



## The Wikipediazation of the American Judiciary

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### **“The Wikipediazation of the American Judiciary” By NEFA Foundation Senior Advisor Jeff Breinholt**



*[Jeff Breinholt is a Senior Advisor for Counterterrorism and Education at the NEFA Foundation and is on a one year sabbatical from the Department of Justice, National Security Division. Until June 2007, Mr. Breinholt served as Deputy Chief of the Counterterrorism Section at the U.S. Department of Justice. Shortly after 9/11, Mr. Breinholt was appointed head of the Department of Justice's terrorist financing enforcement program, and helped found a special FBI unit devoted to U.S.-based fundraising by international terrorist organizations and managed a team of financial prosecutors within the Counterterrorism Section dedicated to prosecuting material support crimes. In 2003, he was honored with the Attorney General's Award for Excellence in Furthering the Interests of U.S. National Security.]*

A hot issue these days in legal circles involves American judges relying on foreign court opinions as precedent in their rulings. Those who criticize this practice argue that it is a threat to American sovereignty (and hegemony), since foreign judges are not part of the American legal tradition and do not deserve a hand in crafting American public and social policy, which includes judicial review. According to this argument, relying on foreign precedent in American court rulings is the first step towards allowing international legal institutions into U.S. policymaking. To these critics, international institutions are not accountable to the American public, which should disqualify them from a role in American law-making.

While these discussions have been occurring, there is a quiet revolution occurring. It seems that judges are increasingly citing *Wikipedia*, the free online encyclopedia, in their written opinions. *Wikipedia* was invented by Jimmy Wales in 1995, in hopes of growing the largest source of knowledge in the world. *Wikipedia* entries are collaborative, and can be constantly updated by self-proclaimed subject matter experts anywhere in the world. This means *Wikipedia* is written simultaneously by everyone and by no one. Its entries are hardly definitive, but when you read an entry on a topic with which you are familiar, you generally come away feeling it is not too bad, if even as a thumbnail sketch or as a place to start.

In some ways, the appearance of *Wikipedia* citations in legal opinions may be a disturbing sign that judges are relying on junk science, which is arguably a more serious problem than relying on foreign precedent. However, what is the real harm, if *Wikipedia*, reflects the considered opinion of a number of people? After all, plenty of serious researchers (and I like to think of myself in this category) look to *Wikipedia* to get a general background on a topic before turning to more authoritative sources. Sometimes, *Wikipedia* is the single best expository source for some information. Its power lies in its being, for certain obscure topics or concepts, the top search engine result. This makes *Wikipedia* a trusted brand name. It can be cited with more authority than a citation to less well-known websites.

There is another factor, which argues that the risk of *Wikipedia* in legal opinions is something to welcome: its information tends to be more timely and immediate than other written sources, which must go through the editing and publication process.

Consider what happened in July, 2005, which foreshadowed the rise of *Wikipedia* in American law. As described by Don Tapscott and Anthony D. Williams in their book *Wikinomics: How Mass Collaboration Changes Everything*, at 8:50 a.m. on July 7, 2005, four synchronized

bombs struck the London transportation system. Eighteen minutes later, the first entry about the incidents appeared on *Wikipedia*. By the end of the day, over 2,500 users had created a comprehensive 14-page account of the bombings that was much more detailed than the information provided by any single news outlet. This was before law enforcement and intelligence professionals started relying on *Wikipedia* to supplement what was known from other sources. The courts would be next.

We are already seeing the specter of *Wikipedia* technology used in U.S. national security. The winner of a recent CIA writing contest which sought creative ideas for reforming the intelligence community was Calvin Andrus, who wrote an essay arguing that the hide-bound community should adopt the Web 2.0 ethos of *Wikipedia* and the blogosphere as a way of increasing its knowledge base and facilitating information-sharing. The CIA took notice. As described in a December 3, 2006 article in the *New York Times Magazine*, the intelligence community now has a classified blogosphere where people with security clearances can post their ideas, in classified format, for the entire community. There is also a classified on-line encyclopedia, known as *Intellipedia*. If these ideas take off and qualified experts jump in, we stand a real chance of some computerized infrastructure that will yield up-to-the-minute knowledge reflecting what the U.S. national security apparatus knows about certain threats, for use by our operational decision-makers who now rely on a hierarchal structure rife with human fallibility. Time will tell.

What about *Wikipedia* usage by another American institution at this moment in history – the judiciary? Is the increased *Wikipedia* usage by American judges a good or bad thing? The answer requires an examination of the cases themselves, which is what I set out to do.

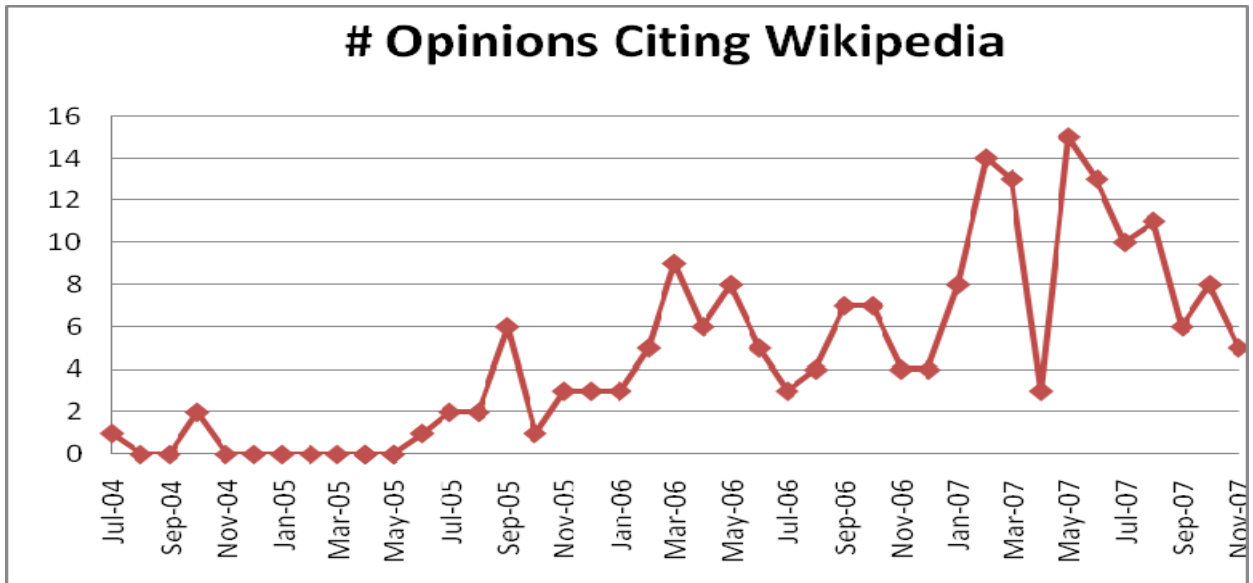
This article starts with a description of the history of citations to *Wikipedia* in federal and state court opinions, something that has been occurring for a little more than three years. From there, I describe the pertinent trends in this usage. Who is citing it, in what type of case, and for what purpose? I then offer my view whether this trend in *Wikipedia* reliance by American judges should be alarming to the U.S. legal community, and considered along with the use of foreign precedent as a threatening development.

