Washington and Lee Law Review

Volume 51 | Issue 1 Article 4

Winter 1-1-1994

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TAKING ANOTHER MEASURE OF THE "CRISIS OF VOLUME" IN THE U.S. COURTS OF APPEALS*

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In 1990, the Federal Courts Study Committee began its discussion of the problems facing the U.S. Courts of Appeals with the tag line we use in our title: "However people may view other aspects of the federal judiciary, few deny that its appellate courts are in a *'crisis of volume'* that has transformed them from the institutions they were even a generation ago."[1] This was the most comprehensive and most recent effort in a long line of studies, committees, and commissions that have focused on the intermediate federal courts, to undertake an assessment of their status, to evaluate the threats from their workload, and to make recommendations for their survival and reform.

Everyone, would-be-reformers and defenders-of-the-status-quo alike, and anyone who has examined the available statistics, must admit the obvious: the caseloads of the U.S. Courts of Appeals have grown dramatically over the last four decades. There has been a pronounced disagreement over the effects of this docket growth and what, if anything, should be done about

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* This Article is adapted from a chapter in a study conducted by the Justice Research Institute for the Federal Judicial Center and authored by Professor Baker. We appreciate the thoughtful comments and suggestions from Paul D. Carrington, Frank H. Easterbrook, Vincent F. Flanagan, Michael C. Gizzi, David H. Kaye, A. Leo Levin, J. Clifford Wallace, and Joseph F. Weis, Jr. The statements, conclusions, and points of view are those of the two authors alone. The authors are grateful for the able research assistance of Michael S. Truesdale.

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1. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990) [hereinafter STUDY COMMITTEE REPORT] (emphasis added). *See generally* DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974).

> We do note, however, that there are "crises" and then there are "*crises*:"
> "Crisis" is a much overused word. Burgeoning caseloads are nothing new, nor is the sense that the system is on the verge of breakdown. What is new is the perception that the traditional remedies—enlarging the number of judgeships and auxiliary staff, creating new courts, or subdividing existing courts into smaller units—are no longer adequate.

Arthur D. Hellman, *Crisis in the Circuits and the Browning Years*, *in* RESTRUCTURING JUSTICE—THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 1, 4 (Arthur D. Hellman ed., 1990) (footnotes omitted). *See generally* Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115 (1991). The Study Committee itself was divided over the seriousness of the appellate caseload crisis and what, if anything, should be done about it. *See* STUDY COMMITTEE REPORT, *supra*, at 123-24 (additional statement of four members).

it. We hope to contribute to this debate by demonstrating a new methodology to quantify and then to compare over time the aggregate delay that has occurred in the U.S. Courts of Appeals as a result of docket growth.

PREVIOUS STUDIES

The commonly repeated perception is that the caseload has become a serious threat to federal appellate ideals and some serious reform is needed. Some, of course, have disagreed with both these conclusions. It is informative background to appreciate just how much effort has been made over the years to try to understand the problems facing the federal intermediate courts that are the result of docket growth. These previous studies have been undertaken by leading experts of various political persuasions. They have taken the measure of the Courts of Appeals both quantitatively and qualitatively, using varied methodologies. The Federal Courts Study Committee was not the first blue-ribbon panel to worry about the "crisis of volume" in the federal appellate courts. There were several earlier efforts worth noting briefly.[2]

The American Law Institute Study was started in 1960 at the instigation of Chief Justice Earl Warren, and was completed in 1968 and then published under the title *Study of the Division of Jurisdiction Between State and Federal Courts*.[3] This study focused primarily on the district courts and their major heads of jurisdiction. It failed to anticipate fully the burgeoning federal court dockets, except to note that demand for scarce appellate resources could be reduced by narrowing the original jurisdiction at the intake court, the district court.

The American Bar Foundation report, entitled *Accommodating the Workload of the United States Courts of Appeals* and published in 1968,[4] recommended some intramural procedural reforms to improve efficiency, recommended an increase in appellate capacity, and proposed a sequential strategy for dealing with anticipated federal docket growth over the long run. The plan would have sought to maintain an ideally sized circuit bench of nine judges, but would have accommodated a larger number of judgeships—deemed inevitable because of forecasted docket growth—by creating internal divisions and then splitting circuits, and eventually would have created another level of appellate court between the Courts of Appeals and the Supreme Court.

Commissioned by the Federal Judicial Center, the *Report of the Study Group on the Caseload of the Supreme Court* was published in 1972 and

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2. This account of federal court studies is adapted from Thomas E. Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 U. FLA. L. REV. 225, 238-43 (1985). That summary in turn relied on Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 B.Y.U. L. REV. 617, 625-37.

3. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969).

4. AMERICAN BAR FOUNDATION, ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS (1968).

informally came to be known as the Freund Committee report, after its Chairman.[5] The Freund Committee, whose members included jurists, scholars, and attorneys, focused primarily on the problems of the Supreme Court. The main proposal to increase federal appellate capacity to meet caseload demand—a recommendation that Congress create a national court of appeals between the existing Courts of Appeals and the Supreme Court—was met with a hailstorm of controversy and criticism and went nowhere.

Responding to the collective urgings of Chief Justice Warren E. Burger, the chief judges of all the Courts of Appeals, the Judicial Conference of the United States, the Federal Judicial Center, and the American Bar Association, Congress created the Commission on Revision of the Federal Court Appellate System in 1972, chaired by Senator Hruska. In 1973, the Commission issued its first report recommending the division of the Fifth and Ninth Circuits.[6] Two years later, the Commission issued its second report, which considered the structure and internal procedures of the federal appellate courts.[7] Again, one of the suggestions was to increase the national appellate capacity by creating a national court of appeals.

