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Charles W. Nihan

Harvey Rishikof

RETHINKING THE FEDERAL COURT SYSTEM: THINKING THE UNTHINKABLE*

*Charles W. Nihan***
*Harvey Rishikof****

To paraphrase the steward Malvolio in *Twelfth Night,* "Be not afraid of change: some are born to change, some achieve change, and some have change thrust upon them."[1] At the present time the federal judiciary, in a rare and somewhat unprecedented public display, is engaged in a spirited debate over its appropriate size.[2] Three general factions or schools have emerged in this debate: some proponents advocate a cap on all federal judges at 1000;[3] others would prefer at the very least an immediate doubling of the current number of federal judges with additions as required;[4] while a third group of advocates prefer a slow growth approach tied to a restricting of federal jurisdiction.[5]

This rather arcane issue of judicial size, that normally would be relegated to technical government reports, has recently been featured in leading law reviews,[6] major newspapers,[7] and other public forums.[8]

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** Charles W. Nihan, Esq., Chief of the Long Range Planning Office of the Administrative Office of the United States Courts.

*** Harvey Rishikof, Esq., Supreme Court Judicial Fellow, Instructor Harvard University.

1. WILLIAM SHAKESPEARE, TWELFTH NIGHT act 3, sc. 4.

2. GORDON BERMANT ET AL., FEDERAL JUDICIAL CENTER, IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES (1993) [hereinafter BERMANT]; Jon O. Newman, *1,000 Judges – The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993); Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761 (1989); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761 (1983); Stephen Reinhardt, *Too Few Judges, Too Many Cases*, 79 A.B.A. J. 52 (Jan. 1993); Gerald Bard Tjoflat, *More Judges, Less Justice*, 79 A.B.A. J. 70 (July 1993).

3. Jon O. Newman, *1,000 Judges – the limit for an effective federal judiciary*, 76 JUDICATURE 187, 187 (1993); Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761 (1989); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 762-67 (1983).

4. Stephen Reinhardt, *Too Few Judges, Too Many Cases*, 79 A.B.A. J. 52, 53 (Jan. 1993).

5. Gerald Bard Tjoflat, *More Judges, Less Justice*, 79 A.B.A. J. 70 (July 1993).

6. 104 YALE L.J. (forthcoming 1994); 47 SMU L. REV. (forthcoming 1994); William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1; William H. Rehnquist, *A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System*, 28 ST. LOUIS U. L.J. 1, 7-10 (1984).

7. Jon O. Newman, *Are 1,000 Federal Judges Enough? Yes. More Would Dilute The Quality*, N.Y. TIMES, May 17, 1993, at A17; Stephen Reinhardt, *Are 1,000 Federal Judges Enough? No. More Cases Should Be Heard*, N.Y. TIMES, May 17, 1993, at A17.

8. *See, e.g., Chief Justice's 1991 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Jan. 1992, 1, at 1.

Of course the size and mission of the federal courts are not new questions. Rather, they are questions that were raised by the Federalists and Anti-Federalists during the founding debates.[9] The federal courts had a modest beginning. The Judiciary Act of 1789 created thirteen districts, each with one district judge, and a Supreme Court, composed of a chief justice and five justices.[10] Thus, the federal system began with nineteen federal judges.[11]

On one level, the current size dispute may appear to be concerned with only numbers, but at a deeper level the issues raised speak to the very nature of what kind of institution the federal judiciary will be in the twenty-first century.

Though there is some disagreement on the course to be charted for the future, the federal bench is of one mind that the federal courts are undergoing an institutional crisis of historic proportions.[12] Regardless of one's view of the issue on growth, the mushrooming caseload burden speaks for itself. Increasingly, the caseload per federal judge, both appellate and district, is expanding at an accelerating rate even in relation to general population growth.[13]

In 1960, the federal district courts received 28,137 criminal case filings and 59,284 civil case filings, while appeals to the circuit courts of appeal numbered 3899.[14] Thirty-two years later, district court filings had grown to 47,342 criminal cases and 226,459 civil cases, while circuit court filings had increased to 46,032.[15] Expressed as percentages of growth since 1960, criminal case filings have increased 72%, civil case filings have increased by 283%, and appeals have increased by 1081%. By contrast, population growth during this period increased by approximately 35%, having grown from 179,323,175 in 1960 to 248,709,873 in 1990.[16]

As these numbers reflect, the circuit courts, in particular, have experienced a steady and staggering increase in workload. The average federal appellate judge in 1950, of which there were sixty-five, decided forty-four cases in a period when 2830 appeals were commenced.[17] Compare this to 1990, when 40,898 appeals

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9. *See* THE FEDERALIST Nos. 78-83 (Alexander Hamilton).

10. Act of Sept. 24, 1789, 1 Stat. 73, 73.

11. *See* RUSSELL R. WHEELER & CYNTHIA HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM (1989).

12. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (Apr. 2, 1990) [hereinafter FCSC]. Naturally, there are those who disagree that the system is in crisis. *See* Jack M. Beermann, *Crisis? What Crisis?*, 80 NW. U. L. REV. 1383 (1986); Michael C. Gizzi, *Examining the crisis of volume in the U.S. courts of appeals*, 77 JUDICATURE 96 (1993).

13. *See, e.g.*, Stephen Reinhardt, *Too Few Judges, Too Many Cases*, 79 A.B.A. J. 52 (Jan. 1993).

14. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbls. B1, C1, D1 (1960).

15. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICAL TABLES FOR THE TWELVE MONTH PERIOD ENDING SEPTEMBER 30, 1992 tbls. B-1, C2, D (1992). Although district court filings have been spiked since 1900, criminal cases were filed in 1970 at a rate of 19 per 100,000 of population, in 1980 at 12 per 100,000, and in 1990 at 19 per 100,000. Civil cases have steadily increased from a rate of 42 per 100,000 in 1970 to 87 per 100,000 in 1990. *See* WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, FEDERAL JUDICIAL CENTER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 30 (Oct. 1994).

16. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 8 (1992).

17. William T. Rule II, *Federal Court Caseloads Since 1950, Working Paper No. 3*, *in* LONG RANGE PLANNING WORKING PAPERS 8 (May 1993).

were filed and the then 156 active appellate judges each decided an average of 255 appeals.[18] During this same forty-year period, an average litigant's time of wait for a decision rose from six months to ten months, while the average number of cases decided by each active judge increased 580%.

Ironically, although the lower courts of the system are experiencing steady workload increases, the Supreme Court's caseload has fallen from its peak of 184 cases in 1983, to the current docket of approximately 116 cases in 1993.[19] In any event, caseload increases in the circuit courts of appeal may have a profound impact on the ability of the Supreme Court to maintain national uniformity and coherence in federal law. This development could result from two facts. First, the Supreme Court has a relatively fixed workload capacity that is unrelated to the demand for its services. The Supreme Court will decide approximately the same number of cases each year whether the number of certiorari petitions it receives is 3000, 5000, or 10,000.

Second, as the number of circuit judges increases, so too does the number of circuit court decisions. As the number of circuit court decisions increases, the percentage of circuit court decisions reviewed by the Supreme Court decreases. "The decrease in the percentage of circuit court decisions reviewed by the Supreme Court over the last 50 years has been dramatic."[20]

"In 1945 the Supreme Court reviewed approximately 8% of circuit court decisions . . . [but by] 1989 the Supreme Court reviewed less than 1% of circuit court decisions."[21] Caseload projections developed by the Long Range Planning Office of the Administrative Office of United States Courts [hereinafter Long Range Planning Office] indicate that by the year 2020 the percentage of circuit court decisions reviewed by the Supreme Court could be as small as one-tenth of one percent.[22] If these projections are accurate, by the year 2020 the Supreme Court will review only one of every 1000 circuit court decisions. Or, to state the converse, in only twenty-six years, 999 of every 1000 circuit court decisions will go unreviewed.

In one sense, therefore, the federal circuit courts of appeal are becoming the de facto court-of-last-resort, given both the legal and practical barriers to the granting of the writ of certiorari.[23]

The impacts of steadily rising district and circuit court caseloads have been noted by many.[24] In a recent speech to the ABA House of Delegates, the Chief Justice of the United States raised the following concerns:

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18. *Id.* at 14. This average number of appeals does not include the service performed by senior judges, visiting judges, and district court judges who sit on panels by designation.

19. *Chief Justice's 1993 Year-end Report Highlights Cost-Saving Measures*, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Jan. 1994, 1, at 4.

20. Internal Memorandum Long Range Planning Office, from Charles W. Nihan (June 16, 1993) (on file with the *Mississippi College Law Review*).

21. *Id.* at 2.

22. *See* discussion *infra* part IV.

23. *See, e.g.*, H.W. PERRY, JR., DECIDING TO DECIDE (Harv. U. Pr. 1991).

24. *See* FCSC, *supra* note 12.

> Unless actions are taken to reverse current trends, or slow them considerably, the federal courts of the future will be dramatically changed. Few will welcome these changes . . . .
>
> Some may say that we merely need to create more federal judgeships, which in turn would require more courthouses and supporting staff . . . . [T]he long term implications of expanding the federal judiciary should give everyone pause . . . . It could end up being divided into an almost unmanageable number of circuits or plagued by appellate courts of unmanageable size, with an increasingly incoherent body of federal law and a Supreme Court incapable of maintaining uniformity in federal law.[25]

In short, our understanding of the federal judiciary—its structure, its nature, and its ability to function—are all embedded in the otherwise rather innocuous questions of size, structure, and growth. Although there is a tendency to lose oneself in a sea of statistics and percentages when analyzing this question, how we approach and resolve these questions will dictate for the future the type of access an average litigant will have to an Article III judge, and the amount and quality of justice our federal courts can provide.

This Article will explore some of the central issues that are shaping the current debate over change. The Article is divided into four parts: Part I draws on the work concerning federal court caseloads during the modern era and analyzes caseload changes in ten year periods; Part II reviews some recent aspects of the size debate concerning the appropriate number of federal judges and examines the process by which new judgeships are created; Part III discusses a number of proposals for change of the appellate structure within the context of the current characteristics of appellate review; and, Part IV, the conclusion, presents trends and forecasts and also examines one possible but pessimistic future scenario for federal court caseloads.

I. THE HISTORIC CASELOAD[26]

A. A Brief Review of the Historic Statistical Caseloads

This section analyzes federal court caseloads and the judicial resources available to process the growing caseload.[27] The statistical overview of federal district court civil and criminal caseloads, circuit court caseloads, and judicial resources is broken into ten year intervals to highlight the growth dynamic.

> To summarize briefly, while the number of [cases by or against officers and employees of the United States] commenced annually increased by about 150% over the period since 1950, the number of private civil cases commenced increased by

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25. Chief Justice William Rehnquist, Remarks before the House of Delegates at the American Bar Association's Mid-Year Meeting 8-10 (Feb. 4, 1992) (transcript on file with the *Mississippi College Law Review*).

26. The following section relies and draws upon the work of William T. Rule II. William T. Rule II, *Federal Court Caseloads Since 1950, Working Paper No. 3, in* LONG RANGE PLANNING WORKING PAPERS (May 1993) [hereinafter Rule].

27. Federal court caseloads are measured in terms of "annual cases commenced," and judicial resources are measured in terms of "authorized judgeships, support personnel, and budget authority."

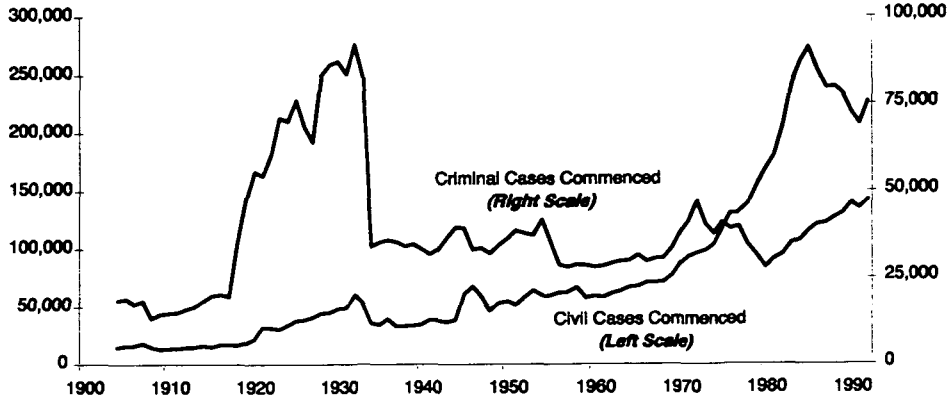
more than 400%. On the other hand, the number of criminal cases commenced increased by a much more modest 28% over the same period.[28]

It may be instructive to first take a look back to the turn of the century in order to fully appreciate how far we have come from the days when Melville Weston Fuller was Chief Justice.

1. A Look Back to 1904

A review of cases commenced in federal district and circuit courts since 1904 reveals remarkable growth. While the U.S. population has increased slightly more than 200%, annual civil case filings in district courts have increased 1424%, with most of that growth in the period since about 1960. (See Figure 1.)[29] On the other hand, since 1904 federal criminal cases commenced annually in district courts have increased by only 157%.[30]

Figure 1
Civil and Criminal Cases Commenced in U.S. District Courts, 1904 - 1992



Most remarkably, annual cases commenced in the federal courts of appeal have increased 3868%. "In fact, while it took 20 years (1924) for the level of appeals to double its 1904 level, and 38 years (1962) to double again, it took 7 (1969), 10 (1979), and 11 (1990) years for each of the next three doublings."[31] (See Figure 2.)

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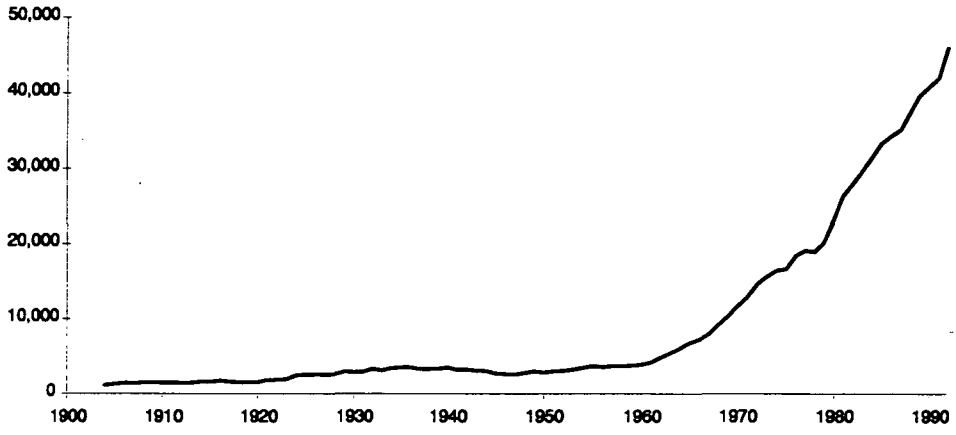
28. Rule, *supra* note 26, at 1.

29. Rule, *supra* note 26, at 2.

30. Rule, *supra* note 26, at 2. Throughout this paper, criminal cases will refer to cases exclusive of transfers, except where noted.

