

Stalking the Increase in the Rate of Federal Civil Appeals

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Introduction

In its 1990 report, the Federal Courts Study Committee warned about the increasing caseload of the U.S. courts of appeals: “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.” According to the committee, “The crisis is caused partly by an increase in district court cases but mainly by a heightened proclivity to appeal district court terminations.”¹ In this report we examine the reasons for the increasing appellate caseload and the extent to which these increases are caused by an increased proclivity to appeal district court terminations.

Civil appeals constitute the bulk of the appellate workload, and although popular perception may be to the contrary, growth in these appeals has long outpaced growth in criminal

1. Report of the Federal Courts Study Committee, 1990, at 109–10. The Federal Courts Study Committee was authorized by Congress, appointed by the Chief Justice of the United States, and included congressional leaders, federal and state judges, and members of the bar. While the report concluded that the crisis of volume was beyond dispute, a minority statement (*id.* at 123–24) questioned whether a crisis had been adequately demonstrated, and the committee as a whole acknowledged the lack of precision in existing measures of appellate workload. Concerns over caseload growth are not new. *See, e.g.*, Charles A. Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 Tex. L. Rev. 949 (1964); S. Rep. No. 781, 90th Cong. (1967) (describing the legislative history of the bill providing for the establishment of the Federal Judicial Center); Charles R. Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 Wash. U. L.Q. 257 (1973); Earl Warren, Chief Justice of the United States, Address to the American Law Institute (May 21, 1968); 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); Paul D. Carrington et al., Justice on Appeal 4–7 (1976); Daniel J. Meador, Appellate Courts Staff and Process in the Crisis of Volume 7–9 (1974); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984?*, 56 S. Cal. L. Rev. 761 (1983); Richard A. Posner, *The Federal Courts* (1985); Lewis F. Powell, *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A. J. 1370 (1982).

Stalking the Increase in the Rate of Appeal

and other types of appeals (see Figure 1).² Although marked increases in the number of civil appeals began in 1968, particularly steep growth occurred after 1980. Except for a sharp upturn that began in 1988, criminal appeals by contrast have increased only modestly over time, and increases in appeals from other sources (e.g., appeals from administrative agencies, bankruptcy appeals, and original proceedings) have always been modest.³

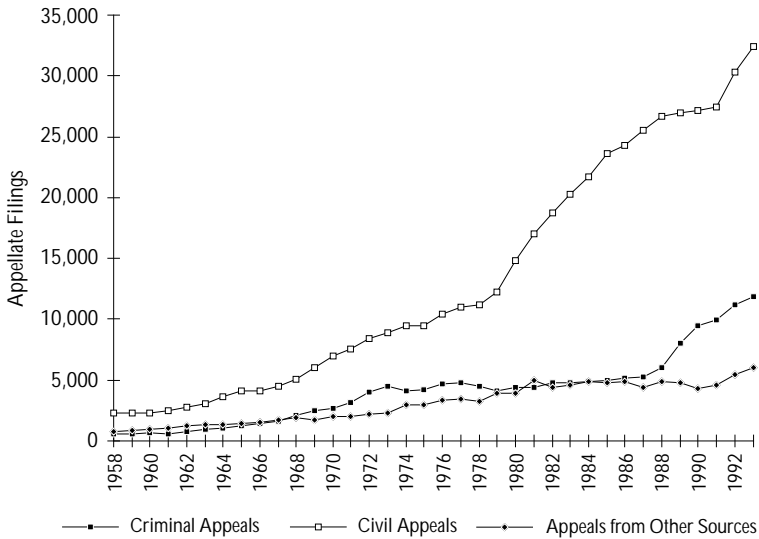
2. Unless otherwise noted, all figures and tables presented in this report rely on information found in two sources: (1) a database assembled by the Federal Judicial Center (data from all but the most recent years are available to the public through Federal Court Cases: Integrated Data Base, 1970–1990, Interuniversity Consortium for Political and Social Research, #8429) and (2) Administrative Office of the U.S. Courts, Annual Report[s] of the Director, 1977–1993, at Tables B-1, B-1A, B-4, B-7, and C-4. Before 1992, the AO reported yearly statistics for the twelve-month period ending June 30 of the given year. From 1992 forward, yearly statistics were reported for the twelve-month period ending September 30. The data come from standardized reports submitted by the clerk of court when a case is terminated.

Land condemnation and bankruptcy cases are excluded from the totals for the district and appellate courts in all figures, tables, and statistics. Land condemnation cases do not appear in the district court terminations data reported in the C-4 tables covering the district courts; we excluded them from our analyses of appellate data to maintain comparability. We excluded bankruptcy cases because numerous rule changes affected district and appellate court jurisdiction over these cases during the years of the study.

3. For a discussion of changes in the overall caseload of the federal courts of appeals, see Judith A. McKenna, *Structural and Other Alternatives for the Federal Courts of Appeals 17–31* (Federal Judicial Center 1993).

Stalking the Increase in the Rate of Appeal

Figure 1
Appellate Caseload, 1958-1993



We report here on a study analyzing the trend in civil appeals, particularly on the trend between 1977 and 1993. Two questions framed the research:

1. How much of the increase in civil appeals reflects changes in the rate at which certain types of cases are appealed?
2. How much of the increase reflects changes in the volume and composition of the underlying district court caseload?

Our findings contradict the Federal Court Study Committee's assertion that increased appeals result mainly from an increase in the proclivity to appeal district court terminations. We conclude that

- the increase in civil appeals has resulted mainly from the increased volume of litigation in the district courts. Civil appeals have grown at a rate disproportionate to caseload increases in the district courts, however, so the increase is not wholly explained by changes in district court caseloads;

Stalking the Increase in the Rate of Appeal

- growth in appellate caseloads has been partly attributable to increasing rates of appeal in prisoner actions and, to a lesser extent, civil rights cases; and
- there is no evidence of an across-the-board increase in the likelihood of appeal.

Project Overview

The rate of appeal for a given case type is measured by dividing the number of appeals filed by the number of potentially appealable judgments from the district courts. Because existing statistical data do not distinguish between appealable and non-appealable terminations, the true rate of appeal cannot be determined. Analysts must instead rely on approximations of the rate of appeal that are of varying precision. These approximations may be useful in identifying changed rates of appeal over time, but their limitations as estimates of the true rate of appeal must be understood.

