable law does not change.¹⁷ Yet the win rate markedly drops. So, the supposedly procedural device of transfer appears to have a remarkably substantive effect.¹⁸

1. *Forum-Shopping*

The most powerful explanation for the transfer effect involves forum-shopping: the plaintiffs' win rate declines because the plaintiff has lost a forum advantage. The theory is that transfer not only causes some plaintiffs to abandon their cases or to settle on less favorable terms, perhaps with the formal entry of judgment for defendant, but

¹⁷ See 15 WRIGHT ET AL., *supra* note 4, § 3846. The transferee court applies the state law that the transferor court would have applied, although surely this choice-of-law process does not always work perfectly to ensure the same outcome. Also, dispute exists over whether this principle of deference applies when the two courts have different views concerning federal substantive law. At any rate, the transferee court applies its own procedural law, the local variations of which could affect outcome. Therefore, change of law could in some part contribute to the plaintiffs' difficulty in litigating successfully in the transferee forum. See Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 252-55 (1991); *cf. infra* text accompanying notes 46-53 (data include transfers under 28 U.S.C. § 1406(a), by which applicable law may change).

¹⁸ A similarly dramatic effect on win rate prevails under the related doctrine of forum non conveniens. That doctrine results in dismissal and, in the federal court system, applies primarily where the preferred court is foreign. See 15 WRIGHT ET AL., *supra* note 4, § 3828. In a survey of plaintiffs' lawyers in the 180 reported transnational cases that the federal courts dismissed on forum non conveniens grounds from 1947 to 1984, responses covered 85 cases; of those 85, not one resulted in a plaintiff's win in the foreign court; most cases were abandoned or settled for little. David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 LAW Q. REV. 398, 418-20 (1987); see also David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353 (1994) (arguing for reliable rules to temper judicial discretion and otherwise to narrow forum non conveniens). However, because of the differences between transfer of venue and forum non conveniens, our favorable policy conclusion on transfer of venue does not extend to forum non conveniens.

Another interesting and possibly confirmatory context is removal. Of the 985,312 nontransfer judgments, 38,306 arrived in federal court by removal from state court. The win rate for these cases is 36.77%. Perhaps the "removal effect" of a lowered win rate results in part from a loss of forum advantage. Unlike change of venue, however, removal has a fairly express purpose of changing outcome. See JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 55 (2d ed. 1993).

Finally, in a limited study of the final outcomes in 19 Supreme Court cases on judicial jurisdiction, the success rate for plaintiffs dropped from 83% in cases in which jurisdiction was upheld to 0% in cases in which it was not. In the seven cases in which jurisdiction was denied, five cases were not pursued elsewhere; one case was settled on terms favorable to defendant; and in one case defendants prevailed on the merits. Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 776-78, 817-32 (1995), *questioned in* Erwin Chemerinsky, *Assessing Minimum Contacts: A Reply to Professors Cameron and Johnson*, 28 U.C. DAVIS L. REV. 863, 864-65 (1995). Again, this study suggests that forum affects outcome.

also makes it more difficult for other plaintiffs to litigate successfully in the unfavorable forum. The judgment database should reveal these latter effects, with fewer plaintiff judgments relative to defendant judgments after transfer.

More specifically, the explanation runs as follows: The plaintiff initially chooses the forum by filing suit. If the choice is too favorable to tolerate, the defendant moves to transfer. A relatively objective judge then chooses the forum, ordering transfer if it is in the interest of justice. The court considers many factors, with matters of convenience dominating; the balance must tilt decidedly toward transfer in order to overcome the presumption in favor of the plaintiff's choice of forum.¹⁹ So, while the court will not transfer merely to shift the inconvenience from the defendant to the plaintiff, the court will transfer when the balance of inconveniences is really lopsided. If transfer occurs, the plaintiff's chance of winning declines through a variety of changed circumstances, such as a possibly less favorable set of local biases in the new forum. The dominant influence, however, is probably the shifted balance of inconveniences. Upon transfer, the plaintiff's cost of litigating will rise, while the defendant's cost will fall; the quantity of litigation "units" that the plaintiff will purchase relative to the defendant will fall commensurately; and so the win rate will decline.²⁰

One would not expect the forum to have a mammoth effect independent of the merits. However, transferred cases do tend to comprise those cases where the substantive effect of forum is greatest. After all, the plaintiff tried to forum-shop, the defendant chose to fight back, and the court decided that the forum truly mattered. Thus, it is reasonable to conclude that redressing plaintiffs' forum-shopping advantage by transfer should decrease the win rate to some extent.

Incidentally, as transfer works to neutralize any lopsided cost advantage, and thereby to equalize the effectiveness of the two sides' litigation expenditures, the outcome should be more accurate in the transferee court. Accuracy tends to be a good, being a critical aspect of justice.²¹ Thus, the forum-shopping explanation of the transfer effect leads to a corollary: the effect of transfer in changing outcome is good, putting costs to the side until Part II. Transfer removes the plaintiff's forum advantage when the interest of justice so counsels, and therefore removes the plaintiff's opportunity to gain an unjust victory in litigation or to achieve an unjust settlement.

¹⁹ See 15 WRIGHT ET AL., *supra* note 4, §§ 3847-3854.

²⁰ See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 564-66 (4th ed. 1992).

²¹ See generally Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994).

Some colleagues have challenged this normative conclusion. They observe cynically or skeptically that judges may have insidious motives in transferring a case or may be in error in deciding to transfer—all to the detriment of the downtrodden plaintiff and to the advantage of the deep-pocket defendant. However, this stereotypical thinking ignores the reality that, in some case categories, plaintiffs may not be little and defendants may not be big or that the casting of the aggrieved in the role of plaintiff or defendant may be rather arbitrary. For example, parties in trademark cases do not fit the stereotypes, but the Appendix shows a more pronounced transfer effect in trademark cases than in general personal injury cases. Moreover, a subset of the database—diversity cases for fiscal years 1987-1991—distinguishes individual and corporate American parties. For individual versus corporation, the win rate increases slightly from 51% to 52% after transfer; for corporation versus individual, however, the win rate drops from 87% to 51% after transfer. Forum-shopping might be in use by the strong against the weak. In evaluating the desirability of transfer, therefore, one should put aside preconceptions about whom it helps and whom it hurts.

In any case, transfer does not shift the choice of forum from plaintiff to defendant, but instead from plaintiff to judge. Moreover, the judge decides to transfer only in rather extreme cases of forum-shopping, normally deferring to the presumption in favor of the selected forum. In short, the transferee forum should generally be a better forum affording a better outcome.

More fundamentally, to distrust judges with that much determination, or equivalently to assume that across thousands of cases self-interested plaintiffs are as likely to choose a just forum as are judges, throws in question our whole judicial system. One could as readily argue that the plaintiff should be free to choose the outcome of the case, because there would similarly be no reason to trust the judge more than the plaintiff. That is silly. Indeed, if forum actually affects outcome as markedly as it seems to, then giving the plaintiff a choice of forum unchecked by the transfer power has nearly the same effect as giving the plaintiff a choice of outcome.