31. Rule, *supra* note 26, at 3.

Figure 2
Federal Appeals Commenced, 1904 - 1992



There is, of course, much more to the changing nature and mix of cases filed in the federal courts than raw growth rates. For example, during the Prohibition era from 1919 through 1933, the number of federal criminal cases commenced annually stood at levels which have not been seen since: it was not until 1992 that the total number of criminal filings exceeded the number filed in 1919.[32]

Expressed in terms of cases per authorized judgeship, the experience of the Prohibition era has hardly been matched before or since: for the period from 1919 through 1933 total civil and criminal case filings per authorized judgeship stood well above the highest level it has since reached (1984). (See Figure 3.) Indeed, in 1932 the level of filings per judgeship exceeded 1,000.

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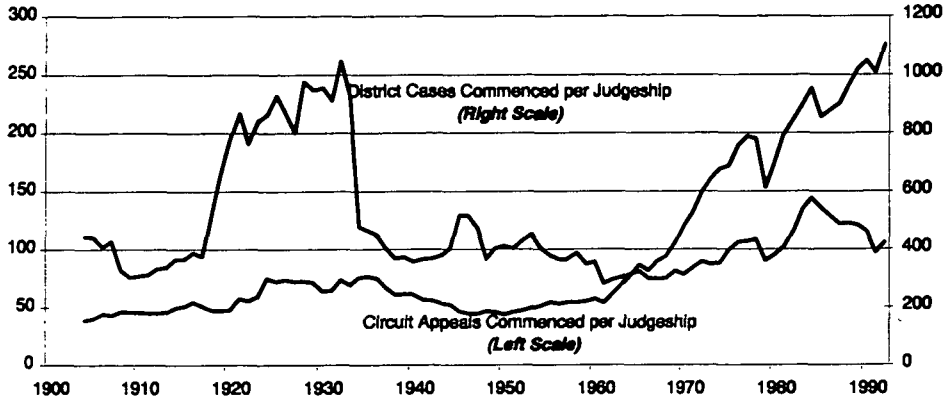
32. Rule, *supra* note 26, at 3.

Figure 3
Cases Commenced per Authorized Judgeship, 1904 - 1992



Apart from the unprecedented level of criminal filings during the Prohibition era . . . other aspects of the federal district and appellate caseload largely appear to have manifested themselves in the period since 1950 . . . .

In 1950 almost 55,000 civil cases were filed in the federal district courts. The breakdown of these cases is shown in Table 1.

U.S. plaintiff cases were nearly one-third of the total civil caseload (almost a third of these were rent control cases under [the Office of Housing Expediter]). Of the remaining U.S. plaintiff cases, the largest portion were negotiable instrument contract actions which constituted about one-quarter of the U.S. plaintiff cases commenced. Among private civil cases, those arising under diversity-of-citizenship jurisdiction dominated, accounting for almost 25% of all civil cases filed in 1950. Cases filed under general local jurisdiction constituted almost 18% of the total.[33]

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33. Rule, *supra* note 26, at 3-4.
It should be noted that the local jurisdiction cases, which arose in the District of Columbia, Alaska, and certain other areas which were not states, were cases which ordinarily would have been handled in state courts. With the granting of statehood to Hawaii and Alaska in 1959 and the creation of the local court system in the District of Columbia in 1970, most of these local cases were removed from the statistics. Consequently, for most purposes of trend analysis and projection, unless otherwise noted, we use figures which exclude local jurisdiction cases.
Rule, *supra* note 26, at 4-5 n.2.

Table 1
Civil Cases Commenced in U.S. District Courts by Decade, 1950 - 1990

Cases Commenced

Basis of Jurisdiction	1950	1960	1970	1980	1990
U.S. plaintiff	17,921	14,986	13,310	39,810	31,763
U.S. defendant	4,508	5,854	11,655	23,818	24,537
United States cases	22,429	20,840	24,965	63,628	56,300
Federal question	6,775	9,207	34,846	64,928	103,938
Diversity of citizenship	13,124	17,048	22,854	39,315	57,183
Admiralty	2,757	3,968	†	†	†
General local jurisdiction	9,537	8,221	4,656	918	458
Private cases	32,193	38,444	62,356	105,161	161,579
Total civil cases filed	54,622	59,284	87,321	168,789	217,879

Percentage Distribution

Basis of Jurisdiction	1950	1960	1970	1980	1990
U.S. plaintiff	32.8%	25.3%	15.2%	23.6%	14.6%
U.S. defendant	8.3%	9.9%	13.3%	14.1%	11.3%
United States cases	41.1%	35.2%	28.6%	37.7%	25.8%
Federal question	12.4%	15.5%	39.9%	38.5%	47.7%
Diversity of citizenship	24.0%	28.8%	26.2%	23.3%	26.2%
Admiralty	5.0%	6.7%	†	†	†
General local jurisdiction	17.5%	13.9%	5.3%	0.5%	0.2%
Private cases	58.9%	64.8%	71.4%	62.3%	74.2%
Total civil cases filed	100.0%	100.0%	100.0%	100.0%	100.0%

Percentage Change over Previous Decade

Basis of Jurisdiction	1950	1960	1970	1980	1990
U.S. plaintiff		-16.4%	-11.2%	199.1%	-20.2%
U.S. defendant		29.9%	99.1%	104.4%	3.0%
United States cases		-7.1%	19.8%	154.9%	-11.5%
Federal question		35.9%	278.5%	86.3%	60.1%
Diversity of citizenship		29.9%	34.1%	72.0%	45.4%
Admiralty		43.9%	†	†	†
General local jurisdiction		-13.8%	-43.4%	-80.3%	-50.1%
Private cases		19.4%	62.2%	68.6%	53.6%
Total civil cases filed		8.5%	47.3%	93.3%	29.1%

† Beginning in 1961, the Administrative Office ceased reporting admiralty cases as a separate jurisdictional basis. Admiralty cases were subsumed under other categories, and cannot be separated using published figures.

In the same year [1950], 36,383 criminal cases were commenced in the federal courts . . . . (See Table 2 for criminal caseload at decade intervals.) These included a heavy load of immigration cases constituting 29% of the criminal caseload.[34] Fraud and other theft constituted almost 25% of the criminal caseload, with the remainder distributed over a wide range of other crimes.[35]

In 1950, the district courts were authorized 221 district judgeships, resulting in 412 filings per judgeship (247 civil and 165 criminal).[36]

Relative to population, the 1950 caseload reflected 35.9 civil filings and 23.9 criminal filings per 100,000 population.

There were 65 authorized circuit judgeships in 1950, with 44 filings per authorized judgeship (2830 appeals were commenced that year of which about 11% were criminal appeals). Table 3 presents various statistics on appellate activity by decade from 1950 to 1990.

There were 3,964 support personnel in the federal judiciary in 1950.[37] The total budget for the judiciary was $23.4 million, which when adjusted for inflation to 1990 dollars, is equivalent to $127 million. Table 4 provides an analysis of supporting personnel and overall judicial budgets by decade from 1950 onward.[38]

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34. Rule, *supra* note 26, at 6.

35. Rule, *supra* note 26, at 6. "Immigration cases peaked in 1951 with 14,931 cases commenced. These cases were apparently dominated by illegal immigrants crossing from Mexico: 97% of the cases commenced were in the southern and western districts in Texas, New Mexico, Arizona, and southern California." Rule, *supra* note 26, at 6 n.3.

36. Rule, *supra* note 26, at 6. "All references to filings per judgeship in this paper are raw filings. No attempt has been made to adjust the case filings using case weights." Rule, *supra* note 26, at 6 n.4.

37. Rule, *supra* note 26, at 6.

Personnel figures include probation, bankruptcy, U.S. commissioner and magistrates staffs, but exclude personnel of the Supreme Court. Personnel figures are for the end of the statistical year, June 30, and come from various editions of the *Annual Report of the Director of the Administrative Office of the United States Courts.* These figures are not published in the statistical appendix of the Report, but, rather, appear in tables contained in the text of the Report.

Rule, *supra* note 26, at 6 n.5.

38. Rule, *supra* note 26, at 6.

Table 2
Criminal Proceedings Commenced in U.S. District Courts by Decade, 1950 - 1990

Proceedings Commenced

Nature of Proceedings	1950	1960	1970	1980	1990
Trans of motor vehicles	2,794	3,796	4,090	381	239
Fraud & other theft	9,056	9,184	9,050	10,645	14,129
Narcotics	2,268	1,535	3,511	3,130	12,226
Liquor	4,013	3,968	1,358	25	9
Immigration laws	10,482	2,293	4,614	1,821	2,317
Other	7,770	7,361	15,479	11,966	17,610
Total criminal	36,383	28,137	38,102	27,968	46,530

Percentage Distribution

Nature of Proceedings	1950	1960	1970	1980	1990
Trans of motor vehicles	7.7%	13.5%	10.7%	1.4%	0.5%
Fraud & other theft	24.9%	32.6%	23.8%	38.1%	30.4%
Narcotics	6.2%	5.5%	9.2%	11.2%	26.3%
Liquor	11.0%	14.1%	3.6%	0.1%	0.0%
Immigration laws	28.8%	8.1%	12.1%	6.5%	5.0%
Other	21.4%	26.2%	40.6%	42.8%	37.8%
Total criminal	100.0%	100.0%	100.0%	100.0%	100.0%

Percentage Change over Previous Decade

Nature of Proceedings	1950	1960	1970	1980	1990
Trans of motor vehicles		35.9%	7.7%	-90.7%	-37.3%
Fraud & other theft		1.4%	-1.5%	17.6%	32.7%
Narcotics		-32.3%	128.7%	-10.9%	290.6%
Liquor		-1.1%	-65.8%	-98.2%	-64.0%
Immigration laws		-78.1%	101.2%	-60.5%	27.2%
Other		-5.3%	110.3%	-22.7%	47.2%
Total criminal		-22.7%	35.4%	-26.6%	66.4%

Table 3
Federal Appellate Activity by Decade, 1950 - 1990

	1950	1960	1970	1980	1990
Appeals	2,830	3,899	11,662	23,200	40,898
Appeals terminated	3,064	3,713	10,699	20,887	38,520
Appeals pending	1,675	2,220	8,812	20,252	32,008
Criminal appeals	308	623	2,660	4,405	9,493
Percentage	10.9%	16.0%	22.8%	19.0%	23.2%
Other appeals	2,522	3,276	9,002	18,795	31,405
Percentage	89.1%	84.0%	77.2%	81.0%	76.8%
Appellate	65	68	97	132	156
Appeals/judgeship	43.5	57.3	120.2	175.8	262.2
Months pending	6.6	7.2	9.9	11.6	10.0

Percentage Change over Previous Decade

	1950	1960	1970	1980	1990
Appeals		37.8%	199.1%	98.9%	76.3%
Appeals terminated		21.2%	188.1%	95.2%	84.4%
Appeals pending		32.5%	296.9%	129.8%	58.0%
Criminal appeals		102.3%	327.0%	65.6%	115.5%
Other appeals		29.9%	174.8%	108.8%	67.1%
Appellate		4.6%	42.6%	36.1%	18.2%
Appeals/judgeship		31.7%	109.7%	46.2%	49.2%

Table 4
Judicial Resources, 1950 - 1990

	1950	1960	1970	1980	1990
Authorized Judgeships	265	294	479	643	727
Judicial Personnel	4,311	5,562	7,395	14,011	22,399
Budget Authority ($000s)	23,425.2	47,267.0	126,648.5	473,761.0	1,423,479.
Price Index	24.1	29.6	38.8	82.4	130.7
Budget Auth. (1990	127,040.4	208,709.4	426,622.7	751,463.1	1,423,479.
%		64.3%	104.4%	76.1%	89.4%
Percentage Change over Previous Decade					
Authorized Judgeships		10.9%	62.9%	34.2%	13.1%
Judicial Personnel		29.0%	33.0%	89.5%	59.9%

† Beginning in 1975, the budget authority for the Judicial branch includes an allocation for cost of space. In order to provide comparability with resource allocations prior to 1975, this amount has been deducted from the budget authority figures for 1975 and all subsequent years.

B. The Sixties

In 1960, over 59,000 civil cases were filed in the district courts. This represents an increase of 8.5% over the 1950 level, and translates to an annual growth rate of slightly less than 1%.[39] For the most part, the distribution of cases showed little significant change from the preceding decade, with the exception of modest decreases in U.S. plaintiff and general local jurisdiction cases.

From 1950 to 1960 there was a decrease of nearly 23% in the number of criminal cases commenced to 28,137. Most of this decrease resulted from the nearly 80% reduction in the number of immigration cases commenced in 1960 as compared with 1950. Otherwise, there was very little change in the general distribution of criminal proceedings relative to the 1950 distribution.

In 1960, there were 245 authorized district judgeships, an increase of 11% over 1950. Filings per authorized judgeship had declined to 357 (242 civil and 115 criminal). This level corresponds to incidence rates per 100,000 population of 32.8 civil cases and 15.6 criminal cases, both rates down from the 1950 levels.

39. Rule, *supra* note 26, at 10.
It should be noted that the amount in controversy threshold applicable to diversity and federal question cases was increased from $3,000 to $10,000 in July, 1958. As a consequence, the level of case filings in these two categories appears to have been depressed by at least 9,000 cases per year, or about 15% of the 1960 level.
Rule, *supra* note 26, at 10 n.6.

By 1960, the number of appeals commenced had increased by about 38% to 3899 and the number of authorized judgeships had increased by less than 5%, from 65 to 68. Consequently, filings per authorized judgeship increased to 57.

. . . .

Between 1960 and 1970, the rate of civil filings increased by 47%, equivalent to a compound growth rate of 3.9%, and more than five times the percentage increase during the previous decade. The growth in civil filings came primarily from increases in private cases, which grew by 62% compared to overall growth of 20% in U.S. cases. The most significant contributing factor to the overall growth in private civil cases commenced was the nearly 16,000 prisoner petitions filed in 1970, a category which accounted for less than 2300 civil cases in 1960.

In the criminal arena, some caseload shifts are evident: proceedings related to liquor violations fell sharply and a shift to narcotics-related activity began to emerge. The total number of criminal filings, at just over 38,000, had rebounded to a level very near that of 1950.

In 1970, criminal cases were filed at a rate of 18.6 per 100,000 population, a 19% increase over 1960. Civil cases were filed at a rate of 42.6 per 100,000 population, an increase of nearly 30% over the 1960 level. With 401 authorized judgeships, the levels of 1970 filings per judgeship were 95 criminal cases, and 218 civil cases, representing slight reductions over 1960 levels.[40]

While expansion of the district court caseload was significant in the 60s, growth of the appellate caseload was explosive: between 1960 and 1970 the number of appeals commenced increased by almost 200%, a compound annual growth rate of 11.5%. In addition, by 1970, criminal appeals constituted nearly 23% of all appeals commenced.

To deal with this flood of appeals, there were 97 authorized circuit judgeships in 1970, up 43% from 1960. However, expansion of authorized circuit judgeships did not keep pace with caseload growth, and appeals per authorized circuit judgeship were more than double the 1960 level.[41]

C. The Eighties

The explosive growth of civil filings in the district courts continued during the 1970s. By 1980 annual civil cases commenced had nearly doubled from the 1970 level. The principal areas of growth were U.S. plaintiff cases for recovery of overpayments and enforcement of judgments, and in federal question cases involving prisoner petitions and suits related to Social Security laws.