We relied on two measures to estimate rates of appeal. Cases terminating with a recorded action by a district court judge or magistrate judge formed the denominator of one measure, and cases terminating with a merits decision formed the denominator of the other. The first denominator is undoubtedly larger than the number of cases with appealable judgments or orders, and the second denominator is smaller, but the resulting estimates were expected to bracket a range of values likely to include the true rate of appeal. We used the measures to identify specific case types whose rate of appeal changed over time.

We carried out the research in two phases. In Phase 1 we drew a random sample of nearly 125,000 civil cases from the pool of cases terminating in the district courts between 1977 and 1987. We traced the movement of individual cases from the point at which they were filed in district court until they exited the federal court system, with or without an appeal taken, and noted the procedural stage at which they terminated. We determined which cases had one or more appeals filed and examined whether any of the appeals were interlocutory. This approach permitted us to search for clues to the development of

appellate caseloads in the caseload composition and activities of the trial courts.

In Phase 2 we incorporated findings from Phase 1 into an analysis of total caseloads in the district and appellate courts. Our objective was to determine if orderly year-to-year relationships existed between district terminations and appellate filings once factors such as changing district court caseload composition were taken into account. Phase 2 transformed many of the specific findings from Phase 1 into readily understood, visual information. Accordingly, we chose to focus this report on Phase 2. Phase 1, including research methods, analyses, and findings, is described in Appendix A. Unless specifically noted, charts and tables were prepared from data on total caseloads.

The discussion that follows focuses on district court terminations as the reservoir from which appeals are drawn.⁴ Figure 2 shows the growth of civil appeals and district court civil terminations since 1958 and the relationship between the two over the years. From 1958 to 1970, appeals grew at a somewhat faster rate than district court terminations, but the rate of growth was moderate for both. From about 1970 to 1979, appeals and district court terminations increased at roughly the same rate. Since the early 1980s, the relationship between appeals and district court terminations has fluctuated. Because of a surge in Social Security and benefit repayment cases, district court terminations increased sharply in the early 1980s, peaking in 1985, and then declined sizably. Appeals increased throughout this time, but the growth trend differed from its earlier pattern. The early 1980s saw a surge in civil appeals that subsided in the late 1980s but did not return to previous levels. Data for 1992 and 1993 indicate that appeals have again turned sharply upward.

4. The pool of appealable judgments is much smaller than the pool of district court terminations. We have determined, however, that it is appropriate to use the pool of district court terminations based on inspection of the approximated rates of appeal developed in Phase 1. When we compared an approximation based on total district case terminations with the approximations based on district cases terminating with judicial action and with a merits decision, we found the relationship among the approximations stable across time for a given case type, although they differed greatly in magnitude.

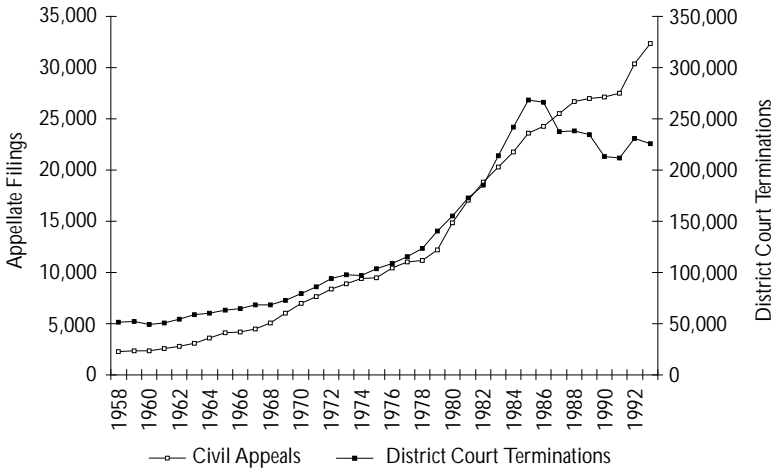
A Note on the Figures

The format used in Figures 2–8 may be unfamiliar to some readers. To facilitate comparisons between appellate and district court caseloads, we have superimposed appellate filings and district court terminations on the same figure. Thus, the scale at the left of each figure is for appeals and the scale at the right is for district court terminations.

In graphs comparing appellate and district court filings, the scale corresponding to appellate court caseloads is one-tenth the scale shown for the district courts. The scales were chosen to promote identification of trends, since the ratio of appeals to district court terminations tends to fluctuate around a 10 to 100 (i.e., 1 to 10) ratio. In practical terms, this means that if 10 appeals are filed for every 100 cases terminated in the district courts in a given year, the points representing appeals and terminations on the graph will be the same. If more than 10 appeals are filed for every 100 district cases, the point corresponding to appeals will lie above the terminations point, and if fewer than 10 appeals are filed for every 100 district cases, it will fall below.

These figures provide a convenient format for comparing caseload volume and changes over time, but there is a minor drawback. As the ratio of appeals to terminations increases from the one-tenth scale, the graphs may visually overstate some differences. To correct for this, we provide information in the text about the actual ratios and include in Appendix B graphs of the ratio for Figures 3–8.

Figure 2
Civil Appellate Filings and District Court Terminations, 1958-1993



What Factors Might Have Contributed to the Increase in Appeals Over the Past Several Years?

Between 1977 and 1993, district court civil case terminations nearly doubled. Appeals during the same period, however, nearly tripled. Commentators have often compared these growth trends and concluded that litigants are, across the board, more likely to appeal cases than they were fifteen years ago.

Several other explanations, individually or in combination, could account for this trend, including:

- a significant increase in rates of appeal for selected types of cases (in contrast with an across-the-board increase affecting many case types);
- changes in the district court caseload such that case types with high rates of appeal are filed in significantly greater numbers;

- changes in the pattern of district court dispositions such that an increasing proportion of large volume case types terminate with appealable actions; and
- the filing of multiple appeals in an increasingly large proportion of cases.

Which Explanations for the Increase in Appeals Received Support?

In Phase 1 we found evidence consistent with the first two alternative explanations above. Specifically, we found that between 1977 and 1987 there was

- a marked increase in the likelihood of appeal for prisoner-civil-rights cases and other prisoner actions (see Table 1);
- a modest increase (followed by a decrease) in the likelihood of appeal for non-prisoner-civil-rights cases (see Table 1); and
- a marked increase in the proportion of district court cases that were prisoner-civil-rights actions (see Table 2).

