4-18-1990

The Challenge to the Judiciary of the Nineties:Managing Appeals in the Federal Courts

Kelly N. Kalus '90
Illinois Wesleyan University

THE CHALLENGE TO THE JUDICIARY OF THE NINETIES: MANAGING APPEALS IN THE FEDERAL COURTS

Kelly N. Kalus
Research Honors Paper
Advisor: Dr. John Wenum
April 18, 1990

TABLE OF CONTENTS

TABLE OF CONTENTS
(Ctd.)

LIST OF TABLES AND FIGURES

CHAPTER I

INTRODUCTION

Statement of the Problem

Court reform is a growing national priority. The overwhelming number of litigants populating American courtrooms today has placed a serious burden upon judicial institutions to produce well-thought, reasoned decisions in light of a rapidly increasing caseload. This caseload growth has restricted judges from fully effectuating their duties. Consequently, efforts to accommodate the growing demand for judicial services reflect a deviation from the traditional role and responsibilities of the American judge. For the United States judicial system, such a departure from tradition has dangerous and potentially irreversible implications. Immediate action must be taken to prevent any serious ramifications from arising.

Purpose of the Study

It is the purpose of this study to examine the nature, the scope and the consequences of the caseload problem as well as the attempts which have been made to improve the situation. Additionally, a proposal based on the research findings of this paper will be advanced in an attempt to alleviate the caseload dilemma.

Scope of the Study

It is the intention of this study to deal exclusively with the federal appellate level. Two reasons exist. First, the federal appellate courts, in particular the Courts of Appeals, have been affected the most by the caseload growth. Second, the function of the appellate courts is distinct from that of the district courts and needs to be preserved. Appellate process requires time for research, reflection and the writing of opinions. In order for these conditions to remain, the proper environment must exist. The rising number of cases filed annually at the appellate level increases judicial workload and subsequently threatens this ideal environment. Since the appellate level is the final stage in the litigation process, the need for quality and confidence in judicial services is of extreme importance. For these reasons, the scope of this study will focus solely on the Courts of Appeals and the Supreme Court.

Limitations of the Study

The majority of the data obtained for this study came from the Administrative Office of the United States Courts. Although some of the data was easily accessible, statistics concerning more specialized information were more difficult to obtain. Consequently, analysis of the data may be restricted to specific time periods because of limited access to information.

Definition of Terms

The following terms are defined to facilitate understanding of the subject matter:

Case Filing: Any action that is reported as filed, terminated or pending in the Administrative Office of the United States Courts. For this study, case filings will be assessed on a per year basis where "year" refers to the appellate court term from September until July.

In Forma Pauperis: Describes permission given to an indigent to proceed without liability for court fees or cost.[1]

Jurisdiction: The power of a court to hear and to determine a judicial proceeding.[2]

Writ of Certiorari: An order which has the effect of ordering the lower court to certify the record and to send it up to the higher court which has used its discretion to hear the appeal.[3]

CHAPTER II

THE FEDERAL COURT SYSTEM

Introduction

The foundation of the federal court system resides in Article III, Section I of the United States Constitution which mandates that the judicial power of the Federal Government shall be vested in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[4] This constitutional authorization for Congress to develop and to shape the judicial branch of the federal government has been instrumental in creating and in attempting to maintain a functional and effective federal court system. Accordingly, changes in the court system's structure and jurisdiction have occurred.

Structural Development

Today, federal judicial power is not only vested in one supreme court but also in several inferior appellate and trial tribunals. Structurally, the present United States court system resembles a pyramid. At the apex, there exists the Supreme Court, the highest tribunal in the United States which consists of eight associate justices and one chief justice. The United States Courts of Appeals preside immediately below the Supreme

Court with each court occupying one of thirteen circuits. Eleven circuits are organized on a regional basis where each encompasses three or more states. The District of Columbia has exclusive jurisdiction for its district. Finally, the Court of Appeals for the Federal Circuit, located in Washington, D.C., has unique jurisdiction and is not regional in nature. Between six and twenty-eight judges are assigned to a circuit depending upon the amount and the complexity of judicial work involved.[5] Overall, there are presently 156 circuit judges within the twelve courts of appeals and an additional twelve in the Court of Appeals for the Federal Circuit.[6] Below the courts of appeals are ninety-four district courts where cases are originally heard and decided. Eighty-nine of those courts are located in the fifty states and the other five exist in the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and the Northern Mariana Islands. Today, there are 575 district judgeships authorized by law.[7]

A series of legislative enactments has transformed the federal judiciary into the complex, three-tiered system that it is today. The Judiciary Act of 1789 was the first major legislative proposal concerning the judicial branch to be approved by the First Congress. This act established two tiers of inferior courts to exist and to function below the Supreme Court. The district courts were designated as exclusive trial courts whereas the intermediate circuit courts, composed of two Supreme Court justices and one district judge, were given trial and appellate responsibilities.[8] Since the circuits were organized on a geo-

graphical basis, the concept of "circuit-riding" evolved as the justices traveled great distances to preside over their designated circuits.

The majority of legislation has been directed at the creation and the reform of the middle tier.[9] Until technology shortened the time involved in traveling, congressional reform of the court system was based solely on mitigating the travel burdens imposed on the circuit-riders. For instance, Congress restructured the circuit courts so as to only require a panel of one justice and one district judge.[10] Congress also opted to expand the membership of the Supreme Court.[11] Originally, Congress resisted such a measure, but as the double duty of circuit-riding and of presiding on the Supreme Court became increasingly burdensome and as western expansion necessitated the creation of new circuits, this type of reform was inevitable.

From 1870 to 1891 such factors as geographical expansion, population growth, commercial development and congressional extensions of federal jurisdiction precipitated a dramatic increase in federal litigation. Consequently, the Circuit Court of Appeals Act, traditionally known as the Evarts Act, was enacted. This act created a circuit court of appeals with appellate jurisdiction for each of the nine circuits and accordingly provided for permanent court of appeals judgeships.[12] Although the circuit courts (as distinguished from the Courts of Appeals in the nine circuits) remained, further change was made in 1911 which completely abolished the circuit courts and trans-

ferred their trial jurisdiction to the district courts.[13] Finally, in 1925, Congress expanded the Supreme Court's discretion over its docket.[14] Essentially, these legislative reforms created the present structure of the federal court system where the district courts have exclusive trial responsibilities, the Courts of Appeals exist for petitioners to assert their right of appeal and the Supreme Court exercises final review at its discretion on matters of public and national importance.

Although the structure has not changed drastically since the early 1900s, modifications in the geographical design of the Courts of Appeals have occurred. In 1929, a tenth circuit was added. [15] Moreover, by implementing the 1948 Judicial Code, Congress created the District of Columbia circuit and technically renamed the Courts of Appeals circuits as the Courts of Appeals for the Various Circuits.[16] In 1981, the Court of Appeals for the Eleventh Circuit was created,[17] and the Court of Appeals for the Federal Circuit was established in 1982 under the Federal Courts Improvement Act.[18] This circuit, merging the courts of customs, patents and claims appeals, is a specialized (rather than regional) court which handles all judicial business regarding patents, trademarks, international trade, and claims against the federal government.[19]

Jurisdictional Development

Article III, Section II of the United States Constitution broadly defines the federal court system's jurisdiction. That is, the United States courts can decide only those cases where the Constitution has given the courts the authority to do so. Accordingly, jurisdiction extends to those cases or controversies where the United States government is a party, where two or more states or citizens from different states are parties to an action, where ambassadors or other public ministers or consuls are involved, or where maritime and admiralty matters merit judicial attention.[20]

With respect to the Supreme Court, the Constitution grants original jurisdiction (the authority to consider and to decide cases in the first instance) as well as appellate jurisdiction (the authority to review a decision or judgment of an inferior tribunal and to affirm, reverse or modify the decision). Where cases or controversies involve ambassadors or other public ministers or consuls, the Supreme Court exercises original jurisdiction. In all other matters, the Supreme Court primarily has appellate jurisdiction.

It is important to note that Congress can control the Supreme Court's appellate jurisdiction by either expanding or limiting it. Indeed, the Constitution stipulates that the Supreme Court's jurisdiction is subject to congressional regulations.[21] Therefore, no inherent right to control jurisdiction

belongs to the Court. Major legislative efforts modifying the Supreme Court's jurisdiction include the Judiciary Act of 1925 which greatly expanded the Court's power of discretion by replacing mandatory appeals with petitions for certiorari and the Judiciary Act of 1928 which mandated that the sole method of mandatory review was in appeal form. More recently, in 1988 Congress eliminated substantially all of the Supreme Court's mandatory, statutory-appeal jurisdiction.[22]

The Courts of Appeals for the First through the Eleventh Circuits and the District of Columbia Circuit have regional jurisdiction. That is, they possess the authority to preside over all cases of any type in a specific region. Conversely, the Federal Circuit claims special jurisdiction, for it has the authority to consider and to rule on all cases of a particular type in the nation. The Courts of Appeals, having no power of discretion, must review all appeals that are filed. In contrast to the appellate jurisdiction of the intermediate courts and the Supreme Court, the district courts have exclusive original jurisdiction.

Additions to the Federal Judicial Apparatus

Certain institutions have recently been created to assist the Federal Judicial Branch in court administration, research and other responsibilities. The Administrative Office of the United States Courts performs many of the support functions of the

federal court system. Among its many responsibilities, the Administrative Office prepares and submits to Congress the budget and legislative agenda for the courts, provides administrative assistance to court personnel and clerical staffs, compiles and publishes statistics on the volume and distribution of the business of the courts and conducts research concerning court procedure and reform.[23] The United States Judicial Conference, the policy-making arm of the Federal Judiciary, consists of the Chief Justice of the United States, the Chief Judges of the Courts of Appeals and twelve district judges chosen for a three-year term. Twice a year the Conference convenes and discusses administrative problems, policy issues and recommendations for legislation affecting the federal judicial system.[24] Finally, in 1968 Congress created the Federal Judicial Center to conduct research and training programs for judges and court personnel. Essentially, the Federal Judicial Center is the research and development arm of the Federal Judiciary.[25] These institutions have proven to be valuable and effective adjuncts of the Federal Judicial Branch.

CHAPTER III

THE DILEMMA AT THE APPELLATE LEVEL

Introduction

The volume of case filings flooding the appellate level of the United States court system presents a dangerous predicament. The function of the appellate courts is distinct from that of the trial courts. Indeed, the Study Group on the Caseload of the Supreme Court emphasizes that the appellate function is a "process" over a period of time which resides "at the opposite pole from the 'processing' of cases in a high-speed, high volume enterprise [such as the district courts]."[26] In defining the role of the appellate courts, the Study Group asserts that the vital conditions for the discharge of the appellate level's responsibilities is "adequate time and ease of mind for research, reflection, [clarification] and consultation in reaching a judgment."[27] The enormous increase in case filings compromises these indispensable conditions to the extent that the integrity of the appellate level and its work is jeopardized. This is the appellate dilemma.

