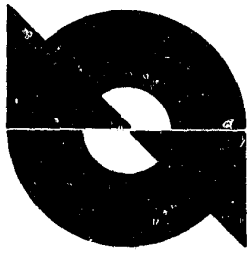
U.S. Department of Justice
Washington, D.C. 20350



The California and the United States Courts of Appeals: Problems and Proposals

by John T. Wold

Federal Justice Research Program
Office for Improvements in the
dministration of Justice

eptember 1979

FJRP-79/008

THE CALIFORNIA AND THE UNITED STATES COURTS OF APPEALS: PROBLEMS AND PROPOSALS*

by

John T. Wold, Ph.D.

Department of Political Science

California State College, Stanislaus

Support for this project was provided by the Federal Justice Research Program under Contract J-8XH-07377-L. Points of view or opinions expressed in this document are those of the author and do not necessarily represent the official position of the U. S. Department of Justice.

TABLE OF CONTENTS

I. Overview of Study Procedures, Findings, and Proposals

A. Background

This project examines three topics on appellate litigation. These are (1) the flow and volume of litigation over time in the California and the United States Courts of Appeals; (2) internal decisional processes -- including interaction, bargaining, and leadership -- among judges 1/ and staff attorneys in the California and United States Courts of Appeals; and (3) aspects of litigation costs in the California Courts of Appeal.

The principal research questions on each of these topics are as follows:

1. The Flow and Volume of Litigation:

. What are the distributions of cases over time by subject matter in the five California Courts of Appeal and the eleven U. S. Courts of Appeals?

. What are the similarities and differences in the distributions of cases between the state and federal intermediate courts?

. What policy proposals are suggested by the findings concerning litigation flow?

. What are the aggregate numbers of cases filed over time in the California Courts of Appeal and U. S. Courts of Appeals, overall and by state district or federal circuit?

. What are the perceptions of federal appellate judges and their law clerks concerning their courts' workloads?

. What policy proposals do the findings indicate concerning volume of litigation?

2. Internal Decision Processes

. What are the types of interaction among judges during decision making, particularly in the California tribunals? How extensive are these interactions?

. What types of negotiations occur among judges during the decisional process, particularly in the California Courts? How extensive are these negotiations?

. What are the patterns of leadership in decision making, particularly in the California Courts?

. What is the nature of interaction between judges and staff attorneys, especially in the state tribunals?

. What policy proposals are suggested by these patterns of negotiation and interaction?

3. The Costs of Appellate Litigation:

. What are the costs of litigation for those paying appellate costs in the five districts of the California Courts of Appeal with respect to the overall charges by attorneys where private attorneys are retained by litigants, attorney compensation paid by the public where private counsel are appointed in criminal appeals, and attorney compensation paid by the public where the state public defender's office is appointed in criminal appeals?

. What recommendations for further research are indicated with respect to litigation costs?

B. Study Methods

The principal goal of this study was to determine the volume and flow of actions filed, by subject matter, in each of the five appellate districts in California and in each federal circuit. Data were obtained from docket sheets and actual case records in the clerks' offices in each of the state districts (San Francisco, Los Angeles, Sacramento, San Diego, and Fresno). A ten percent sample 2/ of filings was drawn covering two fiscal years, 1968 and 1977. A modified version of J. Woodford Howard's

method of classifying appellate actions was used to categorize types of cases on appeal in both jurisdictions. 3/ In order to determine the business of each federal circuit for these same years the Annual Reports of the Administrative Office of the U. S. Courts (AOUSC) were examined. The aggregate numbers of filings -- overall and in criminal and civil categories -- for the California Courts were also identified for eleven fiscal years (1967-1977). Data on caseloads in the federal appellate courts were drawn from the Annual Reports published by AOUSC covering the ten year period between July 1, 1966 and June 30, 1977.

To secure the opinions of judges regarding caseload problems, questionnaires were mailed to all active and senior circuit judges and their law clerks. The questionnaire included items on the perceptions of workload, their interactions with their colleagues, and leadership roles in decision making. Thirty jurists, or twenty per cent of the total, completed and returned the questionnaire. Twenty law clerks also completed it.

Questions on interaction, bargaining, and leadership among California state judges and staff were also explored through in-depth interviews. Eighty per cent of the sitting judges and eighteen percent of their staff attorneys were interviewed. These interviews varied in length from one to three and one-half hours, with the average over an hour and one-half. In almost every case, the interviews were candid and informative.

Litigation costs were studied only in the California Courts of Appeal and in terms of the financial charges incurred by

participants in availing themselves of the appellate process. The indicators of litigants' costs were their attorneys' fees. These fees included not only hourly charges or contingency fees, but also the costs of filing appeals, printing of briefs, secretarial time, etc. In short, attorneys' charges to litigants were conceived broadly; they presumably comprise all or nearly all the direct financial costs borne by litigants in taking cases through the California Courts of Appeal.

Participant costs were defined differently with respect to appointed and retained counsel. Where private counsel were retained, the costs were defined as all charges billed to the litigant. Where private attorneys were appointed to represent indigent criminal appellants, "participant" (in this instance the public's) costs were defined as the fees ultimately paid to counsel. Where the State Public Defender's office was appointed to represent indigent criminal appellants, participant (i.e., the public's) costs were defined as the salary costs for time spent by a deputy public defender.

Litigation costs were studied and compared in five appellate districts in California. Information was gathered using a two-step process. In the first step, the records in the offices of the various court clerks were examined, and in the second, attorneys who had been retained and those who had been appointed were interviewed.

In each court docket sheets were examined for the most recent fiscal year for which complete data were available. The

names of attorneys who had handled at least five cases before the court and the names of the cases they had handled were recorded and the files in these appeals, including the records on appeal, the lawyers' briefs, and the judges' written opinions were reviewed.

Each of the attorneys in these cases was contacted by letter and telephone to obtain permission for an interview. Although appointed attorneys were cooperative, the reactions of those who had been retained were mixed. Two-thirds of the retained attorneys were willing to discuss fees; the others were not.

The judges expressed an inability to comment on the topic of litigation costs. Likewise, a questionnaire sent to samples of practicing lawyers in San Francisco and Sacramento evoked negative reactions insofar as the items on litigation costs were concerned.

In all, twenty-one private attorneys who had practiced before the California Courts of Appeal were interviewed, including between three and five in each of the five appellate districts. Deputies in the State Public Defender's office in each district were also interviewed. These interviews ranged in length from forty-five minutes to two and one-half hours, with the average interview lasting about an hour and one-half.

C. Study Findings and Recommendations

1. Flow and Volume of Litigation.

The most striking finding was the contrast between trends

in districts in the northern and southern parts of California. In San Francisco, Sacramento and Fresno, the percentages of criminal appeals increased markedly between 1968 and 1977, 4/ while the percentages of civil appeals sharply declined. In contrast, in Los Angeles and San Diego, the trends were the reverse of those in the north. The percentages of criminal appeals in these cities decreased, and the proportions of civil cases rose slightly.

Relatively few appeals were docketed throughout California in almost every category of civil litigation. Only torts constituted 2.9 percent of more of the caseload in every district in 1977. Original proceedings constituted a large percentage of the workload of each court, comprising from over one-fourth to almost one-half of the courts' work in 1977. Petitions stemming from criminal cases (mandate, prohibition and habeas corpus) were easily the largest category of original filings in each district.

In comparing the flow of litigation through the state and federal courts, it was found that each level of court was more heavily burdened than the other in areas of law one would have expected. Crimes against persons and property were, in percentage terms, more state than federal concerns. On the civil side, the demands on the federal circuits were relatively heavy in some fields, particularly commerce, contract, labor and torts. Domestic relations cases were, of course, exclusively matters for the state courts.

Original proceedings or appeals in writ proceedings were much more a state than federal concern. Between 1968 and 1977, petitions

for habeas corpus and other prisoner petitions were of declining significance in the federal circuits (from 17.7% in 1968 to 6.3% in 1977), but remained relatively important in the California tribunals (from 16.8% to 12.6%). It is speculated that Supreme Court decisions such as Stone v. Powell, 49 L. Ed. 2d 1067 (1976), may influence trends in the area of writs.