We found no evidence in Phase 1 to support the assertion that the likelihood of appeal had increased across a broad spectrum of case types, nor did we detect significant changes in the proportion of district cases terminating with appealable issues. We were unable to find evidence that litigants filed an increasing number of appeals per case, nor did we find that the likelihood of an interlocutory appeal had increased over time. (We note, however, that detecting changes in multiple and interlocutory appeals would have been difficult because of the low frequency of occurrence.)

Stalking the Increase in the Rate of Appeal

Table 1
Estimates of Rates of Appeal
in Prisoner Actions and Civil Rights Cases

Case Types with Increased Rates of Appeal	Appeals per 100 District Court Cases Terminating with Judge Action		
	1977	1982	1987
Prisoner-Civil-Rights	8.05	15.06	20.56
Other Prisoner Cases	13.99	17.79	26.98
Non-Prisoner-Civil-Rights	27.67	29.99	24.67

Source: Phase 1 sample.

Table 2
Prisoner Actions and Civil Rights Cases As a Percentage
of District Court Terminations

Case Types with Increased Rates of Appeal	Percentage of District Court Terminations		
	1977	1982	1987
Prisoner-Civil-Rights	6.7	10.1	11.9
Other Prisoner Cases	10.3	7.5	7.0
Non-Prisoner-Civil-Rights	<u>10.1</u>	<u>10.1</u>	<u>10.6</u>
Total	27.1	27.7	29.5

Note: Social Security and benefit repayment cases are excluded from the totals.

How Can the Disproportionate Growth in Appellate Caseload Be Accounted For?

We determined from the 125,000 case sample that prisoner-civil-rights cases and other prisoner cases showed an increased likelihood of appeal from 1977 to 1987, and that the likelihood of appeal in non-prisoner-civil-rights cases increased for a portion of the period. We then tried to ascertain what effect the three case types had on appellate growth from 1977 to 1993.

Stalking the Increase in the Rate of Appeal

These case types accounted for an increasingly large proportion of civil appeals (see Table 3), so it was reasonable to hypothesize that they might have a major influence on the appellate caseload.

Table 3
Prisoner Actions and Civil Rights Cases As a Percentage of Filed Appeals

Case Types with Increased Rates of Appeal	Percentage of Filed Appeals		
	1977	1987	1993
Prisoner-Civil-Rights	8.1	17.1	20.5
Other Prisoner Cases	16.2	17.7	19.7
Non-Prisoner-Civil-Rights	<u>13.3</u>	<u>19.2</u>	<u>19.0</u>
Total	37.6	54.0	59.2

Note: Social Security and benefit repayment cases are excluded from the totals.

Figures 3–8 show the relationship between terminations in the district courts and filings in the courts of appeals from 1977 to 1993. These figures demonstrate that

- the disproportionate increase in civil appeals is largely accounted for by prisoner-civil-rights cases, other prisoner actions, and non-prisoner-civil-rights cases; and
- increases in appellate filings for most other case types are consistent with their increased volume in the district courts.

Social Security and Benefit Repayment Cases

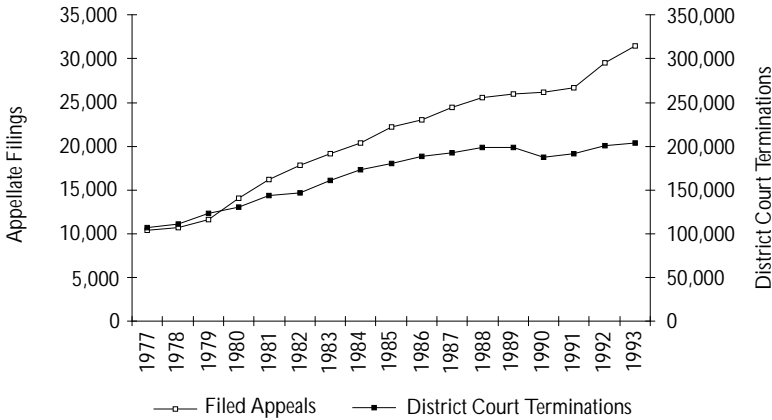
Before considering prisoner litigation and civil rights cases, we removed the effects of Social Security and benefit repayment cases on caseloads. In the 1980s there was a dramatic increase (and then a decrease) in the volume of Social Security and benefit repayment cases in the district courts, yet these types of cases rarely resulted in appeals. In the peak year of 1985, for example, Social Security and benefit repayment cases accounted for nearly 32% of terminations in the district courts, but only 5% of filed appeals. In Figure 3 we excluded the cases

to delineate the underlying relationship between the remaining district court terminations and appeals.⁵

Once we removed Social Security and benefit repayment cases, the mid-1980s “bulge” in district court terminations (see Figure 2) was eliminated. District court terminations in Figure 3 grew steadily until about 1988 and then began to level off. Appeals grew at a somewhat steeper rate, and the greatest increases occurred in the most recent years. We noted earlier that appeals tripled between 1977 and 1993, while total district court terminations doubled. The gap increases slightly when Social Security and benefit repayment cases are removed, because district court terminations do not quite double. (Plotting the ratio of appeals to district court terminations provides additional information about the relationship; plots for Figures 3–8 can be found in Appendix B.)

5. Benefit repayment cases, which are primarily cases in which the United States files suit to collect on defaulted student loans or overpayment of veterans benefits, account for a greater portion of the district court caseload. Such cases are rarely contested and are often resolved when a default judgment is entered against the defendant. The increased volume of Social Security cases during the 1980s stemmed from a change in government policy affecting standards of review on benefit claims by administrative law judges. When standards were revised, such cases were remanded to the administrative agency, and district court filings began to drop precipitously. *See generally* Jack B. Weinstein, *Equality and the Law: Social Security Disability Cases in the Federal Courts*, 35 Syracuse L. Rev. 897 (1984); Marc Galanter, *The Life and Times of the Big Six; Or Federal Courts Since the Good Old Days*, 1988 Wis. L. Rev. 921 (1988).