The inability of court authorities, scholars and researchers to establish definitive causes of the caseload growth further heightens the problem. Changes in the population, in legislation, in the size of the legal profession and in the social,

economic and political environment have immensely affected the caseload growth. However, no specific source can be singled out as the primary cause of the caseload explosion. Court of Appeals Judge Richard Posner, author of The Federal Courts: Crisis and Reform, suggests that expanding the federal rights of an individual has a profound impact upon caseload growth. He remarks, "Increasing the number of potential claims by expanding an individual's federal rights has shifted the demand curve for the federal judicial services outward."[28] Such a claim would correspond with the litigation boom of the 1960s, a decade replete with federal civil rights legislation such as the Civil Rights Act of 1964 and with court decisions supporting fundamental, individual rights such as Gideon v. Wainwright 372 U.S. 335 (1963).

Former Administrative Assistant to the Chief Justice of the United States, Mark W. Cannon also theorizes as to causality. He contends that population growth has played a major role in the caseload increase. As people grow and develop into a complex society, more conflicts will arise resulting in litigation. Likewise, a change in the American public's attitude has occurred. Americans seem more apt to turn to the courts as a first resort. Consequently, the federal judiciary many times must contend with frivolous litigation claims.

A sudden and considerable growth in the legal profession in the 1970s has contributed to the mounting caseload. The emergence of young, ambitious litigators accommodated and perpetuated

the high demand for litigation as opportunity for legal services increased. Also, a new emphasis in the law schools toward advocacy may have improved the problem of inadequate representation in the courtroom but also has boosted case filings as the young lawyers become more confident in their advocacy skills.[29]

With all of these factors influencing the American environment at different times, it is difficult to pinpoint one specific cause. Moreover, Richard Posner concludes that since no one seems to have a very clear idea of the causes of the caseload increase, it is extremely difficult to predict with any confidence future growth and subsequently effective solutions.[30] Thus, the recent efforts of researchers have been directed at surveying and analyzing the case filings of the federal courts in an attempt to locate specific, substantial areas of increase and to proceed from there.

Establishing the Caseload Increase

The Supreme Court. Over the years, the Supreme Court's case filings have increased in number. During the early 1900s, annual filings were estimated at around 565 cases. By the middle of the 1900s between 1,000 and 2,000 case filings were reported.[31] In 1989, 5,000 cases were filed at the Supreme Court of which 63% came from the federal courts.[32] Thus, since the beginning of the 1900s, a considerable increase in case filings per year has occurred. Close analysis of this growth suggests a significant

rise in the percentage of annual filings in the 1960s, then a more constant percentage increase during the 1970s and the 1980s (See Table 1 and Figure 1).

Table 1

SUPREME COURT CASE FILINGS FROM 1920-1990

YEAR	ANNUAL CASE FILINGS	PERCENTAGE OF INCREASE IN ANNUAL CASE FILINGS
1920	565	---
1930	1092	93%
1940	1109	2%
1950	1321	19%
1960	2296	74%
1970	3500	53%
1980	4135	18%
1990	5000	21%

Source: Computed from data submitted by the Administrative Office of the United States Courts

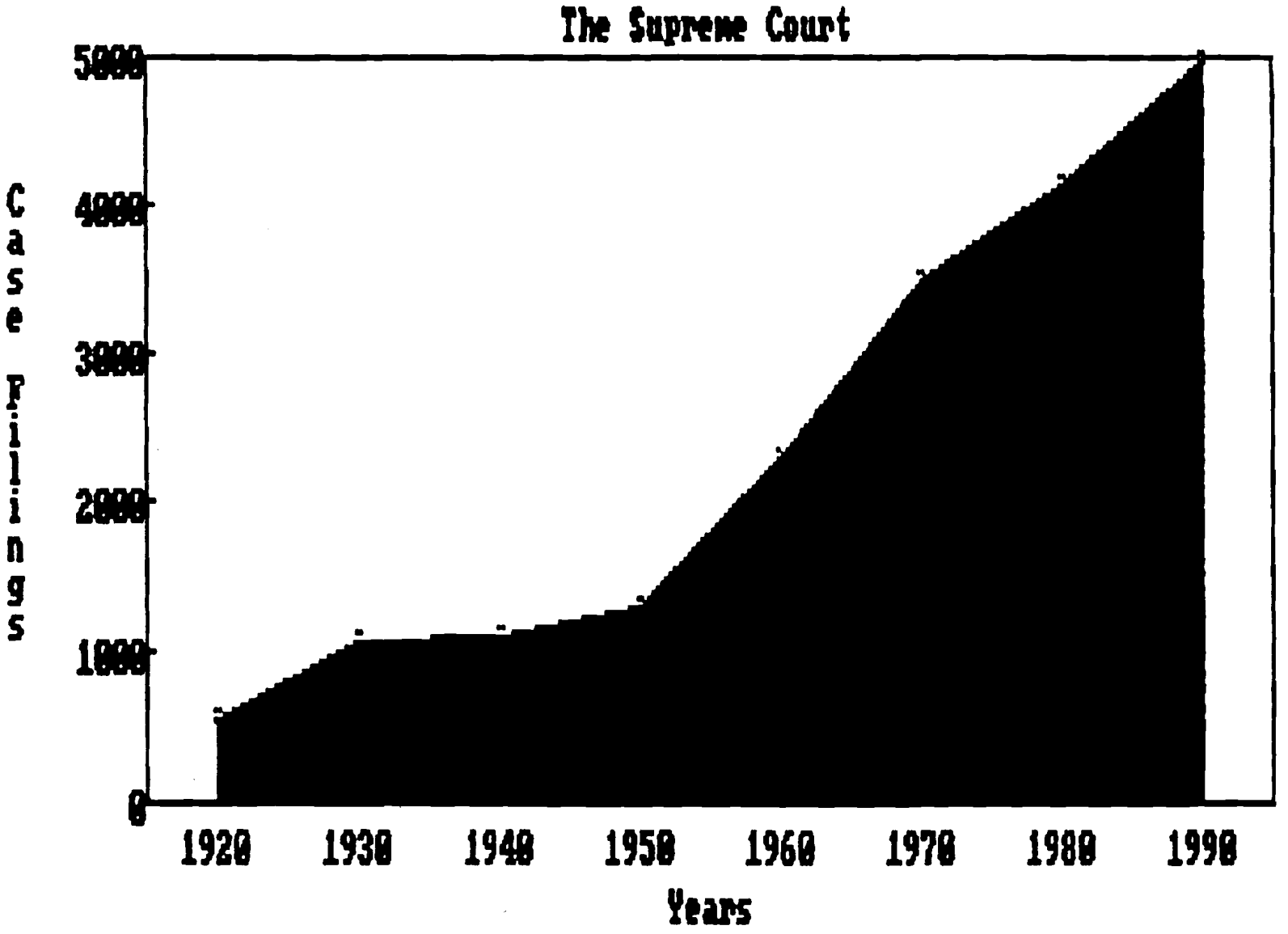


FIGURE 1: Case Filings of the Supreme Court from 1920-1990

Source: Computed from data submitted by the Administrative Office of the United States Courts

The Courts of Appeals. The increase in annual case filings for the Supreme Court, dramatic as it is, is dwarfed by the increase in the number of Courts of Appeals case filings. The Annual Report by the Director of the Administrative Office of the United States Courts reveals that for the 1989 term the Courts of Appeals received 34,995 case filings.[33] Again, a complete examination of the Courts of Appeals annual case filings from 1890-1990 indicates a dramatic and continuous increase (See Table 2 and Figure 2). In fact, within a ten-year span beginning in 1960, case filings for the Courts of Appeals increased by 204 percent. In comparison, examination of the decade prior to 1960 revealed only a 41 percent increase whereas analysis of the 1940-1950 era uncovers a 22 percent decrease in case filings. Additionally, in breaking down the case filings into their respective circuits, it is evident that over the past ten years the largest number of case filings has come from the Ninth and Fifth Circuits whereas the lowest number has emanated from the District of Columbia and the First Circuit (See Table 3).

Table 2

CASE FILINGS FOR THE COURTS OF APPEALS FROM 1890-1990

YEAR	CASE FILINGS	PERCENTAGE INCREASE	NUMBER OF JUDGES	FILINGS PER JUDGE
1890	841	---	11	77
1900	1093	30%	25	44
1910	1672	53%	30	56
1920	1523	9%	34	45
1930	2874	89%	45	64
1940	3446	20%	55	63
1950	2678	-22%	64	42
1960	3765	41%	66	57
1970	11440	204%	90	127
1980	23155	102%	120	193
1990	34995	51%	168	208

Source: Computed from data submitted by the Administrative Office of the United States Courts

