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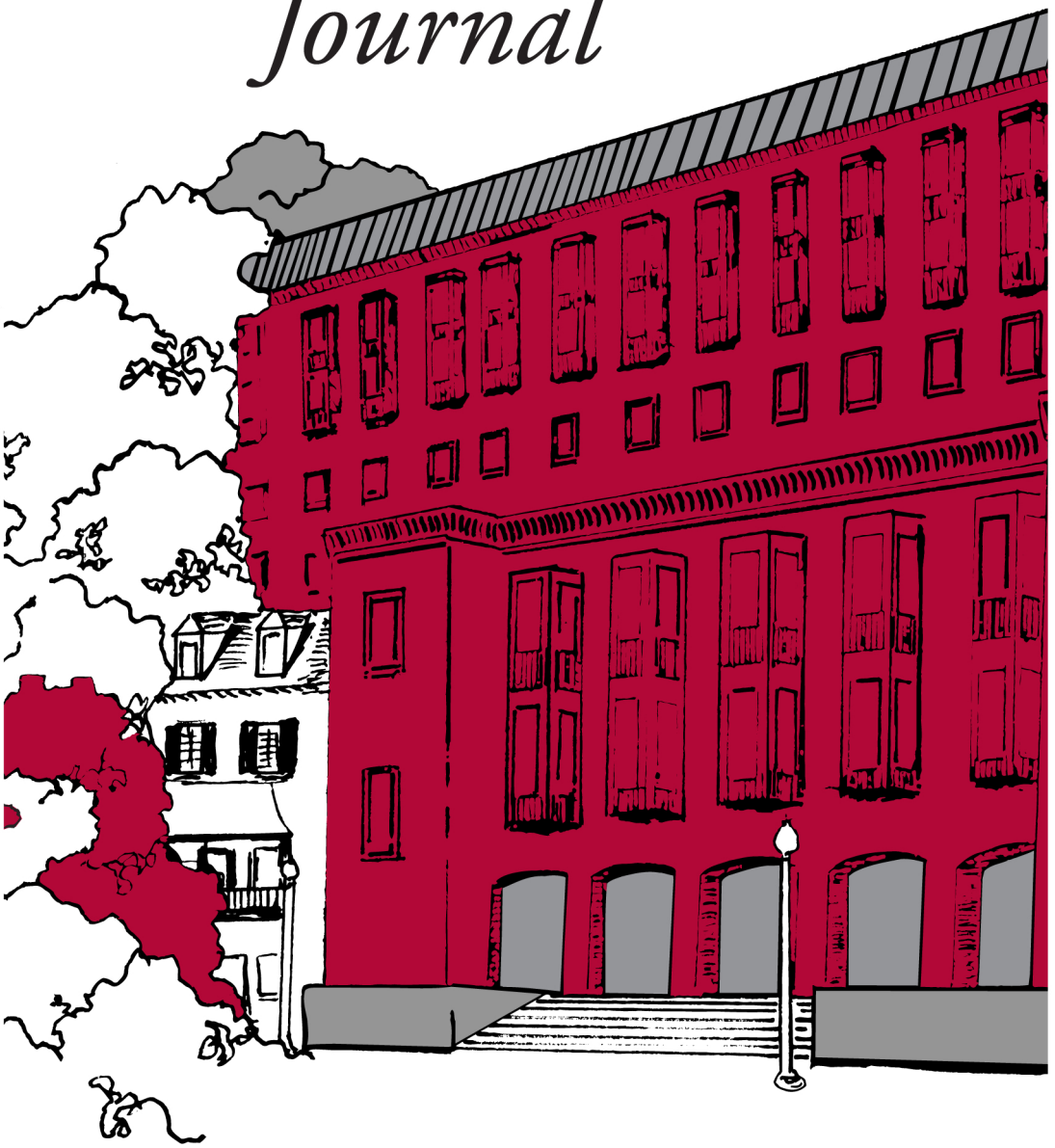

★ The Law As Language: A Computational Text Analysis of Judicial Writing Style

★ The Equal Pay Act: The Law that Promised Equality but Delivered Disparity

★ "The People's Court?" Transforming the Court of Federal Claims to a Model of Judicial Efficiency

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Federal Circuit Bar Journal

CONTENTS

The Law As Language: A Computational Text Analysis of Judicial Writing Style

Jason Rantanen* & Jason Reinecke**

Introduction

Writing style matters. Courts depend on the written word to communicate with their audiences. Reporters (and the public) read them; attorneys parse them; and the parties learn their fates through them. Opinions in casebooks are oftentimes selected in large part because they are written in a particularly clear or especially engaging style.[1] At the same time, there are "[i]nnumerable" sources devoted to judicial style, and commentators observe that judicial style is "of perennial and often intense concern."[2]

Writing style is particularly important at the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), and especially in patent law, where magic words are the name of the game.[3] The court was formed to bring uniformity and predictability to patent law,[4] and it has nationwide jurisdiction

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** Assistant Professor of Law, University of Wisconsin Law School. Stanford Law School, J.D. 2018; University of Wisconsin-Madison, B.S. Mechanical Engineering 2015. For helpful comments, thanks to Paul Gugliuzza, Mark Lemley, Michael Livermore, Lisa Larrimore Ouellette, Dave Schwartz, Ryan Vacca, and Nina Varsava, the University of Iowa College of Law faculty, and participants at the 2025 Works in Progress in IP and 2024 Chicagoland IP Workshops. The views expressed are our own. The dataset, all computer code, and additional results that are not fully presented in the Article can be found on Harvard Dataverse, V1: https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/2FCUTO.

[1] For example, it is beyond question that many Intellectual Property and Trademark casebooks include *Zatairains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786 (5th Cir. 1983), because the opinion is written clearly, includes a clear and fulsome description of numerous relevant doctrines, and includes so many puns.

[2] Nina Varsava, *Elements of Judicial Style: A Quantitative Guide to Neil Gorsuch's Opinion Writing*, 93 N.Y.U. L. Rev. 75, 77 (2018); *see generally* Ruth C. Vance, *Judicial Opinion Writing: An Annotated Bibliography*, 17 Legal Writing 197 (2011) (a highly thorough annotated bibliography of writings on how to write judicial opinions; most of this genre is directed at aspiring law clerks, externship seminars, & classes on opinion writing).

[3] *See* Julie E. Cohen & Mark A. Lemley, *Patent Scope and Innovation in the Software Industry*, 89 Calif. L. Rev. 1, 9 (2001) (describing a "doctrine of magic words").

[4] *See* Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 Wm. & Mary L. Rev. 1791, 1800–02 (2013) ("Proponents of centralizing patent appeals in the Federal Circuit

over specific areas of law, including patent law.[5] As a result, the court has a large, national audience, and its opinions have broad effect. In addition, because of its limited subject matter jurisdiction, the judges are repeatedly called upon to write again and again on the same common topics, such as non-obviousness or claim construction.

Much has been written about the differences among Federal Circuit judges, from articles about panel dependence[6] to their (perhaps not as fiery as Justice Scalia) dissents.[7] The picture that commentators have painted is one of a court where the judges' differences are striking and individual personalities dominate.[8] Yet, while there is a vast literature on the Federal Circuit, and its decisions, doctrines, and influence, its judges' writing style remains largely an unexamined space.

The emergence of computational text analysis tools provides an opportunity to identify and dig into questions that previously would have been virtually impossible to examine. In this article, we present a computational overview of the Federal Circuit judge's writings, drawing on a set of computational tools that allow the examination of text at a level that was not practically feasible just a few years ago. Specifically, we provide a holistic computational overview of judicial opinion writing style and the first computational text analysis of the opinions of the judges of the Federal Circuit.

Our project is unabashedly descriptive: we aim to provide a foundation for future works and identify potential questions for further exploration. This project is driven by the goal of establishing a baseline—a starting point for future journeys rather than a destination.

We divide our observations up into four primary categories:

Opinion Complexity: these metrics address how hard it is to read an opinion, including length, reading level, verdict suspense, and the use of active versus passive voice. Opinion complexity metrics can be useful for understanding how audiences might engage with the opinions, as well as for assessing whether judges may be writing overly

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[argued that the Circuit's specialization served three purposes]: promoting uniformity of the law, increasing the quality of decision making, and enhancing the efficiency of case disposition.").

[5] *See* 28 U.S.C. § 1295(a) (establishing the Federal Circuit's exclusive jurisdiction).

[6] *See* Jason Reinecke, *Decisionmaking in Patent Cases at the Federal Circuit*, 81 Wash. & Lee L. Rev. 169, 177 (2024).

[7] *See* Paul R. Gugliuzza, Jonathan Remy Nash & Jason Rantanen, *Expertise, Ideology, and Dissent*, 74 Am. U. L. Rev. 877, 884–85 (2025).

[8] *See, e.g.*, EcoFactor, Inc. v. Google LLC, 137 F.4th 1333, 1347, 1354 (Fed. Cir. 2025) (en banc) (Judges Reyna and Stark each writing separately); Aqua Prods., Inc. v. Matal, 872 F.3d 1290, 1295 (Fed. Cir. 2017) (en banc) (generating five separate opinions spanning more than 140 pages and with no clear majority opinion).

verbose opinions or, conversely, writing opinions that fail to give justice to the complexities of the case.

Formality: these metrics focus on specific attributes of writing style that relate to its tone, such as the use of contractions, intensifiers, and hedges. As with linguistic patterns generally, formality metrics may be useful for identifying communities of judges who adopt a particular style of speaking.

Stylistic Fingerprinting: these are more complex metrics such as word diversity and frequency of word use that can potentially be used to identify a particular author, or at least an author's unique writing tendencies. Stylistic fingerprinting metrics may be useful for detecting how much a judge may be relying on judicial clerks in opinion drafting**.**

Citation Frequency: these are metrics relating to how much support is claimed from other sources, including precedent and the appellate record. Citations to authority are also the core of doctrinal development and thus are significant in their own right.

Perhaps most surprisingly, we find that the judges vary considerably in how much they write and how much they cite. The mean precedential opinion word count for the four most verbose judges are between approximately 40% and 100% longer than the means for the four least verbose judges. The four judges who most frequently cite legal authority are between approximately 40% and 100% more likely to do so than the four least likely judges. And the four judges who most frequently cite to the record are between approximately five and fifteen times more likely to do so than the four least likely judges.

The findings demonstrate that some judges are much more effective than others at writing effective opinions. Below we offer promising avenues for future research to further identify how some judges are writing more effectively.

We also analyze several indicators of writing in an informal style[9] and conclude that Federal Circuit judges tend to follow more formal writing practices, particularly as compared to the judges on the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") who have been similarly studied.

We also analyze judges' use of common function words. We find that Federal Circuit judges tend to use function words more variably than The United States Supreme Court ("Supreme Court") justices, suggesting (though not confirming) that Federal Circuit judges may rely more on their law clerks to draft opinions. This would make sense given that appellate courts have far more demanding caseloads than the Supreme Court.

Because this article is intended to survey the landscape and provide a foundation, we recognize that there are many unanswered questions—questions that are normatively significant, such as whether longer, more difficult to read opinions are more or less valuable as precedent, or the extent to which judges

[9] *See generally* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. Chi. L. Rev. 1421 (1995) (generally comparing formal and informal opinion writing).

rely on clerks in opinion drafting, or the extent to which Federal Circuit opinions are more formulaic than those of other courts. We thus conclude with a host of research questions raised by our findings, along with potential paths to explore these questions in future work.

This article proceeds as follows. We begin with a discussion of the literature on computational text analysis of judicial opinions, then briefly describe the methodologies we employ (more detailed information is provided in the supplemental data materials accompanying this article). We then present our observations and findings, and finally we offer our thoughts on the promising avenues for future research this work invites.

I. Literature Review

There is a substantial body of scholarship employing statistical techniques to assess judicial style. The scholarship includes, for example, calculating cosine similarity of various parameters to assess the degree of similarity between various legal writings,[10] analyzing to what degree judges use common function words (e.g., an, the, than) differently,[11] and using a whole host of additional tools to assess judicial style including word count and various metrics representing reading complexity.[12] The literature has assessed not only style for its own sake, but to see, for example, how certain stylistic preferences correlate

[10] *See, e.g.*, Morgan L. W. Hazelton & Rachael K. Hinkle, Persuading the Supreme Court: The Significance of Briefs in Judicial Decision-Making 113–17 (2022); Jonathan H. Choi, *Measuring Clarity in Legal Text*, 91 U. Chi. L. Rev. 1, 21–23 (2024); Morgan L.W. Hazelton, *Using tf-idf and Cosine Similarity to Compare Legal Texts*, 32 L. & Cts. Newsl. (Am. Pol. Sci. Ass'n, Washington, D.C.), no. 1, Spring 2022, at 19; Morgan L. W. Hazelton, Rachael K. Hinkle & James F. Spriggs II, *The Influence of Unique Information in Briefs on Supreme Court Opinion Content*, 40 Just. Sys. J. 126, 137 (2019).

[11] *See* Keith Carlson, Michael A. Livermore & Daniel Rockmore, *A Quantitative Analysis of Writing Style on the U.S. Supreme Court*, 93 Wash. U. L. Rev. 1461, 1463 (2016) (using a function-words approach to examine the writing style of Supreme Court justices); Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 69 Cornell L. Rev. 1307, 1308 (2011) [hereinafter *Judicial Ghostwriting*] (same).

[12] *See, e.g.*, Greg Goelzhauser & Damon M. Cann, *Judicial Independence and Opinion Clarity on State Supreme Courts*, 14 State Pol. & Pol'y Q. 123, 128–29 (2014) (studying opinion clarity using Flesch Reading Ease scale, Flesch-Kincaid Grade Level, and the percentage of passive sentences in a court's opinion); Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 Hou. L. Rev. 621, 626 (2008) (examining opinion length); Varsava, *supra* note 2, at 85–106 (examining a whole host of statistical metrics); Nina Varsava, *The Form and Function of Legal Precedent* 177–84 (Aug. 2018) (Ph.D. dissertation, Stanford University) [hereinafter *Form and Function of Legal Precedent*], http://purl.stanford.edu/qp233bk9078 (same, and analyzing in the context of citation); Ryan Whalen, *Judicial Gobbledygook: The Readability of Supreme Court Writing*,

to many diverse topics, including judicial ideology,[13] engagement with female judges,[14] racial bias,[15] and public opinion.[16] Style has also been used to try to formally estimate how much judges rely on their law clerks.[17]

For clarity, we discuss the most relevant results below when we provide our results. At the outset, however, we note that a limitation of the prior literature is that most studies focus only on the Supreme Court[18] or particular judges who may be elevated to the Supreme Court.[19] Although there is a growing literature touching on the courts of appeals, those studies nearly always exclude the Federal Circuit, making it a useful court to study as both an alternative data source and as a significant court in its own right.[20]

We provide a holistic computational analysis of judicial style and the first computational text analysis of Federal Circuit opinions. Below we discuss the most relevant prior literature in more detail where relevant.

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125 Yale L.J. Forum 200, 201 (2015) (analyzing complexity of Supreme Court judicial writing using SMOG).

[13] *See, e.g.*, Gordon Ballingrud & Caitlein Jammo, *Ideology and Risk Focus: A Preliminary Exploration of the Effect of Judicial Ideology on Risk Focus in Supreme Court Opinion Construction*, 96 Denv. L. Rev. 793, 793 (2019).

[14] *See* Elliott Ash, Daniel L. Chen & Arianna Ornaghi, *Gender Attitudes in the Judiciary: Evidence from U.S. Circuit Courts*, 16 Am. Econ. J.: Applied Econs. 314, 314 (2024) (finding that judges who use gender-stereotyped language in their opinions are more likely to reverse lower-court decisions by female judges, are less likely to assign opinions to female judges, and are less likely to cite opinions authored by female judges).

[15] *See* Douglas Rice, Jesse H. Rhodes & Tatishe Nteta, *Racial Bias in Legal Language*, Rsch. & Pols., Apr.–June 2019, at 1.

[16] *See* Justin Wedeking & Michael A. Zilis, *Disagreeable Rhetoric and the Prospect of Public Opposition: Opinion Moderation on the U.S. Supreme Court*, 71 Pol. Rsch. Q. 380, 380 (2018).

[17] *See, e.g.*, *supra* note 11 and accompanying text; Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (And Should We Care)? . . .*, 32 Fla. St. U. L. Rev. 1077, 1079 (2005); Michael A. Livermore, Allen B. Riddell & Daniel N. Rockmore, *The Supreme Court and the Judicial Genre*, 59 Ariz. L. Rev. 837, 858 (2017); Frank B. Cross & James W. Pennebaker, *The Language of the Roberts Court*, 2014 Mich. St. L. Rev. 853, 855 (2014).

[18] *See, e.g.*, *supra* note 11 and accompanying text; Ballingrud & Jammo, *supra* note 13, at 793; Black & Spriggs, *supra* note 12, at 624–25.

[19] *See* Elliott Ash & Daniel L. Chen, *What Kind of Judge Is Brett Kavanaugh? A Quantitative Analysis*, 2018 Cardozo L. Rev. de novo 70, 70 (2018); Varsava, *supra* note 2, at 76.

[20] *See, e.g.*, Varsava, *supra* note 2, at 76 (study of Tenth Circuit in connection with study of now-Justice Gorsuch); Jeffrey Budziak, Matthew P. Hitt & Daniel Lempert, *Determinants of Writing Style on the United States Circuit Courts of Appeals*, 7 J.L. & Cts. 1, 12 (2019) (drawing dataset from a database that does not include the Federal Circuit).

II. Methodologies

This study uses a dataset consisting of every written Federal Circuit panel opinion issued between January 1, 2012, and December 31, 2023. Opinions arising from all origins that appeal to the Federal Circuit were included, including cases arising from the federal district courts that are appealable to the Federal Circuit, appeals from the U.S. Patent and Trademark Office ("USPTO"), U.S. International Trade Commission, U.S. Court of International Trade, U.S. Merit Systems Protection Board ("MSPB"), U.S. Court of Federal Claims ("Court of Federal Claims"), and United States Court of Appeals for Veterans' Claims.

The original source of the records is the United States Court of Appeals for the Federal Circuit, as collected by the Federal Circuit Dataset Project.[21] This dataset contains copies of and metadata for all decisions issued by the Federal Circuit since 2004.[22] This dataset is widely used in studies of the Federal Circuit.[23]

Preprocessing consisted of using a Python package to extract the text of each Federal Circuit opinion from the PDF document, including removing headers, footers, and page numbers, then employing Python code to identify footnotes, break apart separate opinions such as concurring and dissenting opinions, and remove formatting characters. The complete Python code that was used to preprocess the dataset and Federal Circuit opinions is archived with the project materials and may be useful to anyone who is seeking to do a similar project with another court.

This study examines opinions[24] authored by Federal Circuit judges in the context of appeals heard by a Federal Circuit panel. Except in extremely

[21] For a description of the Federal Circuit Dataset Project, see Jason Rantanen, *The Landscape of Modern Patent Appeals*, 67 Am. U. L. Rev. 985, 996–1007 (2018); J. Jonas Anderson, Paul R. Gugliuzza & Jason A. Rantanen, *Extraordinary Writ or Ordinary Remedy? Mandamus at the Federal Circuit*, 100 Wash. U. L. Rev. 327, 346–51 (2022); Jason Rantanen et al., *Who Appeals (and Wins) Patent Infringement Cases?*, 60 Hou. L. Rev. 289, 300 (2022); Jason Rantanen, Lindsay Kriz & Abigail A. Matthews, *Studying Nonobviousness*, 73 Hastings L.J. 667, 697 (2022).

[22] Updated copies of the metadata dataset are routinely archived on the Harvard Dataverse. The metadata dataset also contains links to PDFs of the documents.

[23] *See, e.g.*, Paul R. Gugliuzza & Mark A. Lemley, *Can a Court Change the Law by Saying Nothing?*, 71 Vand. L. Rev. 765, 800–20 (2018); Paul R. Gugliuzza & Rachel Rebouché, *Gender Inequality in Patent Litigation*, 100 N.C. L. Rev. 1683, 1699–1700 (2022); Charles Duan, *On the Appeal of Drug Patent Challenges*, 72 Am. U. L. Rev. 1177, 1190–91 (2023); *see also supra* note 21 and accompanying text (describing the Federal Circuit Dataset Project).

[24] Because we were examining judicial opinion writing characteristics, we focused on documents that were self-labeled as "opinions" by the court itself. However, it is worth

rare situations, all Federal Circuit panels consist of three judges.[25] This study focuses specifically on opinions in which the authoring judge is in the majority, either because the judges were unanimous or the authoring judge was joined by one of the other two judges. In other words, we did not include dissenting or concurring opinions in this study.[26] Both opinions designated by the court as 'precedential' and as 'nonprecedential' were included in the study population; however, we report separately on these two categories.

After assembling the study dataset, we then used Python code to determine the metrics we report below. Additional details on specific packages used are described where applicable.

The study dataset consists of 5,822 opinions. There are between 420 and 546 opinions per year. Approximately 59% of the opinions are precedential. The most common case origins are appeals from district court (1522), the USPTO (1154), the MSPB (1043), and the Court of Federal Claims (865).

III. Opinion Complexity

In this Part, we report our findings. For all relevant figures, the Appendix provides box plots for the relevant variables. Where we do not report the results for nonprecedential opinions, those results can be found in the Appendix as well.

We begin by discussing our findings pertaining to opinion complexity. Specifically, we look at word count, readability, use of active and passive voice, and verdict suspense.

noting what is not included in this set. *See* Merritt E. McAlister, *Missing Decisions*, 169 U. Pa. L. Rev. 1101, 1120–46 (2021). In particular, the dataset used in this study does not include Rule 36 summary affirmances (because there is no text to analyze), decisions in the form of Orders (such as in the context of a Petition for Writ of Mandamus or an Order to dismiss the appeal for lack of appellate subject matter), and administrative terminations (such as termination for failure to prosecute the appeal). For a description of other types of terminating documents, see Jason Rantanen, Missing Decisions *and the United States Court of Appeals for the Federal Circuit*, 170 U. Pa. L. Rev. Online 73, 83–87 (2022).

[25] We also did not include opinions of the court sitting en banc because these arise in a situation involving heightened scrutiny and significance, and the writing behavior of authoring judges may differ from a typical panel opinion. There were 33 of these during the study period. For a discussion of recent en banc Federal Circuit behavior, see generally Ryan Vacca, *Revisiting the Federal Circuit En Banc*, 37 Harv. J.L. & Tech. 501 (2024).

[26] For a discussion of separate opinions, see generally Gugliuzza, Nash & Rantanen, *supra* note 7.

A. Word Count

Perhaps the most basic and foundational metric of writing complexity is its length. Tolstoy's *War and Peace*, or Sanderson's *The Stormlight Archive* are complex in part because of their length. Opinion length likely signifies, at least to some extent, the opinion's complexity, wordiness, and scope.[27] An opinion that is too short will fail to adequately address the issues in the case. Overly verbose opinions also have costs. "[B]revity is the soul of wit,"[28] after all. Longer opinions take longer to read.[29] Commentators have also contended that they take longer to prepare,[30] though we are unsure that that is always, or even usually, the case. Indeed, Blaise Pascal once famously wrote "I would have written a shorter letter but did not have the time."[31] Ultimately, time is our most valuable possession, and we expect that few of us want to spend more of it than necessary preparing and reading judicial opinions.

Unnecessary language also creates additional language for lower courts to interpret, increasing complexity and uncertainty,[32] and giving the court opportunity to improperly speak on issues not before the court.[33] Commentators have also argued that the general public is less likely to read longer opinions,[34] though we are skeptical that opinion length is what's keeping more people from picking up reading Federal Circuit opinions as a hobby.

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[27] *See, e.g.*, Black & Spriggs, *supra* note 12, at 626 ("At the most basic level, the length of majority opinions is likely to embody a variety of concepts of interest to legal scholars—such as an opinion's clarity, scope, and amount of dicta, among other potential quantities."); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984, 1003–04 (1990) (using opinion length and number of footnotes as proxies for "judicial prolixity, issue complexity, documentation of evidence, and precedential significance").

[28] William Shakespeare, The Tragedy of Hamlet, Prince of Denmark act 2, sc. 2 (Polonius).

[29] Others have generally noted such costs. *See, e.g.*, Richard A. Posner, The Federal Courts: Challenge And Reform 147 (1996); Black & Spriggs, *supra* note 12, at 628; Charles A. Beardsley, *Judicial Draftsmanship*, 24 Wash. L. Rev. & State Bar J. 146, 149 (1949); Herbert B. Gregory, *Shorter Judicial Opinions*, 34 Va. L. Rev. 362, 369 (1948).

[30] *See supra* note 29 and accompanying text.

[31] Or something to that effect. *See* Blaise Pascal, *Lettres Provinciales*, Letter 16 (1657) ("Je n'ai fait celle-ci plus longue que parce que je n'ai pas eu le loisir de la faire plus courte.").

[32] *See* Black & Spriggs, *supra* note 12, at 628; Posner, *supra* note 29, at 147.

[33] *See, e.g.*, North Carolina v. Rice, 404 U.S. 244, 246 (1971) ("[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.").

[34] *See, e.g.*, Black & Spriggs, *supra* note 12, at 628; Ray Forrester, *Supreme Court Opinions—Style and Substance: An Appeal for Reform*, 47 Hastings L.J. 167, 177 (1995).

Figures 1 and 2 show the mean word count for each judge's precedential and nonprecedential opinions, respectively.[35]

The median and mean for all precedential opinions is just over 3,500 words and just under 4,000 words, respectively. This mean is fairly similar to the mean found in a recent study of Tenth Circuit opinions.[36] Because the mean is greater than the median, it follows that there are a small number of particularly long opinions.

Figure 1. Mean Opinion Word Count (Precedential Opinions)

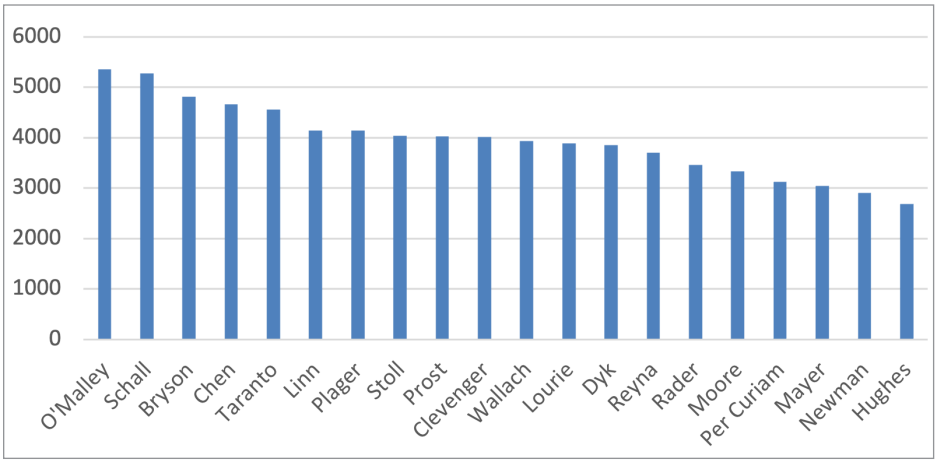
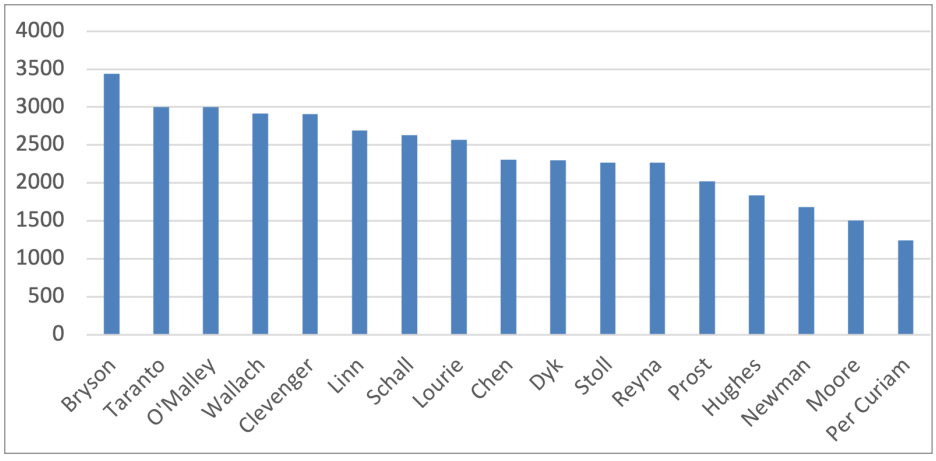


Figure 2. Mean Opinion Word Count (Nonprecedential Opinions)



[35] We calculated word count using Textacy's n_words function.

