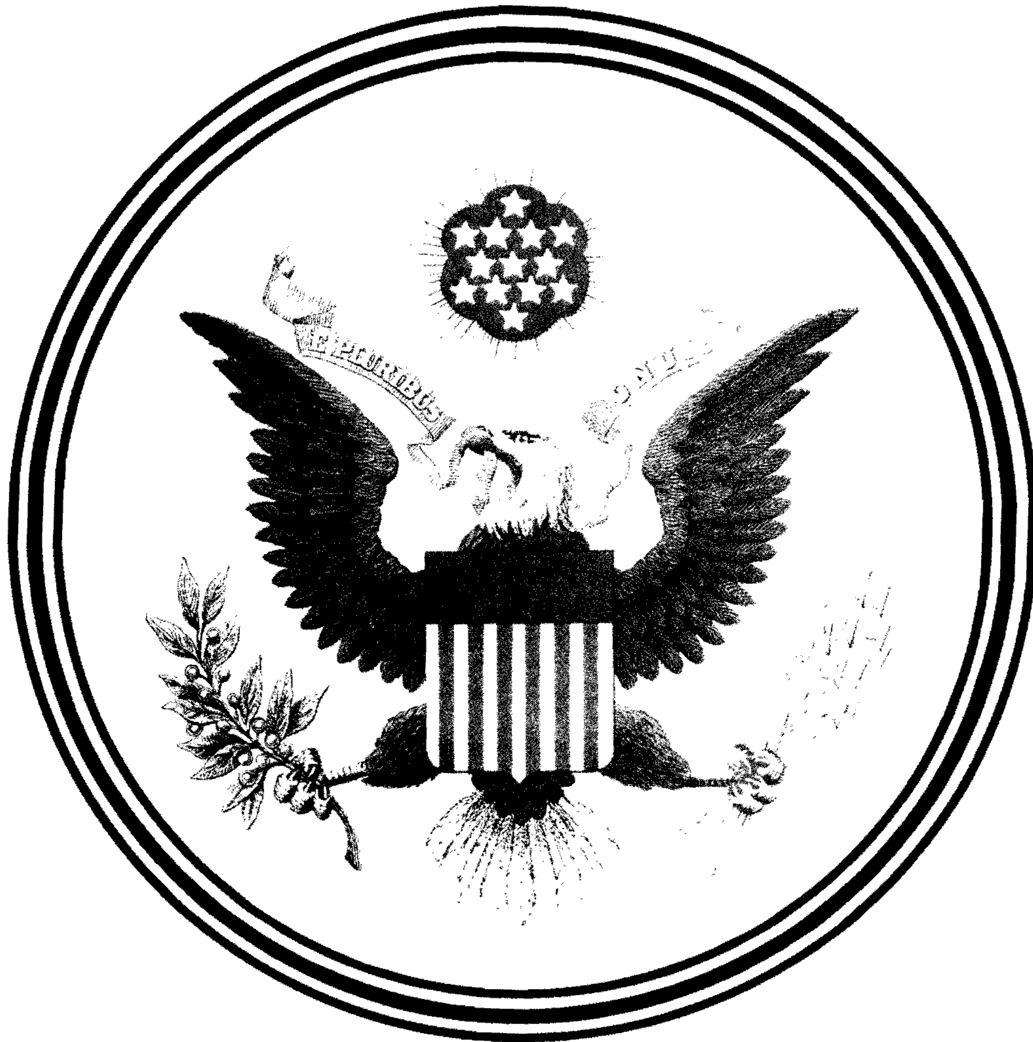
REPORT
OF
THE CIVIL JUSTICE REFORM ACT OF 1990
ADVISORY GROUP
FOR
THE DISTRICT OF ARIZONA



TO

THE JUDGES OF
THE UNITED STATES DISTRICT COURT
FOR
THE DISTRICT OF ARIZONA

June 1993

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PREFACE & SUMMARY OF REPORT

As this report is being written, the product of the national effort undertaken pursuant to the Civil Justice Reform Act is beginning to take form. Most of the other reports cover in detail many, if not all, of the currently popular ideas regarding litigation efficiency and recommend a broad variety of remedies for the perceived problems. Their efforts are worthy additions to the growing literature on litigation reform. This Advisory Group, however, has taken a different tack. Our proposals do not constitute a global assault on the problems of modern litigation. We are benefitted by the occurrence of two grand experiments in the Arizona state courts that will test many of the assumptions that underlie the conventional wisdom regarding discovery reform and alternative dispute resolution. Those experiments, carried out as they are in our "local legal culture," should be observed and their results assessed before they are established as a mandatory part of local federal practice.

Civil litigation in this District is slowly suffocating under a growing criminal caseload that is undermining the court's capacity to process civil disputes. Unless something is done to stem the tide, we see a day in the not distant future when civil litigation will all but disappear because the demands of the criminal docket will consume all available judicial resources. To remedy that crisis, we propose that our judges become more involved at an earlier stage in the processing of civil disputes. We propose abolishing Local Rule 42 and substituting early judicial involvement under Rule 16, Fed. R. Civ. P. The Advisory Group believes that implementation of such procedures will improve efficiency in the processing of civil cases.

We do not believe there are significant unused judicial resources or that the near term holds any promise that additional resources will become available. Thus, to the extent that our proposal will consume additional judicial resources, the time will have to come from somewhere. We propose that it be gained by controlling the unlimited demand on resources now made by the criminal process. Not only do we believe that limiting the growth of that demand is consistent with existing statutory law, we also believe there are strong constitutional reasons why the court must limit the voracity of that demand.

I

THE ADVISORY GROUP'S WORK

Introduction

The District of Arizona

The District of Arizona is one of the largest geographical districts in the nation, covering some 113,642 square miles. It also has one of the highest percentages of federal land in the nation (71%). Over half of that federal land is Indian reservation land totaling nearly 20 million acres, while the remainder falls under the authority of a variety of agencies such as The National Park Service, The Bureau of Land Management and the Air Force. The District of Arizona is an international border district. Two and one half million people and over a billion dollars in goods move annually through the Nogales port of entry. Notwithstanding its vast area and the unique combination of demographic factors noted above, the District of Arizona is predominantly an urban district, with 76% of its fast growing population concentrated in the two urban areas of Tucson and Phoenix.

Arizona is a profoundly multi-cultural, having lived under the flags of four nations (Spain, the Confederacy, Mexico, and the United States of America). At a recent high school graduation in Parker, graduation exercises were conducted in five languages (Spanish, Hopi, Navajo, Mohave, and English). The multi-cultural, international character of the state is reflected in the kinds of cases brought to the United States District Courts for the District of Arizona.

The Civil Justice Reform Act Requirements

The American Bar Association has recently reported on the progress of the Civil Justice Reform Act as follows:

> In 1990, Congress enacted the Civil Justice Reform Act, 28 U.S.C. § 471 et seq., for the purpose of encouraging district-by-district solutions to what were perceived as the growing problems of cost and delay in federal court civil litigation. The Act required each district to create an Advisory Committee charged with analyzing local problems and proposing specific solutions, and required courts thereafter to adopt district-specific Expense and Delay Reduction plans. These plans were to be adopted in two

phases. An initial phase, comprised of so-called "pilot" districts and "early implementation" districts, was to be completed by December 31, 1991; all remaining districts were required to adopt plans by December 31, 1993.

Based upon detailed reports issued by their respective Advisory Committees, 34 districts implemented Expense and Delay Reduction Plans by the Phase I deadline. The Advisory Committee reports generally acknowledge that some problems of cost and delay emanate from legislative action or inaction beyond the direct control of courts (e.g., the increasing federalization of criminal statues, the increasing trial burden caused by mandatory sentencing guidelines, and the failure of Congress and the President to fill judicial vacancies and provide needed resources for our civil justice system). The resultant plans have dealt, therefore, only with aspects of the cost and delay problem that can be controlled by judges, litigants, and lawyers.

The plans enacted to-date, comprising roughly one-third of the federal districts, reflect the flourishing variety which Congress sought to promote in solving the problems of cost and delay. These plans, and the experience that courts will have using the plans in coming months, will define the base line from which the remaining districts will implement their own plans by the end of 1993. (from **REPORT OF THE TASK FORCE ON THE CIVIL REFORM ACT SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION)**

In Appendix E to this report we have included the chart prepared by the Task Force which summarizes those results.

Review of Early Implementation District Plans

Under the terms of the Act, all districts were divided into three categories: 1) demonstration districts, 2) early implementation districts, and 3) all other districts including the District of Arizona. The Advisory Group, in consultation with the Chief Judge of the District of Arizona, elected to await the reports from the early implementation districts before preparing and presenting this report. The Advisory Group has reviewed the reports of the early implementation districts and has learned much from them.

The Advisory Group was struck by the marked differences among the early implementation districts, which range demographically from the most urban to the

most rural districts in the nation. The kinds of problems perceived by the early implementation Advisory Groups and their respective courts reflect their diverse interests and needs. Thus, discovery abuse is a major problem in some districts but not in others; the burden of criminal cases upon the docket of some districts is extraordinary, while in others it is relatively insignificant; and in some districts *pro se* litigation consumes an inordinate percent of the total judicial resource, while in others it presents no particular problem. In some districts civil litigation proceeds efficiently through final judgment, while in others, civil cases languish while criminal cases consume an ever-growing percentage of the district's time. Finally, the reports of the early implementation districts underscore the observation that each district has its own unique legal culture.

Judicial Interviews

The Advisory Group interviewed all of the United States District and Magistrate Judges in the District of Arizona. We did not interview the bankruptcy judges because, in our view, problems of the bankruptcy system are not within the purview of the Civil Justice Reform Act. Each Judge was interviewed by a team of Advisory Group members who then reported back to the Group as a whole with a written report. Each report responded to a specific format for the interview that had been established at the outset of the process.

Other Interviews

After the interviews of the judges were substantially complete, the Advisory Group interviewed the clerk of the court and the courtroom deputies who bear substantial responsibility for managing and scheduling litigation in the district. In addition, because the judges' law clerks perform many important processing functions in this district, they too were interviewed. The Advisory Group gained important insights into the way the civil litigation process in this district functions and how it is often slowed or diverted by various forces.

Statistics

The Advisory Group felt obliged to gather sufficient statistics to demonstrate that we have not ignored the benefit that statistical analysis can bring to an endeavor such as this. We have included the appropriate statistics with the supporting charts in Appendix B. We were always mindful, however, of the fundamental truth that raw figures relating to categories of cases that appear on the court's docket may be misleading because they reflect a focus upon categories that

may or may not be relevant to the goals of reform. At the same time, we believe that some statistics that might be of particular use are simply not available because they have not been systematically gathered over time. For example, though the Clerk's Office is able to produce some statistics about courtroom hours, we are not able to determine from statistics how judicial resources are allocated over time. The judicial interviews provide the primary basis for such information, supplemented by reports from other court personnel. Accordingly, we have made every effort to use the statistics only as one of many methods for analysis of the docket.

In the late 1970s, the Federal Judicial Center developed a method for converting the raw data into "weighted" figures, which were thought to more accurately describe the dockets of the District Courts. Under that system, certain kinds of cases were presumed to consume more judicial resources than others, and the weighting factors reflected those presumptions. During the decade that followed the development of the initial case weighting factors, the complexion of federal litigation changed substantially. In the late 1980s, the Federal Judicial Center began developing a new case weighting system, which is still in the process of development. Some preliminary figures are available, however, and the staff at the Federal Judicial Center has provided us with baseline information important to the work of this Advisory Group. While we understand and respect the caveat concerning the tentative nature of the analysis, we consider the statistics significant because they are empirically and objectively consistent with the impressionistic, subjective and often anecdotal data gained through the interview process.

Other Sources

Throughout the preceding year, the chair, the reporter, and the staff analyst for the Advisory Group consulted many other sources of information both formally and informally. We talked with knowledgeable people from both within and without the district, we attended seminars and we read widely. As noted above, we reviewed the reports of each of the early implementation districts in order to identify particular problems and solutions and to gain insight into the differences among courts throughout the country.

What We Did Not Do

Many of the early implementation districts promulgated extensive questionnaires which were directed to the attorneys and clients who are the primary end users of the federal judicial system. Many of those interview projects produced substantial and sometimes surprising information about the way the

judicial system is perceived by its users. The Advisory Group, however, felt that its resources would be better used elsewhere and after considerable discussion, we declined to engage in such polling techniques. It was our view that our Advisory Group had been chosen carefully to reflect the variety of practice that exists in our district and that, through our own experience and expertise, we could provide the information that might be gained through a poll.

II

ANALYSIS OF THE DOCKET AND OTHER INFORMATION

Once we gathered information, we engaged in a multi-step process for evaluating it. The Advisory Group met for extended discussion of the interviews with the judges and forged a consensus view of the problems of the district. We then developed what we considered to be appropriate proposals to reduce or alleviate the perceived problems.

Types of Cases - Criminal and Related Cases

Criminal prosecutions consume 30.1% of the docket in terms of caseload. An additional 26.9% of the cases on the docket are *pro se* cases challenging various aspects of state criminal prosecutions and subsequent incarcerations for a total of 57% of the cases actually filed.

The death penalty cases which, while small in number, consume an disproportionate amount of time because of their seriousness and complexity. These are habeas cases in which the petitioner is normally represented by counsel. While the habeas and § 1983 cases are technically classified as civil cases, they are, in fact, *sui generis*, and for purposes of our analysis of the docket were included in the criminal category. In total, then, the cases in the criminal category consume 54% of the total docket of the United States District Court for the District of Arizona. Those numbers, however, are misleading in terms of resource demand. We know from experience, for example, that a very high percentage of criminal cases are processed very nearly to the point of trial. Unfortunately, important information, such as the actual number of hours devoted to a particular kind of judicial activity, cannot be derived from the statistics collected in the past. The Chief Judge has informed us that the Rand Corporation will perform a study of this district. That statistical analysis is expected to reveal important resource allocation information. In addition, the Federal Judicial Center has revised its weighted caseload figures and will release them soon. We have learned in advance of the formal release that the District of Arizona has rapidly moved near the top

of the list with respect to criminal caseload burden. That information will come as no surprise to the judges and civil practitioners in this district.

Types of Cases - Civil

For purposes of our analysis of the docket, we recognized two categories of civil cases. On the one hand, there are those ordinary civil cases arising out of the diversity and federal question jurisdiction of the Federal Courts. Those cases present the court with a wide variety of civil litigation. On the other hand, there are the complex civil cases. The District of Arizona has had an unusual number of such cases in the last few years. Cases such as WPPS, American Continental/Lincoln Savings, and GoVideo have no discernable statistical impact upon the docket but consume an inordinate amount of time, even if they settle prior to trial. If they are tried, of course, they demand an extremely high percentage of the available hours of judge and courtroom time for civil litigation. The smaller cases, which are far greater in number, thus find the time available for their resolution greatly reduced. That reduction in resources further exacerbates the problem.

