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# 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.<sup>1</sup> 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-

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† Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, The University of Chicago Law School. I thank Thane Rehn, Emily Rush, and Michael Zhu for very helpful research assistance, and William Landes for very helpful comments.

1. Judge Cudahy was nominated in May 1979, and received his commission in September of that year. *Biographical Directory of Federal Judges: Cudahy, Richard Dickson*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=540&cid=999&ctype=na&instate=na> (last visited Apr. 9, 2012).

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<sup>2</sup>**

<i>Opinion Type</i>	<i>Opinions</i>
Majority	1255
Dissenting	160
Concurring	222
Concurring in Part and Dissenting in Part	84
Total	1721

The table reveals an average of 53.4 opinions per year.<sup>3</sup> 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<sup>4</sup>—well above the national average.<sup>5</sup> Yet there are no telltale signs of haste in his opinions.

2. See Richard A. Posner, Data on Judge Cudahy's Opinions, 1979-2011 [hereinafter Judge Cudahy Data Set] (unpublished data set) (on file with author).

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

## Salute to Judge Richard Cudahy

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.<sup>6</sup>) 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).<sup>7</sup> Both are procedural opinions, as are the third and eighth most-cited opinions.<sup>8</sup> 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,<sup>9</sup> however, and the fourth most cited opinion was also rendered in a commercial case.<sup>10</sup> 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.<sup>11</sup> 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,<sup>12</sup> 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

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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).

10. See *Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chi.*, 747 F.2d 384 (7th Cir. 1984).

11. See *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225 (7th Cir. 1993).

12. See *Limitation of Liability Act*, 46 U.S.C. § 30505 (2006).

injury is experienced. The Supreme Court affirmed the decision, essentially agreeing with Judge Cudahy's analysis.<sup>13</sup>

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.<sup>14</sup> 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"<sup>15</sup> anticipated the Supreme Court's recent ruling in *American Needle, Inc. v. National Football League*,<sup>16</sup> tying unity of interest to the existence of "unitary decisionmaking" and a "single aggregation of economic power."<sup>17</sup>

## 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.<sup>18</sup> This percentage seems especially high for the Seventh Circuit, although I do not have comparative statistics.

Table 2 provides more detailed statistics.

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13. See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 548 (1995).

14. See Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593 (7th Cir. 1996) (Cudahy, J., concurring).

15. *Id.* at 606.

16. 130 S. Ct. 2201 (2010).

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.

**Table 2: Rates of Separate Opinions of Judge Cudahy,  
September 26, 1979-December 31, 2011<sup>19</sup>**

<i>Period</i> <sup>20</sup>	<i>Cases</i> <sup>21</sup>	<i>Majority Opinions</i>	<i>Separate Opinions</i> <sup>22</sup>	<i>Dissenting Opinions</i> <sup>23</sup>	<i>Separate-Opinion Rate</i>	<i>Dissent Rate</i>
1979-84	648	194	86	47	13.3%	7.3%
1985-89	886	257	131	76	14.8%	8.6%
1990-94	1422	314	129	67	9.1%	4.7%
1995-99	708	177	49	24	6.9%	3.4%
2000-04	715	144	31	13	4.3%	1.8%
2005-09	713	121	30	14	4.2%	2.0%
2010-11	270	48	10	3	3.7%	1.1%
1979-94 (Active)	2956	765	346	190	11.7%	6.4%
1995-2011 (Senior)	2406	490	120	54	5.0%	2.2%
1979-2011 (Total)	5362	1255	466	244	8.7%	4.6%

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%.<sup>24</sup> 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 dissenter).

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.<sup>25</sup>

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,<sup>26</sup> 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.<sup>27</sup> 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).<sup>28</sup> 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%).<sup>29</sup> 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%).<sup>30</sup> 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 Corey Yung:<sup>31</sup>

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26. Data on the dispositions of cases for each circuit court are available at *U.S. Court of Appeals—Judicial Caseload Profile—Seventh Circuit*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsa.pl> (last visited Apr. 9, 2012).