By 1980, Federal involvement in auto theft cases had virtually ceased and liquor-related Federal criminal proceedings were virtually nonexistent. The shift in the distribution of criminal proceedings toward both narcotics and white-collar crime,

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40. Rule, *supra* note 26, at 10-11.
The number of authorized district court judgeships was increased by 58 on June 2, 1970, just 28 days prior to the end of the statistical year. Consequently, the figures cited, although correct as of the end of the statistical year, do not accurately reflect the per judgeship caseload which prevailed during the bulk of the year.
Rule, *supra* note 26, at 11 n.7.

41. Rule, *supra* note 26, at 11-12.

especially fraud, continued. Nevertheless, despite a doubling of the U.S. population during the period, the total level of Federal criminal proceedings commenced in 1980 was the lowest [in] 63 years.

These trends are reflected in population incidence ratios which show a 74% increase in the level of civil proceedings per 100,000 population (to 74.1) while the incidence of criminal proceedings fell by nearly one-third to 12.3 per 100,000 population.

By 1980 authorized district court judgeships had expanded to 516 and case filings per judgeship changed dramatically. Civil filings per judgeship nearly doubled over its 1970 level, rising to 327, while criminal filings per judgeship fell by nearly one half to 54. On balance, the growth in authorized judgeships did not keep pace with the growth in new cases: total filings per authorized judgeship rose by about 23% to 381 despite the 29% increase in judgeships. Paralleling the continued rapid growth of the district caseload, the level of appellate filings nearly doubled from 1970 to 1980, with 23,200 appeals commenced, of which 19% were criminal appeals. Caseload per judgeship increased by 46% to 176 as the number of authorized judgeships expanded to 132.

Expansion of the caseload burden in the federal courts was reflected in increased supporting personnel and in expanded budget authority. The number of supporting personnel expanded by almost 90% to 14,011.[42]

D. The Current Period

It is against this background that the 1990s can be understood.

In the decade of the 80s, the civil caseload continued to grow, although the late 80s saw some slackening of the growth in the wave of civil litigation. The level of civil case filings in 1990 was up 29% over the 1980 level, with the growth focused entirely on the private side. Again, one of the principal areas of growth was prisoner petitions, up 83% over 1980 to nearly 43,000.

By 1990, auto theft and liquor had virtually disappeared from Federal criminal proceedings. However, narcotics proceedings increased over the decade of the 1980s by over 300%; narcotics-related criminal proceedings accounted for nearly half of the growth in criminal proceedings from 1980 to 1990.

Relative to population, both civil and criminal case filings rose between 1980 and 1990: civil cases commenced per 100,000 population rose to 86.6 and criminal proceedings increased more than 50% to 19.1 per 100,000.

The size of the district court bench continued to increase, with 575 authorized judgeships in 1990. However, the level of filings per authorized judgeship did not diminish. Indeed, the *civil* filings per judgeship in 1990 (379) [were] almost equal to the *total* filings per judgeship in 1980 (381). Criminal filings per judgeship rose from 54 in 1980 to 81 in 1990, and total filings per judgeship in 1990 [were], at 460, more than 20% higher than in 1980.

The growth of appeals showed some modest abatement in the 1980s as the number of appeals rose 76% to 40,898. The percentage of criminal appeals was again about 23%. At the same time the number of authorized judgeships expanded from

42. Rule, *supra* note 26, at 12-13.

> 132 to 156 [before the bill of 1990 expanded the numbers to 179], an increase of just over 18%. Consequently, per judgeship filings rose again by nearly 50% to 262.[43]

Faced with steady workload increases, the issue of the appropriate mission and size of the federal courts increasingly became a topic of discussion. The "size debate" initiated the discussion over the question – at what point would expansion of judge power become the quantitative change that would prove qualitative for the federal court system?

II. ONE SIZE FITS ALL

A. The Current System

As last amended by Congress in 1990, the Article III federal judiciary is composed of 179 circuit judges and 649 district judges.[44] As indicated in Part I, prior to World War I judicial growth was generally slow. Since 1950, however, the number of district and circuit judgeships has roughly tripled.[45] Since 1964, the Judicial Conference of the United States,[46] the administrative and central policy-making authority of the federal courts, has periodically requested the Congress to authorize additional judgeships based on a "workload formula." This formula assumes that the appropriate workload for a district judge should be determined by an established number of "weighted filings" per year and that the appropriate workload for circuit judges should be determined by a specified number of "merits dispositions." The concepts of "weighted filings" and "merits dispositions" are statistical creations that adjust the number of raw district and circuit court filings in light of the relative burdens that different types of cases impose on judges. These weights are determined by caseload studies conducted for the Judicial Conference Committee on Judicial Resources.

It should be noted, however, that neither districts nor circuits are required to request all of the judgeships allocated to them by the formula, nor is Congress, given the doctrine of Separation of Powers, obligated to grant the Judicial Conference all its requests regardless of how they might be formulated. Based on this system the present allotment of circuit court judges is as follows:[47]

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43. Rule, *supra* note 26, at 13-14.

44. *See* 28 U.S.C. §§ 44(a), 133(a) (Supp. IV 1992). This number includes 13 temporary judges but excludes district judges serving in territorial courts, nine life-tenured judges on the Court of International Trade, 28 U.S.C. § 251 (1988), and senior judges.

45. From 65 to 179 for the circuits and from 212 to 649 for the districts. *See* BERMANT, *supra* note 2, at 4 n.6.

46. 28 U.S.C. § 331 (Supp. IV 1992).

47. *See* 28 U.S.C. § 44 (Supp. IV 1992). As a consequence of the size debate, acting on the recommendation of the Committee of Long Range Planning, chaired by Judge Otto Skopil, the Judicial Conference in September 1993, recommended that the 10 permanent judges requested by the Ninth Circuit be approved as temporary. The Conference then amended its previous request to Congress for additional permanent judges approved in September 1992, to temporary judges as follows: First – 1; Fifth – 1; Sixth – 4; Tenth – 3. *See Judicial Conference Endorses Carefully Controlled Court Growth*, THE THIRD BRANCH (Admin. Office of the United States Courts, Washington, D.C.), Oct. 1993, 1, at 2. Moreover, these figures are for active circuit judges and do not include judges who have opted for senior status.

Circuit Size by Number of Active Judgeships

District of Columbia	12
First	6
Second	13
Third	14
Fourth	15
Fifth	17
Sixth	16
Seventh	11
Eighth	11
Ninth	28
Tenth	12
Eleventh	12
Federal	12

The issue of the size of the appellate bench came to the forefront of debate when, in the March 1993 session, the Judicial Conference charged its Long Range Planning Committee with an interim assignment:

> In response to a request from the Ninth Circuit Court of Appeals for ten additional judgeships, the Judicial Conference determined that, without regard to the merits, it would defer consideration of the request until September 1993, because of the potential impact on the federal judicial system of an expansion of that magnitude.[48]

The addition of ten judges would have increased the Ninth Circuit to thirty-eight active judges. "The Conference decided that the question of whether to limit the size of the federal judiciary should be examined, and it referred this question to the Long Range Planning Committee, in consultation with other committees as appropriate, for study and report to the September 1993 Judicial Conference."[49]

In September of 1993, the Long Range Planning Committee recommended that the Judicial Conference of the United States make no request to Congress for additional permanent circuit judgeships pending reexamination of the process, including the caseload formula and standards for requesting new permanent circuit judgeships, and completion of the Long Range Planning Committee's final recommendations on jurisdiction, structure, and size of the federal courts.[50] The Conference endorsed this recommendation and awaits the results of current studies underway and receipt of the Long Range Planning Committee's final report.

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48. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 16 (Mar. 16, 1993).

49. *Id.*

50. *See* REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON LONG RANGE PLANNING (Sept. 20, 1993) [hereinafter LRPR].

As was pointed out in the Long Range Planning Committee's Interim Report, "[d]ebate over how large to make the federal bench is as old as the first Judiciary Act . . . ."[51]

> The history of the federal courts shows an early pattern of gradual growth and, more recently, a pattern of accelerating growth that promises to continue into the next century. Since 1960, criminal case filings have increased by 72 percent, civil case filings have increased by 283 percent, and appeals have increased by 1,081 percent.[52] In the same time period, the federal judiciary has increased from 73 to 179 judgeships in the courts of appeals, and from 245 to 649 judgeships in the district courts. Throughout this period, concern about the implications of uncontrolled growth of the federal courts has been voiced frequently.[53]
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> In its 1990 report, the Federal Courts Study Committee [hereinafter FCSC] commented on the continued expansion of the federal courts, stating that it was critical to assess how near the judicial system was to the feasible limits on its growth. Although the FCSC did not offer an opinion on the appropriate size of the judiciary, its report noted that "the larger the federal court system becomes, the more difficult it becomes to expand it further without compromising the quality of federal justice."[54] Similarly, the Judicial Conference, acting on the recommendation of its Committee on Judicial Resources, agreed in September 1990 "to support the concept of maintaining a relatively small Article III judiciary through limitations on the jurisdiction and caseload of the courts, but opposed any efforts to set a maximum limit on the number of Article III judgeships."[55]

Pending unforeseen developments, the Long Range Planning Committee's approach of "carefully controlled growth" addresses the current situation, but a residual concern remains over the potential onslaught of new cases. The main source of increased workload begins with jurisdiction. The enlargement of jurisdiction based on Congress's conviction that federal courts are the appropriate place to prosecute an expanding number of crimes, will exacerbate the strain on the federal district and circuit courts.

The strain has been felt most acutely at the appellate level. For that reason, attention has focused on either increasing the number of appellate judges or, in the

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51. *Report of the Subcommittee on the Role of the Federal Courts and their Relationship to the States*, *in* I FCSC WORKING PAPERS 95 (1990) (citing Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 764 (1989)).

52. LRPR, *supra* note 50, at 3.

In the year ending June 30, 1960, 28,137 criminal cases, 59,284 civil cases, and 3,899 appeals were filed. *See* Annual Report of the Director of the Administrative Office of the United States Courts, 1960, Tables B1, C1, and D1. Thirty-two years later, the numbers of filings had risen to 48,366 criminal cases, 226,895 civil cases, and 46,032 appellate cases. *See* Administrative Office of the U.S. Courts, Statistical Tables for the Twelve Month Period Ending June 30, 1992, Tables B-1, C2, and D.

LRPR, *supra* note 50, at 3 n.3.

53. LRPR, *supra* note 50, at 3. "A full presentation of the arguments for and against limiting the size of the federal judiciary can be found in a Federal Judicial Center monograph, *Imposing a Moratorium on the Number of Federal Judges* (1993) . . . ." LRPR, *supra* note 50, at 3 n.4.

54. LRPR, *supra* note 50, at 4 & n.5 (quoting FCSC, *supra* note 12, at 8).

55. LRPR, *supra* note 50, at 4 & n.6 (quoting REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 93 (Sept. 12, 1990)).

words of the FCSC, "the nation may soon have to decide whether to retain the present court structure or adopt a new one."[56] In any event, at some point the addition of judges itself becomes a structural change to the system.

B. The Formula

As a result of Judicial Conference approval of the Long Range Planning Committee's recommendation, the process of how new judgeships are determined is now under reexamination.[57]

> Since 1964, the Judicial Conference has conducted periodic general surveys to determine judgeship needs in the courts of appeals and district courts, followed by comprehensive requests to Congress for creation of new judgeships.[58] For the past 12 years, both circuit and district courts have been surveyed biennially, with the latest survey occurring between August 1991 and June 1992.[59]
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> Survey methodology has steadily evolved over the past three decades. Although the responsible Judicial Conference committee (now the Committee on Judicial Resources) originally determined judgeship requirements based on an ad hoc comparison of relative caseloads, subsequent surveys have included elaborate procedures to ensure more consistent results and allow greater participation by the affected courts. Under current practice, the survey process begins with a questionnaire sent to all chief judges requesting detailed information on their courts' needs for additional judgeships.[60] Following analysis of the questionnaire results and available case statistics, the Subcommittee on Judicial Statistics develops preliminary recommendations which are then disseminated for comment by the circuit judicial councils. Upon receipt of these comments, the subcommittee completes its recommendations and sends them to the full Judicial Resources Committee which, in turn, makes recommendations to the Judicial Conference.
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56. FCSC, *supra* note 12, at 117.

57. The following pages on Methodology for Determining Judgeship Requirements are drawn from Appendix C of the REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON LONG RANGE PLANNING (Sept. 20, 1993) [hereinafter Appendix C].

58. Appendix C, *supra* note 57, at 1.

> Except where usage is necessarily limited by context, the creation of new judgeships includes, for purposes of this discussion, any of the following actions: (1) authorizing a new permanent judgeship; (2) authorizing a new temporary judgeship; (3) converting a temporary judgeship to a permanent position; (4) extending the authorization of a temporary judgeship; and (5) converting a "roving judgeship" assigned to two or more districts to a permanent position assigned to a single district.

Appendix C, *supra* note 57, at 1 n.1.

59. Appendix C, *supra* note 57, at 1. "At first, these surveys were conducted every two years on an alternating schedule. Approximately four years elapsed between the respective surveys of circuit and district judgeships." Appendix C, *supra* note 57, at 1 n.2.

60. Appendix C, *supra* note 57, at 1.

> In addition to statistical support for any judgeship requests, survey questionnaires seek information from individual courts about such ancillary factors as the relative impact of recent legislation, the problems, if any, caused by geographical distances between court locations, any medical difficulties faced by the court's active judges, the extent to which the court relies on the services of senior and visiting judges, the procedures available to meet workload demands in the absence of additional judgeships, and any reasons for not requesting as many additional judgeships as the caseload figures would indicate are needed.

Appendix C, *supra* note 57, at 1 n.3.

In assessing judgeship needs, the Judicial Conference uses a combination of objective criteria and discretionary factors. As an initial matter, the case statistics for each court are examined to determine (a) whether the amount of work in the court requires additional judicial resources[61] and (b) whether any additional judgeships should be authorized on a permanent or temporary basis.[62] In analyzing caseload, the Conference employs threshold values or "benchmarks"—of 400 "weighted filings" per district judgeship[63] and 255 "merits dispositions" per circuit judgeship[64] which reflect the expected annual production of one judge. In general, a new district judgeship is recommended only if a court's weighted filings equal or exceed the benchmark level . . . (and) only if the added (judgeship) will not cause the per-judge caseload to drop below the benchmark level. Conversely, if an additional judgeship is likely to reduce the number of cases to slightly below the benchmark level, or if caseload is unlikely to remain at or above that level (e.g., the court's docket includes a large number of asbestos cases), a temporary judgeship will be requested instead.[65] A new circuit judgeship is recommended if a court's current filings would require merits dispositions per judge greater than the benchmark level.

Application of these benchmarks is only the first step in the analysis of judgeship requirements. In assessing each court's resource needs, the Conference also adheres to informal policies or guidelines intended to uphold local autonomy and avoid unfair, mechanical results. For example, . . . to offset the disproportionate impact of court size, a temporary judgeship may be recommended for a "small" district court (i.e., one with four or fewer judges) even though an extra position is more likely than with a larger court to reduce the weighted filings per judgeship to a level substantially below the benchmark. Similarly, a district court with stable or slowly rising

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61. Appendix C, *supra* note 57, at 2. "The Judicial Conference does not make judgeship recommendations based on projected caseloads; only past trends and current data are used in assessing judicial resource needs." Appendix C, *supra* note 57, at 2 n.4.

62. Appendix C, *supra* note 57, at 2.

Persons appointed to "temporary" circuit or district judgeships are entitled to life tenure during good behavior as required by Article III of the Constitution. A judgeship is considered temporary if Congress stipulates that a subsequent vacancy occurring on the same court cannot be filled, thus ensuring an eventual return to the preexisting number of authorized judgeships.