Figure 3
Appellate and District Court Civil Caseloads—Social Security and Benefit Repayment Cases Excluded



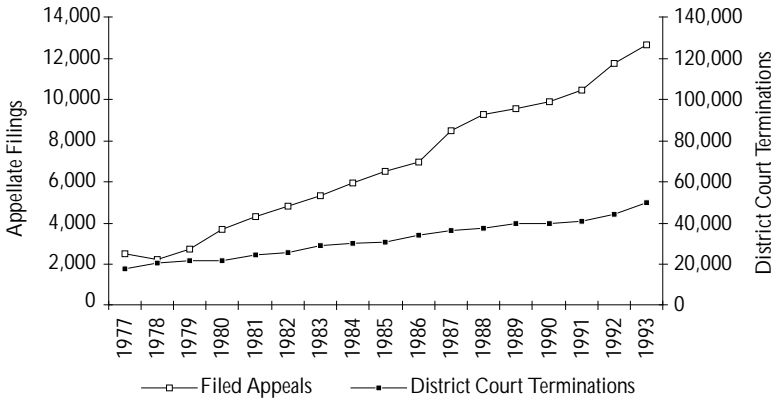
Prisoner and Civil Rights Cases

We found that the expansion of prisoner and civil rights cases in the courts of appeals has outpaced expansion in the district courts, which is consistent with an increasing rate of appeal and stable or increasing numbers of district court terminations.

Distinctive Contribution of Prisoner Cases

Figure 4 depicts the difference in expansion for total prisoner cases. The increase in appeals from 1977 to 1993 was 400% compared with 178% for district court terminations. Calculations show that 14.0 appeals were filed for every 100 terminated district court cases in 1977; in 1993, the rate was 25.2 per 100.

Figure 4
Growth of Prisoner-Civil-Rights Cases and Other Prisoner Actions—
Appellate and District Caseloads



In Figures 5 and 6, prisoner cases are broken down into prisoner-civil-rights cases and other prisoner actions (principally habeas corpus petitions), respectively. Prisoner appeals in recent years have been divided about evenly between these two types of cases. Equal numbers of appeals, however, result from dissimilar rates of appeal.

Other prisoner actions were more likely to be appealed than were prisoner-civil-rights cases. Calculations show that 15.5 appeals were filed from other prisoner actions per 100 district court terminations in 1977; in 1993, the rate was 33.7 per 100. By comparison, 11.9 appeals were filed from prisoner-civil-rights cases per 100 district court terminations in 1977; in 1993, the rate was 20.4 per 100.

Stalking the Increase in the Rate of Appeal

Figure 5
Growth of Prisoner-Civil-Rights Cases—Appellate and District Caseloads

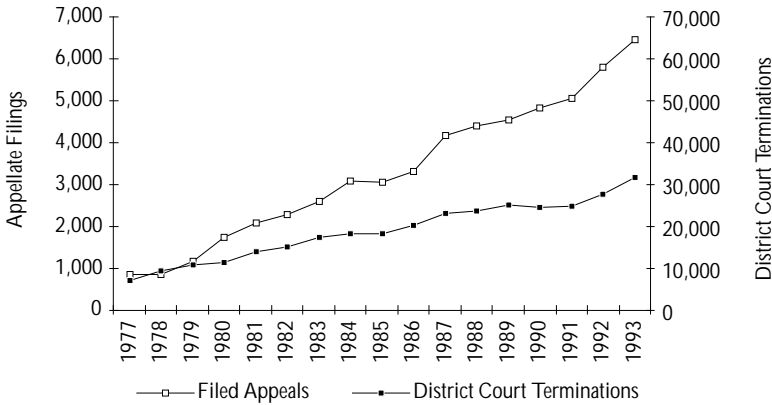
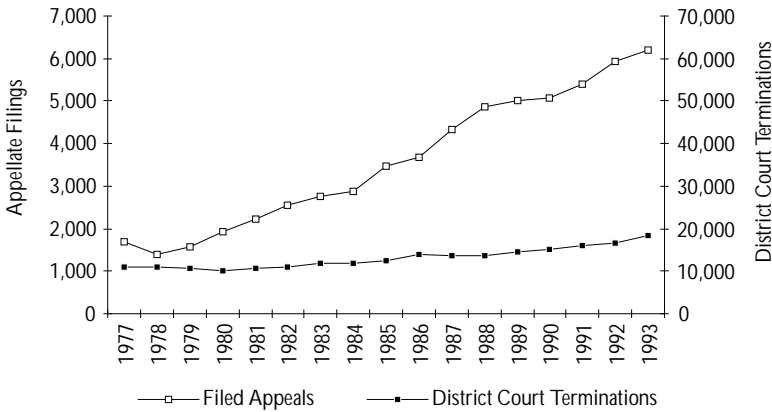


Figure 6
Growth of Other Prisoner Actions—Appellate and District Caseloads



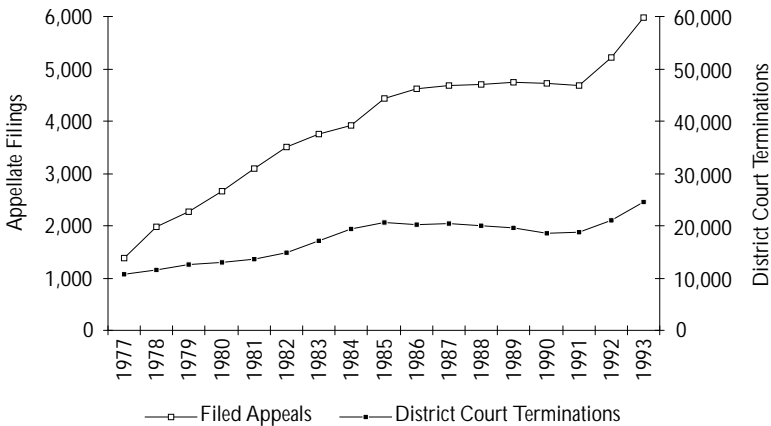
Distinctive Contribution of Non-Prisoner-Civil-Rights Cases

Figure 7 depicts the difference in expansion of non-prisoner-civil-rights cases. The increase in appeals from 1977 to 1993 was 331% compared with 129% for district court terminations.

Stalking the Increase in the Rate of Appeal

Calculations show that 13.0 appeals were filed for every 100 district terminations in 1977; in 1993, the rate was 24.4 for every 100. Although the impact of civil rights appeals on the appellate caseload is significant, it is nevertheless smaller than the impact of prisoner appeals because of the smaller numbers of cases involved.

