# Rocket Dockets: Reducing Delay in Federal Civil Litigation

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*Courts and commentators agree that civil docket delay in the federal courts is a serious problem, undermining justice and increasing costs to both litigants and society in general. Courts have increasingly responded by adopting so-called "rocket dockets," setting early, firm trial dates at the outset of proceedings, and generally allowing modification of such dates only for good cause. However, use of rocket docket techniques has itself come under criticism. Forcing cases to trial on an accelerated schedule arguably creates risks to both procedural and substantive fairness that potentially outweigh any benefits achieved through delay reduction. This Comment addresses the propriety and efficacy of rocket dockets, finding that fears of adverse impact are valid but not inevitable. The author concludes that rocket dockets are one appropriate, if partial, solution to docket delay, and proposes several safeguards to minimize any associated risks. Particularly, the author suggests: (1) formalizing the procedures whereby courts consider requests for trial date continuances; (2) using pretrial conferences to narrow discovery issues as early as possible; and (3) on review, finding prejudice from the denial of a continuance to conduct further discovery on a showing that a party was precluded by the shortness of time from collecting material evidence or locating material witnesses, rather than requiring a showing of actual adverse trial outcome. Such safeguards, while allowing the benefits associated with a more speedy civil docket, will also enhance the psychological experience of litigants by promoting the appearance of a fair process, and will help ensure legitimate outcomes by increasing fairness in fact.*

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## INTRODUCTION

There is a crisis in the federal courts: litigants must wait too long, and pay too much, to resolve civil disputes.[1] In 1989, a special task force, convened at the request of the Senate Judiciary Committee, issued a report examining the widely recognized problems of expense and delay in federal civil litigation.[2] The task force found widespread complaints of docket delay among scholars, judges, attorneys, and litigants, and a perception that such inefficiency unreasonably impedes access to the courts and hinders justice in general.[3]

The task force's findings on docket delay were by no means groundbreaking. Courts and commentators have long recognized that delays in civil dockets "often represent suffering and financial loss which a humane society should not tolerate."[4] The task force concluded that the cost and delay of litigation require meaningful and immediate remedial action: "At a time when many citizens and groups are turning to the courts to redress what they believe to be serious wrongs or injustices, cases must move as quickly and inexpensively as possible."[5] It accordingly proposed various procedural reforms to achieve these objectives.[6]

One suggested reform requires that judges set "early, firm trial dates at the outset of all noncomplex cases."[7] The task force further

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1. *See* BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 1 (1989) [hereinafter JUSTICE FOR ALL]. It should be noted at the outset that this statement must be qualified. Case management procedures of greater and lesser effectiveness vary the delays and costs among districts. The District of Maine, for example, claims that "it is universally realized that the [district] has no delay in civil litigation." FEDERAL LOCAL COURT RULES: CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS OF UNITED STATES DISTRICT COURTS 452 (April 1994 Supp., §2 of 2) [hereinafter LOCAL COURT RULES]. The Eastern District of Virginia similarly asserts an absence of undue expense or delay in civil litigation. *See id.* at 1107.

2. JUSTICE FOR ALL, *supra* note 1, at vii-viii.

3. *See id.* at 5-6.

4. Davis v. United Fruit Co., 402 F.2d 328, 331-32 n.9 (2d Cir. 1968) (quoting Chief Justice Earl Warren, Address at the American Law Institute (May 21, 1968)); *see also* Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts Be Remedied by Local Rules?*, 67 ST. JOHN'S L. REV. 721, 721 (1993); Jon O. Newman, Comment, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1644 (1985). The findings of the Brookings Institution task force indicate that attorneys, judges, and litigants representing a wide spectrum of interests agree on this issue. *See* JUSTICE FOR ALL, *supra* note 1, at 5-6. The task force included "leading litigators from the plaintiffs' and defense bar, civil and women's rights lawyers, attorneys representing consumer and environmental organizations, representatives of the insurance industry, general counsels of major corporations, former judges, and law professors." *Id.* at vii.

5. JUSTICE FOR ALL, *supra* note 1, at 6.

6. *See id.* at 8-29.

7. *Id.* at 17. In the Civil Justice Reform Act (CJRA) of 1990, Pub. L. No. 101-650, 104 Stat. 5090 (codified as amended at 28 U.S.C. §§ 471-482 (1994)), which requires each of the nation's district courts to develop and implement a civil justice expense and delay reduction plan, Congress

recommended that judges review requests to delay trial dates and discovery deadlines under a stringent "good cause" standard in order to minimize continuances.[8] These "rush to trial" techniques, when coupled in practice, comprise a judicial management method commonly termed a "rocket docket."[9] Several district courts have adopted rocket docket principles in their local rules. In addition, some individual district court judges manage their calendars with rocket docket techniques.

The rocket docket has received mixed reviews from various observers of, and participants in, the judicial process. The technique raises obvious and controversial questions about judicial case management: Are judges allowed to control their dockets in this way? If permitted, should they do so? And when they do, how do the benefits of delay reduction compare to potential costs?

This Comment addresses each of these issues, assessing the propriety and efficacy of forcing cases to trial quickly in order to reduce delay in civil litigation.[10] Part I briefly describes the nature of the delay in federal civil litigation and identifies the negative consequences of this delay. Part II discusses the emergence of the rocket docket technique and illustrates the technique's operation in a recent case from the Central District of California. Part III evaluates the effectiveness of rocket dockets in achieving their intended objective of reducing delay, and explores the costs and benefits of rocket docket scheduling techniques. This analysis situates the procedural reform within the broader context of the civil justice system as a whole, considering ways in which various goals, and various types of litigants, are served or harmed. Finally, Part IV suggests that the potential costs and feared adverse consequences of the practice are not inevitable and proposes safeguards to minimize such effects, including an alternative standard of review for the denial of continuance requests.

## I
## THE PROBLEM: DELAY

Rule 1 of the Federal Rules of Civil Procedure mandates that the rules be "construed and administered to secure the just, speedy, and inexpensive determination of every action."[11] Increasingly, however, civil dispute resolution does not reflect these objectives. Disposition of

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codified the task force's recommendation. *See* 28 U.S.C. § 473(a)(2)(B) (1994) (suggesting that, absent special circumstances, judges set "early, firm trial dates").

8. JUSTICE FOR ALL, *supra* note 1, at 21.

9. *See, e.g.*, Terence P. Ross, *The Rocket Docket*, LITIGATION, Winter 1986, at 48, 50.

10. This discussion is limited to delays in federal civil litigation. Federal criminal trial schedules are relevant to this Comment only insofar as they impact civil litigation schedules. *See infra* text accompanying note 14.

11. FED. R. CIV. P. 1; *see also* 28 U.S.C. § 471 (1994).

civil cases is neither speedy nor inexpensive and, consequently, justice is threatened.

Numerous factors may contribute to the delay. Some critics cite institutional factors within the judicial system, including insufficient numbers of federal judges,[12] judicial vacancies,[13] and the statutorily mandated priority given to criminal cases.[14] Others blame the proliferation of certain types of federal litigation.[15] Still others emphasize attorney behavior, citing pretrial discovery as "one of the principal reasons for the high cost and delay."[16]

### *A. Extent of Delay*

Whatever its causes, delay has become an inescapable factor in most federal civil cases. In 1993, the median time interval from filing to disposition of all civil cases in the district courts was eight months.[17] The slowest ten percent of cases required more than twenty-seven months to resolve.

At first glance, these numbers may not appear alarming. The composite statistics, however, are misleading for two reasons. First, these statistics include the significant number of cases that terminate before judicial action commences or the pretrial process begins.[18] Cases that reach the pretrial stage slow considerably. The median disposition time of cases resolved during or after pretrial was fourteen months, with the

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12. *See* Cavanagh, *supra* note 4, at 721.

13. *See id.* at 721-22; Robert L. Haig & Warren N. Stone, *Does All This Litigation "Reform" Really Benefit the Client?*, 67 ST. JOHN'S L. REV. 843, 846 (1993); *see also* Deborah Pines, *Disposition Rates in Federal Courts Slower*, N.Y. L.J., Jun. 9, 1995, at 1 (reporting that court officials cite judicial vacancies as the leading explanation for the previous year's reduced disposition rate in federal appeals and trial courts based in New York City).

14. *See* Cavanagh, *supra* note 4, at 722; Haig & Stone, *supra* note 13, at 846; Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663, 672-77 (1993).

15. *See, e.g.*, Haig & Stone, *supra* note 13, at 847 (noting the addition of complex racketeering cases and drug prosecutions to federal dockets and the insufficient number of judges to keep up); Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891, 899-900 (1993) (summarizing Judge Posner's argument attributing the caseload crisis to an "increase in federal rights" and the corresponding rise of "cases involving individual litigants attempting to enforce public norms").

16. Alfred P. Ewert & Gabriel P. Kralik, *The Rocket Docket*, MANAGING INTELLECTUAL PROPERTY, July-Aug. 1994, at 11. The authors cite a 1991 study of litigation problems, conducted by the President's Council on Competitiveness, which concluded that "over 80% of the time and cost of a typical lawsuit involves the pre-trial examination of facts through discovery." *Id.*

17. ADMINISTRATIVE OFFICE OF U.S. COURTS, UNITED STATES COURTS: SELECTED REPORTS pt. 3, app. I at AI-84 (1993) [hereinafter U.S. COURTS]. The Administrative Office of United States Courts monitors the judicial business in the nation's district courts and calculates the time from filing to disposition of civil cases. The figures cited in this discussion can be found at *id.*

18. *See id.* (showing that, of the 175,363 cases filed during the twelve-month period ending September 30, 1993, 38,760 terminated without court action and 110,224 were resolved before pretrial).

slowest ten percent of these cases lasting at least thirty-four months. Cases resolved by trial experienced even greater disposition delay, with a median interval of nineteen months. Ten percent of the cases that reached trial remained unresolved for more than forty-two months after filing.

Second, the composite statistics severely understate the true delay experienced by some litigants proceeding to trial because the calculated disposition time of all federal civil cases does not reveal regional disparities. In the Second Circuit, for example, the slowest ten percent of cases disposed of by trial took more than sixty-four months. In contrast, the slowest ten percent of the cases tried in the Fourth Circuit required thirty-three months from filing to termination.[19]

### *B. Delay Increases Costs*

There is no question that litigation is expensive for everyone. High litigation costs clearly burden individual litigants who may be unable to afford the expensive judicial forum. The expense also affects corporate entities by diverting time, energy, and resources from essential business functions.[20] Finally, litigation expense can burden society at large if businesses pass their legal costs on to consumers by inflating prices.[21]

Critics of delay have suggested various ways in which litigation delay increases client costs. One such increase results when scheduled trial dates are postponed.[22] If an attorney fully prepares for trial, then faces a last-minute continuance, much of the final preparation effort will be repeated for the next trial date.[23] Since final trial preparation is one of the largest litigation expenses clients face,[24] this type of delay creates a substantial cost increase.

Delay may further increase costs by extending the time available for discovery. Some critics argue that attorueys utilize the extra time to conduct excessive and expensive discovery.[25] The burden of delay is especially troublesome in cases between parties with vastly different resources as, for example, between the government, or a litigant represented by a large law firm, and a party counseled by a sole practitioner. Delay may help further extend the wealthier party's opportunity to

19. The disposition times of the slowest cases tried in the other circuits hover between these two extremes. *See id.* at AI-84 to AI-86.

20. *See* JUSTICE FOR ALL, *supra* note 1, at 5.

21. *See id.* at 1.

22. *See id.*

23. *See* Haig & Stone, *supra* note 13, at 853-54.

24. *Id.* at 853.

25. *See* JUSTICE FOR ALL, *supra* note 1, at 1; *see also* Eric Herman, *Putting the Rocket in the Docket: Discovery Abuses Hike Litigation Costs, Burden Courts*, A.B.A. J., Oct. 1990, at 32 (discussing the use of discovery to harass opponents and add billable hours).

overwhelm its opponent. According to this argument, reducing delay may decrease litigation expense by reducing discovery costs: with less pretrial time to conduct discovery, parties may take fewer depositions and send fewer interrogatories.[26]

A final cost of delay is that, by increasing the number of hours until trial, delay may increase a client's total attorney fees. Extended preparation time allows an attorney to devote more hours to the case, thus elevating the hours for which a client is billed.