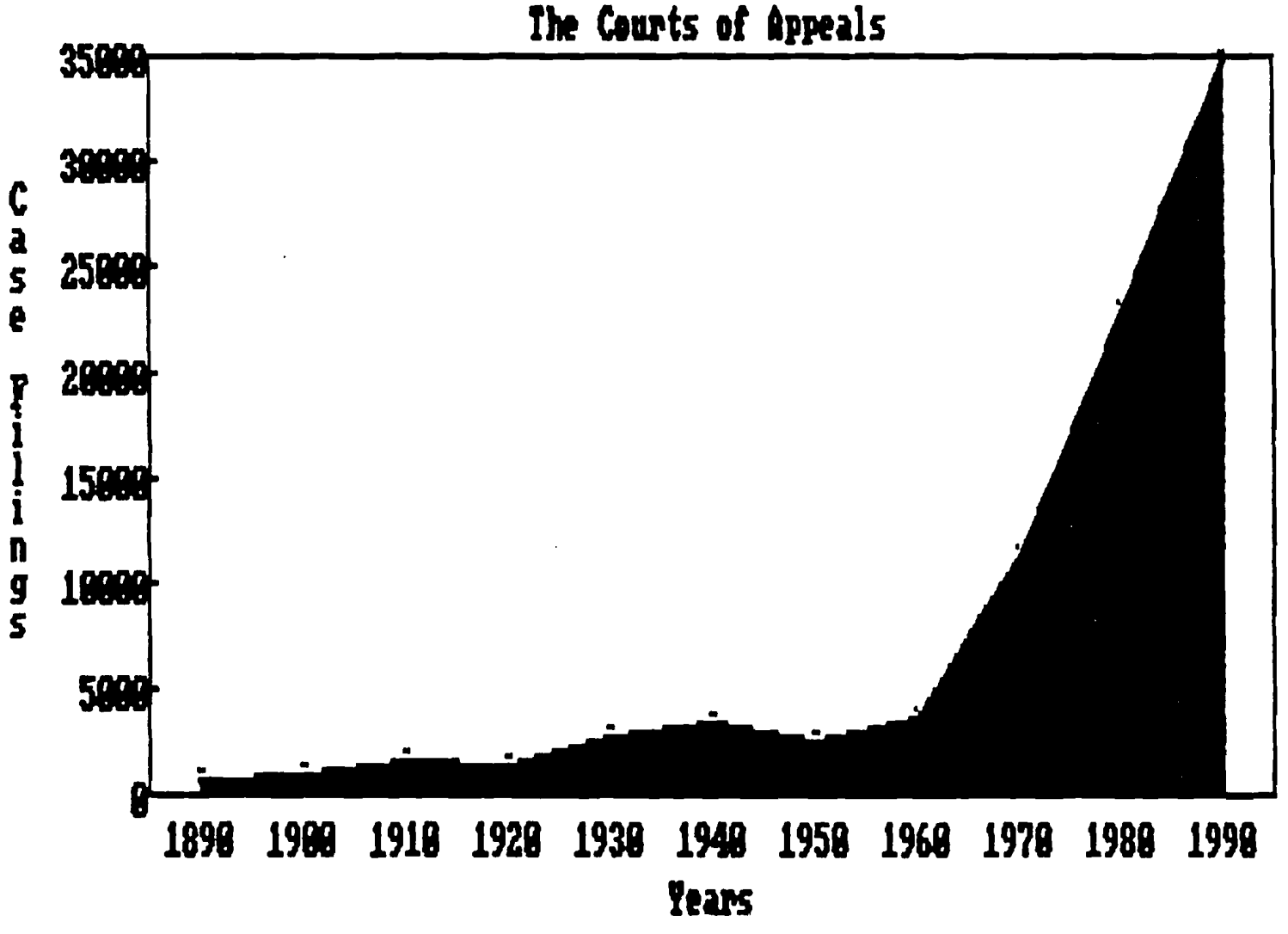


FIGURE 2: The Court of Appeals Case Filings from 1890-1990

Source: Computed from data submitted by the Administrative Office of the United States Courts

Table 3

U.S. COURTS OF APPEALS CASELOAD BY CIRCUIT, 1980-89

CIRCUIT / YEAR

	'80	'81	'82	'83	'84	'85	'86	'87	'88	'89
1	688	761	903	825	966	950	1090	1035	1151	1175
2	1829	2608	2388	2352	2541	2455	2600	2705	2668	2908
3	1659	1600	1850	2164	2137	2236	2191	2274	2652	2776
4	1981	1943	2390	2140	2058	2489	2493	2632	2766	2913
5	3682	4229	2317	2777	3120	3094	3349	3828	3859	4362
6	1823	2016	2265	2438	2599	2737	3237	3425	3467	3754
7	1544	1717	1820	2072	1986	1940	2007	1923	2163	2416
8	975	1156	1405	1492	1609	1815	1842	2035	2150	2477
9	2928	3288	3443	3568	4043	4258	4351	4790	5571	5450
10	1228	1351	1537	1557	1638	1695	1715	1705	1768	1884
11	----	----	2326	2818	3205	3620	3617	3578	3648	4006
DC	922	722	907	836	704	1271	933	868	823	874

Source: Computed from data submitted by the Administrative Office of the United States Courts

* No data was available for the annual case filings of the Court of Appeals for the Federal Circuit

Analysis of Case Filings*

It becomes apparent that the period between 1958 and 1962 represents a turning point for the caseload of the Supreme Court and the Courts of Appeals (Figure 3). In the past ten years the total civil case filings for the Courts of Appeals clearly outnumber the total criminal case filings (See Figure 4). Of those civil matters, private cases including mostly federal questions and diversity of citizenship matters constitute approximately 70 percent of the civil caseload. The other 30 percent consists of public law matters where the government is a party to the cause of action. Such percentages for the Courts of Appeals have remained constant throughout the ten-year span from 1980.

Additionally, areas that seem to indicate a substantial burden for the Courts of Appeals include civil rights, diversity of citizenship, tax suits and social security laws. The Ninth Circuit, over the past ten years, has carried the highest caseload with the Fifth and the Eleventh Circuits also having a substantial amount of judicial business. Conversely, the lowest number of case filings exist at the District of Columbia Circuit and the First Circuit.

* Analysis of the data submitted by the Administrative Office of the United States Courts

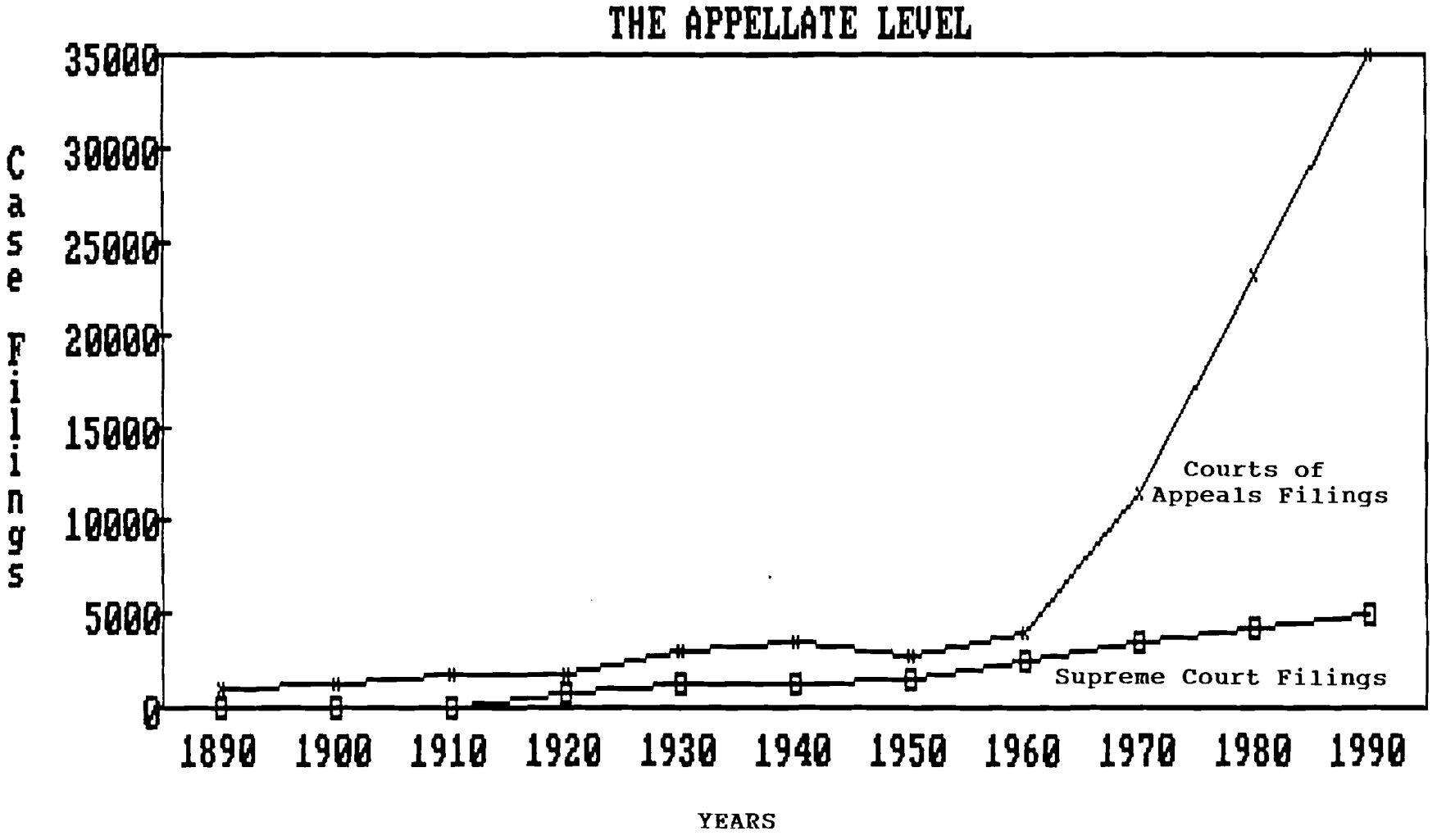


FIGURE 3: Comparison Between the Annual Case Filings of the Courts of Appeals and The Supreme Court from 1890-1990

Source: Computed from data submitted by the Administrative Office of the United States Courts

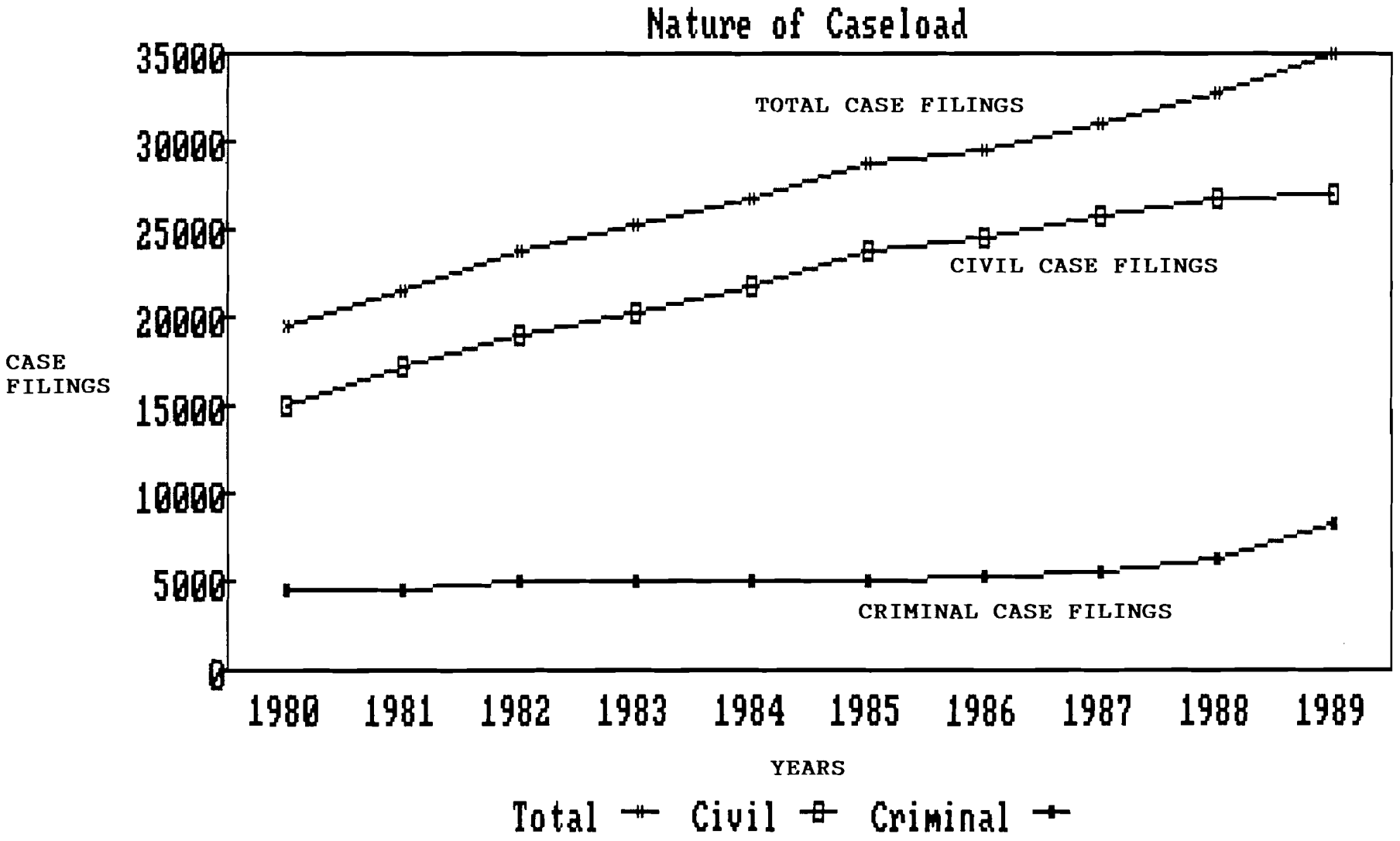


FIGURE 4: A Comparison in the Number of Annual Case Filings for Civil and Criminal Law

