



BENCH PRESENCE 2014:
**AN UPDATED LOOK AT FEDERAL DISTRICT
COURT PRODUCTIVITY**

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Bench Presence 2014: An Updated Look at Federal District Court Productivity

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INTRODUCTION

Last year, we unveiled a new way of thinking about the productivity of the federal district courts.¹ Whereas most studies have equated court productivity with administrative efficiency, we argued that productivity must also account for the effectiveness of court services, as measured by the procedural fairness afforded to the parties and the accuracy of decisional outcomes. We further explained that a district court's commitment to procedural fairness could be measured in a rough but meaningful way by tracking its bench presence; that is, the amount of time that its judges spend in the courtroom, adjudicating issues in an open forum.²

Subsequently, we examined real-world bench presence data from Fiscal Years 2008 through 2012. The data showed a steady year-over-year decline in total courtroom hours during that period, culminating in a national drop in courtroom time of more than eight percent during the five-year span of the study.³ We also found, however, that there are no persistent structural or institutional barriers to reversing the decline: neither court size nor geographic location nor docket composition restricts each district court's ability to open its courtroom doors more frequently to parties and the public.⁴ We called for more research on bench presence by scholars, more tracking of courtroom time by court administrators, and a greater commitment to open court proceedings by judges.⁵

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¹ See generally Hon. William G. Young & Jordan M. Singer, *Bench Presence: Toward a More Comprehensive Model of Federal District Court Productivity*, 118 PENN ST. L. REV. 55 (2013) [hereinafter *Bench Presence*].

² *Id.* at 58.

³ Jordan M. Singer & Hon. William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008-2012*, 118 PENN ST. L. REV. 243, 247 (2013) [hereinafter *Measuring Bench Presence*].

⁴ See *id.*

⁵ See *id.* at 278-83.

In this Article, we take the next step in that research, and provide new data on bench presence in the federal district courts for Fiscal Year 2013. Overall courtroom time continues to fall, but we find reasons to remain optimistic that the trend can be reversed. We also briefly address a series of challenges that commentators have raised with respect to the bench presence measure, and our productivity model more generally. We close with some additional thoughts on bench presence and the importance of courtroom activity at the start of the twenty-first century.

I. The Current State of Bench Presence in the Federal District Courts

The amount of time that federal district judges spend in the courtroom continues to drop at an alarming rate. In Fiscal Year 2013, the ninety-four district courts collectively reported 259,239 total hours spent on trials and procedural matters,⁶ representing a drop in total hours of nearly two percent from the previous year and a drop of about ten percent since Fiscal Year 2008. Moreover, these figures translate to an average of only 423 hours of open court proceedings per active district judge (our standard measure of bench presence⁷) in Fiscal Year 2013—the equivalent of less than two hours per judge per day in the courtroom. This is the lowest rate we have observed in six years of collected data.⁸

⁶ Total courtroom hours are drawn from internal statistics maintained by the Administrative Office of the U.S. Courts (AO). Each month, each district judge must report the number of criminal and civil trials undertaken during the month, as well as separately reporting the total number of hours dedicated to criminal trials, civil trials, and all other procedural matters. The reporting obligations extend to senior district judges and visiting judges, and we include those hours in our calculation. See *Measuring Bench Presence*, *supra* note 3, at 256–57. The reporting form (formerly the JS-10, now an electronic form located on the courts' J-Net system) defines trials broadly to include any "contested proceeding before a court or jury at which evidence is introduced." FORM JS-10, MONTHLY REPORT OF TRIALS AND OTHER ACTIVITY; THE JUDICIAL CONFERENCE OF THE U.S., CIVIL LITIGATION MANAGEMENT MANUAL 167 (2d ed. 2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/CivLit2D.pdf/\\$file/CivLit2D.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivLit2D.pdf/$file/CivLit2D.pdf). It also defines reportable hours broadly, to include any case activity that requires the presence of the judge and the parties, "whether held in the courtroom or in chambers." FORM JS-10, MONTHLY REPORT OF TRIALS AND OTHER ACTIVITY. The AO tracks the JS-10 data internally by district in a spreadsheet known as Table T-8—the Total Hours Activity Report.