Admittedly, the latter two costs attributed to delay are often overstated because critics fail to recognize that expense is determined in part by exogenous factors, including a case's complexity, the number of claims or defenses, and the number of pretrial court appearances required. For example, attorneys will not necessarily increase the amount of discovery conducted (and its resulting costs) simply because they have the time to do so. Similarly, the amount of time necessary to competently litigate a case depends on factors other than the time available. Although a remote trial date may theoretically give an attorney more time to spend on a case, it does not necessarily prompt an attorney to devote more time than the case actually demands. Nevertheless, it has been suggested that a lawyer's work "tends to expand to fill the time available."[27] To the extent that docket delays foster this tendency, increasing preparation time may increase litigation costs.

### *C. Delay Denies Justice*

The notion that justice delayed is justice denied has repeatedly been recognized and confirmed.[28] Delay most obviously obstructs justice by reducing the value of the outcome of a civil suit. By prolonging the litigation period and trial preparation process, delay may increase a client's costs.[29] These costs affect the results for both winning and losing parties by reducing the value of a victory and increasing the burden

26. *See* Longan, *supra* note 14, at 692.

27. *See* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 316 (1986) (adding that "the fact that many lawyers are paid by the hour suggests that [the] profession may be more susceptible to this principle than most").

28. *See, e.g.*, JUSTICE FOR ALL, *supra* note 1, at 6 (explaining that "high transaction costs—manifested in high out-of-pocket legal fees and the time consumed by delay—are the enemies of justice"); Kim Dayton, *Case Management in the Eastern District of Virginia*, 26 U.S.F. L. REV. 445, 491 (1992) (suggesting that quick and efficient case disposition increases the quality of justice for litigants); Virginia E. Hench, *Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action*, 67 TEMP. L. REV. 179, 230 (1994) (explaining that "[d]elaying tactics can keep powerless litigants out of court as effectively as over-zealous 'fast track' measures").

29. *But see supra* Part I.B (noting that cost increases may be illusory in some circumstances).

of a loss.[30] Even absent identifiable financial costs, extended delay imposes opportunity costs by diverting attention, energy, and emotion.[31]

Delay might also compromise justice by eliminating the option of judicial adjudication altogether. When parties are unable to obtain timely relief, the expense of continuing to litigate may force them to accept inequitable settlements:

> To the extent that delay and expense produce settlements, they can do so unfairly: some plaintiffs are "being coerced by the cost of justice into accepting far less than their due, while some defendants are yielding to opportunistic litigants who unabashedly wield the expenses of litigation as weapons to extort undeserved settlements."[32]

Third, delay may threaten justice by disproportionately benefiting defendants. Extended time between initiation and resolution of a lawsuit allows a defendant to retain the value of the judgment during the delay, and thereby to benefit from prejudgment interest. Indeed, defense attorneys may construct their litigation strategies in part to enjoy favorable prejudgment interest rates.[33] Trial delays essentially grant defendants an "interest-free loan for as long as [the defendants can] delay paying out [the judgment]."[34]

Admittedly, prejudgment interest can sometimes be awarded to victorious plaintiffs to compensate for the loss of the use of the money between the time of the underlying action and the time of judgment.[35] The availability of prejudgment interest is often determined by federal statutes that demand interest awards.[36] Similarly, contractual provisions may expressly provide for interest payment.[37] Absent a controlling contract or legislative enactment, federal courts have discretionary authority to supplement damage awards with interest.[38] However, in

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30. John R. Allison, *Combinations of Decision-making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH L. REV. 1135, 1154 (noting that inefficiency may reduce the value of a positive outcome or increase the loss associated with a negative outcome).

31. *See id.*

32. Longan, *supra* note 14, at 688 (quoting Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 3 (1990) (citation omitted)); *see also* JUSTICE FOR ALL, *supra* note 1, at 5-6.

33. *See* Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1338 n.117 (1995) (suggesting this factor affects litigation decisions).

34. Robert B. Fitzpatrick, *Damages and Other Remedies in Employment Cases*, C932 A.L.I.-A.B.A. 459, 480 (1994) (quoting Donovan v. Sovereign Sec., Ltd., 726 F.2d 55, 58 (2d Cir. 1984)).

35. *See* Anthony E. Rothschild, Comment, *Prejudgment Interest: Survey and Suggestion*, 77 NW. U. L. REV. 192, 192 (1982).

36. For example, courts have construed the eminent domain statute, 40 U.S.C. § 258(a), to require awarding prejudgment interest. *See* Rothschild, *supra* note 35, at 206 n.84.

37. *See* Rothschild, *supra* note 35, at 200.

38. *See id.* at 207 n.90 (listing decisions affirming discretionary approach to interest matters).

cases where prejudgment interest is not transferred to the plaintiff, a defendant may enjoy a substantial, but undeserved, benefit.

As delay benefits defendants, it simultaneously burdens plaintiffs. First, if interest is not added to a plaintiff's damage award, delay erodes the present value of the ultimate judgment to an extent determined by the length of delay and the prevailing interest rate during that period.[39] By thus reducing the value of the judgment, delay may deny meritorious plaintiffs full compensation.[40] Furthermore, delaying resolution especially disadvantages plaintiffs with limited economic means who may be unable to support themselves through protracted litigation.

Finally, beyond the effects on actual parties, long delays have a deterrent effect on potential litigants: "High transaction costs of delay and direct expense are the enemies of justice; when these costs become high enough, people who have been injured or had their rights violated may despair of vindication, choosing instead to 'lump it.'"[41] Delay thus undermines justice by effectively denying access to the judicial mechanism of dispute resolution.[42]

## II
## A SOLUTION: ROCKET DOCKETS

As noted above, the docket delays in the federal courts, and their attendant costs, derive from several sources.[43] Some of these causes are clearly beyond the remedial power of individual courts and judges, thus requiring congressional action. However, to the extent that the pretrial process contributes to the problem, local efforts might be helpful. Indeed, a common critique of judicial case management implicates judges' failure to control discovery.[44] Reflecting this premise, the rocket docket trend represents judicial attempts to manage the pretrial stage of litigation more efficiently.[45]

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39. *See* George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 534 (1989).

40. *See* Rothschild, *supra* note 35, at 192.

41. Longan, *supra* note 14, at 688 (footnote omitted).

42. *See* JUSTICE FOR ALL, *supra* note 1, at 6 (summarizing a 1988 survey of participants in the civil justice system in which a majority of respondents agreed that high litigation costs impede an ordinary citizen's access to the system and that "'large interests' with greater resources" enjoy an unfair advantage); Herman, *supra* note 25, at 32 (quoting A.B.A. panelist Francis McGovern of the University of Alabama School of Law, who asserts that the delay and expense of litigation create a social cost by reducing public access to the courts).

43. *See supra* notes 12-16 and accompanying text.

44. *See, e.g.*, JUSTICE FOR ALL, *supra* note 1, at 7 (suggesting that greater judicial control of discovery could reduce delay and cost); Herman, *supra* note 25, at 32.

45. Rocket dockets are only one aspect of the larger endeavor to reduce the cost and delay of federal civil litigation. A comprehensive reformation plan will necessarily include several innovative case management techniques. However, it is beyond the scope of this Comment to assess these various procedures. Similarly, this discussion will not attempt to compare such techniques with the

### A. Operation of a Rocket Docket

Operating a rocket docket is a relatively simple procedure, merely requiring that a judge establish "early" and "firm" trial dates. An "early" trial date places cases on a "fast track" to disposition and consequently limits the time during which a case can remain pending. A "firm" date ensures that the potential delay reductions gained from setting early trial dates are realized.[46] Acknowledging the dangers of departing from scheduled trial dates, the Brookings Institution task force report expressly recommends that judges observe their original scheduling orders, permitting only narrow "good cause" exceptions.[47] The Eastern District of Virginia, widely recognized as a successful "rocket docket" jurisdiction, similarly minimizes extensions, enforcing established trial dates by conveying to attorneys that the court views continuance requests unfavorably.[48]

### B. Permissibility of Rocket Dockets

#### 1. Rocket Docket by Local Rule

Although the wisdom and justice of rocket dockets are debatable, the authority of districts to enforce them is beyond dispute. The Federal Rules of Civil Procedure allow a district court to "make and amend rules governing its practice not inconsistent with [the Federal] Rules."[49] Furthermore, the Civil Justice Reform Act ("CJRA") seems to manifest congressional acceptance, even encouragement, of speeding cases to trial.[50] As originally drafted, the CJRA mandated specific delay reduction procedures, including the prompt setting of a trial date and presumptive time limits for discovery.[51] Although harsh criticism from practitioners and judges prompted revisions to the bill making such practices discretionary rather than mandatory,[52] the enacted version still requires districts to consider several principles and guidelines of litigation management in their cost and delay reduction plans, including a provision for early, firm trial dates.[53] Thus, individual districts are

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rocket docket. For civil justice reform proposals beyond the admittedly narrow focus of this Comment, see JUSTICE FOR ALL, *supra* note 1.

46. JUSTICE FOR ALL, *supra* note 1, at 21. Beyond the financial cost of departing from trial dates summarized above, *see supra* text accompanying notes 22-24, the District of Maryland found two additional dangers: "(a) the setting of trial dates which are not likely to be kept interferes with effective calendaring, and (b) the postponement of trials leads to a public perception that the court system is not functioning efficiently." LOCAL COURT RULES, *supra* note 1, at 458.

47. *See* JUSTICE FOR ALL, *supra* note 1, at 21.

48. *See* Dayton, *supra* note 28, at 455 (citing E.D. VA. LOCAL R. 11(J)).

49. FED. R. CIV. P. 83.

50. *See supra* note 7.

51. *See* Cavanagh, *supra* note 4, at 724.

52. *See id.* at 724-25.

53. 28 U.S.C. § 473(a) (1994).

clearly within their authority when they establish rocket docket calendaring systems.

*2. Rocket Docket by Standing Order*

The permissibility of rocket docket case management techniques also extends to individual district court judges. Subject to Federal Rule of Civil Procedure 83, which requires judges to stay within the limits of the Federal Rules and the rules of their districts, judges may manage their calendars according to personal determinations of efficiency and fairness.[54] Individual judges implementing rocket docket schedules can cite at least three sources of authority for their practices.

First, Rule 16 of the Federal Rules of Civil Procedure explicitly promotes active and creative judicial involvement in case management.[55] The Advisory Committee notes that

> when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.[56]

Accordingly, the Rule envisions a sort of "managerial judging" in which judges determine and enforce the timing of every action.[57] Rule 16(b), for example, requires judges to issue a scheduling order within 120 days after service of the complaint, and specifies that the order may set the trial date.[58] Since this governing order cannot be altered except upon "a showing of good cause,"[59] judges can ensure that cases continue to progress toward resolution.[60].

Second, the CJRA provides explicit statutory authority for judicial calendar management. The Act affirms individual judicial discretion in

54. FED. R. CIV. P. 83 ("[D]istrict judges . . . may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.").

55. *See* Charles R. Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar*, 139 F.R.D. 525, 526 (1991) ("[A]long with our inherent power, [Rule 16] is the specific repository of the authority of a federal trial judge to manage the judicial calendar.").

56. FED. R. CIV. P. 16 advisory committee's note to 1983 amendments.

57. *See* Richey, *supra* note 55, at 527.