With respect to the Supreme Court, over a ten-year span beginning in 1980 approximately 50 percent of the filed petitions on writ of certiorari have concerned private civil matters while 40 percent have been of a criminal nature. However, only approximately 9 percent of the petitions involving criminal cases are actually granted. The highest percentage of cases granted in a particular area are private civil cases which involve constitutional questions and a number of taxation matters. Around 4 percent of administrative appeals are filed with the Supreme Court. However, of those cases 8 percent are actually granted and decided on the merits. David O'Brien, Professor of Political Science at the University of Virginia, recently found the following subject areas represented in the written opinions issued by the Court: Constitutional (56%), Taxation (18.9%), Statutory (15.1%), Administrative (9%), and Criminal (4%).[34]

Measuring the Workload Increase

Judicial caseload is not always comparable to judicial workload. As Richard Posner maintains, "A case is not a standard measurement like a quart or a constant inflation-free dollar."[35] If an increase in case filings were associated with a decrease in the difficulty of the average case, the figures on caseload growth would exaggerate the actual increase in the workload of the courts. Likewise, a stabilization or a decrease in caseload coupled with an increase in the complexity of the average case

would disguise the severity of the caseload/workload crisis. Hence, figures on case filings cannot be solely relied upon to validate the caseload/workload crisis.

However, much evidence exists indicating that the statistics accurately reflect the increased workload of the appellate courts. Such evidence can be found by considering the mounting backlog that exists in the appellate courts, the number of appellate terminations after hearing or submission, the increased reliance of a judge on his support and legal staffs, the growing complexity of a case's subject matter and the mounting concern for this crisis expressed by the appellate judges and justices. Such findings, when taken together, offer compelling reasons to assert that the caseload figures accurately illustrate a case overload in the appellate courts and an unendurable workload for the appellate justices.

The Courts of Appeals. There are presently 25,930 cases that are pending on appeal in the Courts of Appeals circuits.[36] Those cases that are "pending" have not been acted upon during the year for which they were granted, and consequently an accumulation of cases over the years exist. The Ninth Circuit consisting of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam and the Northern Mariana Islands has the largest backlog with the Fifth and the Eleventh Circuits close behind.[37] This backlog coupled with the 34,995 cases filings for this past term suggest an enormous burden on the

appellate courts when attempting to fulfill their unique responsibilities.

Another way to measure workload as distinct from raw caseload is to examine the number of terminations on the merits, that is, the number of terminations after court consideration and judgment on a particular case. Case terminations before these stages in the appellate process require less time. Thus, an increase in the number of cases that are heard in an official manner or are submitted for consideration to a panel of judges reflects an increase in the amount of work a judge must perform. In 1960 the total number of terminations after hearing or submission came to 2,681 cases out of an overall 3,713 terminations[38] whereas in 1989 the terminations on the merits totaled 19,322 cases[39]. In terms of percentage, the number of terminations after oral arguments or submission has increased by 621 percent since 1960.

Additionally, the considerable increase in the length of the opinions issued by the Courts of Appeals and in the length of footnotes and citations included within those opinions suggest that a considerable amount of time is invested in opinion writing--an exclusive appellate function. Again, over a span of twenty-five years beginning in 1960, the length of the Courts of Appeals' opinions nearly doubled.[40] Moreover, considerable evidence exists to relate this increase in the length of opinions and in the number of footnotes and citations to a greater complexity in a case's subject matter.[41] Indeed, Judge Patricia

Wald, currently serving on the District of Columbia Circuit, remarks, "Another important change in at least the D.C. Circuit's caseload is the increasingly technical, complex nature of subject matter."[42] Such cases not only have subject matters that are complicated and specialized but also involve records with thousands of pages, multiple issues, and numerous parties all of which require judicial attention and contribute significantly to the judge's burdensome workload.

Finally, specific Courts of Appeals judges have expressed concern over the growing burden placed upon them by the caseload increase. Richard Posner contends that the appellate system is "on the verge of being radically changed for the worse under the pressure of the rapid and unremitting growth in caseload."[43] Posner goes on to predict a deterioration in the federal court system if reforms are not immediately implemented. Additionally, D.C. Circuit Judge Patricia Wald, emphasizes that a federal appellate court has no control over the total number of docketed cases as is the case for the Supreme Court, for every rejected litigant in the district court has the right to appeal a final order once. She indicates that this, in effect, places a heavier burden upon the intermediate appellate courts and predicts that "heavier caseloads and increasingly complex subject matter are surely here to stay."[44] Wald concludes that in order for the appellate level to survive this deluge of cases a concentrated effort must be made toward acknowledging the essence of the judicial role, preserving it, and making adjustments in light of

it. Essentially, all of these viewpoints stem from the overwhelming concern generated by statistical findings and judicial observations that the conditions necessary for the successful functioning of the appellate level do not exist and will not in the future unless immediate and effective measures are taken.

The Supreme Court. Capturing the essence of the caseload problem Justice John Paul Stevens remarks, "We are too busy to decide whether there is anything we can do about the problem of being too busy."[45] Indeed, all of the justices agree that there exists a serious problem in need of resolution. Such a problem not only includes the work demands placed upon the justices but also the lack of time to formulate and to implement a plan of action amidst a docket full of complex, diversified cases. The fact that all of the justices agree that the increase in caseload for their Court accurately reflects an increase in their workload is persuasive in substantiating the workload dilemma. However, other indications of a heightened workload exist and are worth examining.

First, since the litigation boom in the 1960s, there has been a substantial decrease in the number of granted petitions for review on writ of certiorari. Prior to this caseload growth, the Supreme Court maintained a 17.5 percentage rate for the number of petitions for review on writ of certiorari that it granted. Conversely, by the late 1980s, only 5.7 percent of the petitions from the federal courts were granted. On a larger

scale, over the last ten years the Court has received from the federal courts 27,370 petitions for review on writ of certiorari of which 90 percent were denied and 4 percent were dismissed. Hence, only 6 percent of the petitions that have come to the Supreme Court for review on writ of certiorari over the past ten years have been granted. The following table displays this decrease in the percentage of petitions:

Table 3

PERCENTAGE OF PETITIONS FOR REVIEW ON WRIT OF CERTIORARI THAT HAVE BEEN GRANTED BY THE SUPREME COURT

YEAR	NUMBER OF PETITIONS	NUMBER OF PETITIONS GRANTED	PERCENTAGE OF PETITIONS
1940	951	166	17.5%
1950	1017	113	11.1%
1960	1899	141	7.4%
1970	3286	317	9.6%
1980	2433	139	5.7%
1990	3166	182	5.7%

Source: Computed from data submitted by the Administrative Office of the United States Courts

Justice John Paul Stevens further remarked that the Court is now processing more litigation and granting more petitions for review on writ of certiorari than ever before (Table 3).[46] An increase in case filings and an increase in the number of petitions for review that the Court has granted, coupled with a de-

crease in the percentage of petitions that have been granted, strongly suggests that the justices simply cannot keep pace with the workload the case filings are creating. Further, Justice Stevens admits that he does not have the time to look at the petitions in over 80 percent of the cases that are filed.[47] Consequently, it is the responsibility of Stevens' law clerks to review these cases and select a small minority of petitions that the clerks believe Justice Stevens would have selected himself. Stevens concludes that the other members of the Court with the exception of Justice Brennan also follow this practice.[48]

In support of this contention, David O'Brien, author of Storm Center, also acknowledges the Supreme Court's tendency to rely heavily on its law clerks' recommendations when voting on petitions in conference.[49] O'Brien additionally offers statistics demonstrating that only in rare occasions do the justices deviate from the recommendations of their clerks.[50] Posner also explores this reliance of the justices upon their law clerks. In a special section titled "The Rise of the Law Clerk", Posner devotes a significant amount of time examining the role of the law clerk. Posner emphasizes that the law clerks not only inherit a degree of influence in assuming the justices' screening responsiblities but also play an active role in the writing of opinions. Of significant interest, Posner points out that every few years the style and the tone of the justices' opinions change. He contends that it is no coincidence that this periodic change corresponds with the average length of a law clerk's

term.[51] On the whole, much evidence exists to indicate that the justices are overburdened and, out of necessity, must delegate specific responsibilities to court personnel.

The amount of time invested in writing an opinion which reverses a lower court's decision naturally requires more judicial time and reflection since the judge must provide solid reasons for reversal. Accordingly, O'Brien reports an increasing reversal rate in the number of Supreme Court decisions overruled by the Court and in the number of congressional acts overturned.[52] This reversal rate is intensified by the current shifting in judicial philosophy among the Court as the Reagan appointments begin to gain influence on the Court. Whereas the Court has an increased tendency toward reversal, it also is becoming more divided in its philosophies and in response to very complex, controversial cases that merit judicial attention. Consequently, separate opinions (whether concurring or dissenting) are more often the norm than the exception.

All of these developments in the Supreme Court indicate the growing difficulty for the justices to adequately function when up against the challenge of managing its inflating docket. Chief Justice Rehnquist, in the "1989 Year-End Report on the Federal Judiciary," emphasizes that the increasing volume of cases is only part of the problem facing the courts today. "The nature of the caseload is also becoming more burdensome...Complex cases that require extensive judicial time now represent a greater portion of the overall caseload."[53] Justice Harry

Blackmun also expresses concern over the caseload growth and the threat it poses to the appellate process. For him, experience dictates that the heavier the caseload, the less possibility of proper performance and adjudication. He concludes, "The Nation, in my opinion, deserves better than this."[54]

Examining the Consequences

Recently, Justice Stevens remarked that the unwieldy flow of litigation "is having a more serious impact on the administration of justice than is generally recognized."[55] Additionally, Former Chief Justice Burger asserts, "The work of the Supreme Court of the United States will breakdown or deteriorate in quality so that its historic role will not be performed adequately."[56] Such predictions offered by these Supreme Court justices suggest the severity of the consequences arising from the appellate caseload dilemma.

