

Jury Matters

The Newsletter for the
Civil Jury Project
at NYU School of Law



May '18, Vol. 3, Issue 5

Upcoming Events

- 5.1 Jury Improvement Lunch; Dallas, TX
- 5.2 Jury Improvement Lunch; Houston, TX
- 6.22 Jury Improvement Lunch; Seattle, WA
- 9.5 Jury Improvement Lunch; Las Vegas, NV
- 9.6 Jury Improvement Lunch; Oklahoma City, OK
- 9.7 Jury Improvement Lunch; Miami, FL
- 10.3 Jury Improvement Lunch; Los Angeles, CA
- 10.4 Jury Improvement Lunch; Tucson, AZ
- 10.23 Jury Improvement Lunch; New York, NY

Opening Statement

Dear Readers,

Welcome to the May edition of the Civil Jury Project's monthly newsletter. We are delighted to debut a new Point/Counter-Point feature! This month Professor Nora Freeman Engstrom and Nathan Werksman (Stanford Law '18) respond to an opinion by Judge Richard G. Stearns on the benefits of time limited trials. We hope you enjoy it.

The month of May is particularly important month for jury improvement initiatives; May 8th through 12th is widely recognized as Juror Appreciation Week. As part of our continuing commitment to enhance jury service and honor the citizens who participate in it, the Civil Jury Project has continued to organize Jury Improvement Lunches around the country. Over the course of just one week, we hosted successful Jury Improvement Lunches in Baltimore, Cleveland, and Columbus, Ohio. These lunches were attended by former jurors, federal and state judges, and attorneys. The Civil Jury Project also participated in a panel in Miami titled "The Politics of the Jury" which focused on how today's media and political environment are influencing jurors and the administration of justice.

Thank you for your continued support of the Civil Jury Project. You can find a full and updated outline of our status of projects on our [website](#). In addition, we welcome op-ed proposals or full article drafts for inclusion in upcoming newsletters and on our website either by email or [here](#).

Sincerely,
Stephen D. Susman

Oil States Energy Services v. Greene's Energy Group

The Supreme Court issued its long awaited decision in *Oil States Energy Services v. Greene's Energy Group* on April 24. The Civil Jury Project filed an amicus brief in that case. Research fellow Richard Jolly offers an overview of the decision in relation to points raised in the brief. [Find out more on pg. 6](#)





The Benefits --and Detriments-- of Time Limited Trials

A Case for Reasonable Time Limits

By Judge Richard G. Stearns

[This piece is adapted from an Order Originally Published February 21, 2017, for exclusive use of NYU Law's Civil Jury Project]

My advocacy for setting trial time limits in criminal, as well as civil cases, is prompted by the proliferation in the federal district courts of “megatrials” – trials the duration of which is measured in months rather than days or even weeks, and in which trial exhibits number in the thousands (or in multiple gigabytes if measured in the new courtroom technology). These trials, which consume an inordinate amount of a court's time and focus, while understandable in some cases, have a deleterious impact on the rights of other litigants whose matters do not get the attention they deserve. They also drain the resources of the court, financially and in person-hours, a burden that ultimately falls on taxpayers.

Of equal, if not greater concern, megatrials effectively eliminate from the available venire those jurors who cannot afford to take extended absences from their jobs, or who cannot afford the extra costs of

child or parental care that months of jury service may entail, leaving a venire largely composed of jurors who are retired or who, in a few fortunate instances, have employers willing to indulge their service. A winnowing process based on unlimited leisure time or economic circumstances necessarily risks undermining the ideal of the jury as a fair cross-section of the community.

In criminal cases, megatrials have a perverse impact on criminal defendants of middling means who do not qualify for court-appointed lawyers and who are put to the Hobson's choice of pleading guilty out of expediency or seeking vindication at the near certain price of financial ruin. Megatrials can also have a perverse effect on the government itself by encouraging the over-indictment of cases and by diverting prosecutorial attention from other cases of equal, if not greater, public concern.