⁷ Bench presence is calculated as a simple ratio: a district court's total courtroom hours in a given period divided by the number of active district judges during that same period. We determine the number of active judges by subtracting the number of vacant judgeships years in a district from the number of congressionally authorized judgeships in that district during the same period. Therefore, a court authorized to have four district judges which experienced a single year-long vacancy would be calculated as having three active judges for the year, a court with a single six-month vacancy would have 3.5 active judges, and so on.

⁸ See *Measuring Bench Presence*, *supra* note 3, at 260 tbl.1 (showing national bench presence

The national decline in total courtroom hours persists even though there are many more active district judges in place today than during the height of the federal vacancy crisis in 2010.⁹ More district judges should translate to more courtroom hours overall, with a negligible effect on courtroom hours per judge. Yet most districts continued to see their courtroom time plummet by both measures. In all, fifty-three of the ninety-four districts saw a drop in total courtroom hours from Fiscal Year 2012 to Fiscal Year 2013, with nineteen districts experiencing a drop of ten percent or more, and seven districts experiencing a drop of twenty percent or more. During the same span, fifty-one of the ninety-four districts saw a decline in courtroom hours per active judge. Twenty-six of those districts experienced a drop of more than ten percent in courtroom hours per active judge, and nine districts saw a drop of more than twenty percent.

The ongoing drop in bench presence is disconcerting. Proceedings in open court expose parties and the public to the court's operations and decision-making processes. This act of transparency permits public monitoring, and falls squarely within the district judge's traditional and constitutional role.¹⁰ As importantly, the transparency inherent in bench presence acts as a meaningful proxy for the court's commitment to a fair adjudicative process. Open court proceedings give vitality to the core characteristics of procedural fairness: litigant participation and voice, trustworthiness, and dignified and equal treatment of the parties.¹¹ When a judge treats parties equally and provides them appropriate avenues to tell their stories, the court is perceived as a guarantor of procedural fairness. Such perceptions promote confidence in the court system, which in turn increases and preserves the legitimacy of the courts. The more time a judge spends in open court, the more opportunities the judge has to display his or her commitment to the fair and equal treatment of the parties. When bench presence declines, so too does the visibility of decision-making that is the hallmark of American public adjudication.

Bench presence is an illustrative metric on its own. We believe it is all the more useful as a component of a larger measure of a district court's overall productivity. In the next section, we briefly describe our court

averages for Fiscal Year 2008-2012).

⁹ During Fiscal Year 2013, the federal district courts experienced 784.1 vacant judgeship months, the equivalent of more than sixty-five full-year judicial vacancies. Too many, to be sure, but almost twenty percent fewer than the 964.1 vacant judgeship months (the equivalent of more than eighty full-year judicial vacancies) that the courts experienced in Fiscal Year 2010. See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS: SEPTEMBER 2013, NATIONAL JUDICIAL CASELOAD PROFILE, available at <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/district-courts-september-2013.aspx>.

¹⁰ *Measuring Bench Presence*, *supra* note 3, at 252.

¹¹ *Id.*

productivity model and the role of bench presence in that model, and address a number of concerns and critiques.

II. Bench Presence and the Productivity Model

Court productivity has traditionally been equated with case processing efficiency—the *sine qua non* of court assessment for the past forty years. Indeed, the Speedy Trial Act,¹² Civil Justice Reform Act,¹³ and widespread literature on best practices for case management¹⁴ have forcefully and repeatedly emphasized the importance of resolving cases quickly. And with good reason: the faster resolution of cases is a valuable public good, desired by litigants, attorneys, and policymakers alike. The near-singular emphasis on efficiency, however, has obscured an equally important public good: the effectiveness or quality of court services. Just as we do not measure the quality of a barbershop solely by the number of haircuts given in a day, or the quality of a hospital solely by the number of operations performed in a week, we cannot measure the quality of the courts solely by the number of motions they decide or cases they dispose of in a year.

How, then, *should* we measure the quality or effectiveness of the district courts? With deference and regard to the fundamental values they are designed to protect. As we have explained in more detail elsewhere, both constitutional design and public expectations demand that district court adjudication feature a fair outcome *and* a fair process.¹⁵ The Sixth Amendment assures the accused a right to a speedy trial—but also one that is public, featuring an impartial jury, the right to confront witnesses, and assistance of counsel.¹⁶ Federal Rule of Civil Procedure 1 counsels that the determination of all civil actions should be “speedy[] and inexpensive,” but also “just.”¹⁷ Simply put, the fact that a case or motion is resolved quickly is meaningless if that resolution is wholly inaccurate or violates engrained notions of due process.