2. *Case Selection*

The best alternative explanation of the transfer effect involves case selection: the set of transferred cases comprises weaker cases. For example, a plaintiff's lawyer who loses a transfer motion may be more apt to lose the judgment too, or to arrange for a new lawyer who is apt to lose. Nonetheless, such an explanation would not likely account for the observed magnitude of the transfer effect. Moreover,

this explanation is of questionable validity; after all, lawyers who aggressively forum-shop might be more effective lawyers as a group.

A more powerful version of this sort of alternative explanation would be that easy plaintiff victories often, but not always, occur quickly, without transfer, so that transferred cases are tougher to win. Additionally, transferred cases tend to be big and serious disputes between litigious parties.²² Undoubtedly, this process of biasing the set of transferred cases contributes to the transfer effect. Nevertheless, it probably does not fully explain the effect. After all, easy defendant wins also occur to an extent without transfer, offsetting selection's effect. Moreover, it appears that defendants are winning more cases after transfer, in an absolute sense and not merely relative to the number of plaintiff wins.²³

3. Summary

The issue, then, involves a choice between two competing kinds of explanation: Do the data mean something after all, in which event the drop in win rate rather obviously suggests a loss of favorable forum? Or do these output data reveal nothing, because the input of cases decided in nontransfer and transfer forums could be completely dissimilar? Stated differently, the forum-shopping explanation holds the data to be more or less straightforwardly meaningful, while the case selection view implies that output data with uncontrolled input is too uncertain a premise to support any conclusion. Case selection is occurring. But its existence, while advising caution before embracing the obvious, does not necessarily destroy all meaning in the data and preclude any conclusion. Instead, we can try to tease out from the data whether something is going on in addition to case selection.

²² The data confirm that transferred cases generally have a higher mean amount demanded and take longer to litigate.

²³ Although the ratio of total judgments entered (either for plaintiff or for defendant) to total cases terminated drops from 35.59% for nontransfer cases to 25.92% for transfer cases, and although the corresponding ratio of plaintiff judgments to total cases drops from 20.63% to 7.58%, the ratio of defendant judgments to total cases rises from 14.96% to 18.34%. This effect prevails across the range of case categories. So, it seems that not only are plaintiffs winning fewer cases after transfer, but defendants are winning more. That is, the transfer effect needs some explanation other than that most of the easy plaintiff victories occur without transfer, or that transfer cases comprise a set of evenly disputed cases. An even more powerful case-selection explanation would be that transfer cases involve defendants particularly averse to litigation in the plaintiffs' chosen forum, and that aversion results in their defending only cases to which they have a strong defense. We explore such a phenomenon with respect to foreigners in Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996). We believe, however, that aversion cannot fully explain the transfer effect, which appears to be bigger than the foreigner effect despite the facts that domestic defendants would be less averse than foreigners and would discount their aversion by the possibility of transfer.

Therefore, to establish whether the forum-shopping explanation plays a substantial role, in conjunction with one or more versions of the alternative explanation, in producing the transfer effect, we need to go back into the data for additional empirical analyses. These analyses are informative in themselves, and they provide circumstantial proof of the forum-shopping explanation for the decline in win rate.

C. Empirical Support of Forum-Shopping Explanation

The data include four variables that, in addition to case category, might explain the lower win rate after transfer. Examining each variable reveals the role of forum-shopping in producing the transfer effect.

1. *Controlling for the Merits*

Because weaker suits tend to correlate with larger damage demands, the amount demanded can be used as a proxy for the merits of the case.²⁴ Therefore, by using logistic regression techniques within each subject matter category to hold the amount demanded constant, we can begin to see if transfer has an effect on win rate independent of the merits.²⁵

Looking at the twenty-five categories with the most transfer judgments to compare, amount demanded correlates significantly with win rate in seventeen categories;²⁶ of those seventeen categories, fifteen show a negative correlation,²⁷ and two show a positive correlation.²⁸

²⁴ See Clermont & Eisenberg, *supra* note 15, at 1165 n.99 (similar point regarding trial data).

²⁵ See generally *id.* at 1144-48 (discussing regression techniques). One might argue that cases potentially subject to a transfer motion are more expensive to litigate, involving additional issues and tending to be more complex overall; that they are riskier, being subject to the loss of the forum advantage; and that, consequently, a transferred case with a given amount demanded would tend to be a stronger case on the merits than a nontransferred case for the same amount. If that is so, then the negative effect of transfer observed by regression understates the actual transfer effect. This strengthens our conclusion that the forum-shopping explanation is valid.

²⁶ We required a category to have at least 20 transfer judgments that also contained data on amount demanded. This yielded 26 categories. Of those, the category with the fewest cases was "habeas corpus," which is #530. We discarded that category because amount demanded seems irrelevant to an action created to permit state prisoners to challenge the legality of confinement. See WRIGHT, *supra* note 12, § 53.

For the purpose of these regressions, we set significance at $p < 0.1$. Elsewhere in this Article, except where otherwise indicated, we use "significant" in its conventional sense of $p < 0.05$.

²⁷ This negative correlation is in itself an interesting result. A negative correlation between expected award upon winning and probability of winning is often hypothesized. E.g., Donald Wittman, *Is the Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185, 188 (1985). This regression, then, constitutes some empirical support for that hypothesis.

²⁸ The two exceptional categories are "asbestos," #368, and "tax suits," #870. At least in asbestos, a greater amount demanded plausibly implies a greater chance of winning. Tax suits are more complicated. See 13B WRIGHT ET AL., *supra* note 4, § 3580. Most tax

Focusing on those seventeen categories in which the amount demanded reflects the merits, we see that transfer has an independently significant effect in eleven categories; of those eleven categories, eight show a negative effect,²⁹ and three show a positive effect.³⁰

A less informative but more dramatic way to control for amount demanded is to aggregate all the categories.³¹ Amount demanded then has a very significant negative correlation with win rate. Transfer independently has a highly significant negative effect, reducing the plaintiff's chance of winning by half.³²

This exercise suggests that for two plaintiffs with an equal chance of winning, transfer of one usually lowers its chance of winning. This conclusion supports the forum-shopping explanation of the transfer effect on win rate.

2. Procedural Progress at Termination

The database also includes information on how far the case had proceeded at the time of judgment. These codes can be grouped into

suits are brought by taxpayers for refunds; a bigger claim might indicate a richer and more formidable claimant and, hence, a higher win rate. For the other tax suits, where the government as plaintiff seeks to compel compliance, the win rate is 92% overall; as the amount demanded goes up, the government likely makes ever more sure of its easy victory (the comparable category #152 exhibits a nearly significant positive correlation, while the other comparable category, #153, shows virtually no correlation between amount demanded and win rate). These influences could explain the positive correlation for both sorts of tax suits.