## I. The Courts and *Wikipedia*

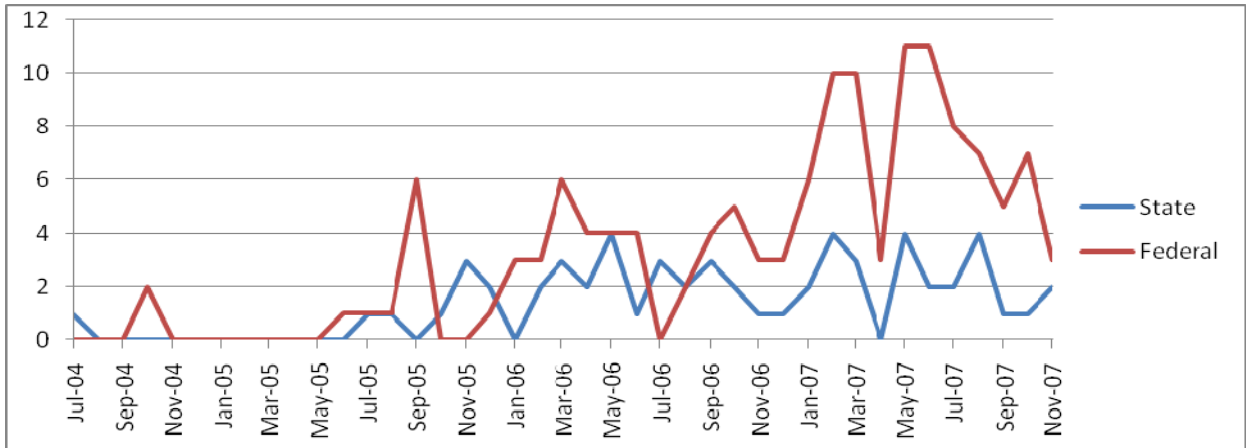
### A. The Universe of Cases Citing *Wikipedia*: Who, Where and How Often

The first time *Wikipedia* was used in a published opinion occurred on July 30, 2004, when a state judge in Michigan cited it for the definition of “positional asphyxia,” the cause of a patient’s death in a nursing home malpractice case. *Bryant v. Oakpointe Villa Nursing Centre*, 471 Mich. 411, 684 N.W.2d 864 (Mich.,2004) A little more than two months later, on October 15, 2004, two federal courts issued rulings with *Wikipedia* cites on the same day. In a First Amendment Establishment Clause case in Virginia arising from a challenge to the use of funds for a memorial featuring the Latin cross, Judge James Cacheris relied on *Wikipedia* for his description of the Hollywood “Walk of Fame.” *Demmon v. Loudoun County Public Schools*, 342 F.Supp.2d 474 (E.D.Va. 2004). That day, in a case arising out of Georgia challenging the constitutionality of the government’s requiring anti-war protestors to pass through a metal detector to attend a rally, the Eleventh Circuit cited *Wikipedia* for its description of the Homeland Security color-coding alert system, which the government pointed to as justification for its actions. *Bourgeois v. Peters*, 387 F.3d 1303 (11<sup>th</sup> Cir. 2004). If these three cases began the *Wikipedia* legal revolution, it means the revolution is slightly more than three years old.

Since American courts took the initial plunge in these three cases, there have been 189 court opinions citing *Wikipedia*, for a total of 192 cases (as of this writing). This figure consists of 134 federal opinions (102 from the U.S. District Courts, and 24 from the Circuit Courts of Appeal, with the remaining cases from the specialized tax, claims, bankruptcy, or trade courts) and 58 state court opinions. The frequency of *Wikipedia* usage by American judges is increasing. As I write this, it appears that *Wikipedia* is cited by some court in the U.S. at a frequency of about 10 times per month (about once every two days, given that there are 20 court days per month). Here is a graph that shows the monthly rate of these opinions (federal and state) between October 2004 and the present:



Here is a graph of the same data, broken down between federal and state court opinions, through November 2007:

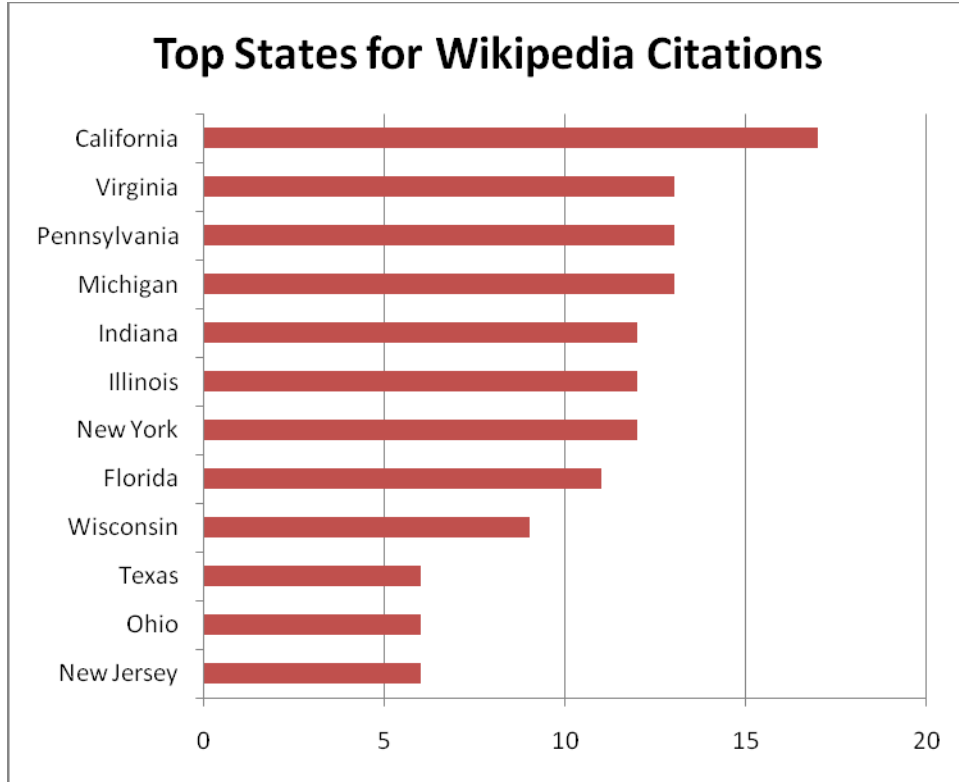


I predict it is just a matter of time until *Wikipedia* is cited by no less of an authority than the U.S. Supreme Court. After all, of the twelve federal circuit courts of appeal, all but two of them - the Eighth Circuit and the D.C. Circuit - have done so. Within the state court system, however, only 21 states have cited *Wikipedia*. This means that the first Supreme Court opinion will likely be in an action that starts in federal court.