Figure 7
Growth of Non-Prisoner-Civil-Rights Cases—Appellate and District Caseloads

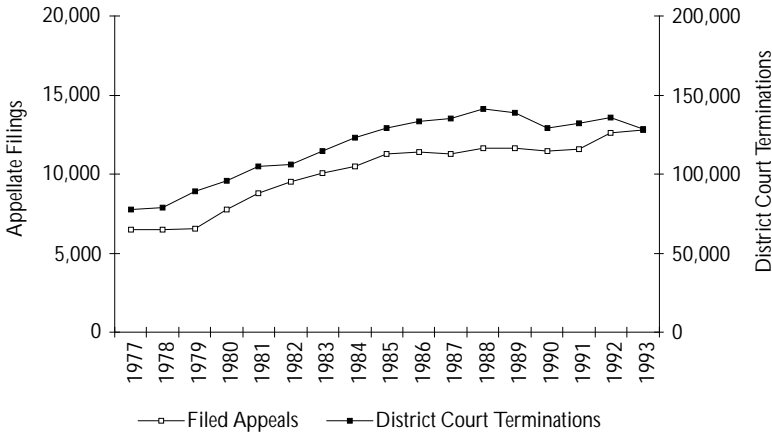


Prisoner and Civil Rights Cases Removed

A state of equilibrium exists when prisoner litigation and civil rights cases are removed from the caseloads (see Figure 8). Our analyses show that the relationship between appeals and district court terminations held steady through the years, with approximately 8.6 appeals filed for every 100 district court terminations. The diverse body of cases covered by this finding includes contract cases, real property cases, tort actions, and cases filed under a variety of federal statutes. Such cases accounted for 46.4% of appeals filed between 1977 and 1993.

Figure 8

Appellate and District Court Civil Caseloads—Civil Rights, Prisoner, Social Security, and Benefit Repayment Cases Excluded



Discussion and Conclusions

Our findings suggest that the Federal Courts Study Committee’s warning concerning increasing rates of appeal is stated too broadly. Although appellate filings have grown faster than district court terminations over the past decade and a half, the disproportionate increase is largely accounted for by growth of appeals in just three case types. For most civil case types, growth of appeals has closely tracked growth in district court terminations. Our findings suggest that any consideration of growth of the appellate caseload must distinguish among the types of cases being appealed.

The federal district court caseload is composed of cases with distinct characteristics and patterns of progression toward disposition.⁶ Our research demonstrates that one such characteristic is the rate of appeal. We have shown that even relatively

6. Galanter, *supra* note 5; Terrence Dunworth & Nicholas M. Pace, *Statistical Overview of Civil Litigation in the Federal Courts* (1990).

modest shifts in the composition of the district court caseload may result in effects that are magnified several times in the courts of appeals if the shifts occur in types of cases with unusually high and increasing rates of appeal.

The growth of appeals in prisoner and civil rights cases highlights a dilemma faced by appellate courts. Because these cases raise fundamental questions of personal liberty, the opportunity to appeal should be readily available to permit review of the relationship between the government and its citizens. Recognizing the special nature of these cases, the courts and Congress have decreased financial barriers to court access; in most prisoner cases, plaintiffs are permitted a waiver of filing fees, and in civil rights cases, there is the prospect, sometimes realized, that plaintiffs will recover attorneys' fees.⁷

7. In prisoner cases, an appeal is often pursued on a pro se basis with a petition for a waiver of filing fees arising from in forma pauperis status. *See* Fed. R. App. P. 24; 28 U.S.C. § 1915 (proceedings in forma pauperis). In civil rights cases, attorneys' fees are awarded if the district court plaintiff prevails, possibly thereby encouraging appeals from adverse decisions. *See* 2 U.S.C. §§ 1988, 2000e-5(k). *See also* Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Rights*, 69 *Tex. L. Rev.* 291 (1990) (reviewing Supreme Court decisions regarding attorneys' fees).

We explored several avenues for analyzing whether the adoption of fee-shifting statutes generally increased the incentive to appeal in affected case types, but we were not satisfied that an empirical analysis could be done with available data. We first attempted to identify sets of cases where there was both an apparent shift in the opportunity to collect fees and a close correspondence to nature of suit codes in the Administrative Office data. A literature search indicated that actual fee-shifting practices were little affected by passage of the authorizing statutes for the few case types that we were able to identify as having corresponding Administrative Office codes. Apparently, most of the relevant statutes amounted to legislative recognition of rights to attorneys' fees that were already practiced by the courts using common law principles. A second approach was similarly frustrated. The Civil Rights Attorney's Fees Awards Act of 1976 was passed by Congress after the Supreme Court rejected the "private attorney general" doctrine (enforcement of public rights through the use of private lawsuits) in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). The *Alyeska* opinion identified several circuits that had adopted a generous approach to attorneys' fees before 1975 and one circuit that followed a restrictive approach; we contemplated pre- and post-1976 comparisons of patterns of filings in the restrictive and less restrictive circuits. A close reading of the opinions of the restrictive circuit, however, suggested that *Alyeska* overstated the differences. We encountered related problems when we examined Lanham Act trademark cases. Circuits

Freeing appeals from financial constraints may have the unintended effect of encouraging appeals that are untimely or lack merit. Studies of prisoner cases filed in the federal district courts reveal that few petitions are granted, and most are dismissed on procedural grounds.⁸ While we are aware of no similar studies of appeals in prisoner cases, the high rate of appeal from the pool of district court terminations suggests that many of these appeals raise issues that are untimely or addressed by well-established legal precedent. Because there is little opportunity to adjust the number of judges available to hear appeals, many courts have responded to the varying needs of a diverse caseload by fashioning truncated appellate procedures that involve one or more of the following: initial review by staff attorneys of the issues raised on appeal (to assess the degree of judicial attention required), use of dispositions that are rarely published, and review by special panels of judges (who decide cases without argument on the basis of briefs and materials prepared by staff attorneys).⁹ Prisoner appeals decided on the merits are often diverted from traditional three-judge argument panels to these special panels.¹⁰

have split over whether the act authorizes the award of attorneys' fees in exceptional cases in which the infringement action involves unregistered trademarks. Although differences across circuits invite comparison on the effects of the fee-shifting practices, attorneys working in this area have told us that attorneys' fees in trademark cases are rare, and that the commercial interests at stake in such cases overwhelm any influence of attorneys' fees.