²⁹ The eight categories are ##110, 120, 140, 190, 360, 370, 440, and 890. The negative effect of transfer is of large magnitude. For these eight categories, 0.486 is the mean "odds multiplier," which is a way of expressing the size of a variable's influence. This value of 0.486 means that a 50% chance of winning drops to 33% after transfer, if all other variables are held constant.

³⁰ The three exceptional categories are "marine personal injury," #340; asbestos, #368; and antitrust, #410. At least for asbestos and antitrust, transfer plausibly implies a greater chance of winning. See *supra* note 16. Marine personal injury actions are more complicated. See 14 WRIGHT ET AL., *supra* note 4, § 3674. Most such suits are nonremovable by statutory provision. The most egregious forum-shopping will therefore occur at the state court level, muting the usual transfer effect in the federal data. The comparable category #330 also exhibits a positive effect on transfer, but an insignificant one.

³¹ There are 402,952 judgments that contained data on amount demanded. For those cases, the nontransfer win rate is 73.08%, and the transfer win rate is 39.82%.

³² The odds multiplier is 0.342, which means that transfer drops a 50% chance of winning to 25%. More specifically, with judgment for plaintiff as the dependent variable, the logistic regression yielded these results:

Variable	Coefficient	Significance
transfer	-1.072	0.000
log of demand	-0.348	0.000
constant	2.195	0.000

chi-squared(2) = 62164.08; prob. > chi-squared = 0.0000;
pseudo r-squared = 0.1319

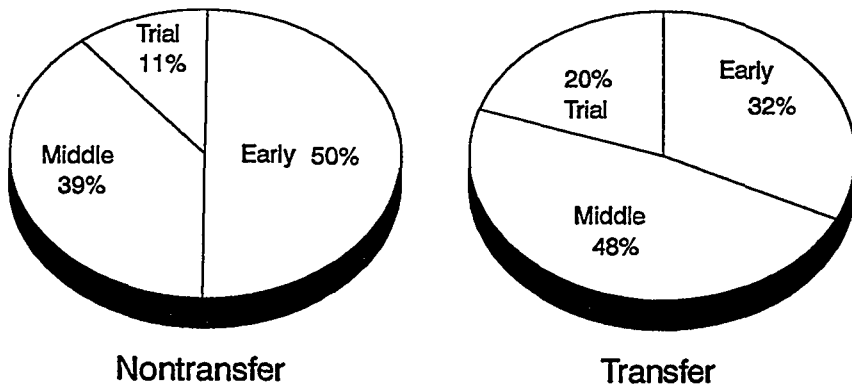
“early,” which means termination before any significant court action; “trial,” when judgment is entered during or after trial; and “middle,” which comprises all other possibilities.

TABLE 1
WIN RATE BY PROCEDURAL PROGRESS

	Nontransfer	Transfer
Early	73%	26%
Middle	41%	23%
Trial	45%	47%

As Table 1 shows, when judgment is entered during the early stage, the win rate dives upon transfer. Figure 2 shows that the early stage contributes proportionately fewer judgments after transfer; 50% of nontransfer judgments occur at this stage, but only 32% of transfer judgments do. This picture is consistent with the notion that easy plaintiff wins occur quickly, without transfer. Yet it also suggests that defendants are successfully weeding out cases quickly after transfer.³³

Percent of Judgments by Procedural Progress



Source: Administrative Office Data, 1979-1991

Figure 2

³³ Even if the entire decrease in the number of judgments (as indicated by Figure 2 and *supra* note 23) consisted of plaintiffs' victories, the early win rate would drop only to 42%. Much of the observed drop, then, comes from the plaintiffs' losing more, and not merely from the plaintiffs' lacking all those cases that are easy to win.

Moreover, as a practical matter it is unlikely that the entire decrease in judgments would consist of plaintiffs' victories. The A.O.'s coding scheme is ambiguous enough that some clerks in the transferee court would code the transfer decision in the transferor court as itself being significant court action meriting a middle code, while other clerks would not. Thus, some of the shift from early to middle codes after transfer might be an artifact of the coding scheme.

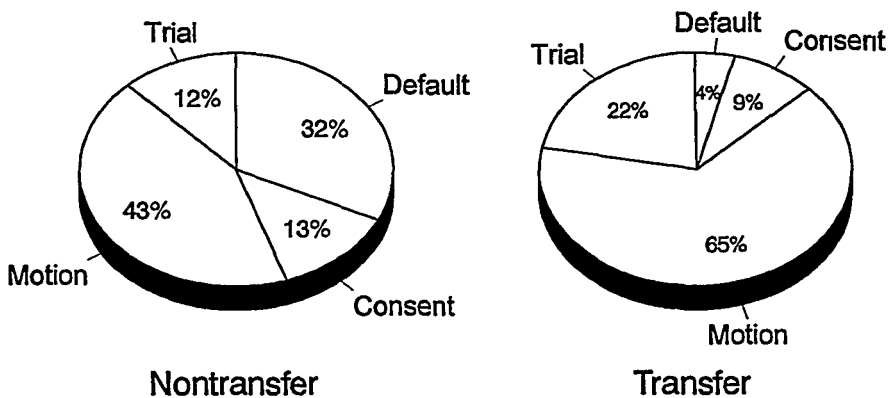
In the middle stage, as Table 1 shows, the win rate continues to drop substantially. This result confirms the need for a forum-shopping explanation of part of the transfer effect.

At trial, the win rates in nontransfer and transfer cases do not differ significantly. This result likely derives from the pretrial settlement process's distilling the selection of tried cases, for both non-transfer and transfer cases, to a residue of evenly disputed cases.³⁴

3. Method of Disposition

The database also indicates the method of disposition that led to judgment or other termination. Whereas the "procedural progress at termination" variable, discussed in the preceding section, represents the litigation stage, or time, at which termination occurred, the "method of disposition" variable refers instead to the procedural method, or device, used to dispose of the case.

Percent of Judgments by Disposition Method



Source: Administrative Office Data, 1979-1991

Figure 3

Over 90% of judgments³⁵ bear one of four disposition codes: default judgment, consent judgment, judgment on pretrial motion (such as a motion under Federal Rule of Civil Procedure 12 or 56), or judgment upon trial. The other judgments bear one of a number of

³⁴ See Clermont & Eisenberg, *supra* note 15, at 1128-30 (citing, inter alia, George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984)). Interestingly, by comparing fully tried nontransfer and transfer cases, we see that the win rate in judge trials drops insignificantly from 44% to 42%, but that the win rate in jury trials rises significantly from 48% to 52%. This suggests that plaintiffs' fears of the transferee jury are exaggerated.

³⁵ The precise figures are 92% for nontransfer judgments and 89% for transfer judgments.

unusual codes. Figure 3 excludes these unusual judgments from the sample population, and divides the rest according to the four most common methods of disposition.