The state courts all experienced steady increases in their caseloads between 1967 and 1977. Overall filings in the courts in fact doubled during the decade. After 1969, civil appeals consistently outnumbered criminal filings. As in the state courts, overall filings in the federal circuits have climbed steeply in recent years, more than doubling between 1967 and 1976. In the Fifth and Ninth Circuits, filings actually tripled during the decade. All circuits were forums for civil appeals much more frequently than they were for criminal. The gap between civil and criminal filings in fact tended to be much wider than in the California courts.

The study's policy recommendations in this area are directed toward limiting the growth of caseloads in the federal circuits. These recommendations are derived from both the data on caseloads and case flow, and from the responses of federal judges to the questionnaire items. They are as follows:

. Eliminate or curtail diversity jurisdiction.

. Reduce the number of federal criminal offenses. Crimes against property (10.5% of workload in 1977) and morals offenses (9.0% in 1977) appeared particularly strong candidates for reduction.

. Institute discretionary jurisdiction in some areas of law. This concept was admittedly a more problematic one than the preceding two. At stake is the notion that litigants should

have a right to at least one appeal from decisions rendered in the trial courts.

. Retain the Courts of Appeals as purely appellate bodies. There should be no attempt to copy the California scheme of permitting petitions for extraordinary writs to be filed originally in the intermediate courts.

2. Internal Decision Processes.

There apparently is a high level of interaction among the California judges. Most of this interaction is informal and takes place in chambers, during coffee breaks, or in other informal surroundings. However, judges apparently have few contacts with judges in divisions other than their own, and almost none with judges in other appellate districts.

Among the reasons for the high levels of interaction are the "open door" policy followed by nearly all the judges; the divisional structure of the courts; and the harmonious personal relationships among the judges.

Negotiations take place in the decisional process, albeit in only a minority of the cases handled. Negotiations primarily revolve around particular portions of or specific verbiage used in opinions -- in the judges' words, around "cosmetics" -- rather than the actual outcomes of cases.

Judges admit using strategies to influence their colleagues. Among the devices they employ are persuasion on the merits; enhancement of personal esteem; circulation of dissenting opinions; and use of mild forms of verbal intimidation.

Leadership in the appellate divisions is not necessarily related to a judge's formal position. That is, presiding judges

do not per se exercise any special influence in decision making. The presiding judges do not, for example, select decisional panels or assign opinions of the court. In fact, the author of the majority opinion appears to be the single most influential person in the decisional process.

Staff attorneys in the California tribunals play important roles in the processing of cases. In almost all divisions, lawyers on the central staff screen out and draft memoranda for the so-called "routine" appeals. 5/ "Non-routine" matters are initially examined by research assistants to the individual judges. The frequency and types of interactions between judges and their assistants reportedly varied considerably.

Questionnaires completed by federal judges and their law clerks provide several basic insights into decision making in the circuits. First, the judges consider at least four-fifths of their cases to be "non-routine" and meritorious, in sharp contrast to the views of their California counterparts. Second, the federal judges claim they enjoy a moderately high level of intellectual exchange among themselves in decision making. Third, like the California judges, the federal judges view the author of the courts' opinion as particularly influential in the decisional process.

Several basic aspects of the California system might serve as a model for changes in the current structure of the federal circuits. These are as follows:

. The permanent divisional structure used in California appears preferable to continual rotation among all judges in

the intermediate courts. Compared to its alternatives, the divisional arrangement facilitates greater interaction among judges; helps conserve the time and financial resources of the judicial system; and enhances the morale of the judiciary.

. The California practice of having judges in the same division work in the same building and in proximity to each other is superior to other alternatives.

. The negligible decisional influence of the office of presiding judge seems desirable in comparison to federal arrangements. The presiding judges in California could not determine the composition of decisional panels, nor could they assign opinions. Likewise, the presiding judges had no power to assign "pro-tem" judges to their courts to fill temporary vacancies. Consideration should be given to trimming the powers of chief judges in light of the California model.

. The California method of "routine decision-making" should be considered as a possible procedure for the U.S. Courts of Appeals. The method of routine disposition may well be an excellent means of expediting the flow of appeals in the federal circuits while reserving judicial control over ultimate decision making.

3. Costs of Litigation

The hourly and contingency fees charged by attorneys relate to several factors including type of practice, location, length of professional experience, specialization and other characteristics of legal practice. The study findings on these are as follows:

. Type of practice Lawyers who specialize in labor-relations litigation all work almost solely on a contingency-fee basis. Four, or about 19 percent, of the respondents fell into this category. These lawyers reportedly use contingency fees because such fees are formally required in certain fields, e.g., workers' compensation.

. Location There are varying ranges of attorneys' fees in different cities or geographical areas. The ranges differ from city to city throughout California, and are higher in cities than in small towns or rural areas. For example, fees in Fresno tend to be lower than in the other centers of the five appellate districts. Fees in Fresno range from $30 to

$90 per hour. In contrast, fees in the Bay Area and in Los Angeles tend to be the highest, ranging from $55 to $130 per hour. Charges in San Diego and Sacramento are in the middle range.

. Length of professional experience As one might expect, less experienced lawyers tend to command lower fees than their more experienced colleagues.

. Specialists v. non-specialists Legal specialists in some fields tend throughout California to charge higher fees than non-specialists.

. Other characteristics Each law firm or solo practitioner apparently allows some flexibility in charging particular types of clients or in certain types of cases. For example, several firms permit a "courtesy discount" when they feel clients might otherwise be unable to pay their fee.

The California Courts of Appeal frequently appoint private counsel to handle appeals brought by indigent criminal defendants. Compensation for appointed counsel is officially $20 per hour. However, data from respondents and from actual case records in Los Angeles and San Diego indicate that the judges usually pay what they feel particular cases "were worth." The court apparently employs standardized schedules in determing compensation. The judges usually reduce the amounts billed by attorneys, but in many instances the court actually increases the compensation beyond the amounts lawyers request.

The Office of the State Public Defender has borne increasing responsibilities for representation of indigent criminal defendants at the appellate level. Costs for each case handled by the Public Defender were measured in terms of the monthly caseloads handled by individual deputies and the range of deputies' salaries. Defined in this manner, the cost per appeal in cases assigned to

deputy public defenders is between $1,006 and $1,744.

Recommendations for further research concerning the costs of litigation in the federal circuits fall into four topics: (1) surveying appellate litigants; (2) public collecting and reporting of data on attorneys' fees; (3) interviewing attorneys; and (4) examining federal court records. These are as follows:

. More extensive interviews of lawyers in the various federal circuits regarding the topic of litigation costs should be made. Attorneys are the vital "middle-persons" between litigants and other components of the judicial system. They presumably know more about participants' costs than any other actors in the process. Each attorney can provide data on costs in many more cases than can the typical litigant. Also, in most appellate cases the overall bill presented by an attorney for all "events" and services presumably comprises all the direct costs incurred by the litigant.

. Court records in the federal circuits should also be examined in order to glean whatever information the records contain concerning litigation costs. In the California Courts of Appeal, court files contain data on compensation for appointed counsel in criminal appeals. Circuit files in the federal circuits should be studied if for no other reason than that they have already been compiled and presumably are available for public inspection.

. A survey should be conducted of appellate litigants from each of the federal circuits. Questioning should focus upon the litigants' definition of appellate "costs", the direct and indirect costs they incur, the nonfinancial "costs" they had borne, and their recommendations for containing litigation costs.

. Finally, a program for collecting and reporting information regarding fees lawyers charge for litigation in the federal courts might also be instituted. This system could provide nationwide data on litigation costs from the standpoint of lawyers' fees; allow access to these data by persons legitimately interested in using such information; be comparatively simple and inexpensive to administer; and provide the basis for proposed reforms designed to contain litigant costs in the federal circuits.