8. See Victor E. Flango, *Habeas Corpus in State and Federal Courts* 61–65 (1994) (only 17 of 1,626 habeas corpus petitions in non-death-penalty cases filed in federal courts were granted, with dismissal on procedural grounds being most common); and Roger A. Hanson & Henry W. K. Daley, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation* 36 (Bureau of Justice Statistics 1995) (94% of the issues are dismissed by the court or by granting the defendants' motion, 4% of the issues involve stipulated dismissals or settlements, and 2% go to trial).

9. See McKenna, *supra* note 3; Donna Stienstra & Joe S. Cecil, *The Role of Staff Attorneys and Face-to-Face Conferencing in Non-Argument Decisionmaking: A View from the Tenth Circuit Court of Appeals* (Federal Judicial Center 1989); Joe S. Cecil & Donna Stienstra, *Deciding Cases Without Argument: An Examination of Four Courts of Appeals* (Federal Judicial Center 1987).

10. Statistical information on the number of cases diverted to special panels in each circuit is not directly available. The prominent role of such programs in disposing of prisoner rights appeals, however, is suggested by an examination of a surrogate

Stalking the Increase in the Rate of Appeal

These truncated appellate procedures are intended to permit judges to allocate their time according to the demands of the issues raised on appeal. As adaptive mechanisms, the procedures no doubt help appellate courts remain current in disposing of their cases.¹¹ At the same time, however, the procedures raise apprehension about delegating and supervising functions that once were limited to law clerks serving judges in chambers.¹² These findings suggest that the courts of appeals should retain discretion to develop procedures that accommodate the needs of diverse appellate caseloads and provide the judicial attention required for a thoughtful disposition of the issues presented on appeal.

We began this report expecting to find that disproportionate increases in appeals are caused by an overall increase in the rate of appeal. Instead, we learned that the rate of appeals differs greatly across various types of cases, and that increases in the appellate caseload are caused in large part by increased filings in the district courts of cases with unusually high rates of appeals. What this suggests is that remedies for increasing rates of appeals should be directed toward specific types of cases rather than applied uniformly across all types of cases. Such remedies must consider the nature of the issues on appeal, the thoroughness of the review by the lower court, and the extent to which the appellant is represented by counsel. Furthermore, the courts of appeals must remain free to tailor procedures to the needs of individual appeals as the mix of appeals changes over time and across circuits.

measure for diversion (i.e., the percentage of merit dispositions that occur without oral argument). Data from 1993 reveal that 88.8% of the merit decisions in prisoner cases were decided without oral argument; the corresponding figure for non-prisoner-civil-rights cases was 57.1%, and for all civil appeals, 63.3%.

11. The median time for processing civil and criminal appeals (from filing of the notice of appeal to final disposition for cases terminated after hearing or submission) was 9.3 months in 1977 and 10.3 months in 1993.

12. See Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 55 B.Y.U. L. Rev. 3, 37-57 (1990).

Appendix A: Summary of Phase 1 Research

Our research in Phase 1 tracked the progress of a large number of cases from filing in district court to the point at which the cases exited the federal court system. The purpose of tracking was to trace the path of district-level litigation and to search any associated appellate activity for clues to the development of appellate caseloads in the caseload composition and activities of the trial courts.

Objectives and Research Methods

The two main objectives for our research in Phase 1 were to test specific hypotheses about the source of civil filings in the courts of appeals and to estimate the likelihood of appeal for various civil case types.

To construct a database to meet our research goals, we first drew a random sample of nearly 125,000 civil cases that terminated in the district courts between 1977 and 1987. Although we relied on data in computerized records dating back to 1970, we used 1977 as the lower bound on the time interval because data were either missing or not considered reliable for critical variables before 1977.

Cases generating appeals were identified and linked to the appropriate appellate records, which involved a search for matches forward in time from the date of district court termination through 1989, and backward in time through 1972. Case matches were then verified. All cases then were tracked (through 1989) from the point of filing to the point at which they exited the federal court system. Linking individual district and appellate case filing histories permitted us to analyze the contribution of specific case types to the pool of potentially appealable cases and examine how appellate caseloads develop as

district court cases move from filing through procedurally significant transition stages.

At the district court level, we examined (1) whether cases received consideration by a judge before termination; and (2) whether cases were terminated with a merits decision. We adopted this framework to circumvent a problem that researchers encounter persistently when calculating rates of appeal—specifying the pool of potentially appealable judgments. Individual cases then were traced to determine whether one or more appeals were subsequently filed and to establish whether any of the appeals were interlocutory.

Only a fraction of the cases passed through each transition stage, making those that survived each transition stage an increasingly narrow subset of the cases from the previous stage. Cases had a greater or lesser chance of passing to the next stage depending on their type. The selective nature of caseload formation has implications both for the flow of cases to the courts of appeals and for the calculation of relevant rates of appeal.

Constructing Rates of Appeal

A rate of appeal measure is the ratio of the number of appeals filed to the number of potentially appealable judgments from the district courts in a given year. Civil appeals generally are taken from final decisions in district court, but because some non-final decisions are appealable and some final decisions (such as dismissals pursuant to settlement) are not, the pool of appealable cases is difficult to specify. Researchers interested in calculating civil rates of appeal have had to resort to using surrogate measures of varying precision.¹³

13. Goldman (1973) used unpublished Administrative Office data on the aggregate number of contested judgments to set the denominator for the rate of civil appeal estimates. His measures, calculated for 1951–1960 and 1970, were stable, ranging from 20% in 1951 to 24% in 1970, or 4 additional appeals for every 100 contested judgments across a 20-year period. Jerry Goldman, *Federal District Courts and the Appellate Crisis*, 57 *Judicature* 211 (1973). Howard and Goldman (1978) used a similar estimation technique on data from three circuits over the interim years 1967–

Stalking the Increase in the Rate of Appeal

We estimated civil rates of appeal using surrogate measures that were defined by our transition-stage analysis of case movement through the district courts. Cases terminating with recorded action by a district court judge—either during trial, after trial, after pretrial conference, or after judgment on a motion, if issue was joined—formed the denominator for one estimate. This denominator excluded cases in which the action was withdrawn by the plaintiff, settled by the parties, or otherwise disposed of without action taken by a judge or magistrate judge. (If a case terminated before issue was joined, it was included under specific conditions in which the court either entered a final or-

1970 to produce the somewhat larger but still consistent estimate of 25.5%. These rates of appeal measures are relatively stable over a period of time that nevertheless saw caseloads grow more rapidly in appellate than in district courts. The authors reconcile their findings by pointing to directly proportional increases in the percentage of district court cases terminating in contested judgments, and conclude from this evidence that parties are compromising less and adjudicating more. J. Woodford Howard & Jerry Goldman, *The Variety of Litigant Demand in Three United States Courts of Appeals*, 47 Geo. Wash. L. Rev. 223, 225–28 (1978). Our research contradicts this explanation of appellate growth for the later years 1977–1989. We find that the proportion of district court case types terminating with contested judgments has, for most case types, remained stable. For certain types of cases, such as non-prisoner-civil-rights cases, other prisoner cases, and Social Security cases, the proportion of district terminations with contested judgments (merit decisions) actually decreased.