The federal opinions citing *Wikipedia*, listed in chronological order, is at Appendix A. The state court opinions are listed in Appendix B. The lists include the type of case at issue.

Of the federal appellate courts, the Seventh Circuit Court of Appeals has cited *Wikipedia* with the most frequency – seven opinions. Of these, three were written by Judge Richard Posner, a former University of Chicago academic who is a technology enthusiast, and perhaps the most prolific writer and creative mind on the federal bench. He is generally considered a conservative, which throws a wrench into any argument analogizing *Wikipedia* usage to judges citing foreign precedent, the latter of which generates protests from the conservative legal movement. (The Seventh Circuit is so embracing of the *Wikipedia* concept that it has its own wiki website devoted to Seventh Circuit law and procedure. See: [http://www.ca7.uscourts.gov/wiki/index.php?title=Main\\_Page](http://www.ca7.uscourts.gov/wiki/index.php?title=Main_Page)).

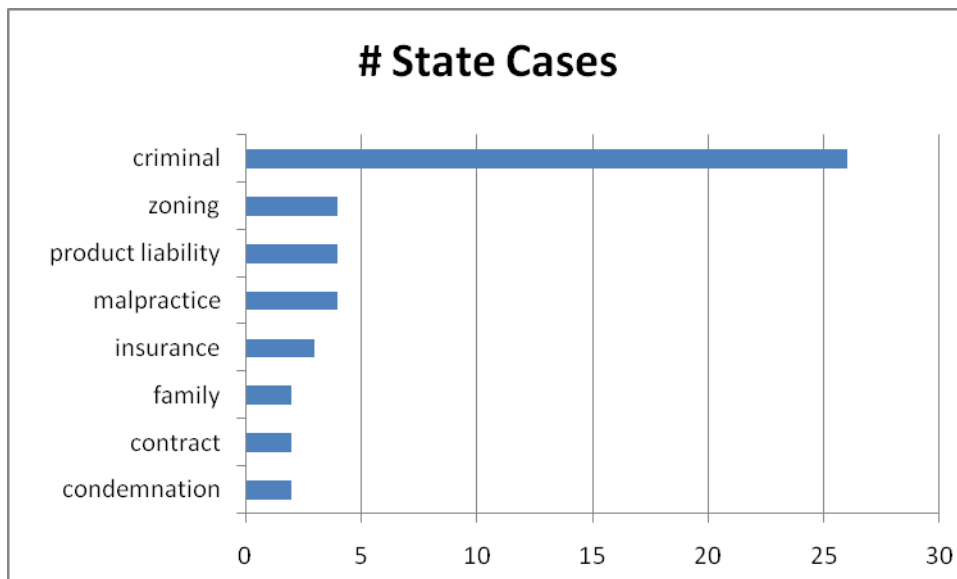
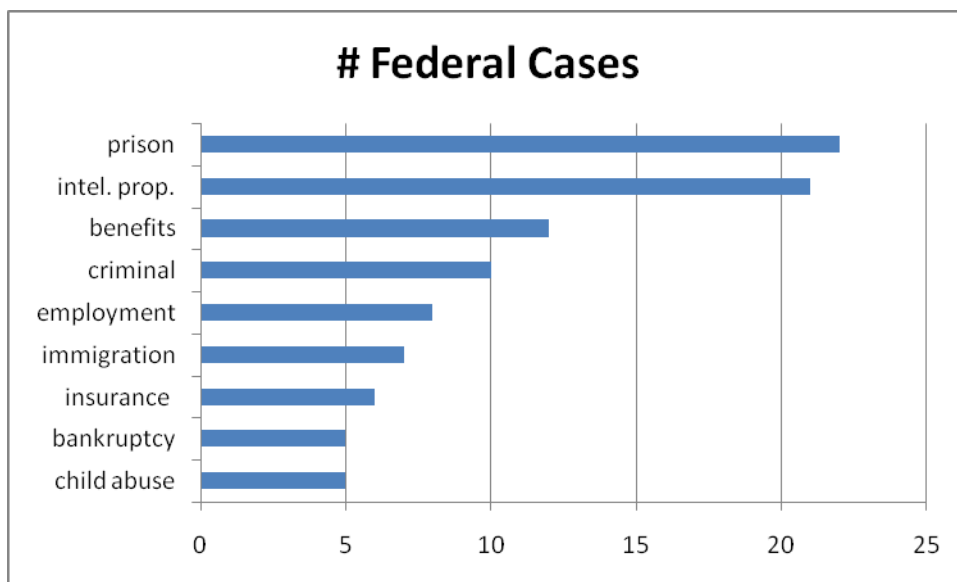
It is possible to isolate the most frequent *Wikipedia*-citing states from among the universe of both state and federal opinions. After all, federal circuit court opinions - which is binding on the several contiguous states covered by the circuit – generally start with a federal lawsuit in one particular state. Of all federal and state opinions citing *Wikipedia*, California tops the list, with 17 opinions. *Wikipedia* usage is apparently most common in large states, although these states have greater opportunity because they cover more people and issue more opinions. Along with California, the other frequently-citing states are shown in the following graph:



California has the honor of being the state from which a single opinion contained the most *Wikipedia* references. On May 26, 2006, Judge Conrad Rushing in Santa Clara County issued an opinion in *O'Grady v. Superior Court*, 139 Cal.App.4th 1423, 44 Cal.Rptr.3d 72 (2006), a lawsuit filed by Apple Computer Inc. against a website that allegedly published Apple's confidential company information. Judge Rushing used *Wikipedia* a total of nine different times to define a series of Internet-related terms (firewire, break-out box, moderators, bulletin board, blog, e-zine, and electronic paper).