27. See CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 17-19*, 156-63 nn.1-26 (2006) (outlining a database with general coverage for the years 1995 through 2004 and longer coverage periods for certain categories of cases); EPSTEIN ET AL., *supra* note 24 (manuscript at 195-96, 330) (describing the Sunstein database, extending its coverage through 2008, and calculating the dissent rate).

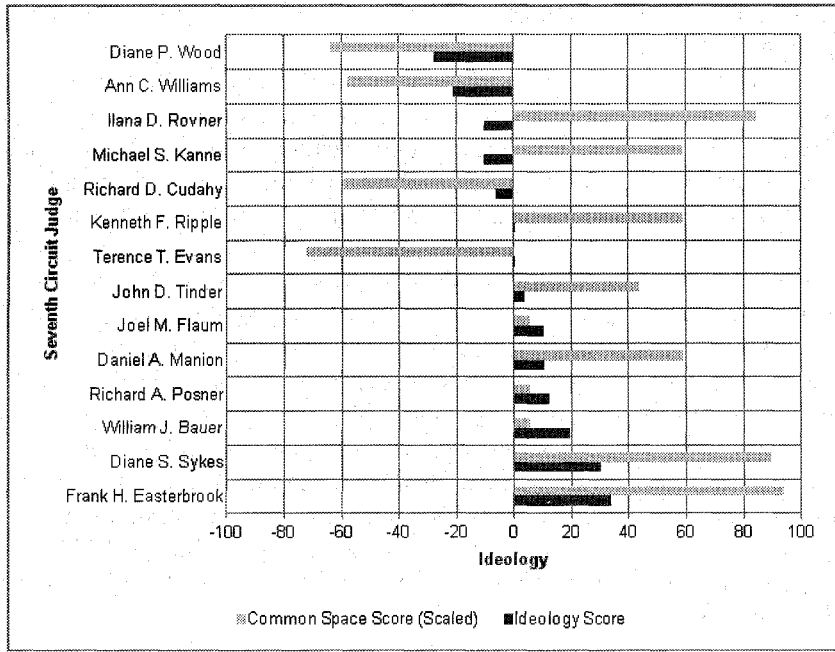
28. EPSTEIN ET AL., *supra* note 24 (manuscript at 330).

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.

**Figure 1: Ideology and Common Space Scores of Seventh Circuit Judges**



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,<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup>

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.<sup>36</sup>

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

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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.

35. *Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 282 (7th Cir. 1992).

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).

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),<sup>37</sup> 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%.<sup>38</sup>

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.<sup>39</sup> 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-

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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<sup>40</sup>**

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

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.<sup>41</sup> Of his Seventh Circuit opinions, 27.9% are separate opinions, but of his opinions in other circuits, only 17.5% are.<sup>42</sup> 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

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 4: Percent Change in Judge Cudahy's Opinion Rate from Active to Senior Service<sup>43</sup>**

	<i>Percent Change in Majority Opinion Rate</i>	<i>Percent Change in Separate Opinion Rate</i>	<i>Percent Change in Dissent Rate</i>	<i>Percent Change in Overall Opinion Rate</i>
All Circuits	-21.3%	-57.4%	-65.1%	-32.5%
Seventh Circuit Only	-19.9%	-54.9%	-66.6%	-30.8%

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.

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43. Data taken from Tables 2 and 3, *supra*.