Bureaucratization of the federal appellate system is a concern of many judicial researchers and members of the legal profession while others remain unaffected by the thought of it. Court of Appeals Judge Patricia Wald concedes that the federal court system hardly operates as a bureaucratic hierarchy. "Vertically, district to circuit, circuit to Supreme Court, the federal judiciary does not function in the hierarchical fashion of a typical bureaucracy."[57] However, Richard Posner, defining a bureaucracy as "a large, organization tenuously held together

by paper," views most of the federal courts in a bureaucratic sense.[58] Although the federal courts structurally may not resemble a bureaucratic institution, certain specific characteristics of a bureaucracy exist.

First, there has been an enormous expansion in the number of federal appellate judges and their support staff. As indicated in Table 2, only eleven judges presided on the Courts of Appeals in 1890 whereas 126 judges exist today. A proliferation of supporting personnel within court chambers and an emphasis on managerial practices and modern office technology also hint at a bureaucratic emergence. Much of this was initiated by Chief Justice Burger who introduced office technology and a more complex internal structure within the court chambers to promote efficiency.

Joseph Vining, Professor of Law at University of Michigan, remarks that the structure of the courts is becoming much too complicated as he has witnessed the emergence of "layers" in the staffs of the law clerks and administrative assistants.[59] David O'Brien observes that the justices have acquired more clerks, more on-staff attorneys, and more secretarial personnel. Further, the court's administrative assistant staff has become more professional and involved in the court's workload.[60] Likewise, the Federal Judicial Center, the United States Judicial Conference (referred to as the "right arm of the judiciary") and the Administrative Office of the United States Courts can also be viewed as important extensions of the Federal Judiciary which add

to the numbers populating this branch of the Federal Government.

More frequent communication among the judges through written memoranda as opposed to personal one-to-one conferences represents another bureaucratic dimension. Court of Appeals Judge Alvin Rubin argues that such a lack of verbal communication decreases the collegiality among justices--an important element in the appellate function.[61] In effect, the judges or justices are becoming more isolated and unaccountable as well as less sociable. This can serve as a detriment to the appellate function in which an essential part rests on collegial discussion of and reflection on certain areas of law.

Another major consequence of the caseload/workload increase is a growing non-uniformity in the Courts of Appeals' decisions. To cope with the volume of cases, the Courts of Appeals must combine to form hundreds of revolving, unpredictable three-judge decisional units. This consequently leads to non-uniformity. Daniel Meador, Professor of Law at University of Virginia, claims that regional organization where non-uniformity in decisions can germinate is a source of increasing problems. He continues to acknowledge that "the potential for decisional disharmony today is even greater than the existence of sixty-five different courts would suggest."[62] In principle, the application of law must be uniform. Hence, non-uniformity can not only create confusion in the legal arena but also instill a degree of distrust in a specific law or, more broadly, in the people's overall understanding of the law and its purpose. Prior measures to reduce

the chance of non-uniformity among the Courts of Appeals were to hold mandatory judicial conferences where confusion in the application of a specific law would be resolved through discussion among the justices.

However, with an increase in judicial workload and a growing complexity in case subject-matter, judges and justices have found it extremely difficult to hold and to attend enough conferences to make substantial progress with this problem.

Another repercussion of the caseload/workload dilemma is the change in the judge's role and his responsiblities. Chief Justice William Rehnquist in an address delivered to the American Bar Association recalled that in the 1950s a federal appeals judgeship was commonly thought of as a "dignified form of semi-retirement".[63] A federal appeals judgeship today is an extreme deviation from that described by Chief Justice Rehnquist. Indeed, as the judge has had to delegate his traditional responsiblities and assume more court/case management functions, he, in effect, has been transformed from a jurist to an administrator and from a draftsman to an editor (with respect to his opinion-writing responsibility). Such a role change has presented judgeships as less attractive positions for which to strive.[64] Essentially, this could jeopardize the quality of the judicial product arising out of the federal appeals courts.

The diminished quality of federal appellate services is one of the most serious consequences. Several factors contribute to this condition. First, today there exists only limited opportu-

nity for complete appellate review. Whereas the Courts of Appeals must hear all cases that come before it, the Supreme Court, having discretionary review, grants annually only 5 percent of the petitions which come to it. Essentially, the title of "court of last resort", traditionally associated with the Supreme Court, can be transferred to the Courts of Appeals since they are basically the last step in the litigation process for the litigants.

The reduction of time allotted for oral argument also diminishes the quality of judicial services because argument is such an integral part of the appellate function. In 1848, the Court began reducing the time involved in oral argument. Before 1848, unlimited time for oral arguments existed. The 1848 rule limited oral arguments to eight hours per case; subsequently, in 1871 the time length was reduced again to four hours per case. By 1911 the two parties in the case were limited to an hour and a half, and in 1970 the justices were persuaded by Chief Justice Burger to further shorten oral arguments to thirty minutes per side.[65] Proponents of oral arguments, one of which is Court of Appeals Judge Patricia Wald, contend that much value resides in the concept of oral argument. "Oral argument places the decision-maker face-to-face with the contestants and gives what is often a remote and abstract legal system an important human character."[66] Additionally, she asserts that a judge will approach a case in a different manner when oral arguments are involved because of the opportunity to question and to conduct

discussion with the counsel litigating the case. Even in the Courts of Appeals, oral arguments are now limited to only 50 percent of the cases.[67] Thus, in the words of Judge Wald, "Oral argument is a vital but endangered species."[68]

Not only are there increasingly limited opportunities for complete appellate review but also skepticism as to the authority of opinions drafted by law clerks rather than the judges and justices themselves. Joseph Vining stresses that the legal profession's ultimate source of primary authority resides in the opinions of the Supreme Court. Indeed, these opinions are "the text of choice for American legal analysis."[69] He deems these opinions as unauthored and patched together by support personnel in the center of a bureaucratic environment. Thus, a waning respect for and trust in the Supreme Court's authority as expressed through the Supreme Court's most valuable instrument--the opinion--can prove to be dangerous and potentially irreversible in the future if changes are not made.

Justice Stevens predicts that the problem of court delay will be a serious consequence of the caseload/workload increase.[70] Thus, not only will the appellate courts have to contend with increasing caseloads but also the accumulation of pending cases. As a result, it will be inevitable that those cases having the most importance will receive the attention of the justices whereas matters of secondary importance will be put aside or delegated to the members of the judge's support staff.

The most profound consequence of the appellate dilemma is

the changing public perception of the federal court system and, more broadly, the concept of justice. Certainly, the appellate level's inability to function properly and effectively lessens the value of its services. Consequently, Jethro K. Lieberman, author of The Litigious Society concludes that Americans may be litigating more, but they are increasingly becoming less satisfied.[71] Additionally, Joseph Vining asserts with concern that there exists "a sense among serious analysts that the Supreme Court is failing them."[72] He continues by stating that these rather harsh complaints are also accompanied by a more general tone of commentary which indicates a growing disrespect for and lack of faith in the internal workings of the present federal judicial system. In an article entitled "Generic Justice", Howard A. Specter, former President of the American Bar Association, asserts that an increasingly high number of people are viewing the concept of justice and the value of court services as a product "to be labeled, marked down, weighed and bagged at the local supermarket".[73] Hence, he challenges society and members of the legal profession to rediscover the humane aspect of the law which in itself allows the legal system to be treated more delicately than a bureaucratic institution. The disintegration of law and its authority is a real and immediate concern for the nineties.

CHAPTER IV

REFORMS AND RECOMMENDATIONS

Introduction

This chapter deals specifically with the reforms and the recommendations that have been advanced in an effort to resolve the caseload dilemma. While some reforms have occurred, those changes have had only a short term effect on the caseload. Indeed, within a few years of the reforms, the case filings escalated to a higher number than before the change took place.[74] There exists a need for the type of reform which will be long-range and highly effective when applied.

Reforms

Technological innovation has been one of the reforms implemented over the past fifteen to twenty years. Such changes have accelerated the processing of the caseload within the judge's court chamber but have had no effect on the actual workload of the judge. Indeed, David O'Brien remarks that although such technological improvements can have an effect on the internal structure, there remains the burdensome judicial workload. [75]

Another reform that has been relied upon is the creation of additional judgeships. However, several arguments have been

advanced in opposition to such a reform. The Federal Courts Study Committee, recently created by Congress to examine problems facing the courts of the United States, stresses that several problems can arise from the creation of additional judgeships. First, a larger judiciary can provoke more conflicting opinions and uncertainty in the application of law within the circuit or among the circuits. Second, as the court becomes larger, so does the possibility of a diminishing familiarity and collegiality among the circuit judges. Third, an increased size of the judicial branch strains the judicial appointment process which in effect could allow unqualified candidates to attain judgeships. Finally, as the judicial institution grows and the judge has less time for individual contribution, the attractiveness of an appellate judgeship decreases.[76] Further, J. Woodford Howard, Jr. states that adding to the number of judges precipitates a bureaucratic structure. He remarks that increasing the number of judges offers a quick fix for small circuits; however, adding judicial manpower to larger circuits "raises a galaxy of qualitative issues concerning the optimum size, number and internal operating procedures".[77] This is not to say that the mere creation of additional judgeships is not advantageous. However, it cannot be the sole reform to be implemented. Additional reforms are needed.

Also, numerous changes in jurisdiction, structure and court procedure have evolved in response to the increased caseload. Most recently, the appellate courts are now imposing penalties

for frivolous case filings.[78] Again, these changes have produced only short term effects and have had only a slight impact on the overall number of case filings.

Recommendations

Daniel Meador, Professor of Law at the University of Virginia, has recommended a restructuring of the United States Courts of Appeals by modifying its regional design. He emphasizes that "regional organization is the source of increasing problems in the administration of federal law."[79] The most serious problem is the non-uniformity among the Courts of Appeals circuits. He concludes that the potential for "decisional disharmony" is even greater than imagined. To resolve this problem Meador advocates the elimination of the regional design of the Courts of Appeals and the implementation of non-regional subject matter courts at the intermediate appellate level. Essentially, this would abolish any non-uniformity since the same types of cases would be heard in one specialized tribunal.

Court of Appeals Judge Patricia Wald strongly opposes such an idea. She remarks, "Specialty courts invite domination by the specialized bar ---no one else understands or cares."[80] She further contends that specialized courts tend to take the judges out of the mainstream of the law and of the legal developments.

Court of Appeals Judge Richard Posner advocates a different approach rather than specialization. Posner primarily argues for

judicial self-restraint to compensate for the large number of federal rights granted to individuals during the 1960s. In addition, he urges more institutional rather than individualistic opinions as well as more legal education with respect to judicial administration.

Again, Judge Patricia Wald indicates her opposition to such a proposal. "The heavier caseload in large part reflects better access to the courts and more legal protections and benefits for less-favored members of society. I resist any wholesale surrender of these hard-fought victories to 'reformers' rallying under the banner of judicial efficiency."[81] Indeed, Posner seems to advocate efficiency at the expense of individual rights.