[36] *See* Varsava, *supra* note 2, at 85–86 & n.3, 94 n.69 (in a study of Tenth Circuit published opinions of more than 200 words between 2007 and 2016, finding a mean length between 4000 and 5000 words, with an upward trend overall).

Opinion length varies widely by judge. The median precedential opinion length of the least verbose judge is less than half the median of the most verbose judge. The fourth largest median (Bryson) is 1,356 words more than the fourth lowest (Mayer), representing a 31% difference.

The story is similar when looking at averages. The mean precedential opinion length of the most verbose judge is just four words shy of being twice as long as the mean of the least verbose judge (5,356 versus 2,680). And there is a difference of 1,333 words between the fourth most verbose (Chen) and fourth least verbose (Moore) judges—a large difference representing 40% of the mean for Judge Moore.

Perhaps unsurprisingly given this discussion, we find that the overall variability in mean and median precedential opinion word count is statistically significant.[37] We also find significant differences in Judge Chen's and Chief Judge Moore's opinion word counts.[38] Mean precedential and nonprecedential word count is relatively strongly correlated, meaning that judges who tend to write longer precedential opinions also tend to write longer nonprecedential opinions.[39]

We believe a large fraction is explained by differences in writing style. Some judges just write longer opinions, while other judges tend to write shorter ones.

Of course, such differences could reflect differences in the underlying subject matter of opinions as opposed to differences in writing style. Wasserman and Slack, for example, demonstrated that some federal circuit judges tend to author disproportionate shares of certain types of opinions (e.g., patent

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[37] We calculated significance using a permutations test. Specifically, we estimated how much variability we would expect in the data due to chance alone by randomly redistributing the opinions to the authors and calculating the variability in average opinion length. After doing this random reassignment 1000 times, we then compared the actual variability to the simulated variability. The actual variability was much greater than *every* simulation.

[38] We compared their word count distributions at the median, 75th percentile, and 90th percentile using the Mood's Median Test. *See* Ted Hessing, *Mood's Median Non Parametric Hypothesis Test*, sixsigmastudyguide, [https://perma.cc/44JS-QUZ6] (last visited Apr. 26, 2026). Although the Mood's Median Test is usually performed to compare medians (hence the name), the test can be used to compare any percentile. *See id.* Irrespective of whether we assessed all opinions or only precedential opinions, Judge Taranto's opinions were significantly longer at every percentile (the *p*-value was less than .00001 at the median and 75th percentile).

[39] *R*-squared is a goodness-of-fit measure for linear regression models and indicates the percentage of variance in the outcome variable that is explained by the explanatory variable. *See R-Squared Statistics*, IBM, [https://perma.cc/88NC-9DYQ] (last updated Nov. 9, 2021) ("R2 . . . summarizes the proportion of variance in the dependent variable associated with the predictor (independent) variables, with larger R2 values indicating that more of the variation is explained by the model, to a maximum of 1."). *R*-squared is .52.

or MSPB opinions).[40] And certain types of appeals tend to necessitate longer opinions.[41]

To account for the possibility that the differences between the judges might be due to certain judges gravitating towards certain types of appeals, we also assessed mean and median precedential opinion length separately for only district court cases (which tend to involve patent issues), only Patent Office appeals, and only appeals from the Court of Federal Claims.[42] The mean and median opinion length differences are still very large and statistically significant. Thus, there are stark differences in word count that are not explained by topic selection.

Another reason for the disparity could be that some judges selectively advocate for being assigned knottier appeals more than others. While that may be true to an extent, we think it is beyond question that such tendencies could not possibly account for such stark differences in opinion length. Our analysis above separately considers precedential and nonprecedential opinions, which should account for a large fraction of such selection differences. And we find it exceedingly unlikely that, for example, Judge O'Malley is consistently assigned opinions that necessitate twice as many words as those chosen by Judge Hughes, or that Judge Taranto is assigned opinions that are far more complex than those assigned to Chief Judge Moore. Accordingly, it appears that at least a large portion of the differences are indeed due to differences in writing style between the judges.[43]

What is less clear is whether the more verbose judges tend to write too much or whether the less verbose judges tend to write too little. Or is it something in between? And is one normatively better than the other?[44] We do not

[40] *See* Melissa F. Wasserman & Jonathan D. Slack, *Can There be too Much Specialization? Specialization in Specialized Courts*, 115 Nw. U. L. Rev. 1405, 1410 (2021) (finding that "judges write a disproportionately large number of opinions in preferred subject matters and write a disproportionately fewer number of opinions in subject areas they seek to avoid").

[41] For example, precedential appeals from district court average 4517 words, while precedential appeals from the Court of Appeals for Veterans Claims average only 2736 words.

[42] There were very few instances of precedential opinions for the other types of appeals.

[43] Our conclusion is further supported by our own observations following the Federal Circuit and by anecdotal discussions we have had with close observers of the Federal Circuit concerning which judges tend to be the most and least verbose.

[44] Many commentators appear to believe that judicial opinions are too long and that the problem is getting progressively worse over time. *See, e.g.*, Joyce George, Judicial Opinion Writing Handbook 29 (5th ed. 2007) ("Keep the decision/opinion short and concise."); *id.* at 30 ("Do not try to cover every contingency. When you do so, you cannot express yourself clearly."); Charles G. Douglas, III, *How to Write a Concise Opinion*, 22 Judges J., no. 2, 1983, at 4 ("Judges will always have to crank out the paper, but it need not be as voluminous or convoluted as many of our opinions are."); Black & Spriggs, *supra* note 12, at 634;

know for certain at this point, thus below in Part VII we offer some possible avenues for exploring this question.

B. Readability

Next, we look at whether some judges author opinions that are harder to read than others. In general, we think a text should be as readable as the subject matter allows. Unnecessary complexity serves only to reduce an opinion's ability to efficiently and accurately convey a message. Most commentators appear to believe that, if anything, judges tend to make things more complex than necessary.[45]

Bryan Garner, The Redbook: A Manual on Legal Style 547 (5th ed. 2023) (arguing that "[t]he best judicial writers know that shorter is better"); 1 Wigmore on Evidence § 8a, at 245 (3d ed. 1940) (arguing that judges write too much, which "tends to remove the decision from the really vital issues of each case and to transform the opinion into a list of rulings on academic assertions"); Joseph Kimble, *The Straight Skinny on Better Judicial Opinions*, 9 Scribes J. Legal Writing, 2003–2004, at 1 (conducting an empirical test and concluding from those results that "if you care to write better opinions (or letters or memos or briefs), then make them straightforward and lean"); Richard B. Cappalli, *Improving Appellate Opinions*, 83 Judicature 286, 318 (2000) ("The general lesson is that in judicial opinion writing less is better."); Robert G. Simmons, *Better Opinions-How?*, 27 A.B.A. J. 109, 109 (1941) (describing a "recent survey made by a committee of the American Bar Association" indicating that "a great majority of lawyers prefer: (1) short written opinions; (2) memorandum opinions in cases in which the law is already clear; (3) the omission of pure dicta"); George Rose Smith, *A Primer of Opinion Writing for Law Clerks*, 26 Vand. L. Rev. 1203, 1205 (1973); Nancy J. Wanderer, *Writing Better Judicial Opinions: Communicating with Candor, Clarity, and Style*, 54 Me. L. Rev. 47, 61, 65 (2002); *see generally* Abner J. Mikva, *For Whom Judges Write*, 61 S. Cal. L. Rev. 1357 (1988) (arguing that judicial opinions have become "less luminous and more voluminous" over the years and that judges should write less, including in part by abandoning footnotes and "redoubl[ing] our efforts to ensure that opinions do not take on issues that are unnecessary to the judgment"); Fed. Jud. Ctr., Judicial Writing Manual: A Pocket Guide for Judges 21 (2d ed. 2013) (suggesting that judges sometimes write too much); Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 Geo. J. Legal Ethics 237, 253 (2008) ("Although some judges might want to write long opinions, opinions must be no longer than they need to be."); Bruce M. Selya, *In Search of Less*, 74 Tex. L. Rev. 1277, 1279 (1996).

[45] *See, e.g.*, Kimble, *supra* note 44, at 1 (providing the results of an empirical study and concluding that "to write better opinions," judges should "make them straightforward and lean"); George, *supra* note 44, at 29 (telling judges to keep opinions "easy to read" and to "[k]eep the sentences short and simple"); Wanderer, *supra* note 44, at 62 ("Two major criticisms of legal writing have predominated across the centuries: 'its style is strange, and it cannot be understood.'"); Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. Rev. L. & Soc. Change 519, 520–24 (1984) (arguing that judges should not write "long complex sentences with many embedded clauses"); Fed. Jud. Ctr., *supra* note 44, at

To measure readability, we rely on the Flesch-Kincaid Grade Level Scale,[46] which quantifies readability in terms of a grade level of a text (e.g., 11 means the complexity is at an 11th grade reading level). The value is calculated based on two proxies for reading complexity: the number of words per sentence and the number of syllables per word.[47] The Flesch-Kincaid Grade Level is obviously far from perfect. But it is surprisingly robust and commonly used to analyze the readability of texts, including legal documents.[48]

Figures 3 and 4 provide each judge's mean Flesch-Kincaid opinion scores for precedential and nonprecedential opinions.[49] Since Flesch-Kincaid reports

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21–23 (advocating for judges to avoid wordiness, eliminate "needless words," and write in "plain English" and "simple language"); *see also* Judith S. Kaye, *Rethinking Traditional Approaches*, 62 Alb. L. Rev. 1491, 1497 (1999) ("[W]e need to make sure that our communications are accessible.").

[46] Rudolph Flesch developed the test. *See* Rudolph Flesch, The Art Of Readable Writing 226–30 (1949); Rudolph Flesch, The Art Of Plain Talk (1946); Rudolph Flesch, *A New Readability Yardstick*, 32 J. Applied Psych. 221, 228–32 (1948).

[47] Specifically, the calculation is: .39 * (avg words / sentence) + 11.8 * (avg syllables per word)–15.59. *See* Varsava, *supra* note 2, at 92 n.66.

[48] *See, e.g.*, Frederick M. Hart & Hunter M. Breland, L. Sch. Admission Council, Research Report 93-06, Defining Legal Writing: An Empirical Analysis Of The Legal Memorandum 27 (1994) (comparing legal documents written by first-year law students with readability indexes); Varsava, *supra* note 2, at 92 (measuring opinion readability in the Tenth Circuit using the Flesch-Kincaid Grade Level Scale); Carlson, Livermore & Rockmore, *supra* note 11, at 1481 (comparing Supreme Court majority and dissenting opinions using the Flesch-Kincaid Grade Level Scale); Stephen M. Johnson, *The Changing Discourse of the Supreme Court*, 12 U.N.H. L. REV. 29, 49–51 (2014) (using the Flesch-Kincaid algorithm to measure the readability of Supreme Court judicial opinions); Lance N. Long & William F. Christensen, *Practice Note: Does the Readability of Your Brief Affect Your Chance of Winning an Appeal?*, 12 J. App. Prac. & Process 145, 150, 154 (2011) (using Flesch-Kincaid to calculate scores for federal appellate opinions and briefs); James Hartley, Eric Sotto & James Pennebaker, *Style and Substance in Psychology: Are Influential Articles More Readable than Less Influential Ones?*, 32 Soc. Stud. Sci. 321, 323–24 (2002) (testing whether the Flesch Reading Ease of a scientific article is correlated to its influence). Although the Flesch-Kincaid test has been criticized by some, others point out that the test correlates highly with "more sophisticated, content-based measures of reading comprehension." Long & Christensen, *supra* note 48, at 150–52; *see also* Johnson, *supra* note 48, at 49–51 (discussing critiques and defenses of the Flesch-Kincaid test); Louis J. Sirico, Jr., *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations*, 26 Quinnipiac L. Rev. 147, 149–54 (2007) (critiquing the Flesch-Kincaid approach); Goelzhauser & Cann, *supra* note 12, at 124, 128 (using Flesch-Kincaid to measure readability of State Supreme Court opinions).

[49] To calculate Flesch-Kincaid, we use Textacy's "readability.flesch_kincaid_grade_level" function. *See* Burton DeWilde, textacy Documentation 112 (2020).

Figure 3. Mean Readability (Precedential Opinions)

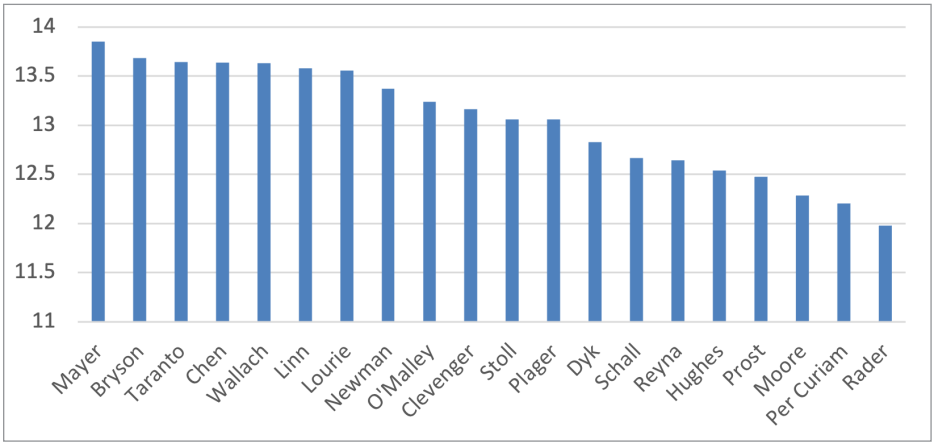
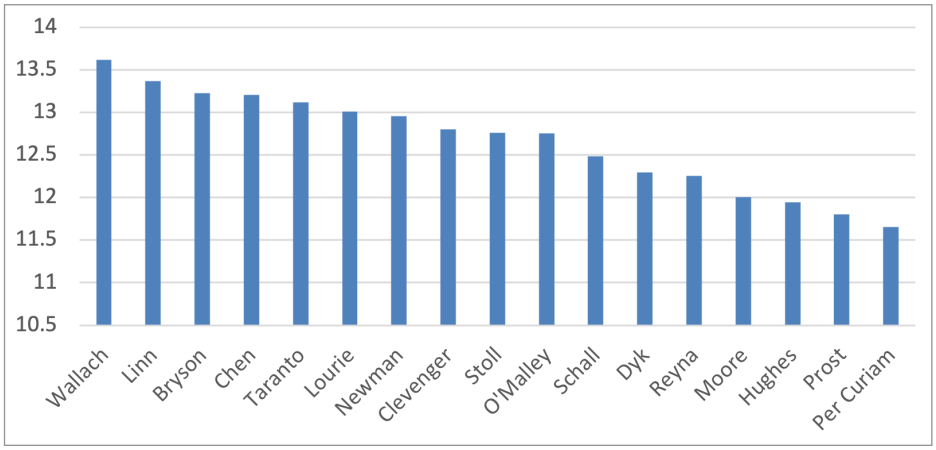


Figure 4. Mean Readability (Nonprecedential Opinions)



a reading grade level, a higher value means the work is harder to read. The overall mean is 12.1 for nonprecedential opinions and 13.0 for precedential opinions. The mean for precedential decisions falls in between prior studies of federal appellate courts and slightly below a recent study of Supreme Court opinions.[50] On a per judge basis, the means range between 12.0 to 13.8 and

[50] *See* Varsava, *supra* note 2, at 93 fig. 5 (in a study of Tenth Circuit published opinions of more than 200 words between 2007 and 2016, finding a mean Flesch-Kincaid Grade Level between 12.1 and 12.6 depending on the year); Johnson, *supra* note 48, at 58 n.184 (using the Flesch-Kincaid algorithm to measure the readability of Supreme Court opinions and finding a mean grade level of 12.19 during the 1931–1933 terms and 13.3 during the 2009–2011 terms); Long & Christensen, *supra* note 48, at 157 n.49, 158 tbl. 1 (finding a Flesch-Kincaid grade level score of 13.59 for a sample of United States Court of Appeals majority opinions from 2001 to 2003). These studies likely do not offer a perfect analogy.

the medians between 11.9 and 14.3. The fourth highest and fourth lowest averages for precedential opinions is 13.6 and 12.5—a difference of essentially just one grade level. We find similar differences when looking only at district court appeals, Patent Office appeals, or appeals from the Court of Federal Claims. Each judge's mean scores for precedential and nonprecedential decisions are highly correlated.[51]

Using the same significance tests as earlier (but now for Flesch-Kincaid scores), the results are highly statistically significant. The significant differences appear to reflect meaningful stylistic differences between the judges. But while the results are statistically significant, we do not think that the modest magnitude of these differences warrants interpreting these differences as meaningful. Overall, all of the judges are writing opinions at around the level of 12th to 13th-grade level.

Interestingly, there did not appear to be any strong relationship between opinion length and readability. Judge Bryson, for example, is near the top in terms of opinion length and also writes opinions near the top of the reading level scale; Judge Schall, on the other hand, also tends to write longer opinions but at about a grade lower reading level and Judge Mayer tended to write much shorter opinions that also required the highest reading level of the cohort. That said, given the relatively narrow range of reading level scores across all the judges, we are hesitant to say that any one judge's opinions are that much more complex than another judge's opinions.

To confirm this observation, we plotted their mean grade level against their mean word count for the judges and calculated a best-fit line. The best fit line showed a small positive correlation, but the correlation was not statistically significant.

C. Active and Passive Voice

We also assessed each judge's use of active and passive voice. Writing commentators both within and outside the law prefer active voice, when appropriate, because they see it as more direct, forceful, and concise.[52]

Our method for removing citations was likely far superior to the methods used in these studies (Long & Christensen did not even try to remove citations). Lingering citations can impact the results.

[51] *R*-squared = 0.9.

[52] *See* William Strunk & E.B. White, The Elements of Style 31–33 (4th ed. 2000) (describing active voice as "bold[er]" and "more direct and vigorous than the passive" voice, and explaining that active voice "makes for forcible writing"); Varsava, *supra* note 2, at 81; George, *supra* note 44, at 387 ("The active voice makes the message stronger, clearer, and shorter."); Wanderer, *supra* note 44, at 63 ("Opinion writers should use the active voice unless they have a reason not to."); Fed. Jud. Ctr., *supra* note 44, at 23 (encouraging judges to

We created a list of syntactic patterns (using dependency tags and part-of-speech tags) to detect passive and active voice, and we used SpaCy's Matcher object to identify active and passive voice based on those patterns.[53] The rules we created are surely both over-inclusive and under-inclusive. But we think the rules offer proxies for use of active and passive voice and, importantly, we use the same rules for all judges.

Each judge's mean results for precedential opinions are provided in Figures 5 and 6. Overall, there is some variability, but not enough in our view to be particularly notable. For most judges, approximately 70 to 75% of sentences incorporate active voice. A difference of approximately 5%—just one sentence in 20—does not seem particularly important. For most judges, approximately 13.5% to 18.5% of sentences incorporate the passive voice. Although this means some judges are nearly 30% more likely to incorporate the active voice, the difference again amounts to approximately one sentence in 20. The average proportion of passive to active voice per opinion for the judges ranges between 14% and 29%.[54]

D. Verdict Suspense

We also looked at the fraction of opinions that leave readers in suspense as to the final verdict, as opposed to providing the holding early on. In many contexts, such as entertainment, suspense is important.[55] The Murder of Roger Ackroyd would not be entertaining if the book disclosed the murderer on page one.[56] Presumably based on the potential advantages of suspense, some

"use the active voice"); Gerald Lebovits, *Do's, Don'ts, and Maybes: Legal Writing Do's—Part II*, N.Y. St. Bar Ass'n J., June 2007, at 53 ("Prefer the active voice to the passive.").

[53] A sentence can have both active and passive components, and sentences were coded as unknown if they did not trigger the rules.

[54] These results are quite a bit larger than the results obtained by Varsava in her study. *See* Varsava, *supra* note 2, at 93 (in a study of Tenth Circuit published opinions of more than 200 words between 2007 and 2016, finding that "[p]roportion of passive to active voice per opinion ranges from 0.046 for the most actively voiced judge to 0.158 for the most passively voiced judge"). The comparison is imperfect, however, because Varsava used a different approach for measuring the use of passive and active voice. *See id.* at 93 n.67. The results are also a bit larger than those obtained by Professors Goelzhauser and Cann, but again the method of identifying passive sentences was likely different. *See* Goelzhauser & Cann, *supra* note 12, at 128–31.

[55] *See, e.g.*, Varsava, *supra* note 2, at 103–04.

[56] *See generally* Agatha Christie, The Murder of Roger Ackroyd (1926). Don't worry—we won't spoil it for anyone.

Figure 5. Mean Fraction Sentences in Active Voice (Precedential Opinions)

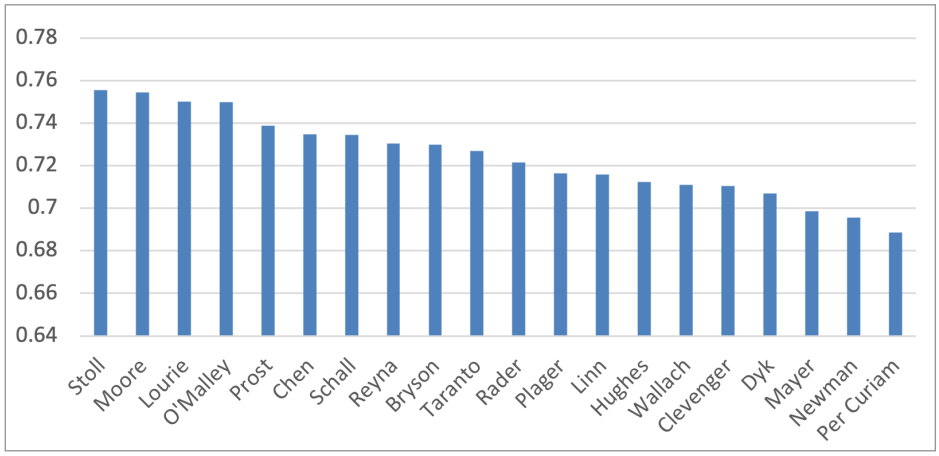
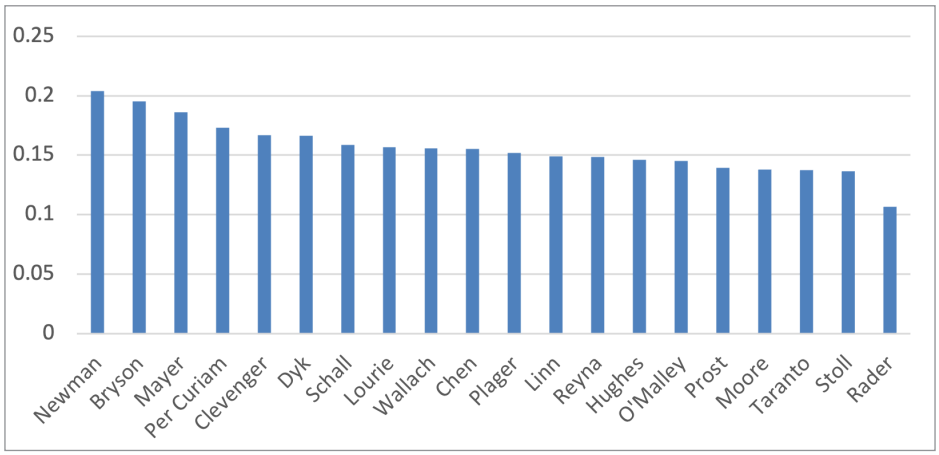


Figure 6. Mean Fraction Sentences in Passive Voice (Precedential Opinions)



judges—including notably Justice Gorsuch—oftentimes withhold the case disposition from the opening paragraphs.[57]

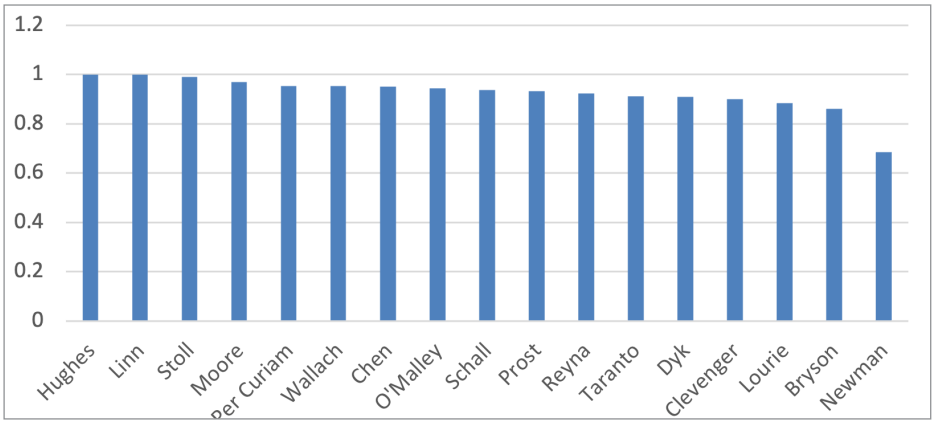
We are skeptical that there is meaningful value to such suspense in judicial opinions. Judicial opinions are not murder mysteries; they are meant to efficiently convey information. A case holding is very important information! We do not enjoy wasting our time searching for dispositions. And,

[57] *See* Varsava, *supra* note 2, at 103–04; *see also* Posner, *supra* note 9, at 1437 (advocating for an impure opinion writing style and explaining that "'[i]mpure' stylists generally avoid beginning their opinions with the conclusion" because doing so "gives the impression that the opinion is just the rationalization of a preordained decision" and "starting with the punchline rather spoils the story").

oftentimes, knowing the conclusion in advance helps readers better understand the remainder of the writing (this is why the answer to a mystery seems so obvious on second read).

We tested how often Federal Circuit judges make their opinions more suspenseful. Like Professor Varsava, we did so by searching for opinions containing a verdict-related word in the first 400 words.[58] The results are in Figure 7. Our results show that, with few exceptions, the Federal Circuit judges do not appear to regularly hide the ball. Professor Varsava likewise found that most judges (with notable exceptions such as then-Judge Gorsuch) on the Tenth Circuit do not regularly use suspense.[59]

Figure 7. Fraction Suspenseful Nonprecedential Opinions



Taken together, our results on the opinion complexity metrics raise some important questions, generally along two dimensions. First, how comprehensible are Federal Circuit opinions? Second, are Federal Circuit opinions covering more or less than they ought to be? We offer some paths to exploring these questions below in Part VII.

[58] Like Varsava, we use the words "dismiss(es)", "reverse(s)," "affirm(s)," "remand(s)," "vacate(s)," "deny(ies)," and "grant(s)." *See* Varsava, *supra* note 2, at 104 n.83.

[59] *See id.* at 104–05 (in a study of Tenth Circuit published opinions of more than 200 words between 2007 and 2016, finding that the average percent of suspenseful opinions was 13%, with a range from 0% to 51%, and where then-Judge Gorsuch used suspense 74% of the time in the second half of his Tenth Circuit career and where all but five judges used suspense less than 10% of the time).