II. The Flow and Volume of Litigation

A. California Courts of Appeal

Table 1 classifies the litigation of each of the five California districts for a seven-to-ten year period. These data, taken from the courts' docket sheets, reflect the cases and petitions filed in the districts during each fiscal year. The data are categorized according to J. Woodford Howard's system of classification with modifications in order to accommodate some of the differences between state and federal appellate litigation.

The most striking finding with respect to the flow of criminal appeals lies in the contrast between trends in the northern and southern parts of the state. For example, the percentage of criminal appeals in the study samples from San Francisco, Sacramento, and Fresno, increased markedly between fiscal 1968 and 1977 and the percentage of civil appeals sharply declined. 6/ By fiscal year 1977, civil appeals in fact constituted no more than one-fifth of the filings in any northern district. Criminal appeals in the same year comprised from nearly one-third to over one-half of the workload of any particular court.

In contrast, the percentage of criminal appeals in samples from the Los Angeles and San Diego courts actually decreased between fiscal years 1969 and 1977. By fiscal 1977, the percentage of criminal filings was in fact smaller in each southern district than it was in any northern court. Also,

Table 1

The Business of Five California Courts of Appeal

	1st		2nd		3rd		4th		5th	
	San Francisco		Los Angeles		Sacramento		San Diego-San Bernardino		Fresno	
	FY 1968	FY 1977	FY 1971[1]	FY 1977	FY 1968	FY 1977	FY 1969[3]	FY 1977	FY 1968	FY 1977
	N=192	N=313	N=299	N=221[2]	N=126	N=195	N= 77	N= 65[4]	N= 30	N= 90
Criminal Appeals	20.8%	30.0%	32.1%	26.2%	21.4%	32.8%	32.5%[5]	29.7%	33.3%	52.2%
Crimes against Persons	5.2	7.3	7.7	8.6	4.8	13.3		7.8	10.0	8.9
Crimes against Property	8.9	14.1	10.0	9.5	8.7	11.8		14.1	16.7	30.0
Morals Offenses	5.2	5.8	12.4	6.3	5.6	5.6		6.3	6.7	11.1
Miscellaneous Crimes	1.0	2.2	1.3	0.5	1.6	1.0		1.6	0.0	1.1
Criminal Procedure	0.5	0.6	0.7	1.4	0.8	1.0		0.0	0.0	1.1
Civil Appeals	27.6	20.8	20.4	24.9	23.8	17.4	31.6	32.8	33.3	20.0
Civil Procedure	0.0	0.0	0.0	0.5	0.8	0.5	0.0	0.0	0.0	0.0
Commerce	0.5	0.0	0.0	1.8	0.0	0.0	1.3	0.0	0.0	0.0
Contracts	4.2	1.6	5.4	6.3	8.7	2.1	3.9	3.1	6.7	2.2
Domestic Relations	3.1	4.8	2.0	1.8	1.6	3.1	3.9	9.4	3.3	3.3
Labor	0.0	1.0	0.3	0.5	0.0	1.5	1.3	1.6	0.0	0.0
Property	2.1	1.3	2.7	0.9	1.6	1.5	3.9	4.7	10.0	1.1

Table 1: The Business of Five California Courts of Appeal (cont'd)

	San Francisco		Los Angeles		Sacramento		San Bernardino		Fresno	
	FY 1968	FY 1977	FY 1971	FY 1977	FY 1968	FY 1977	FY 1969	FY 1977	FY 1968	FY 1977
Civil Appeals										
Taxation	2.1%	1.3%	0.7%	0.9%	0.0%	1.5%	0.0%	0.0%	0.0%	0.0%
Torts	7.3	2.9	4.7	4.5	8.7	3.1	6.6	7.8	6.7	4.4
Personal Status*	4.2	2.2	1.3	2.3	2.4	1.5	1.3	1.6	3.3	4.4
Juvenile	3.1	2.6	2.0	5.0	0.0	2.6	0.0	3.1	0.0	3.3
Other	1.0	3.8	1.3	0.5	0.0	0.0	9.2	1.6	3.3	1.1
Original Proceedings	51.6	49.2	47.5	48.9	54.8	49.7	36.8	39.1	33.3	27.8
Criminal Prosecution	5.2	15.0	21.7	17.2	13.5	20.0	17.1	12.5	0.0	17.8
Habeas Corpus	25.5	7.3	12.4	7.7	34.1	16.4	11.8	9.4	26.7	2.2
Workers' Compensation	2.1	5.4	6.0	5.9	4.8	3.6	1.3	1.6	0.0	0.0
Administrative Action	6.8	1.6	1.0	1.4	0.8	2.1	0.0	3.1	0.0	3.1
Domestic Relations	0.0	1.9	0.3	2.3	0.0	0.0	0.0	3.1	3.3	0.0
Contract	0.5	1.6	1.0	2.3	0.0	0.0	0.0	1.6	0.0	1.1
Commerce	0.5	1.0	0.7	0.9	0.0	0.0	0.0	0.0	0.0	0.0
Other	10.9	15.3	5.0	11.3	1.6	7.7	6.6	7.8	3.3	4.4
Total**	99.9%	99.9%	100.6%	100.3%	100.0%	99.9%	100.7%	101.8%	100.0%	99.7%

*"Personal Status" includes conservatorships, guardianships, trusts, and dispositions of estates.

**Totals do not always equal 100% because of rounding.

TABLE 1: NOTES

1/ Case records from previous fiscal years were unavailable in Los Angeles.

2/ Due to time limitations, data gathered in Los Angeles for fiscal year 1977 consisted of a 5% sample of all cases filed.

3/ Case records for previous fiscal years were unavailable in San Diego or San Bernardino.

4/ Complete case records for FY 1977 were available in San Diego only.

5/ Case records in criminal cases from the 4th District for fiscal year 1969 were available only in San Diego. The Clerk's office in San Bernardino no longer maintained records for FY 1969. This percentage reflects the cumulative criminal caseload in both cities.

rather than diminishing as in the north, the proportion of civil appeals rose slightly in Los Angeles and San Diego. In terms of percentages, the burden of the civil workload had actually become heavier by fiscal 1977 in each southern court than in any of the northern districts.

There are other regional differences, too. Appeals from convictions of crimes against property rose in each northern district, but remained at about the same proportional level in Los Angeles, the only southern court for which complete data were available. Likewise, while the percentages of morals offenses -- including narcotics cases and assorted sexual crimes -- increased or at least remained at the same level in the north, the proportion of these cases decreased sharply in Los Angeles.

The specific legal issues raised in criminal cases were not systematically recorded. However, as the judges, staff attorneys, and case records themselves indicate, certain claims are made much more frequently than others. Among issues commonly raised are claims that police have violated search-and-seizure requirements, that trial counsel has inadequately represented the defendant, that the trial judge has improperly instructed the jury, and that the evidence has been insufficient to support the jury's verdict.

It is not possible on the basis of the accompanying data alone to determine definitively the factors underlying the apparent regional variations. Nor do the interview results offer substantial clues. The contrasts are, in any case,

probably not related to ideological differences between northern and southern judges, since the interviews suggest that the mixtures of judges who tend to be "conservative" and "liberal" in criminal appeals are roughly similar in both regions. Investigation of workload differences among the courts consequently remains a fitting subject for future research.

The most noticeable finding in the civil area is that no categories of appeals clearly dominate the calendars of the various courts of appeal. Comparatively few appeals are filed in almost every category of litigation. An insignificant number of cases are appealed each year in the fields of commerce, labor, taxation, and property (except for the Fresno court in 1968). Contract and tort cases declined in all courts between 1968 and 1977, except for contract cases in the Second District and tort filings in the Fourth. Only in the field of torts did the proportion of the total caseload remain at 2.9% or above in each district by fiscal year 1977.

Original proceedings constitute a large percentage of the caseload of each court. In the San Francisco, Sacramento and Los Angeles districts, petitions for writs comprise about one-half of the workload each year; in Fresno and San Diego these petitions vary between about one-fourth and almost two-fifths of the court's work.