Another major recommendation for court reform is the creation of a National Court of Appeals. Throughout the years variations in this concept have occurred. Thus, three distinct proposals for a National Court of Appeals now exist. First, as endorsed by the Former Chief Justice Warren Burger, a National Court of Appeals should be created which would be located between the Courts of Appeals and the Supreme Court. This tribunal would hear those cases referred to it by the Supreme Court. Therefore, if the Supreme Court thought a case was worthy of court evaluation but did not have time to review it, the case would be given to the National Court of Appeals. The Freund Committee of 1972 suggested another variation in this "National Court of Appeals" concept. According to the Freund Committee report, a court sitting between the levels of the Courts of Appeals and the

Supreme Court would screen all petitions that came to the Supreme Court and make recommendations on which petitions should be granted review.[82] Finally, Justice Stevens proposed a third variation quite similar to that recommended by the Freund Committee. He advocates the creation of a National Court of Appeals which not only would be responsible for making recommendations but also would have the power to decide which cases the Supreme Court would review.[83]

However, implications arise from these three variations. First, the "screening" function is an integral part of the Supreme Court's power; for, to delegate the screening function would be to give up a part of the Supreme Court's authority. The Constitution mandates that judicial power be vested in one supreme court. Thus, the constitutionality of this proposed court is questionable since the court would be assuming one of the Supreme Court's major functions, the power to determine the Court's judicial business. Second, the aim of the Freund proposal is to relieve the justices of their "screening" responsibilities and allow them more time to concentrate on research and opinion writing. However, by implementing the Freund committee's proposal, the justices would still have to perform screening responsiblities since the proposed court would only have the power to recommend which petitions for review should be granted. Finally, if Justice Stevens' recommendation were to be put in effect, the Supreme Court would never see the petitions for review or the respective areas of law that the petitions would

address. Such a proposal would limit the Supreme Court's power and cloud its insight into developing areas of law.

Finally, the Federal Courts Study Committee has proposed several reform alternatives to be considered by the judiciary and others interested in court reform. First, it suggests the elimination of the present Courts of Appeals circuits and the creation of multiple small circuits consisting of only nine or ten judges.[84] While the small size might foster an appropriate environment for judicial deliberation and contemplation, the restructuring could cause more disharmony in circuit decisions. Additionally, as the number of case filings continue to increase, this recommendation could have only a short term effect since no mechanism for dealing with rising case filings in these small circuits has been proposed.

The Federal Courts Study Committee's second alternative for court reform is the creation of a four-tier system.[85] The additional layer would reside in between the Courts of Appeals and the Supreme Court. This new layer of four to five new tribunals would have discretionary review over appeals from the lower circuits. This alternative could be beneficial if it could eliminate some of the confusion as to the uniform application of law in the Courts of Appeals. However, it is apparent that this recommendation would merely add another layer to the present court structure and could potentially contribute to the bureaucratization of the federal court system.

Finally, the creation of national subject matter courts, as

supported by Daniel Meador, has been outlined as another alternative by the Federal Courts Study Committee. The committee agrees that a wide creation of these specialized courts would create numerous political and organizational issues. Therefore, only limited creation of specialized courts are warranted according to the committee.

CHAPTER V

PROPOSAL

Introduction

Any proposal for appellate court reform needs to recognize not only the essential functions of the appellate judge that must be preserved but also the nature of the case filings that most severely jeopardize those functions. A growing trend in technical, complex cases which demand more judicial time, concentration and resources has occurred throughout the 1980s. Additionally, the number of civil cases, in particular those involving private civil matters, constitute a large portion of the appellate court docket. While drug-related criminal case filings are predicted to clutter the appellate court dockets and take priority over other cases in the 1990s, the constant and substantial amount of taxation and social security matters also reflect burdensome areas for the judges in the upcoming decade.

It is clear that no single, all-encompassing reform will totally annihilate the appellate court dilemma. However, a series of gradual and focused reforms looks promising with respect to improving the caseload crisis in the federal appellate courts. While the caseload burden poses a threat to both levels of the federal appellate court system, data indicates that it most significantly impinges on the United States Courts of

Appeals. With the growing non-uniformity among the Courts of Appeals circuits, the primary aim of a long-range proposal should be to ensure public trust and satisfaction in judicial services through, among other things, the uniform application of law. Accordingly, I propose the following recommendations:

1. The creation and/or reallocation of judgeships.
2. The creation of a U.S. Court of Appeals for Administrative Agencies, a U.S. Court for Tax Appeals and a U.S. Court for Social Security Appeals.
3. The creation of a U.S. Court of Review for Intercircuit Conflicts.
4. The creation of an Office of Judicial Impact Assessment.

For immediate relief, judgeships should be added to the Courts of Appeals respective to the needs of each circuit. The present "case participation per appellate judge" formula used by the Judicial Conference as a standard for determining an appropriate number of judgeships to accommodate workload should be applied at this point. However, in the next few years, a new formula sensitive to the difficulty of and time element involved in particular types of cases needs to be constructed. The Federal Judicial Center, the research branch of the Federal Judiciary, would be responsible for the creation and implementation of such a formula. A creation of additional judgeships and a reallocation of existing ones where necessary will occur after this formula is developed.

Many members of the legal profession as well as researchers of judicial administration question the effectiveness of merely adding judgeships to counteract the growing caseload/workload. Indeed, past experience dictates that the creation of additional judgeships for the Courts of Appeals circuits has only short term effects. However, until a more accurate formula can be constructed, establishing new judgeships can provide immediate relief to those circuits that are straining their institutional capacity.

A recent case study of the Ninth Circuit reveals that although the circuit is the largest in the Courts of Appeals with respect to the number of appellate judgeships and case filings, notable improvements in the court's performance and uniformity in decision has occurred.[86] As the Ninth Circuit insists on its effectiveness[87], Professor Arthur Hellman who has conducted research on the question of problems arising from large circuits looks positively on the current performance of the Ninth Circuit and regards it as "the harbinger of future appellate courts rather than as an abnormality."[88] It is necessary to note that the Ninth Circuit has been allowed to experiment with very specialized reforms which it believes will be effective for the particular needs of its circuit. Thus, attached to the proposal for additional appellate judgeships is the freedom for all of the Courts of Appeals circuits to implement specialized reforms. In effect, this provides a mechanism for minimizing the potential risks involved in increasing the number of judgeships.

There also exists a need for a limited number of specialized courts. The three United States Courts of Appeals for Tax, Social Security, and Administrative Agency matters would preside at the same level as the other circuit courts, and direct review of these courts' decisions would exist. The creation of these courts would take many of the complicated, time-consuming cases away from the regional courts and would place them in specialized tribunals able to deal effectively and efficiently with such cases. Of extreme importance, it follows that a greater degree of uniformity in these areas would exist.

Opponents of this "specialized court" concept present reasonable and realistic arguments against such a reform. Indeed, specialization could foster a narrow-minded attitude when application of law is necessary. However, the threat of such a concept to the American judicial system is minimized by the limited number of specialized tribunals that would be created.

Additionally, Daniel Meador points out certain areas of law are ideal for the implementation of this concept. The types of cases that are suitable for this type of reform are those cases that constitute a significant amount of the judge's workload but are not enough in number to allow that judge to deal coherently and constructively with that field of law.[89] After much research, the creation of these specialized courts seems to be extremely beneficial to the present appellate court system since over the last ten years a constant and substantial percentage of

the appellate caseload involves social security, tax, and administrative agency matters.

The proposal's most significant reform is the creation of a United States Court of Review for Intercircuit Conflicts. Such a court would consist of two divisions with nine permanent judges sitting en banc in each division. This court would exist between the Courts of Appeals and the Supreme Court. Mandatory review for all intercircuit conflicts would exist in addition to the opportunity to file a petition for writ of certiorari before the Supreme Court. One of the divisions would consider cases specifically involving private civil matters; the other division would be responsible for conflicts of a criminal or public nature. The court would also be in charge of planning and conducting judicial conferences for the Courts of Appeals level (modeled after the Judicial Conference of the United States) which would be geared toward discussing and improving court administration and judicial adjudication among the circuits.

The advantage of such a proposal is that uniformity and public trust in the law would be maintained. Joseph Vining indicates that much of the growing dissatisfaction in the judicial system stems from the Courts of Appeals' lack of uniformity in applying the law.[90] Not only would greater uniformity exist because of the function of this court, but also discussion of specific problems in the application of law among the circuits would be facilitated at the judicial conferences organized by this court. Other advantages of this proposal are that the

prestige and the nature of the position would attract well-qualified judges, and fundamental rights would be secured against those who advocate judicial restraint as a reform measure.

Finally, an Office of Judicial Impact Assessment, as recommended by the Federal Courts Study Committee, should be established. This office would advise Congress on the impact of proposed legislation and would offer assistance in drafting legislation which most likely would lead to litigation. Such an office would be directed from the Federal Judicial Center.

Charles A. Johnson and Bradley C. Canon, co-authoring the book Judicial Policies: Implementation and Impact, emphasize that although judicial impact assessment theory is still in its infant stage, there exists a growing recognition of its importance.[91] Increased understanding of the impact of legislation would most emphatically eliminate several of the statutory case filings at both the Courts of Appeals and the Supreme Court; for, legislative enactments could be worded more wisely and the statutory intentions could be expressed more clearly.

CHAPTER VI

CONCLUSIONS

The Judicial Branch of the Federal Government is a unique institution; for, technically, it has no power. In section 78 of The Federalist Papers Alexander Hamilton points out that as the executive branch "holds the sword of the community" and the legislative branch "commands the purse," the judiciary has only the cogency of its arguments on which to rely. This has not restricted the federal judiciary from becoming a powerful and effective institution in society. However, essential to its success has been the public trust in and respect for its functions, its purpose and its demonstrated past wisdom. For the court to continue to be an influential part of society, it must maintain the public's approval.

The increase in case filings at the federal appellate level has created an enormous judicial workload for the appellate judges. Serious consequences have arisen from judicial efforts to manage this workload. The most profound of these is the public's changing perception of the federal court system and of the concept of justice. Indeed, dissatisfaction and distrust in the appellate courts are becoming more prevalent.

In the "1989 Year-End Report on the Judiciary," Chief Justice Rehnquist emphasizes that the federal judiciary is in

trouble. He believes that if court reforms are not made within the very near future, the caseload growth will overcome the judges and justices and trigger a slow destruction of the system. The proposal advanced in this paper advocates short term as well as long term reforms which will gradually modify the system and restore public confidence in it by ensuring uniformity and quality in judicial services.

Indeed, judicial reform has become a national priority and action must be taken. Daniel Meador, Professor of Law at University of Virginia, concludes that Americans have come to a point where "judicial architects" must return to the drawing board and modify the present court structure to fit the altered circumstances of time. Just as a major reform was necessary in 1891, it is also necessary as the United States federal court system approaches 1991. The challenge to the judiciary of the 1990s will be the managing of appeals in the federal courts.

