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AFTER THE SPLIT—THE RECENT WORKLOAD OF THE COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT

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Jeffrey Jackson**

Increasing caseload volume in state¹ and federal² courts has been the subject of debate³ among judges, judicial administrators, and commentators⁴ for some years.⁵ The debate has been joined regarding the reality of any crisis of volume,⁶ and its impacts, as well as appropriate mechanisms to deal with volume.⁷ For federal courts, the Federal Courts Study Committee⁸ and earlier study groups,⁹ as

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1. See generally Henry J. Reske, *Record State Caseloads in 1990*, 78 A.B.A. J. 23 (Aug. 1992); Robert T. Roper, *The Propensity to Litigate in State Trial Courts, 1981-1984, 1984-1985*, 11 JUST. SYS. J. 262 (1986).

2. See generally WILLIAM P. McLAUCHLAN, *FEDERAL COURTS CASELOADS* (1984); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 59-76 (1985).

3. Marc Galanter, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921; Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 36-51 (1983); Thomas B. Marvell & Stephen Daniels, *Are Caseloads Really Increasing?*, JUDGES' J., Summer 1986, at 34.

4. See, e.g., Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

5. Identifying and forecasting caseload trends has received considerable attention. See generally FORECASTING THE IMPACT OF LEGISLATION ON COURTS (Keith O. Boyum & Sam Krislov eds., 1980); DEBORAH R. HENSLEY ET AL., *TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS* (1987); Victor E. Flango & Mary E. Elsner, *Estimating Caseloads: Two Methods Tested in Tulsa*, 7 ST. CT. J. 18 (Spring 1983); Thomas B. Marvell, *Caseload Growth—Past and Future Trends*, 71 JUDICATURE 151 (1987).

6. Compare Marc Galanter, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921; Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 36-51 (1983); Marvell & Daniels, *supra* note 3, at 34 with Michael C. Gizzi, *Examining the Crisis of Volume in the U.S. Courts of Appeals*, 77 JUDICATURE 96 (1993) and POSNER, *supra* note 2, at 59-76. See also THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL* 31-32 (1994); Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115 (1991).

7. See, e.g., REPORT OF THE ABA STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS, *THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH*, 125 F.R.D. 523 (1989); JOE S. CECIL & DONNA STIENSTRA, *DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS* (Federal Judicial Ctr. ed., 1987); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3; Victor Williams, *Solutions to Federal Judicial Gridlock*, 76 JUDICATURE 185 (1993).

8. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (Apr. 2, 1990).

9. See, e.g., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE FROM THE COMMISSION ON REVISION OF THE FEDERAL APPELLATE SYSTEM (June 1975) (Hruska Commission); DEPARTMENT OF JUSTICE COMMITTEE ON REVISIONS OF THE FEDERAL JUDICIAL SYSTEM (June 1976) (Bork Committee). See also BAKER, *supra* note 6, at 32-43 (reviewing efforts of previous study groups).

well as numerous commentators¹⁰ within and without the judiciary, have identified several strategies for curtailing or at least dealing with caseload growth.¹¹ These strategies include limiting federal court jurisdiction,¹² perhaps by eliminating or curtailing diversity jurisdiction¹³ or at least in-state plaintiff diversity jurisdiction;¹⁴ diverting cases to administrative tribunals or to alternative dispute resolution [hereinafter ADR];¹⁵ modifying court structure or design;¹⁶ and/or improving court processes through various pretrial, trial, and appellate case management techniques.¹⁷ More recently, part of the debate has focused on whether increasing the size of the federal bench would allow the court to accommodate the demands of caseload or create additional problems for the judiciary.¹⁸

Of course, the problem of caseload growth and the appropriate response to it is not new to the Fifth Circuit.¹⁹ In the early 1960s, the Fifth Circuit was the nation's busiest federal appellate court, facing an increasingly complex civil rights docket.²⁰ When the court sought additional judgeships to meet the unprecedented demands of its docket, some questioned whether courts of appeals should respond

10. See, e.g., BAKER, *supra* note 6.

11. See generally Levin H. Campbell, *Into the Third Century: Views of the Appellate System from the Federal Courts Study Committee*, 74 MASS. L. REV. 292 (1989); Roger J. Miner, *Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the Federal Courts Study Committee*, 65 ST. JOHN'S L. REV. 673 (1991); Michael Wells, *Against an Elite Federal Judiciary: Comments on the Report of the Federal Courts Study Committee*, 1991 B.Y.U. L. REV. 923.

12. See POSNER, *supra* note 2; Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761 (1989). Problems related to defining the "ideal" scope of federal jurisdiction are discussed in Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67.

13. POSNER, *supra* note 2, at 139-47. See also Victor E. Flango, *How Would the Abolition of Federal Diversity Jurisdiction Affect State Courts?*, 74 JUDICATURE 35 (1990).

14. See A REPORT TO THE UNITED STATES JUDICIAL CONFERENCE FROM THE COMMITTEE ON FEDERAL-STATE JURISDICTION, A FRESH LOOK AT IN-STATE PLAINTIFF DIVERSITY JURISDICTION: WHY IT WAS ENACTED AND WHY IT SHOULD BE REPEALED (1994).

15. See Wayne D. Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values*, 1990 U. CHI. LEGAL F. 303; Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1 (1990).

16. The most current discussion of possible reforms for the court of appeals is found in BAKER, *supra* note 6, at 229-86. See also Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit Is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917 (1990); Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy?*, 74 JUDICATURE 217 (1991); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603 (1989); S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853 (1990); Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003 (1991).

17. See generally CECIL & STIENSTRA, *supra* note 7; Robel, *supra* note 7, at 3; Williams, *supra* note 7, at 185.

18. Compare Stephen Reinhardt, *Too Few Judges, Too Many Cases*, 79 A.B.A. J. 52 (Jan. 1993) with Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993). Arguments for and against limiting the size of the federal judiciary are detailed in GORDON BERMANT ET AL., *IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS* (1993).

19. For a discussion of the events leading up to the split of the old Fifth Circuit, see DEBORAH J. BARROW & THOMAS J. WALKER, *A COURT DIVIDED* (1988). See also BAKER, *supra* note 6, at 52-73; Thomas E. Baker, *A Legislative History of the Creation of the Eleventh Circuit*, 8 GA. ST. U. L. REV. 363 (1992).

20. BARROW & WALKER, *supra* note 19, at 122-24.

to caseload growth by increasing the number of sitting judges on the court.²¹ An early position was that a court of appeals could not effectively function with more than nine judges.²² Growth beyond that number was anticipated to make en bancs unwieldy, erode court collegiality, and reduce the ability of judges to keep abreast of the decisions in the circuit.²³

Although a limit to nine authorized judges no longer commands support, and, indeed, now only one court of appeals²⁴ has fewer than nine authorized judgeships, concerns persist that, unlike the district courts, there is a definite limit to the number of authorized judges who can serve on an effective court of appeals.²⁵ In addition to the problems earlier mentioned, there is a concern that large courts of appeals, sitting in countless numbers of three-judge panels, might not be able to maintain consistency and coherency²⁶ in even the law of the circuit, and would inevitably produce intra-circuit conflicts which would be difficult for a large court to resolve en banc.²⁷ Although circuit courts have doubled in size in the last twenty-five years, and the Fifth Circuit itself now has seventeen authorized judgeships, increasingly federal judges are forced to adapt to caseload growth by altering procedures, while urging Congress to reduce generally the jurisdiction of federal courts.²⁸

In this Article, we examine the caseload of the Fifth Circuit since its split. Using statistics collected at the circuit level, and compiled by the Administrative Office of the United States Courts [hereinafter AO], we analyze how the composition of the Fifth Circuit's docket has changed in the years since the division of the circuit. We consider the frequency of case commencements by case type, including both appeals and original filings at the circuit level, as well as

21. BARROW & WALKER, *supra* note 19, at 5. Barrow & Walker identified Chief Judge John Biggs, Jr. of the Third Circuit and Chief Judge Harvey M. Johnson of the Eighth Circuit as strong opponents of increasing a circuit beyond nine judges. BARROW & WALKER, *supra* note 19, at 5.

22. BAKER, *supra* note 6, at 55 (noting "nine judge barrier . . . in judicial administration then had the same mystique as the sound-barrier once had in aeronautics").

23. BARROW & WALKER, *supra* note 19, at 5.

24. The Court of Appeals for the First Judicial Circuit has only six authorized judgeships. 28 U.S.C. § 44 (1988).

25. Of course, the Ninth Circuit is testing most notions regarding limits to circuit size. A collection of articles on the experiment of the Ninth Circuit is found in RESTRUCTURING JUSTICE—THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF FEDERAL COURTS 97-164 (Arthur Hellman ed., 1990) [hereinafter RESTRUCTURING JUSTICE].

26. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 7-8 (Apr. 2, 1990); REPORT OF THE ABA STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH, 125 F.R.D. 523 (1989).

27. Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 Pa. L. REV. 777, 784 (1981). But see Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in RESTRUCTURING JUSTICE, *supra* note 25, at 55-90.

28. REPORT OF THE ABA STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH, 125 F.R.D. 523, 528 (1989).

geographical sources of the circuit's caseload.²⁹ We might describe this as an analysis of case "input" to the court of appeals.³⁰

We also discuss what might be described as the court of appeals' annual "output."³¹ That is, we consider the number and types of cases terminated by the court annually and the mechanisms used to dispose of the cases. Further, we consider the average time for case disposition and the average number of cases terminated per active sitting judge³² on this court of appeals. These data reflect the impact of the increasing caseload on the court's judging capacity and on litigants before the court.

Finally, we consider the number of cases pending at the end of statistical years. Pending cases, the number of cases remaining at the end of a given statistical year, are a measure of the court's backlog. These cases are calculated by adding the number of cases commenced in a given year to the number of cases pending at the start of that year and then subtracting the number of terminations. Increases in pending cases reflect how the increased caseload, coupled with case complexity and judicial vacancies, has taxed the capacity of this court of appeals.

All data presented in this Article were obtained, or derived from, data obtained from the AO.³³ With respect to caseload data such as case filings, terminations, and pending caseload, as well as median time statistics, the principal source was various editions of the *Annual Report of the Director of the AO*.³⁴

From its inception until 1991, the AO provided published data on the basis of a "statistical year" representing the twelve-month period ending June 30.³⁵ Thus, for example, the statistical year 1991 began July 1, 1990 and ended June 30, 1991. However, "statistical year" was redefined beginning in 1992, so that the 1992 and subsequent statistical years would represent twelve-month periods ending September 30.³⁶ For the purposes of this Article, however, caseload statistics for 1992 and 1993 were obtained for the twelve-month periods ending June 30, 1992 and 1993 in order to preserve consistency in the statistical period reported.³⁷ As a

29. That is, we identify the number of cases coming from each of the nine district courts within the circuit. Although this Article primarily deals with the Fifth Circuit's workload since the split of the circuit, data on district origination are available from 1937 onward. Filings originating in the Canal Zone ceased in 1983. See *infra* note 83.