The Advisory Council on Appellate Justice was a nongovernmental body created in 1971 as a liaison between the Federal Judicial Center and the National Center for State Courts.[8] After a four-year study, the Council, comprised of judges, lawyers, and law professors, developed guidelines for restructuring the federal appellate system much in line with the Hruska Commission.

In 1978, the American Bar Association (ABA) created the Action Commission to Reduce Court Costs and Delay, which in turn developed a package of appellate reforms to expedite the disposition of appeals.[9] Its proposals were concerned exclusively with appeal processing efficiency, what might be called intramural reforms, and addressed how the judges could do more and do better.

Appointed by Attorney General Levi, a committee within the Department of Justice, chaired by Solicitor General Bork, surveyed the problems of the federal courts and issued a report in 1977.[10] The report emphasized the problems of the whole federal court system, but included a recommen-

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5. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), *reprinted in* 57 F.R.D. 573 (1973).

6. Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223 (1973).

7. Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1976).

8. Meador, *supra* note 2, at 628-29.

9. Seth Hufstedler & Paul Nejelski, *A.B.A. Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A. J. 965 (1980); Joseph R. Weisberger, *Appellate Courts: The Challenge of Inundation*, 31 AM. U. L. REV. 237 (1982).

10. DEPARTMENT OF JUSTICE COMMISSION ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, THE NEEDS OF THE FEDERAL COURTS (1977).

dation to create administrative courts under Article I for both adjudication and appeals under most federal regulatory laws.

During the next administration, in 1977, Attorney General Bell established a new unit within the Department called the Office for Improvements in the Administration of Justice. The Office was designed to develop and to promote federal court reforms. The most noteworthy appellate reform originating in this office was the proposal, eventually enacted in 1982, to create the Court of Appeals for the Federal Circuit, the first intermediate federal appellate court with a nationwide subject matter jurisdiction.[11]

In 1986, Professors Samuel Estreicher and John Sexton published a short book that presented the findings of the *New York University Law Review Project*.[12] That project focused on the Supreme Court's caseload and the book argued for a new "managerial model" of the Supreme Court. There was no need, in the opinion of the authors, for additional national appellate capacity, so long as the Supreme Court did its part.

In 1989, the ABA Standing Committee on Federal Judicial Improvements issued a comprehensive report entitled *The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth*.[13] The Standing Committee conducted an independent examination of the numerous earlier studies and also evaluated previous congressional responses, such as increasing the number of appellate judgeships, dividing the Fifth Circuit, authorizing the limited en banc court in large circuits, and creating the Court of Appeals for the Federal Circuit. The Standing Committee concluded that the inexorable trend lines promising ever-increasing numbers of federal appeals of greater complexity and difficulty threaten to overwhelm the century-old federal appellate structure. The committee of bar leaders, jurists, and academic experts concluded that "reform of the courts of appeals will not be a question of whether, but a question of when and how."[14] In general, the Standing Committee urged careful study and monitoring of the problems facing the Courts of Appeal, further emphasis on intramural screening procedures, and greater reliance on appellate subject matter specialization.

In November 1988, Congress created the Federal Courts Study Committee as an ad hoc committee within the Judicial Conference of the United States.[15] Appointed by Chief Justice Rehnquist, the fifteen-person Study

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11. Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581, 581 (1992). For the most part, our discussion considers only the twelve regional Courts of Appeals.

12. SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE: THE FEDERAL JUDICIAL PROCESS (1986). For a critical review, see generally Thomas E. Baker, *Siskel and Ebert at the Supreme Court*, 87 MICH. L. REV. 1472 (1989).

13. AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH (1989).

14. *Id.* at 40.

15. *See* STUDY COMMITTEE REPORT, *supra* note 1, at 31-33. The present authors served as Associate Reporter and Reporter to the Federal Courts Study Committee (1989-90). *Id.* at 197.

Committee included representatives of the three federal branches, state government officials, practitioners, and academics. The Study Committee members were thus broadly representative of the individuals and entities who share a compelling interest in the work of the federal courts. The Study Committee surveyed members of the federal judiciary and solicited the views of citizens' groups, bar organizations, research groups, academics, civil rights groups, and others. Numerous public outreach meetings were held and regional hearings focused on published proposals, leading up to the final report.

Congress gave the Study Committee a fifteen month deadline within which to examine the problems facing the federal courts and to develop a long-range plan for the judicial branch. In the explicit charge to the Study Committee, Congress asked for an evaluation of the structure and administration of the United States Courts of Appeals. That section of the Study Committee's final report begins with a supposition that provides the point of departure for our Article: The federal appellate courts are faced with a "crisis of volume" that will continue and that will eventually require some "fundamental change."[16] The Study Committee's black-letter recommendation reads: "Fundamental structural alternatives deserve the careful attention of Congress, the courts, bar associations, and scholars over the next five years."[17]

In the spirit of the Federal Courts Study Committee's entreaty for "careful attention" of these issues, we will attempt to examine the assumption/conclusion reached in most of these previous studies, and repeated by the Study Committee itself: The U.S. Courts of Appeals are undergoing a "crisis in volume."[18]

THE DATA

Everyone knows that the federal appellate caseload has increased enormously over the last four decades, and everyone knows that the increases in the numbers of circuit judgeships have not kept pace with the docket growth in the U.S. Courts of Appeals. At the same time, as we will elaborate below, the individual appellate litigant today still gets a reasonably timely resolution of the case on appeal. Indeed, in absolute terms, considered per appeal, today it takes only slightly longer to resolve each appeal than it took forty years ago. Our thesis, however, is that this is too narrow a focus. Focusing only on the time period for each individual appeal gives, at best, an incomplete measure of the systemic effect felt from the "crisis of volume." We believe that the traditional method of assembling and reporting data subtly masks the systemic effects of the increases in the volume of appeals. The traditional

16. *Id.* at 109. An "[a]dditional statement" by four members of the Committee sounded a note of caution about the assumption of a crisis of volume, and a still louder note of skepticism about the need for radical structural reform. *Id.* at 123-24.