58. FED. R. CIV. P. 16(b).

59. *Id.*

60. *See* Richey, *supra* note 55, at 528-30 (describing cases in which judges have effectively used scheduling orders as a pretrial case control technique to achieve the goals of Rule 1).

enforcing delay and cost reduction plans.[61] In fact, many of the CJRA's provisions duplicate powers judges already have under Rule 16.[62]

Finally, individual judges may rely on an inherent power model to justify their procedural decisions.[63] Under this model, judges derive decision-making authority not from textual sources, but rather from the history and politics of the judiciary as an institution.[64] Case law reveals that docket management falls squarely within a judge's inherent power. The Second Circuit, for instance, explained that, "[s]ince the trial judge must be entrusted with the power to alleviate calendar congestion, we shall not put obstacles in his way when he exercises his judgment wisely in achieving the desired goal."[65]

### *C. The Proliferation of Rocket Dockets*

As noted above, rocket dockets exist either jurisdictionally (pursuant to local rule) or independently (by standing order). Some districts are recognized as "rocket docket" jurisdictions. The Eastern District of Virginia, for example, has maintained a strong commitment to minimizing delay and cost in its courts since the 1960s.[66] Pursuant to local rules and standing orders, judges exercise strict and constant control throughout every phase of civil litigation.[67] Attorneys appearing in these courts must adapt to the speed of litigation and respect the judges' refusal to tolerate unnecessary procedural foot-dragging.

Local court rules governing case scheduling for each district reveal those districts that rush cases through the system.[68] Most districts' delay reduction plans echo the CJRA's recommendation that trials occur

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61. *See* Haig & Stone, *supra* note 13, at 861 n.81 (citing the Federal Judicial Center's explanation that the CJRA "is characterized by flexibility and necessarily involves the exercise of judicial discretion in its implementation").

62. *See* Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1456-60 (1994) (describing the CJRA's redundancy); *see also* Richey, *supra* note 55, at 534 (noting that management practices endorsed by the CJRA reflect the spirit of Rule 16).

63. For a description of inherent power models, as well as other approaches to making decisions on issues of process, see Neil H. Cogan, *The Inherent Power and Due Process Models in Conflict: Sanctions in the Fifth Circuit*, 42 Sw. L.J. 1011, 1012-13 (1989).

64. *See id.* at 1013.

65. Davis v. United Fruit Co., 402 F.2d 328, 332 (2d Cir. 1968); *see also* Mraovic v. Elgin, Joliet, & Easteru Ry. Co., 897 F.2d 268, 270-71 (7th Cir. 1990) (quoting Northern Ind. Public Service Co. v. Carbon County Coal Co., 799 F.2d 265, 269 (7th Cir. 1986): "Matters of trial management are for the district judge; we intervene only when it is apparent that the judge has acted unreasonably.").

66. *See* Dayton, *supra* note 28, at 449-69 (describing the district's case management techniques); *see also* Paul M. Barrett, *"Rocket Docket": Federal Courts in Virginia Dispense Speedy Justice*, WALL ST. J., Dec. 3, 1987, at 29 (noting the district's "unforgiving rules and fierce pride in efficiency"); *cf.* Ewert & Kralik, *supra* note 16 (describing the Eastern District of Texas' delay reduction plan).

67. Dayton, *supra* note 28, at 449-50.

68. Complete analysis of each district's trial scheduling practices is beyond the goal of this Comment. The approaches noted here are representative.

within eighteen months after the filing of the complaint.[69] However, attitudes toward the eighteen-month period vary. Some districts seem to view the deadline quite strictly; the Eastern District of Virginia's plan, for example, requires trial dates "no later than" eighteen months after the complaint is filed, but emphasizes that trials in the district are rarely scheduled for more than seven months after filing.[70] Some plans supplement the trial deadline with specific discovery schedules for various types of cases.[71] Others include language to encourage speed, but rely primarily on the eighteen-month time limit to reduce delay.[72] On the other hand, several districts expressly view the CJRA's eighteen-month standard as a laudable goal, rather than a firm requirement.[73]

Many districts depart from the eighteen-month recommendation altogether. Some are more ambitious, scheduling trial dates within twelve months of the filing of the complaint.[74] Other districts vary maximum disposition periods for different types of cases.[75]

Finally, a few districts reject the concept of early, firm trial dates. The Eastern and Western Districts of Kentucky, for example, do not require "early" trials. Their expense and delay reduction plans stress that trial dates should be promptly established and remain firm, but insist that the districts are "opposed to a 'rocket docket.' It is the setting that should be early, not the trial date."[76] The Eastern and Southern Districts of New York likewise refuse to establish maximum disposition periods, explaining that a fixed requirement "is neither desirable nor consistent with the goal of differentiated case management."[77]

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69. 28 U.S.C. § 473(a)(2)(B) (1994).

70. *See* LOCAL COURT RULES, *supra* note 1, at 1109. For other firm eighteen-month deadlines, see *id.* at 2 (Middle District of Alabama); *id.* at 153 (Northern District of Florida); *id.* at 171 (Southern District of Florida); *id.* at 190 (Northern District of Georgia); *id.* at 217 (District of Guam); *id.* at 455 (District of Maine); *id.* at 685 (Northern District of New York).

71. *See, e.g., id.* at 188-89 (Northern District of Georgia); *id.* at 170 (Southern District of Florida).

72. *See, e.g., id.* at 181 (describing the Middle District of Georgia's "12 to 18 month[]" schedule); *id.* at 348 (describing the Southern District of Indiana's "six to eighteen month[]" deadline).

73. *See, e.g., id.* at 237-38 (District of Idaho); *id.* at 262 (Northern District of Illinois); *id.* at 289 (Northern District of Indiana); *id.* at 358 (Northern and Southern Districts of Iowa); *id.* at 392 (Eastern and Western Districts of Kentucky); *id.* at 426 (Eastern, Middle, and Western Districts of Louisiana).

74. *See, e.g., id.* at 15 (Northern District of Alabama); *id.* at 229 (District of Hawaii); *id.* at 1160 (Western District of Wisconsin).

75. *See, e.g., id.* at 47 (District of Arizona sets disposition goal of twelve months for expedited cases, twenty-four months for standard cases); *id.* at 518 (Western District of Michigan allows nine to twelve months for expedited cases, twelve to fifteen months for standard cases, and fifteen to twenty-four months for complex cases).

76. *Id.* at 386. *But see id.* at 392 (explaining that, while the districts refuse to codify a deadline, they endorse the goal of setting trial within eighteen months of the complaint's filing).

77. *Id.* at 670.

Some districts challenge the feasibility of "firm" dates. The Central District of Illinois, for instance, asserts that setting firm trial dates is often impossible, citing the criminal trial preference and district geography.[78] The District of Alaska similarly questions the true firmness of trial dates:

> In gross, early 'firm' trial dates in civil cases is a contradiction in terms. From the standpoint of overall case management of a civil and criminal calendar, most early trial settings although perhaps firm are not real because nine out of ten will not go to trial. Moreover, the one case in ten which may be expected to go to trial must be calendared subject to the intervention of criminal trials.[79]

Despite the resistance in these districts to the practice of setting early and firm trial dates, individual judges throughout the country can independently maintain speedy calendars. While local rules limit a court's scheduling discretion, each judge remains free to allow only the minimum time required under the rules. A judge can also expedite cases by, for example, refusing to grant continuances and establishing pretrial discovery limits.

### *D. An Illustration:* Martel v. County of Los Angeles

A recent case from the Central District of California illustrates both the administration and potential dangers of a rocket docket.[80]

In June of 1990, Los Angeles County Sheriff's deputies arrived at Angel Martel's house in response to an emergency call from his wife.[81] The deputies found Martel, a paranoid schizophrenic, in the backyard holding a firearm, and proceeded to subdue him. Martel sustained severe injuries during the struggle. On April 22, 1991, Martel filed a civil rights action against the County of Los Angeles, the L.A. County Sheriff, a named Deputy, and other unspecified sheriff's deputies.[82] Two days later, the district judge issued a standing order describing his court's "rocket docket" scheduling procedure: "This court strives to set trial dates as early as possible and does not approve of protracted discovery. EXCEPT FOR UNUSUALLY COMPLEX CASES,

78. *See id.* at 253.

79. *Id.* at 38. The District of New Jersey, in rejecting the firm trial date requirement, concurs: "Fixed dates would be artificial and an unnecessary burden . . . ." *Id.* at 653.

80. Martel v. County of Los Angeles (*Martel II*), 56 F.3d 993 (9th Cir.), *cert. denied*, 116 S. Ct. 381 (1995).

81. This summary of operative facts and procedural developments draws from both the original Ninth Circuit opinion, Martel v. County of Los Angeles, 34 F.3d 731, 732-33 (9th Cir. 1994) (*Martel I*), and the decision upon rehearing en banc, *Martel II*, 56 F.3d at 994-95.

82. Martel did not know the identities of the other deputies who restrained him when he filed suit. Soon after, on May 6, he served interrogatories on the County requesting the names of the participating deputies. *Martel II*, 56 F.3d at 994.

COUNSEL SHOULD EXPECT THE CASE TO GO TO TRIAL WITHIN THREE MONTHS OF THE FILING OF THE FIRST ANSWER."[83] The order emphasized that "[c]ontinuances are rarely granted. . . . The Court sets firm trial dates and will not change them except for emergencies."[84]

The County filed an answer on May 17, and responded to the interrogatories on May 24, identifying seven of the eight deputy defendants. At a mandatory status conference on June 24, the district court scheduled the pretrial conference for August 26 and the trial for August 27.

In mid-July, Martel filed a first amended complaint, naming the additional defendants identified in discovery. He later obtained the name of a final defendant through additional discovery, and filed a second amended complaint on August 12. Martel served the new defendants with interrogatories, but the responses were not due until after trial was scheduled to begin. Therefore, on August 22, four days before the pretrial conference, Martel moved for a continuance of the trial date for time to conduct additional discovery. The district court denied the motion. The trial proceeded as scheduled, and the jury returned a verdict for defendants.

Martel appealed the district court's denial of his motion for a continuance. The Ninth Circuit originally agreed with Martel, finding that the district judge abused his discretion by denying a justifiable request for continuance.[85] Concluding that the error prejudiced Martel in preparing and presenting his case, the divided panel reversed the district court's judgment and remanded the case for a new trial.[86] The Ninth Circuit subsequently reheard the case en banc and reversed the prior appellate decision. The Court held that Martel failed to demonstrate that the district judge's denial of a continuance for additional discovery resulted in "actual and substantial prejudice."[87]

## III
## EVALUATING ROCKET DOCKETS

While rocket docket scheduling falls within judges' broad discretion over calendar management decisions, it does not necessarily follow that such practices *should* be used. Like other managerial techniques, rocket dockets involve "the self-conscious restructuring of procedural incentives by trial judges on an ad hoc basis to achieve certain objec-

83. *Martel I*, 34 F.3d at 732-33 (quoting Order of April 24, 1991, at 3) (emphasis in original).

84. *Id.* at 733.

85. *Id.* at 736.

86. *Id.*

87. *Martel II*, 56 F.3d at 995. Under Ninth Circuit law, a litigant must clearly show "actual and substantial prejudice" for an appellate court to overturn a district court's denial of a continuance sought for discovery purposes. Sablan v. Dep't of Fin., 856 F.2d 1317, 1321 (9th Cir. 1988).

tives."[88] Prominent among these objectives are Rule 1's goals of speed, economy, and justice.

Notably, these objectives are not entirely compatible. Serving one purpose may disserve the others.[89] Ideally, procedural rules should balance Rule 1's goals: maximizing efficiency and minimizing expense, while maintaining the integrity of the process and the quality of the result. One objective can be compromised to further the others only within acceptable limits. Rocket docket supporters may argue that, given this tension, even process concerns have limits: "Perfect process, worthy goal though it is, is not the way to produce prompt or inexpensive dispositions. Perfection can be suffocating if it makes the process more elaborate, complex and labor-intensive than the case can bear."[90] At the same time, however, Rule 1 mandates that limiting the litigation process by setting early and firm trial dates can only be justified if elevating two goals, namely maximum speed and minimum cost, does not unreasonably sacrifice justice.

Not surprisingly, many attorneys complain about the pace of litigation in rocket docket courts.[91] Some warn that rocket docket judges sacrifice justice: "[The] penchant for speed has little to do with a penchant for fairness."[92] Others argue that the accelerated pace favors parties with larger staffs and greater resources.[93] However, many lawyers acknowledge the significant benefits of reduced delay, including certainty of a quick resolution, decreased costs, and increased client confidence in the judicial system.[94] One lawyer summarized these factors, concluding that "[a]s long as it applies equally to the plaintiff and the defendant, then maybe [the rocket docket is] a good thing."[95]

Complete evaluation of delay reduction techniques is an enormous task and will employ the resources of the Judicial Conference, the Federal Judicial Center, the Administrative Office of U.S. Courts, and the RAND Corporation.[96] This Comment attempts no such undertaking.