IV. Formality

In this part, we look at three attributes commonly associated with a more informal writing style—use of contractions, sentences beginning with short conjunctions, and intensifiers and hedge words—to assess opinion formality at the Federal Circuit. There has been significant debate surrounding the association between how effectively a writing conveys its message and the writing's formality.[60]

A. Use of Contractions

Lawyers have conventionally been advised against using contractions in legal writing for being too informal, though that is beginning to change, seemingly because using contractions can help an author achieve a more folksy, conversational tone.[61] As Bryan Garner, the leading expert on legal writing, put it, "[i]f you would say it as a contraction, write it that way. If you wouldn't, then don't."[62]

For our study, we calculated each judge's average number of contractions per sentence.[63] The mean results for precedential opinions are shown in Figure 8. All judges (except perhaps Judge Prost to some small extent) use contractions very rarely.[64] The growing trend of using contractions in judicial opinions to achieve a more informal, folksy tone is therefore yet to take off at the Federal Circuit.

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[60] *See generally* Posner, *supra* note 9 (arguing that a more informal writing style is generally more effective).

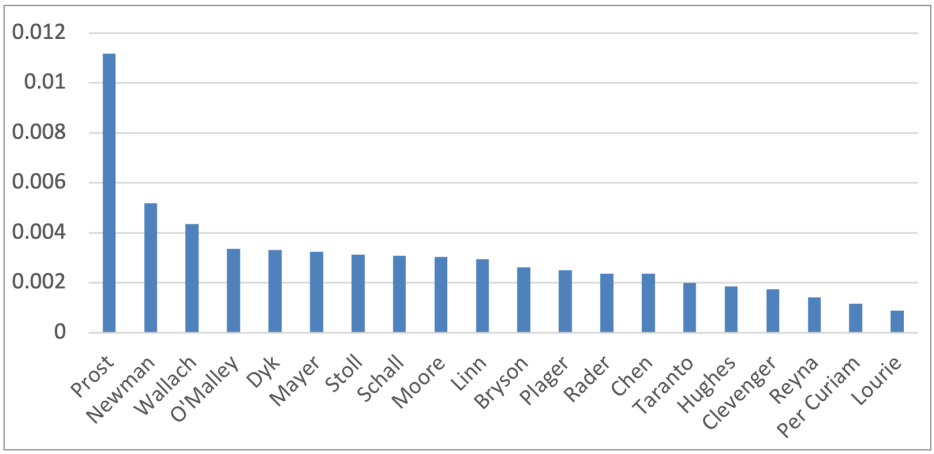
[61] Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 114–19 (2008) (Garner and Scalia discussing their opposing views of contractions in the context of legal brief writing); George, *supra* note 44, at 451 (stating that "the use of contractions [in an opinion] give[s] the impression that this case was not to be treated seriously"); *cf.* Varsava, *supra* note 2, at 87 (constructing an informality scale in part based on using contractions); Gerald Lebovits, *Do's, Don'ts, and Maybes: Legal Writing Don'ts—Part I*, N.Y. St. Bar Ass'n J., July–Aug. 2007, at 50 (advocating against using contractions).

[62] Bryan A. Garner, Securities Disclosure in Plain English 22 (1999).

[63] We identified contractions using Python's contractions package.

[64] For precedential opinions, the average number of contractions per word for each judge spans between 3 in 100,000 to 4 in 10,000. The judges thus appear to use contractions much less frequently than the judges in the Tenth Circuit, though it is unclear whether Varsava identified contractions differently than us. *See* Varsava, *supra* note 2, at 88 n.61 ("Gorsuch averages 3.9 contractions per 1000 words, whereas the group average is 0.8.").

Figure 8. Mean Contractions per Sentence (Precedential Opinions)



B. Sentences Beginning with Short Conjunctions

Another stylistic decision that adds some informality is beginning sentences with a short conjunction. Doing so goes against conventional wisdom,[65] though legal writing experts are increasingly advocating for breaking this norm.[66]

We calculated how frequently Federal Circuit judges began a sentence with a short conjunction.[67] The mean results for precedential opinions are shown in Figure 9. We see a large discrepancy, which is not surprising considering that this practice is controversial and in flux. For precedential opinions, the range is between .5 to 5 times per 100 sentences. Federal Circuit judges seem somewhat less likely to begin sentences in this manner than Tenth Circuit judges: Varsava found that Gorsuch averaged 4.9 short conjunctions at the start of sentences per 1000 *words* and that the group average was 1.5.[68] For the Federal Circuit precedential decisions, the range in short conjunctions per 1000 words is .19 to 1.9, with all but two judges falling below the 1.5 average for the Tenth Circuit.

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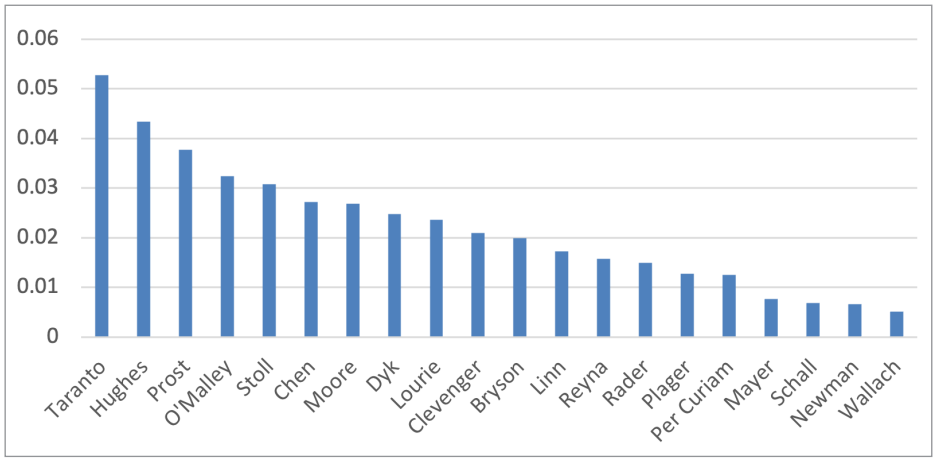
[65] *See, e.g.*, Jill Barton, *Supreme Court Splits . . . on Grammar and Writing Style*, 17 scribes J. Leg. Writing 33, 38 (2016) (discussing the common wisdom that writers should not start sentences with conjunctions).

[66] *See, e.g.*, Bryan A. Garner, The Redbook: A Manual on Legal Style 212–13 (3d ed. 2013) (advocating for using short conjunctions at the beginning of sentences in many circumstances).

[67] Consistent with Varsava's study, we searched for the following short conjunctions at the beginning of a sentence: and, but, so, or, nor, yet. *See* Varsava, *supra* note 2, at 87. We did this by first using SpaCy's nlp function and then running through each sentence with ".sents."

[68] *Id.* at 88 n.61.

Figure 9. Mean Fraction Sentences Beginning with Short Conjunction (Precedential Opinions)



C. Intensifiers and Hedge Words

We also analyzed each judge's use of intensifier words and hedge words by determining the fraction of such words in each opinion.

Intensifiers can potentially serve to convey decisiveness and confidence, and can establish authority.[69] Intensifiers can help readers home in on the most definite aspects of an opinion.[70] Considering such words are commonly used in conversation, such language may also "lend[] a conversational, casual tone to writing."[71] But many commentators criticize using such words, including on the basis that they are conclusory, are distracting, can convey a false sense of confidence, and can come across as obnoxious or condescending.[72]

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[69] *See id.* at 81–82.

[70] *See* Rachael K. Hinkle et al., *A Positive Theory and Empirical Analysis of Strategic Word Choice in District Court Opinions*, 4 J. Legal Analysis 407, 421 (2012).

[71] Varsava, *supra* note 2, at 97.

[72] *See, e.g.*, Bradley G. Clary & Pamela Lysaght, Successful Legal Analysis and Writing: The Fundamentals 102 (2d ed. 2006) ("Let nouns and verbs do most of your talking, not adjectives and adverbs. Particularly avoid exaggeration through conclusory modifiers such as 'clearly,' 'plainly,' 'very,' 'obviously,' 'outrageous,' 'unconscionable,' and the like."); Bryan A. Garner, The Redbook: A Manual on Legal Style 290 (5th ed. 2023) ("[C]learly; obviously. As sentence adverbs <Clearly, this is true>, these weasel words are often exaggerators. They may reassure the writer but not the reader. If something is clearly or obviously true, then prove it to the reader without resorting to the conclusory use of these words."); Neil Daniel, *Writing Tips*, 1 Persps. Teaching Legal Rsch. & Writing 87, 88 (1993) ("[W]riting without [intensifiers] is stronger than writing with them."); Varsava, *supra* note 2, at 97 ("[S]tatements qualified with terms such as 'surely' or 'obviously' can come

Hedges, on the other hand, can be important because, for example, oftentimes a statement is not *always* true. But judges may also paradoxically use hedges to make their statements less controversial and less susceptible to falsification and, as a result, less subject to scrutiny prior to publication.[73]

We used the same intensifier and hedge words as Professor Nina Varsava in her study of Tenth Circuit opinions.[74] The mean results for precedential decisions for each judge are provided in Figures 10 and 11. Overall, there is clearly a fair bit of variation in the use of such words, particularly at the poles. For precedential opinions, judges average between .7 and 1.5 intensifiers per 1000 words and between 2.1 and 3.1 hedges per 1000 words. The judges appear to use slightly fewer intensifiers and approximately the same number of hedges as judges on the Tenth Circuit.[75] Interestingly, and perhaps

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across as obnoxious or condescending."); Richard K. Neumann, Jr., Legal Reasoning and Legal Writing: Structure, Strategy, and Style 330 (5th ed. 2005) ("'It is obvious' and 'clearly' supply no extra meaning. Instead, they divert the reader's attention from the message of the sentence."); Mary Barnard Ray & Jill J. Ramsfield, Legal Writing: Getting It Right and Getting It Written 205 (3d ed. 2000) ("Also avoid modifiers that have little substantive meaning, such as 'in this manner,' 'very,' or 'obviously.'" (quotation marks added)).

[73] *See, e.g.*, George Lakoff, *Hedges: A Study in Meaning Criteria and the Logic of Fuzzy Concepts*, 2 J. Phil. Logic 458, 461–76 (1973). Some commentators also caution against using them. *See, e.g.*, Gerald Lebovits, *Do's, Don'ts, and Maybes: Legal Writing Punctuation—Part II*, N.Y. St. Bar Ass'n J., Mar.–Apr. 2008, at 58.

[74] *See* Varsava, *supra* note 2, at 96 nn.70–71. Specifically, the intensifiers are: "doubtless(), indisputabl(), undeniabl(), plainly, undoubtedly, decidedly, certainly, expressly, simply, never, to be sure, surely, of course, naturally, rightly, obviously, clearly (but excluding the phrase 'clearly erroneous')." *Id.* The hedges are: "unclear(), suppos(), seem(), considerably, hardly, usually, in general, generally, perhaps, may, maybe, might, possibl(), pretty, probabl() (but excluding the phrase 'probable cause')." *Id.* Her list was based on lists created and used by others in earlier studies. *Id.* at 95 n.70; *see* Hinkle et al., *supra* note 70, at 428–29; Lance N. Long & William F. Christensen, *Clearly, Using Intensifiers is Very Bad—Or is It?*, 45 Idaho L. Rev. 171, 181 (2008); Lance N. Long & William F. Christensen, *When Justices (Subconsciously) Attack: The Theory of Argumentative Threat and the Supreme Court*, 91 Or. L. Rev. 933, 948 (2013).

[75] *See* Varsava, *supra* note 2, at 96 (in a study of Tenth Circuit published opinions of more than 200 words between 2007 and 2016, finding that judges average 1.6 intensifiers and 2.8 hedges for every 1000 words). The actual difference in intensifier use might be starker than these results would suggest. Varsava made efforts to exclude terms that could easily be negated with surrounding words and provided two examples ("not very" and "not especially"). *Id.* at 96 n.70. We did not make such efforts. We do not know the full extent of Varsava's attempts (and, therefore, could not have replicated it even if we wanted to), and it was not clear to us whether such culling was warranted.

Figure 10. Mean Fraction Intensifiers per Word (Precedential Opinions)

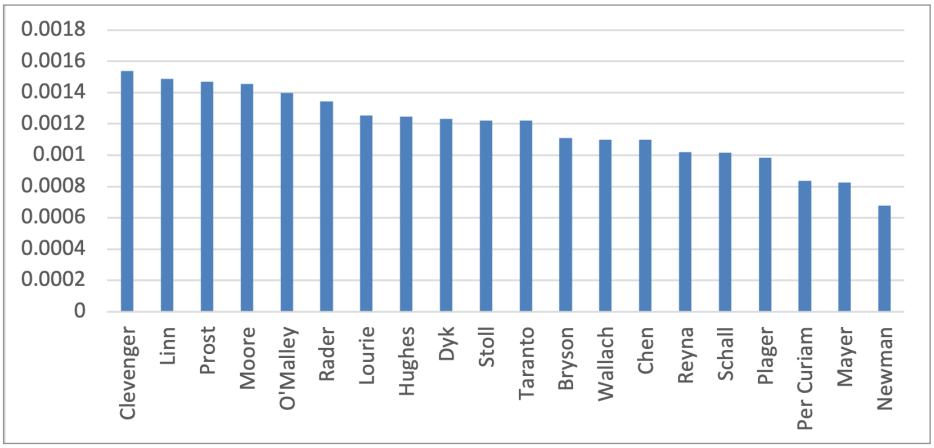
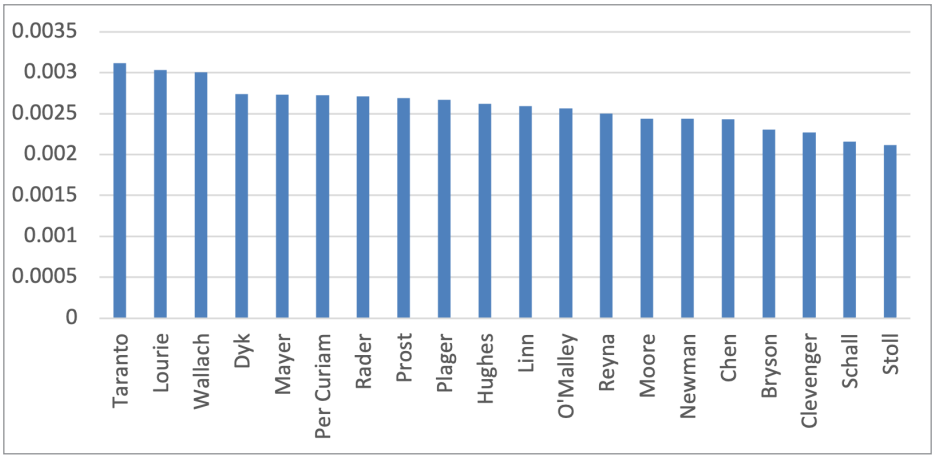


Figure 11. Mean Fraction Hedges per Word (Precedential Opinions)



surprisingly, we do not find a strong correlation between a judge's use of intensifiers and hedges.

Most judges use both intensifiers and hedges less frequently in nonprecedential opinions. Also interestingly, we find that a judge's use of intensifiers in precedential opinions is correlated with their use in nonprecedential opinions,[76] but the same is not true for hedge words. Perhaps all judges feel less need to hedge in nonprecedential opinions, knowing that any legal pronouncements are not binding in subsequent cases, and also knowing that the case is easy. Intensifiers, on the other hand, may represent a stronger character of style.

[76] *R*-squared = 0.45.

All of these choices may also denote membership in a particular group—or perhaps, aspiration to be a member of a group. Just as one knows a millennial or Gen X'er by the slang they use, so too these forms of "language ideologies" may reflect particular judicial communities.[77] We think that exploring communities of Federal Circuit judges through these types of stylistic choices would be a valuable next step

V. Stylistic Fingerprinting

Next, we turn to various metrics that look more closely at word choice. The first set of metrics specifically look at word diversity. The second set look at how frequently an author uses certain functional words. These techniques are particularly useful for detecting how much a judge may be relying on judicial clerks in opinion drafting.

A. Word Diversity

We turn now to lexical diversity. That is, do some judges draw from a larger vocabulary than others? For one measure of quantifying lexical diversity, we use type token ratio ("TTR"), which is a common lexical diversity measure that is calculated by dividing the number of unique words in a text by the total number of words in that text.[78] A higher TTR means that the text uses a wider variety of words. An advantage of TTR is that the results are easy to interpret.

Although TTR is commonly used to measure richness in vocabulary, the results are also highly dependent on the length of the studied writings.[79] Indeed, as a writing gets longer, the author obviously becomes more likely to repeat words (particularly function words like "and" and "than"). For that reason, we also consider two additional, but more complicated, measures that are less influenced by length: measure of textual lexical diversity ("MTLD") and HD-D.[80] As with TTR scores, larger MTLD and HD-D scores repre-

[77] For a discussion of the concept of language ideologies, see generally Kathryn A. Woolard, *Language Ideology*, *in* The International Encyclopedia of Linguistic Anthropology (2021), https://doi.org/10.1002%2F9781118786093.iela0217.

[78] *See, e.g.*, Rie Koizumi & Yo In'nami, *Effects of Text Length on Lexical Diversity Measures: Using Short Texts with Less than 200 Tokens*, 40 System 554, 555 (2012).

[79] *See, e.g.*, David Malvern et al., Lexical Diversity and Language Development 22–23 (2004); Koizumi & In'nami, *supra* note 78, at 555.

[80] "HD-D" is short for hypergeometric distribution using the measure "D." *See generally* Koizumi & In'nami, *supra* note 78 (discussing HD-D and D measures). To calculate TTR, we used Textacy's "ts.diversity.ttr" function. To calculate MTLD and HD-D, we used Python's Lexical Richness library and the "mtld()" and "hd-d()" functions, respectively. For

sent higher lexical diversity.[81] A disadvantage of MTLD and HD-D is that the relative results are more difficult to interpret.

The precedential opinion results for TTR, HD-D, and MTLD are respectively provided in Figures 12–14.[82] The results generally show that some authors vary word choice more than others. But the overall differences seem rather small. For precedential opinions, the judges' mean TTR results span between .19 and .26, which means the judges use, on average, between 19 and 26 unique words for every hundred words. The Federal Circuit TTR results are similar to the TTR results found in a prior study of the Tenth Circuit.[83]

As noted, however, TTR results may be affected by opinion length. Federal Circuit judges' TTR results were not strongly correlated with the HD-D and MTLD results. The TTR results also demonstrate the measure's dependence on length. Specifically, for TTR (but not HD-D or MTLD), nonprecedential opinions tended to have larger scores than precedential opinions, and per curiam nonprecedential opinions (which tend to be the shortest of all) had the highest scores.

The HD-D and MTLD results were more strongly correlated with each other.[84] For this reason, the HD-D and MTLD results are likely more instructive. At a global level, the mean results for all three measures were statistically significant, meaning judges do seem to differ to some extent with respect to word diversity. Whether these differences are practically meaningful is more difficult to interpret, particularly because HD-D and MTLD are difficult to interpret.

The HD-D metric is the sum, for each word in the text, of the probability of encountering that word if you randomly pulled 42 words from the text, divided by 42 to normalize by the sample size. The total variation by judge

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calculating HD-D, we used the standard number of draws (42), except we set the draws to the length of the relevant document for documents shorter than 42.

[81] *See id.* at 555 (explaining that MTLD conceptually represents "the mean length of sequential word strings in a text that maintain a given TTR value" (quoting Philip M. McCarthy & Scott Jarvis, *MTLD, voc-D, and HD-D: A Validation Study of Sophisticated Approaches to Lexical Diversity Assessment*, 42 Behav. Rsch. Methods 381, 384 (2010))); Janina Wilmskoetter et al., *Neuroanatomical Structures Supporting Lexical Diversity, Sophistication, and Phonological Word Features During Discourse*, 24 NeuroImage: Clinical, 2019, at 4, https://doi.org/10.1016/j.nicl.2019.101961 (explaining that "higher values reflect higher lexical diversity" for MTLD and HD-D).

[82] The nonprecedential opinion results were again reasonably highly correlated with the precedential opinion results. $R = 0.49$ for TTR, 0.35 for HD-D, and 0.31 for MTLD.

[83] *See* Varsava, *supra* note 2, at 102–03, 103 fig. 12 (in a study of Tenth Circuit published opinions of more than 200 words between 2007 and 2016, finding TTR results between .20 and .27).

[84] Here R-squared is .4428 ($p < .00001$).

Figure 12. Mean Type Token Ratio (Precedential Opinions)

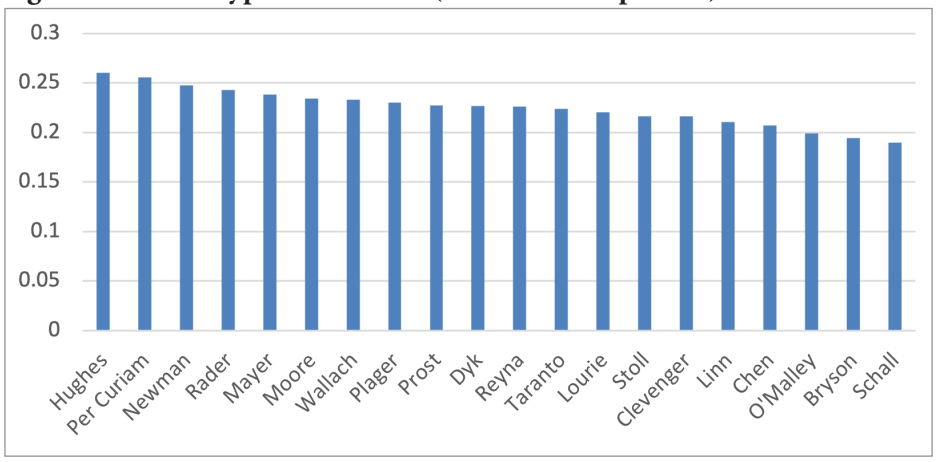


Figure 13. Mean HD-D (Precedential Opinions)

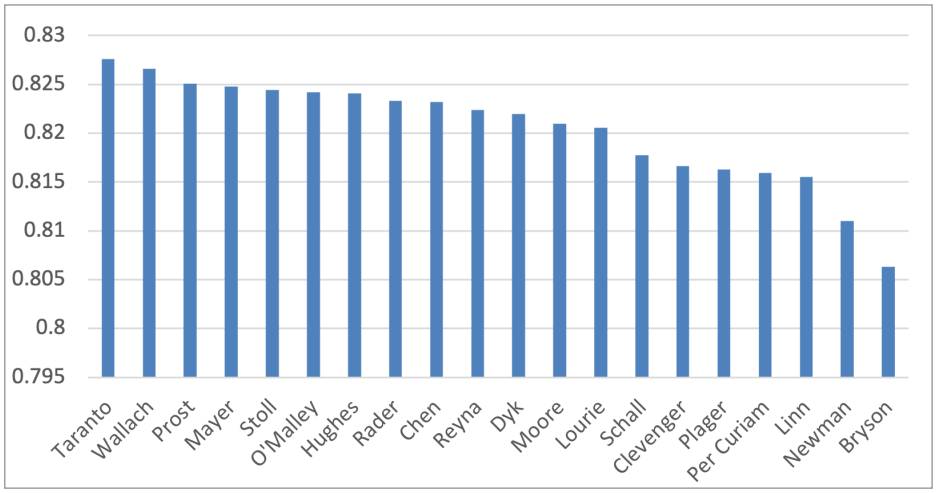
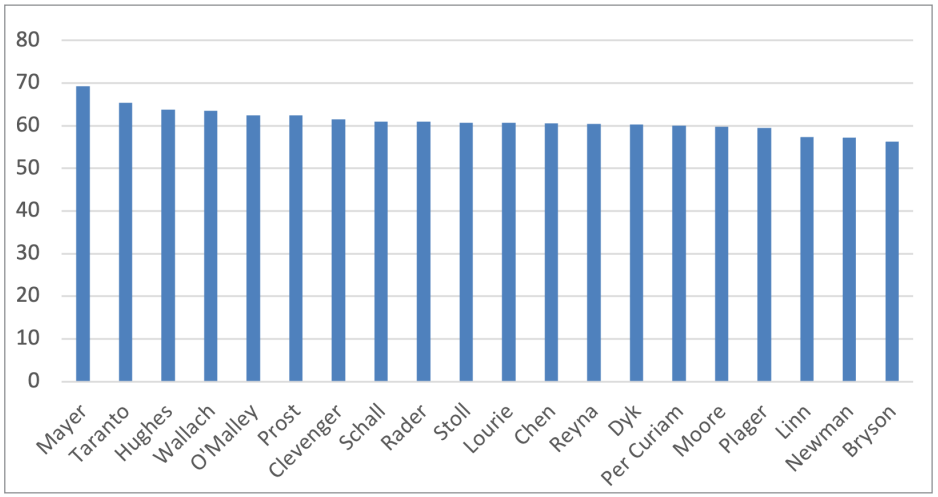


Figure 14. Mean MTLD (Precedential Opinions)



is less than .03, which does not seem particularly large. As another check, we calculated Cohen's *d* between Judges Prost and Linn (who respectively have the third largest and third smallest HD-D means) and get .6, which represents a medium effect size. Even though the effect size is medium, however, it does not necessarily follow that readers could perceive this difference in any meaningful way.

MTLD generally measures how many words must be read before the diversity of vocabulary drops below a certain threshold. The mean differences between Judges Hughes and Linn (who respectively have the third largest and third smallest MTLD means) is around 6 words. Although not clear, that difference does not seem like something a lay reader would be able to pick up. That said, Cohen's *d* is .78, which suggests a rather large effect size.

These differences once again seem largely based on differences in style. For example, the comparative results are also generally similar even when we consider only district court appeals, only Patent Office appeals, or only appeals from the Court of Federal Claims. These findings suggest that the results do not stem from differences in case selection.

B. Frequency of Word Use

We also assessed writing style by comparing how frequently the judges use certain words. We did so with three general sets of tests.

Our first two sets of tests rely on counting function words. Function words are words that function to show the grammatical relationship between the other words in the sentence. These words are largely subject matter agnostic. Examples include: "all," "have," "not," "and," and "than." Prior studies that draw on this approach have focused on Supreme Court opinions.[85]

For our first set of tests, we adopted the methodology created and used by Professors Rosenthal and Yoon in their study of Supreme Court opinions.[86]

Applying this approach, for each judge, we construct a measure called a V-score. Essentially, a V-score is one type of stylistic fingerprint that allows for a comparison of a set of texts. Picture a set of opinions. Within that entire set of opinions, each function word will be used a certain percentage of the time—perhaps 1% of words will be "then" and 4% will be "and." Each individual opinion, however, may use each function word more or less than the set as a whole. This is reflected in the V-score. A larger V-score indicates more

[85] *See* Carlson, Livermore & Rockmore, *supra* note 11, at 1463; *Judicial Ghostwriting*, *supra* note 11, at 1308–09; Jeffrey S. Rosenthal & Albert H. Yoon, *Detecting Multiple Authorship of United States Supreme Court Legal Decisions Using Function Words*, 5 Annals Applied Stats. 283, 285 (2011) [hereinafter *Multiple Authorship*].

[86] *See Multiple Authorship*, *supra* note 85, at 288–90; *Judicial Ghostwriting*, *supra* note 11, at 1314.

variation in the use of function words across opinions, while a lower V-score indicates the opposite. A judge would have a V-score of 1 if the judge has some fixed probability of using each function word for each word of each of their judgments. As the judge's use of function words becomes more varied across their opinions, the value for the judge increases above 1. Some judges may have more variability in their use of function words than other judges.

We used the same set of sixty-three function words used by Rosenthal and Yoon,[87] and we also conducted the same analysis using the vast majority of the three hundred and seven words used by Professors Carlson, Livermore, and Rockmore in their study of Supreme Court opinions.[88] We conducted the analysis for all opinions and separately for precedential opinions only.[89] The results for all four word-opinion combinations were highly correlated.