Estimates for civil rates of appeals published since 1978 have relied on less precise surrogates for appealable judgments. Because the Administrative Office has not collected information on contested judgments for a number of years, appeal rates are based on terminations with action by the court. These calculations provide lower estimates of rates of appeal, as the denominator includes settlements that take place after court action. Appeal rates calculated by this means are reported for widely scattered years, so it is difficult to discern reliable trends in the figures, but they still provide useful, if rough, information. Richard A. Posner, *The Federal Courts*, Table 3.10 (1985), reports overall civil rates of appeal of 8.8%, 18%, and 17.6% for 1960, 1982, and 1983, respectively. The same calculations computed from AO annual reports from 1977–1989 show that 1982 and 1983 were peak years, when figures crept upward from 15.6% in 1977 and then down again to 15.8% in 1989.

Another estimate of the civil appeal rate comes from an analysis that determined whether appellate activity occurred subsequent to the termination of cases by trial. This rate of appeal is elevated relative to other calculations, probably because the stakes tend to be higher in cases that go to trial relative to those that do not. Bermant et al. found a 24% rate of appeal after full trials in 18,500 cases terminating between 1977 and the first half of 1978. Gordon Bermant et al., *Protracted Civil Trials: Views from the Bench and the Bar*, Table 6 (Federal Judicial Center 1981).

der, held a hearing, or decided a dispositive motion upon the plaintiff's motion to terminate.)

Cases terminating with a merits decision—including those in which a final judgment was reached either on motion before trial, jury verdict, directed verdict, or court trial—formed the denominator of the second estimate. This denominator represented a smaller number of cases, additionally excluding those cases with judge action that ultimately were disposed of through such means as settlement, transfer to another district, and remand to a state court or U.S. agency. Other cases screened out of this denominator included those cases with judge action that ultimately were dismissed for various reasons (want of prosecution, lack of jurisdiction, voluntarily, by the parties after settlement), terminated on award of an arbitrator, or disposed of on a default judgment. The estimates based on both denominators together were expected to bracket a range of values that we felt was likely to include the true rate of appeal.

Case Types Analyzed

Cases were grouped into one of thirteen case types according to the nature of the suit. However, analyses focused only on the calculated rates of appeal for those cases accounting for a major portion of district and appellate caseloads. The seven case types singled out for treatment were contracts, torts, non-prisoner-civil-rights cases, prisoner-civil-rights cases, other prisoner petitions, Social Security cases, and cases with causes of action under various other statutes. This group of case types made up 74% of all civil district court terminations and 92% of all civil appeals filed between 1977 and 1988. Cases excluded from additional analyses were benefit repayment cases (mainly student loan defaults and overpayment of veterans' benefits cases), bankruptcy, real property, labor, and forfeiture or penalty cases. Among excluded cases, only the benefit repayment cases made up a substantial portion (12.9%) of district court terminations between 1977 and 1988; others accounted for no more than

2.8% of civil appeals. The impact of benefit repayment cases on future district court caseloads is not expected to be significant.

Major Findings

- Increasing numbers of appeals were filed in every case type studied from 1977 to 1988. The most dramatic increases occurred in three case categories: prisoner-civil-rights cases, other prisoner petitions, and non-prisoner-civil-rights cases. We noted significant increases in the volume of contract appeals, tort appeals, and appeals under various other statutes, although the volume may have begun to decline in the more recent years for appeals under various other statutes. Social Security appeals peaked in 1984 and 1985 and subsequently declined, although they did not return to 1977 levels.
- Increased rates of appeal played a clear role in the rise in filings for two types of cases: prisoner civil rights and other prisoner petitions. They played a probable but less clear role in the rise in the number of appeals from civil rights cases. Increased rates of appeal did not appear to account for increased filings in the other types of cases that we examined. The rate of appeal in contract and tort cases, for example, remained constant over time. The rate of appeal for Social Security cases increased slightly in the early 1980s, but Social Security cases made up only a nominal portion of the total appellate caseload, and the appeal rate subsequently declined to previous levels. The trend in the rate of appeal for other statutory actions was more difficult to discern, but it has remained stable or declined, showing no sign of having increased over time.
- Changes in the way the district courts terminated prisoner civil rights, other prisoner petitions, and non-prisoner-civil-rights actions did not appear to explain the increased rates of appeal in these case types. We examined two indices—the percentage of cases terminating after judicial action and the percentage of cases terminating with a

merit judgment—to determine whether the increasing rates of appeal were associated with an expansion in the proportion of cases terminating with appealable judgments. We found no consistent support for this hypothesis. The proportion of terminations with judicial action actually decreased over time in prisoner-civil-rights cases and other prisoner petitions, and remained about the same in non-prisoner-civil-rights cases. The proportion of terminations with a merits judgment decreased for two of the three case types (civil rights cases and other prisoner petitions), and although we did detect an increase over time in the proportion of merit terminations involving prisoner civil rights, the increase was not large enough to suggest an association with the rising rate of appeal in such cases.

- We found no evidence that litigants filed an increased number of appeals per case, nor did we find that the likelihood of an interlocutory appeal had increased over time. Detecting such effects would have been difficult, however, given the small number of cases with multiple and interlocutory appeals.

