A Heartfelt, Albeit Largely Statistical, Salute to Judge Richard D. Cudahy

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A Heartfelt, Albeit Largely Statistical, Salute to Judge Richard D. Cudahy

Richard A. Posner†

This Essay elaborates on Judge Cudahy's distinction as a judge and discusses our relationship and the broader issue of the management of disagreement, particularly ideological disagreement, in an appellate court. The Essay departs from the usual form of tribute essays by organizing its discussion around statistics and focusing on more general issues of judicial performance. These statistics reveal that Judge Cudahy has been an unusually prolific judge, penning separate opinions at a higher rate than his colleagues both nationwide and on the Seventh Circuit. The numbers also reveal that Judge Cudahy's dissent rate has declined markedly over time. After considering several possible explanations for this trend, including his increased presence as a visiting judge on other circuit courts, the Essay concludes that the best explanation for Judge Cudahy's declining dissent rate is the evolution of his personal ideology and his increasing ability to see eye-to-eye with his more conservative colleagues.

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Introduction

At this writing, Judge Richard Cudahy has been a judge on the United States Court of Appeals for the Seventh Circuit for over thirty-two years.† In that period, he has established himself as one of the nation’s most productive and influential appellate judges, with particular interest and expertise in regula-
tory and commercial cases, and with a strong liberal voice. I have served with him on the Seventh Circuit for thirty years. I am going to elaborate briefly on his distinction as a judge, and I will then discuss our relationship and the broader issue of the management of disagreement, particularly ideological disagreement (the most common form), on an appellate court. I shall depart from the usual form of tribute essays by organizing my discussion around statistics. Other contributors to this tribute issue will doubtless be focusing on Judge Cudahy’s regulatory opinions and his extensive extrajudicial writings on regulation. Rather than further plough a well-ploughed terrain, I focus on more general issues of judicial performance.

I. Judge Cudahy’s Productivity

Judge Cudahy, as I said, has been a productive judge as shown in Table 1:

Table 1: Total Number of Published Opinions by Judge Richard D. Cudahy, September 26, 1979-December 31, 2011

<table>
<thead>
<tr>
<th>Opinion Type</th>
<th>Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Majority</td>
<td>1255</td>
</tr>
<tr>
<td>Dissenting</td>
<td>160</td>
</tr>
<tr>
<td>Concurring</td>
<td>222</td>
</tr>
<tr>
<td>Concurring in Part and Dissenting in Part</td>
<td>84</td>
</tr>
<tr>
<td>Total</td>
<td>1721</td>
</tr>
</tbody>
</table>

The table reveals an average of 53.4 opinions per year. What is remarkable about this figure is that he has been a senior judge since 1994—more than half of his judicial career. Senior judges, who are only required to handle a caseload one-third as heavy as that of active judges (as judges who are not senior judges are termed), are not expected to be as prolific as active judges. In the fifteen years before Judge Cudahy took senior status, he published an average of 72.3 opinions per year—well above the national average. Yet there are no telltale signs of haste in his opinions.

3. See supra Table 1 (reporting 1721 opinions over 32.25 years).
4. See infra Table 2 (reporting 765 majority and 346 separate opinions in 15.25 years).
5. In the year ending September 30, 2010, the Seventh Circuit published only 582 signed (that is, not per curiam) opinions. With ten active judges, plus four senior judges who were still publishing opinions, the average number of opinions per active judge is unlikely to have exceeded fifty. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 46 tab. S-3, available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf. I do not have figures covering the entire period of Judge Cudahy’s service, but I am confident that seventy-seven opinions a year was well above average for an active court of appeals judge during the period in...
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His opinions, whether issued before or after he took senior status, are frequently cited by other judges—a sign of influence. (The table in the Appendix lists his hundred most cited opinions. The number of citations ranges from 1379 to 137.6) Two of his opinions (both majority opinions) have been cited more than one thousand times (remarkably, considering the number of citations it has received, the more recent is only five years old). Both are procedural opinions, as are the third and eighth most-cited opinions. Procedural opinions tend to be cited more than substantive ones because a procedural opinion is not bound to a particular substantive field. Another is a famous antitrust opinion, however, and the fourth most cited opinion was also rendered in a commercial case. Most of the other opinions in his hundred most cited cases are commercial as well, revealing incidentally that there is a tendency toward specialization in the federal courts of appeals even though they are generalist courts (with the exception of the Federal Circuit) and the panels that hear cases are randomly selected from the court’s judges. Judges having a special interest in a particular area of law are more likely to be assigned an opinion in that area than judges on the panel who do not have that interest. With his business and regulatory background, it is unsurprising that Judge Cudahy is assigned a disproportionate number of commercial cases.