Figure 3 shows a gigantic shift toward adjudicatory disposition for transfer cases. Default and consent lead to 45% of nontransfer judgments, but to only 13% of transfer judgments. Motion and trial dispositions fill the gap. This picture is consistent with the notion that transfer cases are litigated more seriously.

Although the win rate for consent judgments declines slightly from 88.17% to 85.55%, the only method of disposition with a substantially changing win rate is pretrial motion, which has a nontransfer win rate of 26.32% and a transfer win rate of 12.82%. This drop further confirms the need for a forum-shopping explanation of part of the transfer effect. The drop comes from plaintiffs' doing less well relative to defendants before adjudicators in undesired forums, not from the parties' settling in light of changed expectations. Furthermore, this decline in win rate also suggests that the transfer effect is not the product of the parties' misperceptions. For two reasons, it is unlikely that misperceptions about the impact of forum on the likelihood of success are biasing the residual subset of adjudicated transfer cases toward suits with a low chance of winning. First, parties who have fought over venue would more likely exaggerate than underestimate the effects of forum, and exaggeration would tend to elevate the transfer win rate. Second, parties seem to straighten out most of their perceptions of the forum by the trial stage, when the transfer effect disappears.

As an additional line of analysis, disposition codes allow for the consideration of terminations other than judgments. The most numerous codes here are for dismissals for lack of prosecution and, more importantly, other dismissals, which are primarily voluntary dismissals. These dispositions are not supposed to be entered as judgments; in fact, only 2% are entered as judgments. Table 2 presents the data on the nonjudgment dismissals.

Table 2 shows dismissals to be a major route out of court. It also shows that dismissals occur more frequently after transfer. Plaintiffs are abandoning their cases following transfer. This supports the forum-shopping explanation of the transfer effect. Indeed, because abandonment is not reflected in the judgment data, the observed transfer effect of win rate dropping from 58% to 29% tends to understate the actual transfer effect. Adding in the dismissals for lack of prosecution as defendant wins, but still excluding the more ambiguous other dismissals, alters the transfer effect to a proportionally bigger drop from 53% to 25%.

TABLE 2
NONJUDGMENT DISMISSALS

	Nontransfer Dismissals	% of Nontransfer Terminations	Transfer Dismissals	% of Transfer Terminations
Lack of Prosecution	93,574	3.38	1,707	4.71
Other Dismissals	1,384,273	50.01	21,378	59.02

Consideration of dismissals more generally implies a greater importance of the finding of a transfer effect among judgments. Judgments include only a small part of all settlements, among which the distinction between judgment for plaintiff and judgment for defendant might only weakly reveal the role of forum advantage in settlement. Presumably, however, the transfer effect observed in the rest of judgments would carry over to influence all nonjudgment settlements and other resolutions. Thus, the availability of the transfer mechanism has importance in dispute resolution alternatives to judgment.

4. *Jurisdictional Basis of Cases*

The database allows disaggregation of terminations and judgments according to the basis for invoking federal jurisdiction. Table 3 does this.

TABLE 3
TRANSFER BY JURISDICTIONAL BASIS

	Total Terminations	% Transferred	Nontransfer Win %	Transfer Win %
Diversity of Citizenship	678,171	2.0	65.3	47.2
Federal Question	1,133,779	1.6	31.9	19.2
U.S. Defendant	388,643	1.0	29.3	14.8
U.S. Plaintiff	594,007	0.2	93.8	90.9

Diversity jurisdiction is most likely to produce a transfer, and the transfer effect on win rate is pronounced. This result suggests that forum-shopping is common in diversity cases, in which choice of venue was wide.³⁶

³⁶ The very existence of diverse citizenship implies that the case has nonlocal elements, increasing the chance of forum-shopping. Moreover, until 1990, a diversity plaintiff statutorily enjoyed a wider choice of venue, being allowed to lay venue in the plaintiff's home district, as well as in the usual venues at the defendant's home and where the claim arose. See WRIGHT, *supra* note 12, § 42.

Suits in which the United States is the plaintiff—primarily suits for recovery of overpayments and for forfeitures—result in the fewest transfers, and the transfer effect is least pronounced. This result confirms the intuition that such cases are lightly litigated but sure winners, often against some beneficiary of a government program who has been overpaid or is in default on repayment.

5. *Controlling for the Additional Variables*

Although a transfer effect certainly exists, some of it results from case selection. In comparing the set of nontransferred cases to the set of transferred cases, one sees a shift from a preponderance of high-win-rate case categories to a preponderance of lower-win-rate categories. Similarly, one sees a shift from the high-win-rate early termination stage to the lower-win-rate later termination stages, from the high-win-rate nonadjudicatory disposition methods to the lower-win-rate adjudicatory disposition methods, and from the high-win-rate U.S. plaintiff cases to the lower-win-rate cases with other jurisdictional bases. In other words, transfer cases look like tough, big, seriously disputed cases. This case selection might explain the transfer effect. At each step of the analysis, however, signs have persisted that forum-shopping helps to produce the transfer effect. Yet, a concern also persists that the various threads of case selection might cumulate to a sufficient explanation of the transfer effect.

We can test the validity of that concern by expanding the earlier regression that involved amount demanded to include four more independent variables: case category,³⁷ procedural progress, disposition method, and jurisdictional basis. Table 4 lists the results of that logistic regression, with judgment for plaintiff as the dependent variable.³⁸

When all the other variables that we can analyze are held constant, transfer continues to have a substantial negative effect on win rate.³⁹ This exercise indicates that case selection does not fully ex-

This observation about forum-shopping in diversity cases does not counsel abolishing diversity jurisdiction. Instead, one could argue that the existence of this type of jurisdiction, combined with transfer of venue, protects defendants against the forum-shopping that could otherwise occur at the state court level. *Cf. supra* note 30 (nonremovable actions). This argument supports retaining removal rights in the face of the current push to eliminate in-state plaintiff diversity jurisdiction. *See Conference Supports Repeal of In-State Plaintiff Diversity Jurisdiction*, THIRD BRANCH, JUNE 1994, at 4.

³⁷ To keep the regression manageable, we considered cases from only the 20 most numerous categories. Those categories included, however, 90.20% of the cases.

In addition to the regression discussed in the text, we ran the regression separately for each of the 20 categories. The effect of transfer was overwhelmingly negative. No category showed a significant positive correlation.

³⁸ There are 342,722 cases that contained the requisite data. For those cases, the nontransfer win rate is 76.03%, and the transfer win rate is 38.60%.

³⁹ The odds multiplier is 0.676, which means that transfer drops a 50% chance of winning to 40%.

plain the transfer effect. Rather, forum-shopping plays a substantial role in explaining the decline in win rate after transfer.