Our productivity model represents an effort to unite these expectations of adjudicative quality and effectiveness with the courts’ existing emphasis on efficiency. We therefore proposed that both accuracy and procedural fairness be included in future measures of court productivity.¹⁸ For the reasons discussed above, we further proposed that bench presence be the foundational metric for procedural fairness. While it is not a perfect

¹² 18 U.S.C. §§ 3161–3174 (2006).

¹³ 28 U.S.C. §§ 471–482.

¹⁴ See *Bench Presence*, *supra* note 1, at 66 nn.53–56 (citing studies).

¹⁵ *Id.* at 70.

¹⁶ See U.S. CONST., amend. VI.

¹⁷ FED. R. CIV. P. 1.

¹⁸ *Bench Presence*, *supra* note 1, at 69–75.

measure of fairness, it is nevertheless extraordinarily useful. Better than any other single measure we know, bench presence captures the opportunities for participation, trustworthiness, and dignified and equal treatment that characterize the American commitment to fair process.¹⁹

Still, the introduction of any metric purporting to capture the essence of procedural fairness was bound to raise some objections, both on its own and as part of a larger productivity model. Several commentators have raised questions and critiques of the model. We briefly address three objections here: first, that bench presence is in tension with overall adjudicative efficiency; second, that bench presence is in tension with outcome accuracy (to the extent accuracy can even be defined or measured); and third, that bench presence is necessarily circumscribed by resource limitations currently faced by the federal court system. While we respect the often thoughtful nature of these objections, we do not believe that any of them poses an insoluble problem for bench presence, either in theory or in practice, in the coming years.

A. *Bench Presence and Efficiency*

There remains, in one judge's estimation, a "widespread belief among both court of appeals and district court judges that oral argument is inefficient and consumes too much court time, without attendant benefit."²⁰ Yet we have identified virtually no support for this position in historical empirical studies, and our own recent study found no correlation whatsoever between a federal district court's bench presence and its overall case-processing speed.²¹ Many district courts, in fact, have excelled in both areas. Professor Gensler and Judge Rosenthal's article on *Pretrial Bench Presence* elegantly suggests why this is so. They explain that oral hearings and conferences—whether for case management purposes under Rule 16(b), or in advance of full briefing for discovery and dispositive motions—promote an actual *conversation* between judges and counsel rather than a static exchange of paper.²² That conversation can be enlightening both to the judge (who, after all, wants to get to the heart of the issue) and the attorneys (who are in a better position to predict how a judge will rule on an issue after hearing directly from the source). For both the judge and counsel, a meaningful conversation about the issues can promote efficiency by streamlining and prioritizing legal arguments. It should not be

¹⁹ *Id.* at 85–88.

²⁰ Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 255 (2009).

²¹ See *Measuring Bench Presence*, *supra* note 3, at 272–77.

²² Steven S. Gensler & Hon. Lee H. Rosenthal, *Pretrial Bench Presence*, 48 NEW ENG. L. REV. 475, 483 (2014).

surprising, then, that one study of federal district courts found that discovery disputes were resolved thirty percent faster on average when they were subject to an oral hearing as opposed to simply being submitted on the papers.²³

Lawyers already know this well.²⁴ Rather than treat the judge as an oracle on the other side of the ECF interface, they “crave the opportunity to meaningfully engage with the judge early in the case about the issues and how best to investigate and resolve them.”²⁵ Such interactions are not merely useful for the instant case, but also carry long-term benefits. Having learned about a judge’s personality, style, and expectations during the course of direct interaction, lawyers are better positioned to anticipate and prepare for their next interaction—even if it comes in a different case.²⁶ Judges, too, draw long-term benefits from interacting with lawyers, both in the impressions they form of counsel and in their ability to directly convey expectations about how litigation should proceed. Far from being inconsistent with court efficiency, then, bench presence may well promote *greater* efficiency over time.

B. Bench Presence and Accuracy

Some observers have also expressed concern that increased bench presence may undermine the accuracy of case outcomes. The traditional view has been that open hearings and trials enhance the accuracy of outcomes by allowing finders of fact to directly assess the credibility of witnesses and evidence. A generation of research into the workings of human cognition, however, has suggested that credibility assessments are influenced by a variety of cognitive biases, heuristics, and intuitive judgments.²⁷ Some commentators have accordingly suggested that more accurate outcomes could be reached by taking certain types of legal decisions out of the hands of the jury, or even out of the courtroom altogether.²⁸ According to this view, increasing bench presence would weaken the overall effectiveness of case resolutions by increasing the

²³ INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 53 & tbl.12 (2009).