The results can be found in the Appendix. The V scores for all judges are significantly larger than 1, meaning that judges do not have a fixed probability of using each function word for each word of each of their opinions. Rather, their use of function words varies across opinions. In addition, many judges have significantly larger V scores than other judges, which supports that many judges differ significantly in their use of function words.

For precedential opinions assessed using Rosenthal and Yoon's function words, the V scores for the judges ranged between 3.2 and 5.5 when considering all judges and between 3.4 and 4.7 when considering active judges only. In their study of Supreme Court justices dating back to 1914, Rosenthal and Yoon calculated V scores ranging between 2.11 and 3.85.[90] Their V scores for the active Supreme Court judges spanned between 3.06 and 3.73. The V scores we calculated are thus quite similar to the V scores for the more recent Supreme Court justices, though possibly a little larger on average.

It is unclear why our results for Federal Circuit judges seem somewhat higher than the results obtained by Rosenthal and Yoon for Supreme Court justices. It could be that the Federal Circuit judges simply have more variability in their use of these words. It could also be a sign that Federal Circuit judges are more reliant on law clerks. Another possibility is that some judges may recite substantial portions of the parties' briefs in their opinions. If that is the case, then the language they are using would not be their own. Intermediate appellate court judges have significantly larger caseloads than Supreme Court justices, and for that reason, such judges likely have to rely

[87] *See Judicial Ghostwriting*, *supra* note 11, at 1314 tbl. 1.

[88] *See* Carlson, Livermore & Rockmore, *supra* note 11, at 1485 tbl. 2. We omitted some terms because they showed up infrequently. Rare words can skew the results.

[89] Like Rosenthal and Yoon, we omitted opinions with less than 250 words. *See Multiple Authorship*, *supra* note 85, at 288.

[90] *Judicial Ghostwriting*, *supra* note 11, at 1319.

more on their clerks. Or it could be at least partly due to the fact that there is more precedent that the Federal Circuit draws upon than the Supreme Court cites.[91]

While we think it is an intriguing path to explore, it is not clear that this value is a proxy for the extent of clerk involvement. While Judges Dyk and Taranto—who we believe based on anecdotal evidence to rely a bit less on their law clerks for drafting opinions—have V scores on the lower side, they are certainly not outliers. And Judge Bryson has a particularly high V score, yet we find it extremely unlikely that he's more reliant than most on his law clerks.

For our second test, we rely on the built-in Language Style Matching tool of the LIWC-22 program.[92] The tool generally relies on comparing the use of function words to compare texts.[93] Using the tool, we compare each opinion to every other opinion. The result is a score measuring the degree of similarity between the opinions, with larger scores meaning more similar. The results are in the Appendix.

We find that LIWC scores between two opinions authored by a judge tend to be significantly larger on average than LIWC scores between opinions authored by that judge and another judge. In other words, a judge's own opinions tend to be more similar on average than when compared with other judges' opinions. But while the results are significant on average, the differences are still rather small and the variability is high. The variability is great enough that the LIWC tool cannot, for example, reliably predict who wrote

[91] The Federal Circuit draws upon both its own voluminous precedent and Supreme Court precedent. The Supreme Court focuses on its own precedent. *See* Joseph Scott Miller, *Which Supreme Court Cases Influenced Recent Supreme Court IP Decisions? A Citation Study*, 21 UCLA J.L. & Tech. 1, 2 (2017).

[92] *See* James W. Pennebaker et al., LIWC, Linguistic Inquiry and Word Count: LIWC2015 Operator's Manual (2015). The LIWC program (though, to our knowledge, not the Language Style Matching tool) has been used by others in previous studies of court opinions. *See* Ryan J. Owens & Justin P. Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*, 45 L. & Soc'y Rev. 1027, 1039 (2011); Budziak, Hitt & Lempert, *supra* note 20, at 9–10 (using LIWC to analyze decisions from the United States courts of appeal except for the Federal Circuit).

[93] *See* Ryan L. Boyd et al., LIWC, The Development and Psychometric Properties of LIWC-22, 4 (2022), [https://perma.cc/L8KG-FREW]; *see generally* Molly E. Ireland & James W. Pennebaker, *Language Style Matching in Writing: Synchrony in Essays, Correspondence, and Poetry*, 99 J. Personality & Soc. Psych. 549 (2010) (describing how language style matching can discern the writer's personal characteristics when applied to everyday and professional writing).

an opinion. The results nevertheless support that judges use function words differently and that such use is part of their stylistic fingerprint.[94]

Finally, we assessed differences in word usage with term frequency-inverse document frequency ("TF-IDF").[95] TF-IDF is a measure of the importance of words to each document in a corpus.[96] The measure is calculated as follows: for each document in a corpus, take each word in the corpus and calculate the frequency of that word in the document and multiply it by a value representing the inverse of the proportion of documents in the corpus that contain that term.[97] As a result, a term is considered important to a particular document when it occurs frequently in that document and infrequently in other documents.

We compare TF-IDF scores for each opinion using cosine similarity. Cosine similarity is a metric used to measure the cosine of the angle between two vectors.[98] A value of one means that the vectors are identical, and a value of zero means no similarity.[99]

In this context, the collection of TF-IDF values for each document provides a vector representation for that document, and cosine similarity can be used to compare how similar any two documents are in terms of those TF-IDF vectors.[100] We can thus compare how closely each document is to every other document in terms of word usage.

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[94] While the differences are significant in the aggregate, the differences that LIWC-22 picks up are not so overwhelming that the software can easily identify who wrote any single opinion.

[95] We thank Professor Morgan Hazelton for providing the public with helpful example code. *See* Hazelton, *supra* note 10, at 20.

[96] *See, e.g.*, Juan Ramos, Using TF-IDF to Determine Word Relevance in Document Queries 1 (2003) (unpublished manuscript), [https://perma.cc/FHJ9-4NNR].

[97] *Id.* at 2.

[98] *See* Avivit Levy, B. Riva Shalom & Michal Chalamish, *A Guide to Similarity Measures and Their Data Science Applications*, J. Big Data, Oct. 28, 2025, at 5–7, [https://perma.cc/J5K2-QEVH].

[99] *Id.* at 5.

[100] *See, e.g.*, Adi Widianto et al., *Document Similarity Using Term Frequency-Inverse Document Frequency Representation and Cosine Similarity*, 4 Data Sci., Info. Tech., & D ata Analytics 149, 150–51 (2024) (assessing and applying a document similarity model with TF-IDF representation and cosine similarity).

Unlike the prior two techniques, this one is not subject matter agnostic. For example, the number of times the opinion uses the word "patent" will obviously depend on whether the opinion stems from a patent appeal or, for example, a tax appeal. To at least partially account for this fact, we limited our analysis to opinions stemming from appeals from district courts or the Patent Office, because such appeals almost always raise patent issues. We also analyzed only precedential opinions because those are most important to the development of the law.[101]

Table 1 provides the results. The first column identifies the judges. The second column provides a value representing how similar, on average, the judge's opinions are to other opinions *written by that judge*. The third column provides a value representing how similar, on average, the judge's opinions are to opinions *written by the other judges*. A higher score indicates greater similarity. Interestingly, although it is difficult to say for certain without a clear baseline for the meaningfulness of small changes in the parameter, the results seem quite close together for all judges. The judges with the largest differences are Dyk and Taranto, who are known for having a heavier hand in drafting their opinions.[102] But even their differences are small, representing a difference of less than 10%.

[101] To conduct this analysis, we used Python's Scikit-learn package, including the "TfidfVectorizer" class and "cosine_similarity" class.

[102] Although commentators disagree on the precise extent to which judges rely on their law clerks for drafting opinions, it is beyond dispute that clerks generally play a large role in most chambers. *See, e.g.*, Todd C. Peppers, Micheal W. Giles & Bridget Tainer-Parkins, *Surgeons or Scribes? The Role of United States Court of Appeals Law Clerks in "Appellate Triage,"* 98 Marq. L. Rev. 313, 316 (2014); Todd C. Peppers, Micheal W. Giles & Bridget Tainer-Parkins, *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 Alb. L. Rev. 623, 625 (2009).

Table 1. TF-IDF Comparisons by Judge

	Comparisons with own opinions	Comparisons with others' opinions
Prost	.323	.320
Newman	.318	.316
Lourie	.306	.311
Dyk	.354	.333
Moore	.295	.307
O'Malley	.331	.323
Taranto	.359	.335
Reyna	.285	.302
Wallach	.311	.311
Chen	.318	.317
Stoll	.320	.318
Hughes	.316	.315

We analyzed the significance of these differences and find that the differences between Dyk and Taranto, as well as a few others, are significant. Interestingly, for two judges (Reyna and Moore), their opinions scored as significantly more like the opinions of other judges than their own opinions. One possible explanation is, again, that they rely more heavily on their clerks. But it might also be that this type of comparison produces very noisy results and should not be relied upon.

We also classified active judges as having pro-patentee or pro-challenger leanings consistent with a previous study conducted by one of us[103] and grouped together the pro-patentee authored opinions and the pro-challenger authored opinions for analysis. Surprisingly, the results for within and across group comparisons were not meaningfully different.

VI. Citations

Finally, we analyzed how frequently each judge cites legal authority and the record. Legal writing commentators tend to encourage judges to cite authorities judiciously, because informal writing "breezes along like an essay, with scant authorities," while overly formal writing is "wooden and riddled with strings of citations."[104] At the same time, however, legal and record authority

[103] *See generally* Reinecke, *supra* note 6 (studying the impact of panel composition and patent ideology on the Federal Circuit's patent decisions).

[104] Ross Guberman, Point Taken: How To Write Like The World's Best Judges xxii (2015); *see also id.* at 162 (quoting celebrated English judge Lord Denning as saying that he does not refer to authorities "at much length" and "avoid[s] all reference to pleadings and orders" because "[t]hey are mere lawyer's stuff"); Scalia & Garner, *supra* note 61,

is the bedrock of a legal opinion. It is more difficult to defend a decision without adequate citation to authority for all relevant legal propositions. For this reason, it is not clear to us that less is usually more in the context of citations.

Figure 15 provides the average number of citations to legal authority per sentence in precedential opinions for each judge, and Figure 16 provides the same but for citations to the record.[105]

Figure 15. Mean Legal Citations per Sentence (Precedential Opinions)

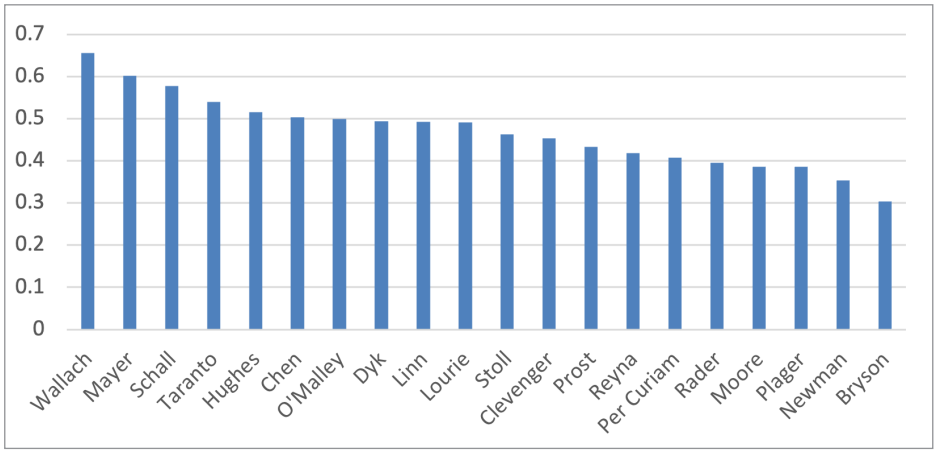
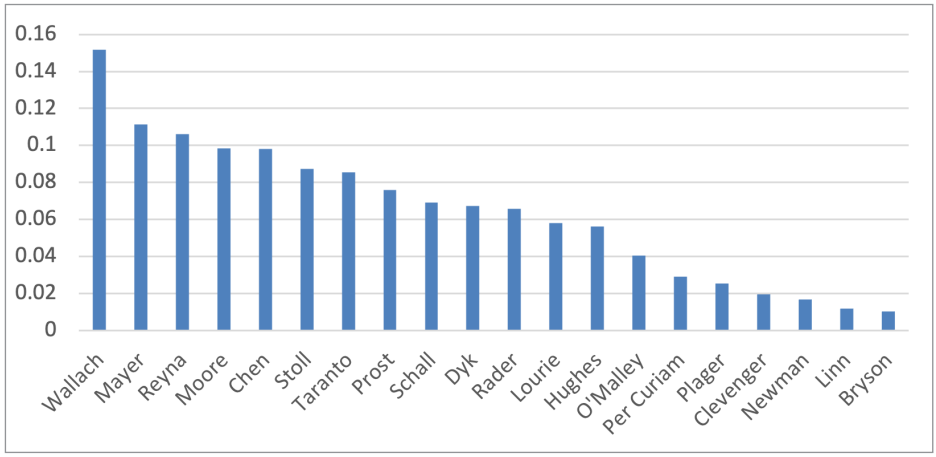


Figure 16. Mean Record Citations per Sentence (Precedential Opinions)



at 125–27 (discussing their view that legal writers should "[c]ite authorities sparingly"); George, *supra* note 44, at 30–31 (discussing her preferred citation practices, which tend to reflect a strong preference for citing sparingly).

[105] We counted the number of legal citations by having Eyecite extract and count citations to statutes and cases. *See* Jack Cushman, Matthew Dahl & Michael Lissner, *Eyecite: A Tool for Parsing Legal Citations*, 6 J. Open Source Software 3617, 3617 (2021). For each opinion, we divide that count by the total number of sentences in the opinion, which we

Starting with legal citations, we find that the judges vary considerably in how frequently they cite legal authority. For precedential opinions, the overall range is .30 to .66, and the average is .47. No, that is not a typo. One Federal Circuit judge is over twice as likely to support a sentence with legal authority as another judge. The range between the fourth most and fourth least likely judges to cite legal authority is still large at .54–.39. These ranges are a bit larger than those found by Professor Varsava in her study of the Tenth Circuit.[106]

Yet again, the overall variation we see between the judges is statistically significant. Judges are more likely to cite legal authority in precedential opinions, which makes sense because those opinions are more likely to involve thorny legal issues (and legal issues more generally).

There are also substantial differences in how frequently judges cite to the record per sentence. For precedential opinions, the range is .01 to .15 with an average of .07. Again, not a typo—one Federal Circuit judge cites the record fifteen times as often as another Federal Circuit judge. The difference between the fourth most and fourth least likely judges to cite the record is .098–.019—a difference of more than five times. Once again, the overall variability between the judges is highly statistically significant.

The results were very similar for nonprecedential opinions,[107] except most judges were a bit more likely to cite legal authority in precedential opinions and a bit more likely to cite record authority in nonprecedential opinions. This finding makes sense. Precedential opinions tend to cover legal questions. Nonprecedential opinions tend to cover record-intensive factual issues.

We again think the differences in citation patterns is largely due to differences in style. And again, we reject the contention that these differences are due to the judges' preferences for writing certain types of appeals. We

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calculated using Textacy's "n_sents" function. We counted the number of citations to the record by breaking up each opinion into tokens and counting the number of occurrences of "J.A.," "Appx.," "S.A." followed by a number, and any of the following if succeeded by "App.": "Resp't's," "S.," "Supp.," "Suppl.," "U.S.," "Appellee," "Appellee's," "Appellant," "Appellant's," "Pet'r's." We also separately calculated the number of record citations searching only for J.A., which we understand to be the most common indication of a citation to the record. This simpler test yields similar relative results.

[106] Varsava found that the judges averaged between 1.4 and 2.2 citations per 100 words, with a mean of 1.8. Varsava, *supra* note 2, at 91. Using the same denominator, our range is somewhat larger between 1.1 and 2.4, and we find the same mean of 1.8. It is unclear whether Varsava's study provides an apples-to-apples comparison because she wrote her own code to identify citations, *id.* at 91 n.65, whereas we used Eyecite, which was not available when Varsava conducted her study.

[107] When comparing the judges' use of citations in nonprecedential against precedential opinions, *R*-squared was 0.89 for record citations and 0.7 for legal citations.

compared the judges' citation practices separately across only district court appeals, only Patent Office appeals, and only appeals from the Court of Federal Claims, and we still see large differences.

We also find some evidence that judges who are more likely to cite legal authority tend to be more likely to cite record authority as well, though this finding is largely driven by Judges Wallach and Mayer who are both particularly likely to cite both types of authority.[108]

We think it is difficult to say from this information alone whether some judges are citing too frequently or too sparingly. What is clear to us, however, is that optimal judicial citation practices are worthy of additional study and discussion. The judges' practices vary tremendously. With greater discourse concerning these practices, we may converge on preferable practices and conventions. These practices are important. Citations provide the primary support for the statements and conclusions in judicial opinions.

VII. Holistic Analysis and Future Avenues for Research

The above analysis tells us that there is both substantial variation among, and similarities within, Federal Circuit judges' opinion writing over the last decade. And it gives us a sense of what the landscape of those opinions looks like. In this part we offer some thoughts on significant questions raised by the data and promising avenues for future work.

Our first set of measures relate to opinion complexity. We find substantial variation among judges in the average lengths of their majority opinions. Some judges (O'Malley, Schall, Bryson, Chen, Taranto) write opinions that are about a third longer or more than those of other judges (Hughes, Newman, Moore).

Opinion length matters. Overly wordy opinions waste significant resources because they convey their messages less efficiently. Worse, inconsistent (or even arguably inconsistent) statements, unclear statements, or even a bit of creative dicta here or there might spawn an unnecessary conflict in the precedent, wasting future judicial and party resources. Opinions that are too short may fail to adequately address all the issues before the court and may present legitimacy concerns.[109] And perhaps unnecessarily verbose writing may

[108] *R*-squared is .361 and *p* is .005. With Judges Wallach and Mayer excluded, *R*-squared is .12 and is not statistically significant ($p = .16$).

[109] *See* Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 Wash. & Lee L. Rev. 483, 496–514 (2015) (discussing the legitimacy and accuracy concerns when judges do not engage in adequate "reason-giving" for their decisions); *see also* Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Information Regulation,* 58 Fla. L. Rev. 743, 744–45 (2006) (discussing the issue of "judicial inactivism"

hide ways in which the law is actually the same—or perhaps mask underlying tensions in the law.

Although the results do not tell us whether some judges are writing too much or others too little, given the magnitude of the differences, we are certain that some judges are more successfully writing clear, concise, and complete opinions. Future research could figure out how.

Now consider our formality measures. As of the study period, trends around contractions and beginning with a short conjunction have not caught on at the Federal Circuit: As a group, the Federal Circuit judges do not use many contractions, nor do they frequently begin sentences with short conjunctions. These indicators of more informal writing are much more common in the Tenth Circuit, as reflected in Varsava's study. When it came to intensifiers, the Federal Circuit judges used slightly fewer than Varsava observed among Tenth Circuit judges. Use of hedge words was about the same. Surprisingly, judges varied widely in how frequently they employed hedges and intensifiers. Also perhaps surprisingly, their use of hedges and intensifiers were not strongly correlated in either direction. We also observed that both hedges and intensifiers tended to be less frequent in nonprecedential opinions, perhaps because these opinions tend to have fewer legal pronouncements necessitating hedging or intensifying. They instead tend to involve statements concerning whether a fact finding was supported by substantial evidence, which does not tend to need hedging or intensifying. Judges who feel the need to hedge when it counts may not feel such a need in nonbinding nonprecedential opinions. Intensifiers may simply be a stronger stylistic fingerprint. Some judges may feel greater urge to explain how something is "clearly" true irrespective of whether the opinion sets forth binding precedent.

Or perhaps, as we posit above, use of hedges, and especially intensifiers, is a conscious choice that is more prevalent when the judge is writing for posterity as opposed to simply deciding the case.

Linguistic choices have long been understood to reflect membership in a particular social or cultural group.[110] While excellent work has been done in this vein already,[111] we suggest that judicial linguistic communities are an area ripe for further exploration. Beyond the stylistic elements that have already been explored (intensifiers, contractions, etc.), we suggest there may be other writing conventions that may reflect group membership. And when linguistic ideology leads, doctrinal ideology may follow.

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whereby courts fail to adequately address all the issues before them, decreasing accuracy and affecting legitimacy).

[110] Indeed, that is the very premise of the 1964 musical *My Fair Lady*.

[111] *See* Varsava, *supra* note 2.

Our third set of measures are perhaps most useful for identifying stylistic fingerprints among the judges. Both word diversity and the frequency of function word use identify some differences, but they may primarily reflect differences in writing style in a way that we are not sure how to normatively assess. One notable aspect of the use of function words, however, is that Federal Circuit judges exhibit more variation in use of function words compared to Supreme Court justices, possibly an effect of a greater caseload and more involvement of judicial clerks in the drafting process.

Finally, and perhaps the most immediate area for future study, are citation patterns. Although we had an inkling that there would be a difference among judges in how frequently they cited to precedent and the record, we were shocked at the range. Some judges—Judge Wallach in particular—cite to precedent and the record much more often than other judges.

Citations are the bedrock of a legal opinion. They form the core support for the opinion. At the same time, unnecessary citation to authority, or poor citation to authority, make opinions more difficult to read and understand.

Again, we make no normative claims about which is better, nor can we say whether the difference is due to a practice of citing, say, the same precedent in every sentence in a paragraph versus citing it once in the first sentence. More work needs to be done to unpack Federal Circuit judges' citation practices.

We end with some suggestions for future research. One potentially promising line of research would be to have readers (ideally readers who are within the primary audience of judicial opinions but who are blind to the particular topic of study) review and subjectively rate opinions on various metrics, such as clarity and concision. Reading comprehension could also be assessed by more objective metrics, such as a score on comprehension questions. This approach could be useful in comparing various types of opinions, such as opinions written by more or less verbose judges, opinions with or without verdict suspense, and opinions written in a formal versus informal tone. To be sure, any findings would show only correlation, not causation. But a strong inference of causation could potentially be made if reviewers provide substantial reasoning along with their thoughts. For instance, a reader might indicate that the opinion was too long or that the opinion was difficult to follow because the verdict was withheld until the end.

Another promising line of future research involves substantive opinion analysis. For instance, further analyzing what judges are writing could show that the more verbose judges write more largely because they spend more time summarizing the parties' positions (which may be unhelpful to future readers), or that some judges write less because they offer little analysis (leading to concerns about legitimacy and whether the court is persuasively addressing all the issues). Analyzing why some judges cite more could show that it is because those judges write longer legal standard paragraphs, or that they

provide more string cites for uncontroversial opinions, or that they offer more authority to support the more controversial portions of their opinion.

One commonly held belief is that Federal Circuit opinions tend to be more formulaic and predictable than opinions in other circuits; formulaic opinions are boring to read and may inhibit the judges' creative thinking.[112] Another promising line of research would be to identify different portions of opinions (e.g., introduction, standard of review, summary of party arguments, substantive opinion, response to losing party's arguments, conclusion, etc.) and code Federal Circuit opinions against opinions from a control circuit to see which are more formulaic.

While we recognize the noisiness of the measures reported in Part V,[113] there remains promise for using these tools to explore the role of clerks. One possible approach might be to analyze these metrics using intra-year variability. Since the vast majority of Federal Circuit clerks are term clerks, who clerk for one or two years, comparing the degree of variability across years might help reveal the role of clerks in drafting opinions.[114] This could be combined with other tools, such as topic modeling, to remove alternate sources of variation.

There is an additional potential for exploration using the combination of the above metrics together with citations. Prior work on the United States Court of Appeals for the Second and Tenth Circuits provides evidence that many of these opinion characteristics are associated with whether the opinion is cited.[115] The Federal Circuit is a unique court, and it would be valuable to test the extent to which these variables impact citations as well. We think it would be particularly useful to assess whether increased opinion complexity is associated with fewer citations of Federal Circuit decisions, both by members of the court itself and district courts deciding patent cases.

Conclusion

Perhaps the two most pressing areas for further research are to unpack why judges vary so much in opinion length and citation practices. The Federal Circuit has a large audience. And as the court with nationwide jurisdiction over many areas of law, including patent appeals, its precedential opinions can be very important nationwide. The court uses opinions to set the law of

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[112] We thank Paul Gugliuzza for these observations.

[113] *See supra* Part V.

[114] A possible approach here would be to use judicial clerkship postings such as OSCAR, to determine the typical clerkship term for each judge, along with start dates.

[115] *See Form and Function of Legal Precedent*, *supra* note 12, at 184–221 (conducting a comprehensive study of Tenth Circuit opinions, augmented by a comparison with Second Circuit opinions, and finding that many of these characteristics have a statistically significant relationship with citation frequency).

the land and convey the law to its audience. It is of paramount importance that these opinions are complete, clear, and concise. While our results are insufficient to reach firm conclusions about precisely what plagues Federal Circuit opinion writing, due to the large variation in opinion length and citation practices, we do feel fairly certain of one thing: some judges seem far superior at writing complete, clear, and concise opinions.

The Equal Pay Act: The Law that Promised Equality but Delivered Disparity

Payton Liles*

Introduction

Gender discrimination is alive and well. Even for federal employees, a pay gap persists. Women in the United States have historically been subject to discrimination by men in the workplace which they still encounter today.[1] The legislative history of the Equal Pay Act ("EPA") and the historical circumstances leading to its passage show that Congress passed the EPA in 1963 as a tool for women (typically), to fight gender discrimination through unequal pay in the workplace.[2] However, the current interpretation of the statute has led to its flawed application, making the EPA an insufficient remedy.[3]

In the past, many women were paid less than men for the same work, because women's work was seen as inferior to men's.[4] The EPA, and other acts passed since, were meant to fix this historical and persistent problem.[5] However, the current standard established by the EPA, and its wide encompassing exceptions for employers, impede the EPA from accomplishing its goal of combating gender discrimination.[6] Further, other issues such as the outdated "substantially equal" work conditions element, and the lack of

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[1] *See Equal Pay Act of 1963*, Nat'l Park Serv. (Apr. 1, 2016), [https://perma.cc/WE48-8U4C].

[2] *See id.*; 109 Cong. Rec. 9213 (1963) (statement of Rep. Matsunaga).

[3] *See* Deborah Thompson Eisenberg, *Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases*, 57 N.Y.U. L. Rev. 815, 817 (2013).

[4] *See* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (quoting S. Rep. No. 88-176, at 1 (1963)).

[5] *See id.*

[6] *See* Eisenberg, *supra* note 3, at 817; 29 U.S.C. § 206(d)(1) (requiring employers to pay employees of different sexes equal pay for equal work, subject to certain enumerated exceptions).

information available to plaintiffs also advance this result.[7] For instance, a woman was denied compensation for overtime work, though her male coworker was not, because she was unable to prove a prima facie EPA violation.[8] Thus, the woman was barred from recovery.[9]

Congress should amend the EPA to allow it to do what it was meant to do, fight gender pay discrimination in the workplace.[10] Therefore, the EPA should be interpreted to require "comparable work" rather than "equal work."[11] The amendments should include language which places the burden of proof initially on the employer, rather than the employee.

Part I of this Note relies on the legislative history of the Equal Pay Act and the historical circumstances which led to its enactment to explain how the purpose of the Act was to combat gender inequality based on unequal pay. Part II of this Note then explains how the EPA's current standard is too difficult for a plaintiff to overcome due to its "equal work" requirement and large encompassing exceptions offered as defenses to employers. Part II also discusses the EPA's other relevant difficulties which burden those attempting to find relief such as the "similar working conditions" element, and burden of proof on plaintiffs initially. This Note then explores the problems created by the exceptions the statute gives defendants (employers). These problems together render the EPA less effective as a tool to fight inequality than Congress initially intended. Finally, Part III proposes and defends the proposition for Congress to amend the language of the statute so that the EPA requires "comparable work" for equal pay and places the burden of proof on the defendant initially.