In original proceedings stemming from criminal cases, as in appeals, there are differences between the northern and southern courts. In the northern tribunals requests for writs

in criminal proceedings (mandate or prohibition) increased dramatically, while in the southern districts the proportion of these petitions declined markedly. Interviewees were unable to help explain these regional variations and were, in fact, unaware that the variations even existed.

The percentage of petitions for habeas corpus declined in every court, and declined significantly in the San Francisco, Sacramento, and Fresno districts. Note again the regional differences: the proportions of requests for habeas corpus are at least twice as high in the earlier years of the decade in the northern courts than in either of the southern tribunals.

Workers' Compensation cases are another category worth noting. These filings are not actually original proceedings, but came to the Courts of Appeal, via writs of review, from the Workers' Compensation Appeals Board. The writs are granted at the courts' discretion, and constitute one of the few areas of discretionary jurisdiction for the California intermediate courts. Despite the discretionary basis of these filings, Workers' Compensation cases comprise fully 5.6%, 5.9%, and 3.6% of the samples from the First, Second, and Third Districts, respectively.

The material on litigation volume in California supplements this information on litigation flow. Figure 1 presents the aggregate numbers of appeals and petitions for extraordiinary writs in the California intermediate courts over eleven fiscal years; 8/ it also breaks down the filings into criminal and civil categories. The graph illustrates the steady and consistent increases afflicting the overall caseloads of the courts. Filings in fiscal 1977, in fact, stood at over twice their number in fiscal 1967.

After fiscal year 1969, civil filings consistently outnumbered criminal appeals. This finding is interesting in that justices' frequent complaints about the alleged burdens of "free" appeals by indigent defendants had led me to expect a far heavier criminal caseload relative to civil. However, petitions for writs of prohibition or mandate in criminal cases are classified by the courts as civil filings, though they actually stem from criminal prosecutions. These petitions comprised from one-eighth to one-fifth of the filings from the various districts in fiscal 1977. If added to the criminal appeals, the petitions in criminal cases would presumably alter substantially the portrait of the courts suggested in Figure 1.

Overall filings by appellate districts are displayed in Figure 2. Note the increases in the workload of each of the courts. Note also that the rankings of the districts in terms of numbers of judgeships corresponded to their rankings