²⁴ Gensler & Rosenthal, *supra* note 22, at 473; *see also* Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 KAN. L. REV. 849, 870–71 (2013).

²⁵ Gensler & Rosenthal, *supra* note 22, at 473.

²⁶ *See* Jordan M. Singer, *Gossiping About Judges*, 42 FLA. ST. U. L. REV. (forthcoming 2015), available at <http://ssrn.com/abstract=2436581>.

²⁷ *See, e.g.*, Jonathan J. Koehler, *Train Our Jurors*, in HEURISTICS AND THE LAW 303, 309–11 (Gerd Gigerenzer & Christoph Engel eds., 2007).

²⁸ *See, e.g.*, Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 835–40 (2011); Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1191–93 (2004).

likelihood of inaccurate outcomes.

We readily admit that intuition, gut feelings, and cognitive shortcuts can affect human decision-making. And some studies have suggested that jurors in particular are poor judges of witness credibility.²⁹ Such studies deserve serious examination, but there is also a robust literature suggesting the contrary view that in making everyday determinations, people tend to get the answer right, even if they do not follow a path of perfect logic.³⁰ While open court hearings may increase the opportunity for intuitive credibility judgments, we see no evidence that the resulting decisions are overwhelmingly flawed or inaccurate, or are otherwise not susceptible to corrective measures.³¹ Moreover, the power of open court proceedings offers countervailing considerations, such as public transparency, litigant dignity, and moral pressure on witnesses to testify honestly, which provide a counterbalance to the limitations on human social cognition.

A related, and in our view more significant, objection to our proposal stems not from the relationship between bench presence and accuracy, but rather from the decision to include accuracy in the productivity model at all. In a gracious and thoughtful critique, Chad Oldfather takes dead aim at the very idea of including accuracy in a model of court productivity.³² He argues that “[a]ttempting to assess the accuracy of judicial decisions in any scalable way is either impossible or imprudent. Accuracy, in cases where it counts, depends on too many assessments that are too contestable or indeterminable in too many respects.”³³ As he observes, many issues may not be susceptible to a single correct answer, but rather contain a range of acceptable answers. If that is the case, Professor Oldfather argues, accuracy is meaningful only if we define a correct answer to mean one “falling within the zone of the proper exercise of discretion.”³⁴ But that formulation

²⁹ See Chet K.W. Pager, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373, 379–85 (2005) (describing studies).

³⁰ See generally GERD GIGERNZER, GUT FEELINGS: THE INTELLIGENCE OF THE UNCONSCIOUS (2007) (describing for a lay audience the position of the “fast and frugal” school of decision-making). See also Todd E. Pettys, *The Emotional Juror*, 76 FORDHAM L. REV. 1609, 1628–29 (2007) (describing qualities of speech that indicate deception, and noting that “[s]uch indicators help to explain why observers’ rate of successful lie detection is greater than chance”). The academic debate between the “heuristics and biases” school of human decision-making and the “fast and frugal” school shows no signs of slowing. For an excellent examination of the debate, see MARK KELMAN, THE HEURISTICS DEBATE (2011).

³¹ See, e.g., Koehler, *supra* note 27, at 311–17; Duane T. Wegener et al., *Flexible Corrections of Juror Judgments*, 6 PSYCHOL. PUB. POL’Y & L. 629, 636–50 (2000).

³² See Chad M. Oldfather, *Against Accuracy (As a Measure of Judicial Performance)*, 48 NEW ENG. L. REV. 493, 494 (2014).

³³ *Id.*

³⁴ *Id.* at 501–02.

itself converts a substantive inquiry into a procedural one. Accuracy would cease to exist as an independent measure and would instead be folded into a larger procedural-fairness inquiry.