17. *Id.* at 116-17.

18. *Id.* at 109.

and familiar "months-per-appeal" statistic disaggregates, and consequently fragments and marginalizes, the delay caused by the caseload growth. Delay technically is not understated, statistically speaking, but it is less normatively understood when presented and considered in the time-per-appeal format.

The alternative way we assemble the data demonstrates that, while the records and briefs are being filed in roughly as timely a fashion as forty years ago, the circuit judges are taking significantly much longer periods to decide cases after the appeal is submitted. Most importantly, we conclude that the traditional focus on the admittedly slight incremental increases in individual case delay overlooks the aggregate effect of relatively slight incremental delays, which can be fully appreciated only when the delay-per-appeal is multiplied and generalized across the huge national appellate docket.

Long-term trends in the time intervals on appeal, measured per appeal and in the national aggregate for all the regional Courts of Appeals, provide some added sense of the impact of caseload on the federal appellate system as a whole. Quantitative comparisons in the length of time it now takes to hear and decide an appeal indicate how severely the volume of appeals is stressing the system. Consider this table:

MEDIAN TIME INTERVALS ON APPEAL (months)

	FILING RECORD TO LAST BRIEF	LAST BRIEF TO HEARING/ SUBMISSION	HEARING/ SUBMISSION TO DECISION/ FINAL ORDER	FILING RECORD TO FINAL DISPOSITION
1950	3.7[19]	0.7[20]	1.5[21]	7.1[22]
1960	3.6[23]	0.8[24]	1.5[25]	6.8[26]
1970	3.5[27]	1.8[28]	1.6[29]	8.2[30]
1980	2.8[31]	2.9[32]	1.6[33]	8.9[34]
1990*	4.5[35]	3.1[36]	2.5/1.1[37]	10.1[38]

* The figures for 1990 were compiled somewhat differently, as explained in the footnotes to the entries.

19. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 135 tbl. B4 (1950) [hereinafter ANNUAL REPORT (1950)]. The high was 5.2 months (Seventh Circuit); the low was 1.7 months (Second Circuit).

20. *Id.* The high was 2.3 months (District of Columbia Circuit); the low was 0.2 month (Fourth Circuit).

21. *Id.* The high was 2.3 months (District of Columbia Circuit); the low was 0.5 month (Sixth Circuit).

22. *Id.* The high was 11.2 months (District of Columbia Circuit); the low was 3.3 months (Second Circuit).

23. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED

A PRELIMINARY ANALYSIS

What comparisons over time can be deduced from this table? It is quite remarkable that collectively the Courts of Appeals remain virtually current despite sustained off-the-chart levels of growth in their caseload. In 1950, there were 65 authorized circuit judgeships, 2,830 appeals were filed, and 2,355 appeals were terminated (36 per authorized judgeship).[39] In 1990, there were 156 authorized circuit judgeships; 40,898 appeals were filed; and 38,520 appeals were terminated (246.9 per authorized judgeship).[40] Despite this huge increase in workload, the total time from filing to disposition increased only ninety days. While this is roughly a 40% increase in delay, in absolute terms,

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STATES COURTS 221 tbl. B4 (1960) [hereinafter ANNUAL REPORT (1960)]. The high was 5.9 months (Ninth Circuit); the low was 2.3 months (Fourth Circuit).

24. *Id.* The high was 2.2 months (Sixth Circuit); the low was 0.1 month (Second Circuit).

25. *Id.* The high was 1.9 months (First Circuit); the low was 1.0 month (Seventh Circuit).

26. *Id.* The high was 10.3 months (Ninth Circuit); the low was 4.7 months (Fourth Circuit).

27. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 220 tbl. B4 (1970) [hereinafter ANNUAL REPORT (1970)]. The high was 5.8 months (Seventh Circuit); the low was 2.2 months (Fifth and Eighth Circuits).

28. *Id.* The high was 3.7 months (Ninth Circuit); the low was 0.4 month (First and Second Circuits).

29. *Id.* The high was 2.3 months (Eighth Circuit); the low was 1.0 month (Ninth Circuit).

30. *Id.* The high was 12.4 months (Ninth Circuit); the low was 5.2 months (First Circuit).

31. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 363 tbl. B4 (1980) [hereinafter ANNUAL REPORT (1980)]. The high was 4.9 months (District of Columbia Circuit); the low was 1.2 months (Eighth Circuit).

32. *Id.* The high was 9.4 months (Sixth Circuit); the low was 0.5 month (Second Circuit).

33. *Id.* The high was 2.1 months (District of Columbia, First, Fifth, and Ninth Circuits); the low was 0.3 month (Second and Third Circuits).

34. *Id.* The high was 17.4 months (Ninth Circuit); the low was 4.2 months (Second Circuit).

35. The figure reported is from filing the notice of appeal, not the record on appeal, to the last brief. This is because by 1990 most Courts of Appeals had dispensed with the full record on appeal and substituted record excerpts for most appeals. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 119 tbl. B4 (1990) [hereinafter ANNUAL REPORT (1990)]. The high was 8.7 months (District of Columbia Circuit); the low was 3.1 months (Third Circuit).

36. *Id.* The high was 6.1 months (Tenth Circuit); the low was 0.6 month (Third Circuit).