This Advisory Group has been asked to survey the core of the civil litigation process and make recommendations designed to reduce cost and delay in the process. By our best estimate, the civil litigation process constitutes an ever-diminishing percentage of the total workproduct of the District Court. But the statistics only give a glimpse at the scope of the problem. While we have no baseline studies, the slim evidence that we do have confirms the impression of almost every judge and staff person we interviewed that the actual trial of a civil jury case in this district is becoming a rare event. Very few civil cases have gone to jury trials in the District of Arizona in the last few years. (See Appendix F.) While that certainly proves nothing by itself, it suggests the state of the civil docket. The great bulk of the civil cases that do get tried are tried to the court and many of the jury trials are handled by visiting judges. If the civil jury trial is a symbol of the Federal Judicial system it appears to be going the way of the American Eagle. The Advisory Group recommendations are designed in large part to conserve the civil jury trial as symbol of the Federal Judicial System. We note that many of the great advances in social justice that have occurred during this century were primarily the work of the United States District Judges who are the primary implementors of national policy. The Advisory Committee believes the Federal civil justice system must be protected from the continuing encroachments upon its functioning caused by the burgeoning criminal case processing demands and the expansion of federal criminal jurisdiction.

III
CAUSES OF COST AND DELAY
CIVIL LITIGATION IN THE DISTRICT OF ARIZONA

Unless trials are actually available and unless they are set on dates certain with the expectation that they will be tried if not settled, the percentage of cases that settle on their own or through ADR techniques will decrease. Trial lawyers know that the setting of a firm trial date has a wonderful capacity to focus the mind. Without firm trial dates and a generalized expectation on the part of the Bar that cases will be tried, it is likely that the efficiency with which civil litigation is handled will continue to decline.

One of the major causes of cost and delay in civil litigation in the District is the limited capacity of the Court to actually try civil cases. As the criminal caseload in this District has continued to grow, Congress has expanded the number and variety of crimes that may be prosecuted in the Federal Courts. There are frequent proposals to continue that process by federalizing various aspects of local crime. The Executive Branch has sought increased resources for the prosecutorial arm of the Department of Justice. Indeed, the staff of the United States Attorney's Office in Arizona has doubled in the last few years. The Federal Judiciary was not similarly blessed. The offices of the United States Attorney and the Federal Defender have advised that only a small percentage of the possible criminal prosecutions are brought because of restraints imposed by limited judicial resources. That latent demand for resources devoted to criminal prosecution poses severe problems for the federal judiciary which may be asked to process that latent caseload in the event that new resources become available. Indeed, the Advisory Group believes that, likely as not, the latent demand for resources to prosecute criminal cases may consume any additional resources made available to the court. Thus, whatever efficiencies may be achieved through Civil Justice Reform are in danger of being consumed by continued expansion of criminal prosecutions.

Many of those interviewed by the Advisory Group believe that the Sentencing Guidelines compound the docket congestion by discouraging settlement of criminal cases. Prosecutors, defense attorneys, and judges noted that the lack of flexibility in sentencing provides little incentive for defendants to plea bargain. Little significant empirical evidence justifies that conclusion, but the breadth and uniformity of the impressionistic data suggests it likely is true.

However, the balance struck between the number of prosecutions brought and the severity of the sentence imposed is a political question. The charging policies of the United States Attorney's Office and the prosecutorial directives

from the Department of Justice are not directly the concern of the Article III courts. It would be naive, however, to ignore the reality of the impact of those political decisions upon the Article III docket. Indeed, to the extent that the political branches of government make decisions that demand an ever-increasing percentage of judicial resources, they determine the agenda for the District Court. Thus, the Advisory Group considers the criminal docket significant impediment to the ultimate goal of recommending ways to reduce cost and delay in civil litigation.

A substantial portion of the federal civil docket is consumed by so-called *pro se* cases. The impact of those cases on the overall judicial resources, however, may be less than appears. While it can be expected that the *pro se* litigation will continue to grow, it does not present the potential for exponential growth posed by the federal prosecutorial function.

Complex cases impose considerable demand upon judicial resources devoted to civil litigation. Even though many complex civil cases settle, they are not likely to do so until the parties and the court have devoted enormous resources preparing the case for trial. The hearings and dispositive motions in such cases are time-consuming. The pretrial demands that such cases place upon the court vastly exceed the demand for trial time that would be suggested by the statistics. And, when such cases actually go to trial, the impact upon the court is tremendous.

Conclusion

The Advisory Group has focussed upon the problems associated with Civil Justice Reform. We are not charged with making sweeping recommendations regarding the Federal Courts in general or the district in Arizona in particular. We recommend simple changes that we think would advance the goal of preserving the civil trials in the Article III courts in Arizona.

IV
SUMMARY OF RECOMMENDATIONS

Our recommendations to the Court are contained in Appendix A, accompanied by appropriate commentary. As to many of the issues that have occupied the time of other District Advisory Groups, we simply counsel the adoption of a wait-and-see attitude. The Advisory Group particularly believes that certain recommendations should await analysis of the outcome of (1) the new discovery rules recently implemented in the Arizona Superior Courts, and (2) the

success of the Alternative Dispute Resolution Program now being developed by the Arizona Supreme Court. Both of those events promise significant information in the near term.

Some matters, however, are more urgent, and we recommend immediate action regarding them.

RECOMMENDATION NO. 1:
SEQUESTRATION OF TIME FOR CIVIL LITIGATION

We propose a case assignment system be adopted that would allow each judge in the District to set aside 45 days twice each year for the purpose of trying only civil cases. During an appropriate preceding period, the judge would take no new criminal matters that would infringe upon the upcoming civil docket. Weekly law and motion calendars on Mondays would be retained and one week of the period would be used to handle criminal matters. Thus, each judge on active status would have two four week periods every year for the trial of civil cases. While there may be several ways in which such cases can be calendared effectively, we believe the method should be left primarily to the courtroom deputies and the Judge's staff. Therefore, we do not propose a specific rule.

Several other Districts, including the Southern District of California and the Western District of Tennessee, have made similar proposals. In neither case, however, does it appear that the suggestion has been adopted by the Judges in any formal fashion, apparently because of perceived statutory restrictions upon the implementation of such a plan. We have concluded that such a plan is not only statutorily sound but, under the conditions that exist in this District, may be constitutionally compelled. The reasons for that conclusion are set forth in the Memorandum contained in Appendix C. Essentially, we conclude that the ***de facto*** control of the docket of the Article III courts by the Executive Branch violates the doctrine of separation of powers and that the uncontrolled delay of civil litigation increasingly frequently impairs the Seventh Amendment right to a jury trial. We also believe that the Speedy Trial Act provides methods to avoid the constitutional problem. Those matters are dealt with in some detail in the Memorandum. We urge the judges to avoid that constitutional question by implementing a program designed to preserve the rights to a federal civil trial, both to a jury and to the Article III court.

RECOMMENDATION NO. 2:
ABOLITION OF LOCAL RULE 42

Both Local Rule 14 and amended Rule 16 recognize the need for flexible administration of cases. Each judge appears to have adopted a practice suitable to the individual needs of that particular judge. This recommendation is based upon the Advisory Group,s strong belief that judges are good for civil litigation and civil litigation is good for judges.

The Advisory Group believes that abolishing Rule 42 and adopting a Local Rule on Scheduling and Discovery Management Conferences would introduce great efficiencies into the civil litigation process. Following appropriate information from and agreement by the lawyers, the Scheduling and Discovery Management Conference could establish a firm timetable for processing the dispute. Then coupled with the ability to set a firm trial date created by the implementation of **RECOMMENDATION NO. 1**, such a pre-trial conference can help promote the just, speedy, and inexpensive determination of every action aspirationally prescribed by Rule 1, of the Federal Rules. **RECOMMENDATION NO. 2** suggests that trial dates should be set early in the litigation. The Advisory Group believes it is crucial that trial dates should be set as early as possible in the litigation. A trial date is the most important factor in bringing civil cases to conclusion. Discovery will be conducted and trial preparation will be completed if the parties and their counsel are facing a firm trial date. As an illustration of the power of trial dates to bring cases to conclusion, a visiting judge recently disposed of 13 cases in this District within 10 trial days.

Attorneys who practice in the state have cases pending in both the state and federal courts. Those cases which are in state courts are assigned trial dates early in the litigation. For example, in both Maricopa County and in Pima County, trial dates are assigned when the parties file a Motion to Set. Although it is acknowledged that the cases cannot always go to trial on the day scheduled, the mere existence of that trial date provides impetus to the attorneys and parties to get their cases prepared for trial and to negotiate settlements. If the cases do not settle, the existence of the trial date prompts judges and court personnel to make every effort possible to find a judge to try the case.

The Advisory Group believes that the backlog of pending cases would be reduced if trial dates were set early in the litigation because many cases would be resolved through settlement much more quickly than under the present practice of setting trial dates at the Rule 42 pretrial conference. We believe this, in combination with our Recommendation 1, would greatly reduce costs and delays for litigants in the District and, in the long run, reduce the amount of work on civil cases for judges in the District.

RECOMMENDATION NO. 3
DIFFERENTIATED CASE MANAGEMENT

Intimately related to **RECOMMENDATION NO. 2** is **RECOMMENDATION NO. 3**, which deals with the adoption of a differentiated case management system. The Advisory Group recommends that the Court devise and implement a differentiated case management system that will place cases in an appropriate litigation track for expedited case management when such management would be efficient.

RECOMMENDATION NO. 4
DISCOVERY REFORM

RECOMMENDATION NO. 4 involves discovery reform. The Advisory Group debated this matter in depth and there was a strong sentiment for the adoption of presumptive limits on the quantity of discovery. On the other hand, there was an equally strong feeling that the concept of automatic disclosure adopted by the Arizona Supreme Court in Ariz. R. Civ. Pro. 26.1 required some testing in the State courts before the Judges of this court should adopt it by rule for all cases. The Advisory Group recommends, however, that the Judges consider adopting disclosure as a part of the discovery plan in individual cases.

RECOMMENDATION NO. 5
UTILIZATION OF MAGISTRATE JUDGES

RECOMMENDATION NO. 5 suggests the greater use of Magistrate Judges. The Advisory Group believes that greater use of Magistrate Judges can help in the administration of the Civil Trial caseload. In general, we recommend seeking additional Magistrate Judges and conferring upon them additional responsibilities including pretrial processing and perhaps administration of a system of court annexed alternative dispute resolution such as described in **RECOMMENDATION NO. 6.**

RECOMMENDATION NO. 6
COURT ANNEXED ADR

RECOMMENDATION NO. 6 suggests that the Court adopt specific local rules regarding the initial implementation of a Alternative Dispute Resolution option for the District. Experience gained in the use of those rules, when coupled with the experience in the Arizona state courts should be of substantial use to future development of an on-going program. We also understand that there are

special Bankruptcy Rules under consideration that would create a court annexed ADR system for the Bankruptcy Court, which if adopted would provide even greater information for further action.

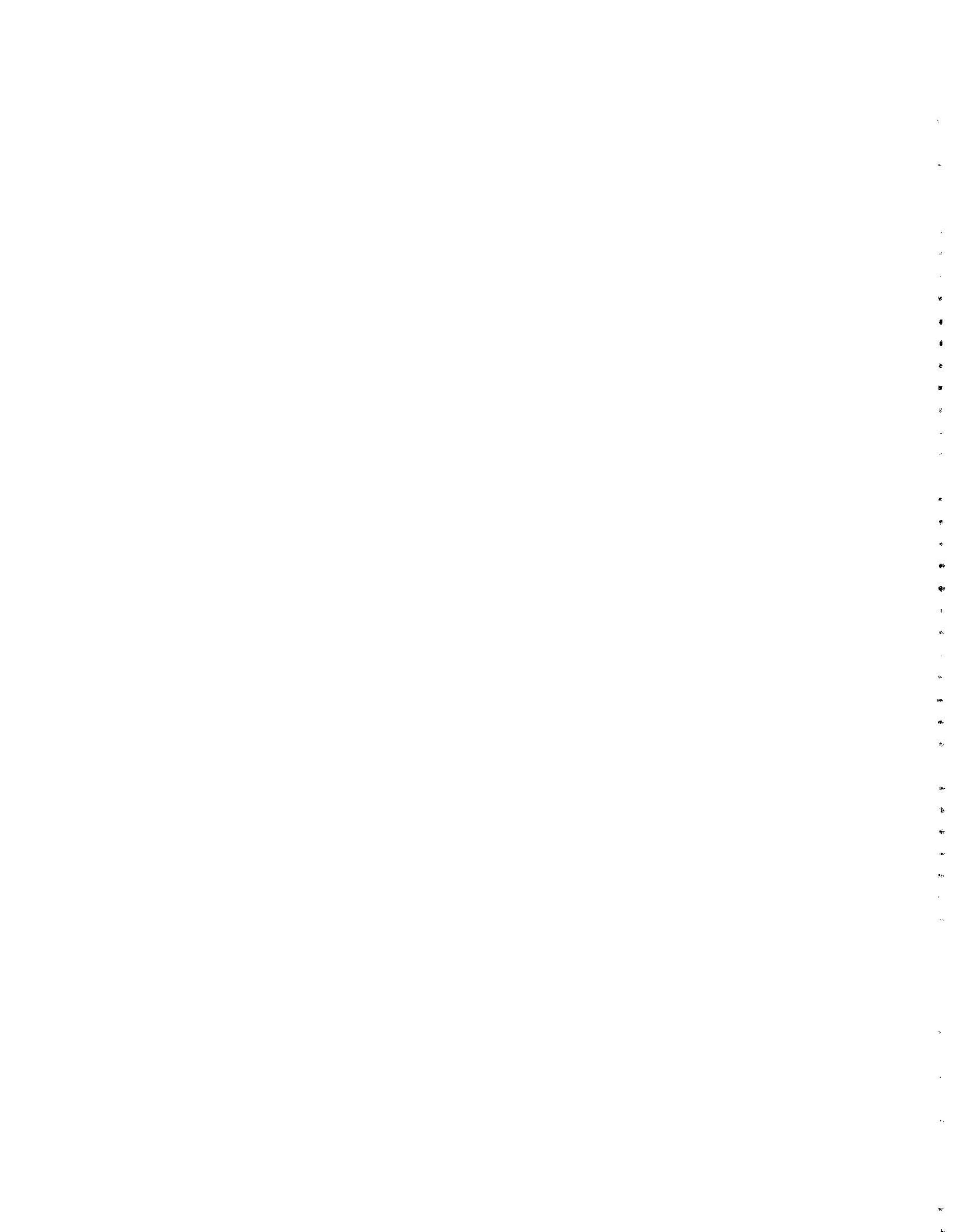
RECOMMENDATION NO. 7
STANDARDS OF CIVILITY

The Advisory Group strongly supports the adoption of standards of civility such as those recently implement in the Seventh Circuit. We do not recommend the adoption of rules that will serve to promote satellite litigation. Rather, we urge the adoption of an aspirational code that will make it plain to all that this District is committed to the preservation of the professional ethics and civility in the litigation process.

V
CONCLUSION

Unlike many of the other advisory groups around the country, we have not proposed radical change. Our recommendations to the Judges are incremental changes in the procedures in the District. But that is not to suggest that we consider our proposals to be unimportant. All of the following recommendations were the consensus judgment of all of the lawyers serving on the Advisory Group and we believe each is deserving of careful consideration.

APPENDIX A



RECOMMENDATION 1

THE COURT SHOULD ADOPT A CALENDAR SYSTEM THAT PROVIDES DEDICATED TIME FOR EACH ACTIVE DISTRICT JUDGES CIVIL CASES.