We have no quarrel with Professor Oldfather's observations. He may well be right about the system's current inability to engage in objective outcome measurement. Yet we are hesitant to remove accuracy from the productivity equation altogether. Accuracy is a fundamental value of the justice system, embodied in constitutional and statutory text, the institutional structure of the courts, and public expectations. A quick thought experiment proves the point: would we settle for a court system that resolved issues quickly and with the full panoply of procedural protections, yet got the ultimate answers wrong half the time? Of course not. Confidence that the courts will usually get the correct answers (however we define "correct") is essential to public acceptance of the courts' role. This is why we have insisted on accuracy as a component of a formal productivity analysis, even if it must remain, for the time being, as a placeholder.

C. Bench Presence and Resources

A final concern about bench presence goes more generally to the pressure that metrics place on courts in an era of diminished resources. Carolyn Dubay argues in this volume that any productivity metric (including, presumably, bench presence) must fit with the prudential and constitutional goals of effective adjudication, nestled within the current reality of "dwindling judicial resources" and an atmosphere of "aggressive cost containment."³⁵ In particular, Professor Dubay argues that proxies such as bench presence must "advance or incentivize judicial behavior that promotes fairness and impartiality in the way that measuring disposition times advances the prudential goals of expeditious and efficient case management and resolution."³⁶ Without such a nexus, judges may consume their limited resources (courtroom facilities, personnel, etc.) in suboptimal ways in order to perform well by the chosen metric.³⁷

Once again, we respect this position and find much substance to it. There is little benefit to measuring simply for measurement's sake, and surely courts ought not consume resources in eager pursuit of unproductive metrics. But we firmly believe that bench presence, even as a proxy for procedural fairness, satisfies Professor Dubay's suggested criteria. The measurement of bench presence *should* incentivize judges to

³⁵ See Carolyn A. Dubay, *A Country Without Courts: Doing More with Less in Twenty-First Century Federal Courts*, 48 NEW ENG. L. REV. 531, 532 (2014).

³⁶ *Id.*

³⁷ See *id.* at 542.

spend more time in the open courtroom, just as efficiency measurement incentivizes the faster resolution of certain cases and motions. This, we submit, is a good thing. Courtroom time enables the participation, transparency, and equal and dignified treatment of parties that are the cornerstones of procedural fairness in the eyes of the public. A greater emphasis on bench presence will likely push some judges to spend more time in the courtroom, but in our view, that result would simply reflect a restoration of the federal district judge's proper historic and constitutional role.

Therefore, while we appreciate the constructive commentary on our productivity model and concede that it might be subject to future refinement, we believe that the three core principles underlying the model—efficiency, accuracy, and procedural fairness—are central to court productivity and must be considered in tandem. Productive courts cannot be one-dimensional, and districts should measure their activity and learn from each other to achieve the best balance.

III. Increasing Bench Presence and Increasing District Court Productivity

As we described in Part I, the national decline in courtroom time in the federal district courts continued in Fiscal Year 2013. This collective drop, however, conceals certain upward trends in bench presence at the individual district court level. Indeed, notwithstanding the national decline, several districts achieved significant one-year gains in bench presence in Fiscal Year 2013, and a handful of courts have reported several years of gains. Moreover, some courts have consistently reported high levels of bench presence year after year, even in the face of persistent judicial vacancies. Our intention here is to identify some of these courts, highlight their successes, and raise further areas for study.

Table 1 identifies the federal district courts with the highest levels of bench presence for Fiscal Year 2013. Each of these districts achieved mean levels of bench presence at least thirty-eight percent higher than the national average of 423 hours per active judge. The District of Montana's level of bench presence (with over 716 hours of courtroom time per active judge) was nearly seventy percent higher than the national average. The District of Montana was not alone: strong bench presence districts were scattered throughout the country. Notably, the district courts with the highest levels in bench presence varied significantly in size and location, suggesting that neither the number of authorized judges on a court nor its geographic setting predetermined its ability to open its courtroom doors widely.

Table 1. The Ten Highest Bench Presence Courts, Fiscal Year 2013

| DISTRICT | AUTHORIZED JUDGES | TOTAL HRS/JUDGE |
|-----------|-------------------|-----------------|
| D. Mont. | 3 | 716.4 |
| S.D. Fla. | 18 | 661.0 |
| S.D.N.Y. | 28 | 658.2 |
| N.D. Ill. | 22 | 654.6 |
| E.D.N.Y. | 15 | 626.6 |
| D. Nev. | 7 | 615.2 |
| D.P.R. | 7 | 603.6 |
| E.D. Cal. | 6 | 601.3 |
| D. Conn. | 8 | 590.3 |
| D. Ariz. | 13 | 587.0 |

Table 2 identifies the courts with the highest one-year growth in bench presence from Fiscal Year 2012 to Fiscal Year 2013. Unsurprisingly, the District of Montana places well on this table as well. But many other districts also managed to increase their level of bench presence by at least twenty percent over the previous year. Again, the geographic dispersal of these districts is notable. And although no very large districts experienced high levels of bench presence growth in Fiscal Year 2013, a variety of smaller and medium-sized districts significantly expanded their per-judge courtroom activity.