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88. *See* Elliott, *supra* note 27, at 326.

89. *See Martel II*, 56 F.3d at 998 (Kleinfeld, J., dissenting) (noting that "one cannot go too far toward one of the three desiderata, 'just, speedy, and inexpensive,' without sacrificing one or two of the others").

90. *See* JUSTICE FOR ALL, *supra* note 1, at 11 (quoting Maurice Rosenberg, *The Federal Civil Rules After Half a Century*, 36 MAINE L. REV. 242, 243, 247 (1984)).

91. *See, e.g.*, LOCAL COURT RULES, *supra* note 1, at 382-83 (summarizing results of a survey of Kentucky attorneys and litigants in which respondents disfavored the practice of setting early and firm trial dates).

92. *See* Barrett, *supra* note 66, at 29 (quoting defense attorney Marvin Miller).

93. *See id.*

94. *See id.*

95. *See* Mike Magan, *Indy Firm Rides 'Rocket Docket' in Virginia Federal Court*, IND. LAW., Feb. 8, 1995, at 7 (quoting attorney C. David Emhardt).

96. *See* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 104(c), 105(c), 104 Stat. 5090 (requiring the Judicial Conference to study district court experiences with CJRA plans);

Rather, this Part will assess the effectiveness of rocket dockets in balancing and fulfilling Rule 1's goals. Accomplishing even this narrow aim is difficult given the numerous perspectives that must be considered. Rocket dockets differentially affect various types of cases and various types of lawyers. Moreover, protecting actual clients and their lawyers is not the exclusive consideration; the legitimate interests of potential litigants, the judicial system, taxpayers, and society at large must also be served.[97] This Part will consider these often competing viewpoints in evaluating the propriety of rocket docket scheduling practices.

### *A. Achieving a "Speedy" Resolution*

It seems axiomatic that rocket dockets, by minimizing the time between filing and disposition with early and firm trial dates, increase the speed with which individual cases are resolved. They do so in two ways. First, if a case actually proceeds to trial, the early trial date ensures a quick resolution. More commonly, however, rocket dockets speed case resolution by facilitating settlement.

The Brookings Institution task force recommended early, firm trial dates in non-complex cases partially because it recognized that such scheduling practices encourage settlement.[98] The tremendous impact of impeuding trial on settlement decisions prompted one federal judge to announce that "the most powerful and most effective stimulant of fair settlements of civil actions is the inexorable progress to *trial on a day certain*, with adequate opportunities for mutual discovery of the unprivileged material information."[99] To the extent that trial dates remain firm, parties understand that if settlement does not soon occur, a trial will.

Admittedly, whether an early, firm trial date actually increases the likelihood of settlement is debatable. It has been argued that delay, rather than speed, encourages settlement.[100] Under this analysis, extended delay between suit and trial increases the total costs of litigation. These increased costs reduce the expected value of the judgment, making settlement more attractive. Conversely, an early trial date decreases the cost of additional litigation relative to settlement, and increases the

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Cavanagh, *supra* note 4, at 727 (noting the RAND Corporation's assistance in comparing district plans).

97. *See* Haig & Stone, *supra* note 13, at 844.

98. JUSTICE FOR ALL, *supra* note 1, at 18.

99. Jeffrey G. Kichaven, *Rule 16 to the Rescue: An Opportunity to Redefine the Dispute Resolution Mission of the Federal Courts*, 29 TORT & INS. L.J. 507, 507 (1994) (quoting Judge William H. Becker) (emphasis added). *But see infra* Part III.C.1.b.ii (questioning whether these settlements are in fact fair).

100. *See* Priest, *supra* note 39, at 534-36 (explaining how changes in delay prompt corresponding changes in litigation and settlement decisions).

expected value of the judgment, thereby increasing the probability of proceeding to trial.[101]

However, this argument ignores two factors that may offset the economic aspects of settlement decisions. First, non-economic considerations may influence the settlement process. When trial is a legitimate and immediate threat, it influences the substance and tenor of settlement discussions: a quickly approaching trial date encourages parties to participate realistically and cooperatively in settlement efforts.[102] Second, rocket docket judges are likely to use other similarly "managerial" methods to encourage settlement.[103]

Regardless of the effect on settlement, case management statistics published annually by the Administrative Office of U.S. Courts support the proposition that rocket docket districts suffer less delay than districts that do not emphasize early and firm trial dates. In 1993, cases on the rocket docket in the Eastern District of Virginia enjoyed a median interval of four months from filing to disposition.[104] Only ten percent of the total cases in the district exceeded ten months.[105] Even cases that went to trial showed a seven-month median disposition time.[106] The District of Maine is similarly committed to setting and enforcing early trial dates. It boasted a seven-month median disposition time for all cases and a twelve-month median interval for termination by trial.[107] Other districts that advocate rocket docket trial scheduling[108] also achieve relatively short disposition times.[109]

While this data might suggest that rocket dockets accelerate case resolution, the correlation does not definitively establish that setting early and firm trial dates is responsible for the delay reduction. Comparing median disposition times illustrates relative efficiency among districts, but does not demonstrate how particular districts achieve their speed.[110] Nevertheless, despite the absence of statistics proving a causal

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101. *Id.*

102. *See* Ewert & Kralik, *supra* note 16 (asserting that impending trial makes parties more serious about settlement).

103. *See* Elliott, *supra* note 27, at 323 (explaining that encouraging settlement is a guiding principle behind judges' managerial choices).

104. U.S. COURTS, *supra* note 17, at AI-84.

105. *Id.*

106. *Id.*

107. *Id.*

108. *See supra* Part II.C.

109. *See e.g.*, U.S. COURTS, *supra* note 17, at AI-85 to AI-86 (showing the median disposition time of total cases in the Western District of Wisconsin (five months), Middle District of Alabama (seven months), Northern District of Florida (eight months), and Southern District of Florida (eight months)).

110. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 420 (1982) (noting difficulties of evaluating the causes of differential disposition rates between districts). For instance,

relationship, it seems logical to conclude that, since rocket dockets guarantee finality by a particular date, either through trial or settlement, they further Rule 1's goal of speedy resolution, at least for actual parties.

The foregoing discussion has focused on the effectiveness of rocket dockets at reducing the disposition time of individual cases. Rocket docket supporters further assert that, to the extent that rocket dockets facilitate quick settlements, the technique may also reduce the delay experienced by potential litigants. Increased settlement prompts a corresponding decrease in court congestion and delay by reducing the volume of cases requiring trial.[111] Thus, insofar as rocket dockets increase speedy settlements, they may also reduce the delay involved in cases actually going to trial.[112]

Rocket docket opponents argue that the apparent delay reduction achieved in the district courts by rushing cases to trial will not necessarily decrease the aggregate time required for federal court litigants to obtain ultimate resolution. Disposition in the lower courts does not end the litigation process for cases proceeding to the appellate level. Rising numbers of district court cases, coupled with an increased rate of appeal, have enlarged the caseloads of appellate courts.[113]

If the concern for speed operates to prevent reasonable discovery, rocket dockets may exacerbate this appellate-level congestion. More specifically, rocket docket schedules which limit pretrial investigation may reduce the legitimacy of trial outcomes, or may be perceived by parties to have such an effect.[114] As a result, more verdicts are likely to be challenged as unreliable.[115]

One can imagine several possible responses to this growing demand for appellate review. Appellate judges might copy district court case management techniques.[116] They might adopt a more deferential review approach.[117] But without some such response, it seems likely that the

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supplemental case management techniques may contribute to speedy case disposition. For innovative delay reduction techniques beyond rocket dockets, see LOCAL COURT RULES, *supra* note 1.

111. *See* Ewert & Kralik, *supra* note 16.

112. However, one could argue that any delay reduction might decrease the cost of continuing to litigate, thus increasing the expected value of judgments. Ultimately, this could raise the volume of litigation. *See* Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 48-49 (1992) (suggesting that individual settlements do not dramatically reduce federal litigation delay).

113. *See* Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405, 406 (1994).

114. *See infra* Part III.C.2.b; Part III.C.1.b.iv.

115. *See Martel II*, 56 F.3d 993, 1005 (9th Cir.) (Kleinfeld, J., dissenting), *cert. denied*, 116 S. Ct. 381 (1995).

116. *See* Selya, *supra* note 113, at 406-07 (noting that the appellate judiciary has tried "settlement programs, screening programs, 'rocket' dockets, and the like").

117. *See id.* at 407 n.7 (acknowledging but rejecting the argument that lower reversal rates indicate a growth in deference).

growing caseload may plague the appellate courts in the same way it has plagued the lower courts, namely by overburdening judges, thus increasing the length of decision time. Speeding cases through the lower courts may increase delay in the appellate courts, perhaps negating any reduction in the overall delay federal court litigants experience.

Despite potential congestion at the appellate level, it appears that, on balance, early trial dates further the goal of "speedy" dispute resolution. This result helps to "give the federal system back to the litigants."[118]

### *B. Economic Considerations*

#### *1. Decreasing Costs by Increasing Speed*

Rocket dockets can be particularly effective in reducing three types of costs: agency costs, litigation costs and external costs.[119]

"Agency costs" arise when a lawyer pursues her own agenda over the needs of her client by, for instance, investing more time or resources in litigating an issue than the client's best interests merit. By limiting preparation time, early trial dates force attorneys to prioritize their litigation efforts. This incentive to develop efficient litigation strategies helps control the common dilatory tactic of filing numerous peripheral motions to harass opponents.[120] Attorneys do not have time for these abusive techniques in a fast-paced litigation setting.

Moreover, attorneys must create streamlined discovery plans that realistically reflect the compressed timeline.[121] Rocket dockets can protect minimally informed clients from overdiscovery by their own attorneys[122] and reduce agency costs by limiting the attention a lawyer can devote to risky or frivolous litigation activities:

> Limiting the amount of time before trial establishes a "zero-sum game," in which part of the cost of working on one issue is the opportunity cost of not being able to work on other issues within the limited time available before trial. This creates incentives for attorneys to establish priorities and "narrow the areas of inquiry and advocacy to those they believe are truly relevant and mate-

118. Mary Hull, *'Jiffy Justice' May Become the Norm*, TEXAS LAW., July 22, 1991, at 1 (citing Judge Robert M. Parker).

119. E. Donald Elliott discusses the potential of managerial judging to reduce "agency costs," "litigation costs," and "externalities." *See* Elliott, *supra* note 27, at 330-33. The discussion here applies his analysis to the narrower issue of how rocket dockets may be similarly effective.

120. *See* Barrett, *supra* note 66, at 29.

121. *See* Haig & Stone, *supra* note 13, at 852-53.

122. *See* Elliott, *supra* note 27, at 330-31 (describing how managerial judging may remedy negative consequences of a client's inability to police attorney behavior and mismatched attorney-client interests).

rial" and to "reduce the amount of resources invested in litigation."[123]

By compelling lawyers to manage their cases efficiently, rocket dockets help reduce both discovery costs and attorney fees.[124] Although early trial dates may compel litigants to choose litigation strategies they may not otherwise select, rocket docket proponents maintain that the time and money saved, and the certainty of quick resolution, outweigh the disadvantages.[125]

Excessive discovery requests, and hence unnecessary costs, emanate from both sides of litigation. Even if a client's own attorney efficiently and economically serves the client's interests, litigation delay multiplies the opportunities for opponents to employ costly pretrial strategies. Rocket dockets can minimize these "litigation costs" by reducing overdiscovery by opposing parties.[126]

Finally, litigation consumes public resources, including valuable judicial time and administration efforts. Thus, the expense of litigation is borne not only by the parties to a particular suit, but also by society at large. Speeding case disposition with rocket docket scheduling diminishes these "external costs" by ensuring that judicial resources are allocated efficiently, rather than hoarded or abused.[127]

### 2. *The Expense of Speed*

While excessive delay may, in some circumstances, increase the costs of discovery and litigation, excessive speed may have the same effect. For example, although rocket dockets are intended to encourage attorneys to streamline their discovery plans, limited preparation time may actually prevent an attorney from carefully considering numerous factors in formulating a discovery strategy, including what the case

123. *Id.* at 313-14 (citation omitted). *But see infra* Part III.B.2 (suggesting that, in some cases, excessive speed may thwart rather than encourage streamlined discovery).