### B. Types of Cases Citing *Wikipedia*

How problematic *Wikipedia* usage is also depends on the type of case at issue. If *Wikipedia* cites occur in cases that are not too important, it would not be a dangerous practice. What type of federal and state court matters result in opinions with *Wikipedia* references? Below are two charts which show the types of cases that generated the most *Wikipedia* usage:



The typology of *Wikipedia*-citing case types shows some interesting points. In the federal system, the three types of cases where a citation to *Wikipedia* is most common are (in descending order) prisoner lawsuits, intellectual property, and disability benefits. This is not particular surprising. Prisoner lawsuits and disability disputes are among the most banal federal controversies. Federal judges hear prisoner lawsuits because they are usually styled as some constitutional violation, and they receive benefits from controversies arising out of the Social Security Administration and the federally-regulated ERISA system. These rulings are generally so insignificant that they are not included in the Westlaw Digest process. Judges might rely on *Wikipedia* in these cases because it is the easiest way to find support for some factual proposition, or for a quick definition in cases they want to quickly move off their desks. No surprise here.

It is also not surprising that *Wikipedia* is cited in federal intellectual property controversies, which involve patent, trademark, copyright, and software licensing issues. *Wikipedia* is often used to explain technical matters, and these issues are more common in intellectual property controversies. Among the most common state cases involving *Wikipedia* are those involving product liability, zoning, and malpractice claims, which frequently involve technical terms.

The next most frequent *Wikipedia* citing type of case in the federal system, and the most common type of case in the state system by a large margin, involves criminal law. There are a total of 36 cases in this category. This area is potentially the most problematic, if *Wikipedia* is being used as an expedient shortcut to avoid the more exacting requirements of courtroom evidence. Even the most enthusiastic supporter of *Wikipedia* would get a little nervous with the notion that a court would take a *Wikipedia*-influenced action in a criminal case – arguably the legal situation where the most is at stake for the defendant – as a shortcut around the other rules designed to assure fairness to people accused. This fact would suggest state judges might be more unscrupulous in their reliance on *Wikipedia* than their federal counterparts.

However, this conclusion depends specifically on how state judges used *Wikipedia* in those 36 criminal cases. If it were as a substitute or complement to a regular dictionary, it would not be as much of a problem as using it to supplement evidence offered by the prosecution or bolster an expert opinion that was otherwise lacking in the proof presented at trial.

### C. How Courts Use *Wikipedia*

I was able to classify the specific *Wikipedia* references in federal and state – how the judges used *Wikipedia* in their opinions. They are, in order of frequency: (1) using *Wikipedia* as a dictionary to define a term that came up in the litigation, either in lieu of or in addition to more traditional dictionaries (110 opinions), (2) using *Wikipedia* as a shortcut to evidentiary fact-finding, to describe a fact or scientific process relevant to the judicial decision, sometimes referred to as “taking judicial notice” (50 opinions), (3) using *Wikipedia* to support or explain a rhetorical argument (27 opinions), and (4) in commentary about *Wikipedia* itself (five opinions).

Of these, the first and third categories are the least controversial. Where *Wikipedia* is used as a dictionary, both the term and the definition are cited in the case, which means it would be easy to for anyone to determine whether the definition was faulty and if it made a difference in the case. The third class of *Wikipedia* usage, to provide rhetorical elaboration, is generally an example of judges trying to be cute. Apart from occasionally be annoying, they do not cause any harm. The worst that can be said about them is that they are gratuitous.

The second and fourth categories are worthy of more examination. Where a court relies on *Wikipedia* for a fact that would otherwise require a witness, the question is whether this comports with the adversarial process and the applicable rules of evidence. If not, it may constitute reversible error, though there have been no cases yet where reliance on *Wikipedia* caused an appellate court to reverse a ruling on that basis. The fourth category - judicial commentary about *Wikipedia* - itself is indicative of judicial attitude towards *Wikipedia* as a legal resource.

#### 1. *Wikipedia* as a Dictionary

Appendix C lists those federal and state opinions (in chronological order) in which *Wikipedia* was used as a dictionary, to define a fact that came up in the case. On this list, I included the particular terms that needed to be defined.

Of these cases, I could not find a single *Wikipedia*-supplied definition of the particular term that was obviously erroneous. Was *Wikipedia* necessary in these cases? This answer depends on the obscurity of those terms. I tested myself, by counting the number of terms in these cases I felt I could comfortably define if asked. I was acquainted with approximately 56 percent of the terms, which means I did not know the meaning of about 44 percent of them. My sense was that my knowledge was fairly average, which meant that it was probably helpful to cite *Wikipedia* in cases where it was used as a dictionary. Of course, some of the terms I did not know may have involved a faulty *Wikipedia* definition. However, as noted, the term and the definition are included in the case, so experts could judge for themselves how robust a tool *Wikipedia* is when used for this purpose.

#### 2. *Wikipedia* as a Source of Evidence

As I note above, the most perilous use of *Wikipedia* would be in opinions arising from criminal prosecutions. There were a total of 36 criminal law opinions in which a federal or state judge cited *Wikipedia*. Most of these cases used *Wikipedia* as a dictionary. In how many criminal opinions was *Wikipedia* used for more than this?

I found that this has occurred in three federal cases and seven state cases:

- In a federal drug prosecution of two Rastafarians who were arrested smoking marijuana on national park land, the court noted that the Rastafarians consider smoking marijuana to be a “sacrament,” akin to a Christian’s consumption of wine as part of communion. Apparently in an act of civil disobedience, the defendants smoked marijuana on three different days at precisely 4:20 p.m., announcing what they were doing on a bull-horn. Judge Stewary Dalzell relied on *Wikipedia* for the significance of that time of day to members of the drug culture. He ultimately rejected their religious freedom defense to the drug charge. *U.S. v. Forchion*, Not Reported in F.Supp.2d, 2005 WL 2989604 (E.D.Pa.,2005).
- In the appeal of the federal racketeering conviction of Frank J. Calabrese, Sr. and James Marcello in Chicago, Judge Richard Posner cited *Wikipedia* to support his finding that the “Chicago Outfit,” of which the defendants were allegedly members, was the lineal descendant of Al Capone’s gang. Their convictions were affirmed over the defendants’ double jeopardy claim. *U.S. v. Calabrese*, 490 F.3d 575 (7<sup>th</sup> Cir. 2007)
- In Chicago, a police officer named Mario Morales pled guilty to racketeering, in a conspiracy to steal drugs and money from drug dealers. He moved to withdraw his plea, claiming it was involuntary because he was at the time delusional. Judge Matthew Kennelly, in rejecting this motion, relied on *Wikipedia* to conclude that the medication Morales was taking at the time of his plea was not prescribed for psychosis, so it did not support his claim that his plea was involuntary. *Morales v. U.S.*, Slip Copy, 2007 WL 2343065 (N.D.Ill. 2007).
- In Iowa, Issa Kante was prosecuted in state court for forgery, and argued that he suffered ineffective assistance of his court-appointed lawyers. The judge used *Wikipedia* to conclude that the native language of Kante’s home country (Guinea) was French to reject his claim that he was not provided an adequate translator. *State v. Kante*, 710 N.W.2d 257 (Table) (Iowa App.,2005).
- A California prosecution arose out of an alleged assault on a police officer. The court cited *Wikipedia* for its note that both the prosecution and the defense betray a woeful lack of familiarity with Hispanic naming conventions. *People v. Acevedo*, Not Reported in Cal.Rptr.3d, 2005 WL 3362797 (Cal.App. 4 Dist. 2005).
- In a review of a state drug conviction of a truck driver arrested on Interstate-20 while driving a shipment of marijuana, the court cited *Wikipedia* to support the police officer’s suspicions over the defendant’s claim that that he was shipping grapes from California to New York. (*Wikipedia* showed that Interstate 20 does not extend from California, and would not be a direct route from California to New York.) *State v. Pigford*, 922 So.2d 517 (La., 2006).
- A California state prosecution involved another alleged assault on a police officer. The dissenting judge disagreed that the defendant’s action – of not immediately dropping his pistol when ordered by a local sheriff - was close enough to an actual threat to constitute assault. To support this conclusion, he used *Wikipedia* to describe how the weapon could not have been fired unless it was cocked, and to find the defendant’s delay in dropping his weapon an insufficient act for him to be convicted of assault without the weapon being ready to fire. *People v. Chance*, 46 Cal.Rptr.3d 235 (Cal.App. 3 Dist. 2006)
- In the Delaware rape and murder prosecution of James Cooke, the defense objected to how much scientific evidence the prosecution desired to put on, arguing that much of it yielded inconclusive results and was therefore irrelevant. The court, citing *Wikipedia*, agreed with the prosecutors argument that its decision was justified by the “CSI Effect:” widespread media coverage of criminal trials and the popularity of television programs such as “C.S.I. Crime Scene Investigation,” “C.S.I.-Miami,” and

“C.S.I.-New York.” These programs have had the effect of developing unrealistic and preconceived notions in juror’s minds about the availability and precision of forensic evidence in criminal trials. If not confronted by prosecutors, this so called “C.S.I. Effect” can lead to a misapprehension of the evidence actually introduced or encourage improper speculation by jurors during their deliberations. *State v. Cooke*, 914 A.2d 1078 (Del.Super.,2007)

- Patrick Kennedy was convicted in Louisiana state court of raping his eight-year old daughter and sentenced to death. In his appeal, the court reviewed the constitutionality of the death penalty in cases like this, and cited a *Wikipedia* article entitled “Capital Punishment in America” as part of “its own survey” of how the death penalty is applied. *State v. Kennedy*, 957 So.2d 757 (La.,2007)
- Following his conviction in Texas state court for murder, Corey Sharod Freeman challenged the jury selection. The appellate court used *Wikipedia* for its description of Dallas county demographics. *Freeman v. State*, 230 S.W.3d 392 (Tex.App.-Eastland, 2007)

### 3. Using *Wikipedia* as a Rhetorical Tool

Judges occasionally use *Wikipedia* to support a rhetorical argument, or to explain their reasoning. This is not particularly disturbing. After all, judges are free to use analogies to explain how they reached their decisions, and the fact that they use *Wikipedia* to explain literary or philosophical allusions or logical process does no harm. In these cases, *Wikipedia* is being used, at worst, gratuitously.

In a review of a state bar disciplinary action against a licensed attorney, the court referred to a particularly audacious argument by the attorney as potentially meritorious only on “opposite day” (which *Wikipedia* defines as “a fictitious holiday, usually celebrated by school-aged children, in which statements made on that day are intentionally false, but taken to mean the opposite by listeners aware that the holiday is being celebrated.”) *Attorney Grievance Com’n of Maryland v. Siskind*, 401 Md. 41, 930 A.2d 328Md.,2007.

In Florida, a state prosecutor filed for bankruptcy. A person who he prosecuted for murder and was serving a life sentence filed a creditor petition, claiming that the prosecutor owed him \$10 billion dollars. The bankruptcy court, in rejecting this creditor claim, cited *Wikipedia* for the conclusion that this amount was so outlandish that it could purchase two Nimitz class aircraft carriers. *In re Loe*, Not Reported in B.R., 2007 WL 997581 Bkrcty.S.D.Fla.,2007.

A debtor in bankruptcy claimed that the severance of a business relationship constituted defamation. The bankruptcy court, citing *Wikipedia*’s description of the Wendy’s advertising campaign “Where’s the beef?” and concluded that the defamation claim failed because there was “no beef” (defamatory statements). *In re Cairns & Associates, Inc.* Not Reported in B.R., 2006 WL 3332990 (Bkrcty.S.D.N.Y. 2006)

Judge Robert Broomfield, in a federal corporate fiduciary responsibility lawsuit, criticized the plaintiff’s lack of citations in light of the size of the court record, citing the *Wikipedia* list of longest novels and the fact that the record exceeded the page number of Leo Tolstoy’s *War and Peace*. *Mann v. GTCR Golder Rauner, L.L.C.* 483 F.Supp.2d 884 D.Ariz.,2007

In an appeal from an eminent domain action involving the fair market value of some land taken by the government, the majority opinion referred to the dissenting judge’s opinion as reflecting “hindsight bias,” citing *Wikipedia* to define the term (a phenomenon whereby the subject, upon learning that something occurred, overestimates the ability to predict that that “something” would occur.) *Michigan Dept. of Transp. v. Haggerty Corridor*, 473 Mich. 124, 700 N.W.2d 380 (Mich. 2005)

A dissenting judge in another condemnation action wrote “As Sherlock Holmes might have said to Dr. Watson, ‘It is elementary, my dear fellow,’ that no meaningful public forum is provided citizens without meaningful notice; and in this context, that should include at least a description of the property or general geographical area to be affected,” citing *Wikipedia* for the Sherlock Holmes allusion. *Public Utility Dist. No. 2 of Grant County v. North*, 159 Wash.2d 555, 151 P.3d 176 (Wash. 2007)

In a federal breach of contract action by a disappointed person who made a hotel reservation that was not honored, Judge Julie Carnes wrote “As Jerry Seinfeld has insightfully noted: Anyone can take a reservation; it’s the holding of the reservation that’s important.” And cited *Wikipedia’s* biography of the comedian. *Ultrasound Imaging Corp. v. Hyatt Corp.* Slip Copy, 2007 WL 2345256 (N.D.Ga. 2007).

In a state firearms prosecution, the judge characterized the agreement to stipulate to the trial severance and bifurcation after the court’s ruling as a Hobson’s choice, citing *Wikipedia’s* definition (an apparently free choice that is really no choice at all). *Gray v. State*, 841 N.E.2d 1210 (Ind.App. 2006) (the term derives from a 17<sup>th</sup> Century English poem).