Appendix C, *supra* note 57, at 2 n.5.

63. Appendix C, *supra* note 57, at 2.

To determine the number of "weighted filings" in a district court, the number of actions filed is adjusted to reflect the relative time burdens imposed on judges by the different types of cases in the court's docket. Until recently, the weight assigned to each case type was derived from information obtained by the Federal Judicial Center in a 1979 study. The adjusted figure is divided by 400 to determine how many district judgeships may be justified by caseload.

Appendix C, *supra* note 57, at 2 n.6.

64. Appendix C, *supra* note 57, at 2.

To determine the number of "merits dispositions" by a court of appeals, the number of cases filed during the most recent year (adjusted to include only one-half of the prisoner petition cases) is multiplied by the average proportion of all appeals terminated in the last five years that were decided on the merits (*i.e.*, based on the substantive rights or obligations of the parties, not on procedural or technical grounds), and then multiplied again by 3 to account for appellate decision-making by three-judge panels. The product of this calculation is divided by 255 to determine how many circuit judgeships may be justified by caseload.

Appendix C, *supra* note 57, at 2 n.7.

65. A temporary judgeship can be created in a variety of ways by Congress, and although the appointment is for the life of the occupant, it is not a permanent additional slot to the circuit, or district court. *See* History of the Authorization of Federal Judgeships Including Procedures and Standards Used in Conducting Judgeship Surveys 14 (unpublished report prepared by the Analysis and Reports Branch, Statistics Division, Admin. Office of the U.S. Courts) [hereinafter History of Federal Judgeships] (on file with the *Mississippi College Law Review*).

workload often has a temporary judgeship converted eventually into a permanent position even though the threshold of 400 weighted filings per judgeship has not been met.

Although statistical benchmarks and policy guidelines play a decisive role in many instances (especially with respect to circuit judgeships), application of these elements is only a point of departure for the ultimate decision. The statistics compiled by the Administrative Office, as well as the survey questionnaires and circuit council reports, also provide data on other pertinent (and variable) factors such as geography, the extent of senior and visiting judge resources, the "mix" of cases, and the use of magistrate judges. This body of information enables the Judicial Conference to exercise discretion in deciding whether a particular court actually needs additional judge power to meet its workload requirements.

Experience with the Current Methodology

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The Judicial Conference has followed the current methodology for evaluating judicial resource needs since 1986. Within that period, a single judgeship bill was enacted, in 1990, which authorized a total of 93 additional circuit and district judgeships (including temporary positions converted to permanent status).[66] Although most of those additions adhered to Judicial Conference recommendations based on the 1986-90 surveys, Congress in some instances added positions for which there was no request and denied positions for which requests had been made.[67]

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The soundness of the methodology has been assessed both inside and outside the judicial branch. Indeed, the 1990 judgeship legislation required the Comptroller General of the United States to review and report to Congress within 18 months on "the policies, procedures, and methodologies used by the Judicial Conference . . . in recommending to the Congress the creation of additional Federal judgeships."[68] The resulting GAO report concluded that the Conference methodology is "reasonable" overall but suggested that the system of time weighting be extended to the benchmark for appellate workload and updated for district court filings.[69]

This criticism of specific criteria but not the basic survey approach can be seen as well in the 1990 report of the Federal Courts Study Committee. The FCSC similarly recommended that the Judicial Conference develop a weighted caseload formula for

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66. Appendix C, *supra* note 57, at 2-3. "*See* Federal Judgeship Act of 1990, Pub. L. No. 101-650, tit. II, 104 Stat. 5089, 5098-5104" [hereinafter Judgeship Act of 1990]. Appendix C, *supra* note 57, at 3 n.8.

67. Appendix C, *supra* note 57, at 3. See History of Federal Judgeships, *supra* note 65, at tbls. 1, 2 (on file with the *Mississippi College Law Review*); BERMANT, *supra* note 2, at 53-54 n.105.

68. Appendix C, *supra* note 57, at 3. Federal Judgeship Act of 1990, 104 Stat. at 5103-04. *See also* S. REP. No. 101-416, 101st Cong., 2d Sess. 33-35 (1990) (discussing appellate judgeship formula). Appendix C, *supra* note 57, at 3 n.10.

69. Appendix C, *supra* note 57, at 3-4. "U.S. General Accounting Office, How the Judicial Conference Assesses the Need for More Judges at 20-21 (Jan. 1993)" [hereinafter GAO Report]. Appendix C, *supra* note 57, at 4 n.11.

determining judgeship needs in the courts of appeals.[70] The Federal Judicial Center, which produced the existing weights for district court filings in 1979, is devising a similar system for analyzing the time burdens imposed by different types of appellate cases . . . .

[In examining] the judgeship recommendations forwarded to Congress since 1986, two trends emerge: (1) the Judicial Conference traditionally approves judgeship requests from the courts of appeals (but those courts typically seek fewer resources than the caseload figures would support);[71] and (2) recommendations for district judgeships are supported primarily by caseload but exceptions are more frequently made to account for unique circumstances in individual courts.[72] These trends are reflected in the most recent judgeship recommendations approved after the 1991-92 judgeship survey. In that survey, four courts of appeals requested a total of ten additional circuit judgeships. All but one were approved (the Tenth Circuit received three of the four positions requested). At the same time, 21 district courts requested 23 additional permanent judgeships, conversion of two temporary judgeships to permanent status, and conversion of two "roving" judgeships to single-district positions; of these, the Conference ultimately recommended five permanent judgeships, 11 temporary judgeships, and conversion of one roving position to a single-district judgeship.[73]

In September 1993, the Conference converted its previous request for nine permanent circuit positions to temporary and authorized ten new temporary appellate requests for the Ninth Circuit.[74] In the end, the Conference has great authority to help shape the debate on the creation of judgeships, but the ultimate authority rests with Congress.

III. Structural Alternatives for Change of the Appellate Structure

A. Structural Change Proposals

If the size of the federal judiciary is to remain basically unchanged, then the only other available response to steadily increasing caseloads is structural change. Since at this time, as reflected in the statistics in Part I, the most extreme pressure is being felt in the circuit courts of appeal, this section will explore some of the

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70. Appendix C, *supra* note 57, at 4 (citing FCSC, *supra* note 12, at 111-12).

Concerns have also been raised about the present formula because the "merits disposition" statistics occasionally omit proceedings in which circuit judges devote substantial time to reviewing the merits in advance of disposing of a case on procedural grounds. *See* Statement of the Hon. Wilfred Feinberg to the Federal Courts Study Committee, Jan. 30, 1990, and Appendix A thereto by Vincent Flanagan. Appendix C, *supra* note 57, at 4 n.12.

71. Appendix C, *supra* note 57, at 4. "*See* History of Federal Judgeships, *supra* note [65], Table 1; Report of the Proceedings of the Judicial Conference of the United States, Sept. 22, 1992, at 69-71; Report of the Judicial Resources Committee, Sept. 1992, at 2 [on file with the *Mississippi College Law Review*]; GAO Report, *supra* note [69], at 18-19." Appendix C, *supra* note 57, at 4 n.13.

72. Appendix C, *supra* note 57, at 4. "GAO Report, *supra* note [69], at 10-18." Appendix C, *supra* note 57, at 4 n.14.

73. Appendix C, *supra* note 57, at 4.

74. *Judicial Conference Endorses Carefully Controlled Court Growth*, The Third Branch (Admin. Office of the United States Courts, Washington, D.C.), Oct. 1993, 1, at 3.

main alternatives that have been put forward to allow those courts to function effectively.[75]

In addressing the appellate caseload crisis, the FCSC stated its belief that "the nation may soon have to decide whether to retain the present court structure or adopt a new one."[76] Although the FCSC refrained from endorsing any specific structural changes in the courts of appeal, its report identified for further study and analysis a variety of alternative appellate structures.[77]

Other ideas for structural change that have been advanced include discretionary review in the courts of appeal, appellate commissioners at the circuit level, "floating" judgeships that are assigned and reassigned to meet shifting workload burdens, additional Article I courts of specialized jurisdiction, and alternative dispute resolution forums annexed to the appellate courts.[78] Additionally, any review of structure should include exploration of possible mechanisms for reducing the impact of lengthy judicial vacancies.

As pointed out by the FCSC, the courts of appeal have continued to demonstrate at least five fundamental characteristics since their creation in 1891:

(1) appeal from the district court is of right;

(2) the courts are still geographically based;

(3) the number of circuits is still closely tied to the number of Supreme Court Justices;

(4) the three judge panel is still the basic decisional unit; and

(5) they are the only courts between the district and the Supreme Court.[79]

In assessing the competing plans that have been put forward to restructure the circuit courts, these five fundamental characteristics will be discussed since they define the very structure of the current appellate process.

Size and Configuration of the Courts of Appeals

In general, the system of regional courts of appeal has served the country well since its inception just over 100 years ago.[80] By allowing the development of federal law on a circuit-by-circuit basis subject to discretionary Supreme Court review, the current system has struck an appropriate balance between national uniformity and regional diversity. Although a variety of alternative appellate structures (e.g., national subject-matter courts, a centralized national court of appeals or national court with regional divisions, "jumbo" circuits, multiple tiers combining these elements) have been advocated to increase functional capacity,[81] a recent Federal Judicial Center report concludes that basic structural change is

75. Recent documents include the FCSC, *supra* note 12, and FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES (1993) [hereinafter STRUCTURAL ALTERNATIVES].

76. FCSC, *supra* note 12, at 117.

77. *See* FCSC, *supra* note 12, at 109-31.

78. *See* STRUCTURAL ALTERNATIVES, *supra* note 75.

79. FCSC, *supra* note 12, at 113.

80. *See* Evarts Act, ch. 517, § 2, 26 Stat. 826 (1891).

81. *See* FCSC, *supra* note 12, at 109-31.

unlikely to provide significant relief to the stresses posed by continuing expansion of federal jurisdiction without concomitant increases in judicial resources.[82] Indeed, the Center's analysis of the various alternative models reveals that adopting another structural model might simply produce different problems whose impact would be difficult to anticipate.[83] In short, as is often the case in reform, the chief cause of future problems are today's solutions.

The FCSC Report recommended that, in the ensuing five years, "Congress, the courts, bar associations and scholars" should give "careful attention" to "fundamental structural alternatives."[84] The FCSC identified five alternative structures for possible study:

(1) Multiple Circuit Appellate Courts Functioning as a Unified Court;
(2) Four-Tiered System;
(3) National Subject-Matter Courts;
(4) A Single Centrally Organized Court of Appeals;
(5) Five Jumbo Circuits.[85]

The FCSC declined to endorse any of these alternatives, since the committee recognized that massive restructuring of the courts of appeal would, by definition, entail substantial disruption of the present system, and the FCSC would not propose it until the alternatives had been carefully and comprehensively analyzed.[86]

More recently the Judicial Conference Committee on Court Administration and Case Management, chaired by Judge Robert M. Parker (Parker Report), recommended retaining the current system of courts of appeal based on geographic circuits, but with the number of circuits reduced and circuit boundaries realigned.[87] The Parker Report stated that "the percolation of law that is afforded by consideration of issues in multiple circuits outweighs the benefits that accompany either national or specialized courts of appeals."[88]

Although no change has occurred in the basic structure of the courts of appeal since 1891, the idea of revising circuit boundaries where necessary is hardly extreme in the overall historical context. During the past 204 years, Congress has acted a number of times to realign the judicial circuits in whole or in part.[89]

What follows is an outline of Congressional action, first to establish three circuits in 1789, and subsequently to alter that structure to keep pace with the

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82. *See* STRUCTURAL ALTERNATIVES, *supra* note 75.

83. As explained below, there are serious concerns about specialized subject-matter tribunals that counsel against use of that model in structuring new or reconstituted Article III courts.

84. FCSC, *supra* note 12, at 116-17.

85. FCSC, *supra* note 12, at 118-23.

86. FCSC, *supra* note 12, at 117.

87. REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT TO THE JUDICIAL CONFERENCE COMMITTEE ON LONG RANGE PLANNING (Feb. 16, 1993) [hereinafter PARKER REPORT].

88. PARKER REPORT, *supra* note 87, at 7.

89. From this history, it is interesting to note the number of occasions in which states were shifted from one regional grouping to another. For example, New York was initially placed in a "New England" circuit including Massachusetts and New Hampshire, while Delaware was passed back and forth between what are now the Third and Fourth Circuits, and Indiana was aligned at various times with Michigan and/or Ohio.

country's geographic expansion, shifts in population, and the attendant growth and movement of federal court business.[90]

B. Alignments of Federal Judicial Circuits Since 1789[91]

1. Act of Sept. 24, 1789[92]

Established three circuits:[93]
Eastern: New Hampshire, Massachusetts, Connecticut, and New York
Middle: New Jersey, Pennsylvania, Delaware, Maryland, and Virginia
Southern: South Carolina and Georgia

2. Act of Feb. 13, 1801[94]

Redivided the country into six circuits:
First: New Hampshire, Massachusetts, and Rhode Island
Second: Connecticut, Vermont, and New York
Third: New Jersey, Pennsylvania, and Delaware
Fourth: Maryland and Virginia
Fifth: North Carolina, South Carolina, and Georgia
Sixth: Tennessee, Kentucky, and Ohio[95]

3. Act of Apr. 29, 1802[96]

Replaced the 1801 alignment with a different set of six circuits:
First: New Hampshire, Massachusetts, and Rhode Island
Second: New York, Connecticut, and Vermont
Third: New Jersey and Pennsylvania
Fourth: Maryland and Delaware
Fifth: Virginia and North Carolina
Sixth: South Carolina and Georgia

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90. *See* ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 35-40 (Oceana Pub. 1987).

91. "This table includes instances in which Congress established and revised circuit boundaries generally, not the addition of new states or territories to existing circuits – a frequent occurrence throughout the 19th century." *See* Internal Memorandum Long Range Planning Office, from Jeffrey A. Hennemuth (Oct. 5, 1993) (on file with the *Mississippi College Law Review*) [hereinafter Hennemuth].

"When reviewing historical developments, the reader should keep in mind that the adjudicative and administrative character of the judicial circuits has changed dramatically since establishment of the federal courts of appeals in the Evarts Act." Evarts Act., ch. 517, § 2, 26 Stat. 826 (1891). *See* Hennemuth, *supra*.

92. Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 73, 74.

93. The districts of Maine and Kentucky (parts of the states of Massachusetts and Virginia, respectively) were part of no circuit; their district courts exercised both district and circuit court jurisdiction. *See* Russell R. Wheeler and Cynthia Harrison, *Creating the Federal Judicial System* (Federal Judicial Center 1989) at 5.

94. Act of Feb. 13, 1801, ch. 4, § 6, 2 Stat. 89, 90.

95. Although this act mentioned the district of Ohio (which was still a territory in 1801), the subsequent practice during the 19th century was to exclude from the circuit system those judicial districts that were outside the existing states. For similar reasons, the district of Maine (which in 1801 remained part of Massachusetts though not geographically contiguous) was generally excluded from the First Circuit until the State of Maine was admitted to the Union in 1820. *See* Hennemuth, *supra* note 91.