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Appendix: Judge Cudahy's Hundred Most Cited Opinions

<i>Citation Rank</i>	<i>Title</i>	<i>Circuit</i>	<i>Date</i>	<i>Citation</i>	<i>Case Cites</i>	<i>Cites per Year</i>
1	Venture Assocs. Corp. v. Zenith Data Sys. Corp.	7th	3/2/1993	987 F.2d 429	1379	72.10
2	EEOC v. Concentra Health Servs., Inc.	7th	8/3/2007	496 F.3d 773	1246	265.34
3	Wright v. Associated Ins. Cos.	7th	7/21/1994	29 F.3d 1244	834	47.01
4	Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chi.	7th	10/19/1984	747 F.2d 384	831	30.22
5	Lott v. Mueller	9th	9/19/2002	304 F.3d 918	780	81.51
6	Publishers Res., Inc. v. Walker-Davis Publ'ns, Inc.	7th	5/22/1985	762 F.2d 557	650	24.15
7	Crowder v. Lash	7th	8/26/1982	687 F.2d 996	632	21.32
8	De La Fuente v. Stokely-Van Camp, Inc.	7th	6/29/1983	713 F.2d 225	622	21.59
9	Doe <i>ex rel.</i> Doe v. St. Joseph's Hosp. of Fort Wayne	7th	4/2/1986	788 F.2d 411	592	22.73
10	Young v. Sec'y of Health & Human Servs.	7th	2/28/1992	957 F.2d 386	587	29.15
11	Bontkowski v. First Nat'l Bank of Cicero	7th	7/1/1993	998 F.2d 459	569	30.27
12	Juarez v. Ameritech Mobile Commc'ns, Inc.	7th	2/18/1992	957 F.2d 317	561	27.83
13	Ed Miniatt, Inc. v. Globe Life Ins. Grp., Inc.	7th	11/5/1986	805 F.2d 732	559	21.96
14	Gray v. Dane Cnty.	7th	7/28/1988	854 F.2d 179	551	23.23
15	Dixon v. Page	7th	5/28/2002	291 F.3d 485	488	49.38
16	Russell v. Delco Remy Div. of Gen. Motors Corp.	7th	4/6/1995	51 F.3d 746	473	27.77
17	Prochaska v. Barnhart	7th	7/24/2006	454 F.3d 731	450	78.63
18	Briscoe v. LaHue	7th	10/27/1981	663 F.2d 713	443	14.53
19	Egger v. Phillips	7th	6/2/1983	710 F.2d 292	436	15.10
20	Donald v. Cook Cnty. Sheriff's Dept.	7th	9/6/1996	95 F.3d 548	430	27.55
21	L.S. Heath & Son, Inc. v. AT&T Info. Sys., Inc.	7th	10/12/1993	9 F.3d 561	416	22.47
22	MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.	7th	1/12/1983	708 F.2d 1081	410	14.01
23	French v. Owens	7th	11/26/1985	777 F.2d 1250	406	15.38
24	Poulos v. Naas Foods, Inc.	7th	3/18/1992	959 F.2d 69	383	19.07
25	Jones v. United States	7th	2/5/1999	167 F.3d 1142	382	28.96