Of all of the matters to which the Advisory Group directed its concern, the above recommendation was deemed most important. Because of the peculiar circumstances of this district, the Advisory Group believes that the trials of civil cases are rapidly disappearing. The Advisory Group fears that absent some specific action by the court, the trial of civil cases in general and jury trials in particular will entirely disappear in the next few years. In Appendix C. the constitutional aspects of that problem are dealt with in some detail. If the court wishes, a subcommittee of the advisory group could work with an Advisory Group of judges and clerks. We would suggest that the committee be composed of at least one district judge, one magistrate judge, and one member of the clerk's office who has day-to-day responsibility for calendaring cases.
The committee's assignment would be to draft a procedure for the implementation of this recommendation.

RECOMMENDATION 2

THE ADVISORY GROUP RECOMMENDS THAT LOCAL RULE 42 BE ABOLISHED AND THAT A NEW RULE BE ADOPTED UTILIZING RULE 16 AND PROVIDING FOR THE AUTOMATIC SETTING OF A TRIAL DATE.

There was very broad support for the abolition of Rule 42. The Advisory Group and most of the lawyers we talked to during the course of the last year thought that Rule 42 creates unnecessary expense and difficulty in civil litigation. Indeed, the most compelling argument for its retention is the fact that it is so burdensome that it encourages settlement. While we understand the functional value of moving cases toward settlement rather than trial, the Advisory Group does not believe that dysfunction and expense are appropriate case management devices.

Rule 16 of the Federal Rules of Civil Procedure provides a flexible framework for accomplishing the same objectives. Many of the judges in this district now use their law clerks for the creation of the initial schedule order and for the handling of the preliminary case management devices. While the Advisory Group understands the efficiency of that mechanism, we urge the court to adopt a policy that would engage the judges directly in that process. One universal that came from our deliberations over the last year was that a firm trial date is the keystone of effective case management. Judges are reluctant to refuse attorney request for continuances during the discovery process because the dates that have been set were not the product of negotiation and commitment on the part of the attorneys, but simply preliminary settings made by law clerks. While we in no way deprecate or underestimate the enormous value of the law clerks, we recognize that in most cases their tenure is a limited one and their ability to force lawyers to comply with appropriately defined discovery and trial timetables is low. It is very important that the judges themselves be involved at this early stage.

The Advisory Group recommends the abolition of Local Rule 42 and the adoption of a new rule establishing flexible case management and scheduling devices under Rule 16. In adopting that rule, the court should delineate certain kinds of progressive case management devices that might be applied to particular cases, such as the imposition of a disclosure rule in lieu of traditional discovery, limitations on discovery, and express authority to limit the length of trial, including the number of witnesses that each side may present, the number of exhibits that may be offered into evidence, the amount of

time for examination of witnesses and the amount of time dedicated to opening and closing argument.

The Advisory Group also recommends the local rule include a mechanism whereby, upon passage of the deadline to complete discovery, the court would sua sponte enter an order setting a trial date. The trial date should be firm as possible, given the court's docket.

The development of a differentiated case management system, such as contained in the following recommendation, is a critical part of the proposed procedures.

RECOMMENDATION 3

THE ADVISORY GROUP RECOMMENDS THAT THE COURT AUTHORIZE THE ESTABLISHMENT OF A DIFFERENTIAL CASE MANAGEMENT SYSTEM FOR IMPLEMENTATION IN THE DISTRICT OF ARIZONA.

I. Definition

The essence of differential case management is reorganization of the caseflow system to recognize explicitly that the speed and method of case disposition depend on the cases' actual resource and management requirements (both court and attorney), not on the order in which they have been filed.

Holly Bakke and Maureen Solomon, "Case differentiation: an approach to individualized case management," Judicature, June-July 1989, Vol 73/No 1 (emphasis provided).

DCM, for purposes of this Recommendation, is a system that screens cases for complexity, assigns cases to specific tracks based on that complexity, and manages cases to disposition according to predetermined milestones established for those tracks.

II. References

A. This Recommendation is based in part on DCM systems outlined in Plans of the Demonstration and Early Implementation Districts:

1. using a framework that accommodates the caseload of this District, such as designating tracks both by complexity and by nature of suit (such as habeas corpus), and

2. incorporating innovative case management techniques, such as setting a firm trial month for certain tracks, and setting firm trial dates during final pretrial conferences for case on other tracks.

B. Guidance to Advisory Groups, Statistics Supplement, September 1992 has provided data which are important in designing tracks. For instance, prisoner pro se cases account for 37% of the civil caseload, and must be accommodated, or at

least acknowledged, in the design of differential case management.

C. Also important in developing a District DCM system is identification of differences, as well as similarities, in the Phoenix and Tucson Divisions. This is especially significant in managing of prisoner pro se, as well as in future development of DCM for criminal cases.

III. Implementation

A Differential Case Management system should employ several other Recommendations, for example, and it should explicitly define:

- use of Magistrate Judges,
- discovery limits, and
- pretrial (Local Rule 42) requirements, which require early judicial intervention.

A. Tracks

1. Prisoner Pro Se, with 1,163 cases in 1992, comprise 37% of the civil docket. Case management is done by pro se law clerks, enabling the effective use of judicial time on this large volume of cases. Within this track, and internal to the pro se law clerk section, are sub-tracks, which should be described in the Court's Plan.

2. Arbitration cases currently comprise 1% of civil docket, but should account for 5% when the program matures. Arbitration is commonly considered a distinct track within DCM systems, as arbitrable cases are diverted from the regular docket, rather than being assigned to a track based on complexity. In this District, arbitrability is determined by the amount of damages sought and the nature of the suit.

3. Expedited cases comprise 16% of the civil docket, based solely on nature of suit, and include

   - Bankruptcy Appeals (145 cases)
   - Social Security (33 cases)
   - Student Loan and VA (256 cases)

- Land condemnation and foreclosure (35 cases)
- Forfeiture & penalty (39 cases)
- Others, such as contract cases with 2 parties, no legal issues, and little discovery needed. Several Districts list factors to consider in designating cases for an expedited track.

4. Standard cases comprise most of the remaining 42% of civil cases, and are those that do not meet the criteria of other tracks.

5. Complex cases are those that require extensive judicial involvement, meet predetermined factors, and are so designated by the judge, counsel, and parties. Several Districts list factors to consider in designating cases as complex.

B. Assignment

Assignment to tracks 1, 2, and 3, is determined by the Clerk of Court, with tracks evident by the nature of the suit. All Standard and Complex cases must be determined by the Judge, after consulting counsel or parties, at the initial pretrial conference. Cases that are not assigned to the expedited track based on the nature of suit also may be assigned to that track at an initial pretrial conference. The Judge's involvement in this initial conference complies with the Act's goal of early and ongoing judicial intervention.

C. Management

1. Milestones should be established after careful case analysis to determine realistic times for events. These would include number of days for discovery, between status conferences, and to disposition.

2. A standard scheduling order should be drafted for each track. The agenda of pretrial conferences, as well as content of pretrial orders, are to be prescribed for each track.

3. Discovery should be managed by track, with time and volume limits imposed for tracks 1 through 3, but with guidelines suggested for tracks 4 and 5.

4. The Plan should incorporate the use of Magistrate Judges, and recommend expanded use of this resource in specific management tasks for each track.

   a. If additional Magistrate Judges are authorized, the Plan should propose what their civil pretrial tasks should be, such as preparation of reports and recommendations for expedited cases.

   b. If additional Magistrate Judges are not authorized, recognizing the workload of existing Magistrate Judges, the Plan should also recommend what case management tasks could be accomplished.

IV. The Differential Case Management system design must provide for effective early and ongoing judicial intervention, while also conserving this District's judicial resource.

RECOMMENDATION 4

THE ADVISORY GROUP RECOMMENDS THAT THE COURT SHOULD PROCEED CAUTIOUSLY REGARDING SUBSTANTIAL CHANGES IN THE DISCOVERY SYSTEM.

Many Advisory Committees around the country have strongly recommended severely curtailing discovery and instituting a requirement of mandatory disclosure. This Advisory Group supports the concept of discovery reform in general and quantitative restrictions upon discovery devices in particular. In regard to the notion of mandatory disclosure, however, the Advisory Group has substantial reservations. We believe that the District of Arizona is in a unique position to evaluate the benefits of such discovery reform because of the establishment in Arizona of so-called "Zlaket Rules", which create one of the most radical changes extant in the country. The Arizona Supreme Court has re-appointed the original Committee, to review the early experience with the new rules and recommend appropriate changes. The District Court will thus have the opportunity to evaluate the progress of the new rules, both from the reaction of the practicing bar and from the judges. The Advisory Group recommends that the federal courts establish some mechanism for evaluating that progress. It may wish to use a subcommittee approach similar to the one proposed in Recommendation 1. Finally, we note that the United States Supreme Court has transmitted to the Congress major changes in the discovery rules that parallel the new Arizona rules. Congress may reject them or modify them in the near future. If they are adopted they will provide for many local options and experimentation and the Court may wish to consider adopting local rules for discovery at that time.

At the same time, the Advisory Group recognizes the values that derive from a common set of discovery rules in the state and federal courts in the District and uniformity is desirable so long as distinctively federal concerns are not ignored. One of those values, however, is the high incidence of "complex" cases found in the federal courts and the development of special techniques for handling those disputes developed under the Manual for Complex and Multi-District Litigation and by individual District Judges.

Among the management tools available under Rule 16, the Advisory Group sees required early disclosure and quantitative limits upon discovery devices as important alternatives to the *status quo* of discovery upon demand.
In the prior recommendation, the Advisory Group recommended abolishing local rule 42 and substituting increased judicial

involvement under Federal Rule of Civil Procedure 16. As part of a carefully tailored case management plan, the Advisory Group believes that individual judges should continue to experiment with the imposition of strict discovery limitations.

RECOMMENDATION 5

THE ADVISORY GROUP RECOMMENDS GREATER USE OF MAGISTRATE JUDGES.

The Advisory Group recommends that the court consider having magistrate judges perform much of the preliminary administration of the pretrial management system, including handling alternative dispute resolution such as suggested in another recommendation.

In addition to their possible use in pretrial proceedings, the Advisory Group recommends expanding the availability of their consent jurisdiction by providing additional training that will enhance the reputation of this important unit of the District judicial system.

RECOMMENDATION 6

THE COURT SHOULD ADOPT AN ALTERNATIVE DISPUTE RESOLUTION PROGRAM DESIGNED TO WORK IN CONJUNCTION WITH THE CASE MANAGEMENT PROCESS.

The Advisory Group proposes that the court adopt a local rule that encourages referral of appropriate cases to ADR on the motion of any party, on the agreement of the parties, or on its own motion. The parties should be free to choose the ADR method and ADR provider, but the court should be prepared to make a referral in those cases in which the parties are unable to agree.

The Advisory Group believes that the development of an effective ADR referral mechanism requires some careful thought and should be coordinated with the system that is being developed in the state courts. Therefore, the Advisory Group recommends that a subcommittee of the Advisory Group work in conjunction with the Arizona Supreme Court committee that is presently establishing the Arizona State Court ADR system, and with the Office of the Clerk of the United States District Court to develop an ADR program.

Alternative Dispute Resolution (ADR) has become a widely used litigation management device throughout the country. In the state courts, the development of ADR programs is well under way. The Advisory Group recommends that the courts adopt a policy encouraging the increased use of ADR techniques through Federal Rule of Civil Procedure 16(c)(7), which invites the parties to a lawsuit to consider "use of extra judicial procedure to resolve the dispute."

It is important to distinguish between arbitration and other forms of limited litigation, both binding and non-binding, and those forms of ADR that involve inducements to compromise without a third party "deciding" the dispute. Various nonlitigation alternatives to dispute resolution have been developed in recent years. The following summary describes the techniques discussed by the Advisory Group. These techniques are no longer the stuff of academics. Many courts have adopted ADR as an important part of the administration of civil justice in a wide range of cases. ADR techniques have been used to resolve complex cases involving millions of dollars as well as simple cases that barely meet the jurisdictional amount requirements. We summarize some of those techniques in the follow paragraphs.
The common thread in these techniques is that they support parties engagement in a process of compromise without imposition of a result by an outsider.

Early Neutral Evaluation

Early neutral evaluation systems provide a neutral party, usually a senior lawyer or respected trial judge, who participates in a settlement conference at a very early stage of the litigation. Such programs appear to be effective principally because highly experienced early neutral evaluators can focus the parties' ranges of realistic litigation outcomes, while at the same time allowing the clients to balance the cost of settlement against the costs of continued litigation. The early neutral evaluation project in the Northern District of San Francisco has been very successful and should be considered here.

Summary Jury Trial

In a summary jury trial, attorneys present a summary of the evidence to a panel of jurors which then renders an advisory, non-binding, verdict. In many cases the parties, informed by the advisory jury's reaction to their case, are better able to negotiate a settlement and avoid trial. Summary jury trials appear to be particularly effective in cases that present a high probability of becoming protracted, complicated, and expensive.

Settlement Conferences

The Advisory Group believes that Settlement Conferences should become an mainstay of the ADR system. Successful settlement conference programs have been developed in the state courts and elsewhere around the country. See, e.g., Brazil, A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values, 1990 U. CHI. LEGAL F. 303; WAYNE D. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR JUDGES AND LAWYERS (1988); D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES (1986)

Mini Trials

Unlike summary jury trials or other forms of ADR, the mini-trial involves the principals or clients directly in the dispute resolution process. The attorneys present their cases to the principals who have the authority to settle the dispute. In most instances, a neutral third-party advisor is employed to manage the mini trial process. Parties agree upon a summary or abbreviated hearing with testimony and cross-examination. The process is private, confidential, and nonbinding. Mini trials appear to work best (1) where few parties are involved, (2) where a particular expertise is

needed, or, (3) where one or more of the parties have unrealistic expectations for the success of the litigation. The mini trial had been particularly effective in cases involving important policy issues which might be best resolved in a face-to-face presentation to the decisionmakers.

Mediation

Mediation is extensively used throughout the federal judicial system. In mediation, a neutral third party listens to the clients' positions and then questions, negotiates, and facilitates the parties in an effort to resolve the dispute. The solution arrived at by the parties with the help of a mediator is typically reduced to writing and signed, and is enforceable as a contract. Mediation is widely used in the family law context and has been successful there. If it is successful in cases in which the parties are as bitterly conflicting as the parties to a family dispute often are, there is no reason why it cannot be effectively used in cases in which the parties are concerned mainly with traditional rights under contract or tort law.

Conclusion and Recommendation

The Advisory Group suggests a new Local Rule 3(j) as follows:

> (j) Alternative Dispute Resolution Procedures
>
> (1) The clerk is authorized and instructed to disseminate an alternative dispute resolution procedure brochure at the time of filing a civil case to the person or entity filing the civil case, one brochure for each party named in the filing. The alternative dispute procedure brochure is to be served on all parties with the summons and complaint.

Beyond authorization for the court to disseminate an ADR procedures pamphlet similar to the pamphlet in the Northern District of California, the Advisory Group suggests that the Court also adopt the following Local Rule 6(e):

> (e) Any attorney who has been permitted to appear and participate in an action before this court must discuss with each client in each action before this court the alternative dispute resolution procedures brochure [Rule 3(j)].

Finally, to further enhance the Court's role in alternative dispute resolution, we suggest the adoption of new Rule 57, Alternative Dispute Resolution:

> Rule 57. ALTERNATE DISPUTE RESOLUTION
>
> In conformance with and pursuant to the providing of the just, efficient and economical administration of justice, the court is authorized to assist the parties on the motion of any party, on agreement of the parties, or on its own motion in discussing the appropriateness of reference to an alternative dispute resolution (ADR) program, whether court-annexed or not.