In the concurring opinion of a Wisconsin drug dealer whose customer had overdosed, the judge wrote “Waving the ‘bloody shirt’ of Wolk’s overdose death invited - in the most blatant way - the jury to consider the evidence as proving that, beyond the delivery-charge, Bannister was also guilty of homicide,” citing *Wikipedia* for the bloody shirt reference. *State v. Bannister*, 294 Wis.2d 359, 720 N.W.2d 498 (Wis.App. 2006)

In jury selection in a federal sexual assault trial of a Native American, the defense attorney asked for a cautionary instruction relating to extraneous testimony about his client’s drinking, referring to it as a “pink elephant.” The court cited *Wikipedia* to explain this as a mixed metaphor to an alcohol-related “elephant in the room” *U.S. v. Yazzzer*, 187 Fed.Appx. 800 (10<sup>th</sup> Cir. 2006).

In a Michigan firearms prosecution involving statutory interpretation, the dissenting judge wrote, “The members of the majority accuse me of falling into the trap of the false choice fallacy by concluding that they are paying mere lip service to their claimed philosophy.” He cited *Wikipedia* for the definition of “false choice” (“The logical fallacy of false choice is a correlative-based fallacy in which options are presented as being exclusive when they may not be. It is often used to obscure the likelihood of one option or to reframe an argument on the user’s terms.”) *People v. Peals*, 476 Mich. 636, 720 N.W.2d 196 (Mich. 2006).

A review of an Alaska assault prosecution quoted Alexander Hamilton as writing that a trial by jury is “a valuable safeguard to liberty”- if not the very palladium of free government”, and *Wikipedia* for the term “palladium” (“a thing on which the safety of something else depends”). *Smart v. State*, 146 P.3d 15 (Alaska App., 2006).

In his dissenting opinion from a California rape case on the sentencing issue, a California judge said that the defendant would not live to be 127 years, when he becomes eligible for parole. For this proposition, he cited a *Wikipedia* entry saying that the person with the oldest documented life span was Jeanne Calment, who died in 1997 at 122 years old. *People v. Curtis*, Not Reported in Cal.Rptr.3d, 2007 WL 854008 (Cal.App. 6 Dist. 2007)

A bankruptcy judge started his opinion with: “There is an oft-quoted saying, ostensibly an ancient curse, which bestows upon the recipient the desire that they might “live in interesting times,” citing *Wikipedia* for the phrase to mean “turbulent” or “perilous” times. He was referring to the bankruptcy jurisprudence in the wake of the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. *In re Kogler* 368 B.R. 785 (Bkrcty.W.D.Wis. 2007).

In a federal terrorist hoax prosecution, Judge Jose Linaris described the possibility that Orson Welles’ radio production “War of the Worlds,” described by *Wikipedia*, may have fallen within the terms of the statute. *U.S. v. Brahm*, — F.Supp.2d —, 2007 WL 3111774 (D.N.J. 2007).

In an Alabama sexual harassment case, Judge Charles S. Coody cited *Wikipedia* for a harassing statement allegedly made by the defendant, and speculated that it came from the film “Cool Hand Look.: The judge offered that the more applicable movie quote was “What we have here is a failure to communicate.” *Reed v. Big Lots Stores, Inc.*, Slip Copy, 2007 WL 1804508 (M.D.Ala. 2007).

Judge Richard Young, ruling in an Indiana ERISA case, citing *Wikipedia* to explain his sentence “Defendants now attempt to complete the invocation of what amounts to a ‘Catch 22.’” citing *Wikipedia’s* description of the Joseph Heller novel. *McDonald v. HSBC Finance Corp.* Slip Copy, 2006 WL 2193072 (S.D.Ind. 2006).

In a Pittsburgh ERISA case, the U.S. magistrate found the plaintiff’s pleading sufficient, reasoning that “For these individuals to provide greater detail, they would have been required to meticulously track the precise language, dates, and times of the statements and omissions, perhaps by carrying an electronic recording device or maintaining a notebook like the autistic character in the movie ‘Rainman.’” He relied on *Wikipedia* for the reference to the movie and the

Dustin Hoffman-portrayed character. *Luckasevic v. World Kitchen, Inc.*, Slip Copy, 2007 WL 2683995 (W.D.Pa. 2007).

In a First Amendment challenge to a Detroit building code that allegedly would have given preferences to religious displays, the magistrate described how the building commission was entitled to do more to enhance the appearance of the Downtown Development area No. 1 than to build a Potemkin village, citing *Wikipedia* for the term used to describe fake buildings in Russia designed to show economic progress. *American Atheists, Inc. v. City of Detroit Downtown*, 503 F.Supp.2d 845 (E.D.Mich.,2007).

In a Connecticut divorce case, the judge wrote “It was clear to the court from the testimony at trial that Ms. Bloomdahl acted as a ‘helicopter parent’,” citing *Wikipedia* for the definition of the term (a mother or father who hovers of a child). *Bloomdahl v. Wilf*, Not Reported in A.2d, 2007 WL 610923 (Conn.Super. 2007).

In a Utah case dealing with the extent of Indian land jurisdiction, Judge Bruce Jenkins wrote “Law necessarily finds expression through language, but the words through which law is expressed do not by themselves change or directly affect the world.” For this proposition, he cited the *Wikipedia* entry for “magical thinking” (“when people believe that words can directly affect the world. This can mean avoiding talking about certain subjects (‘speak of the devil and he’ll appear’), using euphemisms instead of certain words, or believing that to know the ‘true name’ of something gives one power over it, or that certain chants, prayers or mystical phrases will change things.”). *Richmond v. Wampanoag Tribal Court Cases*, 431 F.Supp.2d 1159 (D.Utah 2006).

In describing the facts of a securities fraud case, Judge Sarah Barker wrote “Apparently, Defendants were good salesmen and P.T. Barnum was right when he quipped ‘There’s a sucker born every minute!’, because the Defendants in a very short amount of time raised over \$32 million from 31 investors.” She dropped a footnote citing *Wikipedia* to explain the origin of the quote. *U.S. S.E.C. v. Montana*, 464 F.Supp.2d 772 (S.D.Ind. 2006).

A New Jersey state judge in a zoning case wrote “The dreadful record of disaccomplishment of the NJMC, East Rutherford, and Carlstadt since *Mount Laurel II* and the adoption of the FHA speaks volumes more than an amateurish utterance by a Tomu representative of the new seven dirty words, ‘Mount Laurel low and moderate income housing.’” He included a *Wikipedia* reference to the George Carlin, the source of the famous stand-up comedy routine “seven words you cannot say on television.” *Tomu Development Co., Inc. v. Borough of Carlstadt*, Not Reported in A.2d, 2005 WL 3018666 N.J.Super.L.,2005.