37. *Id.* In 9,447 appeals, the interval was 2.5 months from the hearing to the final disposition. In 11,559 appeals, the interval was 1.1 months from submission without oral argument to the final disposition. The high for argued appeals was 3.4 months (Eighth Circuit); the low for argued appeals was 0.9 month (Second Circuit). The high for summary calendar nonargued appeals was 1.9 months (First, Third and Fourth Circuits); the low for nonargued appeals was 0.4 month (Seventh Circuit).

38. *Id.* The figure reported was from the filing of the notice of appeal, not the record on appeal, to the final disposition. This is because by 1990 most Courts of Appeals had dispensed with the full record on appeal and substituted record excerpts in most appeals. The high was 16.0 months (Ninth Circuit); the low was 6.0 months (Third Circuit).

39. ANNUAL REPORT (1950), *supra* note 19, at 104, 103, 135.

40. ANNUAL REPORT (1990), *supra* note 35, at 3; *see infra* note 48.

few would argue that this much of an increase amounts to a "justice-delayed-is-justice-denied" problem.[41]

The ability to keep relatively current despite the huge docket growth might be explained in several ways, all of which seem to ring true, at least partly. First, an excess of federal appellate capacity at the beginning of this forty-year period likely allowed the Courts of Appeals to absorb greater and greater numbers of appeals for many years. Second, Congress in fact did add large cohorts of circuit judges to increase the national appellate capacity over the last four decades. Third, the various and sundry intramural reforms, procedural shortcuts fashioned by the circuit judges out of a sense of docket desperation, have allowed the Courts of Appeals to resolve many more appeals without expending as much judicial resources.

These hypotheses raise important questions. We might ask what has been the cost of increasing the national appellate capacity? If appeals are being decided today in a qualitatively different way from the way appeals were decided in 1950, does the difference so diminish the appellate process as to compromise federal appellate ideals? If not, can intramural reforms be refined further to achieve still greater economies of appeal so that appellate capacity can continue to expand to help meet projected increased demands without resulting in further delays and without creating more and more judgeships?

In beginning to answer these questions, let us take another look at the figures in the table, because a somewhat different picture emerges when we compare the forty-year changes between the appellate interval under the primary control of the litigants (from the filing of the notice of appeal to the filing of the last brief) with the appellate interval under the primary control of the judges (from the filing of the last brief to final disposition). This comparison indicates the magnitude of the cumulative effect of the increases in caseload volume felt on the federal appellate court system *qua* system. The resulting image depicts a system under severe stress.

The first column of the table shows an interval of 3.7 months for the appellate interval between the filing of the record on appeal to the filing of the last brief for the year 1950. The figures are reported differently over time, because during this forty-year period most of the Courts of Appeals stopped using formal records on appeals and substituted record excerpts and joint appendices. The 1990 figure is less than a month more, 4.5 months, but it is measured from the filing of the notice of appeal to the filing of the last brief. This small increase might even be explained, at least in part, by

41. It would be interesting to compare what has happened in the U.S. Courts of Appeals with the experiences of the state intermediate courts. Data is difficult to locate. The only analogous statistics we could find disclosed that, as of 1980, three state intermediate appellate courts averaged approximately 4 months per appeal in "judge time." NATIONAL CENTER FOR STATE COURTS, COURT STATISTICS AND INFORMATION MANAGEMENT PROJECT, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1980, at 46 tbl. 11 (1984). Obviously, these data are dated and any comparison with the federal statistics would be weak. Further research into state court appellate delay might generate more useful comparisons. *See infra* text accompanying notes 43-45.

the fact that the notice of appeal procedurally and necessarily is always filed first in time.[42] This column describes a four-decade-long trend line that for all intents and purposes is flat. The appellate interval under the control of the attorneys, adjusting for the reporting discontinuity that has been noted, therefore did not grow appreciably longer over the last forty years. This was to be expected, because the effect of caseload volume would not be felt at all by the individual advocate preparing a single appeal. Thus, as would be expected, there has been no appreciable increase in this appellate interval over the period.

Over the same period, however, examine closely what has happened to the two appellate intervals under the control of the judges, as depicted in the next two columns. Look at the sum of the second column (the interval between the last brief and the hearing or submission) plus the third column (the interval between the hearing or submission and the decision or final order). These two appellate intervals added together comprise the period during which an appeal is lodged with the judges, that is, how long it takes the Court of Appeals to perform its appellate review function. In 1950, the median time an appeal was lodged with the court was 2.2 months. By 1990, the median time had more than doubled to a figure of 5.6 months in argued cases and 4.2 months in nonargument summary calendar cases.

It is important to keep in mind that over this same forty-year period the Courts of Appeals implemented numerous procedural shortcuts, various intramural reforms—such as the nonargument summary calendar and the decision without opinion—intended to help cope with dramatic caseload growth. The Courts of Appeals designed these reforms to process many more appeals more efficiently and faster than the more traditional procedures and, therefore, presumably should be understood as having had the expected cumulative effect of reducing these appellate time intervals. At least, that is the justification most often offered for implementing and continuing these appellate procedural shortcuts.

On the contrary, the data show that there has been a significant quantitative increase in the appellate time intervals it takes the Courts of Appeals to hear and decide an appeal. The Courts of Appeals took 255% longer to decide an orally argued appeal in 1990 (5.6 months) than they took to decide an appeal in 1950 (2.2 months). Even an appeal on the nonargument summary calendar, the most significant of the appellate efficiency reforms of the last forty years, took 190% longer (4.2 months) in 1990 than an appeal took in 1950 (2.2 months). And it should be remembered that back in 1950 an oral argument and a written opinion were afforded in every federal appeal as of right.