124. Admittedly, the expected decrease in litigation expense from reduced delay may vary among attorneys with differential fee arrangements. Sole practitioners or small law firms, for example, may obtain payment on a contingency fee basis. For their clients, reducing preparation time will not affect out-of-pocket expenses. In fact, assuming identical judgments, the client's per-hour charges will increase as preparation time decreases.

125. *See, e.g.*, Haig & Stone, *supra* note 13, at 854.

126. *See* Elliott, *supra* note 27, at 332.

127. *See id.* at 333. Additionally, to the extent that rocket dockets encourage settlement, they may further reduce a client's financial expenses by avoiding the attorneys fees and costs incurred by continuing to trial. The savings, however, are offset by the costs of settlement. Parties must investigate and evaluate the strength of their cases in order to predict the probable trial outcome and factor this prediction into their settlement decisions. Thus, costly discovery is required not only for trial preparation, but also for settlement negotiations. *See* Longan, *supra* note 14, at 687 (describing discovery as "a tool for settlement as well as for trial preparation; it is also the most costly component of litigation" (footnote omitted)); *see also* Bundy, *supra* note 112, at 41 (noting necessity of pre-bargaining investigation).

really requires, what evidence is likely to be found, and the likelihood of settlement. Instead, the attorney may haphazardly file numerous and expensive discovery requests in an effort to beat the clock.

Rocket dockets could also increase a client's attorney fees. Parties hiring sole practitioners may be particularly vulnerable. When cases are rushed to trial, the attorney must make each case a priority, perhaps requiring the attorney to downsize her caseload to accommodate the time pressures. With fewer cases, the lawyer may raise her fees to maintain her income.[128]

Clients hiring larger firms are not immune from a rocket docket's potential to increase litigation expense. First, with limited time to prepare for trial, large firms may choose to staff cases more heavily rather than decrease discovery efforts.[129] This extra staffing can increase discovery capabilities as well as cost.[130] Furthermore, the rocket docket scheduling technique introduces procedural variations among federal courts. This diversity requires attorneys to research the local rules of different districts, and perhaps the practices of the individual judge before whom they will appear, thus generating additional "search and information costs."[131]

### *C. The Concern for Justice*

Of Rule 1's three objectives, securing a just resolution intuitively seems the most important. While the potential injustice from excessive delay seems clear,[132] excessive speed is equally dangerous: "[T]oo much speed as well as too much delay can deny justice."[133]

Justice involves two separate but related components. Procedural justice values proper procedure as more than merely a means to legitimate results. Rather, it recognizes that enforcing procedural rules independently contributes to dispute resolution.[134] Protecting procedural

128. *See Martel II*, 56 F.3d 993, 1004 (9th Cir.) (Kleinfeld, J., dissenting), *cert. denied*, 116 S. Ct. 381 (1995). This argument, of course, neglects the reality that an attorney sets her fees in a competitive market. If she raises her fees unilaterally, she is likely to encounter less demand for her services.

129. *See* Magan, *supra* note 95, at 7 (describing firm that "transplanted 14 partners, associates, paralegals and other staffers to work on the case").

130. It should be noted, however, that the benefits of extra staffing can he limited by the inherent complexity of a given case. Since a case is a single unit that must be mastered in its entirety by at least one attorney, distributing discrete litigation assignments too widely may ultimately produce diminishing marginal returns.

131. Cavanagh, *supra* note 4, at 749. *See also* Don J. DeBenedictis, *An Experiment in Reform: Like snowflakes, no two plans for reducing civil delays are alike*, A.B.A. J., Aug. 1992, at 16, 17 (noting that local diversity may increase costs).

132. *See supra* Part I.C.

133. *Martel II*, 56 F.3d at 1003 (Kleinfeld, J., dissenting).

134. *See* Allison, *supra* note 30, at 1135 (noting that employing "formal procedures . . . can have much merit in its own right").

justice reflects an orientation toward rights and a concern for fair process. Substantive justice, on the other hand, involves the reliability of outcomes. It emphasizes results rather than rights, and seeks fair judgment rather than fair procedure. For rocket dockets to successfully accommodate all of Rule 1's components, they must not unreasonably frustrate either procedural or substantive justice in the name of delay and cost reduction.

### *1. Procedural Justice*

Procedural justice requires "reasoned presentation and consideration of the merits and control of outcome and process."[135] It further entails protecting values of fairness and human dignity.[136] Rocket dockets both safeguard and jeopardize procedurally just resolutions.

#### *a. Enhancing Procedural Justice*

In an ideal adversarial litigation setting, parties possess equal competence.[137] Litigants are presumed to have equal access to information, equal argumentative abilities, and equal resources. This assumption of equality justifies judicial non-intervention in the management and presentation of disputes.[138] Modern federal litigation, however, may not mirror this paradigm. Since differences in wealth, experience, and human resources often render parties' disputing competence drastically unequal,[139] judicial passivity may hinder, rather than advance, justice. Rocket dockets, by limiting trial preparation, can help prevent more resourceful parties from "bury[ing] opponents in blizzards of pre-trial briefs."[140] Although establishing and strictly enforcing early, firm trial dates may not entirely equalize party abilities, it can at least minimize the disadvantageous position of parties of lesser means.

In addition to equalizing the litigation playing field, rocket docket scheduling helps achieve procedurally just resolutions by protecting the impartiality of the tribunal. By setting early and firm trial dates as a matter of course, rocket docket scheduling frees judges from early in-

135. *See* Bundy, *supra* note 112, at 43 (defining fair procedure in an adversary system) (footnote omitted).

136. *See generally* Allison, *supra* note 30, at 1146-58 (outlining the instrumental and non-instrumental values of procedure).

137. *See* Bundy, *supra* note 112, at 7-10 (outlining and challenging premises of adversary justice).

138. *See id.* at 8.

139. *See id.* at 10.

140. Barrett, *supra* note 66, at 29 (describing the rocket docket as "a great equalizer"). It should be noted, however, that reducing the time for, and consequently the cost of, pretrial procedures will not necessarily balance discovery resources. *See supra* text accompanying notes 129-30 (discussing extra staffing on rocket docket matters).

volvement in the merits of a case.[141] This separation prevents the development of predispositions toward particular arguments and prejudices toward particular attorneys.[142] Minimizing judicial participation in the factual development of a case ensures that, later in the litigation, consideration of the merits will reflect reason, not emotion.

These equalizing and impartializing functions of rocket dockets protect the procedural rights of actual litigants in the court system. However, a fair and equitable judicial system must consider interests beyond those of the litigants in a particular case. It must also protect the rights of the community by balancing justice for an individual litigant against justice for all other actual and potential litigants.[143] Excessive litigation delays deny legitimate claimants access to the courts, thereby hindering the goal of justice. Thus, to the extent that speeding cases to disposition reduces these obstacles to judicial services, rocket dockets increase access to justice and further Rule 1's mandate.

*b. Threatening Procedural Justice*

Notwithstanding the aforementioned benefits, even proponents of managerial judging concede that managerial techniques inherently pose potential threats to procedural fairness.[144] Rocket dockets are not immune from such risks. These risks fall into four categories: judicial arbitrariness, coerced settlement, disproportionate burdening of certain classes of litigants, and the perception of injustice.

*i. Risk of Judicial Arbitrariness*

Case scheduling practices fall squarely within an individual judge's discretion.[145] As such, trial date decisions may be, or at least appear to be, arbitrarily reached. This real or perceived arbitrariness may result from several features inherent in docket management decisions.

First, there are no explicit standards to guide judges' determinations of the time necessary to prepare a particular case for trial.[146] Moreover, rocket docket scheduling may be perceived as unfair because the rationale for a particular trial date decision or for denying a request for continuance is rarely explained to litigants.[147] Finally, since rocket docket judges establish trial dates in the early stages of litigation without

141. *See* Hench, *supra* note 28, at 236.

142. *See* Resnik, *supra* note 110, at 426-27 (describing judge-attorney interactions as "a fertile field for the growth of personal bias").

143. *See* Elliott, *supra* note 27, at 318.

144. *See id.* at 327.

145. *See supra* Part II.B.

146. *See* Resnik, *supra* note 110, at 426 (noting the lack of guidelines, other than a judge's own "intuition," for how much time a case requires).

147. *See* Elliott, *supra* note 27, at 328.

a comprehensive grasp of the merits of the case, the decisions may be, or at least appear to be, uninformed.[148]

There is a tension here between the goal of limiting judicial pretrial involvement with the facts of a case to preserve impartiality and the need to have informed scheduling decisions. Intimate knowledge of the merits cuts both ways. Early familiarity with the facts and parties breeds emotional and biased decisions, thus undermining procedural justice's requirement of "reasoned presentation and consideration of the merits."[149] However, judicial separation from the merits promotes arbitrary decision-making, an effect which is equally "not reasoned" and procedurally unjust.[150]

This conflict aside, it seems undeniable that rocket dockets invite valid complaints of arbitrariness. Discretionary docket management crucially impacts the course and conduct of litigation, but lacks procedural safeguards: "[W]hen judges make *legal* decisions, the parties have an opportunity to marshal arguments based on an established body of principles [and] judges are required to state reasons to justify their decisions .... [Neither] of these safeguards is available when judges make *managerial* decisions."[151]

*ii. Coercing Settlement*

Procedural injustice may also result from the tendency of rocket dockets to promote, and perhaps coerce, settlement. A rational party's decision to settle involves a comparison of the likely value of settlement with the probable result of continued litigation.[152] Settlement decisions ultimately reflect numerous factors, including estimates of trial outcome, risk-averseness, and the value placed on emotional and intangible consequences of litigation.[153] Norms of procedural fairness suggest that parties should be free to weigh their predictions and preferences as they wish, and decide to settle based on their assessments.

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148. *See id.*

149. *See supra* text accompanying note 135.

150. Allison notes a similar tension between goals of impartiality and efficiency:

> [A] decision maker who has been closely involved with the particular issues or with the conditions leading to the dispute ... has the expertise and background to make a high-quality decision without having to undergo an expensive and time-consuming educational process. Although use of a decision maker with substantial relevant knowledge sometimes may optimize decision quality, there can be many unseen costs if his degree of involvement and familiarity is so great as to create a serious risk of prejudgment.

Allison, *supra* note 30, at 1155.

151. Elliott, *supra* note 27, at 317.

152. Detailed description of settlement decision-making processes is not crucial to the discussion here. For a short description of a rational party's decision to settle, see Bundy, *supra* note 112, at 13-15.

153. *See id.* at 14.

By setting early and firm trial dates, rocket dockets interfere with freedom in settlement decisions. A party with scarce resources will likely be less prepared when an early trial date arrives than will a stronger, wealthier opponent. Recognizing the likelihood of defeat against this formidable adversary, the weaker party may be forced to accept a settlement offer. This default settlement decision, which occurs only because continuing to trial is not an economically viable option, is procedurally unjust.[154] Thus, while the costs associated with delay may induce parties to accept inequitable settlements,[155] the time pressure, discovery limitation, and resource discrepancies magnified by speedy trial schedules can have similarly unjust results by coercing unprepared parties to settle.