With respect to the brochure that should be disseminated by the court clerk, we propose that the District copy, to the extent permitted, the blue brochure prepared by the Northern District of California. Some revision to that brochure may be required but it is of a minor nature.

RECOMMENDATION 7

THE COURT SHOULD ADOPT STANDARDS OF CIVILITY

On June 9, 1992, after three years of investigation and study, the Seventh Circuit's Committee on Civility determined that comprehensive standards guiding litigation practice for lawyers and judges should be adopted to clarify and articulate important values held by many members of the bench and the bar. In addition to adoption of such standards, the Seventh Circuit Committee recommended:

1. As a condition to admission to practice and to filing an appearance, every lawyer should certify that she or he has read and will abide by the standards, which should be disseminated to every lawyer practicing within the circuit or appearing pro haec vice;

2. Civility training, including education about the standards, should be implemented by public law offices, private law firms, and corporations with in-house counsel, and made available to judges at federal judicial workshops;

3. All lawyers and judges within the circuit should consider participation in civility, professionalism or mentoring programs through bar associations, professional legal associations or an American Inn of Court; if such programs do not exist, then lawyers and judges should consider establishing them; and

4. Law schools should encourage discussion of the standards in classroom and clinical training programs.

This Advisory Group believes that civility between and among lawyers and judges involved in litigation has eroded in recent years as a result of a variety of factors, including protracted and abusive discovery, unwarranted threats of and motions for sanctions, billing demands, and the increased size of the bar. The Advisory Group also believes that lack of civility escalates clients' litigation costs without advancing their interests or resolving their disputes. Moreover, with today's overcrowded dockets, judicial resources are wasted dealing with unnecessary disputes fostered by incivility.

Therefore, this Advisory Group recommends that the District of Arizona adopt standards of civility and accompanying recommendations for implementation of such standards modeled after the Seventh Federal Judicial Circuit's Standards and Recommendations. The so-called *Dondi* rules in the Northern District of Texas, according to the Chair of the CJRA advisory group there, had a salutary effect. See Dondi

Properties Corp. v. Commerce Savings and Loan Association, 121 F.R.D. 284 (N.D. Tex. 1988). The adoption of rules of conduct and their enforcement by appropriate sanctions is considered by many to be the keystone of modern pretrial reform. Arizona State Bar has adopted a set of standards entitled "The Lawyers Creed," and the new Arizona discovery rules are predicated upon the belief that it is possible to restore standards of civility to the litigation process that have in some places in the country all but disappeared. While matters have not come to that point in this District, the Advisory Group believes the adoption of this recommendation may help reverse the trend toward unnecessarily adversarial conduct in the processing of civil disputes.

APPENDIX B

EXCERPT FROM 1992 ANNUAL REPORT OF THE DISTRICT OF ARIZONA

I. CASELOAD INDICATORS

A. CIVIL FILINGS.

After several years of decline, and then a small increase in 1991, the District had a large increase in civil filings in 1992.

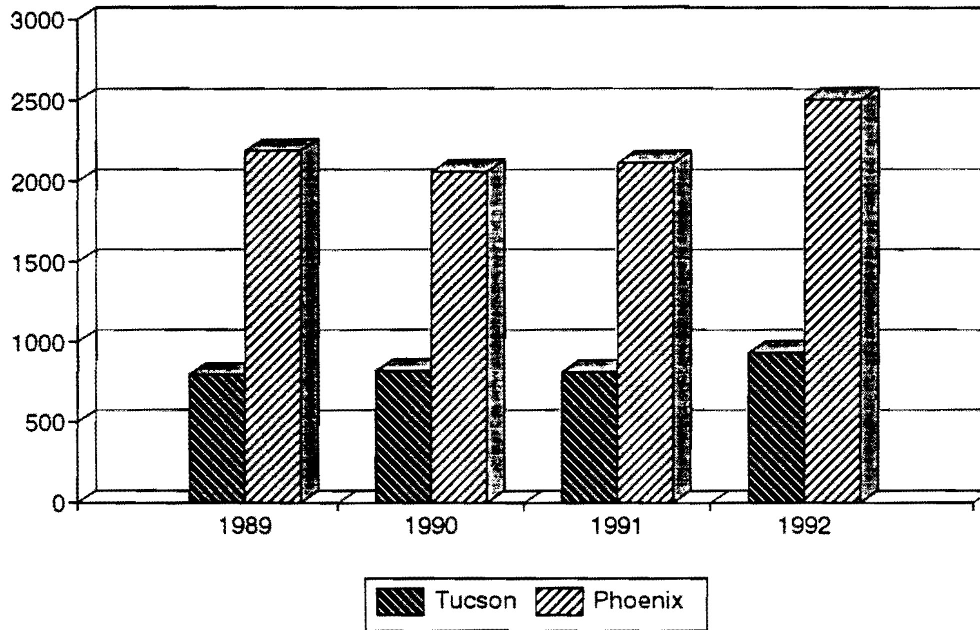


TABLE 6

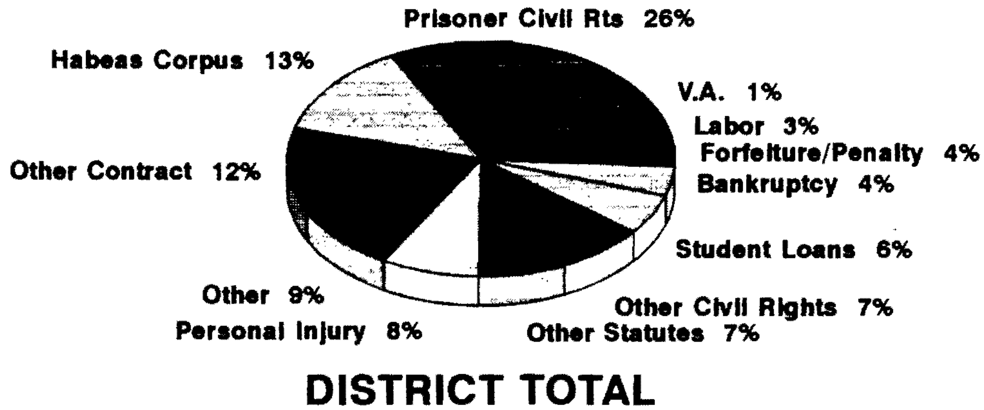
CASES FILED	1989	1990	1991	1992	'91-'92 % Change
Tucson	792	818	808	927	14.7
Phoenix	2185	2056	2108	2504	18.8
DISTRICT	2977	2874	2916	3431	17.7

B. CASE TYPES FILED. During 1992 there were sharp increases in student loans, personal injury, habeas corpus, prisoner civil rights, and other civil rights case types. Significant decreases were experienced in VA benefits and Miller Act cases.

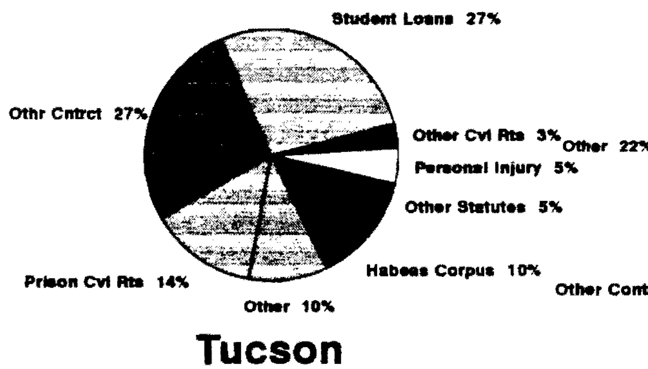
TABLE 7

	PHX			TUC			TOTAL	% of
CIVIL CASE TYPE	1990	1991	1992	1990	1991	1992	1992	TOTAL
Recovery VA Benefits	61	52	26	39	31	17	43	1.25
Student Loans	77	75	143	18	34	49	192	5.60
Social Security	31	27	33	2	3	6	39	1.14
Bankruptcy	74	112	112	24	43	26	138	4.02
Forfeiture/Penalty	57	44	65	58	50	57	122	3.56
Miller Act	64	36	18	13	9	2	20	0.58
Other Contract	351	289	351	86	78	48	399	11.63
Personal Injury	141	166	194	66	62	84	278	8.10
Other Civil Rights	128	112	196	43	49	56	252	7.34
Labor	85	96	87	15	28	19	106	3.09
Negotiable Instrument	35	22	23	1	3	5	28	0.82
Habeas Corpus	166	172	270	160	137	173	443	12.91
Prisoner Civil Rights	459	543	635	216	197	250	885	25.79
Personal Property	20	26	33	4	10	9	42	1.22
Real Property	65	56	52	8	11	23	75	2.19
Property Rights	60	55	67	9	8	8	75	2.19
Taxes	0	35	31	0	6	10	41	1.19
Other Statutes	182	190	168	56	49	85	253	7.37
TOTAL	2056	2108	2504	818	808	927	3431	

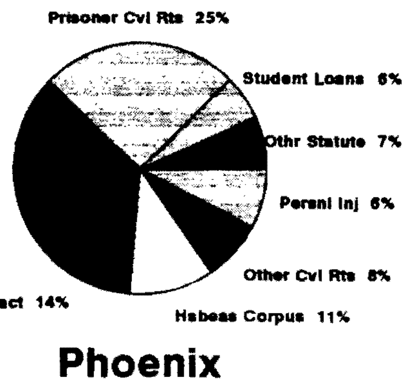
Civil Case Filing Types, 1992
U.S. District Court of Arizona



DISTRICT TOTAL



Tucson



Phoenix

C. CIVIL CASE TERMINATIONS AND PENDING CASES.

Terminations increased by 20.4% in 1992, as compared to the filings increase of 17.7%. Despite this positive showing, the civil pending caseload still grew in 1992.

CIVIL CASE TERMINATION TREND
DISTRICT TOTALS

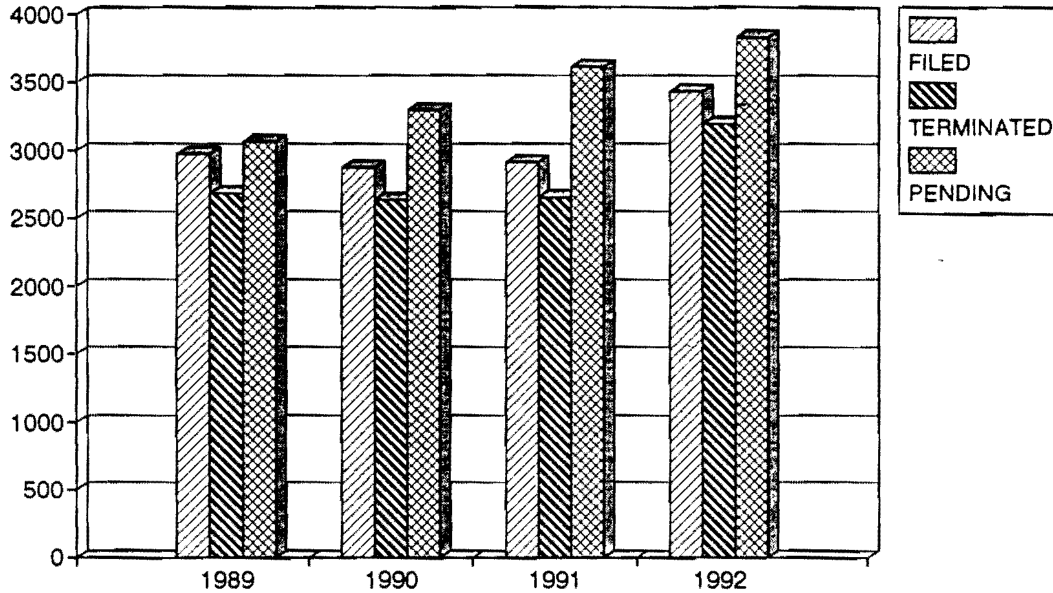


TABLE 8

TERMINATED	1989	1990	1991	1992	'91-'92 % Change
Tucson	798	774	742	851	14.7
Phoenix	1884	1865	1908	2340	22.6
DISTRICT	2682	2639	2650	3191	20.4

PENDING	1989	1990	1991	1992	'91-'92 % Change
Tucson	645	685	745	818	9.8
Phoenix	2417	2607	2869	3010	4.9
DISTRICT	3062	3292	3614	3828	5.9

D. CIVIL PENDING CASE AGE ANALYSIS

Over 80% of the pending cases were less than 2 years old at the end of 1992. Although a positive figure, efforts are underway to improve on this in 1993.

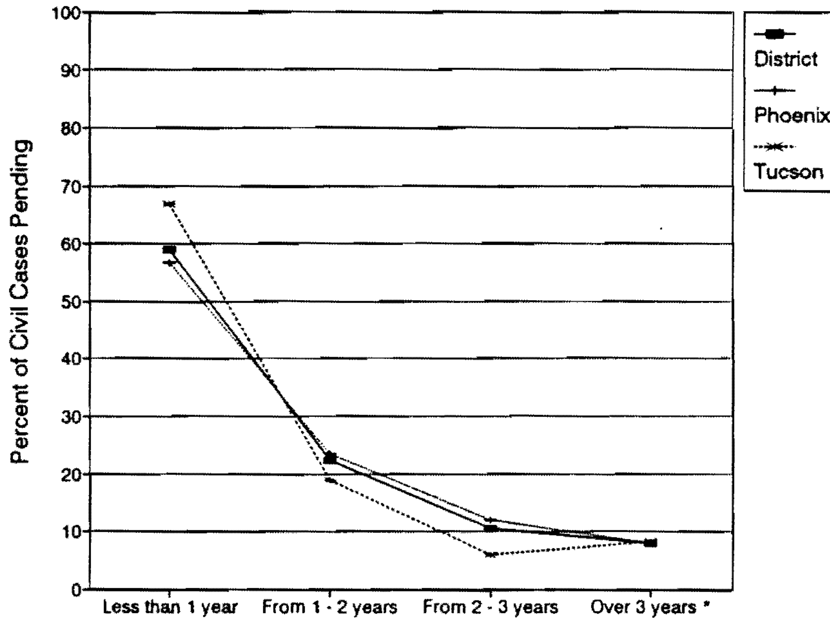


TABLE 9

	1992	% of TTL
PHOENIX		
Less than 1 year	1537	56.7
From 1 - 2 years	637	23.5
From 2 - 3 years	323	11.9
Over 3 years *	214	7.9
	2711	
TUCSON		
Less than 1 year	549	66.9
From 1 - 2 years	155	18.9
From 2 - 3 years	49	6.0
Over 3 years	68	8.3
	821	
DISTRICT		
Less than 1 year	2086	59.1
From 1 - 2 years	792	22.4
From 2 - 3 years	372	10.5
Over 3 years *	282	8.0
	3532	

*Excludes 296 ARCOR cases

E. CRIMINAL FILINGS.

The Tucson Division had very large increases in criminal caseload in 1992, particularly in the number of defendants charged. In contrast the Phoenix Division saw no appreciable change over 1991's data.