AN ALTERNATIVE ANALYSIS

Of course, the argument can be made that overall the Courts of Appeals continue to perform at capacity and their capacity is adequate and their

42. *See supra* note 35.

efficiency is sufficient. It might be observed that the Courts of Appeals continue to terminate approximately the same number of appeals each year as are filed, although the precise numbers demonstrate some worrisome slippage. In 1950, there were 475 more appeals filed than terminated (2,830 - 2,355 = 475); in 1990, there were 2,378 more appeals filed than were terminated (40,898 - 38,520 = 2,378).[43] The 1990 "backlog" thus was larger than the total number of appeals terminated by all the Courts of Appeals in 1950. One way to measure whether an intermediate court of appeals is keeping up with its caseload is to calculate the court's "clearance rate," which is the number of appeals filed in a given year divided by the number of terminations in the same year.[44] Because these two sets of appeals are not identical—since appeals terminated in one year may have been filed in a previous year—a multiple year clearance rate is a more useful gauge of how well the court is keeping up with the volume of appeals being filed. A clearance rate of 100% or higher indicates that the court is holding its own or reducing the backlog. A clearance rate of less than 100% indicates that the backlog is worsening.

Three-year clearance rate calculations for the U.S. Courts of Appeals and for available state intermediate courts covering the years 1989, 1990 and 1991 yield the rankings in the following table:[45]

COURT	3 YEAR CLEARANCE RATE
New York	118.50
California	110.00
Idaho	105.30
Connecticut	104.00
Iowa	103.30
Pennsylvania	101.40
Florida	101.30
Colorado	101.00
D.C. Circuit	**100.00**
1st Circuit	**100.00**
6th Circuit	**100.00**
10th Circuit	**100.00**
Minnesota	99.60
Ohio	99.50
2nd Circuit	**98.40**
Alabama	97.70
Louisiana	97.60
Wisconsin	97.60
New Jersey	97.60
3rd Circuit	**97.10**
8th Circuit	**97.10**
New Mexico	97.10
4th Circuit	**96.90**
Texas	96.90

COURT	3 YEAR CLEARANCE RATE
Kansas	96.80
North Carolina	96.50
ALL STATES	**96.10**
Hawaii	95.80
Illinois	95.80
ALL CIRCUITS	**95.60**
Tennessee	94.90
Missouri	94.60
Arkansas	94.60
Alaska	93.80
5th Circuit	**92.60**
Maryland	92.60
11th Circuit	**90.70**
Oklahoma	90.20
South Carolina	89.90
7th Circuit	**89.30**
Kentucky	88.80
Oregon	88.00
9th Circuit	**87.80**
Arizona	85.80
Michigan	84.60
Washington	84.20
Georgia	76.20

43. ANNUAL REPORT (1950), *supra* note 19, at 104, 135; ANNUAL REPORT (1990), *supra* note 35, at 105.

44. NATIONAL CENTER FOR STATE COURTS ET AL., THE PULSE OF JUSTICE: THE BUSINESS OF STATE TRIAL AND APPELLATE COURTS 54 (1993) [hereinafter THE PULSE OF JUSTICE].

45. The figures for the state courts are taken from *Pulse of Justice*, *supra* note 44, at 55 tbl. II.2b. The figures for the U.S. Courts of Appeals were calculated based on the Annual Reports of the Administrative Office for the same years. These sets of federal and state figures are exactly comparable.

This table reveals that while eight state intermediate court systems actually are reducing their appellate backlogs, not one of the U.S. Courts of Appeals that has a backlog of filings actually is reducing it. Furthermore, the federal intermediate appellate court system, considered as a system, is not even performing above average, when compared to the three-year clearance rates of the state intermediate appellate courts for which data is available. Indeed, only four of the regional U.S. Courts of Appeals are currently "holding their own" against their filing increases. The Courts of Appeals for the D.C. Circuit, First Circuit, Sixth Circuit, and Tenth Circuit, like Alice in *Through the Looking Glass*, are running as fast as they can to stay in the same place. All the others are falling behind.

Alternatively, it might be argued, perhaps even more soundly, that going back to the first table the per-appeal intervals of 5.6 months in argued cases and 4.2 months in nonargued cases—representing additional delays of "only" 3.4 months and 2.0 months respectively over the forty-year period—are not very large when considered relatively or absolutely. There are two levels of response to this argument.

First, it should be pointed out that these are median figures and that they are for all the Courts of Appeals. Mathematically speaking, therefore, there are equal numbers of appeals in the federal appellate system being decided in longer and in shorter appellate time intervals; some particular appeals take more time than others; and some particular Courts of Appeals take more time than other Courts of Appeals.[46] This may be a statistical way of saying nothing more than that things actually could be better or worse than these figures suggest and, because it is difficult to know, we should not make too much out of median statistics. Our expressed purpose here is to make the most of these statistics, but not too much.[47]

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46. In this regard, the footnotes accompanying the first table are instructive. The highest and lowest figures from individual Courts of Appeals are provided. The rankings in the second table are some indication of the variation among the Courts of Appeals.

47. The legendary Harvard Law Professor Thomas Reed Powell was often heard to disapprove of "the kind of social study where 'counters don't think, and thinkers don't count.'" HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 15 (1973).