I. Background

The growing population of women into the labor force coincided with a pronounced undervaluation of their contributions, as evidenced by the wage gap between female and male employees.[12] To remedy this, the EPA was presented to Congress in 1945, but was not enacted.[13] Further efforts were

[7] *See* Eisenberg, *supra* note 3, at 831–35.

[8] *See* Blackwell v. United States, 171 Fed. Cl. 682, 688–90 (2024), *aff'd*, 2026 WL 809534 (Fed. Cir. Mar. 24, 2026).

[9] *See id.* at 689–90.

[10] *See Equal Pay for Equal Work*, U.S. Dep't of Lab., [https://perma.cc/VF9R-9GC8] (last visited May 6, 2026).

[11] *See* Jessie Kratz, *On the Basis of Sex: Equal Pay*, Nat'l Archives: Pieces of Hist. Blog (Mar. 8, 2023), [https://perma.cc/D57Q-K54R].

[12] *See* Nat'l Park Serv., *supra* note 1.

[13] *See id.*

made to combat gender inequality in the workplace.[14] The EPA eventually passed in 1963.[15] The EPA signaled a shift towards eliminating gender-based discrimination in the workplace.[16]

In the beginning of the 20th century, women only made up 24% of the workforce.[17] This changed with labor shortages caused by World War Two.[18] "[B]y 1945, women made up 37% of the civilian workforce."[19] This marked the first time in history that women took on male-dominated roles in industries such as manufacturing and defense production.[20] What makes this particularly significant is that, contrary to widely held beliefs at the time, women performed just as successfully as their male counterparts.[21] The growth of women in the workforce influenced the National War Labor Board to issue an order supporting equal pay for men and women for work of "comparable quality and quantity."[22]

After the war, when men started to rejoin the civilian workforce, employers began firing women in order to be replaced by men.[23] The women who stayed in their positions were paid much less than their male counterparts.[24] When the EPA's predecessor was introduced to Congress in 1945, it specified equal pay for "comparable work" under which the pay was determined by comparing the difficulty and the worth of the jobs.[25] This meant "equal pay for different jobs in the same work place."[26] However, this bill failed to

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[14] *See EEOC History: The Law*, U.S. Equal Emp. Opportunity Comm'n, [https://perma.cc/CHE9-9TJH] (last visited May 6, 2026).

[15] *See* Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d)).

[16] *See* 109 Cong. Rec. 9213 (1963) (statement of Rep. Matsunaga).

[17] U.S. Equal Emp. Opportunity Comm'n, *supra* note 14.

[18] *Id.*

[19] *Id.*

[20] *See* Evan K. Rose, *The Rise and Fall of Female Labor Force Participation During World War II in the United States*, 78 J. Econ. Hist. 673, 673 (2018).

[21] *See Women in the Work Force During World War II*, Nat'l Archives (May 29, 2025), [https://perma.cc/BG6P-EA7T]. The U.S. Department of Labor Women's Bureau report on wartime manufacturing notes that women performed work that was "identical with or comparable to that done by men," and in some cases there was "no question" that their work was comparable in both quality and quantity. Margaret Kay Anderson, Women's Bureau, U.S. Dep't of Lab., Bulletin No. 192-3, Employment of Women in the Manufacture of Cannon and Small Arms in 1942 30 (1943).

[22] Nat'l Park Serv., *supra* note 1.

[23] *See* Rose, *supra* note 20, at 673.

[24] *See* Nat'l Park Serv., *supra* note 1.

[25] *See id.*

[26] *Id.*

pass and by the 1950s, women made up 37% of the workforce but were only making fifty-nine cents on the dollar.[27]

In March 1961, President John F. Kennedy signed Executive Order 10925 which "prohibit[ed] federal government contractors from discriminating on account of race and establish[ed] the President's Committee on Equal Employment Opportunity."[28] "President Kennedy stated that "this enforcement authority signal[ed] a new 'determination to end job discrimination once and for all.'"[29]

The EPA was finally passed after being drafted by labor activist and head of the Women's Bureau in the Department of Labor, Esther Peterson, appointed by President Kennedy.[30] Her draft demanded equal pay for "comparable work," however this was changed to equal pay for "equal work" which is what the law reads as today.[31] There has been a long history surrounding the implementation of the EPA that began with the need for ending sex discrimination of women in the workplace.

A. Core Purpose of the EPA: Fighting Discrimination Against Women on the Basis of Unequal Pay

A contributing factor leading to the passage of the EPA was to "protect[] against wage discrimination based on sex."[32] The passage of the EPA established a requirement for women to be paid the same as their male coworkers.[33] In debates during the EPA's enactment, it was stated that the EPA's passage signified a substantial change to treatment of women in the workforce "[T]here is no longer an excuse for paying women less than men for performing the same work, if there ever was any."[34] Thus, the EPA became a solution to the problem of employment gender discrimination:

> Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."[35]

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[27] *See id.*

[28] U.S. Equal Emp. Opportunity Comm'n, *supra* note 14.

[29] *Id.*

[30] Nat'l Park Serv., *supra* note 1.

[31] *See id.*

[32] U.S. Dep't of Lab., *supra* note 10.

[33] *See* 109 Cong. Rec. 9213 (1963) (statement of Rep. Matsunaga).

[34] *Id.*

[35] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (quoting S. Rep. No. 88-176, at 1 (1963)).

Although the EPA was initially passed to combat gender discrimination in the workplace, its effectiveness due to its workability is up for debate.[36]

The EPA is the "first national civil rights legislation focusing on employment discrimination."[37] A year after its passage, Title VII of the Civil Rights Act of 1964 was passed.[38] Title VII is another way those who have been discriminated against through unequal pay can bring a claim.[39] Unlike the EPA, Title VII does not require the work to be substantially equal.[40] While the EPA applies to every employer, Title VII only applies to employers who meet specific criteria.[41] Under Title VII, for someone to prove a prima facie case of employment discrimination they must prove they belong to a protected class, their employer "subjected [them] to an adverse employment action," and a causal relationship exists between the first and second prong.[42] Essentially that the adverse decision was made due to the employee belonging to a protected class.[43]

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[36] *See id.*; Deborah Thompson Eisenberg, *Shattering the EPA's Glass Ceiling*, 63 SMU L. Rev. 17, 21–22 (2010).

[37] U.S. Equal Emp. Opportunity Comm'n, *supra* note 14.

[38] *See* Civil Rights Act of 1964, 88 Pub. L. No. 352, §§ 701–716, 78 Stat. 241, 253–66; Carlton M. Hadden, *In Pursuit of Pay Equity: Examining Barriers to Equal Pay, Intersectional Discrimination Theory, and Recent Pay Equity Initiatives*, U.S. Equal Emp. Opportunity Comm'n (Nov. 2021), [https://perma.cc/8SQP-GPRY] (on file with the Federal Circuit Bar Journal).

[39] *See* U.S. Dep't of Lab., *supra* note 10 ("Since passing the EPA, Congress has expanded federal protection against compensation discrimination through additional laws, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA) of 1967, and Section 501 of the Rehabilitation Act of 1973. . . . However, these laws have different filing deadlines and standards of proof from the EPA."); *see also* 29 C.F.R. § 1620.27 (defining the relationship between the EPA and Title VII).

[40] 29 C.F.R. § 1620.27(c). Further, while the EPA only covers gender discrimination, Title VII includes other people who are discriminated against on the basis of race, color, national origin, religion, and sex. *See* Hadden, *supra* note 38; 29 C.F.R. § 1620.27(a).

[41] *See Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking*, U.S. Equal Emp. Opportunity Comm'n (Dec. 2, 2024), [https://perma.cc/7BXJ-Z2RL].

[42] Eric Bachman, *What Do I Have to Show to Prove a Prima Facie Case of Employment Discrimination?*, Zuckerman Law (Aug. 5, 2024), https://www.zuckermanlaw.com/sp_faq/show-prove-prima-facie-case-employment-discrimination/.

[43] *See id.*

B. Elements of a Prima Facie Case

A fundamental aspect of the EPA is to guarantee that female and male employees receive equal compensation for equal work, thereby safeguarding against gender-based discrimination in the workplace.[44] The EPA states:

> No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for *equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working condition*s, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.[45]

Therefore, for a plaintiff to satisfy the prima facie case they must prove that they were paid less than a male employee for substantially equal jobs that were performed in similar working conditions.[46] "Equal work" is defined by considering the "skill, effort, and responsibility" of the work.[47] "Similar working conditions" is defined by looking at the hazards and surroundings of the work and workplace.[48] If plaintiffs can establish these elements then the burden shifts to the employer to make an affirmative defense if any apply.[49] In addition, the statute permits very expansive affirmative defenses, including a catch-all provision which allows for pay disparity if the difference in pay is "based on any other factor other than sex."[50] Accordingly, for a plaintiff to win their claim of discrimination under the EPA, they must prove that they received less compensation than their coworker of the opposite sex for substantially the same work and under similar working conditions, and this was not due to any other reason other than sex.[51] The statute has also been interpreted to require that the pay differential is based on sex, which the plaintiff may establish through direct evidence of discriminatory intent or by showing that the employer's proffered justification is pretextual.[52]

The EPA works largely the same for federal employees bringing a prima facie case. Federal employees have two years to bring an EPA violation claim

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[44] *See* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

[45] 29 U.S.C. § 206(d)(1).

[46] *See Corning*, 417 U.S. at 195.

[47] 29 U.S.C. § 206(d)(1).

[48] *See Corning*, 417 U.S. at 202.

[49] *See id.* at 195.

[50] *See* 29 U.S.C. § 206(d)(1).

[51] *See* U.S. Dep't of Lab., *supra* note 10.

[52] *See* Behm v. United States, 68 Fed. Cl. 395, 400 (2005).

against their employer.[53] There are also some safeguards in place to add protection for federal employees bringing a claim against their employer such as a prohibition against unlawful retaliation for bringing such a claim.[54]

The federal pay scale creates a difference between federal employees and employees in the private sector in the context of the EPA.[55] While the federal pay scale arguably increases transparency about employee pay, it may also make it more difficult for someone to claim pay discrimination since they would have to prove that the other employee is being paid more than the amount on the federal pay scale.[56]

II. Analysis

Though the EPA was passed to combat unequal pay, a pay gap still exists for female federal employees.[57] One contributing factor may be the standard established by the EPA,[58] which encompasses the "equal work" and "similar working conditions" elements, the burden of proof resting on the plaintiff initially, and the wide exceptions granted to employers.[59]

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[53] *See* U.S. Dep't of Lab., *supra* note 10 ("A federal employee also has the right to file an EPA suit in federal district court without exhausting internal administrative remedies. The time limit for filing an EPA case in court is two years from the day the last discriminatory paycheck was received or, in the case of a willful violation, within three years. Filing a complaint with CRC under the EPA does not extend the time limit for filing in federal district court.").

[54] *See id.* ("Any individual who files an equal pay claim or assists an individual in filing an equal pay claim is protected against unlawful retaliation by their employer. This protection extends to unlawful retaliation by an employer against an individual for opposing employment practices that allegedly discriminate based on compensation or for filing a discrimination complaint, testifying, or participating in any way in an investigation, proceeding, or litigation under the Equal Pay Act. For purposes of complaints filed with CRC, unlawful retaliation is defined as an adverse employment action by the employer, such as demotion or termination, which is harmful to the point that it could discourage or dissuade a reasonable worker from making or supporting a complaint of discrimination.").

[55] *See Salaries and Wages*, U.S. Off. of Pers. Mgmt., [https://perma.cc/8C4F-CX9Z] (last visited May 6, 2026); *Pay and the General Schedule*, Go Gov't, [https://perma.cc/K3HC-B83R] (last visited May 6, 2026).

[56] *See* Borovicka v. United States, 168 Fed. Cl. 534, 543–44 (2023).

[57] *See* Hadden, *supra* note 38.

[58] *See* 29 U.S.C. § 206(d)(1).

[59] *See id.*; 29 C.F.R. § 1620.15(a).

A. The Problems the EPA Intended to Solve Are Still Prevalent

"[W]e are still a long way from achieving pay equity in America."[60] This statement was made by President Biden in the White House Briefing Room while discussing the U.S. House of Representatives passage of the Paycheck Fairness Act on April 15, 2021.[61] It has been approximately fifty years since the passage of the EPA, and yet unequal pay still exists for federal female employees.[62] "The overall pay gap between men and women in the federal workforce has narrowed considerably, from 19 cents on the dollar in 1999 to 7 cents in 2017."[63] However, this statistic largely considers white women.[64] For women of color, the pay gap has actually increased wherein, "[m]any workers continue to face racial and gender pay gaps, and pay inequity disproportionately affects women of color."[65] While the pay gap for federal employees is typically still smaller than other female employees, it still exists, and was around six percent in 2022.[66]

Although the pay gap for federal employees is smaller than the private sector, it is arguably more egregious. Most federal employees are paid through taxpayer money.[67] Thus, when female federal employees are discriminated

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[60] Presidential Statement on the House of Representatives Passage of the Paycheck Fairness Act, 2021 Daily Comp. Pres. Doc. 317 (Apr. 15, 2021).

[61] *See id.*

[62] *See* Hadden, *supra* note 38 ("In nearly every job—more than 90 percent of occupations—women are still earning less than men. For every dollar the typical man who works full-time [for a] full year earns in America, a woman earns 82 cents. For [Asian American and Pacific Islander] women, it's 87 cents for every dollar a white man earns. For Black women, it's 63 cents. For Native American women, it's 60 cents. And for Hispanic women, it's 55 cents." (alterations in original) (quoting *id.*)).

[63] U.S. Gov't Accountability Off., GAO-21-67, Gender Pay Differences: The Pay Gap for Federal Workers Has Continued to Narrow, but Better Quality Data on Promotions Are Needed (2020), [https://perma.cc/UAK9-NMCY].

[64] *See id.* at 17–18.

[65] Exec. Order No. 14035, 86 Fed. Reg. 34593, 34601 (June 25, 2021); *see* U.S. Gov't Accountability Off., *supra* note 63, at 17–18; Hadden, *supra* note 38 ("These statistics show that persistent pay inequity is not solely an issue of sex discrimination, but an intersectional issue that cuts across race, color, national origin, and other protected classes.").

[66] Advancing Pay Equity in Governmentwide Pay Systems, 88 Fed. Reg. 30251, 30253 (proposed May 11, 2023) (to be codified at 5 C.F.R. pts. 531, 532, 534, & 930). The federal gender pay gap is far smaller than the national gender pay gap, which sat at 16 percent in 2021. *See id.*

[67] *See Federal Revenue Overview*, U.S. Dep't of the Treasury: Fiscal Data, [https://perma.cc/L6J2-2GK8] (last visited May 6, 2026).

against in the workplace, it is taxpayers' dollars being used to facilitate this gender discrimination.[68]

B. "Equal Work" Versus "Work of Comparable Value"

The current standard under the EPA is "equal work" for equal pay.[69] In contrast, when Congress was in the process of passing the EPA, it considered different language, and therefore a different standard.[70] As previously mentioned, the purpose behind enacting this statute was to ensure that people of both genders were being paid equally for equal work.[71] This concept of "equal work" incited much debate.[72] When Congress was considering this statute, they debated what should be required to prove "equal work."[73] These debates contemplated the language of "comparable work" which is what the statute read at first, and "equal work" or "substantially equal work" which is what the statute states now.[74] When the adopted prima facie standard changed from "work of comparable character" to "equal work" it created a much bigger hurdle for plaintiffs.[75] While it is clear the purpose of the act is "equal work for equal pay" it still remains somewhat unclear what exactly equal work means in practice or what should be considered to be "equal work."[76] In other words, what makes "equal work" equal?[77] The congressional debates concerning this concept included arguments over whether equal work meant that the work should be literally the same or comparable.[78] For instance, during these Congressional debates Representative Dent stated he was worried about removing the "comparable work" language because it would make the statute too difficult to overcome and thus difficult to work.[79] Further, Representative Goodell argued that the jobs should be "virtually identical" to be considered "equal."[80] Additionally, Senator McNamara argued that the jobs should not be required to be identical because this was "not the intent of the Senate"

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[68] *See id.*

[69] *See* 29 U.S.C. § 206(d)(1).

[70] *See* Cnty. of Wash. v. Gunther, 452 U.S. 161, 184–85 (1981) (Rehnquist, J., dissenting).

[71] *See* U.S. Dep't of Lab., *supra* note 10.

[72] *See* Corning Glass Works v. Brennan, 417 U.S. 188, 198–202 (1974).

[73] *See id.*

[74] *See Gunther*, 452 U.S. at 185–86 (Rehnquist, J., dissenting).

[75] *See id.* at 186–87.

[76] *See* Eisenberg, *supra* note 36, at 37.

[77] *See id.*

[78] *See id.*

[79] 109 Cong. Rec. 9200 (1963) (statement of Rep. Dent).

[80] Eisenberg, *supra* note 36, at 37 (quoting 109 Cong. Rec. 9197 (1963) (statement of Rep. Goodell)).

and would be "ridiculous."[81] Ultimately, the interpretation of "equal work" to mean "substantially equal work" rather than "comparable work" prevailed, however, this has proven to create many difficulties for those who attempt to obtain relief under the statute.

C. The EPA Makes It Difficult to Establish a Prima Facie Case

As previously mentioned, to establish his or her prima facie case under the EPA, a plaintiff must demonstrate, "that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'"[82] The issue with this standard is that the person bringing the case must prove that their work and a male coworker's work is "substantially equal."[83] "Substantially equal" work is not considered to rely on job titles, rather job content is considered.[84] For a job to be considered "substantially equal" the job does not have to be identical.[85] The person bringing a claim must identify a coworker whose work is "substantially equal" when relying on "the individuals' primary rather than incidental duties."[86] This looks at the "job as a whole."[87] The types of pay that are covered by this law for federal employees is largely all forms of pay including bonuses, overtime pay, etc.[88] Further, for federal employees, if pay discrimination is found, then the pay of the higher paid employee may not be reduced.[89] For the work to be "substantially equal," the jobs being compared must require substantially equal "skill, effort, and responsibility" and be performed under "similar working conditions" within the same establishment.[90]

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[81] *Id.* (quoting 109 Cong. Rec. 9761 (1963) (statement of Sen. McNamara)).

[82] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (quoting 29 U.S.C. § 206(d)(1)).

[83] *See* Eisenberg, *supra* note 3, at 831.

[84] *See id.*

[85] *See id.*

[86] Jordan v. United States, 122 Fed. Cl. 230, 241 (2015).

[87] Ellison v. United States, 25 Cl. Ct. 481, 487 (1992) (citing Gunther v. Cnty. of Wash., 623 F.2d 1303, 1309 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981)).

[88] *See Equal Pay/Compensation Discrimination*, U.S. Equal Emp. Opportunity Comm'n, [https://perma.cc/5M5W-PTRT] (last visited Apr. 14, 2026) ("All forms of pay are covered by this law, including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits.").

[89] *See id.*

[90] 29 U.S.C. § 206(d)(1); *see* U.S. Dep't of Lab., *supra* note 10.

Under the statute, "equal skill" looks at factors such as "experience, training, education, and ability."[91] "Equal effort" is concerned with the measure of "physical or mental exertion needed for the performance of the job."[92] Finally, "equal responsibility" which is also required by the statute to prove "substantially equal" work, is the "degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation."[93]

1. "Equal Work" in Practice Allows for Subtle Differences in Jobs to Bar a Plaintiff from Relief

This concept of "equal work" requiring equal "skill, effort, and responsibility" creates a large hurdle for plaintiffs seeking relief from the EPA.[94] Specifically, because of the language of the statute, if subtle differences in job content or experience exist between a female and male employee, then the plaintiff will likely be unable to satisfy a prima facie case.[95] Due to the statute's requirement, to recover a plaintiff must prove that they and their coworker work with the same effort, or mental and physical exertion, have the same responsibilities, their work requires the same degree of accountability, and they have equal skill, experience, training, education, and abilities.[96] This is a high bar, and the chances of two employees sharing such similar backgrounds and having a job with the same requirements are low. For example, a female marketing manager may earn less than a male colleague with the same title and similar duties. However, if the male employee manages a larger budget, oversees more staff, or has greater specialized experience, a court may find the roles require different levels of responsibility or skill.[97] Even these subtle differences can prevent the plaintiff from establishing a prima facie case under the EPA. Further, because of this specific language and requirements, if there are subtle differences between an employee and their backgrounds, then the work is considered to not be "equal," thus unequal pay could be justified under the statute.[98]

Additionally, it is important to note that job content is becoming much more variable, especially in higher paid positions.[99] This means that, "As

[91] 29 C.F.R. § 1620.15(a).

[92] 29 C.F.R. § 1620.16(a).

[93] 29 C.F.R. § 1620.17(a).

[94] *See* Eisenberg, *supra* note 3, at 831–33.

[95] *See id.* at 832–33.

[96] *See id.* at 831–32.

[97] *See* Eisenberg, *supra* note 36, at 40–41, 43–44.

[98] *See* Eisenberg, *supra* note 3, at 833.

[99] *See The Rising Tide of Non-Standard Employment*, Int'l Lab. Org., https://webapps.ilo.org/infostories/en-GB/Stories/Employment/Non-Standard-Employment#what-does-it-mean-for-workers (last visited May 7, 2026).

women climb the occupational ladder, the manner in which many federal courts interpret the EPA imposes a wage glass ceiling, shutting out women in non-standardized jobs from its protection."[100] Since the "equal work" requirement in sum requires two jobs to be standard, women who work in more variable jobs are likely unable to satisfy the "equal work" requirement of the EPA and thus are unable to find relief.

Further, the federal government's use of position descriptions to lay out the duties and responsibilities of a federal employee's position may make it increasingly difficult for a plaintiff to prove gender discrimination. Specifically, job descriptions create allegedly objective representations of an employee's job responsibilities, creating a higher burden for an employer to show subjective differences between roles in a claim under the EPA.[101] On the other side, job descriptions may state different explanations depicting the roles or duties as different, for example one job description may say the job advises the team and another may omit or glaze over that language, when in reality the other employee may also advise the team or basically do the same work in practice even if that is not reflected in the job description.[102]

Under the "equal work" standard, the statute only protects instances when a female employee is paid less for the exact amount of effort and the exact same work conducted. Therefore, there are numerous instances where the female worker is discriminated against through unequal pay, but they are unable to find relief under the EPA because of this trivial wording.[103] For instance, in *Blackwell v. United States*,[104] a female employee of the U.S. Department of Homeland Security was unable to find relief under the EPA because she could not prove that her and her male colleagues' work were "substantially equal" and performed under "similar working conditions."[105] In *Blackwell*,

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[100] Eisenberg, *supra* note 36, at 17.

[101] *See* Cooke v. United States, 85 Fed. Cl. 325, 345 (2008) ("[J]ob descriptions can be highly probative of equal work." (citing Ellison v. United States, 25 Cl. Ct. 481, 494 n.23 (1992))).

[102] *See* Blackwell v. United States, 171 Fed. Cl. 682, 689–90 (2024), *aff'd*, 2026 WL 809534 (Fed. Cir. Mar. 24, 2026).

[103] *See, e.g.*, *id.*

[104] 171 Fed. Cl. 682 (2024), *aff'd*, 2026 WL 809534 (Fed. Cir. Mar. 24, 2026).

[105] *Id.* at 689–90. The court found that even though both employees' jobs were classified under the GS-14 pay grade, both employees were supervisors, worked on similar projects, and on the same subject matter, the plaintiff was unable to establish a prima facie EPA violation because of differences of the male employee's job. *See id.* at 685–87. The court found the male employee's job required different skills, training because it required firearm qualifications, physical standards and emergency management response. *See id.* at 689. For effort the court acknowledged both employees were supervisors, but the male employee also supervised special task forces and lead special assignments. *See id.* at 689–90. The court pointed

the woman was paid substantially less than her male coworker because he received compensation for his overtime work, and she did not.[106] This resulted in him receiving $45,000 more than she did in overtime compensation.[107] When the female employee requested overtime pay for ten hours a week, she was denied.[108] The U.S. Court of Federal Claims held that the extra pay does not have to be tied to the extra amount of effort, skill, and responsibility.[109] Significantly in this case, the court found that it was not a violation of the EPA that the male coworker's payment for overtime work was not tied to him putting in more effort, skill and responsibility.[110] Additionally, the court found that because Blackwell and her male coworker's work was not "substantially equal," she could not recover.[111] The United States Court of Appeals for the Federal Circuit ("Federal Circuit") affirmed the court's decision.[112]

While some might argue these factors ensure the work is substantially equal, these factors also create a loophole for agencies or government employers to preserve unequal pay based on one's gender. Based on the *Blackwell* holding, the increase in pay does not have to be reliant on the extra effort, skill, or responsibility of the employee, and thus presumably an employer could justify unequal pay by giving the man a small additional responsibility and then paying him increasingly more and just arguing that he has more responsibilities.[113] The employer could also claim the male employee has more experience, training or education which would allow them to rely on a small difference

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to the male employee's job which may also require him to work outdoors in emergency situations to constitute a lack of similar working conditions. *See id.* at 689. Finally, the Court found that even if the plaintiff was able to establish a claim, she was unable to rebut the male employee's defense that the pay was based on a factor other than sex because his overtime pay was for specific work performed as a "customs officer" under COPRA, and the overtime work by Blackwell was not "ordered or officially approved". *See id.* at 690. Although these were the determinative factors for finding in favor of the defendants, this case illustrates the difficult burden a plaintiff faces.

[106] *See id.* at 686.

[107] *Id.*

[108] *Id.*

[109] *See id.* at 690.

[110] *See id.* at 690 (holding that, even if the plaintiff could meet the prima facie standard for an EPA violation, the fact that the male comparator's position is statutorily entitled to overtime pay, while the plaintiff's position is not, is a "factor other than sex" that qualifies as an affirmative defense (quoting 29 U.S.C. § 206(d)(1)).

[111] *See id.* at 689–90. The Court also found that for the plaintiff to win, they must prove the male coworker was substantially equal, when focusing on the individual's primary rather than incidental duties. *See id.*

[112] *See* Blackwell v. United States, 2026 WL 809534, at *1 (Fed. Cir. Mar. 24, 2026).

[113] *See Blackwell*, 171 Fed. Cl. at 688–90.

in the backgrounds of employees and pay one more than the other based on that.[114] Further, these characteristics can be subjective. For instance, what qualifies as more training? Is it the quantifiable years of training, or the quality of the training, for example working on bigger projects? And further what makes a training better quality? These subjective characteristics make the loophole bigger for agencies to evade the protection of the EPA.

2. The "Equal Work" Standard Allows for the Continuation of Undervaluing and Underpaying Female Dominated Roles and Industries

Similarly, the "equal work" standard allows this gap in pay to persist. Specifically, the "equal skill" standard, which adds to the definition of "equal work", considers factors such as the employee's "experience, training, education and ability," to determine whether that employee has the same *skill* as another employee.[115] However, education, skill, and experience are values that women have had a history in the United States of being denied.[116] Therefore, by embedding a requirement in the statute to consider these subjective factors which have been historically off-limits to women continues the tradition of undervaluing women's roles.

3. "Similar Working Conditions" as a Consideration Factor is no Longer as Relevant and Creates Unnecessary Burdens for Plaintiffs

The "similar working conditions" element of the EPA also creates another burden plaintiffs must overcome to prove a violation of the EPA. Even if someone is able to prove that they and their coworkers' work constitute "equal work," they must also prove that the work was conducted under "similar working conditions."[117] Working conditions are defined by looking at the "surroundings" and "hazards" of the job.[118] However, one could argue that these considerations are out of date and are therefore likely irrelevant to most modern-day 21st-century jobs. While this definition may have made sense back when most jobs entailed physical labor, this factor proves to be less

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[114] *See* Corning Glass Works v. Brennan, 417 U.S. 188, 200–03 (1974); 29 U.S.C. § 206(d)(1).