Appendix B: Ratio of Appeals to District Court Terminations for Data Plotted in Figures 3–8

Figure 3
Ratio of Appeals to District Court Terminations—Social Security and Benefit Repayment Cases Excluded

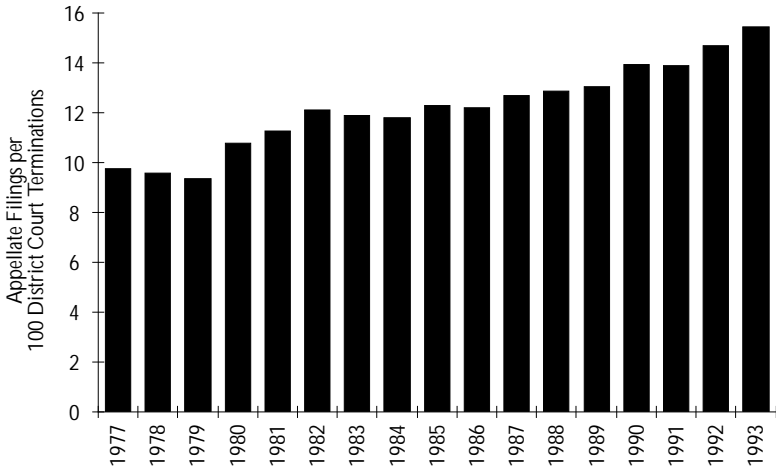
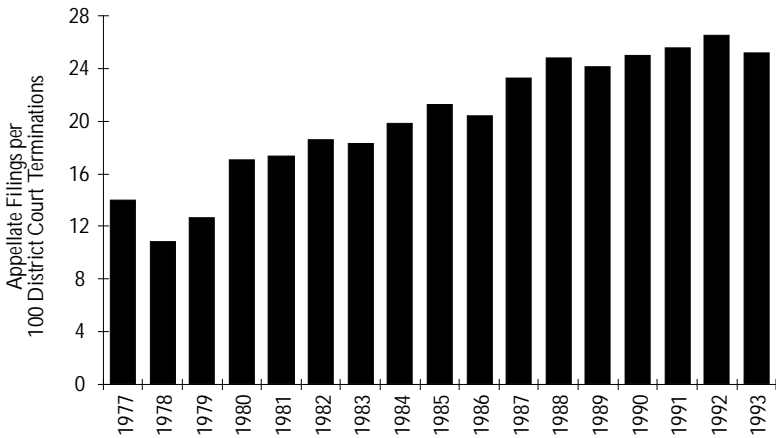


Figure 4
Ratio of Appeals to District Court Terminations—Prisoner-Civil-Rights Cases and Other Prisoner Actions



Stalking the Increase in the Rate of Appeal

Figure 5

Ratio of Appeals to District Court Terminations—Prisoner-Civil-Rights Cases

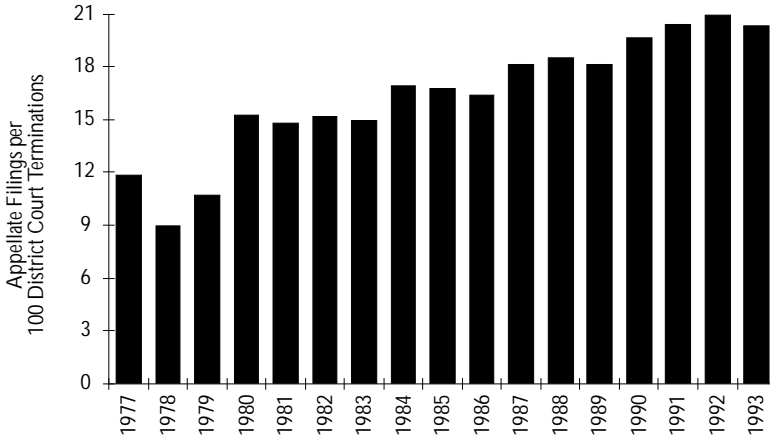


Figure 6

Ratio of Appeals to District Court Terminations—Other Prisoner Actions (i.e., Non-Civil Rights Cases)

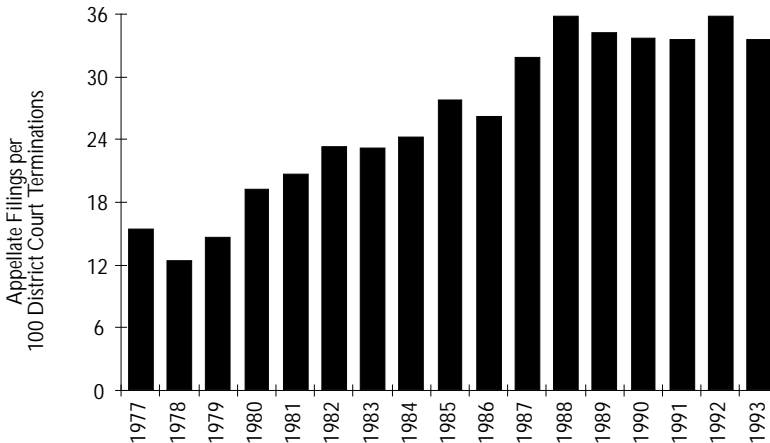


Figure 7
Ratio of Appeals to District Court Terminations—Non-Prisoner-Civil-Rights Cases

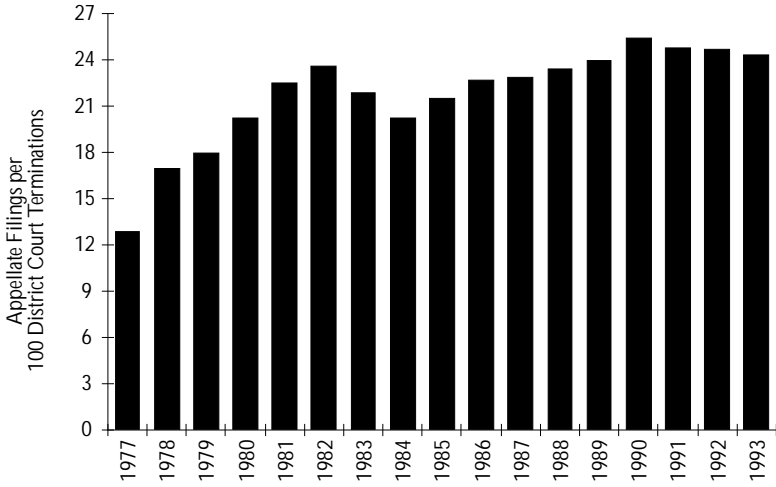


Figure 8
Ratio of Appeals to District Court Terminations—Civil Rights, Prisoner, Social Security, and Benefit Repayment Cases Excluded