The imposition of time limits in civil cases has been a long accepted, if not frequently employed practice in the federal courts. But criminal trials are thought to be, well, just different. Whether this hesitancy derives from excessive deference to the prerogatives of the executive branch or simply from the inertia of custom, I do not know. But I can find no absolute bar in statutory or case law that prohibits the imposition of time limits in criminal tri-

als. In fact, in my Circuit, at least, I can find authority to the contrary. *See, e.g., United States v. DeCologero*, 364 F.3d 12, 25 (1st Cir. 2004) (Boudin, J.).

We have long recognized that federal courts have considerable authority when it comes to managing their dockets, including the ability to manage the presentation of cases. *See Sec’y of Labor v. DeSisto*, 929 F.2d 789, 795-796 (1st Cir. 1991). This inherent authority is reinforced by the Federal Rules of Evidence, which grant courts the power to “exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . avoid wasting time,” Fed. R. Evid. 611(a)(2), and to exclude even relevant evidence that is cumulative or redundant. Fed. R. Evid. 403. After all, “it has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment and whim.” *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1171 (7th Cir. 1983), quoting 6 Wigmore, *Evidence* § 1907 (1976).

Trial time limits, in my experience, serve several beneficial purposes. As a practical matter, they enable a court to efficiently manage its docket. They also ameliorate the onerous burden a drawn-out trial places on the stamina and attention span of the ordinary juror. They promote a more efficient presentation of the case by both the prosecution and the defense, which improves the quality of jury comprehension. As Mark Twain once quipped, “[t]he more

you explain it, the more I don’t understand it.” Finally, time limits tend to eliminate “[n]umerous objections or *sua sponte* interruptions by the court to debate what evidence is repetitious or cumulative,” *United States v. Reaves*, 636 F. Supp. 1575, 1580 (E.D. Ky. 1986).

The imposition of time limits or other restraints on the right of the government and the defendant in a criminal trial must, of course, be reasonable. *DeSisto*, 929 F.3d at 795. The court’s discretion must be guided by an assessment of the complexity of a case to ensure that the parties can “present[] sufficient evidence on which to base a reliable judgment.” *Id.* at 796. Especially in a criminal trial, it is important that everything that needs be said, gets to be said, but, to paraphrase the late Congressman Morris Udall, it may not always be the case that everyone need have the chance to say it.



Judge Richard G. Stearns sits on the U.S. District Court, District of Massachusetts.

Proceed with Caution: The Dangers of Trial Time Limits

By Nora Freeman Engstrom
and Nathan E. Werksman

It's true: Trial time limits can have certain advantages. They almost certainly improve jury service. They sometimes promote trial clarity and, by extension, jury comprehension. And they may also expedite case resolution (though even that's debatable). But, trial time limits also have clear drawbacks. Those drawbacks must be adequately identified and accounted for before time limits are categorically endorsed.

First, limits are difficult to administer. Problems arise as judges, in imposing limits, have to determine how many hours to allot, how to divide those hours, and what, and against whom, time actually "counts." (Does cross-examination count against the party who called the witness or the party questioning the witness? What about an objection to that cross-examination? What about an objection to that cross-examination that's sustained?)

Second, owing to these administrative imperfections, limits are susceptible to strategic gamesmanship, as a party, who realizes his opponent is squeezed, has every incentive to interrupt with objections or coach friendly witnesses to draw out testimony. Vividly illustrating these incentives, in one recent trial where a judge had decided to "count" all time against "the presenting or offering party," a defendant raised 1,992 objections and requested countless conferences—making it hard to say that time was saved or justice was served.

Third—and less obviously—depending on time allocations, time limits risk slanting the

system toward defendants. This risk stems from the fact that, in allocating time, many courts split time evenly. Equal, these courts apparently assume, is equitable.

But data collected by the National Center for State Courts (NCSC) casts doubt on that assumption. The study, conducted back in 1985, found that, across case types, plaintiffs consumed far more "trial time" than defendants. For example, to try a car wreck case, plaintiffs took five-and-a-half hours on average, while defendants took less than three. To try a contract case, plaintiffs took seven hours, while defendants took about four. The NCSC study shows that, when it comes to trial time, defendants typically need—and have historically used—just a fraction of the time required by their opponents. It takes less time, in other words, to demolish a house than to build one.