Citation counts are a crude measure of the quality of judicial opinions. A significant opinion of Judge Cudahy’s that is not among his hundred most cited arose out of a flood in Chicago. The city sued a dredging company for causing the Chicago River to flood underground portions of downtown Chicago. The company filed a claim in federal court for maritime limitation of liability, invoking the court’s admiralty jurisdiction. Judge Cudahy’s opinion held that the case lay within the federal admiralty jurisdiction because the accident was caused by the operation of a barge on a navigable body of water—the Chicago River. The opinion explained that although almost all the victims of the damage caused by the flood were on land, the existence of admiralty jurisdiction depends on the site of the act that causes the injury, rather than the site where the

which he was an active judge. For example, in 1983 the nationwide average of published opinions by active court of appeals judges was below forty-two, and in 1994, it was only fifty-four. RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 74 (1996).

6. See Judge Cudahy Data Set, supra note 2.
7. Id.
8. These opinions include Venture Associates Corp. v. Zenith Data Systems Corp., 987 F.2d 429 (7th Cir. 1983) (1379 cites); EEOC v. Concentra Health Services, Inc., 496 F.3d 773 (7th Cir. 2007) (1246 cites); Wright v. Associated Insurance Companies, 29 F.3d 1244 (7th Cir. 1994) (834 cites); and De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225 (7th Cir. 1983) (622 cites).
9. See MCI Commc’ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983).
11. See Great Lakes Dredge & Dock Co. v. City of Chicago, 3 F.3d 225 (7th Cir. 1993).
injury is experienced. The Supreme Court affirmed the decision, essentially agreeing with Judge Cudahy’s analysis.13

Another notable opinion by Judge Cudahy that is not among his hundred most cited is a concurring opinion in an antitrust case concerning a dispute between a professional basketball team and the National Basketball Association over television broadcast rights.14 His concurrence thoughtfully explored whether separate entities have a sufficient unity of interest to be considered the same entity and therefore enjoy exemption from the prohibition in section 1 of the Sherman Antitrust Act on contracts in restraint of trade. His suggestion that the critical factor should be the “unity of economic interests of the decision-makers”15 anticipated the Supreme Court’s recent ruling in American Needle, Inc. v. National Football League,16 tying unity of interest to the existence of “unitary decisionmaking” and a “single aggregation of economic power.”17

II. Judge Cudahy’s Separate Opinions

But, speaking of concurrences, I note that the percentage of Judge Cudahy’s total opinions that are separate opinions (either concurring, dissenting, or concurring in part and dissenting in part) is very high—27.1%, or 466 out of 1721.18 This percentage seems especially high for the Seventh Circuit, although I do not have comparative statistics.

Table 2 provides more detailed statistics.

15. Id. at 606.
17. Id. at 2212; see also Richard M. Brunell, Some Thoughts on Professor Brodley’s Contributions to Antitrust Through the Eye of American Needle, 90 B.U. L. REV. 1385, 1392 (2010) (“As Judge Cudahy explained in [Chicago Professional Sports], ‘When Copperweld talks about unity of interests in the single entity context, I think it must be taken to mean unity of economic interests of the decisionmakers.’ And that is essentially what the Court held in American Needle, namely that independent action is characterized by a quality of ‘unitary decisionmaking’ and a ‘single aggregation of economic power.’” (citations omitted)).
18. See supra Table 1.
Salute to Judge Richard Cudahy