30. J. Clifford Wallace, *Working Paper—Future of the Judiciary*, 94 F.R.D. 225, 231 (1981).

31. *Id.* at 229.

32. As is discussed below, dispositions per active sitting judge compares the total dispositions to the number of active judges sitting in the circuit. Work by senior judges, visiting judges, and judges sitting by designation is not considered in the calculation.

33. Unpublished data obtained directly from the AO [hereinafter AO DATA] are on file with the *Mississippi College Law Review*.

34. In the case of data relating to case participation and the activities of active resident, senior, and visiting judges in the Fifth Circuit, the data were obtained from various editions of Case Management Statistics published annually by the AO.

35. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 56 (1992) [hereinafter AO REPORT].

36. *Id.*

37. These data were provided to the authors by the Statistics Division of the AO.

result, case data for 1992 and 1993 will not correspond to comparable statistics published in the *Annual Report of the Director of the AO*.³⁸

I. INPUT: CASES COMMENCED IN THE FIFTH CIRCUIT COURT OF APPEALS

A. General Description of the Docket: 1982-1993

We divide the cases commenced, terminated, and pending in the Fifth Circuit Court of Appeals from 1982 through 1993 into nine broad statistical categories, which, with two exceptions, correspond directly to the broad statistical categories used by the Director of the AO in annual compilations of case data.³⁹ These case categories include: (1) criminal appeals; (2) federal prisoner petitions;⁴⁰ (3) other United States appeals;⁴¹ (4) direct review of administrative agency decisions and orders; (5) state prisoner petitions; (6) diversity cases;⁴² (7) other federal question cases;⁴³ (8) bankruptcy appeals; and (9) original filings.

Data regarding cases commenced in the Fifth Circuit are summarized in Table 1.⁴⁴ From 1982 until 1993, the Fifth Circuit had only one year where the number of cases commenced decreased from the previous year.⁴⁵ This was 1985, when 3456 cases were commenced, compared with 3612 filings in 1984, a decrease of 4.3% in the number of circuit filings.⁴⁶ With this sole exception, filing frequency increased steadily over the period, culminating in 6689 filings in 1993, a 146.4% increase over the 2715 filings in 1982.⁴⁷ This rate of growth far exceeds the increase in appeals in all United States courts of appeals. Nationally, appeals rose "only(!)" 78.1% from 1982 to 1993.⁴⁸

38. The ultimate source of the data published by the AO and presented here is data submitted by the clerk of each circuit. Until recently, these submissions were based on compilation of completed JS-34 U.S. Court of Appeals Docket Report Forms. However, this source has been replaced by magnetic media submissions of data maintained in each clerk's office on special databases designed to replace the old JS-34.

39. AO REPORT, *supra* note 35, tbl. B-1 (1992); AO REPORT, *supra* note 35, tbl. B-7 (1992).

40. These include motions to vacate sentences, federal habeas corpus, and prisoner civil rights appeals.

41. These include cases, other than direct appeals from U.S. administrative agencies and federal prisoner cases, in which the United States is either a plaintiff or defendant.

42. While the Annual Report of the AO has a single category called "other private civil cases," we have subdivided that category into two: appeals in diversity cases and federal question cases other than prisoner petitions. We did not include local jurisdiction cases which comprised three "other private civil cases" in 1982 and one case in 1983. Given the interest in curtailing or eliminating diversity jurisdiction, we think it useful for the purpose of the analysis to set forth the diversity cases in a separate category. Of course, data for this subcategory are those collected by the court of appeals and compiled by the AO.

43. That is, those not involving state or federal prisoners, agency and bankruptcy appeals, or cases in which the United States is a party.

44. Data for Table 1 is drawn from AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

45. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

46. In 1985, filings fell in seven categories: bankruptcy, administrative, state prisoner, federal prisoner, criminal and other U.S. civil, and original. AO REPORT, *supra* note 35, tbl. B-1 (1984); AO REPORT, *supra* note 35, tbl. B-1 (1985).

47. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

48. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

Table I
 Appeals Commenced in the Fifth Circuit, 1982 - 1993

	Total Appeals	Criminal	U.S. Prisoner Petitions	Other U.S. Civil	State Prisoner Petitions	Other Federal Questions	Diversity	Bankruptcy	Administrative	Original Jurisdiction	Local Jurisdiction
1982	2,715	345	63	352	275	846	433	40	281	77	3
1983	3,193	406	55	332	587	905	491	79	261	76	1
1984	3,612	432	83	316	788	960	541	84	290	118	
1985	3,456	388	77	343	672	1,085	529	66	217	79	
1986	3,837	501	84	317	766	1,093	588	111	272	105	
1987	4,301	503	98	338	1,120	1,104	665	147	249	77	
1988	4,331	636	116	333	1,102	1,050	622	135	269	68	
1989	4,759	984	157	433	988	1,150	650	119	186	92	
1990	5,048	1,116	181	424	994	1,212	658	159	207	97	
1991	5,606	1,326	200	415	1,221	1,274	664	164	238	104	
1992	6,424	1,421	267	446	1,518	1,424	677	278	278	115	
1993	6,689	1,536	255	539	1,455	1,253	962	218	370	101	

B. Filing Frequency in Specific Types of Cases

In 1982, a total of 2715 cases were commenced in the Fifth Circuit Court of Appeals.⁴⁹ Of these, 345 cases (12.7%) were criminal cases.⁵⁰ Prisoner cases accounted for 12.4% of the circuit's 1982 docket, with 63 federal prisoner cases (2.3%) and 275 state prisoner petitions (10.1%).⁵¹ United States appeals accounted for 352 cases (13%) while other federal questions totalled 846 cases (31.2%).⁵² Diversity appeals were 433 cases (15.9%).⁵³ The remainder of the docket comprised 40 bankruptcy appeals (1.5%), 281 administrative appeals (10.4%), and 77 original actions (2.8%).⁵⁴

In 1993, appeals in criminal cases had risen to 1536, a 345.2% increase from the 1982 level.⁵⁵ Appeals in criminal cases were 23% of the court's docket, nearly double the percentage of the 1982 docket.⁵⁶ These filings were driven in part by large increases in drug cases. Drug cases began to rise after 1987, when 201 drug cases constituted only 4.7% of the overall circuit docket.⁵⁷ In 1988, those filings rose to 323 filings and to 7.5% of the docket.⁵⁸ In 1992, appellate filings in drug cases alone constituted 12.4% of the circuit's docket (797 cases).⁵⁹ Certainly, this increase may be attributed in part to increased enforcement activity in this area, as

49. AO REPORT, *supra* note 35, tbl. B-1 (1982).

50. AO REPORT, *supra* note 35, tbl. B-1 (1982).

51. AO REPORT, *supra* note 35, tbl. B-1 (1982).

52. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO REPORT, *supra* note 35, tbl. B-7 (1982).

53. AO REPORT, *supra* note 35, tbl. B-7 (1982).

54. The docket also included three local jurisdiction cases in 1982. AO REPORT, *supra* note 35, tbl. B-1 (1982).

55. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

56. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

57. AO REPORT, *supra* note 35, tbl. B-1 (1987); AO REPORT, *supra* note 35, tbl. B-7 (1987).

58. AO REPORT, *supra* note 35, tbl. B-1 (1988); AO REPORT, *supra* note 35, tbl. B-7 (1988).

59. AO DATA, *supra* note 33.

well as to increasing appeals of sentences under the sentencing guidelines.⁶⁰ Appeals in drug cases, specifically, have risen 561.3% from 1982 to 1993, while appeals in all other criminal cases rose 224%, from 221 to 716 cases.⁶¹

Perhaps the most remarkable increase in any category of filings was state prisoner petitions, which in 1982 constituted only 10.1% of cases commenced in the court of appeals.⁶² The following year, 1983, that percentage jumped to 18.4% of filings (587 cases) in the circuit.⁶³ This category of cases rose to 26% of filings in 1987 (1120 cases), dropped in 1989 and 1990 (988 cases, 20.8%, and 994 cases, 19.7%, respectively), and then rose thereafter to the recent 1455 filings, or 21.7% of the circuit's 1993 docket.⁶⁴ Overall increase from 1982 to 1993 in these filings was 429.1%.⁶⁵

Figure 1 compares the trend of criminal cases and prisoner petitions to the overall trend in case filings in this period. As that graph indicates, frequencies of appeals in criminal cases and of prisoner petitions increased at a greater rate than the frequency of all appeals.

60. See 28 U.S.C. § 994 (1988). An increase in appeals under the guidelines was unanticipated. REPORT OF THE ABA STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH, 125 F.R.D. 523, 528 (1989) ("[T]he recently promulgated Federal Sentencing Guidelines allow appellate review of sentences in criminal cases, including the great majority of cases in which the defendant has pleaded guilty and there were formerly no grounds for appeal.").

61. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO REPORT, *supra* note 35, tbl. B-7 (1982); AO DATA, *supra* note 33.

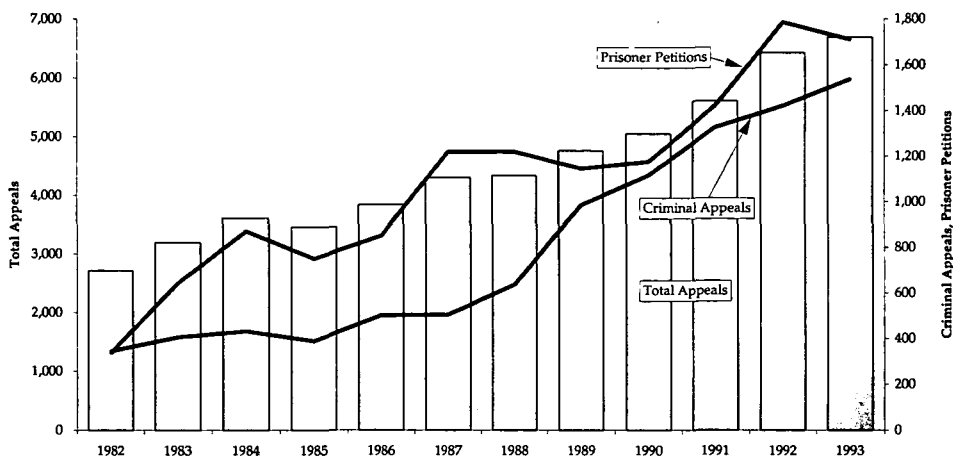
62. AO REPORT, *supra* note 35, tbl. B-1 (1982).