*iii. Burden On Certain Classes*

While rocket dockets may appear to reduce the disparate litigation opportunities that delay affords, they simultaneously jeopardize procedural justice by disproportionately burdening certain classes of litigants. Admittedly, early and firm trial dates rush both parties to trial. However, equality of application does not guarantee equality of impact. By speeding cases to trial and generally refusing to grant continuances, rocket docket judges are likely to hurt clients represented by busy sole practitioners with full, inflexible schedules. Typically, these lawyers assist civil plaintiffs with limited financial means. Civil defendants, on the other hand, can often afford law firms with numerous attorneys and large staffs. Thus, while plaintiffs' cases must share an attorney's time with other clients, defendants' cases are prioritized and addressed.[156]

The *Martel* case, in which the plaintiff's counsel was a sole practitioner with additional trial commitments, illustrates this crucial consequence of rocket dockets.[157] The original Ninth Circuit panel decision expressly recognized the rocket docket's potential for procedural injustice: "Basic norms of equitable treatment dictate that plaintiffs not be penalized simply because they are represented by sole practitioners who are legitimately engaged in other trials."[158]

*iv. Perceived Injustice*

Admittedly, these potential sources of procedural injustice may not materialize in every case. Suppose, for example, that a judge sets an early and firm trial date based on her reasoned estimation of the time

154. *See* Longan, *supra* note 14, at 684.
155. *See supra* Part I.C.
156. *See Martel I*, 34 F.3d 731, 735 (9th Cir. 1994).
157. *See supra* Part II.D.
158. *Martel I*, 34 F.3d at 735.

required to prepare similar cases for trial. Suppose further that the early trial date will not procedurally disadvantage either party. Here, while the decision is neither entirely arbitrary nor procedurally prejudicial, the parties may perceive it as such in the context of their individual dispute. Thus, even in cases in which rocket dockets do not operate to harm litigants, they may nevertheless create a subjective perception of unfairness.

Perceived violations of procedural justice are independently significant, apart from objective fairness.[159] Litigants' perceptions of fairness affect satisfaction and compliance with, as well as emotional responses to, a decision. If a party feels she was not treated with fairness, dignity and respect, she is likely to discount the legitimacy of the outcome.[160]

Several factors influence a litigant's evaluation of procedural justice, including the extent of control over the dispute resolution process, the opportunity to express one's views, and the honest consideration of one's arguments by the tribunal.[161] Rocket docket scheduling techniques potentially undermine each of these aspects of perceived fairness.

Adversarial proceedings generally allow litigants a great deal of process control because parties decide litigation strategies and procedures. By selecting early trial dates with little party input, rocket dockets effectively reduce a party's process control. Moreover, since decreasing trial preparation time limits the time for, and perhaps indirectly the scope of, discovery,[162] rocket dockets may also diminish a party's content control.[163] Studies of procedural justice suggest that "rules that disallow the presentation of issues that seem to a disputant to be important have the effect of restricting process control."[164]

The opportunity to be heard is another important element of a litigant's perception of procedural fairness. Several studies indicate that

159. *See* Allison, *supra* note 30, at 1152-53 (noting importance that outcomes appear fair).

160. The effects of perceived unfairness on litigant satisfaction are less important for purposes of this Comment than are the ways in which rocket dockets promote this perception. Consequently, the following discussion will focus solely on the latter. A complete analysis of how procedural justice evaluations affect litigant satisfaction, perception of legitimacy, and acceptance of and compliance with decisions can be found in E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 61-92 (1988). *See also* Allison, *supra* note 30, at 1153 & n.47 (noting that perceptions of unfair treatment can produce anger and frustration).

161. These factors were found to affect procedural justice perceptions in the empirical studies summarized in LIND & TYLER, *supra* note 160, at 93-112.

162. *See infra* text accompanying notes 186-87 (describing issue-foreclosing effect of early trial dates).

163. *See* LIND & TYLER, *supra* note 160, at 100-01 (distinguishing "process control" ("control over the choice of processes and procedures") from "content control" ("control over the information and arguments considered by the parties")).

164. *Id.* at 95.

litigants value the ability to express themselves and participate in proceedings, apart from the instrumental role such expression might play in achieving the desired result.[165] Setting early trial dates as a matter of course denies litigants the chance to articulate their time constraints and trial preparation concerns. Consequently, rocket dockets may lower perceptions of procedural fairness.

Finally, to be perceived as fair, procedural decisions must provide adequate consideration of a litigant's arguments: "[the] opportunity to . . . have one's views considered by someone in power plays a critical role in fairness judgments."[166] Honest and serious review of a litigant's arguments not only validates her position, but also recognizes and protects her individual dignity.[167] Rocket dockets may ignore this aspect of procedural justice assessments. By rigidly enforcing scheduled trial dates and construing party requests for continuances as presumptively meritless, the court might be perceived as ignoring the parties' expressed reasons for needing additional time.

### 2. *Substantive Justice*

Unlike the focus on process in analyses of procedural justice, evaluations of substantive justice address the legitimacy of outcomes. This outcome-orientation suggests that a just result is one which approximates the "moral or legal rights and wrongs of the conduct giving rise to the litigation."[168] While speed can further just resolution, critics warn that the "[s]peed of the litigation process should be managed so that the truth, not the speed, determines the outcome."[169]

#### *a. Approximating Truth*

Substantive and procedural concerns are intimately linked: "no procedural decision can be completely 'neutral' in the sense that it does not affect substance."[170] In short, just procedures promote just outcomes.[171] Rocket dockets advance substantively just resolutions by protecting procedural justice in the ways noted above.[172] For example, by restricting opportunities for wealthier parties to gain strategic advantages from their greater resources, rocket dockets not only safeguard the fair-

165. *See id.* at 101-04.

166. *Id.* at 106.

167. *See* Allison, *supra* note 30, at 1156 (identifying maintaining individual dignity as an important procedural value).

168. Bundy, *supra* note 112, at 37.

169. *Martel II*, 56 F.3d 993, 1003 (9th Cir.) (Kleinfeld, J., dissenting), *cert. denied*, 116 S. Ct. 381 (1995).

170. Elliott, *supra* note 27, at 325.

171. *See* Allison, *supra* note 30, at 1146-55 (acknowledging instrumental values served by procedure, including accuracy, efficacy of implementation, fairness, and efficiency).

172. *See supra* Part III.C.1.a.

ness of the process, but also legitimize the result.[173] Similarly, by preserving impartiality and increasing access to the courts, rocket dockets also enhance accurate results that reflect the underlying rights and responsibilities of litigants. Finally, to the extent that rocket dockets actually reduce agency and litigation costs,[174] they may further increase substantive justice.[175]

Rocket dockets also produce just outcomes by tending to induce settlement. First, by affecting settlement decisions, rocket dockets necessarily impact settlement terms.[176] When settlement is a party's only option (for example, where a party cannot fully prepare for trial in the limited time available), the settlement is essentially coerced and the terms of the settlement may not reflect a case's true worth. However, since rocket dockets limit both parties' time to compile and prepare compelling trial arguments, one party's economic or practical ability to try a case may not be the sole bargaining chip in settlement discussions. Rather, the likely judgment at trial becomes a primary focus: the "reintroduction of the spectre of trial makes the potential outcome of trial relevant to the negotiations again, and thus the negotiations are more likely to produce a just result."[177] When parties more seriously consider the probable trial result in reaching agreeable settlement terms, their settlement agreements will consequently approximate the judgment had the case continued to trial. Thus, early trial dates increase the substantive justice of settlement terms.

Furthermore, insofar as early trial dates promote settlements that approximate judgments, rocket dockets promote substantive justice by avoiding unnecessary transaction costs associated with litigation. Consider, for example, a case in which the plaintiff deserves, and is likely to receive at trial, a $100,000 judgment. Settling for $100,000 would accurately compensate the plaintiff and legitimately reflect the defendant's financial obligation. Going to trial to obtain the same result, however, would involve substantial expense, thus reducing the value of the plaintiff's award and increasing the amount of the defendant's liability. Settlement here would remedy the inherent judgment-litigation cost differential so that the plaintiff is fully compensated and the defendant is accurately deterred. Thus, rocket dockets may also increase substan-

173. *See* Elliott, *supra* note 27, at 325-26 (noting how managerial judging can increase justice).

174. *See supra* Part III.B.1 (describing reduction in agency costs, litigation costs, and externalities as result of early trial dates).

175. *See* Elliott, *supra* note 27, at 330-33 (explaining that reducing these costs enhances quality of justice).

176. *See id.* at 326 ("Like every other form of procedural change, managerial judging inevitably will affect the substance of settlements.").

177. Longan, *supra* note 14, at 692.

tive justice by minimizing litigation costs and encouraging settlements that more accurately reflect the parties' entitlements and obligations.[178]

*b. Compromising Truth*

Despite these aids to legitimate results, rocket dockets also threaten substantive justice. Reaching a just and legitimate outcome that accurately reflects the merits of a case requires considerable research. The notice-pleading regime of the Federal Rules of Civil Procedure,[179] coupled with the broad relevance rule for discovery,[180] make discovery the primary method of ascertaining facts and developing issues crucial to the litigation.[181] The Supreme Court eloquently acknowledged the importance of discovery under the Federal Rules, noting that the Rules

> restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial . . . . The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial . . . . Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.[182]

Even the most comprehensive discovery efforts may not produce all facts relevant to a given case. Therefore, accurate fact-finding should involve "procedures which, within available resources, foster the identification of relevant issues, the gathering and effective presentation of evidence pertaining to these issues, the testing of evidence for earmarks of reliability, and the application of sound logic to the drawing of inferences."[183]

Rocket docket trial scheduling departs significantly from this ideal and may threaten accurate outcomes. By limiting the time in which a case must be prepared, either for settlement discussions[184] or for trial, setting early trial dates significantly curtails the truth-seeking process. One critic of rocket dockets summarized the potential for substantive injustice: "Justice requires reliable, that is, true, verdicts. Too much speed reduces reliability, so produces less just outcomes. More verdicts are likely to be false if federal civil cases go to trial so quickly that rea-

178. *See* Bundy, *supra* note 112, at 40 (explaining how settling for the judgment amount increases substantive justice by avoiding litigation costs).

179. *See* FED. R. CIV. P. 8(a) (requiring only a basis for jurisdiction, a demand for judgment, and "a short and plain statement of the claim showing that the pleader is entitled to relief").

180. *See* FED. R. CIV. P. 26(b)(1) (allowing discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action").

181. *See Martel II*, 56 F.3d 993, 1003 (9th Cir.) (Kleinfeld, J., dissenting), *cert. denied*, 116 S. Ct. 381 (1995) (noting that "the federal rules of civil procedure make discovery the core of trial preparation").

182. Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947) (footnote omitted).

183. Allison, *supra* note 30, at 1148.

184. *Cf.* Longan, *supra* note 14, at 685-87.

sonable discovery cannot be completed first."[185] Rocket dockets thus illustrate the paradigmatic Rule 1 conflict: to the extent that early trial dates limit discovery, they may reduce costs and delay, but they simultaneously threaten truth and justice.

In addition to potentially thwarting the development of facts, time constraints on discovery may foreclose entire issues.[186] While rocket dockets do not require judges to narrow issues directly, the early trial date forces lawyers to make litigation decisions that will "effectively close off lines of substantive inquiry without benefit of full development and consideration of the merits."[187]

A final way in which rocket dockets jeopardize substantively just outcomes is by reducing party control. More specifically, the procedural injustice resulting from apparently arbitrary trial date decisions produces corresponding costs to substantive justice by allowing a judge with little knowledge of a case to interfere with an attorney's more informed assessment of the issues.[188] This tendency of rocket dockets to diminish party control is fundamentally inconsistent with notions of an adversarial system. The adversarial approach to dispute resolution reflects a trust in party initiative and ability to competently litigate claims. Judicial intervention through rocket docket scheduling techniques abandons this trust and increases the likelihood that judicial misjudgment will promote an unjust result.[189]

## IV
## MAXIMIZING JUSTICE

The power to place cases on a rocket docket offers federal judges a unique opportunity to reduce civil litigation delay and to improve the quality of clients' experiences with the judicial system. Although the technique is vulnerable to abuse by over-zealous judges blindly pursuing speed at the expense of fairness, potential violations of justice can be prevented with procedural safeguards to constrain extreme or improper

185. *Martel II*, 56 F.3d at 1005 (Kleinfeld, J., dissenting).

186. *See* Elliott, *supra* note 27, at 315 ("When a managerially-minded judge . . . selects a trial date only a few months away, the judge forecloses the development of issues." (footnote omitted)).

187. *Id.* at 314.

188. *See* Hull, *supra* note 118 (suggesting that lawyers better understand the importance of testimony on their key issues).