**Table 2. District Courts with the Highest Growth in Bench Presence,
Fiscal Years 2012-13**

| DISTRICT | AUTHORIZED JUDGES | TOTAL HRS/JUDGE FY 2012 | TOTAL HRS/JUDGE FY 2013 | PCT. CHANGE FY 2012-13 |
|-----------|-------------------|-------------------------|-------------------------|------------------------|
| D. Guam | 1 | 175.10 | 503.90 | + 187.78 |
| D. Mont. | 3 | 471.26 | 716.45 | + 52.03 |
| D. Me. | 3 | 263.35 | 377.40 | + 43.31 |
| E.D. Cal. | 6 | 457.33 | 601.26 | + 31.47 |
| D. Nev. | 7 | 471.79 | 615.19 | + 30.39 |
| C.D. Ill. | 4 | 390.33 | 503.84 | + 29.08 |
| D.N.H. | 3 | 252.80 | 321.96 | + 27.36 |
| E.D. Ky. | 5.5 | 248.59 | 315.29 | + 26.83 |
| E.D. Mo. | 8 | 270.50 | 333.72 | + 23.37 |
| M.D.N.C. | 4 | 285.98 | 350.08 | + 22.41 |
| N.D. Ala. | 8 | 218.63 | 265.88 | + 21.61 |
| W.D. Ark. | 3 | 248.23 | 300.89 | + 21.21 |
| E.D. Tex. | 8 | 364.56 | 441.82 | +21.19 |

A high level of bench presence—or an increase in bench presence—in a district court during a single year is an important signal of that court’s commitment to open court adjudication. But one-year figures can also be significantly affected by unfilled or unexpected vacancies or retirement. The loss of an active judge can influence both components of the bench presence ratio, and occasionally a district can experience a one-year spike in bench presence as a vacancy occurs and the remaining district judges increase their own courtroom hours to compensate for the loss. The greater challenge and greater opportunity for district courts comes with growing and maintaining high levels of bench presence over time. We therefore consider three measures of long-term bench presence, and the lessons that can be drawn from the data.

Table 3 identifies the ten districts with the highest mean levels of bench presence over the six-year span covering Fiscal Years 2008–2013. It is immediately apparent that districts of any size can achieve and maintain high levels of bench presence. Several large courts (with fifteen or more authorized judges) are among the top districts, but so are a variety of courts with four to seven authorized judges. Indeed, the Eastern District of California’s overall dominance is noteworthy given its relatively small size:

as we have surmised before, the culture of that district plainly embraces open court adjudication.³⁸

Table 3. The Ten Highest Bench Presence Courts, Fiscal Years 2008-13

| DISTRICT | AUTHORIZED JUDGES | MEAN TOTAL HRS/JUDGE/YEAR |
|------------|-------------------|---------------------------|
| E.D. Cal. | 6 | 716.0 |
| E.D.N.Y. | 15 | 691.8 |
| S.D. Fla. | 18 | 658.9 |
| S.D.N.Y. | 28 | 647.4 |
| N.D. Ill. | 22 | 614.5 |
| M.D. Tenn. | 4 | 597.3 |
| D. Ore. | 7 | 588.7 |
| W.D.N.Y. | 4 | 580.4 |
| D. Utah | 5 | 571.3 |
| D. Colo. | 7 | 565.7 |

Table 4 considers a different measure of bench presence excellence: districts that have grown their levels of bench presence every year since Fiscal Year 2010. Sustained growth is challenging; building on one year's strong effort requires even greater commitment the next year. And in fact, only three districts have demonstrated bench presence growth for three years running: the District of Nevada, the Eastern District of Texas, and the District of Alaska. The growth of bench presence in the District of Nevada is particularly remarkable: since the end of Fiscal Year 2010, that district has experienced yearly double-digit increases in total hours per active judge, culminating in a level of bench presence for Fiscal Year 2013 that was more than sixty percent higher than its level for Fiscal Year 2010. And while the District of Nevada did experience more judicial vacancies in Fiscal Year 2013 than in previous years, as a whole the judges of that district increased their total courtroom hours by more than 460 hours over the previous year.