Some of these usages of *Wikipedia* are good, and make for more interesting reading. Some are annoying. None are particularly disturbing.

#### 4. Judicial Commentary About *Wikipedia*

There are five cases (three federal and two state) where judges detoured from the matter at hand to discuss the legal implications of *Wikipedia* as a legal reference.

The most recent of these opinions involved an Indiana malpractice case filed by parents whose child suffered medical problems during his delivery. The insurance company defendant, in its statement of facts, used *Wikipedia* to define some medical terms. The court noted that on its home page *Wikipedia* acknowledges that it is an encyclopedia that “anyone can edit.” This led Judge Robb to include a footnote cautioning against citing in an appellate brief, especially when more demonstrably reliable sources also available online. *Indiana Patient’s Compensation Fund v. Brewer*, 876 N.E.2d 388 (Table) (Ind.App. 2007).

This statement is ironic and not a little heavy-handed, when one realizes that federal and state judges in Indiana use *Wikipedia* so often that Indiana is among the leading states in *Wikipedia*-citing rulings. (Indiana and Wisconsin are the smallest states listed on the chart of most *Wikipedia*-using states for judges. If one were to calculate the number of cases citing *Wikipedia* per capita by state, Indiana would almost certainly top the list.) If Judge Robb does not like *Wikipedia*, he might consider to taking it up with his judicial colleagues in his home state who use it in their opinions. Good luck.

A Tennessee case involved whether a bottler of spring water was involved in selling a “beverage,” for purposes of a special bottling tax. *Wikipedia* defined beverage to include water.

The court stated that, given the fact that *Wikipedia* is open to virtually anonymous editing by the general public, the expertise of its editors is always in question, and its reliability is indeterminable. Accordingly, it found that *Wikipedia* did not constitute persuasive authority. *English Mountain Spring Water Co. v. Chumley*, 196 S.W.3d 144 (Tenn.Ct.App.,2005) October 25, 2005.

Not all judges who have commented on the worth of *Wikipedia* have been so damning. A federal case in New Jersey arose out of a rap music concert that was held at an Atlantic City baseball stadium in August, 2002. In the weeks leading up to the concert, local police expressed concerns that it would lead to violence, and the owners of the venue canceled it. The concert eventually went forward, but only with the intervention of the court. In the lawsuit over the cancelation, among the claims was that the city was engaged in racial discrimination.

In their summary judgment brief, the plaintiffs claimed that the city's actions were based solely on their fears of the type of concert being presented, i.e. a rap concert, and what they perceived to be the potential for gang-related violence. They claimed that the words "gangsta rap" and "gang-related violence" are closely identified with particular minorities, citing the defendant's papers: "The documentary and deposition testimony is absolutely rife with defendants' descriptions of the threat of 'gangs', 'gangsta rap' and 'gang-related violence,'" they wrote "as the primary motivation behind its decision to shut down the concert. These tags are mere code which was adopted by defendants in an effort to conceal their [sic] true motivation, racial animus."

Judge Freda Wolfson rejected the claim that the defendant's use of the term "gangsta rap" indicated racial animus. This decision was based on the *Wikipedia* definition of the term, which did not include any reference to race. In a footnote, Judge Wolfson stated that while she relied on the *Wikipedia* definition, she does not consider *Wikipedia* an authoritative source. *Platinum Links Entertainment v. Atlantic City Surf*, Slip Copy, 2006 WL 1459986 (D.N.J.,2006).

In a January 2007 asylum case, the per curiam ruling by the Eleventh Circuit rejected the Kosovar alien's claim that he would suffer persecution if forced to return to his home country. The claim was supported by a *Wikipedia* entry about the late President of the country, which the alien claimed as support for the worsening condition in Kosovo and the likely persecution if returned there. Although the judge did not elaborate on the propriety of this type of evidence, he noted that "*Wikipedia* is a free internet encyclopedia that is collaboratively written by its readers and can be edited by anyone." *Gashi v. U.S. Atty. Gen.*, 213 Fed.Appx. 879 (11<sup>th</sup> Cir. 2007).

A federal trademark infringement case in New York involves the qualifications of an expert witness, whose opinions were based in part on *Wikipedia*. The ruling, by a U.S. magistrate, stated that "To begin with, it is not clear that internet sources in general are inherently unreliable. Countless contemporary judicial opinions cite internet sources, and many specifically cite *Wikipedia*." The opinion continued;

"While citing a website in a judicial opinion is not analytically identical to basing an expert opinion on such a source ... the frequent citation of *Wikipedia* at least suggests that many courts do not consider it to be inherently unreliable. In fact, a recent and highly-publicized analysis in the magazine *Nature* found that the error rate of *Wikipedia* entries was not significantly greater than in those of the *Encyclopaedia Britannica*. Thus, despite reasonable concerns about the ability of anonymous users to alter *Wikipedia* entries, the information provided there is not so inherently unreliable as to render inadmissible any opinion that references it."

*Alfa Corp v. OAO Alfa Bank*, 475 F.Supp.2d 357 (S.D.N.Y., 2007).

## II. A Disturbing Trend?

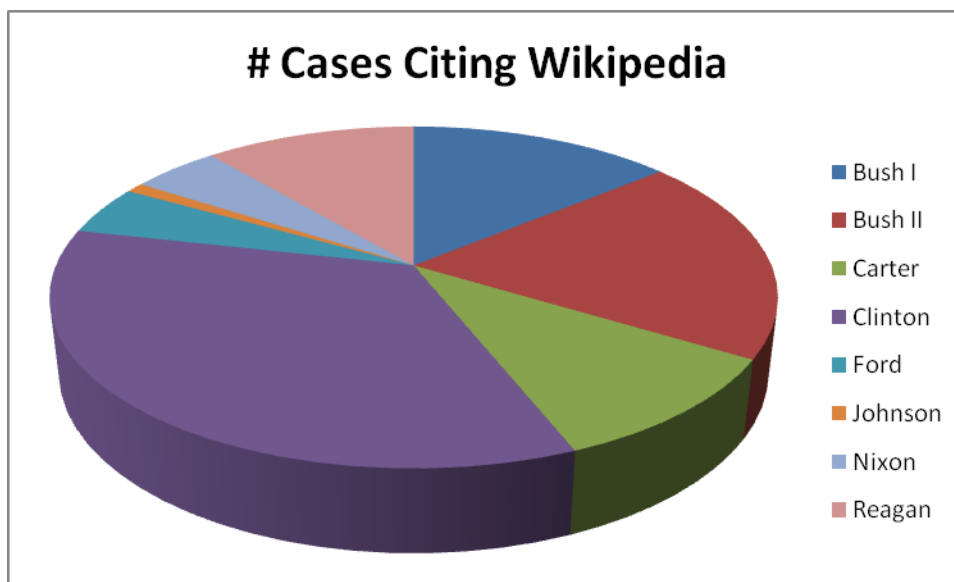
If courts continue to use *Wikipedia* in the way they have over the last three years, is there reason for concern? More than half of the *Wikipedia* citations have used the on-line resource as a dictionary, and this has occurred in plenty of cases involving technical issues where lay knowledge is low. My attitude is very similar to that of the court in *Alfa Corp*: despite the anonymity of *Wikipedia's* authors, I have hard time thinking that judicial reliance on it is particularly problematic. I suppose there could theoretically be a litigant who decides to flood *Wikipedia* with editorial content in hopes of altering the result of a lawsuit, but the chances of this