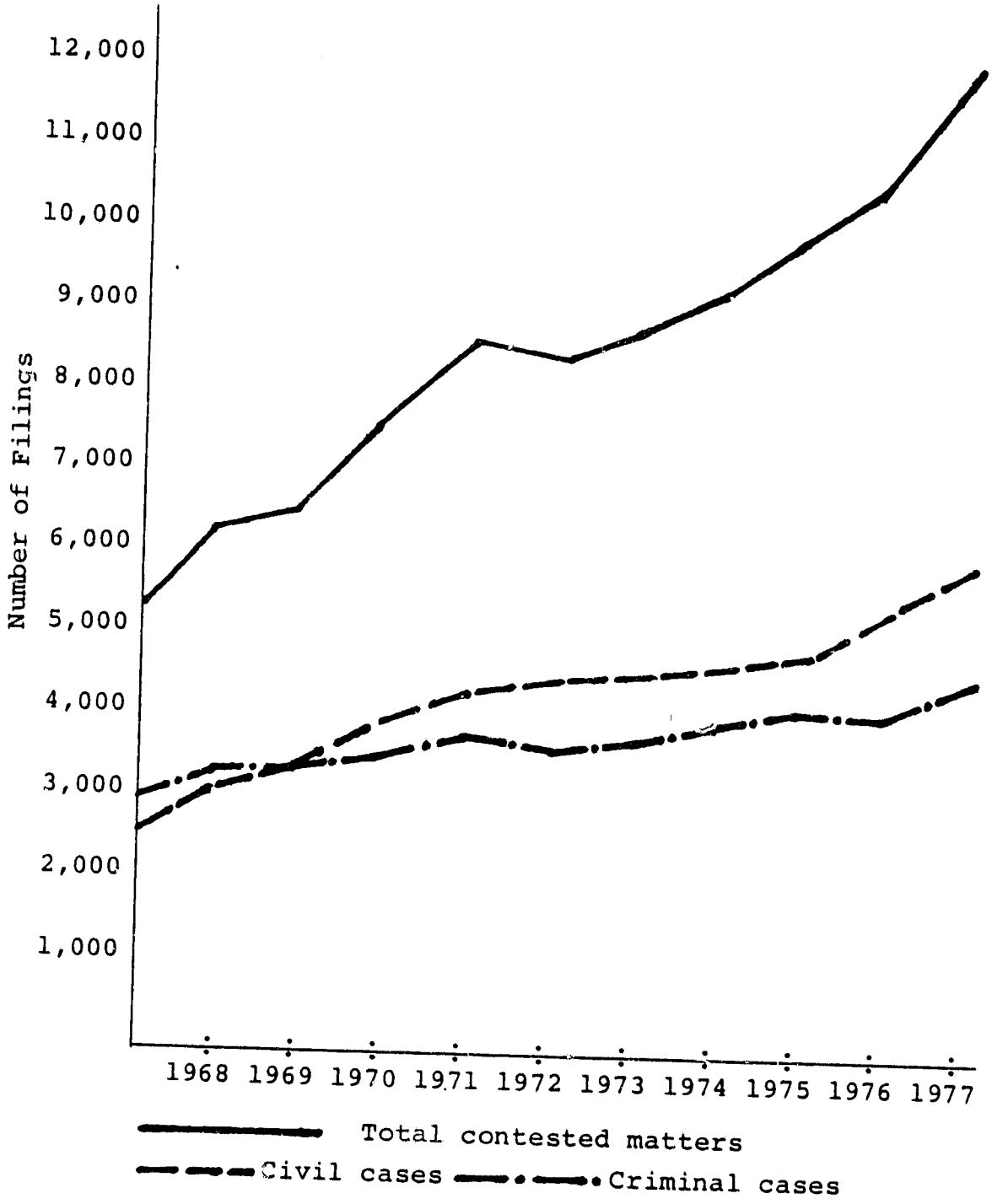


Figure 1

Filings in the California Courts of Appeal
1967 - 1977

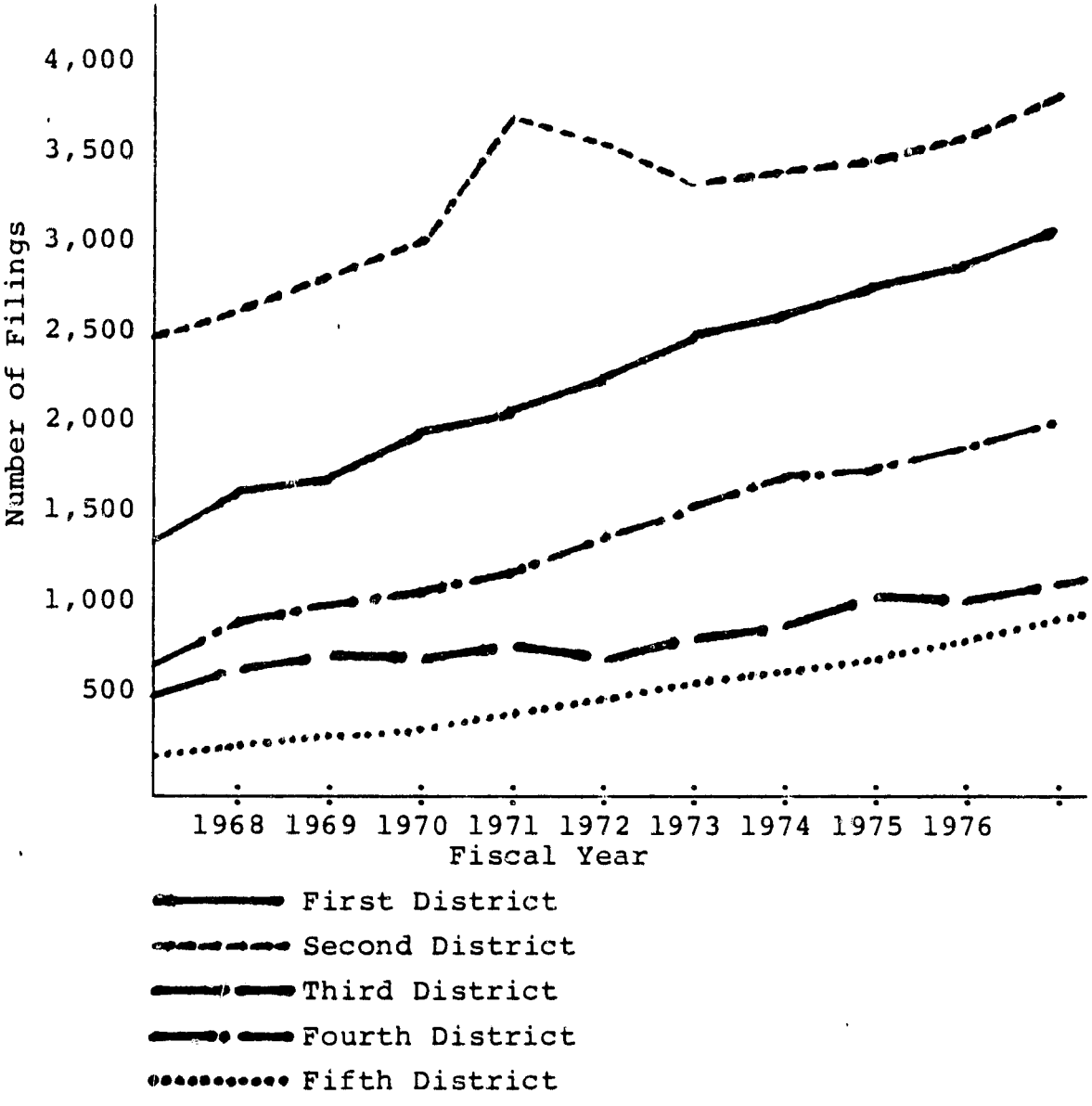


Figure 2

Filings by District in the California Courts of Appeal, 1967-1977

in terms of caseload. The data suggest, however, that the workload per justice in the Third District (Sacramento), with seven justices, is substantially lower in recent years than the corresponding workload in the Fourth (San Diego/San Bernardino) and Fifth (Fresno) Districts, with nine and four judgeships each, respectively.

These data clearly confirm the judges' verbalized perceptions of allegedly increasing demands of their job. The data also lend support to their frequent proposals for additional judgeships or additional support staff in the Courts of Appeal. 9/

B. United States Courts of Appeals

Tables 2 and 3 summarize the business of the federal courts of appeals during fiscal years 1968 and 1977, respectively. These tables consist of information published by AOUSC and are recategorized according to Howard's system of classification. 10/ Habeas corpus and other prisoner petitions are classified separately from other "personal status" cases.

The similarities in the distribution of litigation within the federal circuits appear to outweigh the differences, especially in fiscal year 1977. All the courts had few crimes against persons in the latter year and, with the single exception of the D. C. Circuit , a substantial number of crimes against property. Morals offenses and miscellaneous crimes range from six to 11.7 percent in ten of the circuits, although in the Ninth almost one case in six was of this type. (The Ninth also led in morals cases in 1968.) All courts had few property and taxation cases in both 1968 and 1977 and, with the exception of the Second and Ninth, relatively few commerce cases. Only the D. C. Circuit differed sharply from the other courts in personal status cases during both fiscal 1968 and 1977.

In the labor field, the Sixth Circuit had a markedly higher percentage of cases during 1977 than any other circuit that year. The Sixth also led in 1968, but not by as significant a margin. Prisoner petitions other than habeas corpus requests increased dramatically in the Fourth Circuit, from six

Table 2

The Business of the United States Courts of Appeals
Fiscal Year 1968

	D.C. N=721	1st N=160	2nd N=690	3rd N=537	4th N=916	5th N=1171	6th N=614	7th N=487	8th N=401	9th N=917	10th N=553
Criminal											
Crimes Against Persons	14.0%	0.6%	0.4%	0.6%	0.7%	0.2%	0.5%	3.1%	0.7%	1.1%	1.4%
Crimes Against Property	30.1	20.0	10.6	7.6	10.7	14.6	15.8	16.4	17.7	12.2	13.6
Morals Offenses	4.4	8.1	10.6	0.9	1.0	5.0	2.8	6.2	3.5	12.8	1.4
Miscellaneous Crimes	5.8	8.8	7.1	2.6	5.7	9.5	10.4	5.5	10.2	4.7	6.1
Civil											
Commerce	1.4	4.4	8.6	4.3	1.9	1.4	2.9	5.3	4.2	8.7	2.2
Contracts	9.7	16.9	10.4	11.7	5.1	12.4	9.8	10.9	16.5	10.4	12.1
Labor	1.1	5.6	3.2	4.8	3.5	4.3	5.9	4.1	1.5	2.7	0.7
Property	3.6	0.6	0.9	2.6	0.8	2.2	2.4	2.1	4.5	4.1	5.4
Local Jurisdiction	4.0	0.0	0.0	1.1	0.0	0.0	0.0	0.0	0.0	0.2	0.0
Taxation	0.4	1.3	1.9	1.9	1.3	4.6	4.1	3.7	4.5	5.5	2.0
Torts	9.8	13.1	16.2	32.4	8.6	13.7	12.1	11.1	11.5	7.3	4.9
Personal Status	3.6	9.4	6.5	5.2	6.2	10.3	12.2	13.6	9.2	7.4	8.9
Other	7.5	6.9	11.9	8.4	2.0	5.4	4.9	6.2	6.5	6.3	6.9
Prisoner Petitions	1.0	1.3	0.6	2.4	6.0	2.9	1.5	4.1	3.2	3.6	7.8
Habeas Corpus	3.6	3.1	11.2	13.4	46.6	13.7	14.8	7.8	6.2	13.0	26.6
TOTAL	100.0	100.1	100.1	99.9	100.1	100.2	100.1	100.1	99.9	100.0	100.0

Table 3

The Business of the United States Courts of Appeals
Fiscal Year 1977

	D.C. N=602	1st N=454	2nd N=1683	3rd N=1454	4th N=1498	5th N=3040	6th N=1503	7th N=1176	8th N=997	9th N=2325	10th N=986
Criminal											
Crimes Against Persons	1.8%	0.2%	0.7%	1.9%	1.1%	0.6%	0.9%	2.2%	1.3%	0.8%	1.1%
Crimes Against Property	4.7	11.2	14.1	13.4	9.9	9.0	10.3	12.7	11.0	9.8	9.5
Morals Offenses	8.1	7.3	10.8	6.0	6.5	11.7	6.0	8.3	7.1	16.3	11.2
Miscellaneous Crimes	9.3	8.1	9.9	6.6	8.7	8.3	7.4	7.7	6.2	9.0	8.0
Civil											
Commerce	1.8	2.6	8.6	4.3	1.8	3.2	3.0	5.2	2.5	7.4	4.1
Contracts	7.6	9.0	9.2	8.6	5.5	8.4	7.1	8.7	12.1	7.2	9.5
Labor	2.7	6.2	2.8	8.9	6.7	3.2	13.4	4.2	4.1	3.4	3.0
Property	1.3	0.7	0.5	0.8	1.2	1.2	1.1	1.6	2.1	1.3	2.6
Local Jurisdiction	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Taxation	0.5	1.3	0.8	0.9	1.1	2.4	1.4	2.0	2.4	1.6	1.0
Torts	5.6	10.4	7.5	9.0	4.2	12.1	5.7	4.0	6.3	5.9	7.6
Personal Status	3.7	14.1	12.5	14.4	11.9	13.0	15.4	15.6	13.7	9.8	9.7
Other	48.3	21.1	14.3	13.8	13.2	14.6	16.0	15.4	17.1	18.5	14.3
Prisoner Petitions	2.5	4.6	2.6	7.5	20.7	4.1	4.1	5.4	5.5	4.0	5.6
Habeas Corpus	2.0	3.1	5.5	3.9	7.5	8.5	8.1	7.1	8.4	5.2	12.7
TOTAL	99.9	99.9	99.8	100.4	100.0	100.3	99.9	100.1	99.8	100.2	99.9

percent in 1968 to over twenty percent of the caseload in 1977. The Fourth Circuit's percentage in this area in 1977 was, in fact, over two and one-half times that of any other circuit.