63. AO REPORT, *supra* note 35, tbl. B-1 (1983).

64. AO REPORT, *supra* note 35, tbl. B-1 (1987), subsequent AO REPORTS, and AO DATA, *supra* note 33.

65. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

Figure 1
Criminal, Prisoner Petitions and Total Appeals Filed in the Fifth Circuit, 1982 - 1993



Federal prisoner petitions reached a high of 267 in 1992, and fell slightly to 255 filings in 1993.⁶⁶ Nevertheless, this represents an increase of 304.8% over 1982 filings.⁶⁷ Federal prisoner petitions in 1993 constituted 3.8% of the docket.⁶⁸ Bankruptcy appeals also reached a high in 1992 (278 filings), and then fell to 218 in 1993.⁶⁹ Those filings in 1993 constituted 3.3% of the docket.⁷⁰

Although filings increased in the remaining categories of cases (other U.S. civil, other federal question, diversity, administrative appeals, and original filings), the proportion of these cases declined relative to the overall docket. While other federal question appeals rose 48.1% since 1982, these cases declined steadily as a proportion of the overall docket, to 18.7% of the 1993 docket.⁷¹ Diversity appeals grew 122.2% (from 433 to 962 cases) but fell slightly in their fraction of the docket to 14.4% in 1993.⁷² United States civil appeals rose 53.1% (from 352 to 539 cases) but fell to 8.1% of the docket in 1993.⁷³ Administrative cases rose to 370 cases (a 31.7% increase from 281 cases in 1982).⁷⁴ However, the percentage of these cases in the overall docket fell from 10.3% in 1982 to 5.5% in 1993.⁷⁵ Original filings rose from 77 to 101 cases (a 31.2% increase) and fell as a

66. AO DATA, *supra* note 33.

67. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

68. AO DATA, *supra* note 33.

69. AO DATA, *supra* note 33.

70. AO DATA, *supra* note 33.

71. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33; AO REPORT, *supra* note 35, tbl. B-7 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

72. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO REPORT, *supra* note 35, tbl. B-7 (1982); AO DATA, *supra* note 33.

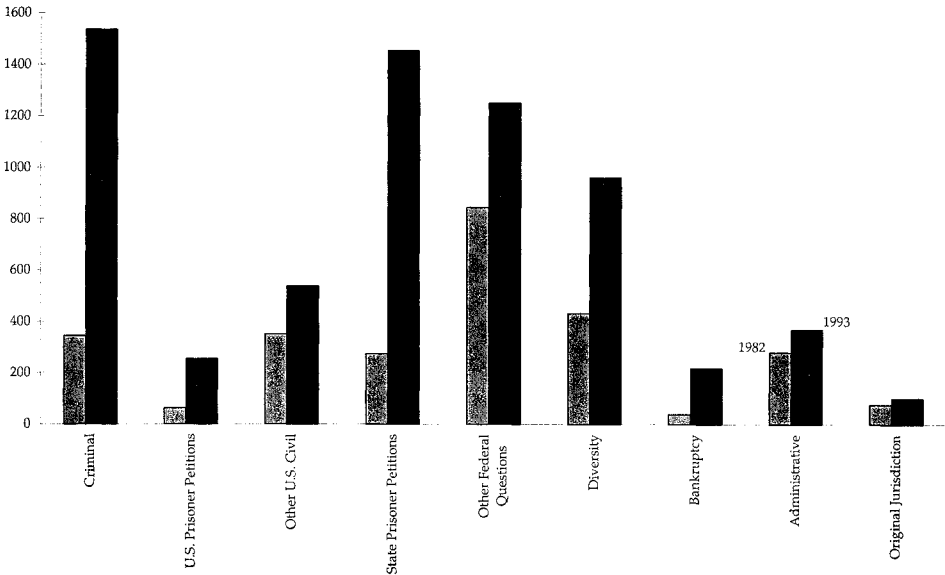
73. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

74. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

75. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

percentage of the docket from 2.8 % in 1982 to 1.5 % in 1993.⁷⁶ Figure 2 compares the 1982 and 1993 filings in each category of appeal.

Figure 2
Cases Commenced in the Fifth Circuit, 1982 and 1993



Cases commenced in the Fifth Circuit are compared in Table II and in Figure 3 to cases commenced in all courts of appeals in 1982 and 1993. As that table indicates, the proportion of diversity appeals in the Fifth Circuit was greater than the national average for those appeals in all courts in 1982. This remains true for the 1993 docket. The proportion of prisoner filings is up both in the Fifth Circuit and nationally. However, the Fifth Circuit docket's percentage of state prisoner cases is greater, and its percentage of federal prisoner cases is smaller, than the national averages for those types of cases in 1993. Since 1982, other federal questions fell as a percentage of the Fifth Circuit's docket so that, in 1993, the proportion of those cases to the Fifth Circuit's docket was comparable to national averages.

76. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

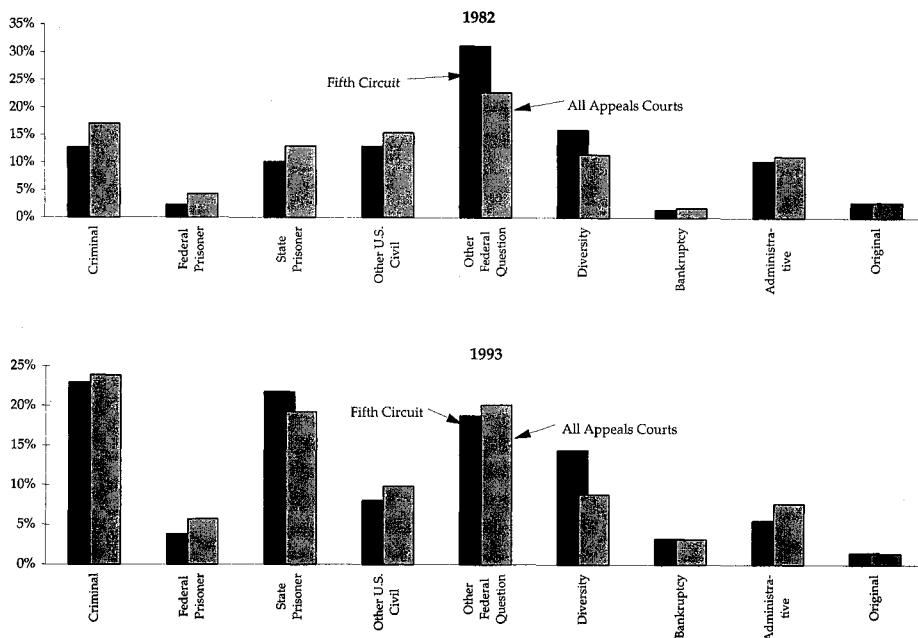
Table II. Case Commencements in the Fifth Circuit
and All Courts of Appeals, 1982 & 1993⁷⁷

Appeals type	1982		1993		% Change in filings, 1982-93	
	% of 5th	% of all U.S.	% of 5th	% of all U.S.	5th	U.S.
Criminal	12.7	17.1	23.0	23.9	345.2	149.3
Federal prisoner	2.3	4.3	3.8	5.7	304.8	136.7
State prisoner	10.1	13.0	21.7	19.2	429.1	163.6
U.S. civil	13.0	15.4	8.1	9.9	53.1	13.8
Other federal qs	31.2	22.8	18.7	20.1	48.1	57.5
Diversity	15.9	11.5	14.4	8.8	122.2	36.5
Bankruptcy	1.5	1.8	3.3	3.2	445.0	213.0
Administrative	10.3	11.2	5.5	7.7	31.7	22.6
Original	2.8	2.7	1.5	1.4	31.2	(11.5)

More striking is the comparison of growth rates of individual types of appeals. In only one category of cases (other federal questions) did the percentage increase of commencements nationally exceed the rate in the Fifth Circuit. In the remaining categories of cases, commencements in the Fifth Circuit grew at rates greater than the national average. Most remarkable are the growth of criminal appeals, state and federal prisoner filings, and diversity appeals in the Fifth Circuit. In each of these categories, percentage increases in commencements in the Fifth Circuit were more than double the percentage increases nationally.

77. The first two columns on U.S. filings do not include all filing categories (*viz.*, local jurisdiction cases are excluded) and so the percentage will not total 100%. The Fifth Circuit column for 1982 excludes local jurisdiction cases. Percentages were computed using data from AO REPORT, *supra* note 35, tbl. B-1 (1982); AO REPORT, *supra* note 35, tbl. B-7 (1982); AO DATA, *supra* note 33.

Figure 3
Comparative Composition of Appeals Filed in the Fifth Circuit and All Courts of Appeal



Continued expansion of federal jurisdiction including the federalization of criminal law is reflected in the growth of the Fifth Circuit's docket and the dockets of all courts of appeals. Concerned with swelling federal court dockets, the Federal Courts Study Committee suggested a reallocation of judicial business between the state and federal systems.⁷⁸ The Study Committee recommended reallocating three large areas of the federal courts' workload to state courts by limiting federal criminal prosecutions to only the most serious cases which cannot be tried in state courts, by establishing administrative procedures which state prisoners would have to exhaust before filing specific federal claims, and by eliminating diversity jurisdiction except in cases involving complex multi-state actions, interpleader, and suits involving aliens.⁷⁹ These three areas, criminal cases (1536 cases), state prisoner petitions (1455 cases), and diversity appeals (962 cases), collectively amount to nearly 4000 cases and comprise almost 60% of the cases commenced in the Fifth Circuit in 1993.⁸⁰

Although it is unlikely that the circuit will be relieved of the burden of these cases in the near future, as these and other filings increase, the circuit, the judiciary as a whole, and Congress may be faced with deciding whether to attempt to increase federal court output further, or to redirect some of these cases to state

78. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 35-53 (Apr. 2, 1990).

79. *Id.*

80. AO DATA, *supra* note 33.

courts or to administrative fora. While the Fifth Circuit's output is discussed briefly later, it is worth noting now that any effort to further increase the circuit's capacity and output potentially entails reducing the quality of the appellate process and the court's decision-making.⁸¹

C. District Courts of Origin for Fifth Circuit Cases

Currently, nine district courts serve as the sources for appellate filings in the Fifth Circuit.⁸² Other sources of the circuit's workload include its original jurisdiction, direct review of administrative agencies, and, prior to 1984, filings from the Canal Zone.⁸³ While overall circuit filings rose 146.4%,⁸⁴ appeals from district courts in the circuit rose 159%⁸⁵ in this same period.