[115] 29 C.F.R. § 1620.15(a).

[116] *See* U.S. Dep't of Just., Equal Access to Education: Forty Years of Title IX, 1, 5, 7, 11 (2012).

[117] *See* 29 U.S.C. § 206(d)(1).

[118] *See Corning*, 417 U.S. at 202 ("'Surroundings' measures the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency. 'Hazards' takes into account the physical hazards regularly encountered, their frequency, and the severity of injury they can cause." (footnote omitted)).

relevant in "office" jobs. For instance, in *Corning Glass Works v. Brennan*,[119] the United States Supreme Court addressed the question of whether Corning Glass violated the EPA by paying a higher base wage to male night shift workers than female day shift workers.[120] This case largely discusses industrial jobs because that is what was most prevalent during that time.[121] The hiring procedures of the company were such that only males were hired for the night shift.[122] The Court held that these hiring practices and unequal pay violated the EPA because the night and day shifts were equal work.[123] However, with the increase in desk jobs, there are not as many hazards or heightened probability of injury.

Further, due to this factor largely being irrelevant, "similar working conditions" likely creates an unnecessary burden on the plaintiff. If there is variability in the workplace, even if the work conducted is essentially the same, a plaintiff may be unable to satisfy this element and thus unable to recover.

D. Issues With the Burden of Proof on the Plaintiff

Many issues arise with the statute placing the burden of proof on the plaintiff. For instance, plaintiffs may not have access to all the information needed to prove their case. This becomes even more complicated considering information about pay is often not disclosed to employees and is even sometimes hidden.[124] Some employers even "prohibit employees from sharing data on salaries, the government does not collect data on salaries, and employers are not required to disclose data on salaries."[125] While federal agencies follow a "government-regulated pay system[]" which provides different wages corresponding with the employee's level, these systems set a minimum wage.[126] This means that the employers may pay above the wage set in the scale, which are precisely the instances where pay disparities can arise.[127] Thus, without publicly available data to show disparate treatment or impact by a specific employer, it can be difficult for a woman to prove unequal pay.[128] Further,

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[119] 417 U.S. 188 (1974).

[120] *Id.* at 190.

[121] *See id.* at 191–95; Eisenberg, *supra* note 36, at 38–39.

[122] *See Corning*, 417 U.S. at 192.

[123] *See id.* at 203–05.

[124] *See* Ruqaijah Yearby, *When Equal Pay is Not Enough: The Influence of Employment Discrimination on Health Disparities*, 134 Pub. Health Rep. 447, 449 (2019).

[125] *Id.* at 448.

[126] *See Working in Government: Pay*, USA Jobs, [https://perma.cc/ECC6-385U] (last visited Apr. 18, 2026).

[127] *See id.*

[128] *See* Yearby, *supra* note 124, at 448.

without access to information of other employees' pay, a female worker would be less likely to know if an employee of the opposite gender is being paid more than they are.[129]

1. Plaintiffs Are Not Getting Their Day in Court.

One may consider why the pay gap still persists in 2025, especially when there are safeguards and remedies in place meant to combat this problem, such as Title VII and the EPA. However, the majority of plaintiffs who bring a claim under the EPA do not find relief, in fact, most courts dismiss EPA cases at the summary judgment stage.[130] The difficulty in proving a prima facie case likely drives this outcome.[131] Summary judgment is granted to a moving party when there is no genuine issue of material facts.[132] "Courts granted 68% of employer motions for summary judgment on equal pay claims."[133] In a study conducted about 500 EPA cases, it was found that these outcomes are affected by the political party of the president who appointed the judge, the gender of the judges, and the geography of the courts.[134] Whatever the cause, the effect of these circumstances is that the majority of those seeking relief under the EPA are being denied their day in court.[135]

The statute states an employer cannot discriminate on the basis of sex by paying an employee of the opposite sex less for "equal work on jobs."[136] It then clarifies that this means the male and female's job performance or work on the job must be of equal skill, effort, and responsibility.[137] This requires basically for the person, typically a woman, bringing a case to prove that she and her male counterpart put in the same amount of effort, skill, and have the same responsibilities.[138] The difficulty in a plaintiff being able to prove this, makes the EPA's standard a high standard. Further, it allows for employers far too easily to win since they would only need to argue that the work was not equal because the male put in more effort, or had more responsibilities, or

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[129] *See id.*

[130] *See* Eisenberg, *supra* note 3, at 817.

[131] *See id.* at 831–35.

[132] *See* Fed. R. Civ. P. 56(a).

[133] Eisenberg, *supra* note 3, at 817, 827, 829 (finding that female judges granted summary judgement at a much lower rate (61%) and finding that Article III judges grant summary judgment in more cases than magistrate judges).

[134] *See id.* at 817–18.

[135] *See id*. at 839.

[136] 29 U.S.C. § 206(d)(1).

[137] *See* Corning Glass Works v. Brennan, 417 U.S. 188, 201 (1974).

[138] *See id.* at 195.

more skills.[139] This would likely not be too difficult because these are subjective standards without quantifiable standards. If by chance, they were unable to prove any of these reasons, agencies are granted a myriad of defenses which give the employer the benefit of the doubt.[140]

E. Even if the Plaintiff Can Establish a Prima Facie Case, the EPA Grants the Employer Wide Exceptions and a Catch-All Exception

In the unlikely event that a plaintiff establishes a prima facie EPA violation by proving the work was substantially equal and performed under similar working conditions, they still may not prevail because of the broad affirmative defenses this statute provides to an employer.[141] Once the plaintiff has satisfied their burden of proof, the burden then falls on the employer to assert and prove any affirmative defenses.[142] For example, the statute states that if the unequal pay between different gendered employees is based on a seniority or merit system, on production measurements, or on anything other than the employees' gender, it does not constitute an EPA violation because it falls under the EPA's exceptions.[143] This offers a catch-all provision for employers to justify their unequal pay for female and male employees if they can point to any other reason the extra pay was provided that is not reliant on either parties' gender.[144] Overall, the statute provides expansive and wide encompassing defenses which gives an employer many different avenues to justify their unequal pay, making it less likely for a plaintiff to recover from the EPA.

Notably, the circuits currently disagree as to what an employer must show to assert an affirmative defense.[145] If the employer claims the unequal pay is tied to any "factor other than sex," most circuits require that this factor be related to a "legitimate" or "acceptable" business matter.[146] In contrast, other

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[139] *See* Blackwell v. United States, 171 Fed. Cl. 682, 689–90 (2024), *aff'd*, 2026 WL 809534 (Fed. Cir. Mar. 24, 2026). This Note uses gendered language to pay respect to the majority of EPA cases brought by female employees as opposed to males. *See* Eisenberg, *supra* note 3, at 823.

[140] *See* 29 U.S.C. § 206(d)(1) ("[E]xcept where such payment is made pursuant to . . . a differential based on any other factor other than sex.").

[141] *See id.*

[142] *See Corning*, 417 U.S. at 196.

[143] *See id.* ("Except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.").

[144] *See id.*

[145] *See* Eisenberg, *supra* note 36, at 58–60.

[146] *See id.*; Behm v. United States, 68 Fed. Cl. 395, 400 (2005). The Sixth, Ninth, Eleventh, and Second Circuits interpret the statute to include this requirement, whereas the other circuits do not. *See* Eisenberg, *supra* note 36, at 59–60, 59 n.298.

circuits do not have this requirement, though, they do require that the factor be in good faith and not discriminatory.[147]

III. Solution

The EPA would be more likely to accomplish its purpose of being an avenue for gender discrimination due to unequal pay if the required standard was "comparable work" and if the burden was on the government employers initially.

A. Congress Should Revise the Statute to Better Accomplish the EPA's Goal of Combating Gender Discrimination in the Workplace

The EPA has arguably become an insufficient remedy for federal employees attempting to find relief for unequal pay based on their gender.[148] Therefore, Congress should amend the statute to change the "equal work" standard to "comparable work," and the burden of proof should fall on the employer initially.

The current standard of "equal work" has proven to be a burden too high in requiring the equal skill, effort, and responsibility of two employees and the work to be conducted under similar working conditions.[149] On the other hand, "comparable work" is a more equitable standard; it does not fall on subtle differences between job duties and instead considers the work as a whole.[150] By lowering the standard to be more accommodating to female employees it promotes Congress' intent of the EPA while still ensuring that frivolous cases do not prevail.

When the statute was first introduced in 1945, the standard was "comparable work" for equal pay.[151] When Congress enacted the statute in 1963, this standard changed from comparable work to equal work.[152] However, many representatives were in favor of keeping the "comparable work" standard because it was a less restrictive standard and better accomplished the statute's goal of addressing unequal pay based on gender.[153] By enacting a

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[147] *See Behm*, 68 Fed. Cl. at 400.

[148] *See The Paycheck Fairness Act*, A.B.A., https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/discrimination/the-paycheck-fairness-act/ (last visited May 7, 2026).

[149] *See* Eisenberg, *supra* note 3, at 831–35.

[150] *See* Hadden, *supra* note 38; Eisenberg, *supra* note 36, at 47–48.

[151] *See* S. Rep. No. 79-1576, at 9–10 (1946).

[152] *See* Cnty. of Wash. v. Gunther, 452 U.S. 161, 185–87 (1981) (Rehnquist, J., dissenting).

[153] *See* 109 Cong. Rec. 9200 (1963) (statement of Rep. Dent); *cf.* 109 Cong. Rec. 9761 (1963) (statement of Sen. McNamara) (arguing that "equal work" does not mean the jobs

standard requiring "comparable work" rather than "equal work," the statute would become more similar to Title VII where the current standard to bring a prima facie case depends on whether the adverse action taken by the employer was related to the employee's protected characteristic or class, rather than comparing the job's duties.[154] This likely would permit more female employees bringing these types of claims to prevail and is more in line with the purpose or intent behind enacting this statute to curb gender discrimination through unequal pay.[155]

For instance, if this Congressional amendment was passed, it could have had a significant effect on the *Blackwell* case, which was recently affirmed by the Federal Circuit.[156] If the Federal Circuit had interpreted the EPA standard to require comparable work which compares the difficulty and worth of the work conducted,[157] Blackwell would have been much more likely to prevail because her claim would not be hindered by subtle differences between her and her male coworker's job or background.[158]

Further, as was the case with the 1945 version of the EPA, language should be added that "express[es] anti-retaliation protections for workers who assist employees with bringing claims under the Act; provides that an employer cannot prohibit workers from disclosing their wages, discussing the wages of others, or inquiring about others' wages; [and] prohibits employers from relying on an employee's prior salary to justify the sex-, race-, or ethnicity- based pay difference[s]."[159] This additional language would assist in combating the problem of employees, typically female, not knowing they are being discriminated against through unequal pay. Further, it would allow those bringing a claim to have access to more information that may assist them in their

need to be identical).

[154] *See* Hadden, *supra* note 38.

[155] *See* 109 Cong. Rec. 9213 (1963) (statement of Rep. Matsunaga) ("[T]here is no longer an excuse for paying women less than men for performing the same work, if there ever was any."); Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) ("Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of 'many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.'" (quoting S. Rep. No. 88-176, at 1 (1963))).

[156] *See* Blackwell v. United States, 2026 WL 809534, at *1 (Fed. Cir. Mar. 24, 2026).

[157] *See* Eisenberg, *supra* note 36, at 46–47.

[158] *See Blackwell*, 2026 WL 809534, at *3 (affirming the lower court's decision that the plaintiff did not prove equal responsibilities despite overall similarities between her role and her male comparator's role).

[159] *California Equal Pay Act: Frequently Asked Questions*, Cal. Dep't of Indus. Rels. (June 2024), [https://perma.cc/W3ZT-6FST].

case. This would also likely fix the problem that may arise under the current language of the statute, that a woman may be paid less because in a previous position, or because historically, they were paid less. Consequently, by amending the statute to explicitly state "comparable work," it aligns closely with Congress's objective of combating gender-based pay discrimination. This amendment is also likely to enhance the prospects of plaintiffs in securing favorable outcomes in court proceedings.

Congress should also amend the statute so that the "similar working conditions" element only applies in relevant situations.[160] A court may decide whether to consider this element based on what is applicable to the plaintiff's occupation, this could arise in a job in the manual labor industry where working conditions are central to the inquiry. For instance, a court may decide not to consider this element due to irrelevance when considering a case of a woman working as a paralegal in a law firm.

B. Increased Effectiveness with Initial Burden of Proof Placed on the Government

Additionally, Congress should amend the EPA so that the burden of proof rests on the employer initially, as opposed to the plaintiff. There are numerous problems with the burden of proof resting on the plaintiff, the biggest hurdle being female employees may not have access to relevant information that may affect their choice to bring a case.[161] The employer typically has more resources than the employee and knows what factors the company took into consideration when determining pay rates: amount of effort their coworker puts in, responsibilities their coworker has, and the employee's skill. By making the burden of proof rest on the employer initially, it may dissuade employers from practicing unequal pay and discriminatory practices. Further, given that most EPA cases are dismissed at summary judgment, if the burden of proof was on the government initially, there would be a higher chance of plaintiffs getting their day in court.[162]

Conclusion

The EPA creates a substantial burden for a plaintiff bringing a prima facie EPA violation, which can cause her to be unable to find relief, even in cases where there is "equal work" for unequal pay.[163] Therefore, Congress should

[160] *See* 29 U.S.C. § 206(d)(1).

[161] *See* Eisenberg, *supra* note 36, at 63.

[162] *See* Eisenberg, *supra* note 3, at 817 ("Courts granted 68% of employer motions for summary judgment on equal pay claims.").

[163] *See id.* at 831–33.

amend the statute to modify the statutory language to require "comparable work" for equal pay. This change is supported by the legislative history of the statute and the purpose behind enacting the statute.[164] Further, Congress should remedy the statute by placing the burden of proof on the government employers or agencies initially since they have access to more information and resources and to ensure plaintiffs get their day in court.

Now more than ever, the EPA providing a sufficient remedy is important due to the rebuke and revocation of diversity, equity, and inclusion safeguards conducted by the current administration.[165] Protections for women in the workplace are in peril, therefore a more sufficient remedy is vital.

[164] *See supra* Sections I.A, II.B.

[165] *See generally* Matthew J. Camardella et al., *Trump Administration Revokes EO 11246, Prohibits 'Illegal' DEI: What the EO* Ending Illegal Discrimination and Restoring Merit-based Opportunity *Means for Employers*, Jackson Lewis (Jan. 23, 2025), [https://perma.cc/S7JQ-8SAF].

"The People's Court?" Transforming the Court of Federal Claims to a Model of Judicial Efficiency

Zack Minsk*

Introduction

"It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same, between private individuals."[1] President Abraham Lincoln declared these words in his first annual message to Congress, delivered just eight months after the outbreak of the Civil War.[2] They are also engraved on the foyer wall of the Howard T. Markey National Courts Building, which houses both the U.S. Court of Federal Claims ("Court of Federal Claims") and the United States Court of Appeals for the Federal Circuit ("Federal Circuit").[3] In the same speech, Lincoln argued that the Court of Claims—the predecessor to the Court of Federal Claims—should be authorized to render final judgments.[4]

The Court of Federal Claims' subject matter jurisdiction is codified in 28 U.S.C. § 1491, also known as the Tucker Act.[5] The Court of Federal Claims hears any monetary claim against the United States founded either upon the Constitution, an act of Congress, any regulation of an executive department, any express or implied contract with the United States, or for any liquidated or unliquidated damages in non-tort cases.[6] In short, the Court of Federal Claims "has jurisdiction over a wide range of claims against the government including . . . contract disputes, bid protests, takings claims, tax refund suits, patent and copyright matters, Indian claims, civilian and military pay cases

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[1] Abraham Lincoln, U.S. President, First Annual Message to Congress (Dec. 3, 1861).

[2] *See id.*

[3] *See* U.S. Ct. of Fed. Claims, Court History Brochure (2018), [https://perma.cc/J5EV-KA2R].

[4] *See* Lincoln, *supra* note 1.

[5] *See* U.S. Dep't of Just., Civ. Res. Manual § 47 (2013), [https://perma.cc/NLT9-HJGY].

[6] 28 U.S.C. § 1491.

and vaccine cases."[7] The Court of Federal Claims has exclusive jurisdiction over claims exceeding $10,000.[8]

The Court of Federal Claims' docket is rapidly increasing.[9] During fiscal year 2023, the Court of Federal Claims experienced a 28.5% increase in its general jurisdiction cases and a 13.4% increase in vaccine petitions.[10] During fiscal year 2023, the Court of Federal Claims had 5,597 pending cases, terminated 2,072 cases, while 2,214 cases were filed.[11] This left the Court of Federal Claims with 5,739 pending cases at the end of fiscal year 2023.[12] Docket backlog is not unique to the Court of Federal Claims; it is a significant issue plaguing federal courts throughout the country.[13] "Over the past 20 years, the number of civil cases pending more than three years rose 346 percent, from 18,280 on March 31, 2004, to 81,617 on March 31, 2024."[14]

The judges sitting on the Court of Federal Claims play an integral role as guardians of the nation's coffers.[15] From "October 1, 2023, to September 30, 2024, the Court of Federal Claims disposed of 886 complaints and 1,491 vaccine petitions."[16] The total claimed amounted to almost $1.6 trillion.[17] The Court of Federal Claims rendered judgments to the claimants in the sum of over $1 trillion—roughly equivalent to the gross domestic product of Saudi Arabia.[18]

In addition to the significant amount of money being litigated, the Court of Federal Claims is also unique because the U.S. government is the defendant in every case. Therefore, governmental as well as judicial efficacy and

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[7] U.S. Dep't of Just., *supra* note 5, § 47.

[8] *Id.*

[9] *See* U.S. Ct. of Fed. Claims, Statistical Report for the Fiscal Year October 1, 2022–September 30, 2023 1 (2023), [https://perma.cc/MK4L-F6PU].

[10] *Id.* It should be noted that the increase in vaccine claims could have been related to the COVID-19 pandemic, but that has no effect on the 28.5% increase in the Court of Federal Claims' general jurisdiction docket.

[11] *See id.* at 2.

[12] *Id.* Of these 5,739 pending cases, the majority of general jurisdiction cases were Takings cases (1,108). *See id.* Contract cases were a distant second consisting of 247 of the pending general jurisdiction cases. *See id.*

[13] *See The Need for Additional Judgeships: Litigants Suffer When Cases Linger*, U.S. Cts. (Nov. 18, 2024), [https://perma.cc/HGF2-CURS].

[14] *Id.*

[15] *See* U.S. Ct. of Fed. Claims, Statistical Report for the Fiscal Year October 1, 2023–September 30, 2024 1 (2024), [https://perma.cc/74Z3-YKE4].

[16] *Id.*

[17] *See id.* ($1,538,609,166,288.00).

[18] *See id.* ($1,063,606,739.25); *GDP*, Int'l Monetary Fund, [https://perma.cc/X2GT-GBD6] (last visited Apr. 16, 2026).

legitimacy is associated with the Court of Federal Claims' case management. Plaintiffs include those represented by Big Law firms to pro se plaintiffs.[19] Therefore, harkening back to Lincoln's words, the Court of Federal Claims is emblematic of a functioning democracy—earning the reputation as the "People's Court" and "the keeper of the nation's conscience."[20]

Given these significant sums, the United States being on the right-hand side of the "*v*" in every case, and the Court of Federal Claims' unique position as stewards between the government and private citizens, the Court of Federal Claims should strive to become the model of case management and efficiency. Thus, the Court of Federal Claims must examine its procedures and enact changes to increase efficiency, which ultimately will reduce judicial workload and transform the "People's Court" into a model of judicial efficiency, fairness, and accuracy.[21] With Lincoln's emphasis on rendering prompt justice at the Court of Federal Claims, the court has an opportunity to reform its current practices and serve as the model for efficient adjudication for other federal courts.[22] Due to its rapidly increasing docket, this is a crucial moment for the Court of Federal Claims to examine its current practices and implement efficient methods to accelerate adjudication and reduce docket backlog.

This Note proceeds in five parts. The introduction provides an overview of the Court of Federal Claims arguing that the court has the responsibility to become a model of judicial efficiency because of the vast sums being litigated and its unique status as "The People's Court," where the United States is the defendant in every case. Through case management reform measures, the Court of Federal Claims can bolster governmental and judicial legitimacy. Part I examines how state and federal courts have improved efficiency through measures including, but not limited to, setting strict deadlines, shortened discovery periods, a policy of no continuances, and using a differentiated case management ("DCM") or track system.[23] Part II analyzes how the Court

[19] Any private American citizen may file a claim in the Court of Federal Claims, provided the claim does not sound in tort. *See* 28 U.S.C. § 1491(a)(1). Pro se plaintiffs are individuals who represent themselves in legal proceedings without the assistance of counsel.

[20] U.S. Ct. of Fed. Claims, *Focus On: U.S. Court of Federal Claims: The People's Court*, Fed. Law., Oct. 2007, at 28, [https://perma.cc/KF2D-XVDN].

[21] *See infra* Section III.B.

[22] *See* U.S. Ct. of Fed. Claims, *supra* note 3; *Ask the Judge: Hon. Matthew Solomson*, U.S. Ct. of Fed. Claims Bar Ass'n (Dec. 28, 2021), [https://perma.cc/6DX9-4HC7].

[23] The concept's essence is that "different types of cases need different types and levels of judicial management." *See* James S. Kakalik et al., Inst. for Civ. Just, Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act 11–12 (1996). Thus, a number of separate tracks are created, each of which entails a structured approach to case scheduling and management and cases are assigned

of Federal Claims could implement these efficiency measures. Part III summarizes the analysis section by making succinct recommendations for the court and discusses relevant critiques and hazards of accelerated adjudication. Finally, the conclusion urges the Court of Federal Claims to adopt these efficiency measures without expanding court personnel in order to fulfill its core mission of rendering prompt justice.

For the Court of Federal Claims to expedite its docket, this Note makes four recommendations. First, the Court of Federal Claims should adopt the U.S. District Court for the Eastern District of Virginia's ("EDVA") six key ingredients, which provide for successful case-flow management techniques. These techniques include: early case management, strict discovery schedules, frequent communication with opposing counsel, a policy of no continuances with early and firm trial dates, continuity on the bench, and judicial and practitioner acceptance. Second, the Court of Federal Claims should adopt early judicial case management, which is defined as any schedule, conference, status report, joint plan, or referral to ADR within 180 days of case filing. Third, the Court of Federal Claims should contemplate using the U.S. International Trade Commission's ("ITC") initial determinations model, where a judge can rule on both dispositive and non-dispositive motions prior to trial. Fourth, the Court of Federal Claims should adopt a DCM or track system based on case type and the Federal Trade Commission's ("FTC") previous model, which assigned a case to a particular track based on factors such as factual complexity, whether novel legal theories are being raised, precedent, and the number of parties.[24] Additionally, the Court of Federal Claims should also consider using the FTC's eight months from filing to trial deadline.

Ultimately, the entire Court of Federal Claims—from judges to practitioners—must accept and foster a culture of expediency. Judges must enforce strict deadlines, a policy of no continuances, page limits, and emphasize transparency to encourage the parties to discuss settlement options throughout the dispute. Although mediation and alternative dispute resolution ("ADR") are often recommended as an efficient means to accelerate adjudication, this will likely be unsuccessful as many disputes before the Court of Federal Claims involve novel legal issues and are thus not likely to be resolved through alternative measures.[25]

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early to these tracks. *Id*. In contrast, the traditional approach is the judicial discretion model, in which judges make management decisions for general civil cases on a case-by-case basis.

[24] *See infra* Section I.B.

[25] In interviews conducted for this note, many of the Court of Federal Claims' practitioners were skeptical of the effectiveness of ADR at the court. To ensure open and transparent conversations, the names of interviewees will remain anonymous.

I. Judicial Efficiency Models: Federal and State Courts

The EDVA has earned its reputation as the "Rocket Docket" by fostering a culture of expediency through key procedural reforms, clearly articulated expectations, and complete judicial and practitioner acceptance.[26] The FTC previously used the DCM, also called a track system, designating certain cases for accelerated adjudication depending on factual complexity and novel legal issues raised.[27] Currently, the FTC expedites procedures through its rules instead of a track system.[28] The ITC established a pilot program to test expedited procedures in May 2021.[29] This program, again, features the track system, granting administrative law judges ("ALJs") discretion to allow parties to file motions identifying specific issues that may resolve the investigation expeditiously or facilitate settlement.[30] Similar to the ITC and FTC, New Jersey also adopted a track system to streamline litigation.[31] Finally, New York's Commercial Litigation Division altered its practices to expedite the docket primarily through triggering language in New York commercial contracts that places a dispute on an expedited timeline.[32]

A. EDVA & the "Rocket Docket"

In 2015, the EDVA had the fastest trial docket in the nation for the eighth straight year and is routinely referred to as the "fastest, fairest federal court in the country."[33] The average EDVA case lasted only six months from filing to disposition, including settlement.[34] The national average, as of 2013, was eight and a half months.[35] More strikingly, the median time to

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[26] *See infra* Section I.A.

[27] *See* Heather Russell Koenig, *The Eastern District of Virginia: A Working Solution for Civil Justice Reform*, 32 U. Rich. L. Rev. 799, 822 (1998); *see also infra* Section II.B.

[28] *See* Nikhil Singhvi, John Graubert & Andrew Smith, *Knotty FTC Adjudication Risks Becoming Even More Tangled*, Law360 (May 19, 2022, 6:16 PM), [https://perma.cc/G9RG-RS4N].

[29] John Brew & Frances P. Hadfield, *USITC Establishes Pilot Program to Test Interim ALJ Initial Determinations on Key Issues in Sec. 337 Investigations*, Crowell & Moring (May 21, 2021), [https://perma.cc/5PKH-F383].

[30] *See id.*

[31] *See infra* Section I.D.

[32] *See infra* Section I.E.

[33] Nicolas Kyriakides, Arunima Shrikhande & Lexi Stefanatos, *The Rocket Docket System: A Model for Active Case Management in Countries Facing Judicial Delays*, 34 N.Y. Int'l L. Rev. 79, 79, 81 (2021) (quoting Koenig, *supra* note 27).

[34] Attison L. Barnes III, Stephen J. Obermeier & Krystal B. Swendsboe, *The Rocket Docket: Ensuring Clarity and Predictability in Civil Litigation*, Litigation, Winter 2023, at 34.

[35] Mark Spottswood, *The Perils of Productivity*, 48 New Eng. L. Rev. 503, 509 (2014).

jury trial at the EDVA was nine months, compared to the national average of 26 months.[36] "Prior to the implementation of COVID-19 guidance, the average length of time between filing a civil case and trial was 11 months."[37] Despite "slowdowns related to COVID-19 precautions, the EDVA remains one of the fastest courts in which a litigant may file a civil case and obtain final resolution."[38]

Prior to becoming the "Rocket Docket," the EDVA was one of the slowest districts in the United States with a backlog of over 1,300 civil cases pending as of 1954.[39] Judge Walter E. Hoffman, appointed to the court that same year, decided to take action.[40] On July 31, 1962, Judge Hoffman wrote to the attorneys within his division that a "dramatic change in procedure relating to the preparation of cases for trial [was necessary] to effect a saving in court time, jury expense, last-minute settlement, expenses of expert witnesses, and many other factors."[41] By 1972, this backlog was reduced to just 288 cases and by 1981 the median time from filing to trial in civil cases was reduced from ten to five months.[42]

The following are the key procedural elements that transformed the EDVA into the "Rocket Docket:" (1) early case management such as early scheduling of conference and pre-trial procedures; (2) completion of discovery which adheres to strict and short deadlines with very limited exceptions; (3) frequent communication with opposing counsel; (4) a policy of almost no continuances, where early and fixed trial dates set about six months from the first conference; (5) continuity on the bench; (6) judicial and practitioner acceptance that engenders a culture of expedition.