Table 2: Rates of Separate Opinions of Judge Cudahy, September 26, 1979-December 31, 201119

<table>
<thead>
<tr>
<th>Period20</th>
<th>Cases21</th>
<th>Majority Opinions</th>
<th>Separate Opinions22</th>
<th>Dissenting Opinions23</th>
<th>Separate-Opinion Rate</th>
<th>Dissent Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1979-84</td>
<td>648</td>
<td>194</td>
<td>86</td>
<td>47</td>
<td>13.3%</td>
<td>7.3%</td>
</tr>
<tr>
<td>1985-89</td>
<td>886</td>
<td>257</td>
<td>131</td>
<td>76</td>
<td>14.8%</td>
<td>8.6%</td>
</tr>
<tr>
<td>1990-94</td>
<td>1422</td>
<td>314</td>
<td>129</td>
<td>67</td>
<td>9.1%</td>
<td>4.7%</td>
</tr>
<tr>
<td>1995-99</td>
<td>708</td>
<td>177</td>
<td>49</td>
<td>24</td>
<td>6.9%</td>
<td>3.4%</td>
</tr>
<tr>
<td>2000-04</td>
<td>715</td>
<td>144</td>
<td>31</td>
<td>13</td>
<td>4.3%</td>
<td>1.8%</td>
</tr>
<tr>
<td>2005-09</td>
<td>713</td>
<td>121</td>
<td>30</td>
<td>14</td>
<td>4.2%</td>
<td>2.0%</td>
</tr>
<tr>
<td>2010-11</td>
<td>270</td>
<td>48</td>
<td>10</td>
<td>3</td>
<td>3.7%</td>
<td>1.1%</td>
</tr>
<tr>
<td>1979-94 (Active)</td>
<td>2956</td>
<td>765</td>
<td>346</td>
<td>190</td>
<td>11.7%</td>
<td>6.4%</td>
</tr>
<tr>
<td>1995-2011 (Senior)</td>
<td>2406</td>
<td>490</td>
<td>120</td>
<td>54</td>
<td>5.0%</td>
<td>2.2%</td>
</tr>
<tr>
<td>1979-2011 (Total)</td>
<td>5362</td>
<td>1255</td>
<td>466</td>
<td>244</td>
<td>8.7%</td>
<td>4.6%</td>
</tr>
</tbody>
</table>

Judge Cudahy’s average dissent rate (number of dissenting or partially dissenting opinions divided by total number of cases that produced opinions) over the thirty-two-year period of his judicial service is high—4.6%—though it has declined markedly in recent years. In contrast, the average dissent rate across the federal courts of appeals is only 2.7% per panel, and in the Seventh Circuit, only 3.0%.24 The per-panel qualification is important: the 2.7% and 3% figures refer to the percentage of three-judge panels in which there is a dissent, so that the average dissent rate per judge is only one-third of the per-panel rate, or 0.9% for the courts of appeals as a whole and 1.0% for the Seventh Circuit (since any one, but only one, of the three judges of a court of appeals panel may be a disserter).

On the other hand, Judge Cudahy’s 4.6% dissent rate is artificially inflated compared to these global rates in another regard: the 2.7% and 3.0% figures are based on dissents as a percentage of all terminations on the merits, including terminations without opinion, whereas the Cudahy dissent rates shown in Table 2 are based on his dissents as a percentage of all cases resulting in opinions reported in Westlaw (including formally “unpublished” opinions). During the fifteen-plus years in which Judge Cudahy was in active service (1979-94), he participated in an average of 193.8 cases per year that produced written opinions.25

19. Judge Cudahy Data Set, supra note 2.
20. Periods run from January 1 of the starting year to December 31 of the ending year, except for periods that start in 1979, which run from September 26, 1979, to December 31 of the ending year.
21. “Cases” include all cases resulting in an opinion by at least one member of the court.
22. “Separate opinions” include concurrences, dissents, and partial-concurrence/partial-dissents.
23. “Dissenting opinions” include dissents and partial dissents.
24. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (manuscript at 365) (forthcoming 2012) (on file with author). Note that since taking senior judge status, Judge Cudahy has sat as a visiting judge in other circuits, as well as continuing to sit in the Seventh Circuit.
25. See supra Table 2 (reporting 2956 cases over 15.25 years).
The number of terminations on the merits per judge in the early 1990s in the Seventh Circuit was roughly twice that, which would reduce his dissent rate in 1990-94 from 4.7% to 2.4%—still between two and three times the per-judge national and Seventh Circuit averages, calculated in the previous paragraph. His dissent rate in the preceding decade (1980-89) may be even more dramatically above-average.