TABLE 4
LOGISTIC REGRESSION RESULTS

Variable	Coefficient	Significance
transfer	-0.392	0.000
case category dummy variables (not separately reported)		0.000
log of demand	-0.046	0.000
early stage	-0.136	0.019
middle stage	0.108	0.054
trial stage (reference category)		
default judgment	2.967	0.000
consent judgment	2.100	0.000
pretrial motion	-1.159	0.000
trial method (reference category)		
U.S. plaintiff	1.468	0.000
U.S. defendant	-0.567	0.000
federal question	-0.025	0.455
diversity of citizenship (reference category)		
constant	0.687	0.000

chi-squared(29) = 243807.5; prob. > chi-squared = 0.0000;
pseudo r-squared = 0.6428

II Costs

In considering the costs imposed or saved by using a certain procedure, it is important to identify both direct costs and error costs.⁴⁰ Professor Steinberg, in his attack on the transfer mechanism, assumes that the only savings it generates stem from the net diminution of direct costs that is associated with litigating in a more convenient forum.⁴¹ However, as the preceding part of this Article shows, transfer yields considerable savings through the diminution of error costs: transfer removes unjust forum advantage and thereby produces more accurate outcomes.

Nevertheless, the other side of the balance also deserves consideration. What are the costs imposed by operating the transfer mecha-

⁴⁰ See generally Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400-02 (1973) (outlining a framework for analyzing legal procedures).

⁴¹ See Steinberg, *supra* note 7, at 452.

nism? To measure the burden of transfer, one must investigate the number of transfer motions and how expensive they are.

A. Number of Transfer Motions

The place to begin is with the number of transfer motions granted. Table 5 lists the number of transfers per year or, more precisely, the number of cases terminated in a given year that had arrived in the district by transfer. This figure has real meaning only as a percentage of cases, and so Table 5 also measures transfers in percent of terminations.

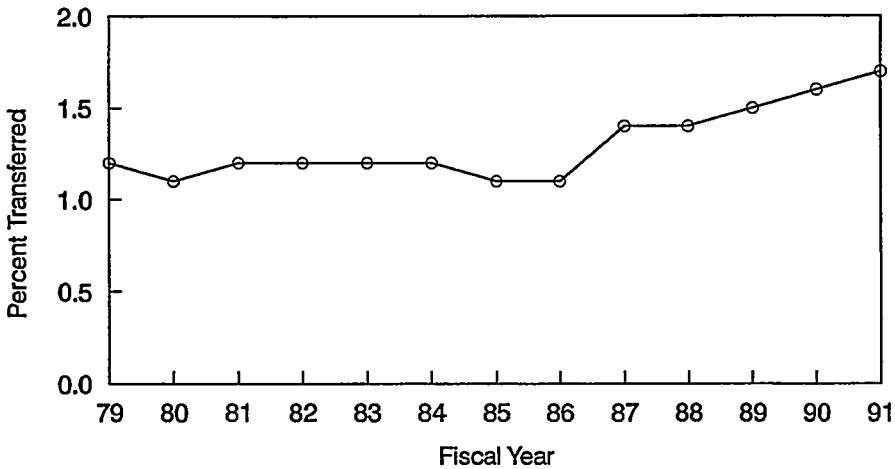
TABLE 5
NUMBER AND PERCENT OF CASES TRANSFERRED

Fiscal Year	All Categories		Nonspecial Categories	
	#	%	#	%
1979	1745	1.2	1216	1.0
1980	1760	1.1	1360	1.0
1981	2169	1.2	1715	1.1
1982	2281	1.2	1789	1.1
1983	2508	1.2	1887	1.0
1984	2837	1.2	2176	1.0
1985	2864	1.1	2186	0.9
1986	3006	1.1	2270	1.0
1987	3246	1.4	2409	1.2
1988	3275	1.4	2452	1.2
1989	3508	1.5	2650	1.4
1990	3434	1.6	2460	1.4
1991	3589	1.7	2543	1.5

The yearly number and percent do not seem very high. However, Figure 4 reveals that the percent has recently shown some increase. Looking at the category-by-category data underlying the graph yields no special explanation of the recent increase. However, examining data over a longer period indicates that this increase is part of a gentle long-term upward trend.⁴² Perhaps that trend reflects a growing need for the transfer device.

⁴² Combining the filing data on transfers (*supra* note 12) with the total number of civil filings (reported in 1968-1994 ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, supplemented by Telephone Interview with Charles D. Gentry, Assistant Chief, Statistics Division, Administrative Office of the United States Courts (Oct. 3, 1994)), we can create an analogous graph for a longer period:

Percent of Cases Transferred

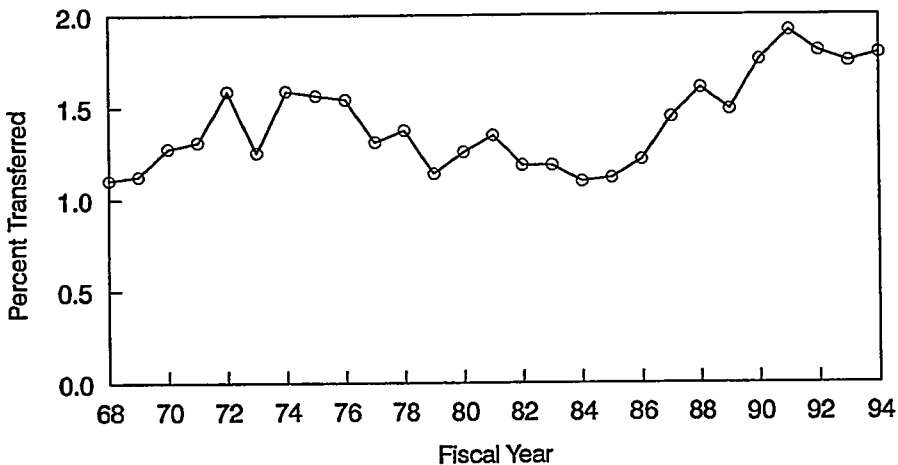


Source: Administrative Office Data, 1979-1991

Figure 4

The category data suggest that the overall number of transfers overstates the burden of transfer motions. Prisoner cases⁴³—primarily habeas corpus and civil rights suits—make a disproportionate contribution to the number of transfers. The Appendix indicates that 25% of transfers occur in prisoner cases. These cases are special, with very

Percent of Cases Transferred



Source: Administrative Office Data, 1968-1994

⁴³ The group called prisoner petitions includes categories ##510, 520, 530, 535, 540, and 550.

low win rates and with distinctive reasons for transfer.⁴⁴ Accordingly, Table 5 presents the transfer data without these special categories.⁴⁵

Furthermore, the transfer number and percent include transfers other than those under the relevant transfer provision, 28 U.S.C. § 1404(a). Although the A.O.'s instructions to clerks and lawyers limit the relevant transfer code to § 1404(a) transfers, there is no code for other transfers into the district except for multidistrict litigation under 28 U.S.C. § 1407.⁴⁶ Thus, transfers under special statutes,⁴⁷ such as the very different transfers under 28 U.S.C. § 1406(a) to correct improper judicial jurisdiction or venue,⁴⁸ appear in the § 1404(a) transfer totals.⁴⁹

To get a rough idea of the proportion of § 1406(a) motions to § 1404(a) motions, we looked at reported cases. More precisely, we used the Westlaw key number system to locate three years' output of transfer cases.⁵⁰ Reading these 238 cases revealed that of the cases involving one of these two motions, only 14% were § 1406(a) motions.⁵¹ One would expect the subset of reported cases to be biased

⁴⁴ Indeed, the habeas corpus statute has its own transfer provision in 28 U.S.C. § 2241(d). The statute allows transfer between the district of confinement and the district of conviction. See generally 15 WRIGHT ET AL., *supra* note 4, § 3843, at 328 (describing the limitations of venue in habeas corpus actions).