1. Early Case Management

Timing procedures are an extremely important force behind the Rocket Docket.[43] Rule 16(b) scheduling orders are typically issued shortly after the defendant's appearance, and, pursuant to Local Civil Rule 16(B), must be issued "no later than sixty (60) days from first appearance or ninety (90) days after service of the complaint."[44] Within this timeframe, the court also enters an order fixing the cut-off dates for the respective parties to complete

[36] *Id.* The Court of Federal Claims does not conduct jury trials; all cases are tried to the bench. 28 U.S.C. § 174(a).

[37] Barnes, Obermeier & Swendsboe, *supra* note 34, at 34.

[38] *Id.*

[39] *See* Kyriakides, Shrikhande & Stefanatos, *supra* note 33, at 81.

[40] *See* Terence P. Ross, *The Rocket Docket*, Litigation, Winter 1996, at 49.

[41] *Id.*

[42] Kyriakides, Shrikhande & Stefanatos, *supra* note 33, at 89.

[43] *See* Barnes, Obermeier & Swendsboe, *supra* note 34, at 35.

[44] *See id.*; E.D. Va. R. 16(B).

the discovery process, the date for a final pretrial conference, and, whenever practicable, the trial date.[45] Moreover, the parties and their counsel are bound by the dates specified in the orders and extensions or continuances are rarely granted.[46]

A 1996 RAND case management study evaluating the Civil Justice Reform Act of 1990 found this "[s]hortened time to discovery cutoff is associated with significantly decreased attorney work hours."[47] Magistrate judges also play a crucial role at the EDVA as they are authorized, pursuant to Local Civil Rule 26 (A)(2), to oversee scheduling, including planning conferences and issuing scheduling orders.[48] Additionally, all non-dispositive motions are automatically assigned to magistrate judges.[49] Discovery begins after the receipt of the scheduling order rather than after the Rule 26(f) conference.[50] "The scheduling order also typically provides that a party may not exceed five nonparty, non-expert depositions, absent leave of the court."[51] On the other hand, the EDVA allows for a greater number of interrogatories—30 instead of the 25 allowed by the federal rules.[52]

Early judicial case management—defined as "any schedule, conference, status report, joint plan, or referral to ADR within 180 days of case filing"—has resulted in a reduction of one and a half to two months in time to disposition.[53] "In the Richmond Division, after the initial pretrial conference is held, the judge will issue his/her own initial pretrial Order that sets pretrial deadlines, discovery deadlines, the final pretrial conference and the trial date."[54] Initial pretrial orders vary depending on the nature of the dispute.[55] In patent cases, for example, a pretrial order will include dates specific

[45] E.D. Va. Civ. R. 16(B).

[46] *See id.*; Barnes, Obermeier & Swendsboe, *supra* note 34, at 35.

[47] Kakalik et al., *supra* note 23, at 2; The Civil Justice Reform Act of 1990 (CJRA) sought to make the federal civil justice system faster, less expensive, and improve accessibility through case management and judicial efficiency measures, such as tracking judicial performance or a judicial backlog report. The 1996 RAND study concluded that the CJRA did not significantly reduce costs or delays overall. *See id.* at 1.

[48] E.D. Va. Civ. R. 26(A)(2).

[49] *See, e.g.*, Initial Order at 2–3, *In re* Capital One Consumer Data Security Breach Litigation, 488 F. Supp. 3d 374 (E.D. Va. 2020) (No 1:19-md-02915).

[50] *See* Barnes, Obermeier & Swendsboe, *supra* note 34, at 35.

[51] *Id.*

[52] *See id.*

[53] Kakalik et al., *supra* note 23, at 14.

[54] DimuroGinsberg PC, The Rocket Docket 28 (2012), [https://perma.cc/7T3D-44LM] (on file with the Federal Circuit Bar Journal).

[55] *See id.*

to patent litigation, such as a tutorial hearing, a claim construction briefing deadline, and a claim construction hearing.[56]

A standard-form initial pretrial order from the EDVA sent out on April 16, 2009 illustrates the compressed pretrial schedule.[57] It set an initial pretrial conference before a magistrate judge for May 13, 2009, at which the parties were to arrange for Rule 26(a)(1) disclosures and develop a discovery plan that would complete discovery by July 10, 2009.[58] The order also required answers to be filed "within twenty (20) days or as otherwise ordered or required under the federal and local Rules," authorized discovery to begin upon issuance of the order, and limited each party to "five (5) non-party, non-expert witness depositions."[59] It then scheduled a final pretrial conference for July 16, 2009, requiring Rule 26(a)(3) disclosures, witness and exhibit lists, and a written stipulation of uncontested facts.[60] Finally, it directed that trial be held within four to eight weeks thereafter.[61]

The expeditious effect of this pretrial order cannot be overstated. The result is that in a typical case: (1) "[t]he initial pretrial conference will be held roughly six top [sic] eight weeks after the case is filed;" (2) "[a] final pretrial conference will be held roughly two months later;" (3) "[s]ummary judgment motions must be filed sufficiently before the trial date for the court to consider them;" (4) "[t]rial will be held four to eight weeks later;" (5) "from start (when the complaint is filed) to finish (when trial begins), the case will be set for trial 18 to 22 weeks (roughly five to six months) after the case is filed."[62]

2. Discovery

These strict scheduling requirements produce an intense discovery process.[63] Discovery is typically limited to 90 to 120 days after the Rule 26(f) conference; however, scheduling orders often permit the parties to serve discovery requests before that conference.[64] "No discovery motion may be filed . . . until counsel have met and attempted to resolve the controversies informally, and the

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[56] *See id.*

[57] *See* Loren Kieve, Eastern District of Virginia Pretrial Procedures 3–4 (2010), [https://perma.cc/LJ88-WV43]. It is important to clarify that associate judges instead of magistrate judges are more involved in patent cases early on and will participate in the initial pre-trial conference and often hear non-dispositive and discovery motions. *See* DimuroGinsberg PC, *supra* note 54, at 28.

[58] Kieve, *supra* note 57, at 3.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 4.

[62] *Id.*

[63] *See* Barnes, Obermeier & Swendsboe, *supra* note 34, at 36.

[64] *Id.*

court will not rule on discovery motions not accompanied with a statement by counsel that such a meeting took place."[65] Local rules also require parties to serve objections within fifteen days of service and thus objections must be served before responses are due.[66] This shortened discovery process and the need to file early objections "encourage[s] litigants to target their discovery requests, avoid boilerplate objections, and focus on the most important issues during discovery disputes," thereby narrowing the issues presented to the court and conserving judicial resources by avoiding minor or inconsequential disputes.[67] Furthermore, the court's compressed discovery timeline often requires litigants to undertake document collection and initial review immediately after entering a case, even before a motion to dismiss is resolved.[68]

"In [EDVA's] Alexandria Division, litigants may seek rapid resolution of any objection disputes using the court's one-week procedure for non-dispositive motions."[69] For example, "[a] litigant may file a non-dispositive motion by 5 p.m. on Friday for a hearing [scheduled] on the next Friday. The response in opposition is due by 5 p.m. on Wednesday and a reply must be filed as early as possible on Thursday."[70] Therefore, "litigants often raise fundamental issues of privilege or immunity, or other key case-defining issues, in pre-response motions as a strategy to ensure that the forthcoming production is as comprehensive as possible."[71] Shortened discovery periods are associated with both a significant reduction in time to disposition and decreased attorney work hours.[72] "If a district court's median discovery cut-off is reduced from 180 days to 120 days, the estimated median time to disposition falls

[65] Kim Dayton, *Case Management in the Eastern District of Virginia*, 26 U.S.F. L. Rev. 445, 458 (1992) (footnotes omitted).

[66] *See id*. at 457.

[67] Barnes, Obermeier & Swendsboe, *supra* note 34, at 36.

[68] *See id.* at 37. Nationwide, the median time from filing to disposition for civil cases was 13.7 months in 2024, an increase from 8.7 months in 2023. *U.S. District Courts—Judicial Business 2024*, Admin. Off. of the U.S. Cts., [https://perma.cc/U7RN-7C72] (last visited Mar. 21, 2026). The following is a timeline of typical civil litigation outside of the EDVA: (1) The complaint and the response (one to three months); (2) discovery phase (three to twelve months depending on complexity); (3) motions and hearings (two to six months); (4) pre-trial settlement and negotiations occur throughout the proceedings; (5) trial (six months to one year); post-trial and appeal (one to two years or more). *How Long Does Civil Litigation Take? Timeline & Expectations*, Barli L. LLC (July 10, 2025), [https://perma.cc/5ZZN-GGMT].

[69] Barnes, Obermeier & Swendsboe, *supra* note 34, at 36–37.

[70] *Id.* at 37.

[71] *Id.*

[72] Kakalik et al., *supra* note 23, at 16.

by about 1.5 months for cases that last at least nine months."[73] Additionally, lawyer work hours decrease by approximately 17 hours.[74] The RAND study further reported no statistically significant change in attorney satisfaction or perceived fairness.[75]

"The EDVA [also] limits the number of interrogatories . . . in a civil case to thirty—including parts and subparts—and counsel may not waive this requirement."[76] "[A] party may not exceed five nonparty, non-expert depositions, absent leave of the court."[77]

3. Frequent Communication with Opposing Counsel

The EDVA achieves expedited resolutions by not requiring litigants to obtain permission to file a motion; however, litigants must certify that they met and conferred with opposing counsel prior to filing.[78] Litigants are generally required to set an oral argument date for each motion, and the court encourages frequent communication between opposing parties.[79] This requirement, codified in Local Rule 37(E), mandates that counsel confer before filing motions, thereby decreasing the filing of unnecessary discovery motions.[80] Thus, no motion concerning discovery may be filed until both parties attempt to resolve the discovery issue in controversy.[81] Motions are deemed withdrawn if the movant fails to set a hearing within 30 days after filing the motion.[82] Judges will often rule on a pending motion from the bench especially if it is non-dispositive or the judge will signal how the motion will be resolved to enable the parties to reach a compromise.[83] "Judges in the Alexandria Division will also cancel hearings and rule on the papers where appropriate," therefore forcing litigants to not skirt their briefing obligations or plan to rely solely on oral arguments, which may not be allowed.[84] During oral arguments, counsel is "encouraged not to restate the same arguments in their briefs and are similarly advised . . . not to present duplicative witnesses,

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[73] *Id.*

[74] *Id.* (while attorney work hours may decrease over months, as the study suggests, expedited proceedings also engender midnight filings and quick turnarounds).

[75] *Id.*

[76] Koenig, *supra* note 27, at 809.

[77] Barnes, Obermeier & Swendsboe, *supra* note 34, at 35.

[78] *See id.* at 37.

[79] *See id.* at 37–38.

[80] *See* E.D. Va. Civ. R. 37(E).

[81] *See id.*

[82] *See* E.D. Va. Civ. R. 7(E).

[83] *See* Barnes, Obermeier & Swendsboe, *supra* note 34, at 38.

[84] *See id.*

particularly in a bench trial."[85] This practice shortens hearings as well as trials, preserving court resources.[86] An EDVA judge will commonly "send lawyer[s] out to the hallway to discuss an issue and return to the courtroom after the discussion, primarily to avoid the need for a follow-up motion on a later date."[87]

4. No Motions for Continuances

The EDVA will rarely grant motions for continuances.[88] In fact, one EDVA lawyer lamented, "short of bleeding to death in the courtroom, you are not going to get a continuance."[89] EDVA's policy against continuances originated with Judge Hoffman, the EDVA's principal reformer, "who was reported to have semi-facetiously referred to the term 'continuance' as 'obscene.'"[90] The court's aversion towards continuances is codified in Local Civil Rule 7(I), which states, "[a]ny requests for an extension of time relating to motions must be in writing and, in general, will be looked upon with disfavor."[91] Additionally, Local Civil Rule 16(B) states that "[t]he parties and their counsel are bound by the dates specified in any such orders and no extensions or continuances thereof shall be granted in the absence of a showing of good cause."[92]

5. Firm Trial Dates

Judge Hoffman also established firm trial dates.[93] "The judicial philosophy for the Rocket Docket has long been that an early and fixed trial date is the best motivator for parties to settle their differences."[94] The 1996 RAND study observed that the "'rocket docket' approach of setting early and firm trial dates yielded a 'reduction of 1.5 to 2 months in estimated time to disposition but no further significant change in lawyer work hours.'"[95] Early and fixed trial dates expedite the docket in several other ways. An immediate trial date diminishes preparation time, which in turn, encourages settlement

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *See id.* at 35. Continuances add weeks or months to civil litigation proceedings. *Avoiding Unnecessary Delays: Role of Continuances in Civil Litigation*, Cochran, Kroll & Assocs., P.C. (June 27, 2025), [https://perma.cc/FSL4-5LFE].

[89] Koenig, *supra* note 27, at 805.

[90] Barnes, Obermeier & Swendsboe, *supra* note 34, at 34.

[91] E.D. Va. Civ. R. 7(I).

[92] E.D. Va. Civ. R. 16(B).

[93] *See* DimuroGinsberg PC, *supra* note 54, at 6.

[94] *Id.* at 7.

[95] Spottswood, *supra* note 35, at 527 (quoting Kakalik et al., *supra* note 23, at 14).

as a trial date without adequate preparation time can be daunting and forces parties to the negotiating table.[96] "Hard-fought disputes can end abruptly when an opposing party is unable to secure a continuance of an impending trial."[97] Typically, "[t]rial is scheduled at the final pretrial conference . . . for a date around four to eight weeks later."[98] Additionally, parties are encouraged to appear before a magistrate judge for a settlement conference.[99] "[EDVA] judges routinely advise litigants regarding the benefits of mediation and the availability of a magistrate judge for settlement conferences."[100] The availability of mediation options helps "overcome the barriers to pursuing settlement, such as posturing or a reluctance to be perceived as weak."[101]

6. Continuity on the Bench

The Rocket Docket's judicial speed and efficiency are aided by continuity on the bench.[102] EDVA judges serve for a long time.[103] The continuity on the bench helps safeguard the court's expeditious values and unique procedures.[104]

EDVA judges highlighted four main reasons why they believed that the EDVA was so efficient. First, scheduling conferences were set promptly.[105] Second, "trials are set about six months from the first conference."[106] Third, an extremely high threshold must be met for a continuance.[107] Fourth, "judges manage the dockets for the convenience of the parties, not for the lawyers."[108]

7. Judicial and Practitioner Acceptance

In addition to procedures that engender accelerated adjudication, the EDVA has also fostered a culture of expeditiousness. Many EDVA judges

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[96] *See* Barnes, Obermeier & Swendsboe, *supra* note 34, at 38.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *See id.* at 34.

[103] *See id.* Judge Hoffman served for 42 years. *Id.* "Former Chief Judge Albert V. Bryan Jr.—who instituted the issuance of early scheduling orders and a regular motions day in the Alexandria Division in the 1980s—served as a member of the court for 48 years." *Id.* Also, four former judges, three current senior judges—Robert Doumar, T.S. Ellis, and Claude Hilton—as well as a current judge, Leonie Brinkema, have all served on the court for more than 30 years. *Id.*

[104] *Id.*

[105] Kyriakides, Shrikhande & Stefanatos, *supra* note 33, at 90.

[106] *Id.*

[107] *Id.*

[108] *Id.*

have been serving for more than thirty years.[109] "The EDVA bar is a tight-knit community that prides itself on its courtesy and professionalism."[110] The EDVA requires unadmitted counsel to associate with local counsel for appearances in any case and this requirement is more than a mere formality.[111] Local rules "require[] that local counsel . . . sign and file all pleadings in a case, and . . . local counsel cannot withdraw their appearance 'without leave of the Court.'"[112] Further, local counsel is responsible for ensuring that EDVA procedures are followed and standards of professionalism are upheld.[113] While the "Rocket Docket's" speed may create unique challenges, EDVA practitioners praise the Rocket Docket's clarity and predictability that its culture and procedures foster.[114] "Predictable deadlines and expectations allow practitioners to advise their clients effectively and to focus . . . on the areas of greatest concern."[115]

B. Federal Trade Commission and its Expedited Adjudication Model

The FTC, "an independent federal agency created in 1914 by the FTC Act[,] . . . investigates natural persons or entities to prevent and impede unfair, deceptive, or fraudulent practices in the marketplace" and promotes competition by enforcing antitrust laws.[116] Expeditious proceedings are one of the core principles of the FTC.[117] According to its governing rules, found in 16 C.F.R. § 3.1, "[t]o the extent practicable and consistent with requirements of law, the Commission's policy is to conduct such proceedings expeditiously."[118]

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[109] *See* Barnes, Obermeier & Swendsboe, *supra* note 34, at 34.

[110] *Id.*

[111] *See id.*

[112] *Id.*

[113] *See id.*

[114] *See id.* at 35.

[115] *Id.* Whether such a "local counsel" requirement would translate to the Court of Federal Claims is less clear. Unlike the EDVA, which draws from a geographically concentrated bar, the Court of Federal Claims operates as a national court without a defined local bar. *See* Fed. Cl. R. 83.1(a)(1)(A). However, a modified version of this practice, such as requiring admission to the court's bar and demonstrated familiarity with its procedures, could serve a similar function in promoting efficiency and professionalism. Counsel who frequently appear before the Court of Federal Claims could, in effect, become stewards of expeditiousness, while the court could also make its "culture of expediency" clear in the local rules prior to filing. Again, pro se plaintiffs should be given latitude in accord with being "The People's Court."

[116] *Federal Trade Commission (FTC)*, Legal Info. Inst. (July 2021), [https://perma.cc/P7RP-RN84].

[117] *See* 16 C.F.R. § 3.1 (2026).

[118] *Id.*

Thus, according to practitioners, administrative adjudication at the FTC "moves at warp speed."[119]

Evidentiary hearings are scheduled eight months after the FTC issues the complaint or after five months if the commission seeks preliminary relief in federal district court.[120] As some practitioners note:

With only a matter of months from the filing of the complaint through the start of the trial, pretrial procedures are accelerated by necessity. For example, the parties meet to discuss scheduling and exchange initial disclosures within five days of the filing of the answer, the ALJ convenes a scheduling conference within 10 days of the filing of the answer, and the ALJ enters a scheduling order two days after the conference.[121]

Motions practice also moves expeditiously at the FTC. As a general rule, an opposing party has ten days after service to respond to any written motion.[122] In contrast, at the Court of Federal Claims, a response to a written motion must be filed within 14 days after service—the same timeline as the EDVA.[123] The ALJ must also rule on motions within fourteen days after the filing of all motion papers.[124] Also, unlike the EDVA, discovery at the FTC does not occur before the issuing of a prehearing scheduling order, unless all parties expressly agree otherwise.[125]

In its 1998 rule changes, the FTC proposed and adopted "fast track" procedures.[126] However, in 2009, the agency amended these rules eliminating Rule 3.11A ("Fast Track Proceedings") instead opting to streamline agency adjudication via expedited deadlines in its rules.[127] Previously, the FTC utilized certain factors to determine which cases are appropriate for this expedited adjudication. "For example, if it is likely that an agency action will raise new, untested, or novel theories of antitrust liability, the commission may not

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[119] Nikhil Singhvi, John Graubert & Andrew Smith, *Knotty FTC Adjudication Risks Becoming Even More Tangled*, Law360 (May 19, 2022, at 6:16 PM ET), [https://perma.cc/95N9-2HTJ].

[120] *See id.*

[121] *Id.*

[122] *See* 16 C.F.R. § 3.22(d) (2026). The deadlines are set in terms of calendar days. *See In re* Microsoft Corp., 2025 WL 2355464, at *1 (F.T.C. May 9, 2025) (setting a five-day expedited deadline to respond to a motion that included two weekend days).

[123] *See* Fed. Cl. R. 7.2(a)(1); E.D. Va. Civ. R. 7(F)(1).

[124] 16 C.F.R. § 3.22(e).

[125] 16 C.F.R. § 3.31(a).

[126] Federal Trade Commission Rules of Practice, 63 Fed. Reg. 7525, 7525–28 (Feb. 13, 1998) (to be codified at 16 C.F.R. pt. 3).

[127] *FTC Issues Final Rules Amending Parts 3 and 4 of the Agency's Rules of Practice*, Fed. Trade Comm'n (Apr. 27, 2009), [https://perma.cc/C7M8-C4EP].

designate the speediest alternative."[128] Additionally, factual complexity may also limit the expedited track alternative. These are all valuable considerations for determining which cases would be suitable for expedited proceedings at the Court of Federal Claims.

C. Expedited Adjudication at the United States International Trade Commission

Should the ITC, an administrative agency which investigates, inter alia, patent infringement, be considered an even more efficient forum than the EDVA? Most infringement investigations, called Section 337 investigations, are completed within 12–15 months with an average of 17.6 months from commencement of the investigation to a final determination by the ITC on the merits.[129] By comparison, the amount of time to verdicts in U.S. District Courts is 27.8 months.[130] Discovery at the ITC is "typically . . . completed by the fifth or sixth month after filing, perhaps due in part to the abridged time period for responding to discovery requests: ten days or less. An evidentiary hearing is usually held in the sixth or seventh month following filing."[131]

On May 12, 2021, the ITC implemented a new pilot program that has several important implications. First, ALJs can issue interim initial determinations ("IDs") on case-dispositive issues 45 days prior to the evidentiary hearing which cost-effectively resolves its investigations.[132] These "interim IDs on discrete issues" enable ALJs to "(1) narrow the investigation prior to the evidentiary hearing or (2) dispose of the investigation altogether."[133] Furthermore, it is anticipated "that interim ID issues will be case-dispositive" on issues such as "infringement, invalidity, patent eligibility, [or] standing."[134] Similarly, "ALJ[s] may hold expedited hearings on designated issues" and

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[128] Koenig, *supra* note 27, at 821–22.

[129] Yar R. Chaikovsky, Jordan Coyle & Philip Ou, *Trade Secret Litigation at the US International Trade Commission: A Rising Fence*, White & Case (Dec. 8, 2023), [https://perma.cc/F7BA-SHAB]; David Hickerson, *What Every Multinational Company Should Know About . . . Section 337 Cases at the International Trade Commission*, JD Supra (July 13, 2023), [https://perma.cc/D45A-YRPT].

[130] Chaikovsky, Coyle & Ou, *supra* note 129.

[131] Barbara Mandell, *Economically Efficient Patent Litigation*, Software L. Bull., June 2007, at 9.

[132] *See* Vincent C. Capati, *Pilot Program: Expediting Case-dispositive Intellectual Property Issues at the International Trade Commission*, Nixon Peabody (Jan. 4, 2022), [https://perma.cc/H7PN-E3Y7].

[133] *Id.*

[134] *Id.* It is important to note that a review process does exist for these IDs. "Petitions for review of the interim ID are due eight calendar days after the interim ID issues and responses are due five business days later." *Id.*

"may stay discovery on the remaining issues pending resolution of the 100-day proceeding."[135] "[A] petition to review an initial determination in a 100-day proceeding is due within five business days after service of the initial determination."[136] "Absent review, the initial determination on these issues becomes final within 30 days."[137]

Second, the pilot program allows "ALJ[s] [to] *sua sponte* assign issues to the program or allow parties to move particular issues into the program."[138]

Third, the ITC implemented a DCM or track system as part of the pilot program.[139] "For modification proceedings or advisory opinions involving a pure question of law . . . the Commission's final decision [is] normally issued within 60-90 days from the date that the Commission's notice to conduct the proceeding is published in the Federal Register."[140] In contrast, "[f]or modification proceedings or advisory opinions involving minimal factfinding . . . the Commission's final decision [is] normally issued within 90–180 days from the date that the Commission's notice to conduct the proceeding is published in the Federal Register."[141] If the modification or advisory opinions require extensive factfinding, the ITC refers the matter to an ALJ and will issue its final decision within six to nine months from the date of notice in the Federal Register.[142]

Other important factors such as "[t]he specialized knowledge and experience of ITC [ALJs] and commissioners also contribute to the efficient resolution of disputes."[143] Additionally, "the ITC has no jurisdiction to award damages, only injunctive relief and fines."[144]

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[135] Jo Dale Carothers, *New ITC Rules for Patent Infringement Cases: Adding Fuel to the Ultimate Rocket Docket*, Weintraub Tobin: The IP L. Blog (May 23, 2018), [https://perma.cc/3KAE-Z4PV].

[136] *Id.*

[137] *Id.*

[138] Capati, *supra* note 132.

[139] *See Pilot Program Will Test Expedited Procedures for USITC Modification and Advisory Opinion Proceedings*, U.S. Int'l Trade Comm'n, [https://perma.cc/8TUC-LZYT] (last visited Apr. 2, 2026).

[140] *Id.*

[141] *Id.*

[142] *See id.*

[143] Mandell, *supra* note 131 at 9.

[144] *Id.*

D. New Jersey's "Track" System

The DCM model is used in many courts throughout the country.[145] In New Jersey state courts, the clerk of the court assigns all civil actions to one of four tracks based on the case type that the plaintiff selects when filing the complaint.[146] The discovery periods are based on the assigned track. The following are the four discovery tracks and their assigned tracks: (1) Track I—150 days of discovery for book accounts (debt collection), summary actions, and insurance claims (including declaratory judgment actions); Track II—300 days of discovery for employment actions, personal injury claims, and noncomplex commercial transactions and construction cases; Track III—450 days of discovery for medical and professional malpractice actions, product liability actions, and complex employment cases; Track IV—450 days of discovery for environmental actions, insurance fraud claims, and multicounty litigation.[147]

Once the clerk provides a track assignment notice, which occurs within 10 days after the plaintiff files a complaint, the parties have limited opportunities to change a case's discovery track.[148] To change the track assignment, the plaintiff must show good cause within 30 days of receiving the track assignment notice.[149] The assigned track also informs the case management procedures.[150] For example, the assigned track determines whether the court must hold a case management conference after all parties join the action.[151] It also determines the number of court-initiated or court-mandated settlement conferences allowed and whether the parties must participate in arbitration.[152]

E. New York Commercial Division

Another model of accelerated adjudication is the Commercial Division of the New York Supreme Court, which began allowing a fast-track of commercial disputes in 2014.[153] Litigants can consent to this accelerated adjudication

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[145] The Florida Supreme Court requires all Florida courts to use this system. *See* Order *in re* COVID-19 Health & Safety Protocols and Emergency Operational Measures for Florida Appellate and Trial Courts, No. AOSC21-17, Amend. 3, at 15–23 (Fla. Jan. 8, 2022). All Maryland state courts use a DCM model. *See* Md. R. 16-302.

[146] *See* Discovery Tracks, Timing, and Extensions (NJ), Practical Law Practice Note w-023-5663 (West 2026) [hereinafter Discovery Tracks]; N.J. R. 4:5A-1.

[147] Discovery Tracks, *supra* note 146.

[148] *See id.*

[149] *See id.*

[150] *Id.*

[151] *See* N.J. R. 4:5B-2.

[152] *See* N.J. R. 4:5B-3; N.J. R. 4:21A-1.