In contrast, habeas corpus petitions in the Fourth decreased from a remarkable 46.6 percent of the workload in fiscal 1968 to only 7.5 percent in 1977. Likewise, the percentage of crimes against property in the First Circuit went from 20 to 11.2, and the percentage of torts in the Third Circuit declined from 32.4 in 1968 to only 9.0 in 1977.

Figure 3 presents the civil, criminal, and total filings in the federal intermediate courts over ten fiscal years. Figures 4 through 14 show similar data for each of the circuits. 11/ As in the California courts, filings in the U.S. Courts of Appeals climbed steeply in recent years, more than doubling between fiscal 1967 and fiscal 1976. But in six of the circuits -- the D.C., the First through Fourth, and the Tenth -- the numbers tend to vary more erratically from year to year than they did in all but one of the California districts.

The gap between civil and criminal filings also tend to be much wider than in the California tribunals. All circuits are forums for civil appeals much more frequently than they are for criminal. This finding should not be surprising, since the scope of criminal jurisdiction in the state courts has historically been much broader than in the federal.

In any event, demands on the circuits were obviously considerably heavier in fiscal year 1976 compared to a decade

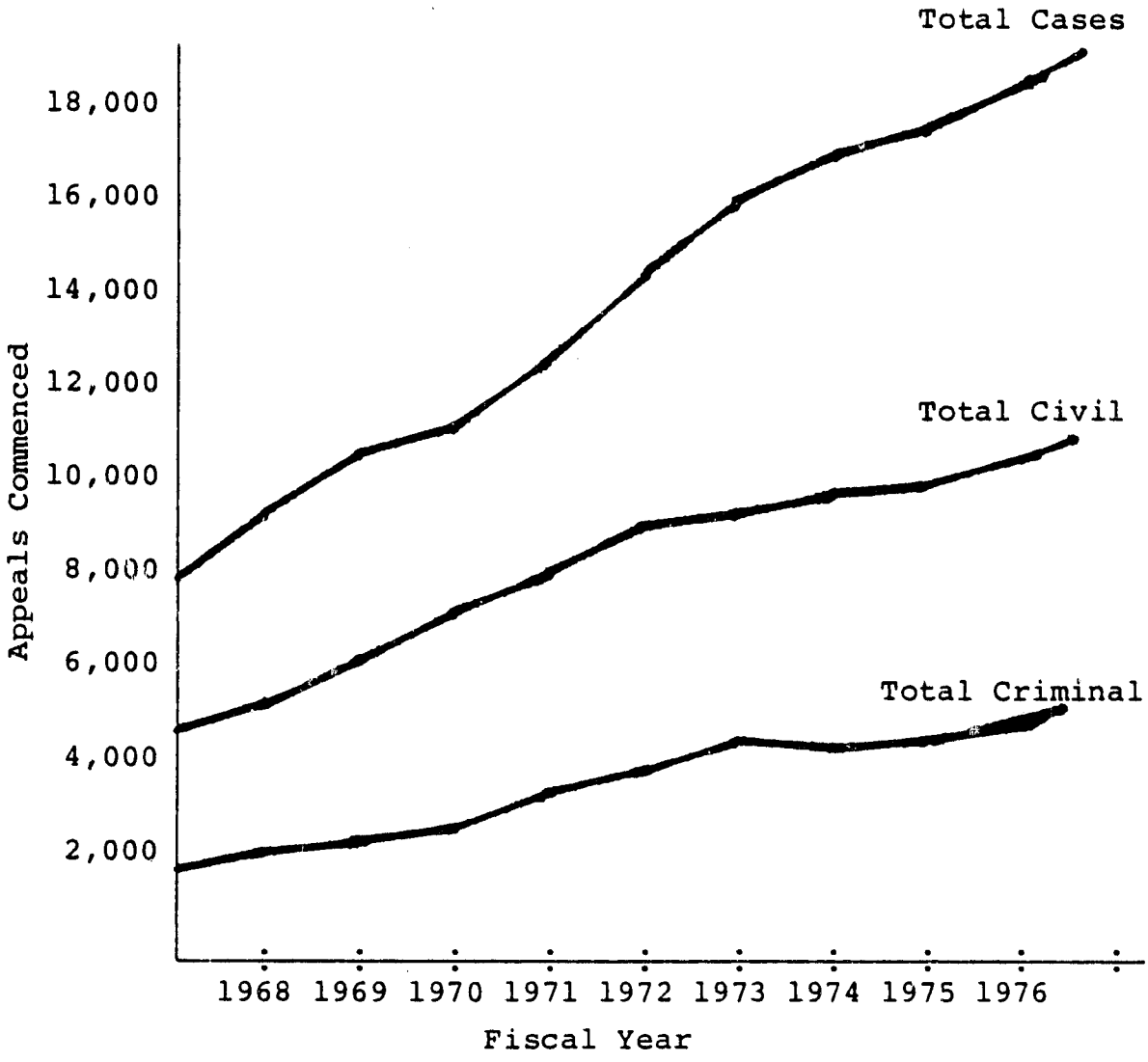