189. One other potential danger of rocket docket speed is that the quality of judicial decisions may suffer. An early trial date compresses the time for judges to consider all pretrial matters. Mandating speedy determination of such matters may force judges to sacrifice careful evaluation to satisfy deadlines. While fear of this result seems reasonable, a study of federal district court case management reports an opposite effect. *See* Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 783 (1981) (summarizing 1975 study indicating that efficiency did not compromise quality in judicial performance). According to the study, faster courts ruled on more motions per case and gave more, rather than less, careful attention to each case. *Id.*

rocket docket case management. This Part proposes several such protections.

### *A. Preventing Arbitrariness: The "Good Cause" Standard*

The local rules governing a district court provide guidelines for setting trial dates. Thus, a trial date that seems early but conforms to the requirements of local rules is not wholly arbitrary. Instead of addressing the method by which trial dates are chosen, a more effective approach to combating arbitrariness is to formalize the consideration of continuance requests in ways that require judges to take account of individual circumstances.

As a preliminary matter, judges committed to maintaining an active and current docket by strictly adhering to trial schedules should inform parties at the outset that continuances will not be freely granted. This notice should adequately warn the parties and their attorneys that they must structure their litigation efforts to fit the originally allotted time. Further, when a continuance request is subsequently denied, parties are not likely to feel that the decision was random or surprising.

Continuance requests should be evaluated according to a firm "good cause" standard. The Federal Rules authorize a judge to establish a trial date in the initial scheduling order and provide that "[a] schedule shall not be modified except upon a showing of good cause."[190] A district court judge has considerable latitude in determining what constitutes "good cause," and an appellate court will overturn continuance decisions only when they reflect an abuse of discretion. The Fifth Circuit summarized the rationale for such deference:

> When the question for the trial court is a scheduling decision, such as whether a continuance should be granted, the judgment range is exceedingly wide, for, in handling its calendar and determining when matters should be considered, the district court must consider not only the facts of the particular case but also all of the demands on counsel's time and the court's.[191]

A judge's discretionary evaluation of whether there exists "good cause" for postponing a trial date should assess the facts, circumstances, and procedural development of the case. Given the rocket docket's time compression, extensions may often be requested to allow additional discovery.[192] Applying the "good cause" standard to a continuance

190. FED. R. CIV. P. 16(b).

191. Fontenot v. Upjohn Co., 780 F.2d 1190, 1193 (5th Cir. 1986).

192. *See, e.g., Martel II*, 56 F.3d 993 (9th Cir.), *cert. denied*, 116 S. Ct. 381 (1995); Daniel J. Hartwig Assoc., Inc. v. Kanner, 913 F.2d 1213 (7th Cir. 1990) (alleging improper denial of motion to reschedule trial date and extend discovery where attorney ceased investigation during pendency of motion to dismiss); U.S.I. Properties Corp. v. M.D. Constr. Co., Inc., 860 F.2d 1 (1st Cir. 1988) (addressing claim that district court elevated docket management over litigant interests in refusing to

requested for this purpose should include analysis of at least three factors.

First, a judge must consider the reason that more time is needed. The inquiry will necessarily examine the attorney's diligence in preparing for trial. If an attorney delayed discovery efforts, this factor will mitigate against granting the continuance. However, since rocket docket schedules burden some types of attorneys, especially sole practitioners, more than others,[193] the judge should assess the degree of attorney culpability. If the delay resulted not from negligence, but rather from a busy lawyer's other legitimate trial commitments, denying the continuance could unfairly penalize the client.

A second relevant factor in determining good cause involves the inconvenience to both the opposing party and to the court that will result from continuing the trial. This analysis might include, for instance, the proximity of the request to the scheduled trial date, the length of the resulting delay in the case's disposition, and the extent to which rescheduling might impact other cases on the court's docket.

Finally, a jndge should consider the content of the intended additional discovery. A discovery effort seeking information of only questionable relevance should be held insufficient to support a continuance. Abandoning trial dates for mere "fishing expeditions" would significantly compromise the rocket docket's delay reduction goals. Rather, the minimum standard for discoverability remains that of Federal Rule 26(b)(1), which limits avenues of inquiry to those that appear "reasonably calculated to lead to the discovery of admissable evidence."[194] Of course, a judge may accord additional weight to this content factor if the discovery sought seems especially compelling under the circumstances.

By granting continuances on a limited basis, the "good cause" requirement for continuance requests allows judges to control their caseloads by setting early and firm trial dates. At the same time, however, applying the above described factors to particular facts individualizes the analysis, making the decision to grant or deny the request less arbitrary and more case-specific.

While the "good cause" factors and individualization will likely reduce actual arbitrariness in continuance rulings, they may not reduce the equally important perception of procedural injustice. As a final safeguard, judges should explain to parties the reasons justifying their

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extend time for discovery); Commercial Union Ins. Co. v. Gonzalez Rivera, 358 F.2d 480 (1st Cir. 1966) (requesting additional time to prepare for trial).

193. *See supra* Part III.C.1.b.iii.

194. *See* FED. R. CIV. P. 26(b)(1).

scheduling decisions.[195] The explanation will dispel the appearance of arbitrariness by illustrating that the judge thoughtfully balanced the legitimate bases for the request against the reasons for denial.

### *B. Preventing Settlement Coercion: Rule 16(a) Conferences*

Rocket dockets may make it impossible for parties, particularly less resourceful parties, to fully prepare for trial within the available time. In this way, they pressure parties toward settlement. This pressure stems in large part from the discovery-centered litigation process constructed by the Federal Rules.[196] Broad pleadings invite broad discovery; attorneys "are virtually compelled to cast the discovery net as broadly as reason will permit" in order to ascertain the disputed issues and relevant facts.[197] In this model, much time and expense is spent on discovery which ultimately only reveals what further discovery is necessary.[198]

However, the Rules contemplate a procedure which could, if used properly, eliminate the need for such broad discovery. Rule 16(a) authorizes a court to require parties or their representatives to attend pretrial conferences aimed at various objectives, including "expediting the disposition of the action,"[199] "discouraging wasteful pretrial activities,"[200] and "facilitating the settlement of the case."[201] Holding pretrial conferences early in the litigation can further these goals by formalizing interparty communication and allowing litigants and their lawyers to "isolate those issues that are the greatest barriers to settlement so that discovery can focus on those problems."[202]

By defining what issues are in controversy in the early stages of a case, Rule 16 conferences narrow the dispute and confine discovery to its appropriate purpose: "to help resolve, not to determine, what is in dispute."[203] The resulting narrowly tailored discovery plans ensure that less time will be wasted on unproductive preliminary investigation. The limited trial preparation time allowed in a rocket docket trial schedule will be better spent, increasing parties' readiness for trial on the material

195. *See* Elliott, *supra* note 27, at 317 (distinguishing legal decisions, for which judges must explain their reasoning, from managerial decisions).

196. *See supra* text accompanying notes 179-82 (describing importance of discovery under Rule 8's broad pleading standards).

197. Kichaven, *supra* note 99, at 510.

198. *See id.* (cbaracterizing discovery as an effort by lawyers to educate themselves about a case).

199. FED. R. CIV. P. 16(a)(1).

200. FED. R. CIV. P. 16(a)(3).

201. FED. R. CIV. P. 16(a)(5).

202. Kichaven, *supra* note 99, at 513; *see also id.* at 512-13 (advocating early use of Rule 16 conferences).

203. *Id.* at 513 (emphasis omitted).

disputes and reducing the likelihood of settlement coercion for want of preparation.

### C. Protecting Truth: The Role of Appellate Review

Early trial dates inevitably limit the time available for discovery. Firmly enforcing these dates by denying extensions to conduct further investigation before trial may hinder the pursuit of truth and promote inaccurate outcomes. The task of determining the extent to which strict adherence to a rocket docket diminishes the completeness of the search for truth in an individual case falls on the appellate court when it is asked to review a district court's denial of a continuance requested to extend discovery. The standards of injustice applied by the appellate court reflect the degree to which fact-finding may tolerably be thwarted. Thus, employing standards that adequately protect accurate outcomes can effectively prevent substantive injustice.

#### 1. Reviewing Trial Management Decisions

The circuits universally review a decision to grant or deny a continuance for an "abuse of discretion." Case management is within a lower court's discretion and scheduling practices will not be disturbed absent an abuse of authority.[204] This deferential standard respects a district court judge's legitimate need for docket control.

A finding that a district judge abused his discretion is necessary but not sufficient for a plaintiff to obtain relief. Rule 61 of the Federal Rules of Civil Procedure codifies the "harmless error" doctrine, providing that

> no error or defect . . . in anything done or omitted by the court . . . is ground for . . . disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.[205]

Under Rule 61, an erroneous judicial action, even one demonstrating an abuse of discretion, will be considered "harmless" absent a showing of

204. *See, e.g.*, Brooks v. United States, 64 F.3d 251 (7th Cir. 1995); Arabian Amer. Oil Co. v. Scarfone, 939 F.2d 1472 (11th Cir. 1991); U.S.I. Properties Corp. v. M.D. Constr. Co. Inc., 860 F.2d 1 (1st Cir. 1988); Fontenot v. Upjohn Co., 780 F.2d 1190 (5th Cir. 1986); Watson v. Miears, 772 F.2d 433 (8th Cir. 1985); Rios-Berrios v. I.N.S., 776 F.2d 859 (9th Cir. 1985); Aruba Bonaire Curacao Trust Co. Ltd. v. C.I.R., 777 F. 2d 38 (D.C. Cir. 1985); Robinson v. United States, 718 F.2d 336 (10th Cir. 1983); Fontana v. United Bonding Ins. Co., 468 F.2d 168 (3d Cir. 1972); Michelsen v. Moore-McCormack Lines, Inc., 429 F.2d 394 (2d Cir. 1970); Pingatore v. Montgomery Ward & Co., Inc., 419 F.2d 1138 (6th Cir. 1969); Golding v. United States, 219 F.2d 109 (4th Cir. 1955).

205. FED. R. CIV. P. 61.

resulting injustice. This showing is uniformly termed the requirement of "prejudice."[206]

In addressing the definition of prejudice when reviewing lower court decisions, several courts have measured prejudice with reference to the trial outcome, holding that, to be prejudicial, a decision must be outcome-determinative. The Fifth Circuit, for instance, held that a trial court's violation of Federal Rule 26(b)(3) did not prejudice the aggrieved party because "[t]here [was] no real likelihood that retrial would produce a different result."[207] The law of that circuit further holds that a court's refusal to continue a trial to accommodate the availability of a testifying witness will not be found prejudicial if a party cannot show that the evidence omitted from presentation "was material to the extent that it would have changed the jury's verdict."[208] The Sixth Circuit also recently employed this result-oriented definition, holding that a district court's exclusion of the plaintiff's expert witness as a sanction for violating discovery procedures was harmless under Rule 61 "because it [could not] be shown that the expert's testimony would have had any effect on the outcome of the trial."[209]

Given the deference afforded to lower court scheduling decisions, appellate courts rarely find the requisite abuse of discretion in continuance denials and therefore often have no occasion to reach the prejudice question. Consequently, there is only limited case law describing what constitutes a prejudicial continuance ruling or how a party can prove that an erroneous denial was not harmless under Rule 61.

In *Martel II*,[210] the Ninth Circuit confronted this precise question in the context of rocket docket time constraints. Recognizing the requirement of prejudice to obtain reversal of a continuance decision, the court reasoned in outcome-determinative terms, asking whether there was "a reasonable probability that the outcome would have been different had the continuance been allowed."[211] In considering a similar request for extended discovery time, the Seventh Circuit likewise implied an outcome-determinative requirement, refusing to find reversible error absent a "reasonable probability that [denial of a continuance to conduct more discovery] caused [the party] to lose the case."[212]

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206. *See, e.g.*, Fontenot v. Upjohn Co., 780 F.2d 1190 (5th Cir. 1986) (noting failure to show prejudice from continuance denial); Wells v. Rushing, 755 F.2d 376 (5th Cir. 1985) (finding abuse of discretion but affirming judgment for lack of demonstrated prejudice).