A database compiled by two groups of scholars of “published” (that is, formally precedential) decisions in a set of controversial fields such as employment discrimination provides a more meaningful index of Judge Cudahy’s dissenting behavior, as well as a clue to its possible cause. The national per-panel dissent rate in this database (the “Sunstein-Epstein” database) is 9.1% (though only 6.0% in the Seventh Circuit), implying an average per-judge dissent rate of 3.0% (2.0% in the Seventh Circuit). Judge Cudahy’s dissent rate in the cases in the Sunstein-Epstein database is 3.3%, which is the fourth highest in the Seventh Circuit, after Judges Rovner (4.6%), Wood (3.8%), and Williams (3.5%). (Mine is 0.5%.) Those four were the most liberal judges on the court in the period covered by the data. If we look just at cases in which the majority consisted of two judges appointed by Republican Presidents (a proxy, though a crude one, for a judge’s ideological leanings), Judge Cudahy has the second highest dissent rate, at 6.0%, just behind Judge Williams (6.1%), and ahead of Judges Rovner (5.9%) and Wood (3.7%). (Mine is 1.0%). Thus, Judge Cudahy’s presence in an ideological minority on the court appears to play some role in his overall dissent rate.

III. A Look at Judge Cudahy’s Ideology

This possible explanation for Judge Cudahy’s high dissent rate is further developed by this very interesting figure from a recent article by Professor Co- ray Yung.

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28. EPSTEIN ET AL., supra note 24 (manuscript at 330).

29. The dissent rates were calculated using an updated database created by Professor Sunstein and his colleagues for their book, supra note 27. The specific dataset used for the calculation will be posted online in connection with the publication of my upcoming book, see EPSTEIN ET AL., supra note 24, in the fall of 2012.

30. See supra note 29.

31. Corey Rayburn Yung, Judged by the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals, 51 B.C. L. REV. 1133, 1174 fig.9 (2010). Figure 1 was recreated with the permission of Professor Yung and the Boston College Law Review. The data set underlying this figure is on file with Professor Yung.
The white bar is a measure, known as “common space,” of the judge’s presumed ideology when he or she was appointed; the gray bar is the ideology inferred from the judge’s judicial votes in 2008. The farther to the left a judge is on either bar, the more liberal he or she is; the farther to the right, the more conservative. When appointed, Judge Cudahy was far to the left, and indeed he was the most liberal active judge on the court. (There were two equally or more liberal senior judges on the court at the time of his appointment, while the other three judges on the liberal side of the white bar in Figure 1 were appointed in the 1990s.) I am shown as slightly to the right when appointed. For reasons discussed elsewhere, the “common space” method of assessing ex ante judicial ideology is not very accurate; in fact, Judge Cudahy when appointed was moderately rather than extremely liberal, and I was very conservative. But he was indeed the most liberal active judge on the court, and I the most conservative. Unfortunately, Professor Yung’s ex post ideology measure is based only on opinions in 2008, and I cannot find any comparable measure of ideology for Seventh Circuit judges in the early years of Judge Cudahy’s judicial career.