Figures 4, 5, and 6 show the relative proportion of appeals originating in the nine district courts for the twenty-five-year period from 1967 to 1992.⁸⁶ Clearly, the circuit's docket is dominated by appeals from Texas' four districts and the Eastern District of Louisiana. These are the most populous districts in the circuit, and the districts which since 1982 have shown the greatest increase in population.⁸⁷ The greatest increase from 1967 to 1992 has come in Texas Eastern, which showed a 1347.4% increase (38 to 550 cases) for that twenty-five-year period, and a 301.5% increase from 1982 to 1992 (137 to 550 cases).⁸⁸ In 1992, however, cases from Texas Eastern constituted only 9.6% of the cases appealed from the district courts compared to 5.9% in 1982.⁸⁹

81. McCree, *supra* note 27, at 783-91.

82. These are Louisiana Eastern, Middle, and Western; Mississippi Northern and Southern; and Texas Eastern, Northern, Southern, and Western.

83. See 28 U.S.C. § 41 (1988) (termination of Canal Zone effective March 31, 1982); AO REPORT, *supra* note 35, tbl. B-3 (1984). See also Panama Canal Treaty, Sept. 7, 1977, U.S.-Pan., art. II, para. 5, 33 U.S.T. 39, 72-73.

84. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

85. AO REPORT, *supra* note 35, tbl. B-3 (1982-1986); AO DATA, *supra* note 33.

86. Obviously, these district court data cover periods prior to the split of the circuit. However, the composition of these nine district courts was not affected by the split. The Middle District of Louisiana was not formed until 1982. Therefore, cases from what is now that district appear as cases from the other two Louisiana districts in the 1967 chart.

87. AO DATA, *supra* note 33.

88. AO REPORT, *supra* note 35, tbl. B-3 (1982-1986); AO DATA, *supra* note 33.

89. AO REPORT, *supra* note 35, tbl. B-3 (1982-1986); AO DATA, *supra* note 33.

Figure 4
District Court of Origin of Fifth Circuit Appeals, 1967

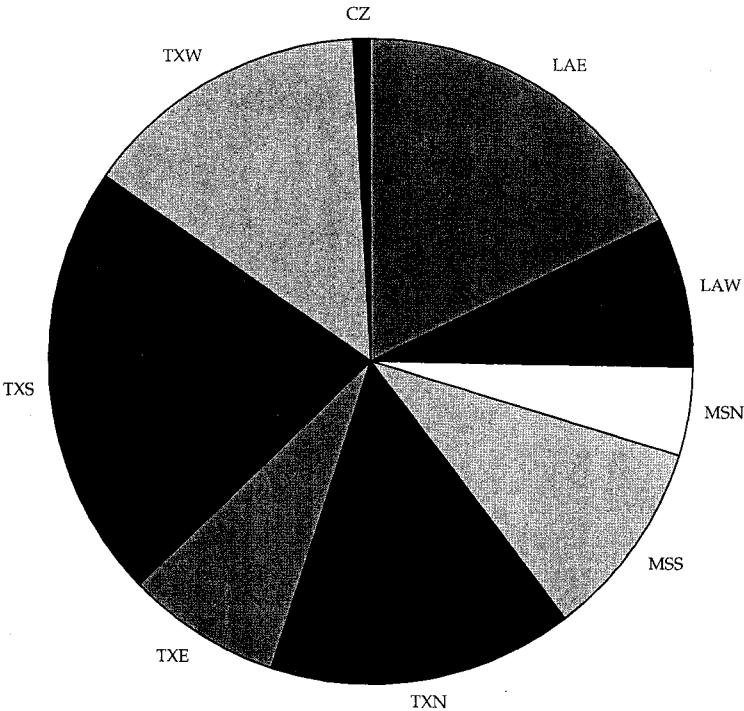


Figure 5
District Court of Origin of Fifth Circuit Appeals, 1982

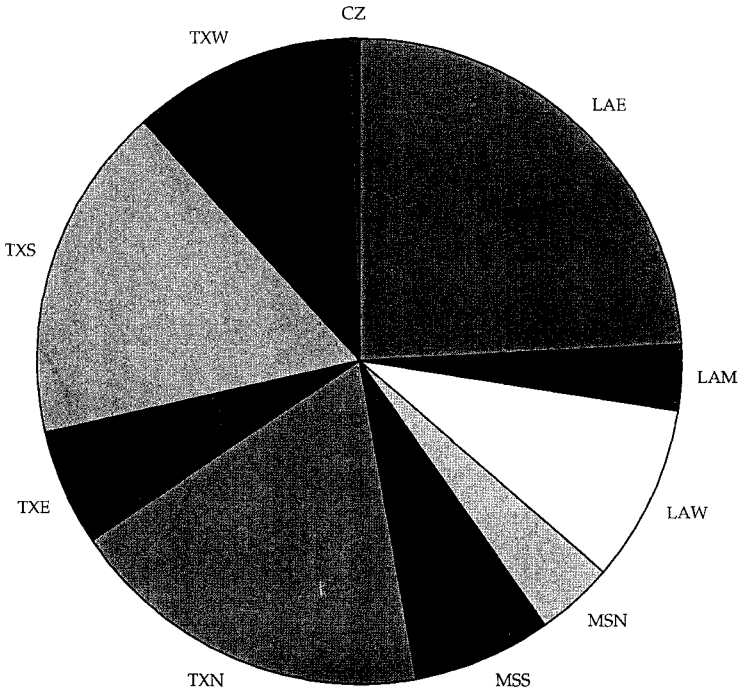
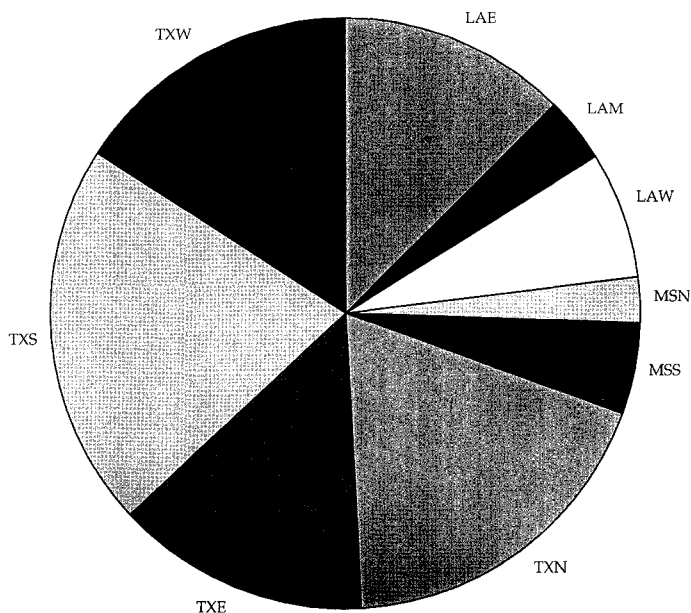


Figure 6
District Court of Origin of Fifth Circuit Appeals, 1993



From 1967 to 1992, appeals from the Southern District of Texas rose 1111.9%, from 109 to 1321 cases.⁹⁰ Appeals from that same district rose 237.9%

90. AO DATA, *supra* note 33.

from 1982 to 1992.⁹¹ In 1992, 23% of the appeals (1321 out of 5753 cases) from district courts originated in the Southern District of Texas.⁹² That same district contributed only 17% of the appeals from districts in 1982.⁹³

Appeals from Texas Western increased from 256 in 1982 (11.1% of cases appealed from district courts) to 962 cases in 1992, 16.7% of appeals originating in district courts.⁹⁴ Cases from Texas Northern constituted 17.6% of district court appeals (1012 cases in 1992), down from 18.3% in 1982 when 423 appeals arose from that district.⁹⁵ Although appeals from Louisiana Eastern increased 53.1% from 1982 to 1992, those appeals fell to 14.8% of appeals from districts in 1992 from a level of 24.2% in 1982.⁹⁶

The remaining four districts⁹⁷ showed modest increases in filings from 1982 to 1992. Combined, those four districts contributed in 1992 only 18.3% of appeals from districts, compared to 23.5% in 1982.⁹⁸

II. OUTPUT: TERMINATIONS OF THE COURT OF APPEALS

Since 1982, the Fifth Circuit has been able to terminate more cases than were commenced in only one year, 1986, when 3904 cases were terminated compared to 3837 cases commenced.⁹⁹ In the area of administrative appeals, the court actually terminated more cases than were filed in this twelve-year period.¹⁰⁰ Terminations exceeded filings of direct administrative appeals in 1982, 1983, 1986, 1987, 1989, and 1990.¹⁰¹ In all other areas of the docket, filings exceeded terminations, and, therefore, the court's backlog of pending cases increased.¹⁰²

Total terminations have increased steadily over the twelve-year period, from 2772 in 1982 to 6262 terminations in 1993.¹⁰³ This is an increase of 125.9% (compared to an increase of 146.4% in filings during the same period).¹⁰⁴ Only in 1985 did the court terminate fewer cases than the previous year.¹⁰⁵ A better indicator of the court's activity, however, is the number of terminations excluding cases disposed of by consolidation.¹⁰⁶ Excluding consolidations, terminations rose

91. AO REPORT, *supra* note 35, tbl. B-3 (1982-1986); AO DATA, *supra* note 33.

92. AO DATA, *supra* note 33.

93. AO REPORT, *supra* note 35, tbl. B-3 (1982-1986).

94. Appeals from Texas Western increased 1236.1% from 1967 to 1992 (72 to 962 cases). AO REPORT, *supra* note 35, tbl. B-3 (1982-1986); AO DATA, *supra* note 33.