⁴⁵ Table 5 also eliminates the special bankruptcy category #421. See *supra* note 16. Table 5 shows the number of nonspecial transfers, as well as that figure as a percent of nonspecial terminations. If Figure 4 graphed these nonspecial transfers, the line would shift downward but retain its general slope.

⁴⁶ See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, XI GUIDE TO JUDICIARY POLICIES AND PROCEDURES transmittal 64, at II-13 to -14, -18, -53 (Mar. 1, 1985); Letter, *supra* note 12, at 1. On § 1407, see 15 WRIGHT ET AL., *supra* note 4, §§ 3862-3866.

⁴⁷ For a description of these special statutes, see 15 WRIGHT ET AL., *supra* note 4, §§ 3842, 3843, at 328.

⁴⁸ For details on § 1406(a), see *id.* § 3827.

⁴⁹ For example, the large number of habeas corpus transfers means that 28 U.S.C. § 2241(d) transfers are being coded as § 1404(a) transfers. See *supra* note 44. We can exclude the prisoner categories. See *supra* note 43. Most of the other special transfer statutes are either basically similar to § 1404(a), such as 28 U.S.C. § 1402(a)(2) for corporate tax refund actions, or rarely used, such as 28 U.S.C. § 1631 for correcting improper subject-matter jurisdiction. For these, then, miscoding is not troublesome. We can therefore focus on the inclusion of § 1406(a) transfers in the § 1404(a) totals.

Section 1406(a) transfers definitely do appear coded as § 1404(a) transfers. For the § 1406(a) grants appearing in the reporters, see *infra* text accompanying note 50, we could track 19 of those 23 cases down in the A.O. database after transfer. Seventeen were coded in the transferee court as § 1404(a) transfers.

⁵⁰ The years of decision were 1981, 1986, and 1991. The key numbers were 170BII(B).1 and .2, which correspond to venue laid in a proper forum and venue laid in a wrong forum. The cases consisted of 89% district court cases and 11% appellate court cases.

⁵¹ Reading the cases gives one a handle on some other ambiguities in the A.O. database. Of the § 1404(a) motions, approximately 6.6% came on the plaintiff's motion; no § 1404(a) motions came by joint motion or on the court's motion. Accordingly, we have justifiably referred to § 1404(a) in this Article as a defendant's motion.

toward overstating the proportion of § 1406(a) motions,⁵² because such motions often present the legally interesting question of improper judicial jurisdiction or venue rather than the factually dependent question of transfer in the interest of justice. So, probably fewer than 14% of transfer motions are pursuant to § 1406(a).⁵³

Accordingly, even excluding prisoner cases, the transfer number and percent derived from the A.O. database overstate transfers under § 1404(a) and hence slightly exaggerate the burden imposed by that mechanism. The stated figures thus predominantly, though not exclusively, represent transfers granted under § 1404(a).

The reported cases also generate a rough idea of the ratio of unsuccessful transfer motions to these grants of transfer. Of the § 1404(a) motions granted or denied, 45% were granted and 55% were denied. Admittedly, reported cases, which typically involve serious or difficult motions, tend to skew toward a 50% success rate. However, the expense of transfer motions screens the making of motions, skewing the background success rate toward the same 50% figure. But differential stakes could cause a departure from 50%.⁵⁴ And defendants often benefit from the delay caused by moving for transfer.⁵⁵ All of this produces a success rate below 50%. So, the number of unsuccessful transfer motions exceeds the number of successful transfer motions, but this limited empirical foray suggests that the ratio is not huge.

Setting the ratio of unsuccessful motions to successful motions rather arbitrarily at two to one yields an estimate of the number of § 1404(a)-type motions: roughly ten thousand per year, including prisoner cases. Thus, transfer motions occur in less than 5% of case terminations.

B. Expense of Transfer Motions

Although as many as ten thousand transfer motions may be made each year, our sample of reported cases indicates that only about fifty-

⁵² Prisoner cases offer a telling illustration of the bias in reported cases. While 25% of actual transfers occur in prisoner cases, *see supra* text accompanying note 43, only 2% of the reported transfer cases do. On the other hand, 15% of all transfers come from category #190, "other contract actions," which nevertheless contributes 26% of the reported transfer cases.

⁵³ On the other hand, § 1406(a) motions would seem to be disproportionately granted (here 23 of 30 motions), and so the percentage of § 1406(a) motions could be greater in the A.O. database of transferred cases. This raises the possibility that the observed transfer effect of lowered win rate is partly owing to the § 1406(a) cases. However, for the 7 judgments rendered in the 19 cases transferred under § 1406(a) that we could track down, *see supra* note 49, the win rate was 29%, which is the same as the win rate for all transferred cases. Thus, the mixing of § 1406(a) cases into the database probably has minimal impact in producing the transfer effect.

⁵⁴ *See* Clermont & Eisenberg, *supra* note 15, at 1131.

⁵⁵ *See* Steinberg, *supra* note 7, at 463-67.

seven trial motions under § 1404(a) are reported each year. That is, very few § 1404(a) transfer motions are contested or difficult enough to be interesting or important. After all, defendants present some motions half-heartedly, and plaintiffs contest motions sometimes weakly or not at all. A hearing on transfer is not mandatory.⁵⁶ Even the reported transfer cases do not seem to involve the expenditure of a great deal of resources on the parties' part. The district courts seem to dispose of transfer motions rather easily, usually focusing on only a couple of factors. This is not to deny, of course, that some very visible transfer motions are fought to the death. In short, there may be a tendency among commentators to overestimate the expense of transfer motions.⁵⁷

Turning from the trial to the appellate level, there is likewise reason to discount intuitive estimates of expense. Appealability and reviewability of transfer orders are strictly limited,⁵⁸ although there is room for reform by imposing even stricter limits.⁵⁹ At any rate, few transfer cases reach the appellate level, and those that do are overwhelmingly affirmed. For appellate cases, the world of reported cases is a much more complete and accurate representation of the actual universe of cases. Our survey indicates that only about five reported appellate cases each year involve § 1404(a) transfers, and only about four-fifths of those actually entail review of the transfer motion. Most of these review a denial of the motion. All of these cases entailing actual review of the transfer motion in our survey resulted in affirmance.