ENDNOTES

1. Henry Campbell Black, Black's Law Dictionary, (St. Paul: West Publishing Company, 1979) 700.

2. Henry Campbell Black, Black's Law Dictionary, (St. Paul: West Publishing Company, 1979) 766.

3. Henry Campbell Black, Black's Law Dictionary, (St. Paul: West Publishing Company, 1979) 1443.

4. United States Constitution, Article III, Section I.

5. Administrative Office of the United States Courts, The United States Courts, Their Jurisdiction and Work (Washington, D.C.: Congressional Quarterly, 1989) 6.

6. Administrative Office of the United States Courts. The United States Courts, Their Jurisdiction and Work (Washington, D.C.: Congressional Quarterly, 1989) 6.

7. Administrative Office of the United States Courts, The United States Courts, Their Jurisdiction and Work (Washington, D.C.: Congressional Quarterly, 1989) 8.

8. Act of September 24, 1789, ch. 20, 1 Stat. 73.

9. T.E. Baker, A Primer on the Jurisdiction of the United States Courts of Appeals, (Washington, D.C.: Federal Judicial Center, 1989) 4.

10. Act of March 2, 1793, ch. 22, 1 Stat 333.

11. Act of March 2, 1855, ch. 142, 10 Stat. 631; Act of March 3, 1863, ch. 100, 12 Stat. 794 as amended by Act of February 19, 1864, ch. 11, 13 Stat. 4.

12. Act of March 3, 1891, ch. 517, 26 Stat. 826.

13. Act of March 11, 1911, Pub. L. No. 61-475, 36 Stat. 1087.

14. Act of February 13, 1925, Pub. L. No. 68-415, 43 Stat. 936.

15. Act of February 28, 1929, Pub. L. No. 70-840, 45 Stat. 1346.

16. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869.

17. Act of October 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994.

18. Federal Courts Improvement Act of 1982, 28 USC Sec. 41 (1982).

19. Lawrence Baum, American Courts: Process and Policy, (Boston: Houghton Mifflin, 1986) 36.

20. United States Constitution, Article III, Section II.

21. United States Constitution, Article III, Section II.

22. Act of September 25, 1988, Pub. L. No. 100-352, 102 Stat. 662.

23. Administrative Office of the United States Courts, The United States Courts, Their Jurisdiction and Work, (Washington, D.C.: Congressional Quarterly, 1989) 11.

24. Administrative Office of the United States Courts, The United States Courts, Their Jurisdiction and Work, (Washington, D.C.: Congressional Quarterly, 1989) 11.

25. Erwin C. Surrency, History of the Federal Courts, (New York: Oceana Publications, 1987) 90.

26. Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court, (Washington, D.C.: Federal Judicial Center, 1972) 1.

27. Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court, (Washington, D.C.: Federal Judicial Center, 1972) 1.

28. Richard Posner, The Federal Courts: Crisis and Reform, (Cambridge, Harvard University Press: 1985) 80.

29. Mark W. Cannon, "Judicial Administration to the 21st Century," Public Administration Review November 1985: 681.

30. Richard Posner, Federal Courts: Crisis and Reform, (Cambridge: Harvard University Press, 1985) 93.

31. Lawrence Baum, The Supreme Court, (Washington, D.C.: Congressional Quarterly, 1989) 105.

32. Administrative Office of the United States Courts, The United States Courts, Their Jurisdiction and Work, (Washington, D.C.: Congressional Quarterly, 1989) 6.

33. Administrative Office of the United States Courts, Annual Report of the Director, (Washington D.C.: Administrative Office of the United States Courts, 1989) Table B-7.

34. David O'Brien, Storm Center, (New York: W. W. Norton, 1986) 133.

35. Richard Posner, Federal Courts: Crisis and Reform, (Cambridge: Harvard University Press, 1985) 66.

36. Administrative Office of the United States Courts, Annual Report of the Director, (Washington, D.C.: Administrative Office of the United States Courts, 1989) Table B-7B.

37. Administrative Office of the United States Courts, Annual Report of the Director, (Washington, D.C.: Administrative Office of the United States Courts, 1989) Table B-7B.

38. Richard Posner, The Federal Courts: Crisis and Reform, (Cambridge: Harvard University Press, 1985) 69.

39. Administrative Office of the United States Courts, Annual Report of the Director, (Washington, D.C.: Administrative Office of the U.S. Courts, 1989) Table B-5.

40. Richard Posner, Federal Courts: Crisis and Reform, (Cambridge: Harvard University Press, 1985) 72.

41. Richard Posner, The Federal Courts: Crisis and Reform, (Cambridge: Harvard University Press, 1985) 73.

42. Patricia Wald, "The Problem With the Courts," Trial June 1984: 30.

43. Richard Posner, Federal Courts: Crisis and Reform, (Cambridge: Harvard University Press, 1985) vii.

44. Patricia Wald, "The Problem with the Courts," Trial June 1984: 30.

45. John Paul Stevens,"Some Thoughts on Judicial Restraint," Judicature 66 November 1982: 179.

46. John Paul Stevens,"Some Thoughts on Judicial Restraint," Judicature 66 November 1982: 178.

47. John Paul Stevens,"Some Thoughts on Judicial Restraint," Judicature 66 November 1982: 179.

48. John Paul Stevens, "Some Thoughts on Judicial Restraint," Judicature 66 November 1982: 179.

49. David O'Brien, Storm Center, (New York: W.W. Norton, 1986) 133.

50. David O'Brien, Storm Center, (New York: W.W. Norton, 1986) 133.

51. Richard Posner, The Federal Courts: Crisis and Reform, (Cambridge, Harvard University Press, 1985) 107.

52. David O'Brien, Storm Center, (New York: W.W. Norton, 1986) 43.

53. William H. Rehnquist, Report, "Year-End Report on the Federal Judiciary," Washington, D.C., 1989.

54. Federal Judicial Center, Structure and Internal Procedures: Recommendations for Change, (Federal Judicial Center, 1975) 184.

55. Justice John Paul Stevens, "Some Thoughts on Judicial Restraint," Judicature November 1982: 178.

56. David O'Brien, "Managing the Business of the Supreme Court," Public Administration Review November 1985: 667.

57. Patricia Wald, "Bureaucracy and the Courts," Yale Law Journal 92 (1983): 1479.

58. Richard Posner, The Federal Courts: Crisis and Reform (Cambridge: Harvard University Press, 1985) 115.

59. Joseph Vining, "Bureaucratic Justice," University of Michigan Law Review December 1981: 251.

60. David O'Brien, "Managing the Business of the Supreme Court," Public Administration Review November 1985: 667-677.

61. Alvin B. Rubin, "Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency," Notre Dame Lawyer 55 (1980): 646.

62. Daniel Meador, "A Challenge to Judicial Architecture: Modifying the Regional Design of the United States Courts of Appeals," University of Chicago Law Review Spring 1989: 603.

63. Chief Justice William Rehnquist, Speech, American Bar Association Mid-Year Meeting, Colorado, 1989: 1.

64. Mark W. Cannon, "Judicial Administration to the 21st Century," Public Administration Review November 1985: 681.

65. David O'Brien, "Managing the Business of the Supreme Court," Public Administration Review November 1985: 671.

66. Patricia Wald, "Bureaucracy and the Courts," Yale Law Journal 92 (1983): 1484.

67. Patricia Wald, "Bureaucracy and the Courts," Yale Law Journal 92 (1983): 1484.

68. Patricia Wald, "Bureaucracy and the Courts," Yale Law Journal 92 (1983): 1484.

69. Joseph Vining, "Bureaucratic Justice," University of Michigan Law Review December 1981: 251.

70. Justice John Paul Stevens, "Some Thoughts on Judicial Restraint," Judicature November 1982: 178.

71. Jethro K. Lieberman, The Litigious Society, (New York: Basic Books, 1981) 4.

72. Joseph Vining, "Bureaucratic Justice," University of Michigan Law Review December 1981: 250.

73. Howard A. Specter, "Generic Justice," American Bar Association Journal 68 November (1982): 6.

74. David O'Brien, Storm Center, (New York: W. W. Norton, 1986) 149.

75. David O'Brien, "Managing the Business of the Supreme Court," Public Administration Review November 1985: 667.

76. Federal Courts Study Committee, Report, "Tentative Recommendations for Public Comment," 22 December 1989: 7.

77. Howard, J. Woodford, Jr., Courts of Appeals in the Federal Judicial System, (Princeton: Princeton University Press, 1981) 270.

78. Mark W. Cannon, "Judicial Administration in the 21st Century," Public Administration Review November 1985: 682.

79. Daniel Meador, "A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals," University of Chicago Law Review Spring 1989: 603.

80. Patricia Wald, "Bureaucracy and the Courts," Yale Law Journal 92 (1983): 1481.

81. Patricia Wald, "Bureaucracy and the Courts," Yale Law Journal 92 (1982): 1479.

82. Federal Judicial Center, Report, "Report of the Study Group on the Caseload of the Supreme Court," December 1972: 18.

83. John Paul Stevens, "Some Thoughts on Judicial Restraint," Judicature November 1982: 182.

84. Federal Courts Study Committee, Report, "Tentative Recommendations for Public Comment," 22 December 1989, 111.

85. The Federal Courts Study Committee, Report, "Tentative Recommendations for Public Comment," 22 December 1989: 112.

86. Joe S. Cecil, Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project. (Washington, D.C.: Federal Judicial Center, 1985) 1.

87. The United States Court of Appeals for the Ninth Circuit, Report, "Fourth Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeship Act of 1978," July 1989: 2.

88. Federal Courts Study Committee, Report, "Tentative Recommendations for Public Comment," 22 December 1989: 108.

89. Daniel Meador, "Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals," University of Chicago Law Review Spring 1989: 603.

90. Joseph Vining, "Justice, Bureaucracy and Legal Method," University of Michigan Law Review December 1981: 249.

91. Charles A. Johnson and Bradley A. Canon, Judicial Policies: Implementation and Impact, (Washington, D.C.: Congressional Quarterly Press, 1984) 224.

Works Cited

Act of November 19, 1988. Pub. L. No. 100-702, 102 Stat. 4642.

Act of October 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994.

Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869.

Act of February 28, 1929, Pub. L. No. 70-840, 45 Stat. 1346.

Act of February 13, 1925, Pub. L. No. 68-415, 43 Stat. 936.

Act of March 11, 1911, Pub. L. No. 61-475, 36 Stat. 1087.

Act of March 3, 1891, Ch. 517, 26 Stat. 826.

Act of March 3, 1863, Ch. 100, 12 Stat. 794.

Act of March 2, 1855, Ch. 142, 10 Stat. 631.

Act of February 13, 1801, Ch. 4, 2 Stat. 89.

Act of March 2, 1793, Ch.22, 1 Stat. 333.

Administrative Office of the United States Courts. Report. Annual Report of the Director. Washington, D.C.: 1980-1989.

Administrative Office of the United States Courts. The United States Courts, Their Jurisdiction and Work. Washington, D.C.: Congressional Quarterly, 1989.