95. AO REPORT, *supra* note 35, tbl. B-3 (1982-1986); AO DATA, *supra* note 33.

96. AO REPORT, *supra* note 35, tbl. B-3 (1982-1986); AO DATA, *supra* note 33.

97. Mississippi Northern and Southern, and Louisiana Middle and Western.

98. AO REPORT, *supra* note 35, tbl. B-3 (1982-1986); AO DATA, *supra* note 33.

99. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

100. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

101. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

102. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

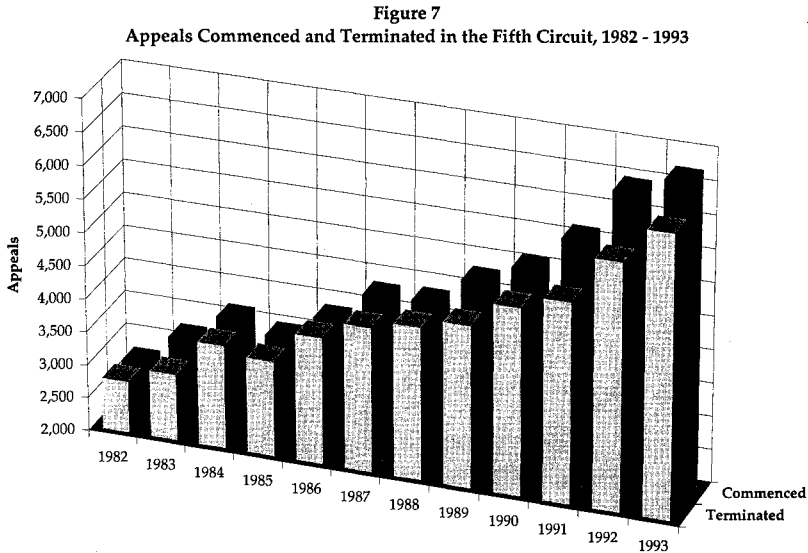
103. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

104. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

105. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

106. This reduces terminations by cases which are not separately adjudicated.

between 1982 to 1993 from 2364 to 5458, an increase of 130.9%.¹⁰⁷ Cases commenced are compared to terminations in Figure 7.



The data on the circuit's dockets support several observations regarding recent trends in the court's output such as relative proportions of merit and procedural terminations, the process of review in the circuit, and the rates of affirmance and reversal. These are discussed in turn.

A. The Output of Individual Judges Is Increasing.

Not surprisingly, each year active judges in this circuit are terminating more cases per judge than in previous years.¹⁰⁸ We measure terminations per "effective active resident judges." Effective active resident judges is the number of active judges actually sitting on the court in any given statistical year. This would not include senior judges, visiting judges, or those sitting by designation who are not responsible ultimately for the output of the circuit. Unlike authorized judgeships, effective active resident judges account for periods of vacancy during any given year. For example, in a year when the circuit had 14 authorized judgeships, and where one judgeship was vacant for the entire year and a second judgeship was vacant for six months, the number of effective active resident judges would be 12.5, rather than 14.

Using this measure, terminations per effective active resident judge rose steadily from 228.5 in 1982 to 485.2 per judge in 1993.¹⁰⁹ This is an annual increase of

107. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

108. Data on active judge output are collected in the appendix.

109. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL COURT MANAGEMENT STATISTICS (1982) [hereinafter AO STATISTICS]; AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

7.1 % a year per effective active resident judge.¹¹⁰ This compares to a national average of 226.8 cases per effective active federal judge in 1982 and to 320.3 cases in 1993, an average increase of only 3.2 % a year per effective active resident judge.¹¹¹

Data on effective active resident judges and case participation by senior and visiting judges is contained in the appendix.

B. The Circuit Is Quantitatively Under-Judged.

The Fifth Circuit Court of Appeals is quantitatively under-judged in two ways. First, and most obvious, is the fact that, while in 1993 the court had seventeen authorized judgeships, it had four judicial vacancies.¹¹² Three of these vacancies have been filled by Judges Benavides, Parker, and Stewart.

Second, the circuit has requested fewer authorized judgeships than are allowed under the policies of the Judicial Conference of the United States for requesting appellate judgeships.¹¹³ Under the Judicial Conference formula, which is employed only as a guideline for determining judgeship need, a circuit is entitled to no more than the number of judgeships which would result in an expected 255 merit terminations per panel.¹¹⁴ Thus, the formula as implemented is:

110. In this Article, all annual rates of growth were computed as compound rather than as average rates of growth.

111. AO STATISTICS, *supra* note 109 (1982); AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

112. AO STATISTICS, *supra* note 109 (1993).

113. In September 1992, the Judicial Conference of the United States requested one judgeship for the Fifth Circuit. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 69-70 (Sept. 22, 1992). As noted below, under the Judicial Conference formula, the circuit could request raising the circuit's authorized judgeships to 36 judges. *See infra* text accompanying notes 114-15.

114. GENERAL ACCOUNTING OFFICE, HOW THE JUDICIAL CONFERENCE ASSESSES THE NEED FOR MORE JUDGES 76 (Jan. 1993).

$$\text{Judgeships} = \left(\text{Total Filings} - \frac{\text{Prisoner Petitions}}{2} \right) \times \frac{\sum_{\text{year=most recent}}^{\text{most recent} - 4} \left(\frac{\text{Merit Terminations}}{\text{Total Terminations}} \right)}{5} \times \frac{3}{255}$$

Under this formula, the circuit is entitled to thirty-six judgeships.¹¹⁵

We speak here of the circuit as being quantitatively under-judged within the Judicial Conference formula. The lack of judges, however, is not a commentary on the qualitative output of the court. Certainly, numerous arguments can be raised about the danger of substantially increasing the size of a circuit.¹¹⁶ Increasing circuit size raises the potential of increasing intra-circuit conflicts, reducing collegiality, and substantially enlarging existing regional bureaucratic structures.

In contrast to the Ninth Circuit, which last year requested ten additional judgeships under the judgeship formula,¹¹⁷ the Fifth Circuit has requested only one additional judgeship, which the Judicial Conference approved in September

115. The calculation is as follows:

	Total Terminations [A]	Merit Terminations [B]	Merit Termination Ratio [C] = [B]/[A]
1993	6,308	3,359	0.5325
1992	5,855	3,020	0.5158
1991	5,123	2,692	0.5255
1990	4,887	2,660	0.5443
1989	4,542	2,540	0.5592
		Total:	2.6773
		Average:	0.5355
	Total 1993 Filings		6,657
Less:	1/2 Prisoner Petitions	1,759 x .5 =	(880)
Equals:	Adjusted Case Filings Base		5,777
Times:	Average Merit Termination Ratio		0.5355
Equals:	Expected Merit Terminations		3,094
Times:	3 Judges Per Panel		3
Equals:	Merit Termination Participations		9,282
Divided by:	255 Merit Terminations per Judge		255
Equals:	Formula Basis Judgeships		36.4

AO DATA, *supra* note 33. The formula treats every two prisoner filings as one case. GENERAL ACCOUNTING OFFICE, HOW THE JUDICIAL CONFERENCE ASSESSES THE NEED FOR MORE JUDGES 76 (Jan. 1993).

116. Compare Newman, *supra* note 18, at 187 with Reinhardt, *supra* note 18, at 52. Arguments for and against limiting the size of the federal judiciary are detailed in BERMANT ET AL., *supra* note 18. The Judicial Conference, at the urging of the Long Range Planning Committee, adopted a policy of controlled growth in the federal judiciary.

117. The Ninth Circuit received Judicial Conference authorization for 10 temporary judgeships. If approved by the Congress, the Ninth Circuit would have 28 permanent and 10 temporary judgeships.

1992.¹¹⁸ The Conference converted the Fifth Circuit and all other pending circuit judgeship requests to Congress to temporary judgeships in September 1993.¹¹⁹ Although such judgments in individual circuit councils create regional differences in the average number of cases per judge, individual circuits are not required to request judgeships under the formula.¹²⁰ Under Judicial Conference practice, these judgments have been left to individual circuits.¹²¹ Whether the circuit's choice not to request additional judgeships has had an adverse impact on preserving the quality of the Fifth Circuit's decision-making, or a positive impact on the quality of the circuit's appellate process, is not a question which can be answered with the data reviewed in this Article.

*C. Proportions of Procedural and Merit Terminations
Have Remained Relatively Stable over the Period.*

In 1982, the circuit's non-consolidation terminations were 2364.¹²² Of these, 1506 terminations, or 63.7%, were merit terminations, and the remaining 858 cases (36.3%) were procedural terminations.¹²³ These percentages remained relatively stable over the period.¹²⁴ Merit terminations as a percentage of non-consolidation terminations fell to a low of 55.1% (1702 of 3090 cases) in 1984, but otherwise remained above 60% in all but three years during the period.¹²⁵ In 1993, merit terminations were 61.3% of non-consolidation terminations, and, correspondingly, procedural terminations constituted 38.7% of these terminations.¹²⁶ From 1982-1993, merit terminations in the circuit rose 122.3% from 1506 to 3348 cases.¹²⁷

For all United States courts of appeals in 1982, 53.5% of non-consolidation terminations were on the merits and 46.5% were procedural terminations.¹²⁸ By 1993, the percentage of merit dispositions for all courts of appeals rose to 58.4%.¹²⁹

Breakdowns of merit and procedural terminations for the Fifth Circuit are provided below.

118. See *supra* note 113. The Conference converted the Fifth Circuit and all other pending circuit judgeship requests to Congress to temporary judgeships in September 1993.

119. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 51 (Sept. 20, 1993).

120. The circuit could have requested 11 judges based on its workload. GENERAL ACCOUNTING OFFICE, HOW THE JUDICIAL CONFERENCE ASSESSES THE NEED FOR MORE JUDGES 19 (Jan. 1993).

121. *Id.*

122. AO REPORT, *supra* note 35, tbl. B-1 (1982).

123. AO REPORT, *supra* note 35, tbl. B-1 (1982).

124. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

125. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

126. AO DATA, *supra* note 33.

127. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

128. AO REPORT, *supra* note 35, tbl. B-1 (1982).

129. AO DATA, *supra* note 33.

*D. Merit Terminations Following Oral Argument Declined
Since 1985; Merit Terminations Following Submission on Brief,
Without Oral Argument, Correspondingly Increased.*

Beginning in 1985, data were collected regarding the process used by the circuit in its merit terminations. This process is tracked in two statistical categories: merit terminations following oral argument and merit terminations on submission of briefs. It has been suggested that reference to the latter category of cases as being decided "on submission" is euphemistic, since the parties desiring oral argument usually have no choice in the matter and are merely told that their case will not receive oral argument.¹³⁰

In 1985, the court had 847 merit terminations following oral argument and 1137 merit terminations on submission of briefs.¹³¹ Terminations following oral argument constituted 42.7% of all merit terminations¹³² while termination on submission comprised the remaining 57.3%.¹³³

Since 1985, the absolute number of merit terminations following oral argument increased 8.1%, to 916 cases in 1993.¹³⁴ However, the relative proportion of merit terminations following oral argument fell to a low in 1991 of 27% of all merit terminations.¹³⁵ In 1993, terminations following oral argument were only 27.4% of all merit terminations.¹³⁶ Since 1985, merit terminations on submission of briefs rose 113.9% to 2432 cases.¹³⁷ Nationally, the percentage of cases receiving oral argument for all courts of appeals fell from 56.5% in 1985 to 40% in 1993.¹³⁸ Obviously, when compared to courts of appeals generally, the Fifth Circuit grants oral argument in a smaller proportion of its cases.