happening – given how courts rarely rely on *Wikipedia* for an answer to the ultimate issue in a court case – is very small. In addition, there is something inevitable about technology-assisted judicial rulings. It is not something we could effectively fight, even if we wanted to, any more than we can keep people from using the Internet. My bet is that Judge Robb in Indiana is engaged in a Quixotic battle if he persists in discouraging lawyers from appearing before him from citing *Wikipedia*.

Of course, the same could be said of judges relying on foreign precedent, a trend that the conservative legal movement is protesting. Could this protest be expanded to include *Wikipedia* references?

As noted above, one of the judges who uses *Wikipedia* in his opinions is Seventh Circuit Court of Appeal Judge Richard Posner, a conservative. This suggests that the practice might not be something that should scare those in the conservative legal movement. To test this theory, I looked at the judges who issue opinions contain *Wikipedia* citations. The only way to determine if they are liberal or conservative was by which President appointed them. (This method cannot be applied to state judges.) We have now had almost eight year of President George W. Bush, and before that there were eight years under President Clinton, which means that many of the judges on the federal bench who decided cases within the last few years have about an equal chance of being Republican-appointed as Democrat. I focused only on the federal cases, where the author of the opinion was identifiable – a total of 108 cases. I did not include per curiam opinions, rulings issued by magistrates, or by tax, bankruptcy or claims judges.

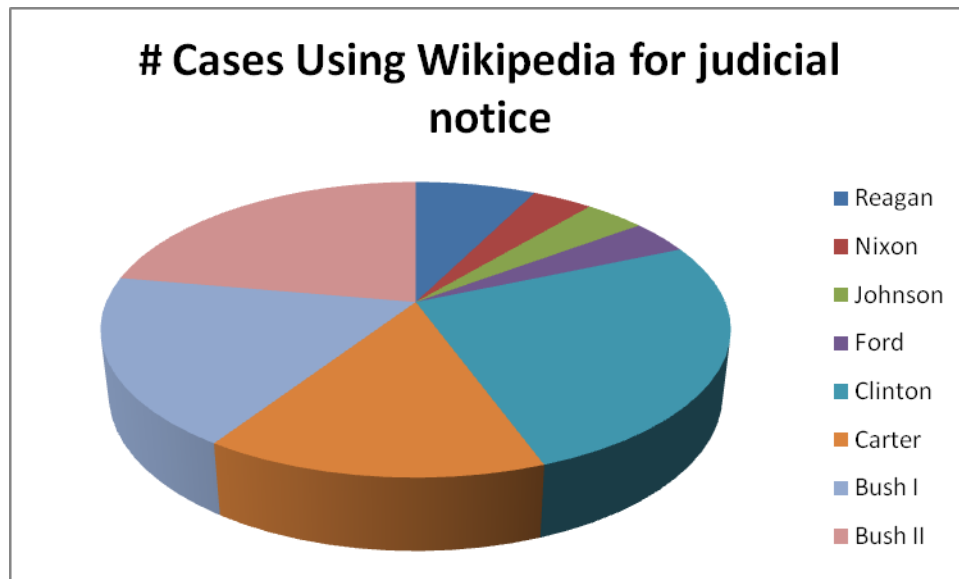
Appendix D is a list of these cases, with the name of the judge and the President who appointed them. The totals are reflected in the following chart.



Perhaps judges appointed by Democrats are more likely to cite *Wikipedia*. After all, if there was no difference, one would expect more *Wikipedia*-citing opinions from judges appointed during the 12 years under the two Bush presidencies, than from judges appointed by Clinton. However, Clinton-appointed judges yielded 37 *Wikipedia*-citing opinions, which are about the same number of judges appointed during the eight-year span of the Clinton administration as the combined twelve-year span of the two Bush presidencies (36 cases).

Despite this difference, I am not convinced that *Wikipedia* use by American judges has the makings of a partisan issue, as plenty of Republican-appointed judges have resorted to it in their opinions.

Here's more support: if we consider only those *Wikipedia* citations that are potentially the most dangerous – those in which the judge relies on *Wikipedia* for evidence – there are 27 cases that were written by an identifiable federal judge. (These cases are denoted with an asterisk on Appendix D.) Here is a graph depiction of the Presidents who appointed judges in those 27 cases:



The judges in these categories were just as likely to be appointed by Clinton (7 cases) as by Bush II (6 cases). You might also consider that, of the federal judges who issued three or more opinions citing *Wikipedia* (Dalzell, Crabb, Conrad, Posner, Moody, and McKeague), all but two of them (Crabb and Moody) was appointed by a Republican president. In federal litigation at least, it seems that *Wikipedia* usage does not correlate with ideology.

### III. Conclusion: A Counterterrorism Tool?

By now it is clear that I am not alarmed by the trend in *Wikipedia* usage by the courts. On balance, I believe the advantages outweigh the downsides, though this depends on a factor that drives the viability of *Wikipedia* itself: the buy-in and participation by true experts. If *Wikipedia* is to be useful to national security, the intelligence community needs to start playing. If courts are to properly rely on it, *Wikipedia* must assure that it is not composed of “garbage in,” since we all know what the result is. I am trying to do my part. On the *Intelipedia*, I submitted an article on the one topic I can claim expertise – terrorist financing. Hopefully, my colleagues who have expertise in other things are playing along as well.

Of course, none of the judicial opinions I examined involved terrorism. However, they did include a type of case that may presage *Wikipedia* being cited in such cases – two Muslim prisoner cases, where the court relied on *Wikipedia* for a description of what religious practice the plaintiff was requesting. If, as I believe, court opinions are an undervalued source of strategic intelligence about American enemies, *Wikipedia* will be part of this exploitation of it.