<i>Citation Rank</i>	<i>Title</i>	<i>Circuit</i>	<i>Date</i>	<i>Citation</i>	<i>Case Cites</i>	<i>Cites per Year</i>
26	Kunik v. Racine Cnty.	7th	10/30/1991	946 F.2d 1574	369	18.03
27	Nechis v. Oxford Health Plans, Inc.	2nd	8/24/2005	421 F.3d 96	362	54.53
28	Courtney v. Biosound, Inc.	7th	12/13/1994	42 F.3d 414	353	20.35
29	Sherwin Manor Nursing Ctr., Inc. v. McAuliffe	7th	10/6/1994	37 F.3d 1216	336	19.17
30	Scivally v. Sullivan	7th	5/20/1992	966 F.2d 1070	328	16.47
31	Mace v. Van Ru Credit Corp.	7th	3/17/1997	109 F.3d 338	319	21.15
32	Dawson v. Gen. Motors Corp.	7th	10/13/1992	977 F.2d 369	319	16.35
33	Jordan v. Summers	7th	2/29/2000	205 F.3d 337	310	25.56
34	Collier v. Budd Co.	7th	9/26/1995	66 F.3d 886	308	18.60
35	Wolfolk v. Rivera	7th	3/14/1984	729 F.2d 1114	308	10.96
36	Leigh v. Engle	7th	1/27/1984	727 F.2d 113	288	10.20
37	Abdullahi v. City of Madison	7th	9/12/2005	423 F.3d 763	286	43.42
38	Santiago v. Lane	7th	1/23/1990	894 F.2d 218	285	12.82
39	Swofford v. Mandrell	7th	8/4/1992	969 F.2d 547	264	13.40
40	Beam v. IPCO Corp.	7th	1/29/1988	838 F.2d 242	259	10.69
41	Perez v. Oakland Cnty.	6th	10/18/2006	466 F.3d 416	256	46.65
42	<i>In re</i> Jartran, Inc.	7th	4/19/1984	732 F.2d 584	253	9.04
43	Nat'l Fidelity Life Ins. Co. v. Karaganis	7th	2/2/1987	811 F.2d 357	251	9.96
44	Schlifke v. Seafirst Corp.	7th	1/19/1989	866 F.2d 935	250	10.76
45	McDonald v. Village of Winnetka	7th	6/17/2004	371 F.3d 992	247	31.57
46	Washington v. Smith	7th	7/6/2000	219 F.3d 620	246	20.89
47	Metz v. Tootsie Roll Indus., Inc.	7th	8/16/1983	715 F.2d 299	244	8.51
48	First Nat'l Bank of Cicero v. Lewco Sec. Corp.	7th	10/27/1988	860 F.2d 1407	239	10.18
49	Spraying Sys. Co. v. Delavan, Inc.	7th	9/17/1992	975 F.2d 387	237	12.10
50	Wellman v. Faulkner	7th	8/9/1983	715 F.2d 269	237	8.26
51	Chambers v. Am. Trans Air, Inc.	7th	2/28/1994	17 F.3d 998	230	12.69
52	United Computer Sys., Inc. v. AT&T Corp.	9th	5/31/2002	298 F.3d 756	228	23.09
53	Panaras v. Liquid Carbonic Indus. Corp.	7th	1/19/1996	74 F.3d 786	228	14.04

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<i>Citation Rank</i>	<i>Title</i>	<i>Circuit</i>	<i>Date</i>	<i>Citation</i>	<i>Case Cites</i>	<i>Cites per Year</i>
54	Sands, Taylor & Wood Co. v. Quaker Oats Co.	7th	9/2/1992	978 F.2d 947	223	11.36
55	Alexander v. City of Chicago	7th	5/12/1993	994 F.2d 333	214	11.30
56	<i>In re</i> Cont'l Ill. Sec. Litig.	7th	4/23/1984	732 F.2d 1302	207	7.40
57	R.J.R. Servs., Inc. v. Aetna Cas. & Sur. Co.	7th	2/16/1989	895 F.2d 279	203	8.76
58	Culver v. Gorman & Co.	7th	7/20/2005	416 F.3d 540	202	30.00
59	Amadio v. Ford Motor Co.	7th	2/1/2001	238 F.3d 919	200	17.86
60	Wroblewski v. City of Washburn	7th	6/12/1992	965 F.2d 452	198	9.98
61	Volovsek v. Wisc. Dept. of Agr., Trade & Consumer Prot.	7th	9/18/2003	344 F.3d 680	195	22.75
62	LaSalle Nat'l Bank v. Lake Cnty.	7th	3/24/1983	703 F.2d 252	190	6.54
63	Rankow v. First Chi. Corp.	7th	2/24/1989	870 F.2d 356	189	8.17
65	Boyd v. City of New York	7th	7/9/2003	336 F.3d 72	186	21.22
64	Paper Exp., Ltd. v. PfankuchMaschinen GmbH	7th	8/11/1992	972 F.2d 753	186	9.45
67	<i>In re</i> Longardner & Assocs., Inc.	7th	8/24/1988	855 F.2d 455	185	7.82
66	Thornton v. Evans	7th	11/1/1982	692 F.2d 1064	185	6.28
69	Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund	7th	5/20/1994	25 F.3d 417	184	10.27
68	Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.	7th	8/6/1993	1 F.3d 639	184	9.84
70	Johnson v. Nordstrom, Inc.	7th	7/20/2001	260 F.3d 727	182	16.95
71	United States v. Keplinger	7th	10/29/1985	776 F.2d 678	182	6.88
73	Vakharia v. Swedish Covenant Hosp.	7th	9/9/1999	190 F.3d 799	180	14.29
72	Fishman v. Estate of Wirtz	7th	11/21/1986	807 F.2d 520	180	7.08
74	<i>In re</i> Jartran, Inc.	7th	9/26/1989	886 F.2d 859	178	7.89
75	Kelly v. United States	7th	7/6/1994	29 F.3d 1107	175	9.84
76	United States v. Tilmon	7th	3/24/1994	19 F.3d 1221	175	9.69
78	Egert v. Conn. Gen. Life Ins. Co.	7th	4/17/1990	900 F.2d 1032	174	7.91
77	United States v. Napue	7th	11/19/1987	834 F.2d 1311	174	7.13
79	Martin v. Consultants & Adm'rs, Inc.	7th	6/18/1992	966 F.2d 1078	173	8.72
80	Price v. Rochford	7th	11/8/1991	947 F.2d 829	172	8.41