CRIMINAL FILINGS TREND

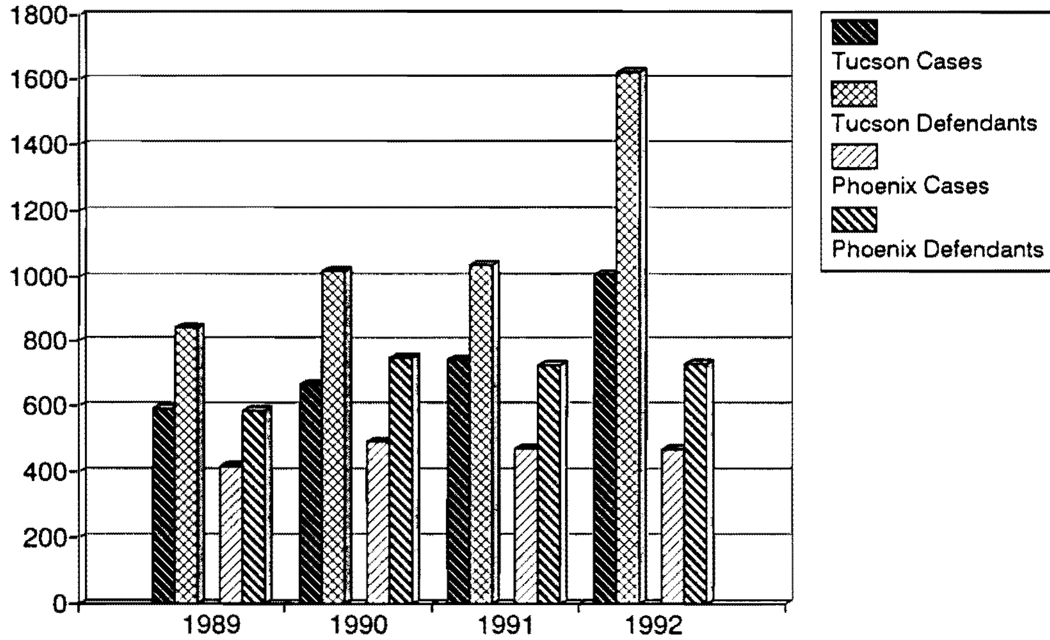


TABLE 10

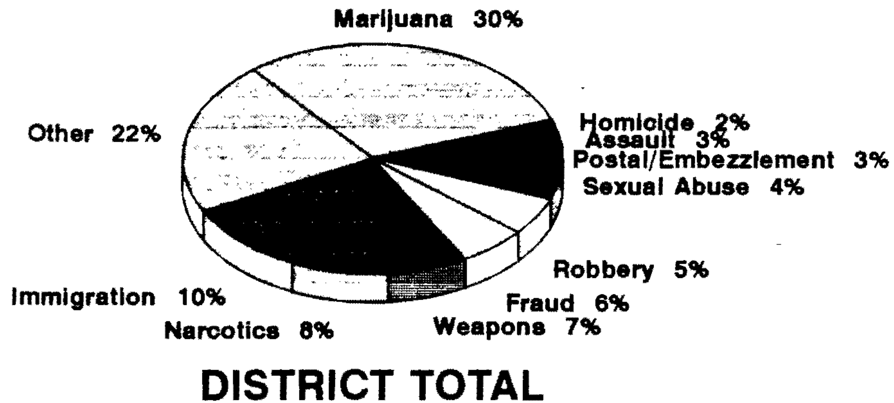
FILINGS/ DEFENDANTS	1989	1990	1991	1992	'91-'92 % Change
Tucson Cases	595	667	745	1008	35.3
Defendants	843	1017	1038	1624	56.5
Phoenix Cases	419	491	472	470	-0.4
Defendants	588	750	729	732	0.4
DISTRICT Cases	1014	1158	1217	1478	21.4
Defendants	1431	1767	1767	2356	33.3

F. CASE TYPES FILED. Large increases were experienced in all but five types of cases from 1991 to 1992. Only homicides saw a large drop.

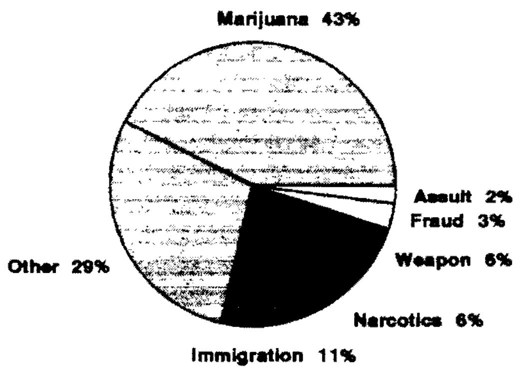
TABLE 11

CRIMINAL CASE TYPE	PHX 1990	PHX 1991	PHX 1992	TUC 1990	TUC 1991	TUC 1992	TOTAL 1992	% of TOTAL
Marijuana	23	15	18	348	430	430	448	30.31
Narcotics	40	53	58	43	54	64	122	8.25
Embezzlement	38	10	10	5	4	6	16	1.08
Fraud	53	39	55	16	15	30	85	5.75
Forgery/Counterfeit	16	17	11	0	2	9	20	1.35
Immigration	60	33	40	130	84	115	155	10.49
Postal	19	16	21	0	4	1	22	1.49
Robbery	38	51	64	6	11	15	79	5.35
Assault	20	20	16	14	9	21	37	2.50
Sexual Abuse	51	38	54	10	10	11	65	4.40
Weapons/Firearms	22	47	44	33	27	57	101	6.83
Homicide	15	27	20	5	7	7	27	1.83
Other	86	106	59	67	88	242	301	20.37
TOTAL	481	472	470	677	745	1008	1478	

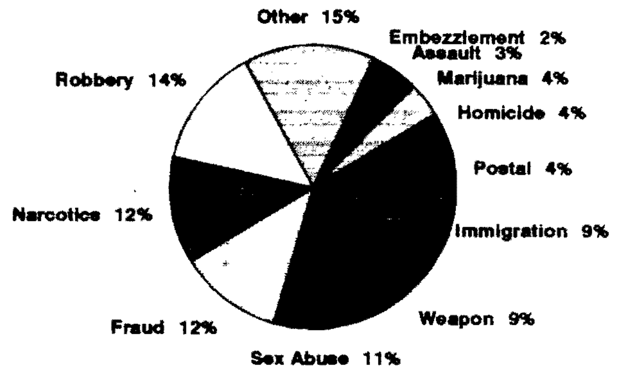
Criminal Case Filing Types, 1992
U.S. District Court of Arizona



DISTRICT TOTAL



Tucson



Phoenix

G. CRIMINAL TERMINATIONS AND PENDING CASES.

As in civil cases, the District's increase in criminal terminations (26.4%) was larger in 1992 than the criminal case filings increase (21.4%).

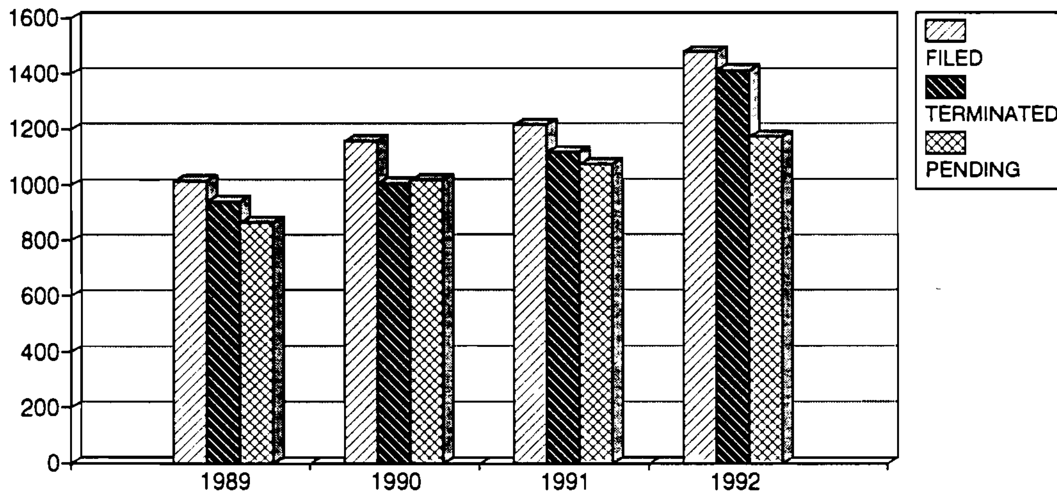


TABLE 12

TERMINATED	1989	1990	1991	1992	'91-'92 % Change
Tucson Cases	574	584	691	918	32.9
Defendants	824	844	988	1221	23.6
Phoenix Cases	365	422	425	493	16.0
Defendants	526	606	615	736	19.7
DISTRICT Cases	939	1006	1116	1411	26.4
Defendants	1350	1450	1603	1957	22.1

PENDING	1989	1990	1991	1992	'91-'92 % Change
Tucson Cases	520	603	614	703	14.5
Defendants	728	901	947	1349	42.4
Phoenix Cases	345	414	460	470	2.2
Defendants	556	700	818	813	-0.6
DISTRICT Cases	865	1017	1074	1173	9.2
Defendants	1284	1601	1765	2162	22.5

H. TEN-YEAR FILINGS TREND. Total filings rose sharply in 1992, greatly accelerating a three year trend. Filings are now at their highest level in ten years.

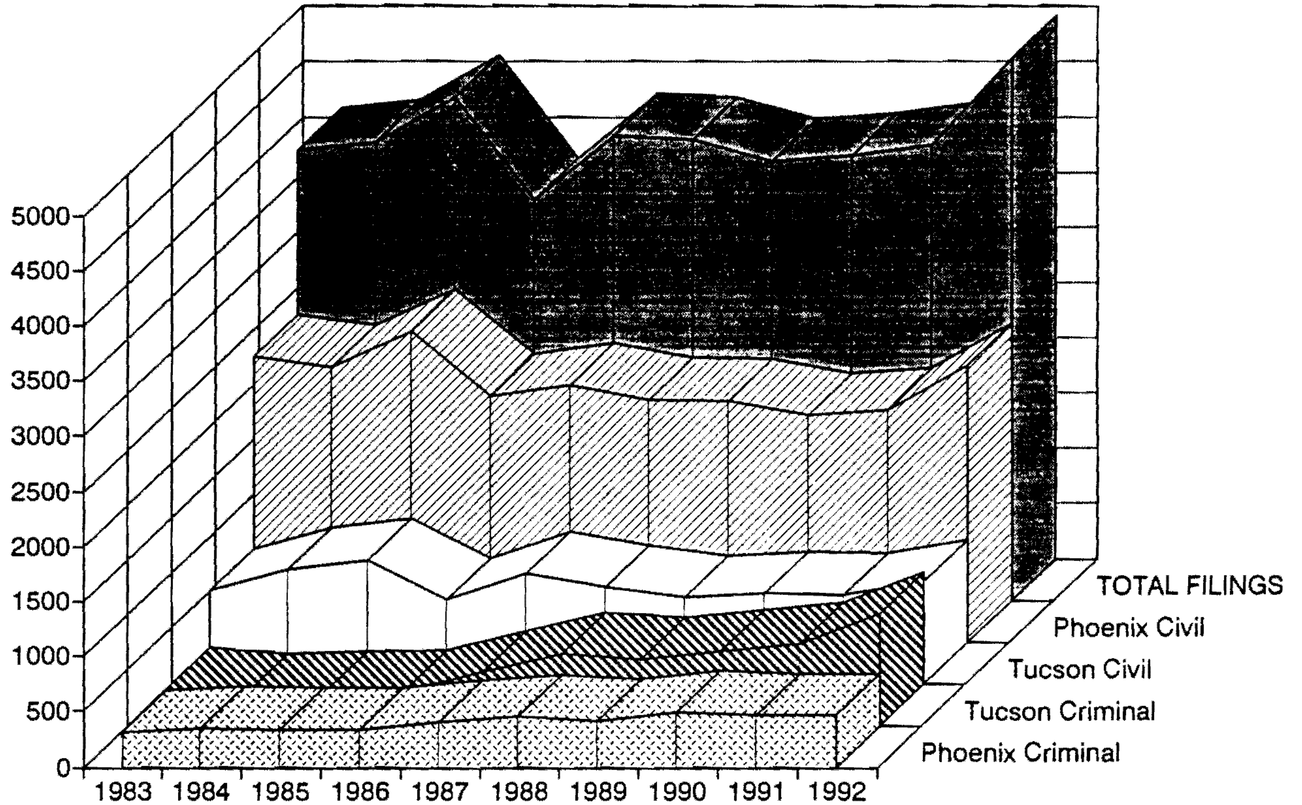


TABLE 13

	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992
Phoenix	2590	2491	2813	2228	2327	2196	2185	2056	2108	2504
Tucson	850	1038	1124	770	1005	879	792	818	808	927
CIVIL TTL	3440	3529	3937	2998	3332	3075	2977	2874	2916	3431
Phoenix	318	354	333	337	403	452	419	491	472	470
Tucson	320	271	288	300	476	646	595	667	745	1008
CRIMINAL TTL	638	625	621	637	879	1098	1014	1158	1217	1478
Phoenix	2908	2845	3146	2565	2730	2648	2604	2547	2580	2974
Tucson	1170	1309	1412	1070	1481	1525	1387	1485	1553	1935
GRAND TOTAL	4078	4154	4558	3635	4211	4173	3991	4032	4133	4909

APPENDIX C

DRAFT

MEMORANDUM

TO: Richard Segal
FROM: Winton Woods
SUBJECT: Speedy Trial Act/Separation of Powers
DATE:

The issue discussed here is whether the Speedy Trial Act requires that criminal cases be given pre-emptive priority and if it does so, the extent to which that may give rise to separation of powers problems or impair the constitutional right to a jury trial in civil cases. The issue arises in the context of a proposal that would allow each judge in the District to set aside one month twice year for the purpose of trying civil cases only. During an appropriate preceeding period of time the judge would take no new criminal matters that would infringe upon the upcoming civil docket. Weekly law and motion calendars on Mondays would be retained and one week of the month would be used to handle criminal matters. Thus each judge on active status would have two three week periods every year for the setting and trial of regular civil cases. There may be a variety of ways in which such case can be effectively calendared[1].

It is believed that ability to give a certain trial date promotes pre-trial resolution of civil disputes and the statistics support that belief[2]. Since there are many litigants who seek delay for their own tactical purposes, it is hoped that a trial setting on a date certain will promote focussed attention to the resolution of the dispute. At a broader level, however, the restoration of the civil trial function of the Article III courts in Arizona is matter of great public importance. While the Courts in the District of Arizona are among the most effective and efficient in the nation, the important public policy reasons for leaving open the doors of the federal courthouse for the trial of civil cases are obvious.

<u>The Speedy Trial Act</u>

While there is much talk about the way in which the Speedy Trial Act establishes priorities for the federal docket, the Act

---

[1]. See, e..g. Thomas E. Willging, ASBESTOS CASE MANAGEMENT: PRETRIAL AND TRIAL PROCEDURES, Federal Judicial Center (1985).

[2]. S. Flanders, Case Management and Court Management in United States District Courts 33 (Federal Judicial Center 1977).

itself, when read as whole, does not appear to go that far. The legislative history indicates that the Congressional purpose behind the Act stemmed in large part from concerns about preventative detention in the early 1970's[3]. There is nothing in the legislative history that deals with problem confronted by those Districts that approaching the abolition of civil trials. There was much concern about the problem of congestion and the concern that its talismanic invocation might undermine the purposes of the Act[4] but the problem addressed here simply did not exist at the time the Act was written. In general, however, the Congress was concerned about the impact that mandatory dismissal might have upon effective criminal law enforcement and it adopted as a compromise a floor amendment that permitted dismissal without prejudice. Apparently, in order to protect against abuse of such power, the legislation required a detailed factor analysis as a predicate to a dismissal without prejudice[5]. The fact remains, however, that a dismissal without prejudice is in appropriate cases available as palliative to outright termination of the criminal case. Thus, the oft repeated bogeyman of the assassin being set free in order to try a garden variety diversity case is as unsound from a standpoint of statutory construction as it is silly.