96. Act of Apr. 29, 1802, ch. 31, § 4, 2 Stat. 156, 157.

4. Act of Feb. 24, 1807[97]

Seventh Circuit: Created consisting of Ohio, Kentucky, and Tennessee

5. Act of Mar. 3, 1837[98]

Seventh Circuit: Realigned to include Ohio, Indiana, Illinois, and Michigan; and created two additional circuits –
Eighth: Kentucky, Tennessee, and Missouri
Ninth: Alabama, Eastern District of Louisiana,[99] Mississippi, and Arkansas

6. Act of Aug. 16, 1842[100]

Fifth: Added Alabama and Louisiana; Reassigned the former states (Virginia and North Carolina) to the
Fourth: Virginia added
Sixth: North Carolina added

7. Act of July 15, 1862[101]

Realigned six of the existing circuits:
Fourth: Delaware, Maryland, Virginia, and North Carolina
Fifth: South Carolina, Georgia, Florida, Alabama, and Mississippi
Sixth: Louisiana, Texas, Arkansas, Tennessee, and Kentucky
Seventh: Ohio and Indiana
Eighth: Michigan, Wisconsin, and Illinois
Ninth: Minnesota, Iowa, Missouri, and Kansas

8. Act of Jan. 28, 1863[102]

Transferred Indiana from the Seventh Circuit to the Eighth Circuit
Transferred Michigan from the Eighth Circuit to the Seventh Circuit

9. Act of Mar. 3, 1863[103]

Tenth Circuit created consisting of California and Oregon

10. Act of July 23, 1866[104]

Reduced the number of circuits from ten to nine, and realigned boundaries:
First: remained the same (Maine, Massachusetts, New Hampshire, and Rhode Island)

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97. Act of Feb. 24, 1807, ch. 16, § 2, 2 Stat. 420, 420.

98. Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176, 176-77.

99. Until the realignment of 1862, Congress occasionally excluded from the circuit system entire states or districts within states, typically on the frontier. In the excluded areas, the district court also exercised circuit court jurisdiction.

100. Act of Aug. 16, 1842, ch. 180, § 1, 5 Stat. 507, 507.

101. Act of July 15, 1862, ch. 178, § 1, 12 Stat. 576, 576.

102. Act of Jan. 28, 1863, ch. 13, 12 Stat. 637, 637.

103. Act of Mar. 3, 1863, ch. 100, § 2, 12 Stat. 794, 794.

104. Act of July 23, 1866, ch. 210, § 2, 14 Stat. 209, 209.

Second: remained the same (Connecticut, New York, and Vermont)
Third: New Jersey, Pennsylvania, and Delaware
Fourth: Maryland, West Virginia, Virginia, North Carolina, and South Carolina
Fifth: Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas
Sixth: Michigan, Ohio, Kentucky, and Tennessee
Seventh: Wisconsin, Illinois, and Indiana
Eighth: Minnesota, Iowa, Missouri, Kansas, and Arkansas
Ninth: California, Oregon, and Nevada

11. Act of Feb. 28, 1929[105]

Divided the Eighth Circuit into two circuits:
Eighth: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota
Tenth: Kansas, Oklahoma, Wyoming, Colorado, Utah, and New Mexico

12. Act of July 24, 1948[106]

Recognized the District of Columbia as a judicial circuit

13. Fifth Circuit Court of Appeals Reorganization Act of 1980[107]

Divided the Fifth Circuit into two circuits:
Fifth: Louisiana, Mississippi, Texas, and the Canal Zone
Eleventh: Georgia, Florida, and Alabama

14. Federal Courts Improvement Act of 1982[108]

Federal Circuit: Created a new circuit with nationwide subject-matter jurisdiction in certain classes of cases.

Despite this record of adaptation to changed circumstances, the present arrangement of circuits (apart from the Tenth, Eleventh, and D.C. Circuits) derives from legislation enacted in 1866.[109] The intervening years have reshaped the country in countless ways, but the geographical circuit boundaries have remained largely the same for reasons of politics, federalism, and economy. As a result, seven of the twelve regional circuits can still be found east of the Mississippi River, even though they account for less than half (47.6%) of the appellate caseload nationwide. The individual courts of appeal also vary widely in size, from six judges at the First Circuit (covering four New England states) to twenty-eight judges at the Ninth Circuit (covering nine large western states plus territories).[110]

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105. Act of Feb. 28, 1929, ch. 363, § 1, 45 Stat. 1346, 1346-47.

106. Act of July 24, 1948, ch. 646, § 41, 62 Stat. 869, 870.

107. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, § 2, 94 Stat. 1994, 1994.

108. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 104, 96 Stat. 25, 25.

109. Act of July 23, 1866, ch. 210, § 2, 14 Stat. 209.

110. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES tbl. S12 (1990).

There are also significant inter-circuit disparities in both the numbers of case dispositions per judge and the methods of case management.

If alterations in the geographic structure of appellate review are warranted, it would be appropriate to redraw circuit boundaries so that the geographic alignment of circuits would continue to ensure (1) reasonable proximity to court facilities for purposes of access and administration, (2) relatively even distribution of appellate workload nationwide, and (3) equitable representation and participation in judicial governance. Ideally, the size of an individual court of appeals would be structured not to exceed its capacity to maintain coherence and consistency in decision making and preserve judges' collegiality and ability to stay abreast of developing circuit law.

It is interesting to note that although the FCSC Report made no recommendation on circuit size, it stressed the following principles:

> Tribunals of seventeen, much less twenty-four, sitting in panels of three, may resemble a judgeship pool more than a single body providing unified circuit leadership and precedent. Still, large courts such as these may be workable. Whether tribunals of thirty or forty judges will be workable is more problematic. The question is not simply one of administration but of the effect, both within the circuit and nationally, of so many uncoordinated opinions from so many judges. Whether these will breed litigation and incoherence or, as some believe, will cause no serious problem, are questions for further study.[111]

While the Parker Report recommended that "the circuits be realigned to create ten circuits that will evenly distribute the national appellate caseload," and "[e]ach court of appeals should have twelve Judges," the savings to the system that this process would engender were not specified.[112] The concept of "jumbo" or "realigned" circuits due to the historic role of federalism sparks heated debate among practitioners since it raises the question to what extent the regions reflect regional values versus national power.[113]

C. Appellate Review

While not constitutionally mandated, the right to at least one appeal from the judgments and other appealable orders of courts of original jurisdiction has been fundamental to the Anglo-American concept of justice and deeply embedded in the culture of bench and bar. The twin purposes of appellate review – correcting errors and declaring the law – have been viewed as necessary to maintain quality in adjudication and a coherent, consistent body of precedent for later courts to follow.[114] Any attempt to move to a more "discretionary" review, as now practiced by the Supreme Court would radically change the nature of appellate practice and the essence of the caseload crunch. The FCSC did not address this issue expressly,

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111. FCSC, *supra* note 12, at 114.

112. PARKER REPORT, *supra* note 87, at 7.

113. *See* Gerald Bard Tjoflat, *More Judges, Less Justice*, 79 A.B.A. J. 70, 72 (July 1993).

114. *See* STRUCTURAL ALTERNATIVES, *supra* note 75.

though the centrality of the concept is such that the other recommendations in its report presuppose that Article III appellate review would continue to be freely available.[115]

The Parker Report, on the other hand, recommended adoption of a two-track method of appellate review: (1) initial summary review (in all cases) of concise (fifteen-page maximum) briefs with limited appendices/record excerpts; and (2) plenary review (in selected cases) with supplemental briefing and, at the court's option, oral argument on one or more specified issues.[116] In making the recommendation, the committee rejected the idea of providing only discretionary review on grounds that the courts of appeal "have traditionally been courts concerned with error correction."[117] The committee did, however, urge that either discretionary review or a district court appellate division be provided if the recommended case management method were rejected or proved unavailing.[118] Although the committee contends that the proposal is not discretionary review, some have understood the first track as being analogous to the Supreme Court's process of certiorari.

D. A Fourth Tier

While serious concerns exist at the trial level over workload, particularly with expanded jurisdiction, the strain facing the federal courts is becoming most acute in the courts of appeal. To preserve the tradition of appeal by right, if the volume continues to increase, some have argued it may be necessary to provide an alternative mechanism for initial appellate review that requires less circuit judge participation and makes greater use of district judges whose courts are not as busy, or another tier of appellate judges.[119] Since the effectiveness and impact of this approach is difficult to anticipate, the goal would be to allow the right of appeal while allowing for a procedure that could either designate some cases for immediate review by the second level, or a "quasi" form of certiorari.

While the FCSC identified various structural alternatives for appellate review, including a four-tiered system with appeals as of right to regional appellate divisions of nine to ten judges, it declined to endorse any of them.[120] The creation of an appellate section of the district court might be a "workable solution" to the workload crisis in the courts of appeal, but it would probably require additional district judges. To proponents, the advantage of this fourth tier between district courts and

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115. *See generally* FCSC, *supra* note 12. Although, Judge Weis's dissenting proposal in the FCSC report recommended that Social Security disability claims adjudicated by administrative law judges should be reviewable initially by an administrative appeals board similar to the Benefits Review Board established for black lung benefit and longshore workers' compensation cases, then be afforded review as of right in the district courts, followed by discretionary review on questions of law in the courts of appeal and Supreme Court. FCSC, *supra* note 12, at 58-59.

116. PARKER REPORT, *supra* note 87, at 8-9.

117. PARKER REPORT, *supra* note 87, at 8-9.

118. PARKER REPORT, *supra* note 87, at 9.

119. *See generally* FCSC, *supra* note 12.

120. FCSC, *supra* note 12, at 117.

circuit courts is that it maintains the right of appeal while diverting cases from the circuit courts' calendars.[121]

E. Intercircuit Conflict

An issue that has been tied to the creation of more circuits, or more tiers, is the effect on "intercircuit conflict." In a study of intercircuit conflicts sponsored by the Federal Judicial Center, Professor Arthur D. Hellman of the University of Pittsburgh School of Law has found meager empirical evidence of persistent outcome-controlling conflicts: out of 142 instances in which an intercircuit conflict was denied review during recent Supreme Court terms, only forty disputes ultimately remained unresolved, continued to produce litigation, and controlled the outcome in one or more reported cases.[122] According to Professor Hellman, this lack of evidence suggests (at least preliminarily) that ours is not "a system that is jammed at the top."[123] Indeed, the fact that certiorari has been granted in substantially fewer cases in the past several years indicates a sufficient Supreme Court capacity to resolve intercircuit conflicts.[124] According to this perspective, so long as these conditions persist, it seems unnecessary to add another layer of appellate review in order to resolve this problem.[125]

The FCSC did not favor creation of a "national intermediate court of appeals" as proposed in 1975 by the Hruska Commission,[126] and recommended that Congress authorize a "five-year, experimental pilot project to resolve some intercircuit conflicts, during which the Supreme Court could refer selected cases (presenting intercircuit conflicts to different courts of appeals en banc for final disposition) and creation of national precedent."[127] It also recommended that the Federal Judicial Center undertake the above-mentioned study of the number, frequency, and "tolerability" of intercircuit conflicts.[128]

Although the Parker Report did not specifically address the idea of creating a separate tier of review between the geographic circuits and the Supreme Court, its recommendation to establish a maximum of ten circuits was intended to reduce the

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121. FCSC, *supra* note 12, at 119-20.

122. STRUCTURAL ALTERNATIVES, *supra* note 75, at 65 (citing Arthur D. Hellman, Unresolved Intercircuit Conflicts: The Nature and Scope of the Problem, Second Interim Report, Phase II (1993)) (unpublished manuscript, on file with the author).

123. STRUCTURAL ALTERNATIVES, *supra* note 75, at 65 (quoting Arthur D. Hellman, Unresolved Intercircuit Conflicts: The Nature and Scope of the Problem, Second Interim Report, Phase II (1993)) (unpublished manuscript, on file with the author).

124. For example, the Court granted 116 petitions for certiorari during the 1992-93 Term: a 42.8% decrease from the 187 cases in which review was granted during the 1985-86 Term. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. A1 (1993).

125. The Supreme Court might, however, undertake changes in its work methods—e.g., granting review more frequently to resolve or prevent intercircuit conflicts, providing clearer and more certain opinions—to help ease the workload burdens on the lower federal courts. *See generally* Roger J. Miner, *Federal court reform should start at the top*, 77 JUDICATURE 104 (Sept./Oct. 1993).

126. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, *reprinted in* 67 F.R.D. 195 (1975) (popularly known as the Hruska Commission Report).

127. FCSC, *supra* note 12, at 126.

128. FCSC, *supra* note 12, at 126.

number of intercircuit conflicts, presumably eliminating the need for any "national court of appeals."[129]

F. Courts of Specialized Jurisdiction

Concerns about the need for greater uniformity of national law occasionally give rise to proposals for routing certain matters (e.g., administrative cases) to courts whose subject-matter jurisdiction is more narrowly defined than that of district courts and circuit courts of appeal. There has been positive experience with such courts in exceptional circumstances (e.g., the Court of Appeals for the Federal Circuit and the Court of International Trade). Historically judges have opposed this approach however, since the putative benefits of specialization are typically overshadowed by loss of the broader experience that judges gain on courts of more generalized jurisdiction, a critical factor when one considers the interrelationship between the various areas of law. Moreover, the vaunted expertise and doctrinal uniformity of specialized courts can be a "two-edged sword" since it may also inhibit selection of judicial appointees, frustrate growth in the law, and, because some parties would litigate there repeatedly, raise possible questions about the court's fairness and credibility. In the literature of political science this is referred to as the "capture thesis" whereby those being regulated begin influencing the regulators.[130]

The FCSC rejected the idea of consolidating review of federal administrative agency orders in a special Article III "court of administrative appeals," but recommended an Article III appellate division of the Tax Court, as well as a study of various models for appellate restructuring, including the establishment of several national courts with jurisdiction to review district court judgments in Social Security, admiralty, labor, tax, civil rights, and other specialized cases, respectively.[131] The Parker Report, reflecting the belief in non-specialization, endorsed the value that having legal questions "percolate" through review in multiple circuits outweighs the putative advantages of courts with specialized jurisdiction.[132]

G. Alternative Dispute Resolution

Short of restructuring, Alternative Dispute Resolution [hereinafter ADR], in all of its forms, is a mechanism that has the advantage of utilizing judge time to its maximum efficiency. A number of circuits have instituted various ADR programs and staff to eliminate a substantial number of cases from their dockets and scale down the size and complexity of others presented for decision.[133] Techniques include: preliminary jurisdictional analysis, screening cases for oral argument, weighting cases based on complexity, motion handling, and unpublished

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129. PARKER REPORT, *supra* note 87, at 7.