Clearly, while the circuit's caseload and output have increased substantially from 1982 to 1993, in the last eight years the court has not increased substantially the number of cases decided following argument.¹³⁹ Part of the court's adaptation to its increasing caseload has been to increase substantially the number of cases decided only on submission of briefs. This has allowed the court to steadily increase its number of merit terminations without increasing the number of cases for which argument has been afforded. In 1985, more than two of five merit terminations followed oral argument; in 1993, that ratio dropped to nearly one of four

130. William M. Richman & William L. Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 J. L. REF. 623, 630 n.37 (1988) ("Submission is a euphemism because the parties generally are told there will be no oral argument. They may submit, but only because there is no choice.").

131. AO REPORT, *supra* note 35, tbl. B-1 (1985).

132. These were 26.5% of all non-consolidation terminations.

133. AO REPORT, *supra* note 35, tbl. B-1 (1982) and subsequent AO REPORTS.

134. AO REPORT, *supra* note 35, tbl. B-1 (1985); AO DATA, *supra* note 33.

135. AO REPORT, *supra* note 35, tbl. T-1 (1991).

136. AO DATA, *supra* note 33.

137. AO REPORT, *supra* note 35, tbl. B-1 (1985); AO DATA, *supra* note 33.

138. AO REPORT, *supra* note 35, tbl. B-1 (1985); AO DATA, *supra* note 33.

139. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

even though the number of cases receiving oral argument (916) was at a high for the period.¹⁴⁰

Deciding cases on submission, an innovation created by the Fifth Circuit twenty-five years ago to help the court accommodate its burgeoning caseload, has now become more the rule than the exception in the circuit's decision-making process for merit dispositions. The court's screening process, which utilizes both staff attorneys and judicial screening panels, attempts to identify cases, consistent with the Federal Rules of Appellate Procedure and the court's own operating procedures, where argument would be helpful.¹⁴¹ The screening process used by the circuit has been well-publicized and will not be reviewed in detail here.¹⁴² In an early explanation of its screening procedure, the court noted that deciding cases on submission reduces delay, since cases can be submitted for decision immediately upon receipt of brief, saves to litigants the cost associated with oral argument,¹⁴³ and obviously saves judge-time which otherwise would be consumed by a larger argument docket.¹⁴⁴

Whether jettisoning argument in most cases is a pearl of too great a price is a matter of some dispute.¹⁴⁵ Then-Solicitor General Wade McCree believed that changes such as reducing oral argument and opinion writing made in the hope of increasing court productivity "have not been made without significant costs to the quality of justice."¹⁴⁶ McCree expressed grave concerns that courts are responding to the press of caseloads by increasing staff.¹⁴⁷ A more bureaucratic judiciary might result in reducing the personal involvement of judges in the process of decision-making as clerks and staff attorneys are relied upon increasingly to review the records and briefs.¹⁴⁸ Professor Daniel J. Meador likewise has encouraged a return to visibility in the appellate process by restoration of oral argument.¹⁴⁹ Echoing Judge McCree's comments, Professor Meador noted that "in the minds of many lawyers, apprehension about the loss of visibility was intensified by concern over

140. AO REPORT, *supra* note 35, tbl. B-1 (1985); AO DATA, *supra* note 33.

141. See *Huth v. Southern Pac. Co.*, 417 F.2d 526, 527-30 (5th Cir. 1969) (explaining Fifth Circuit's procedures); CECIL & STIENSTRA, *supra* note 7, at 35-66; Alvin B. Rubin & Gilbert Ganuchau, *Appellate Delay and Cost—An Ancient and Common Disease: Is It Intractable?*, 42 MD. L. REV. 752 (1983).

142. See *supra* note 141.

143. Rubin & Ganuchau, *supra* note 141, at 761-62. These costs include attorney time, travel, and the like. Rubin & Ganuchau, *supra* note 141, at 762.

144. Rubin & Ganuchau, *supra* note 141.

145. See generally John B. Oakley & Robert S. Thompson, *Screening, Delegation, and the Values of Appeal: An Appraisal of the Ninth Circuit's Screening Docket During the Browning Years* and Jerry Goldman, *Appellate Justice Economized: Screening and Its Effect on Outcomes and Legitimacy*, in RESTRUCTURING JUSTICE, *supra* note 25, at 97-164.

146. McCree, *supra* note 27, at 778 (footnote omitted).

147. McCree, *supra* note 27, at 787 (referring to the "cancerous growth" of central staff).

148. McCree, *supra* note 27, at 788.

149. Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732, 732-34 (1983). See also Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 428-30 (1987).

whether the cases were actually being decided by staff attorneys and rubber-stamped by the judges."¹⁵⁰

Other costs are related to the reduction of oral argument. Judge Richard A. Posner has noted that oral argument, in addition to providing judges an opportunity to question counsel, "provides a period of focused and active judicial consideration of the case."¹⁵¹ Some judges in the Fifth Circuit and Ninth Circuit interviewed for a study of disposing of cases on submissions noted that one associated cost was the loss of an opportunity for an in-person judges' conference of cases following argument.¹⁵²

Certainly, it is not unreasonable to suggest that in some cases oral argument merely duplicates written brief,¹⁵³ and that in others, under-skilled counsel do not provide sufficient meaningful information and insight to justify the costs to the court, counsel, and litigants associated with argument.¹⁵⁴ Apart from increases in case volume, differential treatment of appellate cases is indicated, and appeals which are not treated equally in terms of process can be decided fairly. However, it is probably true that the reduction in argument in the Fifth Circuit is motivated as much by necessity as by judicial preference. The circuit with its current number of judges could not provide oral argument in all, or nearly all, merit dispositions without extending unduly the average time it takes to dispose of its cases. The resulting backlog of cases on the argument calendar most likely would be intolerable. Nonetheless, with only one in four merit dispositions receiving oral argument (compared to a national average of two in five), there is greater emphasis in this court of appeals on a paper process.¹⁵⁵

E. Reversal Rates Have Fallen Steadily.

In 1982, 1137 of 1506 cases (75.5%) terminated on the merits affirmed or enforced the lower court or agency.¹⁵⁶ Cases reversed numbered 287, or 19.1%.¹⁵⁷ The percentage of cases reversed fell steadily from 1982 to 11.8% of merit

150. Meador, *supra* note 149, at 735-36 (footnote omitted). See also Richman & Reynolds, *supra* note 130, at 632 ("Without oral argument, it is impossible to be sure whether the judge has had any input into the decision-making process, or indeed, whether she has done more than sign an order prepared by a clerk, a staff attorney, or an extern.").

151. POSNER, *supra* note 2, at 120.

152. CECIL & STIENSTRA, *supra* note 7, at 137.

153. Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 21-24 (1986).

154. See POSNER, *supra* note 2, at 119 ("Although the average quality of oral argument in federal courts, (including the Supreme Court) is not high, the value of oral argument to judges is high."); Rubin & Ganucheau, *supra* note 141, at 762 ("The value of oral argument is, usually, overstated.").

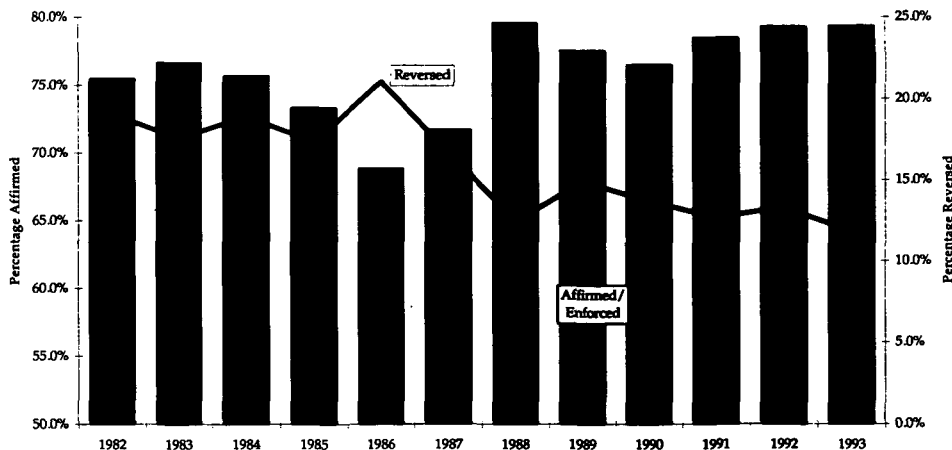
155. AO DATA, *supra* note 33. Meador, *supra* note 149, at 732-34.

156. AO REPORT, *supra* note 35, tbl. B-5 (1982).

157. The remaining cases were reported in two statistical categories, those dismissed and "others." The former category included 64 cases in 1982; the latter category had 18 cases. Beginning in 1985, an additional category of cases "remanded" was added to the reporting. AO REPORT, *supra* note 35, tbl. B-5 (1982).

terminations in 1993.¹⁵⁸ An increase in cases affirming or enforcing rulings below, which rose to 79.4% of all merit terminations,¹⁵⁹ accounts for part, but not all, of this decrease. Figure 8 compares the percentages of cases affirming or enforcing rulings below to the percentage of cases disposed of through reversal.

Figure 8
Percentage of Merit Terminations Affirming and Reversing in the Fifth Circuit, 1982-1993



A similar steady decline in the rates of reversal is found in merit terminations of all courts of appeals. Nationally in 1982, 16.8% of merit terminations were reversals.¹⁶⁰ By 1993, the national reversal rate had fallen to 9.8%.¹⁶¹

F. Average Disposition Times for Merit Dispositions Have Declined.

Not surprisingly, given that a diminishing proportion of the court's cases receive oral argument, average disposition times for merit dispositions have declined since 1982. From 1982 to 1993, average disposition times for all merit dispositions declined from 11.2 months to 9.4 months.¹⁶² This compares to national averages of 8.9 months in 1982 and 10.4 months in 1993.¹⁶³ In 1993, cases receiving oral argument in the Fifth Circuit were disposed of in an average of 10.3

158. The exception to this steady decline in reversals is 1986, when 21% of merit terminations were reversals. In two years, 1988 and 1991, reversals were less than 13% of all merit terminations. AO REPORT, *supra* note 35, tbl. B-5 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

159. The remaining cases are accounted for by increases in the number of cases remanded, those dismissed, and other dispositions. AO REPORT, *supra* note 35, tbl. B-5 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

160. AO DATA, *supra* note 33.

161. AO DATA, *supra* note 33.

162. AO REPORT, *supra* note 35, tbl. B-4 (1982); AO DATA, *supra* note 33.

163. AO REPORT, *supra* note 35, tbl. B-4 (1982); AO DATA, *supra* note 33.

months.¹⁶⁴ Cases not receiving oral argument were disposed of in an average of 8.7 months.¹⁶⁵

Table III compares average merit disposition times in the Fifth Circuit to all United States courts of appeals. As that table indicates, since 1987, the Fifth Circuit disposes of its cases on the merits more quickly than the national average. This is true for all merit dispositions, for dispositions following oral argument, and for dispositions on submission of briefs. Since 1987, the Fifth Circuit's disposition times were equal to or better than national averages for all circuits.