Baker, T. E. A Primer on the Jurisdiction of the United States Courts of Appeals. Washington, D.C.: Federal Judicial Center, 1989.

Baum, Lawrence. American Courts: Process and Policy. Boston: Houghton Mifflin, 1986.

Baum, Lawrence, Sheldon Goldman and Austin Sarat. "The Evolution of Litigation in the Federal Courts of Appeals, 1895-1975." Law and Society Review. 1983: 291-309.

Baum, Lawrence. The Supreme Court. Washington, D.C.: Congressional Quarterly, 1989.

Beerman, Jack M. "Crisis? What Crisis? A Review of The Federal Courts: Crisis and Reform." Northwestern Law Review. 80 Spring 1986: 1383-1406.

Black, Henry C. Black's Law Dictionary. St. Paul: West Publishing Company, 1979.

Brennan, William J., Jr. "Some Thoughts on the Supreme Court's Workload." Judicature. 66 December-January 1983: 230-235.

Cannon, Mark W. "Judicial Administration to the 21st Century." Public Administration Review. 45 November 1985: 679-684.

Cannon, Mark W. and David M. O'Brien. Views From the Bench. Chatham: Chatham House Publishers, 1985.

Cecil, Joe S. Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project. Washington, D.C. Federal Judicial Center, 1985.

Congressional Record. 29 January 1990: 493-497.

Congressional Record. 25 January 1990: 414-421.

Congressional Record. 9 May 1989: 5026-5028.

Dubois, Philip L. The Analysis of Judicial Reform. Lexington: Lexington Books, 1982.

Federal Courts Study Committee. Report. Tentative Recommendations for Public Comment. 22 December 1989.

Federal Judicial Center. Central Legal Staffs in the United States Courts of Appeals. Washington, D.C.: Federal Judicial Center, 1978.

Federal Judicial Center. Report of the Study Group on the Caseload of the Supreme Court. Washington, D.C.: Federal Judicial Center, 1972.

Federal Judicial Center. Structure and Internal Procedures: Recommendations for Change. Washington, D.C.: Federal Judicial Center, 1975.

Hamilton Alexander, John Jay and James Madison. The Federalist Papers. New York: Bantam Books, 1982.

Hellman, Arthur D. "Caseload, Conflicts, and Decisional Capacity: Does the Supreme Court Need Help?" Judicature. 67 (1983): 28-48.

Hoffman, Daniel N. "Nonpublication of Federal Appellate Court Opinions." Justice System Journal. 6 (1981): 396-433.

Howard, J. Woodford, Jr. Courts of Appeals in the Federal Judicial System. Princeton: Princeton University Press, 1981.

Johnson, Charles A. and Bradley C. Canon. Judicial Policies: Implementation and Impact. Washington, D.C.: Congressional Quarterly Press, 1984.

Judicial Council and the United States Court of Appeals for the Ninth Circuit. Fourth Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeship Act of 1978 and Other Measures to Improve the Administration of Justice in the Ninth Circuit. Washington, D.C.: Congressional Quarterly Press, 1989.

Lateef, Noel V. "Keeping up with Justice Automation and the New Activism." Judicature. 67 (1983): 213-223.

Lieberman, Jethro K. The Litigious Society. New York: Basic Books, 1981.

McLaughlan, William P. Federal Court Caseloads. New York: Basic Books, 1984.

Meador, Daniel, J. "A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals." University of Chicago Law Review. 66 Spring 1989: 603-642.

Meador, Daniel, J. "Comments on the Study of Appellate Court Administration." Justice System Journal. 12 (1987): 143-147.

Neubauer, David W. ""Are We Approaching Judicial Gridlock? A Critical Review of the Literature." Justice System Journal. 12 November 1987: 363-385.

O'Brien, David M. "Managing the Business of the Supreme Court." Public Administration Review. 45 November 1985: 667-677.

O'Brien, David. Storm Center. New York: W.W. Norton, 1986.

Posner, Richard. The Federal Courts: Crisis and Reform. Cambridge: Harvard University Press, 1985.

Powell, Lewis F., Jr., " Are the Federal Courts Becoming Bureaucracies?" American Bar Association Journal. 68 November 1982: 1370-72.

Pressman, Steven. "The California Split." California Lawyer. 9 August 1989: 19.

Rehnquist, William H. "1989 Year-End Report on the Federal Judiciary," 1989.

Rehnquist, William H. "1988 Year-End Report on the Federal Judiciary," 1988.

Rehnquist, William H. "1987 Year-end Report on the Judiciary," 1987.

Rehnquist, William H. Address. Remarks of the Chief Justice. American Bar Association Mid-Year Meeting. Denver, 6 February 1989.

Reynolds, William L. and William M. Richman. "Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform." University of Chicago Law Review. 48 (1981): 573-631.

Rubin, Alvin B. "Bureaucratization of the Federal Courts: Tension Between Justice and Efficiency." Notre Dame Lawyer. 55 (1980): 645-656.

Specter, Howard A. "Generic Justice." American Bar Association Journal. 68 November (1982): 1.

Stevens, John Paul. "Some Thoughts On Judicial Restraint." Judicature. 66 November 1982: 177-183.

Stienstra, D. and J. Cecil, The Role of Staff Attorneys and Face-to-Face Conferencing in Non-Argument Decisionmaking. Washington, D.C.: Federal Judicial Center, 1989.

Surrency, Erwin C. History of the Federal Courts. New York: Oceana Publications, 1987.

United States Constitution, Article III, Sections I and II.

Vining, Joseph. "Justice, Bureaucracy and Legal Method." University of Michigan Law Review December 1981: 248-258.

Wald, Patricia M. "Bureaucracy and the Courts." Yale Law Journal. 92 (1983): 1478-1486.

Wald, Patricia M. "The Problem with the Courts: Black Robed Bureaucracy or Collegiality Under Challenge?" Trial. June 1984: 28-34.

Wasby, Stephen L. "The Study of Appellate Court Administration: The State of the Enterprise." Justice System Journal. 12 November 1987: 119-142.

Wheeler, Russell R. and Charles W. Nihan. Administering the Federal Judicial Circuits: A Survey of Chief Judges' Approaches and Procedures. Washington, D.C.: Federal Judicial Center: 1982.

APPENDIX

Appendix A

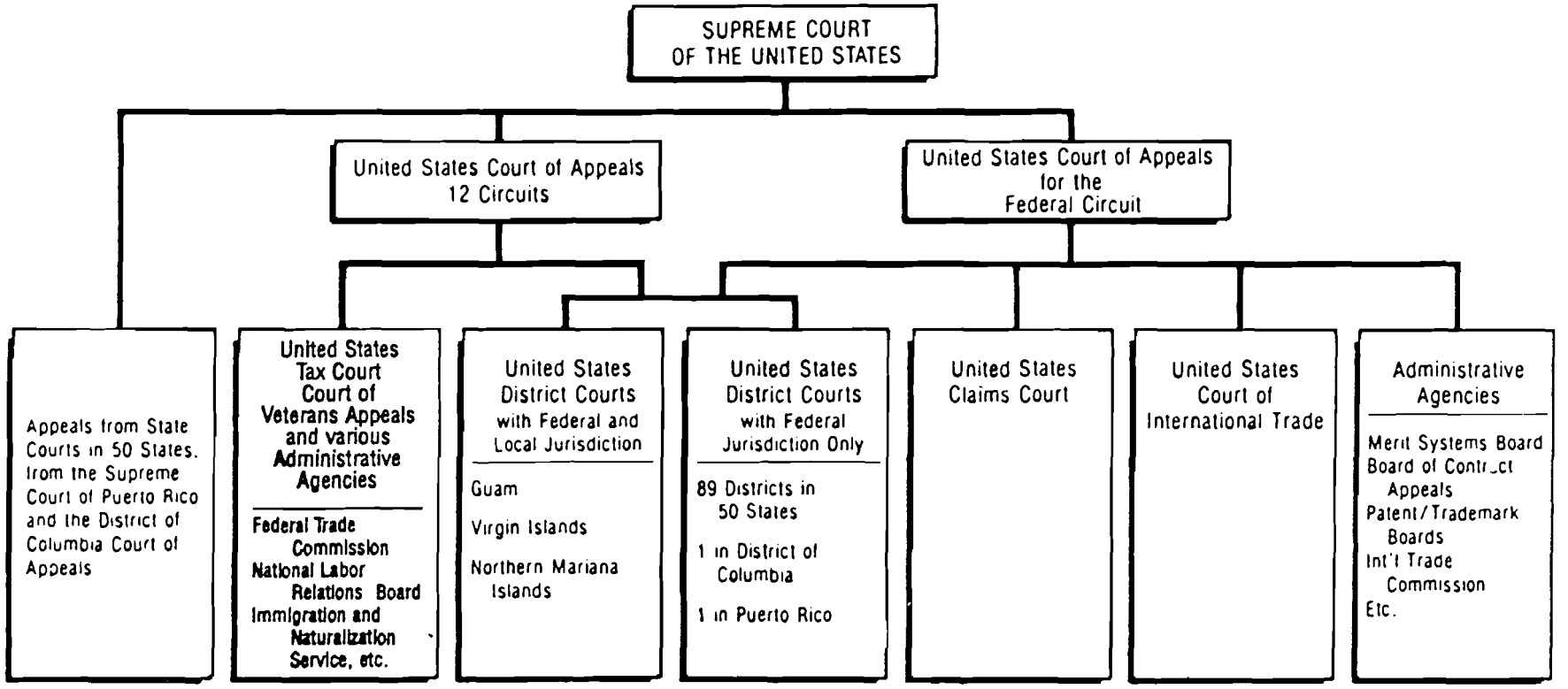
UNITED STATES COURTS OF APPEALS

CIRCUITS	GEOGRAPHICAL AREAS	NUMBER OF JUDGES
Federal Circuit	United States	Twelve
District of Columbia	District of Columbia	Twelve
First Circuit	Maine, Massachusetts, New Hampshire, Rhode Island and Puerto Rico	Six
Second Circuit	Connecticut, New York, and Vermont	Thirteen
Third Circuit	Delaware, New Jersey, Pennsylvania, and the Virgin Islands	Twelve
Fourth Circuit	Maryland, North Carolina, South Carolina, Virginia, and West Virginia	Eleven
Fifth Circuit	Louisiana, Mississippi, and Texas	Sixteen
Sixth Circuit	Kentucky, Michigan, Ohio and Tennessee	Fifteen
Seventh Circuit	Illinois, Indiana and Wisconsin	Eleven
Eight Circuit	Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota	Ten
Ninth Circuit	Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Marina Islands	Twenty-Eight

UNITED STATES COURTS OF APPEALS
(ctd.)

CIRCUITS	GEOGRAPHICAL AREA	NUMBER OF JUDGES
Tenth Circuit	Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming	Ten
Eleventh Circuit	Alabama, Florida and Georgia	Twelve

THE UNITED STATES COURT SYSTEM*



APPENDIX B

* Chart Obtained from the Administrative Office of the United States Courts