The statutory scheme is clearly spelled out in the words of the statute. The Speedy Trial Act requires that in all criminal cases the judicial officer "shall . . . set the case for trial . . . so as to assure a speedy trial." 18 §USC 3161(a). The statute then goes on to set time limits within which the trial must commence and describes the circumstances under which a judge may consider a continuance. Title 18 § 3162(2) prescribes the sanction of dismissal if the case is not brought to trial within the statutory period. That section, however, contemplates the possibility that a dismissal will be without prejudice and it describes the factors the court shall consider in making that determination. Thus, the Act can be read to require only that the case be dismissed if the trial cannot be completed within the established time frame. That is really all the act says and probably all it was intended to accomplish. In my view, the courts ought to avoid reading the Act to mandate an absolute priority for criminal cases over civil cases since there is no legislative history support for such a reading and it gives rise to two serious constitutional questions. First, does the establishment of a "priority" for criminal cases violate separation of powers

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[3]. See, Partridge, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 (Federal Judicial Center 1980), at pp. 13-15.

[4]. id. at 29-30

[5]. Unfortunately, there is no legislative history to give meaning to the language adopted by the floor amendment. id. at 33.

doctrines by removing from the Article III judges the power to regulate an inherent aspect of their function, the docketing of particular cases in the context of the immediate needs of the court? Secondly, does the *de facto* impact of the Speedy Trial Act upon the trial of civil cases deprive litigants in Arizona of the right to trial by jury under the Seventh Amendment?[6]

Those serious constitutional question are raised when the legislation is read as requiring Article III judges to clear their civil calendars, if needs be, in order to give priority to whatever criminal cases the United States Attorney determines to bring. The proposition that an Article III court that does not comply with the Act is subject to "sanction" seems ludicrous upon its mere statement. Upon reflection it is worse. I will suggest the outlines of the constitutional questions below, but I think that the traditional reluctance of Article III courts to unnecessarily decide constitutional issues counsels a limited reading of the statute.

The statute can and should be read to provide several alternatives to deal with docket problems:

1. Dismissal without prejudice[7]

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[6]. The CJRA Advisory Committee has been informed by the Clerk's Office that only eight civil jury trials were undertaken during the calendar year 1991.

[7]. The Act provides:

> § 3162. Sanctions
> (2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h) (3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. . . .

2. Continuance in special circumstances[8]
3. Dismissal with prejudice[9]

There is, moreover, nothing in the statute that would appear to prevent the District from adopting a mechanism by which cases which are pushing the Speedy Trial Act limit could be transferred to another judge for trial. Certainly, a Master Calendar for

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[8]. The Act excludes from the 70 day time period continuance granted upon a specific finding that ends of justice would be served:

> (8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, <u>if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.</u> No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.
> (B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:
> [There follows a listing of non--exclusive factors relating to problems with the particular case under consideration]

The Act goes on to say, however:

> (C) No continuance under subparagraph (A) of this paragraph shall be granted because of <u>general congestion of the court's calendar</u>, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

[9]. 18 U.S.C. § 3162. <u>Sanctions</u>

certain types of routine criminal cases seems eminently sensible and for the more difficult cases a mechanism for occasional transfer would appear to be a workable alternative.

Under that reading, the proposal to break out specific time for the trial of civil cases would pass muster. I doubt that many criminal prosecutions would in fact be affected, but to the extent that the total judicial resource available for criminal prosecutions has finite limits even now, the impact would be only relative. The United States Attorney might modify the charging policy in some cases in order to present to the Grand Jury a range of charges that might make plea bargains possible. It might be that a few minor criminal prosecutions would get dismissed but it unlikely that the dismissal would be with prejudice when the cause was the unavailability of any Article III judge to try the case. The Court might consider using a master calendar system for certain types of routine criminal cases such as are present in large numbers in our District. The use of magistrates to run "settlement conferences" in certain kinds of criminal cases has been suggested in other districts[10], and there may be a variety of mechanisms that would actually reduce the number of criminal trials. In short, the preservation of dedicated time for civil trials need not undermine the enforcement of criminal laws by the federal courts.

It is important to remind ourselves that the Article III trial courts established by the Judiciary Act of 1789 were civil courts. Over the years, the most important function of the Article III trial judge has been to be the operational arm of the Supreme Court of the United States and the Congress in regard to a broad variety of civil law issues. The recent primary focus upon the criminal function of those courts is in fact an historical aberration and one that we must allow to obliterate the historic functions that can only be performed by the Article III courts.

The Constitutional Questions

Article III Judges have a sphere of activity that is protected from control or restriction by the executive or legislative branch. The precise outlines of that protected sphere are, of course, unclear and the topic of current active debate in the Supreme Court. Unfortunately for our purposes, the Court decline to address the separation of powers question in its most recent case. Robertson v. Seattle Audubon Soc., ---U.S.---, 112 S.Ct. 1407 (1992). Several of the CJRA Reports from the early implementation districts view the Speedy Trial Act as establishing a mandatory priority for criminal cases over all civil cases. Thus, under that view, if the government brings indictments in a sufficient number of cases the entire judicial resource would be consumed and no

[10]. see San Diego rule

civil case could be tried. Coming to such a pass poses a substantial question under the Seventh Amendment right to trial by jury in Civil Cases. While no District has yet reached the point where the criminal docket has obliterated the civil docket, several (including the District of Arizona) are rapidly approaching that point. Our District Judges have taken remarkable actions to avoid obliteration of the civil calendar. Consents to Magistrate Judge trials apparently have increased. Some judges are trying civil cases on a morning track and criminal cases in the afternoon. Civil cases may be spread over many months with trial days slipped in between criminal cases. There may be other short term solutions but that are just that: short term. The apparently inexorable growth of the criminal docket will at some point consume even those few civil trial days wrung with force from the judicial resource. The degree of impairment of the Civil function in the District of Arizona is illustrated by the remarkable fact that only 8 civil jury trials occurred in last calendar year, a rate of one per judge.

There are many things that drive the above described consumptive process. Crime is omnipresent and the President is publicly committed to the most vigorous prosecution possible. Congress apparently feels compelled to expand the criminal responsibility of the federal courts by adding new crimes and extending federal jurisdiction to old ones. The Justice Department has established a rigorous enforcement policy that is implemented at the District Level by the United States Attorney's charging policy. The sentencing guidelines interact with the charging policy in a way that, by wide agreement, forces many defendants to trial because their is no viable alternative. Looming on the near horizon are increased state court death penalty habeas cases and a growing number of ordinary prisoner cases both under 28 USC §2254 and 42 USC §1983. If some action is not taken the trial of ordinary civil cases in this District will cease.

The traditional solution is to provide more judges and staff. While that is part of the solution, it is not the entire solution. The United States Attorney has made it clear that there are many more criminal cases brought to that office than can presently be handled and if new judges and staff became reality, the problem will not go away. Even if it would, the kind of increase in the judicial resource needed to accomplish the goal of total criminal law enforcement is simply not realistically probable in the near term. The CJRA seeks to provide a palliative for that problem.

The CJRA solution is apparently focussed on "making do" with the existing resource by the introduction of a variety of efficiencies including alternative dispute resolution devices, case management techniques, control of discovery abuse, etc. While those goals are important and profoundly worthy, they too must be evaluated in the light of the above described hydraulic pressure from outside the court. I fear that no matter what is done, no

matter how effective the proposed efficiencies may be, that the consumptive forces from outside will consume every additional resource the judges are able to muster. Viewed in that light, the CJRA is simply a waystation on the path to eventual elimination of the civil docket.

I do not believe the judges are powerless to prevent the *de facto* destruction of their civil jurisdiction. To the extent that the current crisis is driven by policy determinations made in the executive and legislative branches, two lines drawn by the constitution well have been crossed.

Separation of Powers

In United States v. Brainer, 691 F.2d 691 (4th Cir. 1982), United States District Judge Young had refused to dismiss an indictment and had held the Speedy Trial Act unconstitutional under the separation of powers doctrine. The Fourth Circuit reversed on the facts before it, but left open the precise question presented here:

> " We do not foreclose the possibility that the time constraints and dismissal sanction of the Act could, in an extreme case, "prevent( ) the (judiciary) from accomplishing its constitutionally assigned functions." 691 F.2d at 699

It may well be that conditions in Arizona and a few other Districts presents precisely that situation. The proposal here does not ask the federal judges to ignore the Speedy Trial Act by refusing to dismiss an indictment because a civil trial is scheduled. That is what was correctly held improper in Brainer. As was noted above, this proposal would follow the mandate of the act and require the Court to either dismiss completely or in an appropriate case dismiss without prejudice if the circumstances that required it met the statutory requirements. Thus the proposal would adhere tightly to the statutory language of the Speedy Trial Act. The constitutional issue that arises from such a proposal is therefore not a question of whether the entire Speedy Trial Act is unconstitutional. Rather, the issue raised by the suggested proposal is whether the application of the Act to impose a mandatory priority for criminal cases is unconstitutional when the effect of that priority is to effectively impair the functioning of the civil arm of the District Courts.

So far as I can tell, Brainer is the only federal appellate court opinion that is close to being on point. In Brainer the District Judge had held the Speedy Trial Act unconstitutional because the mandatory dismissal sanction determined the actual substantive outcome of individual criminal cases and thereby

usurped the adjudicative role which Constitution assigns to judiciary and also constituted an unwarranted intrusion into administration of the judicial system. U.S. v. Brainer, 515 F.Supp. 627 (Md 1981). The Fourth Circuit reversed primarily on the ground that there had been no factual showing that would justify the refusal to dismiss after the 70 day Speedy Trial Act period had passed. Though there is much *dicta* in Brainer regarding the doctrine of separation of powers, that doctrine was not necessary to the decision as the concurring opinion of Judge Murnaghan so forcefully points out. In sum, the Fourth Circuit opinion in Brainer does not stand for the proposition that the Speedy Trial Act is free from constitutional attack on separation of powers grounds. Indeed, as noted above, it specifically avoids such a decision thus leaving open the matters posed by the proposal here. Brainer is discussed extensively in McCabe, FOUR FACES OF STATE CONSTITUTIONAL SEPARATION OF POWERS: CHALLENGES TO SPEEDY TRIAL AND SPEEDY DISPOSITION PROVISIONS, 62 Temp. L. Rev. 177 (1989) which concludes that a substantial constitutional question is presented by the scheme of the Speedy Trial Act. Indeed, the proposal here is substantially and fundamentally different from the refusal to comply with the requirements of the Act reversed in Brainer.[11]

The Supreme Court has articulated the standard to be followed in analyzing the degree of separation of the branches of government

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[11]. The Court has noted the need to approach constitutional questions with an eye close to the particular facts:

> No one can foresee the varying applications of these separate provisions which conceivably might be made. A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case. Watson v. Buck, 313 U.S. 387, 402, 61 S.Ct. 962, 967, 85 L.Ed. 1416 (1941)

required by the Constitution. In Nixon v. Administrator of General Services the Court adopted a balancing test for review of such questions:

> Like the District Court, we therefore find that appellant's argument rests upon an 'archaic view of the separation of powers as requiring three airtight departments of government,' 408 F.Supp., at 342.[FN6] Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. United States v. Nixon, 418 U.S., at 711-712, 94 S.Ct., at 3109. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. Ibid. [Nixon,, , 433 U.S. 425, at 443, 97 S.Ct. 2777, at 2790)

The current situation in the District of Arizona comes very close to abolition of the civil trial function. At the very least, it seems clear that the impact of the criminal docket driven by the Speedy Trial Act presents "the potential for disruption" that forms the predicate for the Nixon inquiry. The question then becomes one of seeking to determine whether there is an overriding need to endure the impact in order to promote the Congressional objectives. Unfortunately, those objectives are something less than clear. The Speedy Trial Act was originally an effort to overcome the impact of pre-trial detention.[12] It has been suggested that in most cases it is not in the perceived best interests of the criminal defendant to get to trial in the shortest possible time, so the protection of the interests of defendants in insuring their right to a speedy trial is less than compelling. Indeed, the principal problems with the Speedy Trial Act apparently stem from the interests of the Department of Justice.[13] There is nothing, so far as we can find, in the history of the Speedy Trial Act that indicates that Congress was concerned with those issues. If that is so the "overriding need" to promote Congressional objectives is simply not present and the separation of powers issues looms large[14].

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[12]. see, ----, supra

[13]. comment on operation triggerlock, the thornburg memos etc.

[14]. Indeed, Congress itself expressed some concern for possible negative impacts upon the docket. In 18 U.S.C. §3174 is found the following dispensation:

> Judicial emergency and implementation

In the state courts there has been much expression of concern regarding legislative attempts to control dockets. The Oklahoma Supreme Court said long ago:

> No one will deny that the legislative arm of the government has the power to alter and regulate the procedure in both law and equity matters, but for it to attempt to compel the courts to give a hearing to a particular litigant at a particular time, to the absolute exclusion of others who may have an equal claim upon its attention, strikes a blow at the very foundation of constitutional government. The right to control its order of business and to so conduct the same that the rights of all litigants may properly be safeguarded has always been recognized as inherent in courts, and to strip them of that authority would necessarily render them so impotent and useless as to leave little excuse for their existence and place in the hands of the legislative branch of the state, power and control never contemplated by the Constitution.

(a) In the event that any district court is unable to comply with the time limits set forth in section 3161(c) due to the status of its court calendars, the chief judge, where the existing resources are being efficiently utilized, may, after seeking the recommendations of the planning group, apply to the judicial council of the circuit for a suspension of such time limits as provided in subsection (b). The judicial council of the circuit shall evaluate the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of resources.
(b) If the judicial council of the circuit finds that no remedy for such congestion is reasonably available, such council may, upon application by the chief judge of a district, grant a suspension of the time limits in section 3161(c) in such district for a period of time not to exceed one year for the trial of cases for which indictments or informations are filed during such one-year period. During such period of suspension, the time limits from arrest to indictment, set forth in section 3161(b), shall not be reduced, nor shall the sanctions set forth in section 3162 be suspended; but such time limits from indictment to trial shall not be increased to exceed one hundred and eighty days. The time limits for the trial of cases of detained persons who are being detained solely because they are awaiting trial shall not be affected by the provisions of this section.

> [Atchison, Topeka and Santa Fe Ry. Co. v. Long, 122 Okl. 86, 251 P. 486, 489 (1926).]