Table III. Average Disposition Times in Months for Merit Terminations for the Fifth Circuit and All U.S. Courts of Appeals, 1987-1993¹⁶⁶

Year	With Oral Argument		On Submission of Briefs		All Merit Terminations	
	5th	U.S.	5th	U.S.	5th	U.S.
1987	10.2	10.4	8.4	8.7	8.8	10.3
1988	9.0	10.2	7.3	8.5	8.0	10.1
1989	10.0	10.0	8.2	8.5	8.9	10.3
1990	10.1	10.1	8.5	8.7	9.2	10.1
1991	9.3	10.4	8.0	9.0	8.8	10.2
1992	9.8	11.0	8.9	9.7	9.5	11.4
1993	10.3	10.6	8.7	9.0	9.4	10.4

G. While Procedural Terminations Have Remained Stable as a Percentage of Non-Consolidation Terminations, the Proportion of These Terminations with Judicial Action Is Increasing.

As noted earlier, although procedural terminations grew 145.9%, from 858 to 2110 cases, the percentage of the court's procedural terminations has remained relatively constant from 1982 to 1993.¹⁶⁷ That percentage rose from its 1982 low of 36.3% of non-consolidation terminations to a high in 1984 of 44.9%.¹⁶⁸ Since 1987, that percentage has never fluctuated more than 2.5% per year.¹⁶⁹ In 1993, the court's 2110 procedural terminations constituted 38.7% of its non-

164. AO DATA, *supra* note 33.

165. AO DATA, *supra* note 33.

166. AO REPORT, *supra* note 35, tbl. B-4 (1987), subsequent AO REPORTS, and AO DATA, *supra* note 33.

167. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

168. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO REPORT, *supra* note 35, tbl. B-1 (1984).

169. AO REPORT, *supra* note 35, tbl. B-1 (1987), subsequent AO REPORTS, and AO DATA, *supra* note 33.

consolidation terminations.¹⁷⁰ In all United States courts of appeals, from 1982 to 1993, the ratio of procedural terminations to non-consolidation terminations was generally higher than the ratio in the Fifth Circuit.¹⁷¹ In 1982, 46.5% of non-consolidation terminations were procedural in all courts of appeals; in 1993, these procedural terminations were 41.6%.¹⁷²

Procedural terminations are divided into two groups: those cases disposed with and those disposed without judicial action.¹⁷³ In the former group (those disposed with judicial action) are five types of cases. These are cases terminated (1) because of jurisdictional defects; (2) under Federal Rule of Appellate Procedure 42; (3) due to default; (4) because a certificate of probable cause is denied; and (5) others.¹⁷⁴ The latter group of cases, staff terminations or those disposed without judicial action, are of three types: dismissals under Federal Rule of Appellate Procedure 42, defaults, and others.¹⁷⁵ From 1982 to 1993, the percentage of procedural terminations with judicial action has increased steadily, from 11.6% to 16.9% of all non-consolidation terminations and from 31.9% to 43.8% of procedural terminations.¹⁷⁶ Staff terminations as a percentage of non-consolidation terminations fell marginally from 24.7% to 21.7% in 1993 and, as a percentage of procedural terminations, from 68.1% to 56.2%.¹⁷⁷ Still, in 1993, 21.7% of the court's non-consolidation terminations were without judicial action.¹⁷⁸

Interestingly, while the trend in the Fifth Circuit has been toward procedurally terminating more cases with judicial action, the national trend since 1982 is otherwise. In 1982, in all courts of appeals, 55.7% of procedural terminations were with judicial action.¹⁷⁹ That rate fell steadily since then.¹⁸⁰ In 1993, in all courts of appeals only 35.5% of procedural terminations were with judicial action.¹⁸¹

H. Summary of Terminations; the Resulting Backlog.

The Fifth Circuit's non-consolidation terminations from 1982 to 1993 rose 130.9%, an average of 7.9% a year from 1982 to 1993.¹⁸² The ratio of merit to

170. AO DATA, *supra* note 33.

171. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

172. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

173. FEDERAL COURT MANAGEMENT STATISTICS, at d (Administrative Office of the U.S. Cts. 1992) (explanation of the Judicial Workload Profile for the United States Courts of Appeals).

174. AO DATA, *supra* note 33.

175. AO DATA, *supra* note 33.

176. In 1982, procedural terminations with judicial action were 274 cases. In that year there were a total of 858 procedural terminations, and 2364 non-consolidation terminations. In 1993, these terminations were 924 out of 2110 procedural and 5458 non-consolidation terminations. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

177. In 1982, staff terminations were 584. In 1993, these terminations were 1186. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

178. AO DATA, *supra* note 33.

179. AO REPORT, *supra* note 35, tbl. B-1 (1982).

180. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

181. AO DATA, *supra* note 33.

182. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

procedural terminations has remained relatively constant at three to two.¹⁸³ However, although oral arguments rose during the period, the number of cases receiving oral argument has declined as a percentage of all non-consolidation terminations.¹⁸⁴ In 1993, approximately one in six of all non-consolidation terminations were with oral argument.¹⁸⁵ Merit terminations for cases submitted on briefs correspondingly increased as a percentage of all non-consolidation terminations.¹⁸⁶

Terminations have not kept pace with case commencements. The court's backlog of cases has grown 119.8% from 1982 to 1993, from 2210 to 4857 cases.¹⁸⁷ The backlog of all courts of appeals rose from 21,510 to 37,567 cases, a 74.6% increase during the same period.¹⁸⁸ In 1993, types of cases in the backlog were in rough proportion to cases commenced that year.¹⁸⁹ Criminal cases, 23% of cases commenced in 1993, were 25.3% of the backlog.¹⁹⁰ The backlog of those cases rose from 292 cases in 1982 to 1227 cases in 1993.¹⁹¹ State prisoner petitions, 21.8% of cases commenced, were 18.7% of the 1993 backlog.¹⁹² The backlog of those cases rose 372.9%, from 192 to 908 cases.¹⁹³ Only the backlog of administrative cases fell in this period from 333 to 220 cases, a decrease of 33.9%.¹⁹⁴

III. SOME CONCLUSIONS ABOUT THE WORKLOAD OF THE FIFTH CIRCUIT

The data reflect an overall increase in case filings in the Fifth Circuit from 2715 cases in 1982 to 6689 cases in 1993, a 146.4% increase, driven in large part by greater filing frequency of criminal appeals and of state prisoner petitions.¹⁹⁵ This compares to a 78.1% increase of filings in all courts of appeals during the same period.¹⁹⁶ In five categories of cases—criminal appeals, federal prisoner, state prisoner, U.S. civil, and diversity—filings in the Fifth Circuit increased at over twice the rate of those filings nationally from 1982 to 1993.¹⁹⁷

Productivity of the circuit's judges more than doubled since 1982 in terms of terminations per effective active resident judge. These terminations in the Fifth

183. AO REPORT, *supra* note 35, tbl. B-1 (1982); subsequent AO REPORTS, and AO DATA, *supra* note 33.

184. AO REPORT, *supra* note 35, tbl. B-1 (1982); subsequent AO REPORTS, and AO DATA, *supra* note 33.

185. AO DATA, *supra* note 33.

186. AO REPORT, *supra* note 35, tbl. B-1 (1982); subsequent AO REPORTS, and AO DATA, *supra* note 33.

187. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

188. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

189. AO DATA, *supra* note 33.

190. These cases were 30.1% of the collective backlog of all courts of appeals in 1993. AO DATA, *supra* note 33.

191. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

192. These cases were 14.1% of the collective backlog of all courts of appeals in 1993. AO DATA, *supra* note 33.

193. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

194. These cases were 8.5% of the collective backlog of all courts of appeals in 1993. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

195. AO REPORT, *supra* note 35, tbl. B-1 (1982); subsequent AO REPORTS, and AO DATA, *supra* note 33.

196. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

197. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO REPORT, *supra* note 35, tbl. B-7 (1982); AO DATA, *supra* note 33.

Circuit rose from 228.5 to 485.2 cases per effective active resident judge.¹⁹⁸ This is an increase in productivity of 112.3%. Nationally, the average productivity of all courts of appeals judges rose 41.2% from 226.8 to 320.3 cases per effective active federal judge from 1982 to 1993.¹⁹⁹

Currently, there is no case-weighting system for federal appeals which would indicate how many of a circuit's cases require significant expenditure of judge time. However, as noted in the discussion of the judgeship formula, the Judicial Conference treats each prisoner filing as one-half of a case when evaluating a court's judgeship needs.²⁰⁰ These filings (from state and federal prisoners) were 1710 cases, one quarter of the Fifth Circuit's commencement docket in 1993.²⁰¹ Further, the available data indicate the number of cases terminated without judicial actions. Of the Fifth Circuit's non-consolidation terminations, 38.7% were on procedural grounds in 1993.²⁰² More than one half of all of the circuit's procedural terminations (approximately one in five of all non-consolidation terminations) are without judicial action.²⁰³

The circuit's disposition times for merit dispositions improved from 1982 to 1993 and never fell below the national average in any year since 1987.²⁰⁴ The circuit's average disposition times for both oral argument and cases submitted on brief are better than the national average.²⁰⁵ While the circuit is terminating more cases on the merits, and while the average time to disposition is shorter, decision following oral argument is the exception rather than the rule in the circuit. Of the merit terminations (61.3% of all non-consolidation terminations in 1993), the ratio of dispositions after oral argument to dispositions on submission of briefs fell from two in five in 1985 to nearly one in four in 1993.²⁰⁶ While data from all courts of appeals show a decrease in the percentage of merit dispositions after oral argument from 1985 to 1993, nationally, two of five merit dispositions are still after oral argument.²⁰⁷ Increased filings appear to have forced the court to increase its productivity by reducing appellate process. The impact of this reduction in terms of the quality of the court's decision-making has not been evaluated.