32. See EPSTEIN ET AL., supra note 24 (manuscript at 85-87).
Still, Judge Cudahy and I were further apart when we were appointed than we are now (notice in Figure 1 how close both Judge Cudahy and I are to the midpoint in our voting in 2008, though he still is to the left of the midpoint and I am still to the right). It is no surprise, therefore, that we clashed in a number of cases in our early days together on the court. In one case, I wrote the majority opinion for the court, sitting en banc, modifying a consent decree that had restricted the investigatory powers of the FBI regarding terrorism and other threats to domestic security. Judge Cudahy wrote a vigorous dissent. It begins:

This is a case, if there ever was one, where the result dictates the rationale. It is possible to understand the very high priority which the majority accords to inquisitorial freedom at the possible expense of free speech. But it is difficult to discern exactly how the majority proposes to deal with the legal doctrines which until now I thought most clearly applicable to the interpretation of consent decrees.

In another case, I wrote the panel majority opinion reversing an injunction against the termination of a franchise, noting that

the more difficult it is to cancel a franchise, the higher the price the franchisors will charge for franchises. So in the end the franchisees will pay for judicial liberality and everyone will pay for the loss of legal certainty that ensues when legal principles are bent however futilely to redistributive ends.

Judge Cudahy tartly replied:

Illinois did not enact [the Illinois Franchise Disclosure Act] because it thought franchisors were being abused by their franchisees, as the majority seems to believe. Apparently, the legislators had not read enough scholarly musings to realize that any efforts to protect the weak against the strong would, through the exhilarating alchemy of economic theory, increase rather than diminish the burden upon the powerless.

Yet, despite our frequent disagreements, our personal and professional relations remained and still remain entirely cordial. Judge Cudahy deserves the primary credit. For while I was, as I said, the court’s most conservative member

33. Alliance To End Repression v. City of Chicago (Alliance I), 742 F.2d 1007 (7th Cir. 1984) (en banc). I have to say that I am totally unrepentant about my position in that case. The decree at issue had placed onerous restrictions on the Chicago police as well as on the FBI. I clarified and reaffirmed my position in a follow-on opinion that was published eight months to the day before the 9/11 terrorist attacks. See Alliance To End Repression v. City of Chicago (Alliance II), 237 F.3d 799, 802 (7th Cir. 2001).
34. Alliance I, 742 F.2d at 1020 (Cudahy, J., dissenting). The vote of the en banc court was 6-1.
36. Id. at 283 (Cudahy, J., dissenting). Some of our other disagreements are discussed in Richard D. Cudahy, Judge Posner Through Dissenting Eyes, 17 J. CONTEMP. HEALTH L. & POL'Y xxxiii (2000).
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when I first joined, I was closer to the center of the court than Judge Cudahy was, and as a result he found himself disagreeing with me more often than I found myself disagreeing with him. It is not fun to be a dissenter, yet Judge Cudahy never allowed his feathers to be ruffled. He helped to establish what has proved to be a durable tradition in the Seventh Circuit, which is that disagreements are not personalized, and ideological and other clashes, even when they engage the deepest beliefs of the judges, do not produce anger, rancor, or incivility. This triumph of civility not only makes the lives of the judges more pleasant but also improves the quality of the court’s work. Time is not lost in nitpicking colleagues’ opinions or refusing to resolve differences by deliberation and compromise; there are still dissents but they are not multiplied by mutual suspicion and antagonism. Recall that in the Sunstein-Epstein database of published opinions, the dissent rate in the Seventh Circuit is substantially below the average for all the courts of appeals.

Now glance back at Table 2, and notice the interesting time pattern of Judge Cudahy’s dissents. The rate at which he dissents has declined markedly—from 8.6% in 1985-89 to 1.1% in 2010-11. The decline began in 1990-94, a period in which he participated in almost twice as many opinion-producing cases per year on average than in his previous years of service (284.4 per year versus 149.7), but it continued thereafter, when he took senior status. His dissent rate as an active judge was 6.4%, but as a senior judge it has been only 2.2%. Notice, too, how in Figure 1, by 2008, Judge Cudahy was almost in the center of the court ideologically and I only a little to the right. As a result we disagree rarely nowadays. Public disagreements between judges are more likely to reflect ideological differences than differences in “legal” analysis narrowly defined. The latter differences can usually be resolved in discussion (for often they really do have a “right” and a “wrong” answer) or simply compromised. That is not the case with ideological disagreements, in which the disputants tend not to be arguing from shared premises.