One measure of the increase in the workload of the Courts of Appeals is the ratio of cases per three-judge panel:

Year	Appeals	Per Three-Judge Panel
1950	2,830	131
1960	3,899	172
1970	11,662	361
1980	23,200	527
1990	40,898	787

Thomas E. Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 FLA. L. REV. 225, 235-36 (1985); ANNUAL REPORT (1990), *supra* note 35, at 3 tbl. 1. These figures show the trend in the workload of a judge who theoretically works only in conjunction with two colleagues, drafting opinions, reading briefs, preparing for argument, reviewing records on appeal, editing proffered opinions, writing concurrences and dissents,

Second, there is a more interesting way to consider the increases in the appellate intervals systemically, which takes into account the increase in the volume of appeals during the last four decades. While somewhat novel, we believe this system is more revealing of the effect of the "crisis of volume." Our method is to multiply the length of the median appellate intervals by the total number of appeals decided during the year to compute a figure of the aggregate median appellate time interval. This new methodology yields an aggregate measure of how long all the Courts of Appeals took to decide all the federal appeals for that year. Then we will compare this systemic aggregate measure of decision time for the years 1950 and 1990. This will allow a comparison of roughly how long the Courts of Appeals took to hear and decide a full year's worth of federal appeals before and after what has been called the "crisis of volume." The mean number, of course, would be preferable, even ideal, for this computational comparison. Unfortunately, the mean appellate intervals are not compiled and reported and, therefore, are not available. Presumably, the median figures are at least some rough approximation of what the mean figures would be. At least that is the explicit assumption we make here.

In 1950, the Courts of Appeals decided 2,355 appeals with a median appellate interval of 2.2 months, for a national aggregate of 5,181 months of appellate decision time for that year. In 1990, the Courts of Appeals decided 21,006 appeals on the merits; screening the appeals for different appellate procedural tracks complicates the mathematics somewhat, but the national aggregate for that year was 88,456 months of appellate decision time.[48]

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considering staff screening recommendations, et cetera.

The following ten-year totals also are instructive:

	1950	1960	1970	1980	1990
Courts of Appeals					
Judges	65	68	97	132	156
Appeals	2,830	3,899	11,662	23,200	40,898
Terminations	3,064	3,713	10,699	20,887	38,520
Pending	1,675	2,220	8,812	20,252	32,396
Terminations per judges	47	55	110	158	247

Administration of the Federal Judiciary: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 102d Cong., 1st Sess. (1991) (statement of Judge Charles Clark) (footnote omitted; this is a portion of the chart).

48. The breakdowns are reported by screening category. 16,814 cases x 3.1 months from filing last brief to hearing or submission = 52,123.4 months. 9,447 cases x 2.5 months from hearing to final disposition = 23,617.5 months. 11,559 cases x 1.1 months from submission to final disposition = 12,714.9 months. This totals 88,455.8 months for all appeals for 1990. *See* ANNUAL REPORT (1990), *supra* note 35, at 119 (describing median time intervals of cases terminated after hearing on submission).

There is an apparent discrepancy between the 1990 figure used in this aggregate delay comparison and the 1990 figure used in the earlier total termination comparison for the years 1950 and 1990. *See supra* note 40 and accompanying text. In 1990, there were a grand total of 38,520 appeals reported as "terminated" by all appellate procedures, without any break-

This increase in the national aggregate decision time for the appellate year represents an increase of one full order of magnitude in the total number of months it took the circuit judges to decide a year's worth of federal appeals. Measured in years, the 1990 aggregate is just over 17 times the 1950 aggregate, an increase from four centuries to more than seven millennia, an added difference of biblical proportions.[49] Keep in mind that these national aggregations of appellate delay are annual figures. This is the total for each calendar year. Beyond peradventure, these numbers must be considered significant, relatively, or absolutely.

The comparison makes the current situation seem even worse when considered in reverse. In 1990, the Courts of Appeals decided 21,006 cases on the merits and took 88,456 months of judge time in the aggregate to decide them. If the Courts of Appeals of 1990, with all their "new-fangled" appellate procedures, added resources and more personnel, were as efficient as the 1950 Courts of Appeals (2.2 months appellate interval), the same caseload would have been decided in 46,213 months of judge time, closer to half the time they actually took. In addition, every appeal could have been orally argued and decided with a published opinion. Finally, it should be remembered, the appellate interval within the control of the attorneys has not changed appreciably over the same period of comparison. Either the 1990 Courts of Appeals are half as efficient today as they were back in 1950 or the "crisis of volume" has them doubled over.

Because these aggregate appellate time intervals, which are median computations, are spread over so large a number of appeals they are actually experienced and then accounted for in fragments. The magnitude of their cumulative increase, by and large, has escaped the notice of court watchers. The conclusion to be drawn from these computations and comparisons over time may be stated succinctly. The increases in the median judicial time intervals for individual appeals demonstrate that appellate justice is being delayed on the appeal as of right (1950: 2.2 months for all appeals; 1990: 5.6 months in argued appeals and 4.2 months in nonargued appeals). But this is only the tip of the iceberg. The national aggregate computations provide some estimate of the overall systemic delay caused by the docket growth. In other words, these figures are some indication of the magnitude of the overall effect felt by the federal appellate court system from the increases in the number of appeals. This provides a new and different vantage on what the "crisis of volume" has wrought.

The often-repeated observation in the debate over what to do about the growth in the federal appellate docket identifies only three logical possibilities: adding appellate resources, reducing appellate procedures, or accepting

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downs given by screening categories. The Administrative Office reports, however, that 21,006 appeals were "Terminated After Hearing or Submission." *Compare* ANNUAL REPORT (1990), *supra* note 35, at 105, tbl. B (tabulating cases commenced, terminated, and pending) *with id.* at 119, tbl. B4 (tabulating media time intervals in cases terminated).