[153] *See* Andrew C. Smith & Shriram Harid, *New York Creates Rocket-Docket for Commercial Disputes—But Accelerated Adjudication Comes with Trade-Offs*, Pillsbury (June 2, 2014),

process by using specific triggering language in their contracts.[154] New York's Commercial Division requires participating litigants to be trial-ready in nine months.[155] In other words, litigants agree to conclude all pre-trial proceedings including discovery, pre-trial motion practice, and mandatory mediation within nine months of filing a Request of Judicial Intervention ("RJI").[156] In this expedited process, litigants agree to waive certain rights and objections including objections based on lack of personal jurisdiction or forum non-conveniens, a jury trial, right to recover punitive or exemplary damages, and the right to interlocutory appeal.[157] Parties also agree on limited discovery which includes no more than seven interrogatories, five requests for admission, and seven discovery depositions per side that are no more than seven hours each.[158] Additionally, documents requested by the parties are limited to those relevant to the claim or defense, must be in a searchable format, and are restricted in time-frame, subject-matter, and only pertain to parties and entities associated with the requests.[159]

Most pertinent to the Court of Federal Claims is New York's use of "informal processes" related to expert witnesses. The Commercial Division's treatise suggests the court could force the parties' experts to "meet informally, with no stenographer or reporter, for a candid discussion of the technical issues."[160] There, experts would "ask each other questions to uncover the foundation for their opinions and the methods employed to reach their conclusions."[161] Thus, the "resulting dialogue can serve to avoid the protracted questioning and surprise that results from hearing an adversary's expert's opinion for the first time at trial."[162] "[S]uch discussions may facilitate settlement by high-

[https://perma.cc/D8F6-K6ZG].

[154] *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g) R. 9. For example, "parties [can] express their consent to this accelerated adjudication process . . . by using specific language in a contract, such as: 'Subject to the requirements for a case to be heard in the Commercial Division, the parties agree to submit to the exclusive jurisdiction of the Commercial Division, New York State Supreme Court, and to the application of the Court's accelerated procedures, in connection with any dispute, claim or controversy arising out of or relating to this agreement, or the breach, termination, enforcement or validity thereof.'" *Id.*

[155] *See* Smith & Harid, *supra*, note 153, at 1.

[156] *See id.* at 2.

[157] *Id.* at 1–2.

[158] *Id.* at 2.

[159] *Id.* at 3.

[160] Martin E. Ritholtz & Rebecca C. Smithwick, 4B N.Y. Prac., Com. Litig. in N.Y. State Cts. § 73:75 (5th ed. 2025).

[161] *Id.*

[162] *Id.*

lighting the strengths and weaknesses of each side's expert testimony."[163] The most beneficial aspect of this approach for the Court of Federal Claims is that the resulting dialogue can inform the judge where the experts differ—prior to trial—so the judge has an opportunity to prepare, understand the contentious points, and can formulate questions prior to the courtroom.[164] This would save valuable court resources by trimming down expert testimony and ultimately producing a faster ruling.

However, there are important trade-offs by expediting and streamlining litigation. Judge Martin E. Ritholtz recognized many of these drawbacks in his treatise for New York's Commercial Litigation Division:[165]

> Complete justice may require joining parties who will slow the litigation down. Stipulating facts for trial may expedite resolution of the case but require abandoning certain ground. Discovery "shortcuts" can save time and resources but pose a danger of waiving rights or missing important information. And mechanisms for consolidating related cases often promise substantial cost savings but carry with them the risk of an all-or-nothing result. . . . Even before commencing suit, it is important to weigh the advantages of alternative dispute resolution, which might prove cost and time efficient, but, nevertheless, may preclude adequate appellate review. . . . [A]n accelerated approach can expedite resolution of the case, but . . . may sacrifice thoroughness, and inadvertently result in an unsatisfactory outcome.[166]

In sum, parties in New York's Commercial Division can opt for accelerated adjudication, which has created its own "Rocket Docket."[167] Whether a case is suited for accelerated adjudication depends on the complexity of the matter.

II. Analysis: Expediting the Docket at the Court of Federal Claims

To improve efficiency and accelerate adjudication at the Court of Federal Claims, the court should adopt the following: (1) implement the EDVA's six key ingredients, which ultimately are successful case-flow management techniques; (2) implement early judicial case management; (3) contemplate using the ITC's initial determinations model; (4) adopt a DCM or "Track"

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[163] *Id.*

[164] *See id.*

[165] *See id.* § 73:2.

[166] *Id.* However, the EDVA has been using an expedited approach for close to fifty years. If practitioners questioned the accuracy and fairness of the decisions, the Rocket Docket would likely have been abandoned, or in the very least, altered to promote more satisfactory outcomes. Instead, the Rocket Docket is referred to as the "fastest, fairest" court in the country. Koenig, *supra* note 27, at 799. Furthermore, in the RAND examination of the CJRA's proposal for accelerating adjudication, practitioners' views of the fairness of the results were unaffected. Kakalik et al., *supra* note 23, at 2.

[167] *See* Ritholtz & Smithwick, *supra* note 160, at § 73:2.

system based on a combination of the FTC's model as well as New Jersey's current track system.

A. EDVA's six key "ingredients"

To expedite adjudication, the Court of Federal Claims can adopt the six key elements from the EDVA.[168] These abovementioned six crucial elements include: (1) early scheduling of conference and pretrial procedures; (2) completion of discovery which adheres to strict and short deadlines; (3) imposing strict limitations on the scope of discovery; (4) prioritizing swift resolution of substantive issues; (5) having a policy of almost no continuances that establish early and fixed trial dates set about six months from the first conference; (6) abbreviated trials that are strictly managed by the judge, not by counsel. Settlement should be encouraged throughout the dispute. Parties should also be required to confer with one another prior to filing motions. Mediation should also be an option throughout the dispute.

The Court of Federal Claims must also foster a culture of expeditiousness from the bench to counsel. This culture will take time. The Court of Federal Claims can foster an expeditious culture in two ways. First, every judge must prioritize docket efficiency. This can be achieved by adopting the EDVA's six crucial elements mentioned above. Unlike the EDVA, which links expediency to its continuity on the bench, judges at the Court of Federal Claims have fifteen-year terms.[169] Therefore, the Court of Federal Claims must instill its expeditious culture for newly appointed judges. However, judges do not bear the sole responsibility for creating an efficient culture. There must also be practitioner acceptance. From the practitioner's perspective, an expeditious culture can be achieved at the Court of Federal Claims because the United States is the defendant in every case and oftentimes is represented by the same attorneys from different divisions within the U.S. Department of Justice. Furthermore, the Court of Federal Claims has an independent bar, similar to the EDVA, and thus those admitted to the court's bar should understand and comply with the expedited conditions. Thus, the Court of Federal Claims should be transparent in its docket reform by involving practitioners from both sides of the "*v.*" Litigants are an integral part of the Court of Federal Claims and their involvement in the reform process ensures practitioner acceptance.

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[168] Practices at the Court of Federal Claims currently vary between judges and thus lack uniformity. In some instances, counsel's incentives may not fully align with expeditious resolution. The adoption of strict, uniform deadlines ensures that the parties themselves benefit from efficient adjudication, regardless of any such divergence in incentives.

[169] 28 U.S.C. § 172(a).

It is crucial that accelerated adjudication does not sacrifice quality and accuracy, procedural fairness, and transparency.[170] Standards of quality and accuracy can be upheld by judicial monitoring throughout the entire dispute, and if necessary, by increasing the number of status conferences ensuring judicial oversight and party accountability. These quality and accuracy standards can be measured in several ways. The first of these are post-trial exit surveys. Second, the affirmance rate of appeals are monitored. Procedural fairness can easily be achieved by developing local rules for the Court of Federal Claims that are consistent with the objective of expedited adjudication. The local rules also uphold transparency as counsel can know what to expect, but this also means that each judge must also adhere to the Court of Federal Claims' standard of accelerated adjudication.

B. Early Judicial Case Management

Commentators, including David C. Steelman, argue that early judicial case management is essential for reducing pretrial delay.[171] Specifically, Steelman argues that the basic tenet of case-flow management research is that the court, not the participants, should control the progress of a case.[172] Furthermore, judges should accept responsibility for the case from the time of filing, ensuring that no case is unreasonably delayed.[173] Steelman affirmed previous studies which emphasized that attempts to alter caseloads by increasing the number of judges or decreasing filings are unlikely to increase productivity or speed.[174] Instead, he argued essentially the same procedures used by the EDVA:

> Establish management systems by which the court, and not the attorneys, controls the progress of cases[.] Use trial-scheduling practices and continuance policies that create an expectation on the part of all concerned that a trial will begin on the first date scheduled[.] Emphasize readiness to try rather than settle cases, as a means to induce settlements[.][175]

Ultimately, "[t]he objectives of early case management are to resolve cases as early in the process as is reasonable and to reduce the costs for the parties and the court."[176]

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[170] *See infra* Section III.B.

[171] *See* David C. Steelman with John A. Goerdt & James E. McMillan, Nat'l Ctr. for State Cts., Caseflow Management: The Heart of Court Management in the New Millennium 3–4 (2000). The Court of Federal Claims could consider using magistrate judges but should first adopt the measures suggested throughout the note.

[172] *Id.* at 3.

[173] *See id.*

[174] *Id.* at xv (citing Thomas Church, Jr. et al., Nat'l Ctr. for State Cts., Justice Delayed: The Pace of Litigation in Urban Trial Courts (1978)).

[175] *Id.*

[176] *Id.* at 3.

C. Initial Determinations from the ITC

The Court of Federal Claims should consider interim IDs, used by the ITC, to (1) narrow the investigation prior to the evidentiary hearing or (2) dispose of the investigation altogether.[177] The IDs should be tailored to the type of case and can be on case-dispositive issues such as statute of limitations, standing, and claim or issue preclusion.

D. Using the FTC Model at the Court of Federal Claims

The FTC provides an important model for expediting adjudication.[178] The Court of Federal Claims can follow the FTC's current expedition procedures—e.g., setting evidentiary hearings eight months from the filing of the complaint.[179] The Court of Federal Claims could also use the FTC's previous track model, where the judicial clerk could summarily analyze the pending cases, and, using customized factors, determine which cases are suitable for accelerated adjudication. These factors are intertwined and could include: (1) the factual complexity of the case; (2) number of parties involved in the dispute; (3) whether a clear and unambiguous precedent exists on the matter; and (4) whether the case is one of first impression. Additionally, the Court of Federal Claims could create a call list of parties willing to have their cases heard on short notice. This could gradually diminish docket backlog while simultaneously easing judicial transitioning towards a new, expedited ideology. Finally, the FTC has codified the importance of expedition in its Code of Federal Regulations. Similarly, the Court of Federal Claims should also emphasize expedition in its local rules.

E. Implementing the New Jersey Track System at the Court of Federal Claims

The Civil Justice Reform Act of 1990 experimented with a pilot program in 20 study district courts that implemented, inter alia, the track concept, more commonly known as DCM.[180] The concept's essence is that "different types of cases need different types and levels of judicial management."[181] Thus,

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[177] *See supra* Section I.C.

[178] *See* 16 C.F.R. § 3.1 (2026). Additionally, the FTC's pre-amended rules also prioritized efficiency throughout a track system. *FTC Announces Set of Procedural Rule Changes Designed to Streamline Administrative Trial Process*, Fed. Trade Comm'n (Sep. 18, 1996), https://www.ftc.gov/news-events/news/press-releases/1996/09/ftc-announces-set-procedural-rule-changes-designed-streamline-administrative-trial-process [https://perma.cc/RF3G-T7H9].

[179] *Id.*

[180] *See* Kakalik et al., supra note 23, at 11.

[181] *Id.*

a number of separate tracks are created, each of which entails a structured approach to case scheduling and management and cases are assigned early to these tracks.[182] In contrast, the traditional approach is the judicial discretion model, in which judges make management decisions for general civil cases on a case-by-case basis.[183]

The 1996 RAND study evaluating the DCM found that the "objective data available at the time of filing (such as nature of the suit category, origin, jurisdiction, and number of parties) are not particularly good predictors of either time to disposition or cost of litigation."[184] The study suggested that if a track model is implemented, "decisions about track assignments should be supplemented with subjective information from the lawyers or judge."[185] It seems obvious that automatically assigning cases based on objective factors, including dollar amount, without judicial input and thus ignoring decades of judicial experience and expertise in the name of docket expedition or efficiency is likely to fail. Instead, this Note recommends that judges, when deciding a case's track, should rely on a holistic approach that considers the following: a dispute's dollar amount, the nature of the case, the number of parties, the number and complexity of the legal issues raised, the judge's experience with similar cases, and the track recommendations of the parties or the clerk.[186] The Court of Federal Claims should also include the track system in its local rules.

Although New Jersey's DCM or track system has significant discovery periods that are inconsistent with the EDVA's model and accelerated adjudication in general, the New Jersey model still provides a valuable example of a track system and the corresponding discovery timeline. The following is a proposed track model for the Court of Federal Claims:[187] Track I—90 days of discovery for military pay, civilian pay, bid protests, and tax cases; Track

[182] *Id.*

[183] *Id.* Ultimately, the CJRA's experimentation with the track program failed because courts continued to place cases suitable for expedition in the standard track or failed to assign cases to any track. *See id.* at 12. According to interviews with judges and lawyers, the lack of experimentation with and successful implementation of the DCM tracking system resulted from: (1) difficulty in determining the correct track assignment for most civil litigation cases; and (2) judges' desire to tailor case management to the needs of the case and to their style of case management rather than relying on the track assignment to provide the management structure for the case. *Id.*

[184] *Id.*

[185] *Id.*

[186] The FTC relied on these factors in its previous "track" system. *See supra* Section I.B.

[187] This Note based these recommendations on the Court of Federal Claims case report from October 10, 2023, to September 30, 2024. *See* U.S. Ct. of Fed. Claims, *supra* note 15.

II—180 days of discovery for takings, contract, and copyright cases. Track III—240 days of discovery for complex litigation and patent cases.[188]

The assigned track, similar to the New Jersey Track system, would also determine certain procedural timelines, such as the number of pretrial conferences, settlement conferences, and an estimated date for an oral argument. For example, the Sedona Conference proposed a streamlined program for low-value patent cases with claim construction briefings completed at 15 weeks, followed by a claim construction hearing at 17 weeks, expert discovery concluding at 27 weeks, submission of trial briefs at 35 weeks, and finally a three-day bench trial at 40 weeks.[189] "If the court determines that one asserted claim is infringed and not invalid, then a damages phase begins that lasts 12 weeks."[190] Further, due to the similarity between agency success during bid protests at the Court of Federal Claims and patent owners at the ITC, who have a reported success rate just short of 90% in 2017, this court could adopt a streamlined program for bid protests.[191]

The purpose of a track system is to provide courts with flexibility depending on many different factors such as the nature of dispute, the amount in controversy, the number of parties, the number of legal issues, or the novel nature of legal issues. Without such a system, "courts customarily apply the same procedures and timetables to all cases of a given type. . . . Such an approach fails to recognize the differences among individual cases."[192] Similar treatment of cases inevitably results in some cases being rushed while others are unnecessarily delayed.[193]

III. Recommendations and Critiques of Expedited Adjudication

To summarize, this Note recommends that the Court of Federal Claims can expedite its dockets in four ways. First, the Court of Federal Claims should implement the EDVA's six key ingredients: early case management, strict discovery schedule, frequent communication with opposing counsel, no motions for continuances which also emphasize early and firm trial dates, continuity on the bench, and judicial and practitioner acceptance. Second, the Court of Federal Claims should apply early judicial case management, a

[188] Patent litigation would be assigned to Track III because of the lengthy time required for Markman proceedings and amended contentions.

[189] The Sedona Conference, *Commentary on Patent Litigation Best Practices: Streamlining Lower-Value Patent Cases Chapter*, 24 Sedona Conf. J. 727, 734, 736, 738, 770–72 (2023).

[190] *Id.*

[191] *See* Carothers, *supra* note 135.

[192] Steelman, Goerdt & McMillan, *supra* note 171, at 4.

[193] *Id.*

common thread throughout many of these efficiency measures. Third, the Court of Federal Claims should consider using the ITC's initial determinations model, where a judge can rule on both dispositive and non-dispositive motions prior to trial. Fourth, the Court of Federal Claims should adopt a DCM or track system based on the FTC's previous model, which assigned a case to a particular track based on factors such as factual complexity, whether novel legal theories are being raised, precedent, and the number of parties while also incorporating discovery timelines based off New Jersey's track system. Additionally, the court should also consider using the FTC's eight months from filing to trial deadline.

A. Further Recommendations for the Court of Federal Claims

According to practitioners, the main issue hindering the resolution of disputes at the Court of Federal Claims is the Court's Rule 12, which provides the United States with 60 days to file an answer to a complaint.[194] However, the government frequently responds by requesting a motion for extension of time.[195] This Note recommends that the Court of Federal Claims amend its rules and provide the United States with a longer response time, 80 or 100 days, while prohibiting the United States from filing a motion for extension of time, and instead requiring the United States to respond with a substantive defense.

The Court of Federal Claims should also adopt the EDVA's page limits, reducing the page limit for initial briefs from forty to thirty pages.[196]

B. Accelerated Adjudication's Effect on Accuracy and Fairness

The development of productivity analyses for the U.S. district courts has not kept pace with that of other public sector entities. "Rather, district court analysis continues to follow a forty-year-old model in which productivity is defined and measured solely as a function of how efficiently cases are brought to resolution."[197] It is crucial to harmonize expedited adjudication, or efficiency, with adjudicative accuracy, procedural fairness, and transparency. Some criticize previous studies on accelerated adjudication "as they have focused almost exclusively on the speed of case processing, equating a court's productivity

[194] *See* Fed. Cl. R. 12(a)(1)(A). In interviews for this note, many practitioners discussed this rule as central to the delay at the Court of Federal Claims.

[195] *See, e.g.*, Defendant's Motion for Extension of Time to File Answer, King v. United States, 165 Fed. Cl. 613 (2023) (No. 1:18-cv-01115).

[196] *See* E.D. Va. Civ. R. 7(F)(3).

[197] *See* William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 Penn. St. L. Rev. 55, 62 (2013).

with the court's rate of docket clearance or a case's average time from filing to disposition."[198]

In measuring accuracy, or the appropriateness of case outcomes, the focus should be on the quality of judicial output, which cannot be sacrificed for the sake of expeditiousness. For example, in appraising the performance of a medical laboratory, the key measure is how many test results are valid and reliable, not how many tests it can run through its machines.[199] Therefore, court productivity that focuses nearly exclusively on timeliness measures such as the time from filing to disposition or the number of motions that are resolved within six months are not truly productivity assessments insofar as they fail to address adjudicative accuracy, effectiveness, or quality.[200] Therefore, deeming a district court productive simply because it expeditiously clears the docket would ignore a court's crucial societal and institutional role.

Procedural fairness can ultimately be defined as embracing the expectations of due process.[201] One study developed a new metric to measure procedural fairness termed "bench presence."[202] Bench presence is the "measure of the time that a federal district judge spends on the bench, presiding over the adjudication of issues in a public forum."[203] Bench presence seeks to qualitatively capture the degree to which parties and the public are directly exposed to the judge's practices and procedural safeguards, which is immediately measured through data collected by the Administrative Office of the U.S. Courts.[204] Bench presence also attempts to refocus the discussion of a court's productivity mainly on the role of a district court judge: presiding over trials and open hearings.[205]

Judicial transparency in relation to docket expedition can easily be achieved through the local rules and by having complete judicial acceptance throughout the Court of Federal Claims. The local rules must clearly delineate a schedule for motions, scheduling, and trials. Additionally, judges must strictly adhere to this schedule and prohibit dissent by counsel. There must be judicial uniformity insofar that every judge adheres to a court's objective of docket expedition.

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[198] *Id.* at 55. This study seeks to "offer[] a more robust model of district court productivity that explicitly incorporates measures of accuracy and procedural fairness." *Id.*

[199] *Id.* at 69 (quoting Peter F. Drucker, *Knowledge-Worker Productivity: The Biggest Challenge*, 41 Cal. Mgmt. Rev. 79, 84 (1999)).

[200] *See id.* at 57.

[201] *Id.* at 58.

[202] *See id.*

[203] *Id.*

[204] *See id.*

[205] *See id.*

Therefore, the Court of Federal Claims should balance expedited adjudication or efficiency with adjudicative accuracy, procedural fairness, and transparency while simultaneously fostering a culture of expediency on the bench.

C. Does Accelerated Adjudication Reduce Litigation Costs?

It is unclear whether accelerated adjudication lowers the overall cost of litigation. On the one hand, expedited adjudication preserves judicial resources by encouraging parties to settle. Although early case management efforts reduced the median time to disposition by 1.5 to two months, it corresponded to a 20-hour increase in lawyer work hours.[206] The same study found that litigant costs are "also higher in dollar terms and in litigant hours spent when cases are managed early," and thus, concluded "[t]hese results debunk the myth that reducing time to disposition will necessarily reduce litigation costs."[207] Early judicial case management necessarily requires lawyers to respond to a court, leading to increased litigation costs.[208] However, these increased "front-end" costs would likely be minuscule compared to whether the dispute ultimately went to trial. In other words, early case management and strict adherence to scheduling requires "a larger initial investment of resources to ensure strategic success than in slower courts where the cost burden is stretched over longer periods."[209]

At the Court of Federal Claims, where the United States is always the defendant, this lack of flexibility could be construed as a disadvantage for the government because it may lack "notice of the plaintiff's intent to file a lawsuit" and then be required to rapidly respond to the plaintiff's suit in a condensed time span.[210] This could prove to be an even greater disadvantage for the government if strict adherence to scheduling is coupled with a policy of no continuances. Pro se plaintiffs, a common feature at the Court of Federal Claims, will also likely be disadvantaged as they lack "the ability or time to [maintain] pace with a represented, or better-equipped, adversary," who would also be well-adapted to the court's strict scheduling.[211] In sum, the merits of early case management and strict adherence to scheduling orders will depend on the litigant. Parties that can afford legal fees and litigation expenses would not be affected by these changes.[212] However, "smaller com-

[206] Kakalik et al., *supra* note 23, at 14.
[207] *Id.*
[208] *See id.*
[209] Barnes, Obermeier & Swendsboe, *supra* note 34, at 35–36.
[210] *See id.* at 36.
[211] *Id.*
[212] *See id.*

panies and less affluent individuals facing document-intensive cases . . . may be . . . challenge[d] financially with an intense period of expenditure."[213] Further, "[i]f burdensome discovery requests are served as soon as the initial order is issued, some litigants would be forced to settle to avoid the costs, even when the case has questionable merit."[214]

D. Should the Court of Federal Claims Increase the Number of Judges?

A kneejerk reaction to help combat the ballooning docket might be to increase the number of judgeships at the Court of Federal Claims. However, this is an unrealistic solution because increasing the number of judgeships would require Congressional approval, which will be difficult in a partisan environment. Unlike Article III courts, the Court of Federal Claims is an Article I tribunal whose judges serve fixed, renewable 15-year terms of office.[215] While the Court of Federal Claims is less ideologically salient compared to Article III courts, increasing judgeships will still be politically contested. Therefore, delay is better addressed through procedural reform than through the expansion of judgeships.

Currently, there are sixteen judges sitting on the Court of Federal Claims, with an additional five senior judges.[216] This amounts to approximately 267 cases a year per judge.[217] This is comparable to the U.S. District Court for the District of Columbia, which has a total of twenty-five judges—fifteen active judges and ten senior judges.[218] In fiscal year 2024, 6,574 cases were pending before the U.S. District Court for the District of Columbia.[219] This amounts to approximately 263 cases a year per judge, which is just nine more cases per judgeship compared to the Court of Federal Claims. The national average of

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[213] *Id.*

[214] *Id.* In keeping with "the People's Court," the Court of Federal Claims should, overall, be more lenient with pro se plaintiffs.

[215] *Types of Federal Judges*, U.S. Cts., [https://perma.cc/6N2F-ZUF3] (last visited May 5, 2026).

[216] *See Judges*, U.S. Ct. of Fed. Claims, [https://perma.cc/CPP5-LMD8] (last visited Apr. 10, 2026).

[217] *See supra* note 9 and accompanying text. Calculated based off 5,597 cases pending before the Court of Federal Claims.

[218] *See District Judges*, U.S. Dist. Ct. for D.C., [https://perma.cc/8CU8-7FLP] (last visited Apr. 10, 2026); *Chief Judge James E. Boasberg*, U.S. Dist. Ct. for D.C., [https://perma.cc/SX6N-EJN5] (last visited Apr. 10, 2026); *Senior Judges*, U.S. Dist. Ct. for D.C., [https://perma.cc/9JKM-BUU5] (last visited Apr. 10, 2026).

[219] *Table N/A—U.S. District Courts–Combined Civil and Criminal Federal Court Management Statistics (September 30, 2024)*, U.S. Cts. (Sep. 30, 2024), [https://perma.cc/J6JT-ACD7].

case filings per judgeship is 491 as of March 31, 2023.[220] In 2023, the Judicial Conference of the United States recommended to Congress the creation of 66 new district court judgeships.[221] Approximately "10 additional judges would be added every two years, staggering them between different presidents."[222] The Judicial Conference's recommendations eventually became the Judicial Understaffing Delays Getting Emergencies Solved Act ("JUDGES Act").[223]

In August 2024, the bill unanimously passed in the U.S. Senate, "which is extremely rare" because of the chamber's "divisive partisan split."[224] The U.S. House of Representatives passed the bill on December 12, 2024, on a 236–173 vote.[225] "Hundreds of judges appointed by both parties took the rare step of publicly advocating for the bill" citing the 30% increase in federal caseloads "since Congress last passed legislation to comprehensively expand the judiciary," the Judicial Improvement Act of 1990.[226] However, then-President Joe Biden vetoed the bipartisan bill, arguing that it "'hastily' creates new judgeships without addressing key questions about whether new judges were needed and how they would be allocated nationally."[227] The failure of the JUDGES Act demonstrates the likely difficulty the Court of Federal Claims would experience if the court petitioned Congress for additional judgeships. Further, if such legislation passed, additional judgeships for the Court of Federal Claims would likely be implemented in a staggered fashion—similar to the JUDGES Act—as a partisan compromise. Because the president appoints individual judges, it would most likely take several presidencies for the court to reap the benefits of additional judges. The current increase in filings would greatly outpace such benefits. It follows that creating additional judgeships at the Court of Federal Claims is an unrealistic and lackluster solution to expediting the docket and reducing backlog.

Conclusion

Although this Note was written prior to "efficiency" entering the national spotlight, which emphasizes reducing the number of federal workers, the

[220] JUDGES Act of 2024, S. 4199, 118th Cong. § 2(5) (2024).

[221] U.S. Cts., *supra* note 13.

[222] Courtney Cohn, *Biden Vetoes Bill That Would Add 63 New Federal Judges Over Next Decade*, Democracy Dkt. (Jan. 2, 2025), [https://perma.cc/BJT8-Q724].

[223] *See id.*

[224] *Id.*

[225] *See* Nate Raymond & Dan Burns, *Biden Delivers on Threat to Veto Bill to Expand US Judiciary*, Reuters (Dec. 24, 2024), [https://perma.cc/RCH7-D3TH].

[226] *Id.*

[227] *Id.*

strategies for efficient adjudication discussed throughout this Note can be achieved without adding more judges, clerks, and court staff.

The Court of Federal Claims could simultaneously implement these recommendations, but this will likely result in judicial and practitioner opposition. Therefore, the Court of Federal Claims should provide notice to all judges and practitioners that the court plans to make efficient adjudication its primary focus. The Court of Federal Claims should begin with instituting a track system. As demonstrated, the FTC previously used this model, the ITC currently uses it, and many state courts like New Jersey also use this model. The use of the track model must be mandatory to ensure uniformity and implementation. The track system would require the court to adhere to strict scheduling deadlines based on the assigned track. Coupled with a policy of no continuances, strict limitations on the scope of discovery, emphasis on constant communication between the parties, extending the response time of the United States between 80–100 days but prohibiting a further extension, and reducing the number of pages from forty to thirty would significantly accelerate adjudication at the Court of Federal Claims.

The docket at the Court of Federal Claims will continue to increase as will the significant sums of money controlled by the court. The court must adopt efficiency measures to manage the increased filings without creating further docket backlog. By adopting these efficiency measures, as recommended in this Note, the court can return to its core mission as declared by Abraham Lincoln: to render prompt justice.

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