So what has happened? Figure 1 shows little change in my ideology, but a great deal in Judge Cudahy’s; and though, as I say, the common-space measure is not accurate (and in fact underestimates the degree to which my ideology has evolved), a difference as large as that shown for Judge Cudahy is unlikely to be purely the artifact of the measure’s inaccuracy. Unfortunately, the common-

37. See supra Table 2 (reporting 1422 cases over the five years from 1990-94 and 1534 cases over the ten-and-a-quarter-year period from 1979-89).
38. See supra Table 2.
39. But see Ill. Commerce Comm’n v. FERC, 576 F.3d 470 (7th Cir. 2009). In this recent case, we did tangle over a “legal” question. The case involved the question whether the Federal Energy Regulatory Commission can require utility companies to share the costs of a new transmission facility that is to be built outside their service area but will confer a benefit on them by making the entire national electricity grid less prone to brownouts, without quantifying those benefits. I said “no;” for the panel majority, Judge Cudahy said “yes.”
space measure, besides not being accurate, is an estimate of a judge’s ideology at the time of his appointment, before he starts sitting, and not an evaluation of the ideological valence of his judicial votes in the early part of his judicial career. Nevertheless a difference between ex ante ideology and voting ideology twenty-nine years later is at least consistent with a change over that period in the ideological valence of a judge’s votes.

A fact that is not quantitative but sufficiently uncontroversial to be compelling is that the federal judiciary became more conservative between 1979 and 2008. There were Republican presidents in twenty of those thirty years, and the Supreme Court, from which most lower-court federal judges naturally take their bearings, became decidedly more conservative, as did indeed the nation’s political culture. Not all liberal judges would be affected by these changes, but some would be, and I believe that Judge Cudahy may have been so affected.

The further a judge’s ideology is from the ideology of the median judge on his court, the more likely he is to dissent. A liberal judge who became more conservative while the median judge’s ideology was unchanged would thus dissent less (unless he became an extreme conservative). If the Seventh Circuit were no more conservative after 1990 than before, the likeliest explanation for Judge Cudahy’s sharply diminished dissent rate would be that he had become more conservative. Although I cannot quantify the change in the court’s ideology over this period, though, I believe it has participated in the general rightward shift of the federal courts. Therefore, Judge Cudahy would need to have moved to the right at a faster rate than the court as a whole in order to explain the observed effects.

Another possibility I need to consider is that he is dissenting less because, like most senior judges, he often is sitting as a visiting judge in other circuits. Maybe they are more liberal circuits, like the Ninth, or maybe a visitor is somewhat reluctant to dissent if it would involve expressing disagreement with previous decisions of a court not his own. The behavior of visiting judges is an underexplored subject of general interest for the study of judicial behavior because most federal courts of appeals nowadays make heavy use of visiting judges. But I am concerned only with the possible influence of visiting on Judge Cudahy’s dissent rate.

A Westlaw search enables a comparison between his opinions as a visiting judge and his opinions in the Seventh Circuit. The results are shown in Table 3.
Table 3: Judge Cudahy’s Opinions by Circuit, September 26, 1979-December 31, 2011 40