130. THEODORE LOWI, THE END OF LIBERALISM (Norton Pr. 1979).

131. FCSC, *supra* note 12, at 10-26.

132. PARKER REPORT, *supra* note 87, at 7.

133. *See, e.g.*, ANTHONY PARTRIDGE & ALLAN LIND, FEDERAL JUDICIAL CENTER, A REEVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN (1983).

decisions.[134] Due to the peculiarities among circuits, these methods are not employed in all courts. Although it may be argued that some basic changes in structure are needed to expand the federal courts' ability to keep pace with increasing circuit court workload demands, while at the same time preserving their traditional excellence, ADR advocates contend that the present courts of appeal have greater functional capacity than is currently being utilized.[135] The issue often raised by expanded use of ADR concerns access to Article III judges.[136]

Recognizing the advantages of such ADR programs, the FCSC suggested that: (1) a Judicial Conference committee conduct an in-depth evaluation of the costs of pro se litigation to the litigants and the courts, and recommend to the Conference methods to reduce those costs and to improve the efficiencies of dispensing justice in those cases, and (2) the Judicial Conference conduct an intercircuit study, perhaps under the aegis of the Federal Judicial Center, of the most effective appellate case management techniques, and provide a means for the courts regularly to exchange case management information, experience, and ideas.[137]

Naturally, ADR has engendered a great deal of debate, but it is an approach that is still being studied and evaluated.[138] Interestingly, the Parker Report, in advocating a two-track method for more efficient judicial handling of appellate caseloads, made no recommendation with respect to ADR. Some circuits have settled a significant percentage of their cases through settlement or mediation programs and other improvements in case management.[139] As part of its study of appellate restructuring, the Federal Judicial Center will provide in its upcoming reports continuing evaluation of existing programs in the circuits to improve case management efficiencies.

IV. SCENARIOS, TRENDS, AND FORECASTS

The debates over size and structure of the federal courts may be placed in context by an examination of the proposals to reduce workload by case diversion: eliminate diversity jurisdiction; restrict federal remedies by encouraging state exhaustion; reintroduce and raise amount-in-controversy requirements; and establish discretionary jurisdiction in district courts for limited types of cases. But these proposals usually require congressional action which is not always forthcoming. Therefore, another way to illuminate these debates over size and structure is by examining responsible caseload trends and forecasts without any techniques of diversion. By disaggregating the case mix an alternative view emerges.

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134. *See* STRUCTURAL ALTERNATIVES, *supra* note 75, at 50-53.
135. FCSC, *supra* note 12, at 84.
136. FCSC, *supra* note 12, at 84.
137. FCSC, *supra* note 12, at 82-86.
138. FCSC, *supra* note 12, at 82-86.
139. FCSC, *supra* note 12, at 82-86.

Yet what do the trends portend? In the language of futurologists, one refers to the concept of "scenario."[140] A scenario is defined by Peter Schwartz as

> a tool for ordering one's perceptions about alternative future environments in which one's decisions might be played out. Alternatively: a set of organized ways for us to dream effectively about our own future . . . [t]hese stories are built around carefully constructed "plots" that make the significant elements of the world stand out boldly.[141]

To conceive of the future,

> to operate in an uncertain world, people need to be able to *reperceive*—to question their assumptions about the way the world works, so that they see the world more clearly. The purpose of scenarios is to help yourself change your view of reality—to match it up more closely with reality as it is, and reality as it is going to be.[142]

In this way scenarios "are not about predicting the future, rather they are about perceiving futures in the present."[143]

Employing such a strategy, we have conceived three basic scenarios for the federal courts: (1) jurisdiction in federal court is expanded, more cases are brought in district court, more appeals are taken, and more techniques of case diversion are utilized as the system becomes severely overstrained; (2) jurisdiction in federal courts is restricted, the "techniques of diversion" are successful, and the courts return to being a special forum for adjudication; and (3) federal court jurisdiction remains more or less the same, increases in case filings are incremental accompanied by moderate growth in judgeships with a gradual reorganization of circuits in size and geographical configuration. In the remainder of this paper we will examine the first and most pessimistic scenario.

A. Trends

The Part I analysis of case filings at ten year increments provided an insight into the rate of growth in demand for judicial resources since World War II. However, examination of the record from 1950 to 1992, when combined with standard techniques of regression, results in an expanded view of developments.

A statistical analysis of the observable trends in the major series was performed by the Administrative Office's Long Range Planning Office using both linear and exponential trend regression models.[144] The data was analyzed to reveal what factors help explain the growth patterns.

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140. PETER SCHWARTZ, THE ART OF THE LONG VIEW (Doubleday 1991).

141. *Id.* at 4.

142. *Id.* at 9.

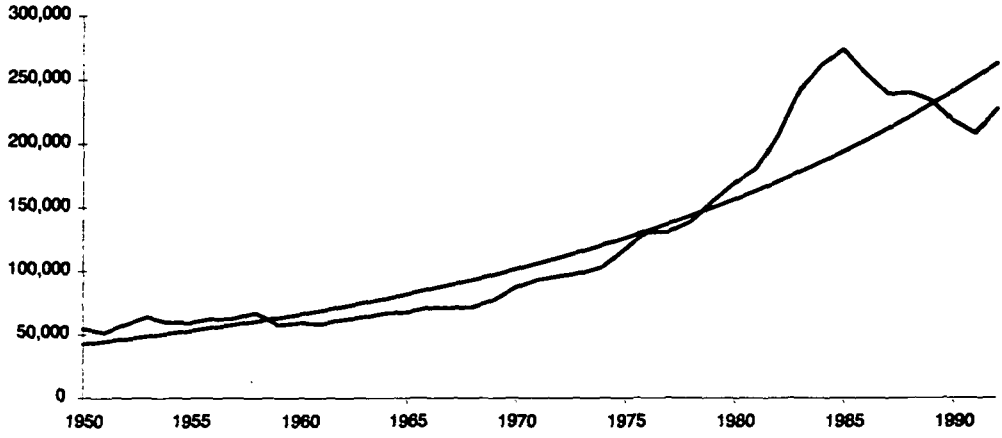
143. *Id.* at 38.

144. Rule, *supra* note 26, at 15.

> The former technique attempts to fit a straight line to the data, while the latter fits a constant growth rate line to the data. Both techniques were applied to each series and the technique which provided a better statistical "fit" to the data was selected as the relevant trend model. In virtually all cases, the dominant model was the exponential model, *i.e.*, the constant growth rate model.

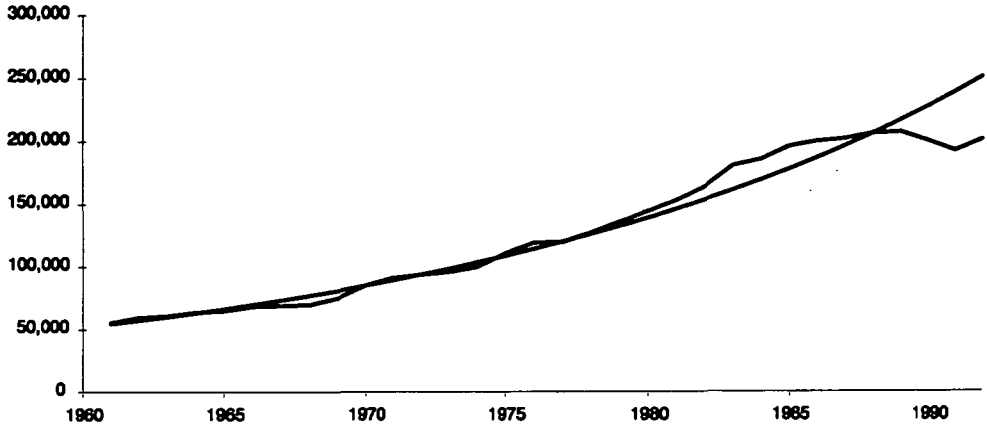
Rule, *supra* note 26, at 15 n.8.

Figure 4
Total Civil Cases Commenced, 1950 - 1992



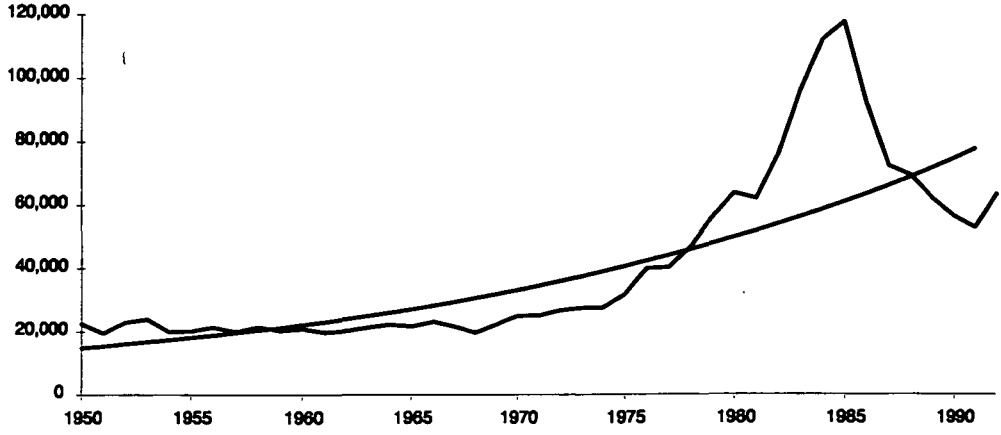
Total civil cases commenced exhibits [sic] a trend rate of growth of 4.4% over the 1950-1992 period. However, as is evident in Figure 4, the number of civil cases commenced rose dramatically above the trend line in the 1981-1988 period. Examination of the underlying data indicates a very significant increase in recovery and enforcement actions during this period which is apparently attributable to federal efforts aimed at recovery of veterans' benefits overpayments as well as student loans. In addition, there was a surge of social security cases during this period which nearly doubled the number of such cases filed annually. When total civil filings are reduced by these unusual departures from trend, the level of civil filings exhibits a much more stable growth rate as is clear in Figure 5. Moreover, the overall growth rate for the adjusted civil filings series is 5.0% per year, at which rate the number of such filings will double every 14 years.

Figure 5
Civil Cases Net of Social Security and Recovery Cases, 1961 - 1992



U.S. civil filings, shown in Figure 6, clearly show the effects of the recovery of overpayments/ enforcement of judgments and social security filings referred to above.[145]

Figure 6
U.S. Civil Cases Commenced, 1950 - 1992



When the U.S. civil cases commenced data is reduced by the combined effect of recovery/enforcement and Social Security cases, the overall growth rate in net U.S. cases is 3.0% per year. (See Figure 7.)

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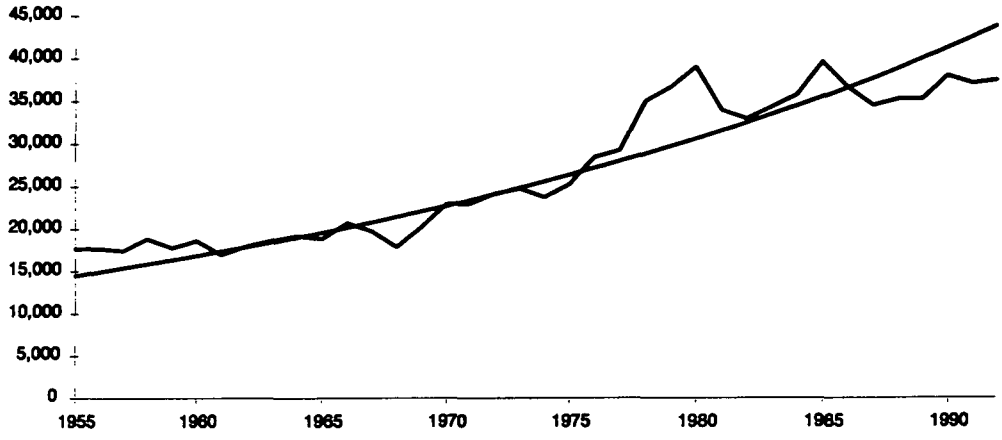
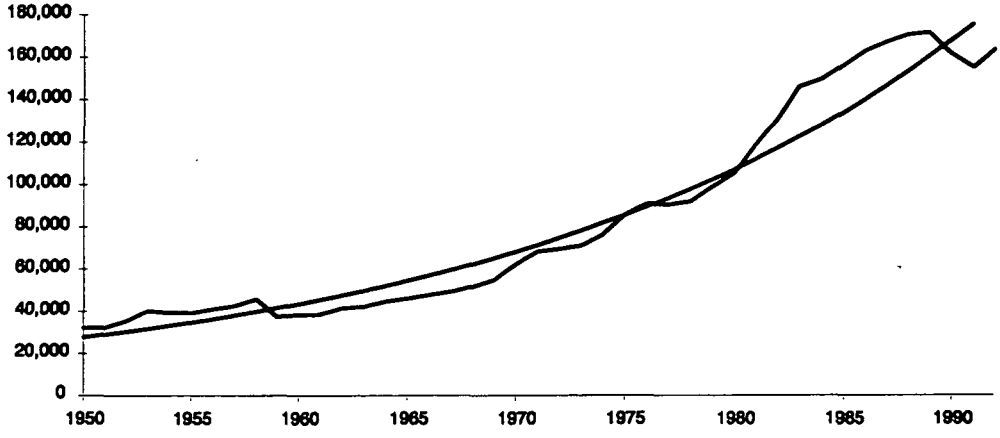
145. Rule, *supra* note 26, at 15-16. "All Social Security cases are classified as U.S. cases. Virtually all recovery/enforcement cases are U.S. cases: in 1992 less than 0.9% (149 of 17,475) were private cases." Rule, *supra* note 26, at 16 n.9.

Figure 7
U.S. Cases less Social Security and Recovery Cases, 1950 - 1992



Private civil cases (Figure 8) show a somewhat higher trend rate of growth of 4.6% compared to adjusted U.S. civil cases. However, private civil filings should be analyzed in terms of its component parts, diversity cases and federal question cases, in order to gain a clearer picture of the dynamics of federal private civil litigation.

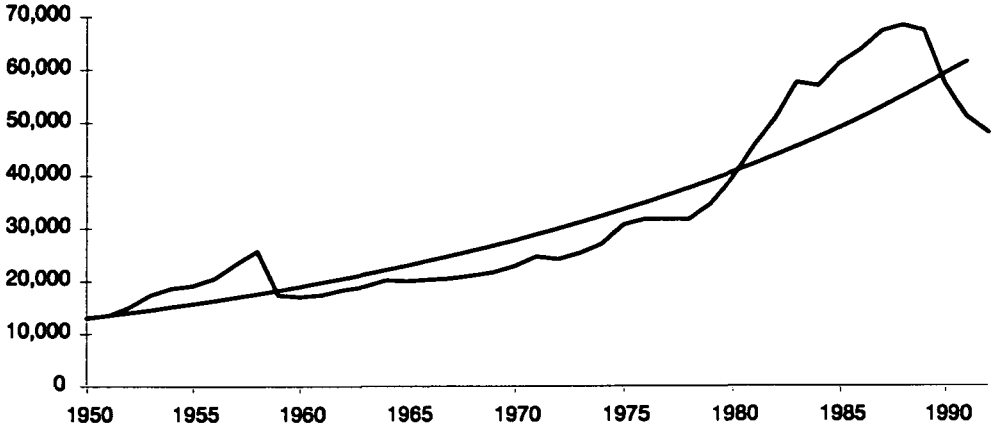
Figure 8
Private Civil Cases Commenced, 1950 - 1992



Diversity cases exhibit a trend rate of growth through the 1950-1992 period of 3.9% per year. As can be seen in Figure 9, the consistent overall growth in diversity cases has been interrupted twice over this period: in 1958 and again in 1989. These two points coincide with increases in the minimum amount-in-controversy requirement of 28 U.S.C. § 1332(a), the first raising the threshold from $3000 to $10,000 and the second raising the threshold to $50,000. Because this threshold has been so infrequently amended (only four times in over 200 years), its effectiveness as a restraint on the number of diversity filings would be expected to erode due to the

cumulative effects of inflation. When this factor is taken into account, the apparent trend in diversity filings is 3.1% per year holding the inflation-adjusted threshold constant. The difference between the actual trend rate of 3.9% and this adjusted rate is deemed to be largely due to the effect of inflation in lowering the economic size of the amount-in-question threshold.[146]

Figure 9
Diversity Cases Commenced, 1950 - 1992



Federal question cases represent the fastest growing single segment of civil cases on a jurisdictional basis. The trend rate of growth in federal question cases commenced annually is 7.1%, equivalent to a doubling every ten years. In 1950 such cases constituted slightly more than 12% of all civil cases commenced; in 1990 federal question cases were almost 48% of civil filings. (See Figure 10.)