207. Miles v. M/V Mississippi Queen, 753 F.2d 1349, 1353 (5th Cir. 1985).

208. Wells v. Rushing, 755 F.2d at 382 (quoting Behar v. Jenkins, 309 F.2d 160, 161 (5th Cir. 1962)).

209. Innes v. Howell Corp., 76 F.3d 702, 711 (6th Cir. 1996).

210. *Martel II*, 56 F.3d 993 (9th Cir.), *cert. denied*, 116 S. Ct. 381 (1995).

211. *Id.* at 995.

212. Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 270 (7th Cir. 1986).

Thus, despite the relative paucity of authority, current case law seems to indicate a trend toward an outcome-determinative conception of prejudice. Under this approach, no prejudice from a continuance denial will be found, and any error will be deemed harmless and thus irreversible, unless the decision adversely affects a party's ultimate trial result.

*2. Distinguishing Rocket Docket Continuance Requests*

While few appellate courts have squarely addressed decisions on continuances to conduct further discovery, the current proliferation of rocket docket scheduling techniques suggests that requests for continuances for this purpose will likely increase. Thus, how district courts should respond to such requests, and how appellate courts should review such responses, must be resolved in a manner that protects accurate outcomes.

The outcome-oriented definition of prejudice seems reasonable for reviewing some judicial actions. Refusing to alter a lower court's judgment except where actual harm results protects the need for individualization and discretion in case management. Reversing technically erroneous decisions that do not affect a case's ultimate disposition would engender inefficiency and compromise the ideal of truthful outcomes. However, the restrictive outcome-determinative requirement is inappropriate for reviewing the denial of a continuance pursuant to a rocket docket scheduling plan. Applied to this circumstance, the outcome-oriented standard fails to acknowledge the compelling purpose motivating the continuance request and overlooks the unique risks of early, firm trial dates.

A continuance requested for purposes of obtaining additional discovery differs from other requests for postponement in that denying this continuance ultimately denies discovery.[213] Thus, the scheduling decision simultaneously operates as a discovery ruling. The crucial role of discovery under the Federal Rules[214] justifies affording special protection to the truth-seeking endeavor when balancing goals of speed with goals of justice: "Delay should be avoided to the extent that it is unnecessary or unreasonable but adequate time must be allowed for discovery of the facts and assembly of the proof."[215]

Admittedly, discovery management, like scheduling decisions, falls within a trial court's broad discretion: "Trial judges have responsibility

213. *See* Sablan v. Dep't of Fin., 856 F.2d 1317, 1321 (9th Cir. 1988) (stating that "a continuance was sought for the purposes of conducting discovery, and hence its denial was effectively a denial of discovery").

214. *See supra* text accompanying notes 179-82.

215. Freehill v. Lewis, 355 F.2d 46, 48 (4th Cir. 1966).

and authority to expedite the discovery process."[216] Orders denying discovery will be reversed only where the action reflects an abuse of discretion.[217] However, the discovery restriction resulting from the denial of a continuance sought for purposes of gathering additional pretrial information is readily distinguishable from other types of discovery limits judges may impose.

The Federal Rules expressly allow judges to impose direct content limits on the issues for litigation and the scope of discovery.[218] When judges eliminate issues on which discovery is allowed, parties are protected from uninformed preclusion by pretrial communication; a judge has ample opportunity to learn the material facts and disputes of a case before setting content limits. In contrast, firm trial dates specifically limit the *time* for discovery. In *Martel II*, for instance, the dissenting justice described the issue on appeal as "time for discovery, not appropriateness of the discovery."[219] This time restriction constitutes de facto issue exclusion, yet attaches few procedural safeguards to ensure that sufficient fact-finding can occur.

The Rules similarly authorize a judge to limit the permissible number of depositions, interrogatories, and admission requests.[220] When judges limit the frequency with which discovery methods will be used, they do not risk wholly eliminating a party's claim or defense. Rather, the limits simply force good lawyering, thoughtful analysis, and careful planning. Moreover, Rule 26(b)(2) alerts judges to specific criteria which might guide their modification of allowable discovery, thus protecting parties from unnecessary limitation.[221] A rocket docket's early trial date, on the other hand, may force a party to prioritize various arguments without adequate time to consider optimal litigation strategies. The subsequent strict refusal to continue a trial date when a party realizes that its rushed discovery choices were unwise or inadequate will force parties to abandon uninvestigated issues.

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216. Watson v. Miears, 772 F.2d 433, 437 (8th Cir. 1985) (citing Societe Internationale, etc. v. Rogers, 357 U.S. 197 (1958)).

217. *See, e.g.*, Stagl v. Delta Airlines, Inc., 52 F.3d 463, 474 (2d Cir. 1995); Springer v. Seaman, 821 F.2d 871, 882 (1st Cir. 1987).

218. *See, e.g.*, FED. R. CIV. P. 16(b) ("The scheduling order also may include . . . modifications of the . . . extent of discovery to be permitted . . . ."); FED. R. CIV. P. 16(c) ("[T]he court may take appropriate action, with respect to . . . the formulation and simplification of the issues, including the elimination of frivolous claims or defenses . . . ."); FED. R. CIV. P. 26(b) (providing that the scope of discovery may be "limited by order of the court in accordance with [the Federal Rules]").

219. *Martel II*, 56 F.3d 993, 1004 (9th Cir.) (Kleinfeld, J., dissenting), *cert. denied*, 116 S. Ct. 381 (1995).

220. *See* FED. R. CIV. P. 26(b)(2).

221. *See id.* ("[U]se of the discovery methods . . . shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative . . .; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit . . . .").

The denial of discovery that inevitably follows a court's refusal to modify its established early trial date not only distinguishes rocket docket discovery limits from other types of discovery restrictions, but also distinguishes continuance rulings in rocket docket circumstances from other discretionary decisions. It further illustrates the impropriety of extending the outcome-determinative definition of prejudice to requests for additional discovery time. When the requirement that a party show an adverse trial outcome from a judge's decision is applied in challenges to evidentiary rulings that, for example, exclude particular witnesses from testifying or forbid questioning on certain issues, the search for truth is not threatened; only the presentation of truth is modified. Requiring this showing to prove prejudice from the denial of discovery, however, ignores the siguificant difference between presenting the truth (evidentiary rulings) and gathering the truth (discovery rulings). It treats suppressing "the known" and suppressing "the unknown" as equal concepts when, in fact, they produce fundamentally different consequences; preventing testimony may leave certain truths untold, but denying investigation risks leaving many truths undiscovered.

In sum, a continuance request to conduct additional discovery introduces different considerations than ordinary continuance requests. Likewise, the denial of such a request prompts more severe consequences. These distinctions, coupled with the several aforementioned ways in which rocket dockets raise suspicions of injustice, indicate that the deference afforded to trial court continuance denials in some circuits may be unwarranted. Requiring an erroneous continuance decision to be outcome-determinative in order to satisfy Rule 61's harmless error standard does not sufficiently protect the truth-seeking process.

*3. An Alternative Definition of Prejudice*

Rule 61's harmless error standard protects the "substantial rights of the parties."[222] The language of the Rule allows appellate reversal where an error affects these rights, even without a demonstrated outcome effect. Accordingly, the outcome-determinative conception of error advanced by the Fifth, Sixth, Seventh, and Ninth Circuits imposes a heightened prejudice requirement beyond that described in Rule 61.

A better definition of prejudice where the denial of a continuance request prevents meaningful discovery would emphasize the discovery process and recognize that procedural injustice, without more, can sig-

222. FED. R. CIV. P. 61.

nificantly prejudice a party's case.[223] An error should be reversible even absent a showing that the desired discovery would have produced facts with outcome impact. Instead, prejudice from the denial of a continuance requested for purposes of conducting further discovery should be found where "a party was precluded by the shortness of time from collecting material evidence or locating material witnesses."[224]

At least two circuits have subscribed to this process-oriented approach by focusing the prejudice inquiry on a party's ability to fairly and fully present its case.[225] These courts explicitly reject the requirement that an error impact outcome. In finding prejudice from a district court's preclusion of discovery on one issue by denying a motion to compel, the Fourth Circuit enunciated an extremely low threshold for prejudice: "Where the excluded evidence is highly relevant and we cannot be certain that its absence did not prejudice the outcome, the error is not harmless."[226] Here, the mere risk of outcome effect was deemed prejudicial.

The Tenth Circuit has also found prejudice absent a showing of outcome determination. Where matters that had been deemed irrelevant during discovery became relevant during trial, the court's refusal to allow subsequent investigation of the issues constituted reversible error because the denial of discovery "precluded a fair trial," even though it was "not possible to determine . . . whether the outcome would have been different had discovery been permitted."[227]

Discovery is designed to aid the search for truth. Protecting the pretrial investigation process by finding Rule 61 prejudice in the denial of an opportunity to conduct meaningful discovery, regardless of the ultimate effect of that discovery, thus furthers truthful outcomes. It should be noted that denying discovery opportnnities by erroneously refusing to grant a trial continuance is not per se prejudicial. Limiting pretrial investigation does not necessarily hurt a party's trial preparation; indeed, the precluded discovery might consist entirely of unproductive research efforts that ultimately contribute little "truth" to the case.[228] A process-oriented appellate review recognizes this possibility;

223. An analogous equation of procedural injustice with error requiring reversal can be found in procedural protections for criminal defendants. An accurate conviction, if based on a coerced confession or illegal search, will be reversed for failure to conform with proper procedures.

224. *Martel II*, 56 F.3d at 1000 (Kleinfeld, J., dissenting).

225. *See, e.g.*, Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc., 840 F.2d 236, 243 n.11 (4th Cir. 1988) (refusing to find prejudice because the party was not prejudiced in presentation of its case).

226. Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332, 355 (4th Cir. 1992) (citations omitted), vacated, Sandberg v. Virginia Bankshares, Inc., No. 91-1873(L), 1993 WL 524680 (4th Cir. Apr. 7, 1993).

227. Shaklee Corp. v. Gunnell, 748 F.2d 548, 550 (10th Cir. 1984).

228. *See supra* text accompanying notes 197-98 (describing breadth of discovery).

although the standard does not inquire into the outcome effect of additional discovery, it does require a party to show materiality.[229]

## CONCLUSION

Delay in federal civil litigation undeniably hinders Rule 1's goal that case resolution be "just, speedy, and inexpensive." On balance, it appears that rocket dockets can effectively reduce the delay, and its attendant consequences, currently experienced by federal civil litigants. However, the rocket docket solution's emphasis on "speed" clearly threatens the judicial system's important objectives of maintaining fair processes and achieving accurate outcomes.[230]

This Comment has attempted to identify the issues and concerns relevant to the Civil Justice Reform Act's recommendation that district courts consider establishing early, firm trial dates in their efforts to reduce litigation cost and delay.[231] The foregoing discussion suggests some procedural safeguards to minimize the dangers of speed. The proposed modifications of traditional rocket docket case management, including formalizing the standard for modifying scheduling orders, holding Rule 16(a) pretrial conferences in the earliest stages of litigation, and reviewing lower court denials of continuance requests for discovery purposes under a more liberal definition of prejudice that protects the search for truth, will have at least two significant effects. First, they will enhance the psychological experience of litigants by promoting the appearance of fairness in the litigation process. Second, and equally important, they will help secure legitimate outcomes by increasing fairness in fact.

Pursuant to the CJRA, the Judicial Conference must submit to the Judiciary Committees of the House of Representatives and Senate a report summarizing and evaluating the results of various districts' delay reduction programs.[232] This report must include a "recommendation as to whether some or all district courts should be required to include, in their expense and delay reduction plans, the . . . principles and guidelines of litigation management" identified in the Act.[233] Perhaps the modifications proposed by this Comment can inform the Judicial Conference's assessment of the appropriate role for rocket dockets in reducing delay in federal civil litigation.

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229. *See supra* text accompanying note 224 (defining prejudice as denial of opportunity to conduct "material" discovery).

230. *See* Magan, *supra* note 95 (noting one attorney's warning that "[c]areful study should precede widespread adoption of [rocket dockets] to assure 'quick' and 'justice' remain partners").

231. 28 U.S.C. § 473(a)(2)(B) (1994).

232. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 104(d), § 105(c), 104 Stat. 5090 (1990), *amended by* Pub. L. No. 104-317, § 608, 110 Stat. 3847 (1996).

233. *Id.* at § 105(c)(2)(A).