CONCLUSION

Critics of transfer of venue tend to overlook its benefits and to overstate its costs. Our empirical investigation suggests that transfer offers the considerable advantage of countering the very real detriments of forum-shopping, and that it does so without undue burden. The new empirical evidence is not definitive, but the transfer critics definitely can find no support in it. Good policy calls, at the least, for preserving the transfer mechanism.

⁵⁶ See 15 WRIGHT ET AL., *supra* note 4, § 3844, at 338.

⁵⁷ E.g., Steinberg, *supra* note 7, at 509; cf. Irving R. Kaufman, *Observations on Transfers Under Section 1404(a) of the New Judicial Code*, 10 F.R.D. 595, 595 (1951) (describing early experience with § 1404(a)).

⁵⁸ See 15 WRIGHT ET AL., *supra* note 4, § 3855.

⁵⁹ See *id.* § 3841, at 321-22; Edward L. Barrett, Jr., *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 631-32 (1954); Currie, *supra* note 7, at 309-10; Irving R. Kaufman, *Further Observations on Transfers Under Section 1404(a)*, 56 COLUM. L. REV. 1, 1-11 (1956); Kitch, *supra* note 5, at 110-31; Korb, *supra* note 6, at 618 n.64. *But see* Steinberg, *supra* note 7, at 472-78.

APPENDIX

TRANSFER OF VENUE IN FEDERAL CIVIL CASES

Source: Administrative Office Data, 1979-1991

Category Name	A.O. Code	Total Terminations	Total Transfers	% Transferred	% of Transfers	Nontransfer Judgments	Transfer Judgments	Nontransfer Win %	Transfer Win %	Significance
CONTRACT										
Indemnity on Admiralty Cases	100	1	0	0.00	0.00	0	0	NA	NA	NA
Insurance	110	77,030	827	1.07	2.28	17,865	179	48.96	37.99	.004
Marine	120	59,244	857	1.45	2.37	10,995	147	82.24	65.99	.000
Miller Act	130	16,372	184	1.12	0.51	2,785	30	79.10	70.00	.257
Negotiable Instruments	140	48,865	343	0.70	0.95	25,442	84	95.35	71.43	.000
Recovery of Overpayments & Enforcing Judg.	150	61,961	96	0.15	0.27	37,342	31	98.00	7.10	.003
Recovery of Medicare Overpayments	151	967	9	0.93	0.03	351	1	65.81	100.00	1.00
Recovery of Defaulted Student Loans	152	45,228	105	0.23	0.29	31,051	48	99.33	97.92	.278
Recovery of Overpayment of Veterans Benefits	153	224,867	139	0.06	0.38	119,235	60	99.33	96.67	.062
Stockholders Suits	160	2,017	65	3.22	0.18	351	11	45.01	45.45	1.00
Other Contract Actions	190	291,501	5,322	1.83	14.69	87,198	981	78.93	55.35	.000
Employee Relations	191	24	0	0.00	0.00	9	0	88.89	NA	NA
Hospital Care Act	193	5	0	0.00	0.00	1	0	100.00	NA	NA
Contract Product Liability	195	6,585	116	1.76	0.32	1,137	13	54.09	46.15	.589
REAL PROPERTY										
Land Condemnation	210	26,002	25	0.10	0.07	18,648	11	24.87	45.45	.156
Foreclosure	220	88,399	74	0.08	0.20	60,142	26	98.25	92.31	.075
Rent, Lease, Ejectment	230	4,924	37	0.75	0.10	1,563	8	81.57	25.00	.600
Torts to Land	240	5,687	49	0.86	0.14	1,161	16	51.59	31.25	.132
Tort — Product Liability	245	904	6	0.66	0.02	159	2	35.85	50.00	1.00
Other Real Property Actions	290	13,910	137	0.98	0.38	3,779	26	55.76	30.77	.016

APPENDIX (continued)

Category Name	A.O. Code	Total Terminations	Total Transfers	% Transferred	% of Transfers	Nontransfer Judgments	Transfer Judgments	Nontransfer Win %	Transfer Win %	Significance
TORTS-PERSONAL INJURY										
Airplane	310	8,926	247	2.77	0.68	1,473	38	46.23	50.00	.742
Airplane Product Liability	315	3,858	191	4.95	0.53	589	30	34.47	10.00	.005
Assault, Libel & Slander	320	10,529	194	1.84	0.54	2,688	57	25.93	33.33	.223
Federal Employers' Liability	330	27,492	1,070	3.89	2.95	2,621	98	57.92	66.33	.117
Marine	340	56,310	1,055	1.87	2.91	9,473	191	52.94	56.02	.421
Marine — Product Liability	345	1,547	40	2.59	0.11	409	2	62.84	50.00	1.00
Motor Vehicle	350	83,836	1,754	2.09	4.84	12,365	257	58.47	51.75	.035
Motor Vehicle — Product Liability	355	7,473	135	1.81	0.37	1,160	34	36.90	47.06	.280
Other Personal Injury	360	92,904	1,956	2.11	5.40	18,912	375	37.42	33.07	.095
Workman's Comp. (Inclus. Accident Board)	361	5	0	0.00	0.00	2	0	50.00	NA	NA
Personal Injury — Medical Malpractice	362	16,391	373	2.28	1.03	3,664	77	32.70	27.27	.390
Personal Injury — Product Liability	365	64,203	1,137	1.77	3.14	10,324	188	30.38	23.79	.936
Asbestos Personal Injury — Product Liability	368	40,897	1,056	2.58	2.92	1,656	106	69.32	76.42	.128
TORTS-PERSONAL PROPERTY DAMAGE										
Other Fraud	370	23,978	361	1.51	1.00	5,618	78	58.29	42.31	.005
Truth in Lending	371	2,181	5	0.23	0.01	372	4	43.01	0.00	.140
Other Personal Property Damage	380	22,879	442	1.93	1.22	4,569	61	54.41	54.10	1.00
Property Damage — Product Liability	385	5,156	75	1.45	0.21	826	15	40.19	33.33	.792
STATUTES										
State Reapportionment	400	107	3	2.80	0.01	46	1	56.52	100.00	1.00
Antitrust	410	14,959	556	3.71	1.54	3,530	130	35.21	44.62	.032
Bankruptcy Trustee	420	1,998	31	1.55	0.09	384	3	62.24	33.33	.560

APPENDIX (continued)