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Cases</th>
<th>Majority Opinions</th>
<th>Separate Opinions</th>
<th>Dissenting Opinions</th>
<th>Separate-Opinion Rate</th>
<th>Dissent Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>7th Circuit: Active Service</td>
<td>2956</td>
<td>765</td>
<td>346</td>
<td>190</td>
<td>11.7%</td>
<td>6.4%</td>
</tr>
<tr>
<td>7th Circuit: Senior Service</td>
<td>1819</td>
<td>377</td>
<td>96</td>
<td>39</td>
<td>5.3%</td>
<td>2.1%</td>
</tr>
<tr>
<td>7th Circuit: Total</td>
<td>4775</td>
<td>1142</td>
<td>442</td>
<td>229</td>
<td>9.3%</td>
<td>4.8%</td>
</tr>
<tr>
<td>9th Circuit</td>
<td>179</td>
<td>24</td>
<td>8</td>
<td>6</td>
<td>4.5%</td>
<td>3.4%</td>
</tr>
<tr>
<td>1st Circuit</td>
<td>26</td>
<td>9</td>
<td>3</td>
<td>3</td>
<td>11.5%</td>
<td>11.5%</td>
</tr>
<tr>
<td>D.C. Circuit</td>
<td>20</td>
<td>0</td>
<td>9</td>
<td>3</td>
<td>45.0%</td>
<td>15.0%</td>
</tr>
<tr>
<td>11th Circuit</td>
<td>77</td>
<td>24</td>
<td>3</td>
<td>2</td>
<td>3.9%</td>
<td>2.6%</td>
</tr>
<tr>
<td>6th Circuit</td>
<td>73</td>
<td>15</td>
<td>1</td>
<td>1</td>
<td>1.4%</td>
<td>1.4%</td>
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<tr>
<td>2nd Circuit</td>
<td>73</td>
<td>11</td>
<td>0</td>
<td>0</td>
<td>0%</td>
<td>0%</td>
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<tr>
<td>3rd Circuit</td>
<td>85</td>
<td>18</td>
<td>0</td>
<td>0</td>
<td>0%</td>
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<tr>
<td>5th Circuit</td>
<td>11</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>0%</td>
<td>0%</td>
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<tr>
<td>10th Circuit</td>
<td>23</td>
<td>7</td>
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<td>0</td>
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<td>0%</td>
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<tr>
<td>Federal Circuit</td>
<td>20</td>
<td>2</td>
<td>0</td>
<td>0</td>
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<td>0%</td>
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<tr>
<td>Other Circuits: Active Service</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
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<tr>
<td>Other Circuits: Senior Service</td>
<td>587</td>
<td>113</td>
<td>24</td>
<td>15</td>
<td>4.1%</td>
<td>2.6%</td>
</tr>
<tr>
<td>Total</td>
<td>5362</td>
<td>1255</td>
<td>466</td>
<td>244</td>
<td>8.7%</td>
<td>4.6%</td>
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</table>

It is easily calculated from the table that 92.0% of his opinions have been in the Seventh Circuit cases, and only 8.0% in cases in other circuits. 41 Of his Seventh Circuit opinions, 27.9% are separate opinions, but of his opinions in other circuits, only 17.5% are. 42 His dissent rate in the Seventh Circuit is 4.8%, but in the other circuits only 2.6%, with outliers in the First and D.C. Circuits.

But is the reduction in his all-circuit dissent rate since he became a senior judge a result in whole or part of his visiting other circuits? Table 3 indicates that the answer is no. Judge Cudahy’s Seventh Circuit dissent rate from 1995-2011 was 2.1%. That is 19.0% below his 1995-2011 other-circuit dissent rate of 2.6%. It is also 67.0% smaller than his Seventh Circuit active-service dissent rate of 6.4%.

40. Judge Cudahy Data Set, supra note 2. In reading this table, please note the following:
These data are the result of Westlaw searches.
“Cases” include all cases resulting in an opinion by at least one member of the court. “Separate opinions” include concurrences, dissents, and partial-concurrence/partial-dissents. A dissent is defined as a full or partial dissent.
The separate-opinion rate is the number of separate opinions divided by the number of cases. The dissent rate is the number of dissents divided by the number of cases.
The Fourth and Eighth Circuits are omitted because Judge Cudahy did not write any opinions for them (and probably did not sit with them at all).
41. See supra Table 3 (reporting 1142 majority opinions and 442 separate opinions in the Seventh Circuit out of 1255 majority opinions and 466 separate opinions overall).
42. See supra Table 3 (reporting 442 separate opinions out of 1584 total opinions in the Seventh Circuit and 24 separate opinions out of 137 total opinions in other circuits).
rate of 6.4%. Because the drop in Judge Cudahy's dissent rate is even more pronounced when analysis is limited to the Seventh Circuit, the change cannot be understood as a result of visiting other circuits.