Other state courts have reached similar results with similar powerful language. See, e.g., Lindauer v. Allen, 85 Nev. 430, 456 P.2d 851, 854 (1969); Sands v. Albert Pike Motor Hotel, 245 Ark. 755, 434 S.W.2d 288, 291-292 (1968); Kostas v. Johnson, 224 Ind. 540, 69 N.E.2d 592, 596 (1946); Riglander v. Star Const. Co., 98 App.Div. 101, 90 N.Y.S. 772, 774-775, aff'd, 181 N.Y. 531, 73 N.E. 1131 (1905). One of the most often quoted holdings is the following from the Supreme Court of Ohio in Schario v. State, 105 Ohio 535, 138 N.E. 63 (1922):

> True, the general subject-matter of procedure by the parties to the cause, prescribing the manner of invoking the jurisdiction, the pleadings, and the time within which the jurisdiction shall be invoked, in short, the adjective law of a case, has always been regarded within the proper province of legislative action, yet the legislative branch of the government is without constitutional authority to limit the judicial branch of the government in respect to when it shall hear or determine any cause of action within its lawful jurisdiction. Whether or not justice is administered without 'denial or delay' is a matter for which the judges are answerable to the people, and not to the General Assembly of Ohio. [105 Ohio 535 at 538, 138 N.E. at 64]

District Judge Joseph H. Young in his Brainer opinion refusing dismissal of indictment on Speedy Trial Act grounds cogently reviewed the case law with the following words. I quote at unusual length simply because I do not think I can improve upon his observations:

> Although not directly faced with a constitutional separation of powers issue, the late Justice Cardozo fully realized that the power to control the court docket was an integral facet of judicial power: "... the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes of its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. North American Co., 299 U.S. 248, 254, 57 S.Ct. 163, 165, 81 L.Ed. 153 (1936); see also, Avery v. Alabama, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1939) (trial court given great latitude in disposition of requests for continuances, even when denial of constitutional rights is asserted). Indeed, the power of the federal Judiciary to control its own proceedings is well established: "(T)he power to direct

trial judges in the execution of their decision-making duties was regarded as a judicial power, one to be entrusted only to a judicial body." Chandler v. Judicial Council, 398 U.S. 74, 103, 90 S.Ct. 1648, 1663, 26 L.Ed.2d 100 (1970) (Harlan, J., concurring). . . . In United States v. Correia, 531 F.2d 1095 (1st Cir. 1976) . . . the Circuit Court used similar language in recognizing the principle that requires judicial control over judicial proceedings: "It is axiomatic that the district court has inherent power to control its own docket to ensure that cases proceed before it in an orderly fashion." 531 F.2d at 1098. The necessity of some degree of administrative autonomy for the Judiciary in the execution of its constitutional function does not render unconstitutional every Congressional action affecting the Judiciary. Undeniably, Congress possesses a constitutional role in the formulation and direction of rules for the orderly conduct of business in the federal courts. Two of the most notable examples of this role can be found in the Federal Rules of Civil Procedure and the Federal Rules of Evidence. See, Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965) and Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943). However, Congress' involvement in those areas of the judicial function clearly recognizes the significance of a certain degree of judicial autonomy. In addition, the very nature of our comprehensive system contemplates a certain degree of interdependence among the three co-equal branches: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but independence, autonomy but reciprocity." United States v. Nixon, supra 418 U.S. at 707, 94 S.Ct. at 3107 quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). Thus, the Speedy Trial Act must be analyzed in the context of a constitutional balance of a "workable government." The role of the Judiciary under Article III must be weighed against the interests advanced by Congress in enacting the Speedy Trial Act in order to determine if Congress has "passed the limit which separates the legislative from the judicial power." <u>United States v. Klein</u>, [80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1871)] supra at 146.
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It seems clearly within the power of Congress to mandate dismissal with or without prejudice as it has done in the Act. In a sense that mandate is not unlike a statute of limitations. But

it is wholly another matter to dictate to an Article III judge the way the docket must be managed. It is particularly troublesome when the effect of that mandated management principle has the effect of severely curtailing and perhaps eliminating the trial of civil cases in a particular court.

There can be no question that Congress has virtually unlimited power to adjust or eliminate the civil jurisdiction of the federal courts. But the constitution demands that when it exercises that power that it do so directly and clearly. I do not believe that Congress has the power to curtail federal jurisdiction by implication. Nor do I believe that the Courts should draw that inference from a single paragraph in a complex statutory scheme[15]. That is particularly so when the statute can be read to avoid the constitutional issue[16].

The Seventh Amendment Right to Jury Trial

As we noted above, the incidence of civil jury trials in the District of Arizona is remarkably low. There may be many reasons for that, but the possibility that it is a direct result of the burgeoning criminal docket cannot be ignored and should be carefully studied. If it turns out that the Speedy Trial Act has substantially burdened the exercise of the right to civil jury trial articulated in the Seventh Amendment, a substantial constitutional issue is raised.

In Armster v. U.S. Dist. Court for the Cent. Dist. of California, 792 F.2d 1423 (9th Cir.1986) the United States Court of Appeals for the Ninth Circuit was confronted by an "order" from the

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[15]. The Speedy Trial Act language from which that inference has been drawn is:

s 3161. Time limits and exclusions

> (a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time,shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

[16]. That is exactly what the Court did in the Spotted Owl case noted above. See, Robertson v. Seattle Audubon Soc., ---U.S.---, 112 S.Ct. 1407 (1992).

Administrative Office of United States Courts which suspended jury trials for the remainder of the fiscal year in order to overcome budgetary shortfalls. The Court held:

> The answer to the fundamental question before us is, as the Justice Department has suggested, simple. It is not, however, the one the Department has proffered. We conclude that the availability of constitutional rights does not vary with the rise and fall of account balances in the Treasury. Our basic liberties cannot be offered and withdrawn as "budget crunches" come and go, nor may they be made contingent on transitory political judgments regarding the advisability of raising or lowering taxes, or on pragmatic or tactical decisions about how to deal with the perennial problem of the national debt. In short, constitutional rights do not turn on the political mood of the moment, the outcome of cost/benefit analyses or the results of economic or fiscal calculations. Rather, our constitutional rights are fixed and immutable, subject to change only in the manner our forefathers established for the making of constitutional amendments. The constitutional mandate that federal courts provide civil litigants with a system of civil jury trials is clear. There is no price tag on the continued existence of that system, or on any other constitutionally- provided right.
>
> The decision to maintain a system of civil jury trials was made long ago at the time our Constitution was adopted. It is not within our power or that of any other branch of government to create exceptions for budgetary reasons. See Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1547 (Fed.Cir.1983) ("So long as the Seventh Amendment stands, the right to a jury trial should not be rationed ..."); Raytheon Co. v. RCA, 76 F.2d 943, 947 (1st Cir.), aff'd 296 U.S. 459, 56 S.Ct. 297, 80 L.Ed. 327 (1935) ("Neither the Congress nor the courts can deprive a litigant of [the] right [to a civil jury trial]"); cf. Ex Parte Milligan, 71 U.S. (4 Wall) 2, 125, 18 L.Ed. 281 (1866) (Rejecting the argument that criminal jury trials could be suspended during wartime, the Court said that our founders "secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. *1430 Not one of these safeguards can the President, or Congress, or the Judiciary disturb ...").
>
> We conclude that the civil jury trial system may not be suspended for lack of funds. [FN13] Specifically, we conclude that the seventh amendment right to a civil jury trial is violated when, because of such a suspension, an individual is not afforded, for any significant period of time, a jury trial he would otherwise receive. We do not

> suggest that a suspension of any duration whatsoever would be constitutional. We need only decide here that a suspension for a significant period is barred by the seventh amendment. The suspension of civil jury trials described in the Administrative Office memorandum clearly falls within the parameters of that term. In fact, we believe three and a half months constitutes far more than a significant period, given the mandate of the seventh amendment.[792 F.2d at 1429-1430][17]

The situation now presented by the massive increase in the criminal docket is not different in kind or degree from the situation held unconstitutional by the Ninth Circuit. Indeed, it is precisely the same, though the abolition of the civil jury trial now is diffuse and the economics driven cause is in the background rather than the forefront. But it remains so that if the money was available to create new judgeships and support staff the problem would be diverted for a while and civil trials would perhaps again regain their prominence. We are told however that there lurks behind the cases charged by the United States Attorney an equal number of cases that are not now brought because of limited resources. Thus it may well be so that absent some control such as suggested by the Committee the insidious growth of the criminal docket will consume each new resource. If that is so, the only solution is to insure that the judges retain their inherent power to manage their docket in order to carry out their constitutional duties.

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[17]. See also the later comment by the Circuit in U. S. v. Enriquez-Munoz, 906 F.2d 1356, (9th Cir. 1990) at note 6:

> Our courts have already experienced the awesome strain that the burgeoning criminal case load can put on the limited resources of our judicial system. See Armster v. United States Dist. Court, 792 F.2d1423 (9th Cir.1986), motion to vacate denied, 806 F.2d 1347 (9th Cir.1986). Disregard for the benefits of plea agreements might well force us to revisit the potential constitutional crisis that arises from the shortage of judges and courtrooms, plus inadequate Congressional funding of the judicial system, on the one hand, and on the other, the demands of both the Sixth Amendment, and the related statutory authority implementing the right to a speedy trial in criminal cases, and the Seventh Amendment, which guarantees our citizens the right to civil jury trials.

APPENDIX D

MEMORANDUM

TO: The CJRA Advisory Committee
FROM: Winton Woods
SUBJECT: Topics for Consideration
DATE: February 11, 1992

We have now completed the first phase of our work. We have interviewed all but one of the Judges and the Clerk of the court, most of the courtroom deputies and various and sundry other persons. The second phase of our work will be the statistical analysis of the docket. Before we can properly do that, however, we need the most recent weighted case studies from the Federal Judicial Center. Unfortunately, the new Weighted Case Load Study will not be completed in final form for perhaps two years. We have prevailed upon the Center to give us sanitized preliminary information relating to our District and I have prepared two charts which reflect those data. We have been asked to keep this information confidential and I have so marked on the charts.

Dick and I think it is fair to assume that the final statistical study will conclude two things: (1) our overall caseload is very high; and, (2) that our criminal caseload is a particular problem that must be addressed. Our interviews and the preliminary statistics confirm those projected conclusions.

The time has now come for the Committee to become engaged in the specific process mandated by the CJRA. We have appended to this memorandum the specific section that describes in somewhat redundant detail the scope of our efforts. What follows here is a summary of that statutory language, re-arranged into a more workable format. We ask that each of you devote some attention to the matters set forth below. They will be on the agenda of our meetings for the next few months. This is the point where your expertise and experience can be of the greatest value to the judges. It is also the time for you to create other ideas which could be included in our report and recommendations to the court.

The District Court, and thus the Advisory Committee must consider the factors that are on the following pages. For more detail please consult the specific statutory language set forth in Appendix A. As a Committee we must be particularly attentive to views of the Judges on these issues.

Dick and I appreciate your effort and time. We believe that this is a project which can have positive results for all of us. I have left room on the memo for your notes!

THE GENERAL CONSIDERATIONS

1. A neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a non-binding conference conducted early in the litigation.

2. Systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to the needs of specific categories of cases.

3. Early and ongoing control of the pretrial process through involvement of a judicial officer.

4. For all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences before the presiding judicial officer.

5. Encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices.

6. Authorization to refer appropriate cases to alternative dispute resolution programs such as mediation/arbitration, mediation, mini-trial, summary jury trial, moderated settlement conference, fact finding, or other ADR device.

THE SPECIFIC CONSIDERATIONS

1. A requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so.

2. A requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters.

3. A requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request.

4. A requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference.

5. Conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion.

OTHER CONSIDERATIONS

The CJRA also allows the court to consider other things that may help the District achieve the ultimate goal of reduction of expense and delay in civil litigation. One proposal that has come from the interviews and has been discussed in the Committee is the ideal of providing each judge with periodic assignment to a purely civil calendar and the opportunity to take a sabbatical type leave on a regular basis. Our Committee has also considered amending or outright abolition of Local Rule 42, use of Settlement Weeks, changes in motion practice and increased use of Magistrate Judges in civil proceedings. We should also consider the need for further studies of the use of judicial resources so that the true allocation of resources in the District can be known. As our deliberations become more focussed, other areas of concern will undoubtedly surface.

APPENDIX

EXCERPTED FROM THE CIVIL JUSTICE REFORM ACT

28 U.S.C.A. § 473
UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART I--ORGANIZATION OF COURTS
CHAPTER 23--CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

§ 473. Content of civil justice expense and delay reduction plans

(a) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction:

(1) systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case;

(2) early and ongoing control of the pretrial process through involvement of judicial officer in--

(A) assessing and planning the progress of a case;

(B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint, unless a judicial officer certifies that--

(i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or

(ii) the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases;

(C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; and

(D) setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

(3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer--

(A) explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;

(B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;

(C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and

with any procedures a district court may develop to--

(i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and

(ii) phase discovery into two or more stages; and

(D) sets, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

(4) encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices;

(5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion; and

(6) authorization to refer appropriate cases to alternative dispute resolution programs that--

(A) have been designated for use in a district court; or

(B) the court may make available, including mediation, minitrial, and summary jury trial.

(b) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following litigation management and cost and delay reduction techniques:

(1) a requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;

(2) a requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters;

(3) a requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request;

(4) a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation;

(5) a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference; and

(6) such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title.

(c) Nothing in a civil justice expense and delay reduction plan relating to the settlement authority provisions of this section shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, or any delegation of the Attorney General.

(Added Pub.L. 101-650, Title I, s 103(a), Dec. 1, 1990, 104 Stat. 5091.)