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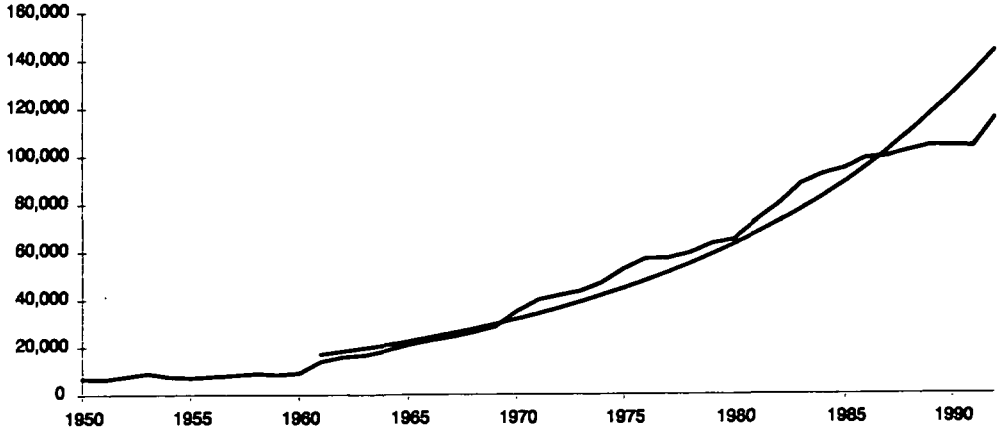
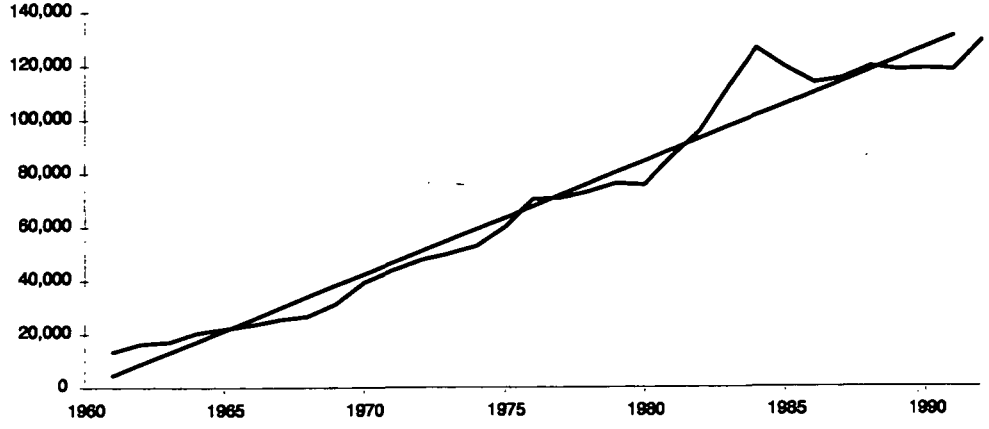
146. Rule, *supra* note 26, at 16-18.
During the course of most of the period under study, the federal question jurisdictional basis was subject to the same amount-in-controversy threshold as diversity jurisdiction. However, in 1980 the threshold for federal question cases was dropped pursuant to the provisions of Pub. L. No. 96-486 amending 28 U.S.C. § 1331. The effect this had on the relative number of cases styled as federal question rather than diversity cases has not been investigated here.
Rule, *supra* note 26, at 18 n.10.

Figure 10
Federal Question Cases, 1950 - 1992



In addition to the jurisdictional basis above, civil filings can be viewed from the standpoint of the nature of the suit. Under this taxonomy, civil filings broadly comprise contract, real property, and tort actions and actions under statute.[147] (See Figure 11.)

Figure 11
Actions Under Statute, 1961 - 1992



Contract actions include insurance, marine, Miller Act, and negotiable instrument actions. During the period from 1961 through 1990, contract actions increased in numbers by 182%, yet declined from 28% to slightly less than 23% of

147. Rule, *supra* note 26, at 18-19. "There is an 'other action' category which represents local jurisdiction cases for the most part. We have ignored this category here since it represented less than .06% (116 of 226,895) of civil actions in 1992." Rule, *supra* note 26, at 19 n.11.

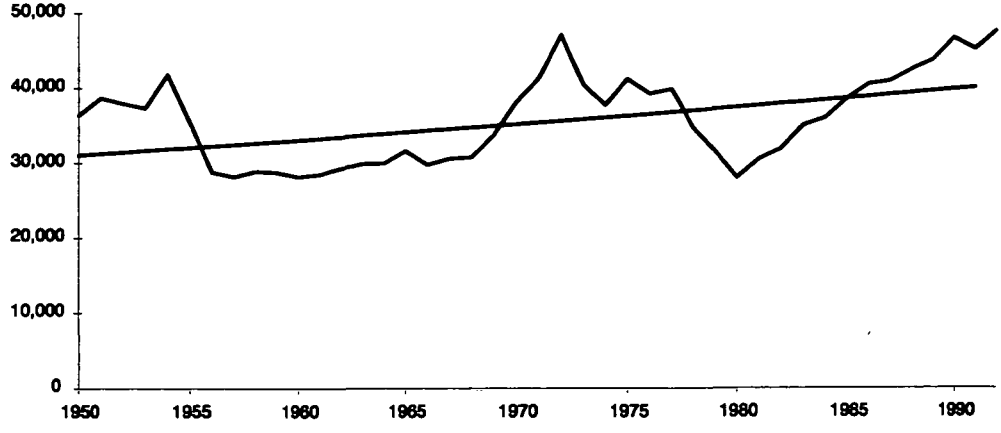
total civil actions commenced over the period. Within the broad category of contract actions, the most significant component in terms of sheer numbers of suits was recovery of overpayments and enforcement of judgments, which increased more than 23,250% from 249 in 1973 to a peak of 58,160 in 1985 before falling back to 10,878 in 1990. The huge number of these suits is attributable largely to increased federal efforts regarding overpayments/enforcement discussed earlier.

Real property actions, including most notably, condemnation and foreclosure actions, represented about 5% of civil cases commenced during the 1961-1990 period. These suits have grown in numbers 186% from 1961 to 1990. Large as this relative increase is, however, it was well under the overall growth in civil cases of 274%, resulting in an overall decline in the share of civil actions commenced attributable to real property actions.

Tort actions, including personal injury and personal property damage, increased 106% from 1961 to 1990. As in the case of real property actions, however, this overall increase was substantially less than the overall growth rate in civil cases commenced, and the share of civil actions attributable to torts fell from 36% in 1961 to 20% in 1990.

The single factor which has dominated growth in civil cases commenced during the 1961-1990 period is actions under statute. Included in this category are, among others, actions under federal labor laws, prisoner petitions, civil rights actions, and actions under Social Security laws. Over the 1961-1990 period, the number of such actions increased 782%, causing the share of all civil actions attributable to this category to increase from 23% to 54%, meaning that in 1990 there were more such actions than torts, real property actions[,] and contract actions combined. Indeed, there were twice as many actions under statute in 1990 as there were total civil actions in 1961. Actions under statute increased at a compound annual growth rate of about 7.7% per year over the 1961-1990 period. To put this rate of growth in perspective, were it to continue unabated for another twenty-eight years, the number of civil actions attributable to this category alone would exceed 1,000,000 in 2020.

Figure 12
Criminal Cases Commenced (Excluding Transfers), 1950 - 1992



For purposes of this analysis, criminal cases commenced are net of transfers in order to measure the inflow to the federal judicial system. Overall, the criminal caseload (Figure 12) has grown at the very low rate of 0.6% per year during the 1950-1992 period. However, as noted earlier, the early part of this period saw a very large number of immigration cases originating in a very few districts along the Mexican border. Removing immigration cases from the total criminal caseload reduces some of the early variance in the series, it increases the trend rate of growth to 1.3% per year, and it improves the statistical fit. (See Figure 13.)

Figure 13
Non-Immigration Criminal Cases Commenced, 1950 - 1992

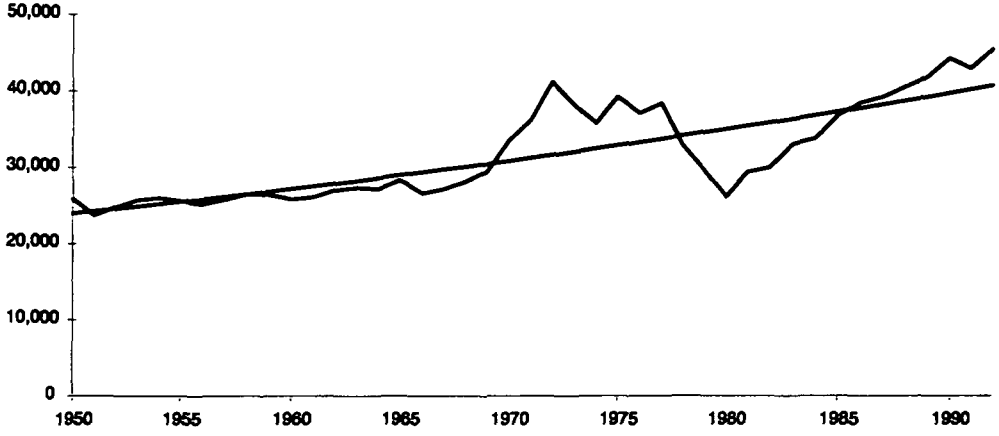
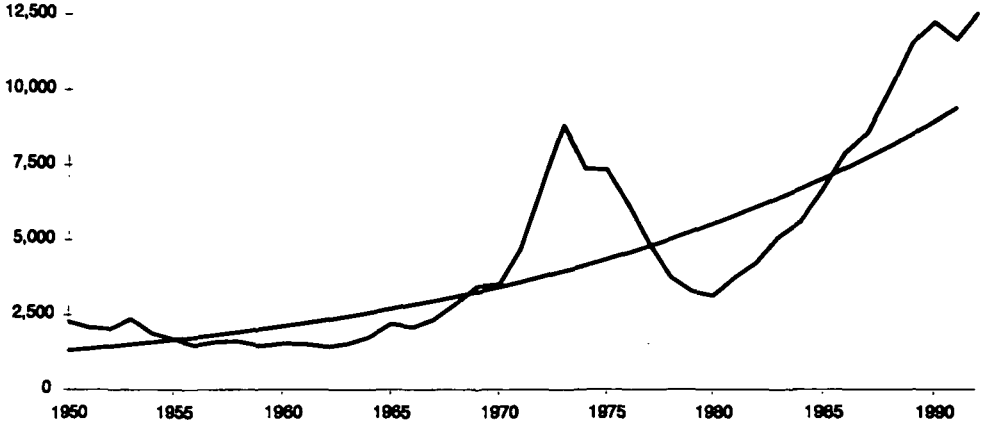


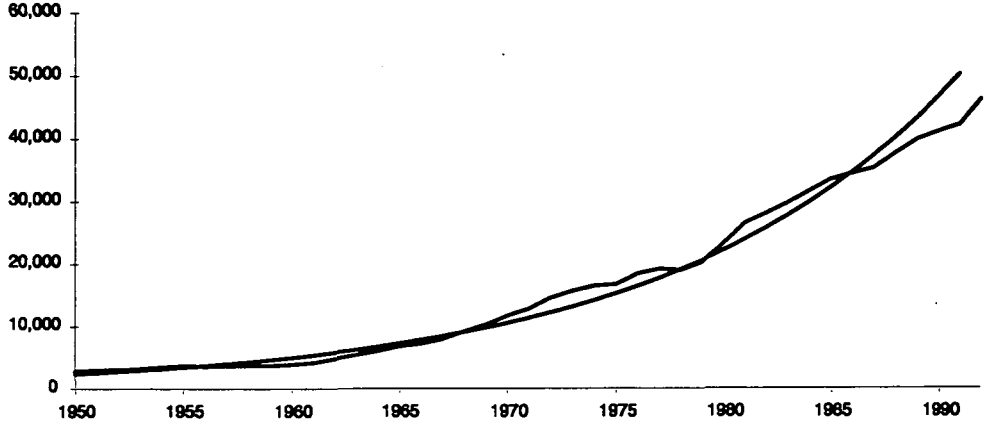
Figure 14
Drug Cases Commenced, 1950 - 1992



The component of criminal cases commenced which has been the focus of greatest attention recently is the level of drug-related cases. As shown in Figure 14, the drug caseload has shown significant growth over the period. The trend rate of growth in this series is 4.9% per year over the entire period. The trend growth has

been relatively stable with the exception of the period from 1972 to 1976, immediately following the passage of the Drug Abuse Prevention and Control Act of 1970, which became effective May 1, 1971. Since 1980, the trend growth rate in the drug caseload has stabilized at a 12.9% annual pace, which, if it continues, will lead to a doubling in the number of drug cases commenced every six years.

Figure 15
Appeals Commenced, 1950 - 1992



At the appellate level, total appeals commenced (Figure 15) has demonstrated remarkably steady and stable trend growth at the rate of 7.7% per year. This will, if continued, lead to a doubling of appeals commenced about every nine years.

Underlying the overall growth in appeals are significantly different trend growth rates in criminal (Figure 16) and non-criminal (Figure 17) appeals. For the former, the trend growth rate is 8.7% while the growth in the latter was a somewhat more modest 7.5%. The effects of this divergence in growth rates is [sic] reflected in the increase in the share of appeals commenced which is attributable to criminal appeals[,] from 11% in 1950 to 24% in 1992.[148]

The underlying factors supporting growth appear endemic to the system for both civil and criminal cases: expanding federal jurisdiction combined with increased utilization of the federal forum for the vindication of rights and the maintenance of social order.

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148. Rule, *supra* note 26, at 19-24.