When considering time limits, the implications of the NCSC's research are huge. The research suggests that, although an "equally imposed" trial time limit (such as a four-hour cap in a contract dispute or a three-hour cap in a car wreck case) may look fair, it actually isn't. It will, in fact, leave the defendant wholly untouched, while substantially curtailing the plaintiff.

Fourth, by restricting the time afforded to make one's case, time limits may impair litigants' sense of procedural justice. From decades of research, we know that process matters. People care as much—if not more—about the procedures that accompany decisions as they do about the decision itself. We also know what a "fair" process entails: It's one that offers meaningful opportunities for participation, that feels decorous and respectful, and that is "thorough," such that sufficient attention is paid to establishing and weighing the facts of the dispute. All this suggests that, when time limits are harshly

imposed and rigidly adhered to, they may undercut the all-important sense of fairness litigants need to satisfy procedural justice principles.

All this has played out in trials across the country. For example, in a Title VII case in federal court, a rigid limit left a litigant with seventy-nine minutes to examine four witnesses. The witnesses literally ran to and from the witness stand, turning, as Judge Richard Posner wryly noted, a “federal trial into a relay race.” In a second case, a state action from Louisiana, a woman was catastrophically injured. When she and her husband sued (she for her injuries, he for loss of consortium), the judge imposed a restrictive limit. Time ran, and the judge then cited that limit when refusing to let the husband testify—and then, in a Kafkaesque twist, cited the husband’s failure to testify as grounds to reject his claim. In a final case out of Hawaii, a judge imposed a three-hour limit in a child custody case in family court, while allegations of child and spousal abuse swirled. When the mother was on the stand discussing her devotion to her children and that history of abuse, the clock expired.

The trial is the most important—and also the most visible—part of civil liti-

gation. It is where laws get tested and opinions get shaped. These trials are, according to all evidence, dwindling in number. And, they are also, generally, already very short: In the entire federal court system last year, only [eleven](#) civil trials lasted twenty days or more, and the [majority](#) lasted one day or less. As we have fewer civil trials, those left have an outsized and ever-larger effect—when it comes to enforcing laws, setting precedent, and promoting accountability and transparency. Given all this, we ought to be extremely careful when considering a “fix” like trial time limits that may only further truncate, slant, and undermine the civil trials that remain.



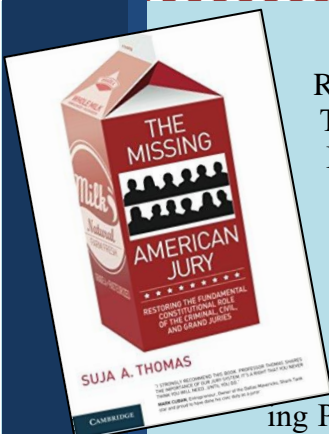
Nora Freeman Engstrom is a Professor of Law and the Associate Dean for Curriculum at Stanford Law School. She is the author of *The Trouble With Trial Time Limits*, which will be published in the Georgetown Law Journal this Spring.



Nathan E. Werksman is a member of Stanford Law School’s class of 2018

Reviewing “The Missing American Jury”

Richard Lorren Jolly, research fellow for the CJP, published a book review of Suja A. Thomas’s *The Missing American Jury* in the most recent edition of the Michigan Law Review. Jolly considers Prof. Thomas’s core argument that juries have dwindled due to usurpation of their authority by the traditional government branches. Jolly then critiques Prof. Thomas’s decision to omit private civil procedure from the discussion, contending that the rise of binding arbitration and private procedural ordering have tracked the other usurpation outlined in the book. He contends that by removing power from the jury and vesting it in private hands, the legislature and judiciary have benefited from increased efficiency and thwarted attempts at public scrutiny. Jolly concludes by applying Prof. Thomas’s doctrinal framework in the context of private civil procedure. The book review is available in print and for download [here](#).