Category Name	A.O. Code	Total Terminations	Total Transfers	% Transferred	% of Transfers	Nontransfer Judgments	Transfer Judgments	Nontransfer Win %	Transfer Win %	Significance
Bankruptcy Transfer Rule										
915 (h)	421	1,123	190	16.92	0.53	157	49	58.60	73.47	.066
Bankruptcy Appeals Rule 801	422	41,005	524	1.28	1.45	7,373	69	33.41	28.99	.522
Withdrawal	423	5,804	145	2.50	0.40	720	23	59.44	56.52	.831
Banks and Banking	430	5,197	76	1.46	0.21	1,476	12	54.81	41.67	.396
Other Civil Rights	440	118,801	897	0.76	2.48	37,257	290	21.32	12.07	.000
Voting	441	2,536	14	0.55	0.04	1,060	6	54.53	16.67	.099
Jobs	442	101,334	1,051	1.04	2.90	31,238	345	21.63	12.17	.000
Accommodations	443	4,216	13	0.31	0.04	1,101	3	47.50	33.33	1.00
Welfare	444	2,413	16	0.66	0.04	889	4	47.58	75.00	.353
Interstate Commerce	450	25,101	151	0.60	0.42	7,707	29	46.17	37.93	.457
Deportation	460	1,781	5	0.28	0.01	425	3	17.41	0.00	1.00
RICO	470	4,302	124	2.88	0.34	877	18	41.62	38.89	1.00
PRISONER PETITIONS										
Vacate Sentence (28 USC 2255)	510	22,456	111	0.49	0.31	9,594	50	15.85	8.00	.172
Parole Board Review	520	306	14	4.58	0.04	186	9	9.68	22.22	.232
Habeas Corpus	530	135,073	3,695	2.74	10.20	61,250	1,695	4.90	3.36	.003
Death Penalty — Habeas Corpus	535	69	2	2.90	0.01	18	2	11.11	0.00	1.00
Mandamus & Other	540	7,576	263	3.47	0.73	3,113	105	6.30	5.71	1.00
Prisoner — Civil Rights	550	245,829	4,834	1.97	13.35	91,416	1,860	3.62	2.96	.132
FOREFTURE & PENALTY										
Agriculture Acts	610	1,160	6	0.52	0.02	473	3	75.26	66.67	.575
Food & Drug Acts	620	7,839	209	2.67	0.58	4,191	165	96.23	96.97	.894
Drug Seizure or Property	625	2,174	4	0.18	0.01	1,278	2	96.64	50.00	.068
Liquor Laws	630	66	0	0.00	0.00	33	0	81.82	NA	NA
Railroad & Trucks	640	174	0	0.00	0.00	89	0	94.38	NA	NA
Airline Regulations	650	1,025	4	0.39	0.01	373	1	94.64	100.00	1.00
Occupational Safety/Health	660	1,722	0	0.00	0.00	833	0	96.04	NA	NA

APPENDIX (continued)

Category Name	A.O. Code	Total Terminations	Total Transfers	% Transferred	% of Transfers	Nontransfer Judgments	Transfer Judgments	Nontransfer Win %	Transfer Win %	Significance
Other Forfeiture & Penalty Suits	690	34,496	74	0.21	0.20	19,896	30	95.96	80.00	.002
LABOR LAWS										
Fair Labor Standards Act	710	19,683	56	0.28	0.16	8,543	13	84.19	61.54	.042
Labor/Management Relations Act	720	47,290	172	0.36	0.48	14,990	41	55.08	41.46	.085
Labor/Management Reporting & Disc. Act	730	3,087	13	0.42	0.04	1,091	4	44.73	0.00	.133
Railway Labor Act	740	2,852	32	1.12	0.09	898	9	20.27	11.11	.696
Welfare Pension Plan Disclosure	750	3	0	0.00	0.00	1	0	100.00	NA	NA
Other Labor Litigation	790	18,550	137	0.74	0.38	6,224	41	55.83	36.59	.017
ERISA	791	55,160	207	0.38	0.57	18,144	54	82.10	55.56	.000
OTHER STATUTES & LOCAL QUESTIONS										
Selective Service	810	58	1	1.72	0.00	16	0	6.25	NA	NA
Copyright	820	24,277	146	0.60	0.40	7,586	29	88.85	68.97	.003
Patent	830	13,228	493	3.73	1.36	3,221	117	65.35	51.28	.002
Trademark	840	26,651	331	1.24	0.91	9,335	79	89.65	65.82	.000
Securities, Commodities, Exchange	850	32,002	1,071	3.35	2.96	7,000	216	59.53	45.83	.000
Social Security (before 7/1/78)	860	20,059	65	0.32	0.18	11,796	43	28.00	30.23	.735
Health Insurance (42 USC 1395f(b))	861	3,685	27	0.73	0.08	1,364	4	31.16	50.00	.593
Black Lung (30 USC 923)	862	4,402	15	0.34	0.04	3,043	6	35.20	16.67	.672
Disability Insurance (42 USC 405(g))	863	123,234	282	0.23	0.78	52,338	100	99.59	28.00	.018
Supplemental Security Income	864	29,273	69	0.24	0.19	10,473	23	36.83	21.74	.193

APPENDIX (continued)

Category Name	A.O. Code	Total Terminations	Total Transfers	% Transferred	% of Transfers	Nontransfer Judgments	Transfer Judgments	Nontransfer Win %	Transfer Win %	Significance
Retirement & Survivors Ins. (42 USC 405(g))	865	3,555	12	0.34	0.03	1,402	4	33.45	25.00	1.00
Tax Suits	870	36,550	198	0.54	0.55	12,102	65	59.40	50.77	.165
IRS — Third Party Suits (26 USC 7609)	871	5,040	13	0.26	0.04	1,965	3	59.08	33.33	.571
Customer Challenge (12 USC 3410)	875	336	0	0.00	0.00	106	0	9.43	NA	NA
Review or Enforcement	880	9	0	0.00	0.00	3	0	66.67	NA	NA
Other Statutory Actions	890	75,016	899	1.20	2.48	21,512	229	50.59	41.92	.010
Agricultural Acts	891	3,665	19	0.52	0.05	1,399	9	48.96	66.67	.384
Economic Stabilization Act	892	395	9	2.28	0.03	112	1	43.75	100.00	.442
Environmental Matters	893	7,984	78	0.98	0.22	2,969	27	65.39	22.22	.000
Energy Allocation Act	894	766	14	1.83	0.04	245	5	48.16	20.00	.373
Freedom of Information Act of 1974	895	5,902	94	1.59	0.26	2,379	51	12.86	5.88	.199
Appeal of EAJA Fee Determination	900	56	0	0.00	0.00	23	0	13.04	NA	NA
Domestic Relations	910	747	16	2.14	0.04	424	4	96.23	50.00	.010
Insanity	920	824	202	24.51	0.56	33	5	87.88	80.00	.527
Probate	930	147	0	0.00	0.00	34	0	97.06	NA	NA
Constitutionality of State Statutes	950	3,842	44	1.15	0.12	1,350	13	34.44	15.38	.289
Narcotic Addict Rehabilitation Act	970	59	0	0.00	0.00	0	0	NA	NA	NA
Other Local Question	990	1,784	13	0.73	0.04	322	2	73.91	0.00	.070
Local Appeal	992	73	0	0.00	0.00	17	0	52.94	NA	NA
Uncategorized	999	716	0	0.00	0.00	4	0	50.00	NA	NA
TOTAL		2,804,640	36,222	1.29	100.00	985,312	9,389	57.97	29.26	.000