49. 5,181 months = 431.75 years aggregate appellate delay for the year 1950. 88,456 months = 7,371.3 years aggregate appellate delay for the year 1990.

longer delays. Over the last forty years, there has been enormous growth on the supply side, as new judgeships were created, more law clerks were added, new technologies were implemented, et cetera. Over the same period, federal appellate procedures have been streamlined and efficiencies have been pursued at every stage of the consideration of an appeal, so that most observers have concluded that little marginal gain is to be expected from further intramural reforms.

Despite all these additions to appellate capacity and all these new efficiencies, longer and longer delays have occurred. This Essay has attempted to quantify the magnitude of the growing delay. On an individual or per appeal basis, the increase in the delay certainly is noteworthy. Considered in the national aggregate, the increase in the systemic delay simply is staggering. Furthermore, there is no sign that the growth in the federal appellate docket is slowing. Any discussion of what to do about the continuing growth in the appellate caseload, therefore, must be informed by a fuller appreciation for the relationship between increases in appellate filings and the resultant appellate delay experienced in the federal intermediate appellate court system *qua* system.

Some Concluding Observations

Certainly, everything about the Courts of Appeals is bigger in the 1990s. Of course, there are more judges deciding more appeals. But it is most noteworthy that the time it takes the Courts of Appeals to hear and decide all the cases on their annual docket is appreciably longer than it was one generation ago. 1950 represents a typical year before the deluge of appeals and before the intramural reforms of appellate procedures. 1990 represents the aftermath of the crisis of volume. That the aggregate increase is so huge is even more significant given the wholesale reforms of appellate practice and procedure implemented by the Courts of Appeals over the same period. The trend lines for this period are charted in the Appendix following this Article.

The comparative computations these two years yield, most assuredly, would be wholly unacceptable in other areas of federal public policy performance. For example, suppose that in 1950 it took two days for the Post Office to deliver a letter mailed from Lubbock, Texas to Washington, D.C. Suppose that forty years later, in 1990, faced with larger volumes of mail but afforded more personnel and greater resources, including new technology and other economies of scale, it took the Postal Service four or five or even six days to deliver the same letter and then it was delivered to a post office box rather than to the person's home. Who would find that acceptable? Could any responsible person comfortably accept that trend or allow it to continue? Would Congress sit idly by? While our analogy uses letters and days, the comparisons of aggregate appellate time intervals, after all, deal with appeals in federal litigation and months. The matters involved are more weighty and the added delay is much more pronounced.

Most of the previous studies, committees, and commissions have expressed varying degrees of concern, often expressed as a grave concern, for

the problems facing the U.S. Courts of Appeals. Many fear, however, that their warnings resemble those of the Greek seer Cassandra, whose curse was that her prophecies would be accurate but always ignored.[50] These commentators have expressed their warnings both qualitatively and quantitatively.

Some have expressed concerns that the pressures of caseload over the last four decades have resulted in intramural "reforms" that already have misshaped the quality of federal appellate procedure almost unrecognizably. They worry that the federal appellate tradition and ideals already have been severely compromised by these responses to docket growth.[51] Others have expressed an even more profound worry about quantitative predictions, expressing a concern for an uncertain and not too distant future that threatens to worsen the "crisis of volume" until the existing federal appellate structure collapses under the weight of caseloads and judgeships. They also worry that if we do nothing we run a grave risk of irrevocably losing our federal appellate tradition and ideals; they insist we must plan and prepare alternative structures for the inevitable transfiguration of the intermediate federal court.[52]

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50. Judge Posner succinctly summarized the built-in structural limitations for dealing with this "crisis":

> Much of the book has been concerned with what I have called the caseload "crisis" of the federal courts. The word is used advisedly, and is not, I hope, exaggerated. The fact that judges and commentators were complaining about federal judicial caseloads 25 years ago, when those caseloads were but a fraction of what they have become, yet the system still has not collapsed, will make some readers think that I, too, am crying wolf. But the wolf really does seem to be at the door. It is not the number of cases alone that makes a caseload crisis; it is, as I have argued, the difficulty of expanding a unitary judicial system to absorb an ever-growing number of cases that eventually brings about a critical situation. The federal judicial system is a pyramid the apex of which—the Supreme Court—is fixed in size. The midsection of the pyramid, consisting of the federal courts of appeals, is not fixed, but it cannot be expanded, beyond a point that seems to have been reached, without either creating extremely poor working conditions at the court of appeals level (by making each such court too large to function effectively) or placing unreasonable demands on the Supreme Court. In these circumstances, the fact that district judges can be added with relatively little threat to the effective operation of the district courts (the case of the pyramid) is only a small comfort.

RICHARD A. POSNER, THE FEDERAL COURTS—CRISIS AND REFORM 317 (1985); *see also supra* note 1.

51. STUDY COMMITTEE REPORT, *supra* note 1, at 134; *see, e.g.*, Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 SAN DIEGO L. REV. 371 (1988) (arguing that increases in judicial productivity do not correlate with improved judicial deliberation); William M. Richman & William L. Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 U. MICH. J.L. REF. 623 (1988) (analyzing scholarly critiques of primary means by which courts internally control caseloads).

52. In a speech delivered at the 1992 Judicial Conference of the Court of Appeals for the Federal Circuit, Chief Justice Rehnquist remarked:

> One of the chief needs of our generation is to deal with the current appellate capacity crisis in the federal courts of appeals. Few would argue about the existence of such a crisis, born of both spiraling federal filings and an increasing tendency to

Along with Chief Justice Rehnquist, we confidently predict that "change will come" for the U.S. Courts of Appeals.[53] We hope that this Article will contribute to a better understanding of the problems facing the federal appellate courts and, in turn, that our effort will aid the thoughtful search for solutions.[54]

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appeal district court decisions.