Another possibility is that Judge Cudahy was less motivated to write opinions of any kind as he got older and that this shift was what caused the dissent rate to dip. Table 4 shows the percent change between his active and senior service opinion rates.

<table>
<thead>
<tr>
<th></th>
<th>Percent Change in Majority Opinion Rate</th>
<th>Percent Change in Separate Opinion Rate</th>
<th>Percent Change in Dissent Rate</th>
<th>Percent Change in Overall Opinion Rate</th>
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</thead>
<tbody>
<tr>
<td>All Circuits</td>
<td>-21.3%</td>
<td>-57.4%</td>
<td>-65.1%</td>
<td>-32.5%</td>
</tr>
<tr>
<td>Seventh Circuit Only</td>
<td>-19.9%</td>
<td>-54.9%</td>
<td>-66.6%</td>
<td>-30.8%</td>
</tr>
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</table>

It is apparent that Judge Cudahy's separate opinion, majority opinion and overall opinion rates all declined following his active service. This holds true whether we consider all his cases or only those in the Seventh Circuit. But the decline in the dissent rate is more pronounced than the decline in his other opinion rates. He did not write proportionately fewer opinions across the board. Therefore, the change in his dissenting behavior cannot be completely explained as the result of a reduction in his overall opinion-writing rate.

Nor can it be attributed to the Seventh Circuit's becoming more liberal, because it has not; I suggested earlier (admittedly without presenting proof) that the court has participated in the federal judiciary's general rightward drift since the 1980s. (Notice that Figure 1 shows five liberal-leaning judicial voters in the Seventh Circuit and seven conservative-leaning as of 2008.) In light of all this evidence, I am inclined to think that Judge Cudahy has become more conservative relative to the court’s mean, even as that mean has itself drifted to the right—and that that is the principal reason that he dissents less today.

Conclusion

Liberalism and conservatism are not uniform ideologies. It is possible for the liberal or conservative policies of one generation to be achieved or abandoned and, either way, cease to be bones of contention in future generations. A liberal or a conservative in 1979 may find himself a conservative, a liberal, or a centrist in 2011. Such changes, alongside actual changes in an individual's beliefs, may explain changes in the rate of dissent—a change that one observes in the long, distinguished, and continuing service of Judge Richard D. Cudahy on the United States Court of Appeals for the Seventh Circuit.

43. Data taken from Tables 2 and 3, supra.
Appendix: Judge Cudahy’s Hundred Most Cited Opinions

<table>
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<tr>
<th>Citation Rank</th>
<th>Title</th>
<th>Circuit</th>
<th>Date</th>
<th>Citation</th>
<th>Case Cites</th>
<th>Cites per Year</th>
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<td>1</td>
<td>Venture Assocs. Corp. v. Zenith Data Sys. Corp.</td>
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<td>7th</td>
<td>8/3/2007</td>
<td>496 F.3d 773</td>
<td>1246</td>
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<td>3</td>
<td>Wright v. Associated Ins. Cos.</td>
<td>7th</td>
<td>7/21/1994</td>
<td>29 F.3d 1244</td>
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<td>4</td>
<td>Haroco, Inc. v. Am. Nat’l Bank &amp; Trust Co. of Chi.</td>
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<td>10/19/1984</td>
<td>747 F.2d 384</td>
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<td>5</td>
<td>Lott v. Mueller</td>
<td>9th</td>
<td>9/19/2002</td>
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<td>Publishers Res., Inc. v. Walker-Davis Publ’ns, Inc.</td>
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<td>5/22/1985</td>
<td>762 F.2d 557</td>
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<td>Young v. Sec’y of Health &amp; Human Servs.</td>
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<td>7/28/1988</td>
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<td>MCI Commc’ns Corp. v. Am. Tel. &amp; Tel. Co.</td>
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367
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<td>89</td>
<td>Price v. City of Fort Wayne</td>
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<td>6/27/1997</td>
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<td>Dickinson v. Heinold Sec., Inc.</td>
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<td>Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.</td>
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<td>McCool v. Strata Oil Co.</td>
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