<i>Citation Rank</i>	<i>Title</i>	<i>Circuit</i>	<i>Date</i>	<i>Citation</i>	<i>Case Cites</i>	<i>Cites per Year</i>
81	Skelton v. Gen. Motors Corp.	7th	10/14/1988	860 F.2d 250	169	7.19
82	United States v. Jiminez	11th	8/29/2000	224 F.3d 1243	168	14.45
83	Diamond Mortg. Corp. of Ill. v. Sugar	7th	9/21/1990	913 F.2d 1233	168	7.79
84	United States v. Jacobs	2nd	7/7/1997	117 F.3d 82	167	11.30
85	<i>In re</i> Prescott	7th	11/4/1986	805 F.2d 719	166	6.52
86	Kayembe v. Ashcroft	3rd	7/1/2003	334 F.3d 231	165	18.77
87	Maynard v. Nygren	7th	6/10/2003	332 F.3d 462	165	18.65
88	Ruth v. United States	7th	6/30/1987	823 F.2d 1091	165	6.65
89	Price v. City of Fort Wayne	7th	6/27/1997	117 F.3d 1022	159	10.74
90	Dickinson v. Heinold Sec., Inc.	7th	10/6/1981	661 F.2d 638	156	5.11
91	Simpson v. Borg-Warner Auto. Inc.	7th	11/18/1999	196 F.3d 873	153	12.33
92	Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.	7th	2/4/1992	955 F.2d 1143	146	7.23
93	Pasco Int'l (London) Ltd. v. Stenograph Corp.	7th	12/23/1980	637 F.2d 496	145	4.63
95	McCool v. Strata Oil Co.	7th	8/21/1992	972 F.2d 1452	144	7.33
94	Hughes Masonry Co., Inc. v. Greater Clark Cnty. Sch. Bldg. Corp.	7th	9/28/1981	659 F.2d 836	144	4.71
96	Williams v. Washington	7th	7/6/1995	59 F.3d 673	143	8.52
97	Vallone v. CNA Fin. Corp.	7th	7/15/2004	375 F.3d 623	140	18.07
98	Garcia v. Zenith Elecs. Corp.	7th	6/28/1995	58 F.3d 1171	139	8.27
99	McPherson v. City of Waukegan	7th	8/11/2004	379 F.3d 430	137	17.85
100	Liquid Controls Corp. v. Liquid Control Corp.	7th	9/30/1986	802 F.2d 934	137	5.36