CIVIL/CRIMINAL BALANCE

1988–1992

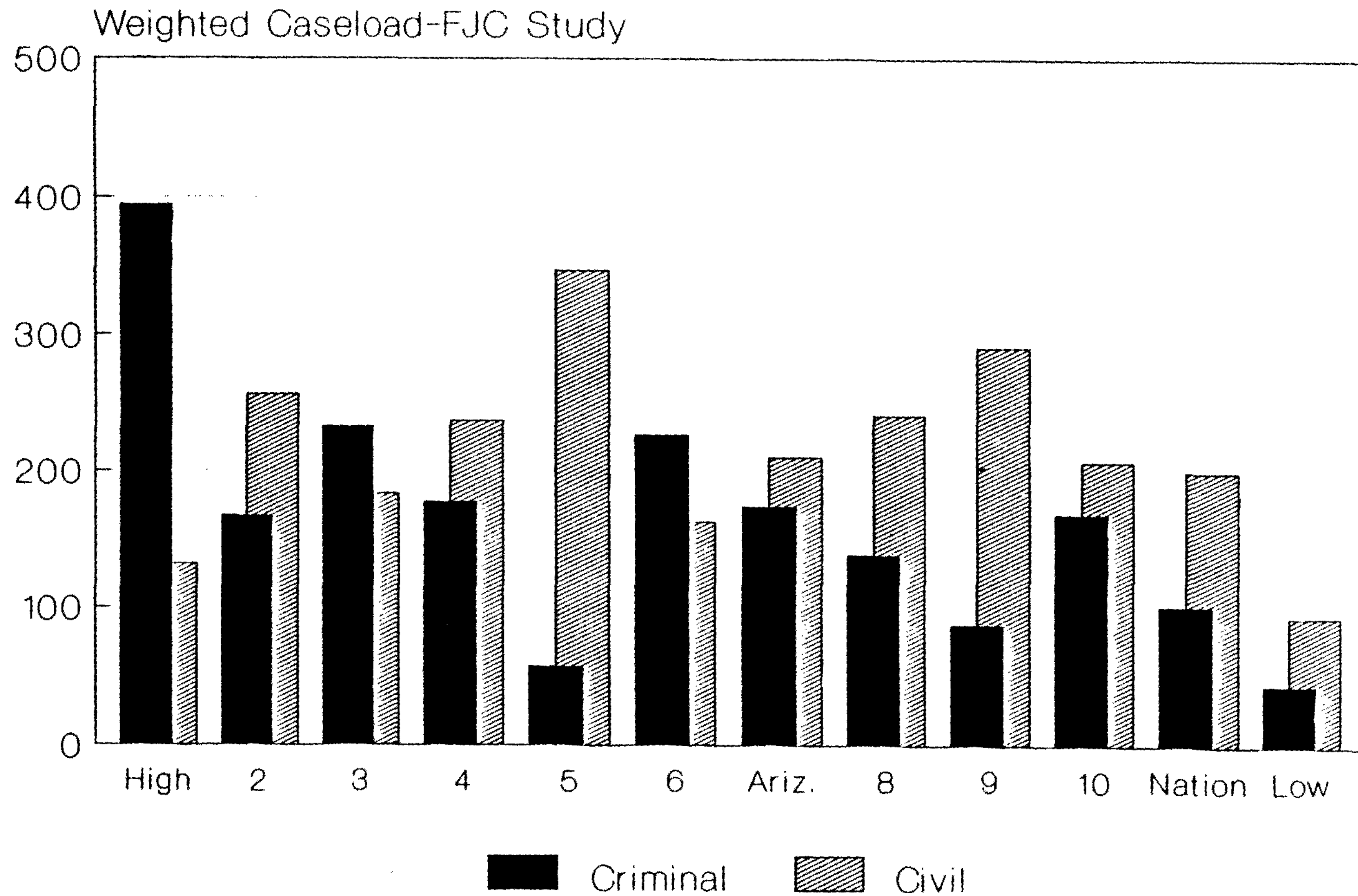
Based upon Courtroom Hours

THIS CHART IS HYPOTHETICAL

APPENDIX CA

Weighted Caseload Burdens Per Judge

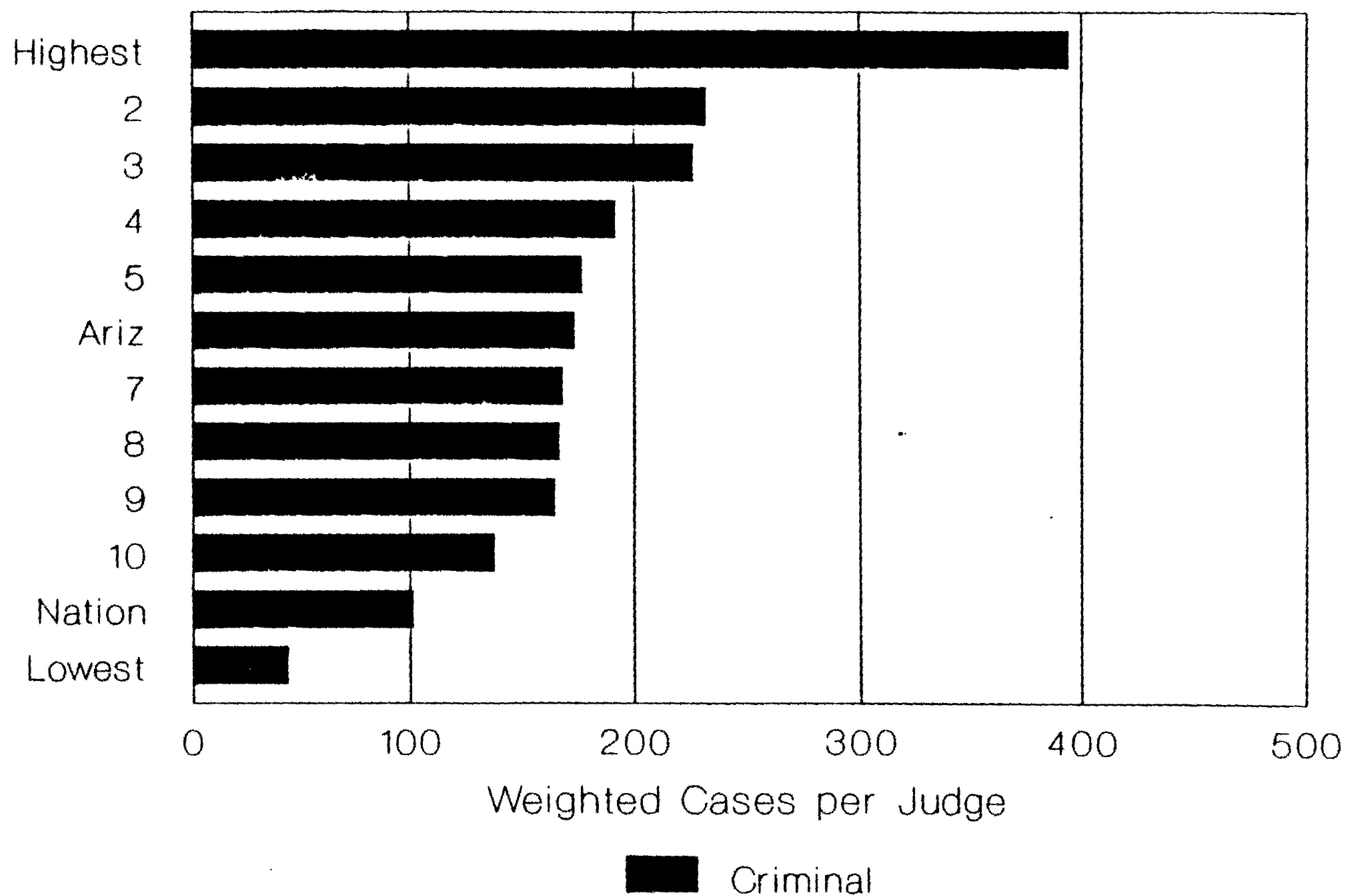
Ten Most Heavily Burdened Districts



For Use of CJRA Group Only-Confidential

Weighted Criminal Caseload Per Judge
Felony Cases Only

District Rank



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APPENDIX DA

APPENDIX E

Data Collection Methods

District	Judge Intervws	Judge Survey	Attorney Survey	Audit Clerk	Clk/Per Intervws	AO/FJC Stats	Open Forums	Attorney Intervws	Literature Review	Consult.	Litigant Survey	Litigant Intervws
Alaska	x	x	x	x	x	x						
Arkansas-E	x	x	x	x	x	x	Publ./Bar Hrg.				x	
CA-E	x		x		x			x	x			
CA-N	x					x	Publ. Hrg.	x	x			
CA-S										x		
Delaware	x	x	x	x	x	x						
Florida-S	x		x	x		x	Publ.Hrg.				x	
Georgia-N	x		x	x		x				x		
Idaho			x			x	Publ. Hrg.					
Ill-S	x		x	x	x	x			x	x		
Indiana-N	x				x	x		x	x			
Indiana-S	x		x		x		State Bar Mtg.	x				
Kansas				x		x						
MA		x		x	x	x		x	x	x		
MI-W	x			x	x	x	Publ. Hrg.	x		x		x
Montana	x		x	x		x						
New Jersey						x						
New York-E	x		x			x	Publ. Hrg.	x		x		
New York-S	x	x	x	x		x		x	x	x		
Ohio-N					x					x		
Oklahoma-W	x		x		x	x		x			x	x
Oregon				x		x		x	x			
PA-E	x		x				Publ. Hrg.				x	
Tennessee-W	x		x	x	x	x	CLE/Bar/Publ	x		x	x	
Texas-E	x			x	x	x		x				
Texas-S	x		x	x		x	Workshop/Bar	x	x		x	
Utah			x			x				x	x	
VA-E					x	x	Bar Organiztns		x			
Virgin Islands			x	x								
WI-E	x	x	x		x	x	Bar Mtgs	x	x	x	x	x
WI-W			x	x		x	Publ. Hrg.	x	x			
WV-S			x	x		x						
WV-N				x		x						
Wyoming	x		x		x	x		x			x	

PRINCIPLE AND GUIDELINES
§ 473 (a) CJRA

Systematic Differential Treatment Civil of Cases (1)	Early Involvement of Judicial Officer (2)	Discovery Case Management (3)	Encouragement of Cost Effective Discovery (4)	Certification of Discovery Motions (5)	ADR Referral System# (6)
Alaska	Alaska	Alaska	Alaska	California (N)+	Alaska
California (N)+	Arkansas (E)	Arkansas (E)	Arkansas (E)	California (S)*	California (E)
California (S)*	California (S)*	California (E)	California (E)	Delaware*	California (N)+
Delaware*	Delaware*	California (N)+	California (N)+	Georgia (N)*	California (S)*
Florida (S)	Florida (S)	California (S)*	California (S)*	Idaho	Delaware*
Georgia (N)*	Georgia (N)+	Delaware*	Delaware*	Illinois (S)	Florida (S)
Illinois (S)	Idaho	Florida (S)	Florida (S)	Indiana (N)	Georgia (N)*
Kansas	Indiana (N)	Georgia (N)*	Georgia (N)*	Indiana (S)	Idaho
Massachusetts	Indiana (S)	Idaho	Idaho	Massachusetts	Illinois (S)
Michigan (W)+	Kansas	Illinois (S)	Illinois (S)	Montana	Indiana (N)
Montana	Massachusetts	Indiana (N)	Indiana (N)	New Jersey	Indiana (S)
New Jersey	Montana	Indiana (S)	Indiana (S)	New York (S)*	Kansas
New York (E)	New Jersey	Kansas	Kansas	Ohio (N)+	Massachusetts
New York (S)*	New York (E)	Massachusetts	Massachusetts	Oklahoma (W)*	Michigan (W)+
Ohio (N)+	New York (S)*	Michigan (W)+	Michigan (W)+	Pennsylvania (E)*	Montana
Oklahoma (W)*	Ohio (N)+	Montana	Montana	Tennessee (W)*	New Jersey
Oregon	Oklahoma (W)*	New Jersey	New Jersey	Texas (S)*	New York (E)
Pennsylvania (E)*	Oregon	New York (E)	New York (E)	Utah*	New York (S)*
Tennessee (W)*	Pennsylvania (E)*	New York (S)*	New York (S)*	Virgin Islands	Ohio (N)+
Texas (E)	Tennessee (W)*	Ohio (N)+	Ohio (N)+	W. Virginia (S)	Oklahoma (W)*
Texas (S)*	Texas (E)	Oklahoma (W)*	Oklahoma (W)*	W. Virginia (N)+	Oregon
Utah*	Texas (S)*	Oregon	Oregon	Wisconsin (E)*	Pennsylvania (E)*
W. Virginia (N)+ W.	Utah*	Pennsylvania (E)*	Pennsylvania (E)*	Wyoming	Tennessee (W)*
Virginia (S)	W. Virginia (N)+	Tennessee (W)*	Tennessee (W)*		Texas (S)*
Wisconsin (E)*	W. Virginia (S)	Texas (E)	Texas (E)		Texas (E)
Wyoming	Wisconsin (E)*	Texas (S)*	Texas (S)*		Utah*
	Wisconsin (W)*	Utah*	Utah*		Virgin Islands
	Wyoming	Virgin Islands	Virgin Islands		W. Virginia (N)+
		Virginia (E)	Virginia (E)		W. Virginia (S)
		W.Virginia (N)+	W.Virginia (N)+		Wisconsin (W)
		W.Virginia (S)	W. Virginia (S)		Wisconsin (E)*
		Wisconsin (E)*	Wisconsin (E)*		Wyoming
		Wisconsin (W)	Wisconsin (W)		
		Wyoming	Wyoming		
Total: 26	Total: 28	Total: 34	Total: 34	Total: 23	Total: 32

\+ Demonstration Courts
* Pilot Courts
\# Includes Settlement Conferences

TECHNIQUES
§ 473 (b) CJRA

Joint Discovery Plan at Initial Pretrial Conference (1)	Power to Bind Parties on Topics Scheduled for Discussion (2)	Requests for Extensions to be Signed by Attorney and Party (3)	Neutural Evaluation Program (4)	Power to Bind Parties at Settlement Conference (5)
Due to the variations in Pretrial Conference requirements and the details of discovery case management plans among courts, this technique does not lend itself to quantification in a chart of this type.	Alaska	Alaska#	Alaska	Alaska
	Arkansas (E)	Arkansas (E)	California (N)+	Arkansas (E)
	California (S)*	Idaho	California (S)*	California (S)*
	Florida (S)	Texas (E)	Idaho	Georgia (N)*
	Idaho	W. Virginia (S)	Indiana (N)	Illinois (S)
	Indiana (N)		Indiana (S)	Indiana (N)
	Kansas		New York (E)	Kansas
	Massachusetts		Ohio (N)+	Massachusetts
	Montana		Tennessee (W)*	Montana
	New Jersey		W.Virginia (S)	New York (E)
	New York (E)		Wisconsin (E)*	Ohio (N)+
	New York (S)*		Wisconsin (W)	Pennsylvania (E)*
	Ohio (N)+			Tennessee (W)*
	Oklahoma (W)*			Texas (S)*
	Pennsylvania (E)*			Virgin Islands
	Tennessee (W)*			W. Virginia (S)
	Texas (S)*			Wisconsin (E)*
	Texas (E)			Wyoming
	Utah*			
	W.Virginia (N)+			
	W.Virginia (S)			
	Wisconsin (E)*			
	Wisconsin (W)			
	Wyoming			
	Total: 24	Total: 5	Total: 12	Total: 18

\+ Demonstration Courts
* Pilot Courts
\# Applies only after the first request has been granted

APPENDIX F.

EXCERPT FROM 1992 ANNUAL REPORT OF THE DISTRICT OF ARIZONA

VII. OTHER WORKLOAD INDICATORS

A. **Trial and Hearing Activity** - As Table 18 on the next page shows, trial activity in the District continued to increase in 1992, with a total of 496 trials. Civil trials in particular had a dramatic increase, up 34% over 1991.

Comparing the divisions within the District, Tucson conducted 63% of the total number of trials, while Phoenix handled 32% and Prescott 5%. Tucson conducted 54% of the civil trials, Phoenix 44%, and Prescott 2%. For criminal trials, Tucson conducted 66%, Phoenix 28%, and Prescott 6%.

Regarding total jury trials, Tucson conducted 46%, Phoenix 45%, and Prescott 9%. Tucson conducted 67% of civil jury trials, Phoenix 30%, and Prescott 3%. For criminal cases, Tucson handled 43% of the jury trials, Phoenix 46%, and Prescott 11%.

The total bench trials data reveal that Tucson handled 70%, Phoenix 28%, and Prescott 2%. Tucson conducted 50% of civil bench trials, Phoenix 49%, and Prescott 1%. For criminal bench trials, Tucson handled 78%, Phoenix 20% and Prescott 2%.

It is interesting to note that although the Tucson Division had 63% of the total number of trials, those trials accounted for only 40% of the District's total trial hours.

Table 18

BENCH AND JURY TRIALS

	1990			1991			1992				
	PHX	TUC	TOTAL	PHX	TUC	TOTAL	PHX	PCT	TUC	TOTAL	% Change 91-92
Bench Trials:											
Criminal	38	135	173	60	169	229	45	6	179	230	0.4
Civil	45	25	70	40	37	77	46	1	47	94	22.0
Total	83	160	243	100	206	306	91	7	226	324	6.0
Jury Trials:											
Criminal	71	45	116	74	74	148	62	14	58	134	-9.5
Civil	13	15	28	8	6	14	10	1	17	28	100.0
Total	84	60	144	82	80	162	72	15	75	162	0.0
Total Trials:											
Criminal	109	180	289	134	243	377	107	20	237	364	-3.4
Civil	58	40	98	48	43	91	56	2	64	122	34.1
Total	167	220	387	182	286	468	163	22	301	486	3.8
Total Hours:			4155			4258	2727	722	2222	5608	32.0

NOTE: PHX=Phoenix, PCT=Prescott, TUC=Tucson