Chief Justice Addresses Federal Court Workload, Future Needs, THIRD BRANCH, June 1992, at 4. *See also* Delores K. Sloviter, *The Judiciary Needs Judicious Growth*, NAT'L L.J., June 28, 1993, at 17 (arguing that measured growth along with congressional and executive restraint is best way to control expanding case loads); Gerald Bard Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70 (arguing that large federal judiciary results in lower individual productivity, clarity, and stability of opinions, and is inhospitable to individual rights). *Compare* Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993) (arguing that increases in size of fedearl judiciary threaten quality) *with* Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52 (arguing that federal judiciary doubling in size would not reduce quality).

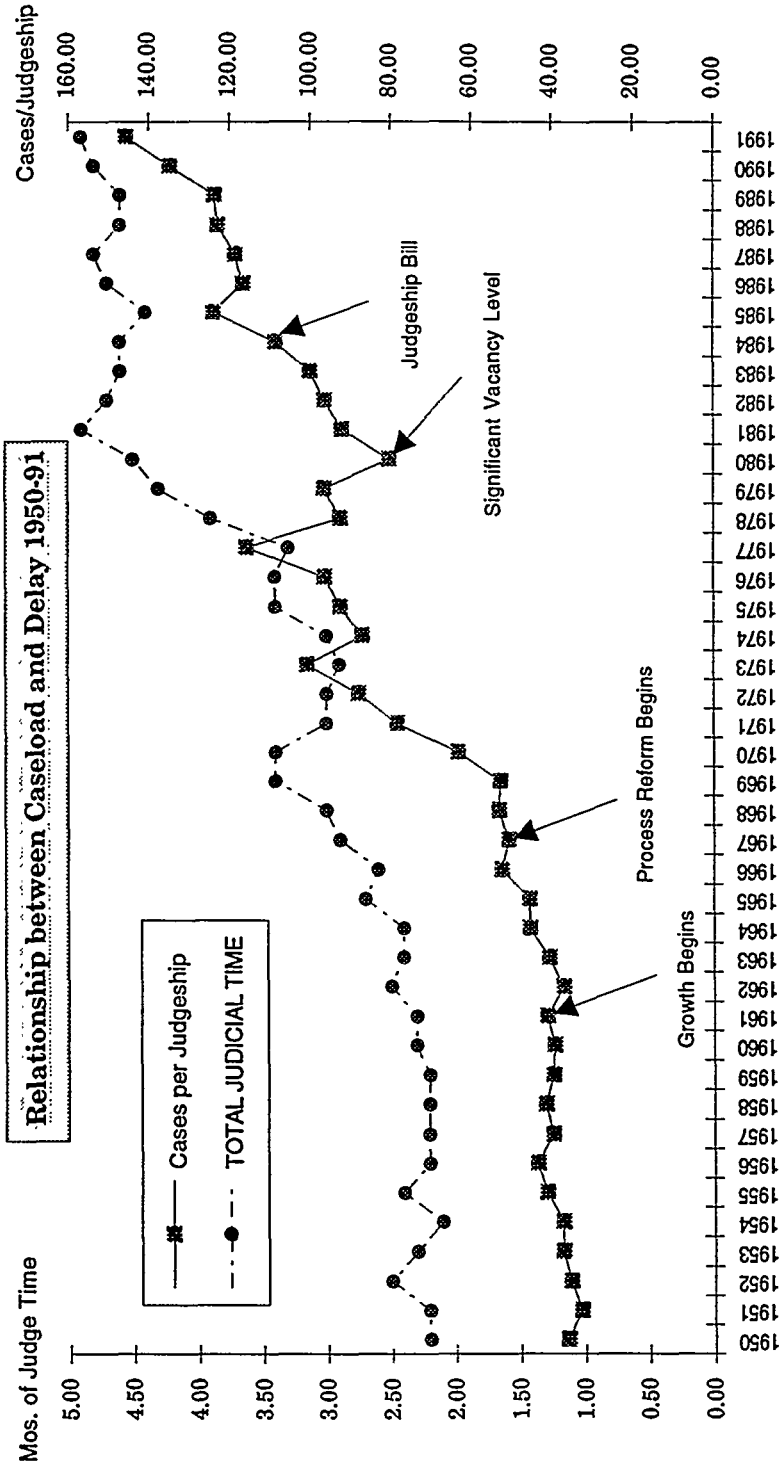
53. Describing the "current appellate capacity crisis," Chief Justice Rehnquist predicted, "Although no consensus has yet developed around any particular set of changes to the status quo—and to be sure any alternatives will present practical and political difficulties—it is safe to say that change will come." Welcoming Remarks of Chief Justice William H. Rehnquist, 1993 National Workshop for Judges of the U.S. Courts of Appeals (Feb. 8, 1993).

54. *See supra* note 47.

For a most provocative analysis, by a political scientist, of case management statistics and perceptual survey data, see generally Michael C. Gizzi, *Examining the Crisis of Volume in the U.S. Courts of Appeals*, 77 JUDICATURE 96 (1993).

As something of a postscript on the obvious, we note that our effort here is predominately *quantitative*. There may well be *qualitative* differences between 1950 and 1990. The modern federal appeal may be more complicated and more difficult than appeals were forty years ago; the decisions and opinions in the *Federal Reporter* may be longer and better. We have our doubts about such "presentist" assumptions, but is enough to say that a qualitative comparison over time is another article.

APPENDIX


Relationship between Caseload and Delay 1950-91
Cases/Judgeship
Mos. of Judge Time
Cases per Judgeship
TOTAL JUDICIAL TIME
Judgeship Bill
Significant Vacancy Level
Process Reform Begins
Growth Begins