³⁸ *Measuring Bench Presence*, *supra* note 3, at 262–63, 281.

Table 4. District Courts with Increases in Bench Presence Every Year, Fiscal Years 2010-13

| DISTRICT | AUTHORIZED JUDGES | PCT. CHANGE FY 2010-2011 | PCT. CHANGE FY 2011-2012 | PCT. CHANGE FY 2012-2013 | OVERALL CHANGE FY 2010-13 |
|-----------|-------------------|--------------------------|--------------------------|--------------------------|---------------------------|
| D. Nev. | 7 | 11.35 | 10.25 | 30.39 | 60.08 |
| E.D.Tex. | 8 | 1.38 | 0.09 | 21.19 | 23.94 |
| D. Alaska | 3 | 4.2 | 11.28 | 6.04 | 22.96 |

Finally, we consider a form of sustained excellence in bench presence: districts that have maintained bench presence levels at least fifteen percent higher than the national average for at least three years. Table 5 identifies the ten district courts that have achieved this level, in some years exceeding the national average by fifty percent or more.

Table 5. District Courts with Bench Presence at Least 15% above the National Mean Every Year, Fiscal Years 2011-13

| DISTRICT | AUTHORIZED JUDGES | PCT. ABOVE MEAN FY 2011 | PCT. ABOVE MEAN FY 2012 | PCT. ABOVE MEAN FY 2013 |
|------------|-------------------|-------------------------|-------------------------|-------------------------|
| D. Utah | 5 | 80.61 | 48.42 | 16.51 |
| E.D.N.Y. | 15 | 69.99 | 58.03 | 47.85 |
| W.D. Wis. | 2 | 59.24 | 71.25 | 17.03 |
| S.D.N.Y. | 28 | 54.50 | 47.34 | 55.30 |
| N.D. Ill. | 22 | 44.28 | 55.09 | 54.45 |
| W.D.N.Y. | 4 | 30.25 | 30.81 | 36.71 |
| D. Ore. | 6 | 20.24 | 43.84 | 34.00 |
| D. Colo. | 7 | 22.35 | 31.13 | 17.01 |
| D. Ariz. | 13 | 21.19 | 16.52 | 38.49 |
| E.D. Wash. | 4 | 17.43 | 20.04 | 29.27 |

As before, what is perhaps most notable about the districts identified in Tables 3–5 is their diversity. Courts of different sizes, located in different parts of the country, with variety in their docket composition, all managed to achieve and sustain high levels of open court adjudication. These new data further suggest that there are no structural barriers to increasing bench presence in every district court. While individual districts may vary somewhat in levels of bench presence from year to year, collectively the

district courts should be able to grow their courtroom time consistent with thoughtful, accurate, and efficient adjudication of their cases.

CONCLUSION

In this short piece, we have sought to respond to commentary on our productivity model and introduce new bench presence data for Fiscal Year 2013. Bench presence is a valuable metric both for measuring a component of court productivity and for understanding a district court's ability to publicly demonstrate its commitment to procedural fairness. The most recent national numbers on courtroom time in the federal district courts are still discouraging, but high levels of bench presence in several individual districts suggest that we have not yet lost our traditional commitment to the open courtroom.

Still, there is much work to be done. Most fundamentally, courts and the public must ask what is lost when bench presence declines. We have suggested here (and elsewhere) that a nationwide drop in courtroom time reflects a serious and significant loss of procedural fairness protections. Parties—be they civil litigants or criminal defendants—miss out on meaningful moments to tell their stories to the court, as well as the feeling that whatever the outcome, the court treated them with due respect. Both litigants and members of the public lose opportunities to witness the arguments and evidence that ultimately influence legal decision-making. While each case merits its own treatment, and not all issues require public hearings, it is simply not the case that avoiding courtroom adjudication will itself render a district court more efficient or more respected. To the contrary, judicial activity in the open courtroom does wonders to restore public faith in the impartiality and professionalism of the judiciary. That is an outcome that all users of the system should wholeheartedly support.