Figure 16
Criminal Appeals Commenced, 1950 - 1992

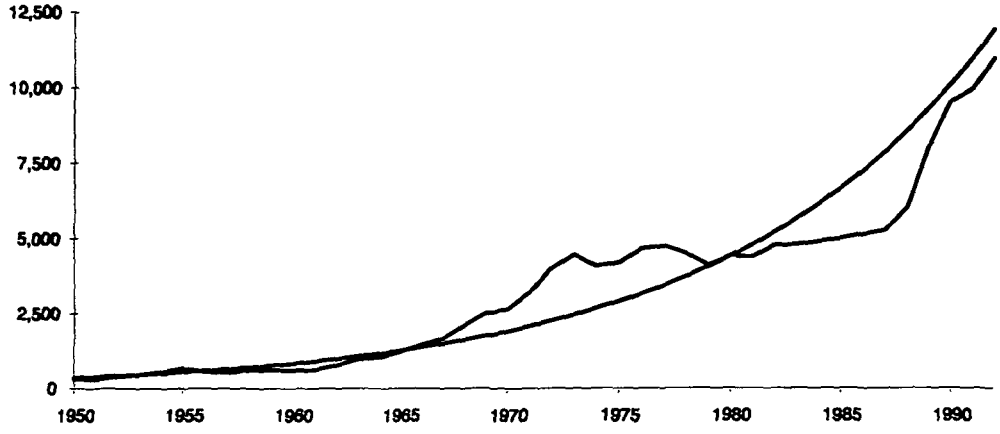
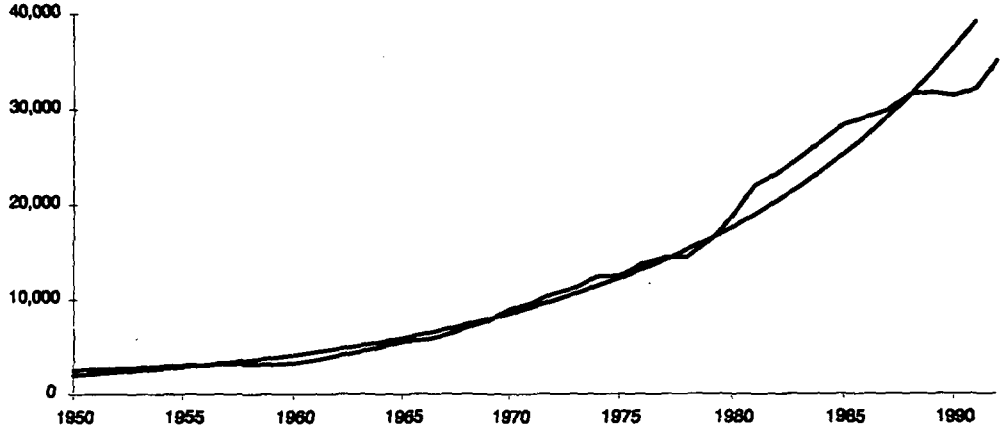


Figure 17
Non-Criminal Appeals Commenced, 1950 - 1992



B. Forecasts

Based on the assumptions deduced on the trends, the Long Range Planning Office developed forecasts of district and appellate caseloads to show where the continuation of current trends would lead the federal courts. The forecasts of caseload growth and associated judicial resource requirements were projected out to the year 2020, only twenty-six years from today.

> On the civil side, [the Long Range Planning Office] analyzed U.S. civil cases, diversity cases and federal question cases. Criminal caseload was bifurcated into drug and non-drug cases. Appeals were analyzed on the basis of a criminal/non-

criminal split. The data were analyzed and forecasting equations were estimated using multiple regression analysis. For all but one of the series examined the final forecasting equations represented extensions of the above trend analyses (in Part Four).

The lone exception was for diversity jurisdiction which required inclusion of the threshold variable as previously discussed. For purposes of the forecasts presented here, the amount-in-controversy was assumed to remain at the current statutory rate of $50,000, and the rate of inflation was assumed to be a steady 3.5%. To the extent that the inflation rate exceeds the 3.5% level, a higher level of diversity filings would be predicted.

The forecasts presented in Table 5, and graphed in Figures 18-24 are entirely consistent with the trend findings discussed above. The relatively high annual growth rates in the major component series examined generate forecasts which, in some cases, represent order-of-magnitude increases in caseloads.[149]

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149. Rule, *supra* note 26, at 24-29.

Trend Projections of Major Caseload Components: 2000, 2010 and 2020

	Net U.S. Civil Cases	Diversity Cases	Federal Question Cases	Total Civil Cases
1992	37,420	47,981	115,168	226,459
2000	51,365	66,248	189,007	306,621
2010	67,677	102,012	336,871	506,561
2020	88,703	157,102	593,008	838,813

	Drug Cases	Non-Drug Cases	Total Criminal Cases
1992	12,512	34,955	47,467
2000	21,874	33,997	55,871
2010	44,267	36,702	80,969
2020	89,821	39,675	129,497

	Criminal Appeals	Other Appeals	Total Appeals
1992	10,956	35,076	46,032
2000	21,326	68,788	90,114
2010	47,404	150,743	198,147
2020	105,085	323,117	428,203

Figure 18
U.S. Civil Cases Commenced Less Social Security & Recovery Cases

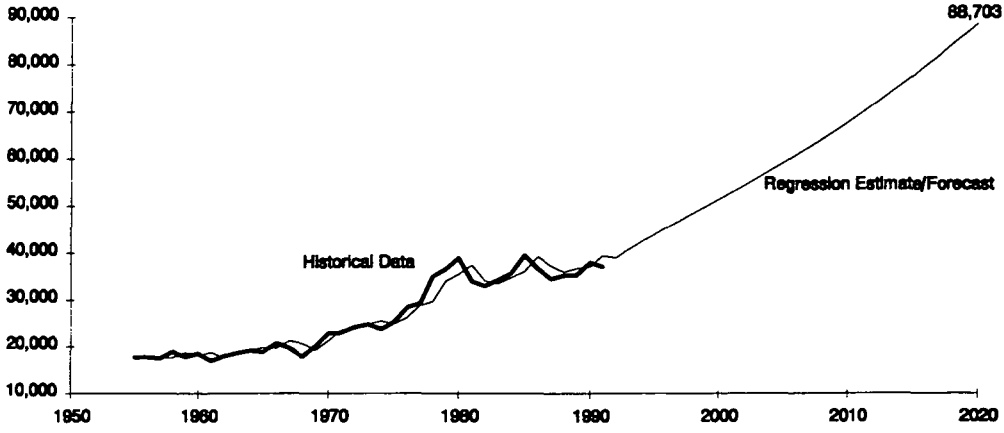


Figure 19
Non-Diversity Private Civil Cases Commenced

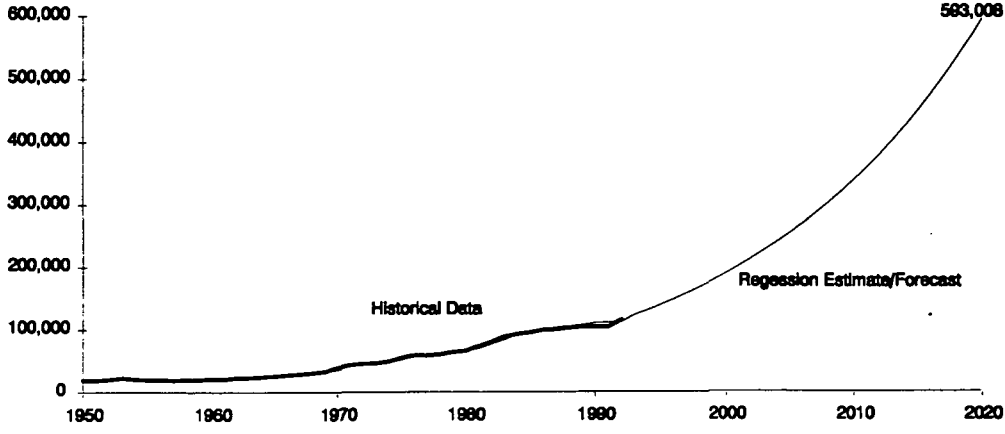


Figure 20
Diversity Cases Commenced

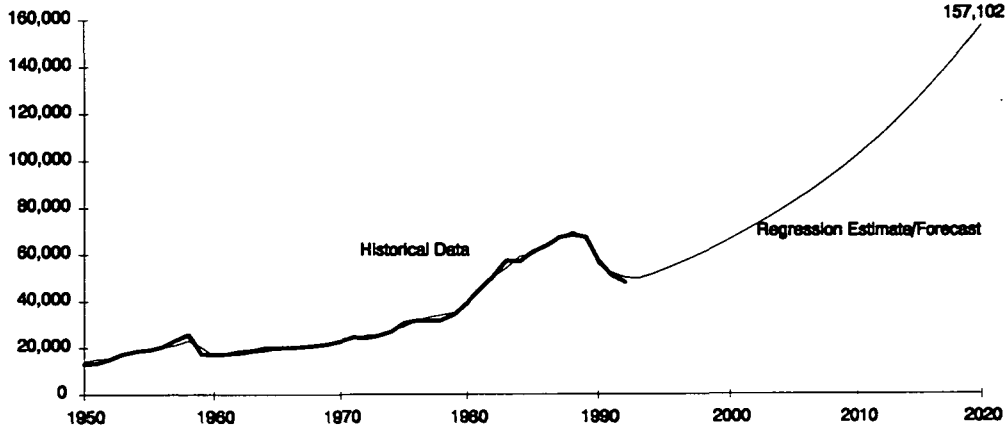


Figure 21
Non-Drug Criminal Cases Commenced
(Net of Immigration Cases)

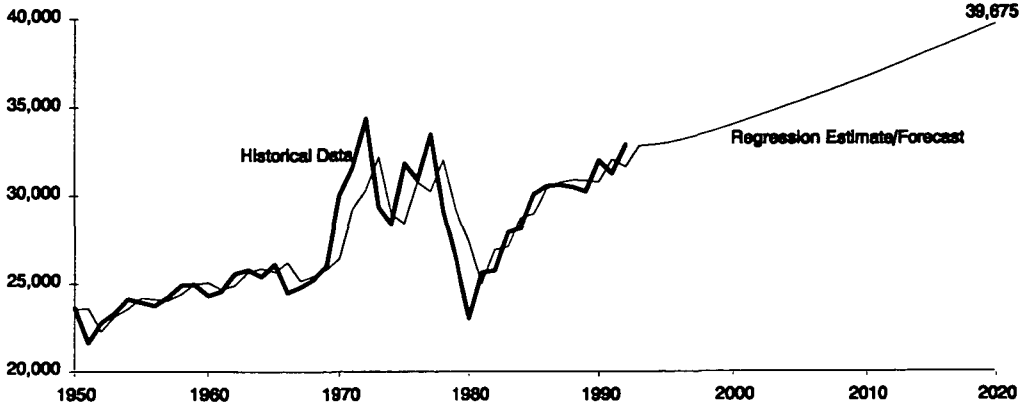


Figure 22
Drug Cases Commenced

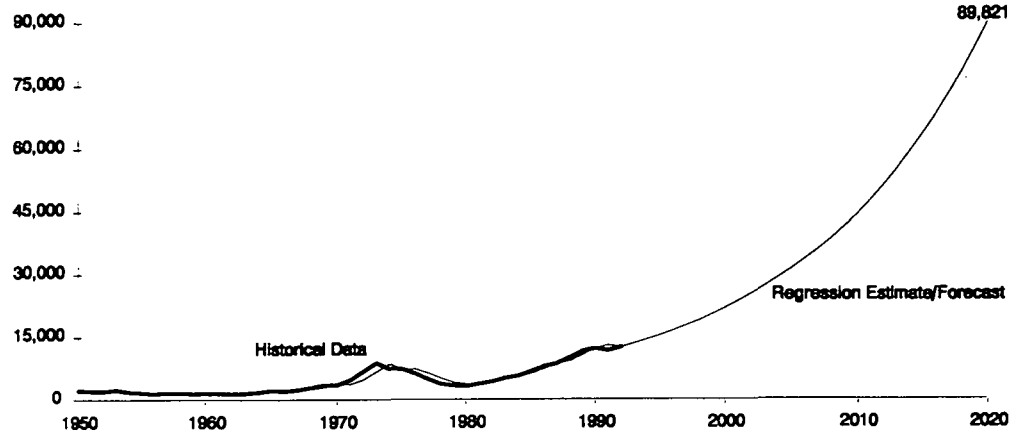


Figure 23
Non-Criminal Appeals Commenced

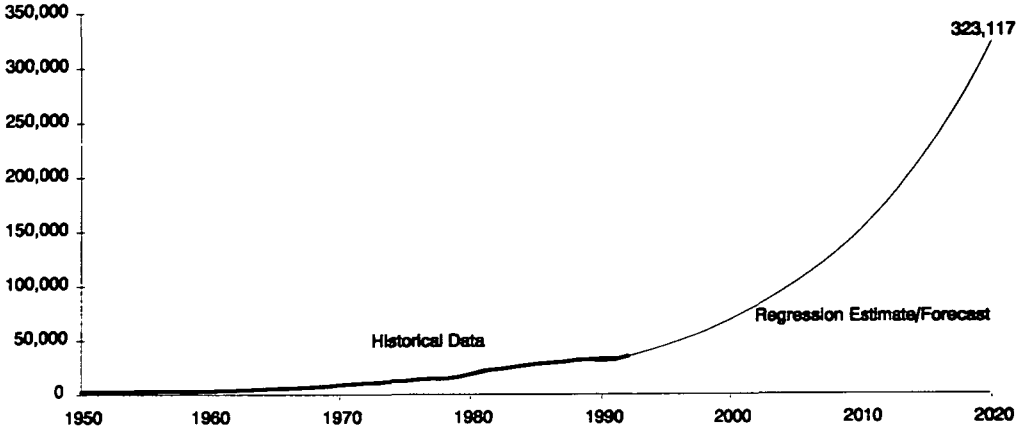
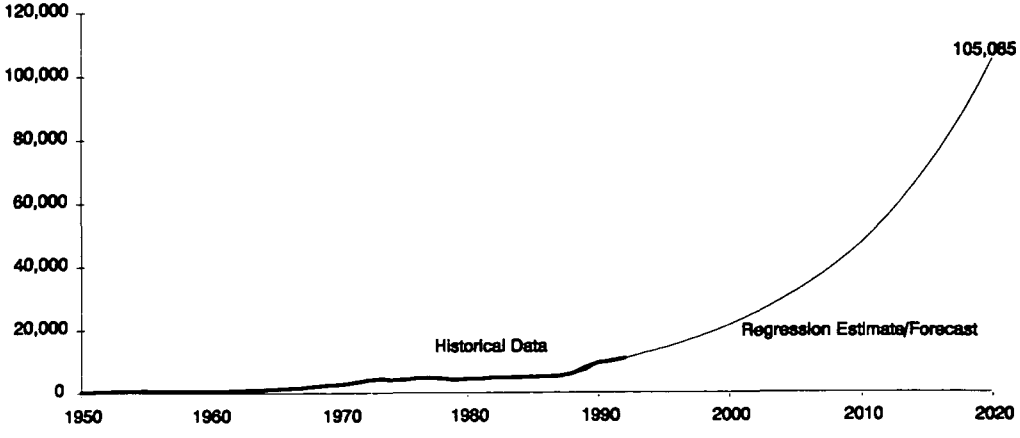


Figure 24
Criminal Appeals Commenced



These trend forecasts indicate that by the year 2020 the number of civil cases commenced annually could exceed 830,000, while the number of criminal cases commenced could reach nearly 130,000. At the same time appeals cases commenced could approach the staggering figure of 430,000.

These numbers have been developed by standardized techniques of projection.[150] Naturally, these predictions over caseload may prove to be exaggerated. Ultimately the jurisdiction of the federal courts will be determined by Congress. But if the current political trends continue, and Congress increasingly turns to the federal court system as the preferred forum for adjudication, we will be moving toward a "unified" rather than "federal" system. If such a state of affairs obtains, the warnings contained in this Article will become harbingers for the future. What will happen to the mix of cases that drive growth—under general jurisdiction, prisoner appeals, pro se, diversity jurisdiction and crime initiatives—remains to be seen. If existing trends continue, and we think the unthinkable, then like Malvolio we will have a set of circumstances thrust upon us and we will have changed. Within this potentially changed context the debate over the appropriate size and structure of the judiciary will take on renewed vigor. The federal judiciary continues to wrestle with these issues, but they are in the early rounds, and only time will tell what the outcome will be.

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150. *See supra* note 65 and accompanying text.