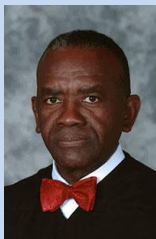




New Advisors Spotlight



Hon. Timothy Williams
Eighth Judicial Dist. Ct. for
the State of Nevada



Hon. Guy Reece
Franklin Cty. Ct. of Common
Pleas, Columbus Ohio



Hon. Lydia Green
Seventh Judicial Dist. For
the State of Oklahoma



Hon. Monica Bachner
Los Angeles County Superi-
or Court

IPR and the Seventh Amendment

The Supreme Court issued its decision in *Oil States Energy Services v. Greene's Energy Group* on April 24. The case dealt with the constitutionality of *inter partes* review, the America Invents Act's administrative and juryless procedure for determining the validity of granted patents. The Civil Jury Project filed an amicus brief in support of neither party because the case raised important Seventh Amendment issues concerning legislative removal of traditional causes of action from juries. As expected, the Court upheld *inter partes* review over Article III and Seventh Amendment challenges. The opinion is narrow and does not considerably move the ball on the issues the Civil Jury Project raised in its brief.

The Court chiefly based its opinion on the public rights doctrine as an exception to Article III jurisdiction. The Court voiced some of the same criticisms of that doctrine that the Civil Jury Project raised in its brief, noting that "[t]he Court has not 'definitively explained' the distinction between public and private rights, and its precedents applying the public-rights doctrine have 'not been entirely consistent.'" But the Court concluded that this case did not require further elucidation of the doctrine because "[i]nter partes review falls squarely within the public-rights doctrine."

The Court was able to reach this conclusion by painting *inter partes* review as "simply a reconsideration of [the initial patent] grant," and holding that "Congress has permissibly reserved the PTO's authority to conduct that reconsideration." This was the expected outcome among Court observers. It also conforms to the Civil Jury Project's urging that the

Court avoid using this case as a vehicle to address broadly the public rights doctrine.



On the Seventh Amendment specifically, the Court committed but a single paragraph. The Court repeated established precedent that "when Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.'" Thus, "rejection of [the] Article III challenge also resolve[d] [the] Seventh Amendment challenge." From the Civil Jury Project's perspective, this is a less than desirable holding. It further establishes public rights as exception to the Seventh Amendment without engaging in the historical and doctrinal shortcomings of that approach. Critically, however, the Court did not conclude that the jury trial right never applies outside of Article III courts, for instance private rights committed to Article I tribunals. Avoiding this alternative outcome was the Civil Jury Project's strongest urging.

Justice Gorsuch dissented, joined by the Chief Justice. The dissenting opinion is largely based on an alternative recounting of the history of early patent procedures, and considers at length the problem of regulatory capture in administrative bodies and the importance of impartial Article III judges. Unfortunately, it completely jettisons the Seventh Amendment issue, overlooking the importance of lay participation in the administration of justice.

The Court's full opinion is available [here](#), and the Civil Jury Project's brief is available [here](#).

Status of Project: Spring 2018



The Civil Jury Project looks forward to continuing its efforts throughout 2018 with the following objectives:

- Continue our efforts to enlist and involve judicial, academic, and practitioner advisors around the country
- Identify and study those judges who are trying the most jury cases, endeavoring to understand their techniques
- Develop plain language pattern jury instructions
- Encourage public discussion and debates about the pros and cons of public dispute resolution, particularly through the use of social and traditional media

This is but a sampling of our objectives for the coming year. A comprehensive list is available on our website, [here](#).

Thank you for your involvement in this important project. By working together we can reach a better understanding of how America's juries work and how they can be improved.

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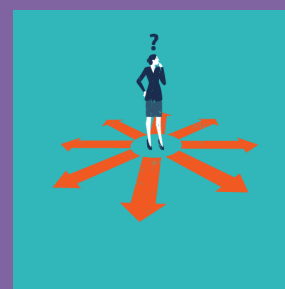


Kaitlin Villanueva
Admin. Assistant

A Preview of Next Month . . .



President of the Dallas Bar Association, Michael K. Hurst, discusses the urgent need to halt the decline of jury trials.



Trial Consultant, Dr. Ken Broda-Bahm, proposes techniques to limit uncertainty in jury trial outcomes.