Even with enhanced productivity, the court has not kept pace with the rising number of commencements. The court's backlog has increased steadily since 1982.²⁰⁸

198. AO STATISTICS, *supra* note 109 (1982); AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

199. AO STATISTICS, *supra* note 109 (1982); AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

200. See *supra* note 115.

201. AO DATA, *supra* note 33.

202. AO DATA, *supra* note 33.

203. AO DATA, *supra* note 33.

204. AO REPORT, *supra* note 35, tbl. B-4 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

205. AO DATA, *supra* note 33.

206. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

207. AO REPORT, *supra* note 35, tbl. B-1 (1982); AO DATA, *supra* note 33.

208. AO REPORT, *supra* note 35, tbl. B-1 (1982), subsequent AO REPORTS, and AO DATA, *supra* note 33.

It is unclear what more the circuit can do in order to keep pace with its increased filings if cases are not reallocated to state courts or to other administrative fora. The court could seek to add judges, or to further reduce opportunities for oral argument, to increase quantitative output. However, those solutions might produce the kinds of problems which the split of the former Fifth Circuit presumably sought to avoid.

APPENDIX

Fifth Circuit Terminations

YEAR	TOTAL ¹	CRIMINAL	U.S. PRISONER PETITIONS	OTHER U.S. CIVIL	STATE PRISONER PETITIONS	OTHER PRIVATE CIVIL ¹	BANKRUPTCY	ADMINISTRATIVE	ORIGINAL
1982	2,772	384	56	324	245	1,281	40	357	85
1983	2,996	443	65	336	479	1,232	60	310	71
1984	3,551	405	76	352	725	1,515	80	285	113
1985	3,432	419	78	331	714	1,562	75	166	87
1986	3,904	411	77	331	714	1,737	88	447	99
1987	4,174	529	97	359	867	1,834	129	278	81
1988	4,295	515	105	314	1,304	1,631	151	202	73
1989	4,438	780	121	387	916	1,787	126	236	85
1990	4,823	935	169	440	979	1,846	130	228	96
1991	5,021	1,178	189	380	1,148	1,704	134	196	92
1992	5,722	1,287	215	409	1,227	1,977	225	268	114
1993	6,262	1,412	271	466	1,428	2,011	234	334	106

¹ Includes cases disposed of by consolidation.² Includes diversity cases and other federal questions, which were discussed separately in text.

Pending Cases: Fifth Circuit

YEAR	TOTAL	CRIMINAL	U.S. PRISONER PETITIONS	OTHER U.S. CIVIL	STATE PRISONER PETITIONS	OTHER ¹ PRIVATE CIVIL	BANKRUPTCY	ADMINISTRATIVE	ORIGINAL
1982	2,210	292	42	251	192	1,072	25	333	3
1983	2,407	255	32	247	300	1,237	44	284	8
1984	2,468	282	39	211	363	1,223	48	289	13
1985	2,492	251	38	223	321	1,275	39	340	5
1986	2,425	341	45	209	373	1,219	62	165	11
1987	2,552	315	46	188	626	1,154	80	136	7
1988	2,588	436	57	207	424	1,195	64	203	2
1989	2,909	640	93	253	496	1,208	57	153	9
1990	3,136	821	104	237	513	1,232	88	131	10
1991	3,738	975	114	271	590	1,467	126	173	22
1992	4,430	1,106	167	309	882	1,585	178	184	19
1993	4,857	1,227	151	382	908	1,796	159	220	14

¹ Includes diversity cases and other federal questions, which were discussed separately in text.

Fifth Circuit Judgeships

YEAR	AUTHORIZED JUDGESHIPS	VACANT JUDGESHIP MONTHS	EFFECTIVE ACTIVE JUDGESHIPS	SITTING SENIOR JUDGESHIPS
1982	14	22.4	12.1	5
1983	14	13.8	12.9	6
1984	14	0.0	14.0	6
1985	16	22.2	14.2	5
1986	16	15.1	14.7	5
1987	16	24.0	14.0	5
1988	16	26.5	13.8	5
1989	16	24.0	14.0	5
1990	16	19.8	14.4	6
1991	17	35.9	14.0	7
1992 ¹	17	38.3	13.8	8
1993 ⁱ	17	48.0	13.0	8

¹ Figures reported for 1992 and 1993 are for the year ended September 30.

Fifth Circuit Terminations Per Effective Active Judge

YEAR	TERMINATIONS ¹	TERMINATIONS PER EFFECTIVE ACTIVE JUDGE
1982	2,772	228.5
1983	2,996	233.2
1984	3,551	253.6
1985	3,432	242.5
1986	3,904	264.8
1987	4,174	298.1
1988	4,295	311.4
1989	4,438	317.0
1990	4,823	336.1
1991	5,021	358.4
1992 ²	5,855	424.0
1993 ²	6,308	485.2

¹ Includes cases disposed of by consolidation.

² Figures reported for 1992 and 1993 are for the year ended September 30.

Fifth Circuit Distribution of Case ParticipationsCASE PARTICIPATIONS BY

YEAR	TOTAL CASE PARTICIPATIONS	RESIDENT ACTIVE JUDGES	RESIDENT SENIOR JUDGES	VISITING JUDGES
1982	4,479	4,007.0	359.0	113
1983	4,935	4,302.0	470.0	163
1984	5,359	4,872.0	335.0	152
1985	6,113	5,615.0	446.0	52
1986	6,488	5,984.0	386.0	118
1987	6,685	6,098.0	419.0	168
1988	7,217	6,648.0	386.0	183
1989	7,383	6,799.0	446.0	138
1990	8,107	7,533.0	484.0	90
1991	8,129	7,295.0	786.0	48
1992 ¹	9,231	8,129.0	813.0	289
1993 ¹	10,130	9,085.0	784.0	261

¹ Figures reported for 1992 and 1993 are for the year ended September 30.

Fifth Circuit Distribution of Case ParticipationDISTRIBUTION OF CASE PARTICIPATIONS BY

YEAR	TOTAL ¹ CASE PARTICIPATIONS	RESIDENT ACTIVE JUDGES	RESIDENT SENIOR JUDGES	VISITING JUDGES
1982	100.0%	89.5%	8.0%	2.5%
1983	100.0%	87.2%	9.5%	3.3%
1984	100.0%	90.9%	6.3%	2.8%
1985	100.0%	91.9%	7.3%	0.9%
1986	100.0%	92.2%	5.9%	1.8%
1987	100.0%	91.2%	6.3%	2.5%
1988	100.0%	92.1%	5.3%	2.5%
1989	100.0%	92.1%	6.0%	1.9%
1990	100.0%	92.9%	6.0%	1.1%
1991	100.0%	89.7%	9.7%	0.6%
1992 ²	100.0%	88.1%	8.8%	3.1%
1993 ²	100.0%	89.7%	7.7%	2.6%

¹ Due to rounding, columns may not add up to 100%.

² Figures reported for 1992 and 1993 are for the year ended September 30.

Judgeships: All Courts of Appeals

YEAR	AUTHORIZED JUDGESHIPS	VACANT JUDGESHIP MONTHS	EFFECTIVE ACTIVE JUDGESHIPS	SITTING SENIOR JUDGESHIPS
1982	132	103.1	123.4	47
1983	132	53.3	127.6	50
1984	132	23.9	130.0	50
1985	156	275.0	133.1	45
1986	156	163.0	142.4	41
1987	156	123.4	145.7	50
1988	156	122.9	145.8	50
1989	156	92.7	148.3	54
1990	156	153.3	143.2	60
1991	167	191.8	151.0	60
1992 ¹	167	237.8	147.2	66
1993 ¹	167	213.4	149.2	70

¹ Figures reported for 1992 and 1993 are for the year ended September 30.

Terminations Per Effective Active Judge: All Courts of Appeals

YEAR	TERMINATIONS ¹	TERMINATIONS PER EFFECTIVE ACTIVE JUDGE
1982	27,984	226.8
1983	28,660	224.7
1984	31,185	239.9
1985	31,387	235.8
1986	33,774	237.1
1987	34,444	236.4
1988	35,888	246.2
1989	37,372	252.0
1990	38,520	268.9
1991	41,414	274.2
1992	44,373	301.5
1993	47,790	320.3

¹ Includes cases disposed of by consolidation.

Distribution of Case Participations: All Courts of AppealsCASE PARTICIPATIONS BY

YEAR	TOTAL CASE PARTICIPATIONS	RESIDENT ACTIVE JUDGES	RESIDENT SENIOR JUDGES	VISITING JUDGES
1982	38,059	29,579	3,749	4,731
1983	40,258	31,719	4,127	4,412
1984	44,048	35,776	3,828	4,444
1985	49,854	40,281	4,861	4,712
1986	55,467	45,370	5,355	4,742
1987	56,579	46,920	5,650	4,009
1988	58,714	48,712	5,763	4,239
1989	59,638	49,704	5,561	4,373
1990	64,293	53,081	6,819	4,393
1991	68,950	56,226	7,980	4,744
1992 ¹	71,775	57,178	9,404	5,193
1993 ¹	78,025	62,998	9,463	5,564

¹ Figures reported for 1992 and 1993 are for the year ended September 30.

Distribution of Case Participations: All Courts of AppealsDISTRIBUTION OF CASE PARTICIPATIONS BY

YEAR	TOTAL ¹ CASE PARTICIPATIONS	RESIDENT ACTIVE JUDGES	RESIDENT SENIOR JUDGES	VISITING JUDGES
1982	100.0%	77.7%	9.9%	12.4%
1983	100.0%	78.8%	10.3%	11.0%
1984	100.0%	81.2%	8.7%	10.1%
1985	100.0%	80.8%	9.8%	9.5%
1986	100.0%	81.8%	9.7%	8.5%
1987	100.0%	82.9%	10.0%	7.1%
1988	100.0%	83.0%	9.8%	7.2%
1989	100.0%	83.3%	9.3%	7.3%
1990	100.0%	82.6%	10.6%	6.8%
1991	100.0%	81.5%	11.6%	6.9%
1992 ²	100.0%	79.7%	13.1%	7.2%
1993 ²	100.0%	80.7%	12.1%	7.1%

¹ Due to rounding, columns may not add up to 100%.² Figures reported for 1992 and 1993 are for the year ended September 30.