

EXECUTIVE SUMMARY

Measuring the Need for Judges: Rationalizing the Allocation of Judicial Resources

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Steven Caylor
Trial Court Administrator
2nd Judicial District
Lewiston Idaho

Introduction

Because it is in the nature of people to complain even when things are going well, those who lead the courts who hear that things are going poorly and that more judges are needed must first determine if that is so, and then carry their case to those with power to fund new judgeships. Although it is possible (and may even be time-honored in some places) to justify new positions purely on the basis of politics, that isn't an option for most courts, which must provide at least prima facie evidence supporting their purported need for greater public funding. Doing that has not been easy, because every measure of what judges do has flaws; every analytical method makes assumptions that may or may not be true; there are no objective and absolute standards of need; there are no absolute benchmarks of efficiency or effectiveness in the use of existing resources; there may be no common standard of proof; and worse, there is much distrust of the Court as an institution of government. Having said all that, it is still the case that a Court will from time to time feel the need for more help, and if it can show some persuasive bases for that feeling (even though flawed), it may get what it asks.

Measures of Judicial Need

The Courts in the United States have used a number of statistical measures believed to be related to the need for more judges. These have included population increases and judge/population ratios (as well as demographic shifts within populations); case filings (both unweighted and weighted, with weighted filings reflecting the fact that changes in child custody take more judge time than changes of name, and that a death penalty defendant demands more bench attention than a public drunk (though perhaps not cumulatively, as a class). Courts have also looked at pending active caseloads, the age of those caseloads and their compliance with time standards; disposition rates, clearance rates (dispositions divided by filings); jury trial rates (now disfavored); bench time versus time in chambers (also suspect); the use of supplemental judicial officers (retired judges, judges pro tempore, referees, commissioners, special masters, etc.); and even judicial travel (since too many judges aren't located near their work).

Analytical Methods - Normative Analysis, Regression Analysis, Computer Modeling

Courts have explored the relationships between these data elements (within single courts, in multiple courts in the same system, and across jurisdictional lines) through techniques like normative analysis, which compares a subject court to a target court, (but which, at best, assumes that the target court is appropriately managed and equipped and which at worst rewards bias in the unscrupulous researcher); or through regression analysis, which plots a line through data points using well established statistical methodology, (but which must also assume that the line then constitutes a standard); or through computer modeling, which uses sets of algorithmic formulas to predict probable outcomes under given circumstances (which may or may not be repeated in real life), based on various assumptions (which may or may not be valid), applied to such data as are available (and whose currency and accuracy are always subject to question). Even in combination, these are weak reeds for a Court competing with other agencies' demands for limited resources, especially in the face of legislative, executive and popular indifference, or even disbelief, regarding the Court's concerns, requests, and proofs.

Analytical Methods - Weighted Caseload Studies

The strongest technique for measuring the need for judges is a weighted caseload study, which has two approaches, the least favored being the Delphi Method, which builds case weights out of the random sampling of expert opinion (judges, attorneys, clerks, litigants or other court system stakeholders) as to the length, frequency, variability and probability of particular events in particular casetypes. Although usable information can be obtained by this method, it is not self-validating, and it may be unpersuasive to funding authorities, since the resulting analysis is based on the opinions of interested parties. The more defensible approach is to actually measure those same event attributes (length, frequency, etc.) - that is, to conduct an empirically-derived, weighted caseload study. The strength of this approach (when done correctly) is that the results obtained lead to a reasonably accurate and comprehensive picture of how long it took a group of judges to process a given body of judicial work - a statistically valid model of actual courthouse phenomena. Even with its flaws, no other judicial workload assessment tool is as closely tied to the real world.

Limitations of Weighted Caseload Studies

One of the necessary limitations of a weighted caseload study is its assumption that a statistical average - a composite numerical picture of a hopefully representative sample of judges performing a particular task - provides in fact a proper measure of time for that task. That may or may not be so. The average elapsed time of a particular case event in an already overburdened court might differ greatly from the average elapsed time of that same event in a court whose clock counts only peaceful hours. Further, it is possible to spend a long time doing something poorly or well; just as it is possible to cut to the heart of a matter with a single word, or to mistate the point entirely, but succinctly. At any rate, even though 'justice delayed is justice denied,' justice must still be served, and that takes time - and 'average time' has at least the virtue of convenience. This limitation may be addressed, however, by adding a Delphi component to an empirical study, and the delphic panel of experts should (in addition to its other role) consider whether the actual time spent, or perceived to be spent, is too little, too much, or just right. Then it must be able and willing to say in detail why, so that rational and desirable changes may be recommended and instituted which reflect those opinions.

The other major limitation of an empirical weighted caseload study is yet another necessary

assumption - that historical data remains valid with the passage of time. That useful fiction must be addressed in two ways - by doing annual follow-up studies selectively for certain casetypes, especially those in which there have been significant changes in law or procedure; and then, more generally, by conducting comprehensive empirical revalidations, perhaps as often as every three to four years. Since data collection can be both onerous and expensive, these limitations can be significant, especially if the Court and its funding authorities do not agree upon a common standard of need or a common standard of proof well before the process is begun.

Addressing Obstacles to Good Function

The results of a methodologically rigorous weighted caseload study of an inefficient, ineffective or dysfunctional court system are about as useful as knowing the average telephone number for every town in Idaho. A court that wants more judges should be able to show it isn't wasting the ones it has. Fortunately, there are standards for measuring court performance, and there are ways of helping particular courts or judges to meet those standards. Other obstacles to good court function may be structural, substantive, procedural, statutory, constitutional, or even jurisprudential. To change those which have been imposed on the Court may require cooperation from the Court's stakeholders against the pressures of inertia and the active opposition of those who have found some shelter in the shade of those same barriers.

Conclusion

Because of the various flaws and limitations inherent in measuring judicial workload, the best approach to assessing the need for additional judges in a court system may be an empirical weighted caseload study conducted as a joint project between a Court and its funding authorities, so that questions of methodology, the appropriate standards of need and the standards of proof can be worked out in anticipation rather than after the results are in. It will be desirable to augment that study with a delphic component to address what ought to be, not just what is. The implementation of time and performance standards may be necessary as well, to permit the Court to demonstrate that it is using its current resources effectively.

Afterword

If the Court is to be seen again as a rational and compassionate steward of the public good, and as a branch of government working productively on the peaceful maintenance of a dynamic social order, it must look very closely and very publicly at the things it does, and be able to justify the reasons why it does them. The Court must be willing to amend or abandon any principle or practice that imposes irrational, unnecessary, or perverse burdens on the administration of justice, even when those features are traditional, comfortable and/or expedient. Those in the Court who would serve justice through truth - rather than power through social control - must be willing to assert the radical (though not seditious) notion, "How long soever it hath continued, if it be against reason, it is of no force in law."(*1)

(*1) Sir Edward Coke, 1552-1634, Institutes: Commentaries upon Littleton, First Institute, § 80, Oxford Dictionary of Quotations, 2nd ed., p.148 (1953).

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