Figure 3

Appeals Commenced in the U.S.
Courts of Appeals, 1967-1976

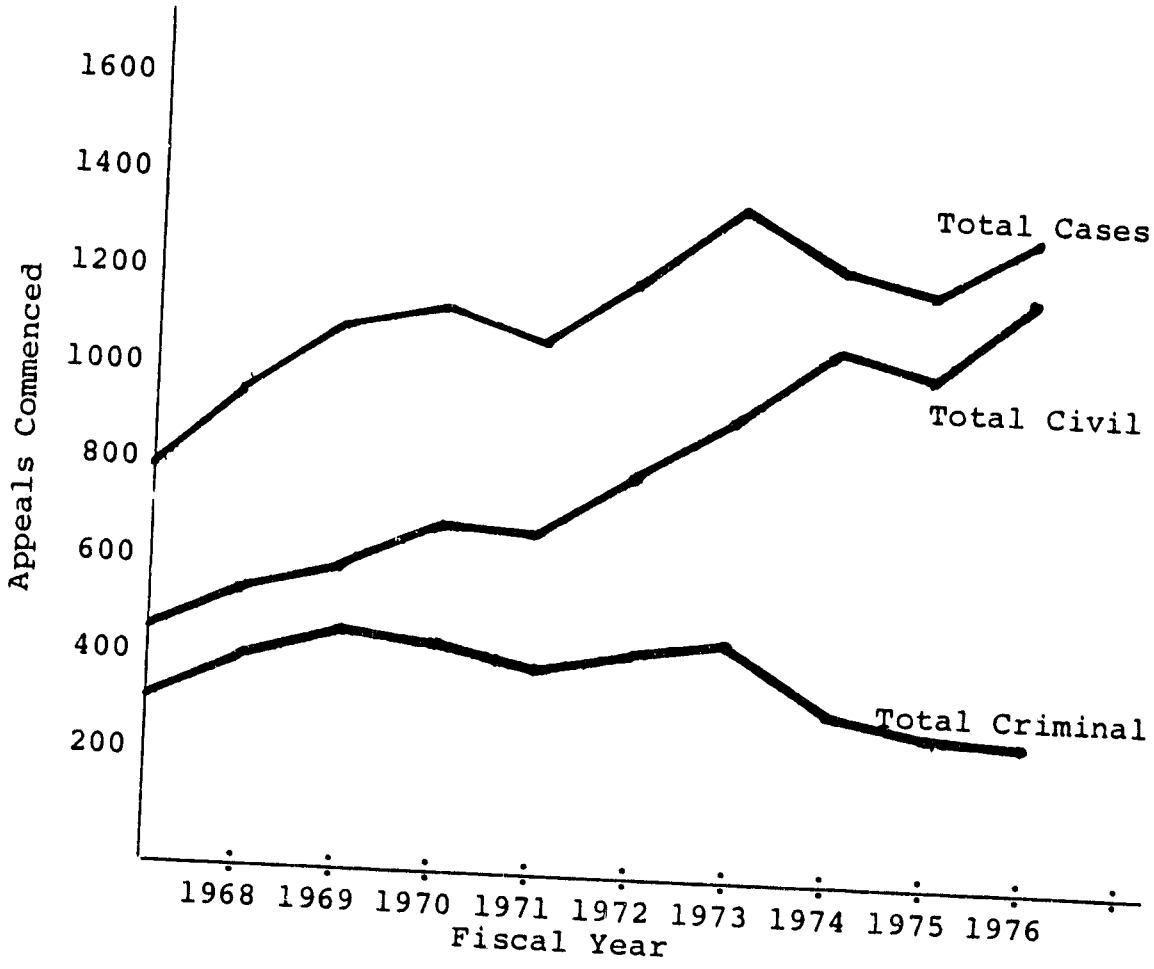


Figure 4

Appeals Commenced in the District of Columbia Circuit, 1967-1976

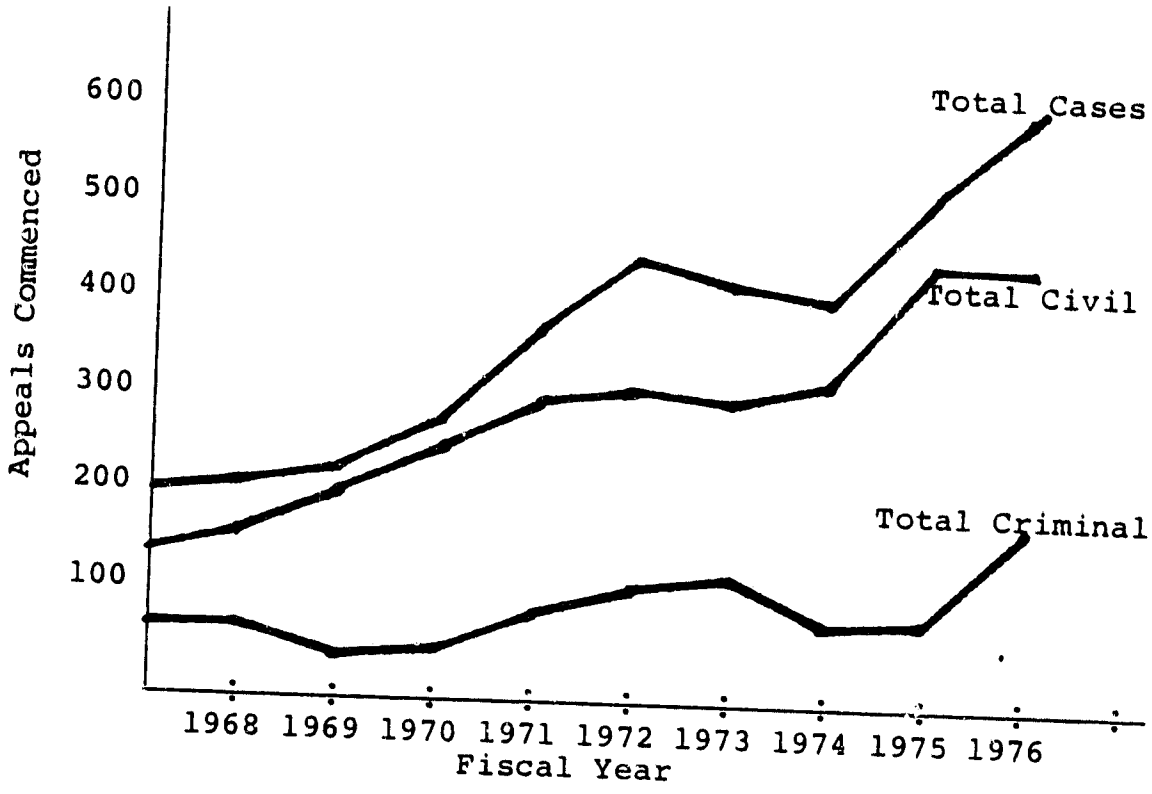


Figure 5

Appeals Commenced in the First Circuit
1967 - 1976

Figure 6

Appeals Commenced in the Second Circuit
1967 - 1976

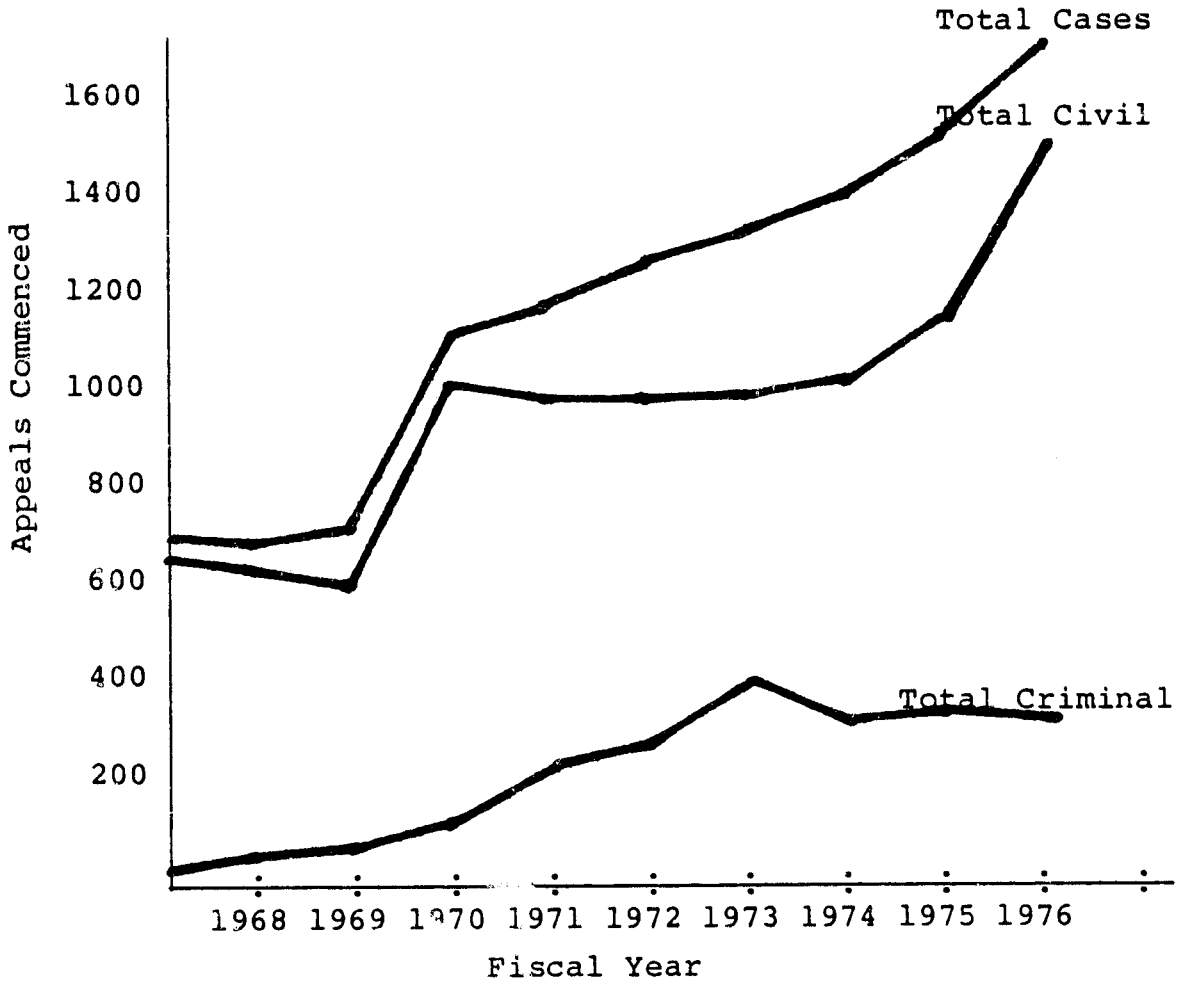


Figure 7

Appeals Commenced in the Third Circuit
1967 - 1976

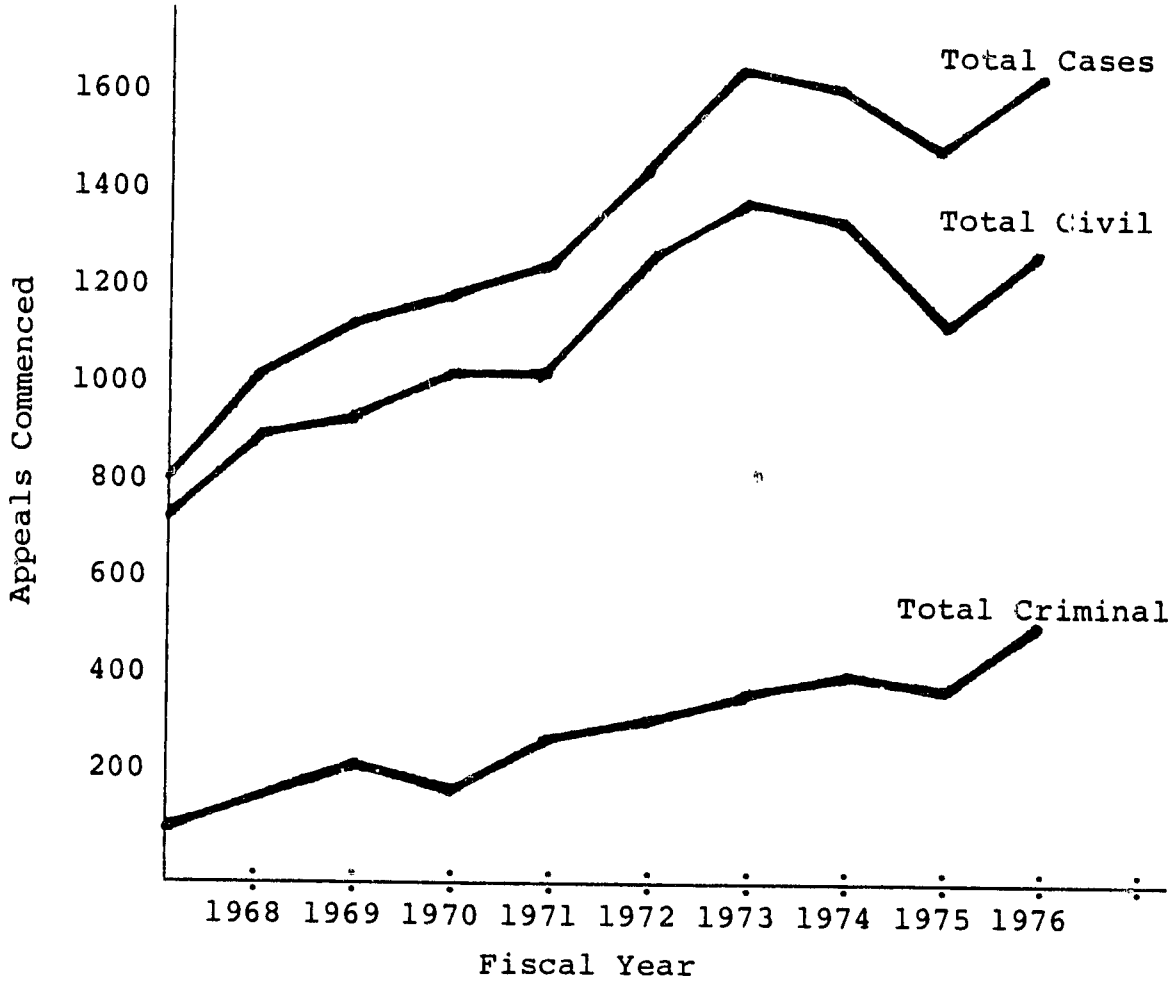


Figure 8

Appeals Commenced in the Fourth Circuit
1967 - 1976

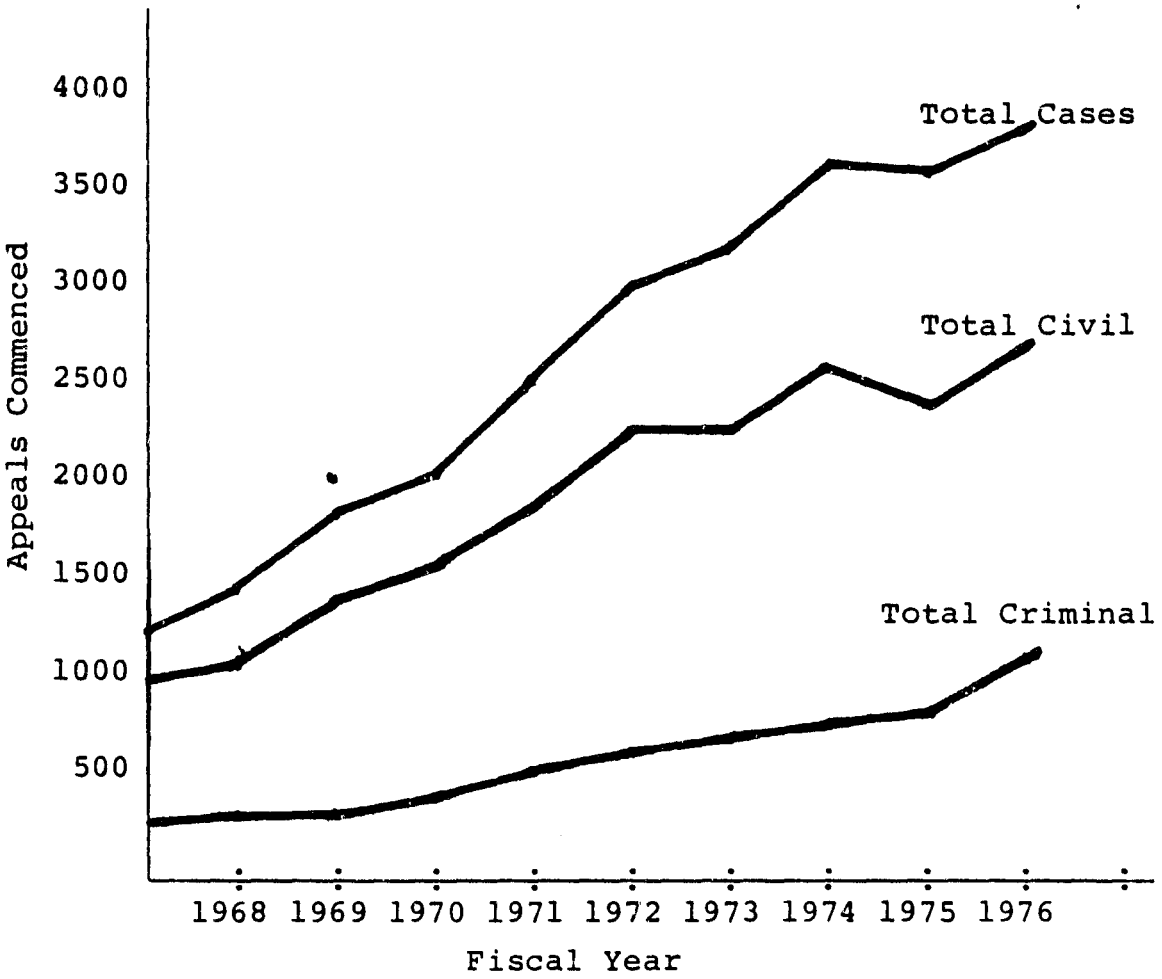


Figure 9

Appeals Commenced in the Fifth Circuit
1967 - 1976

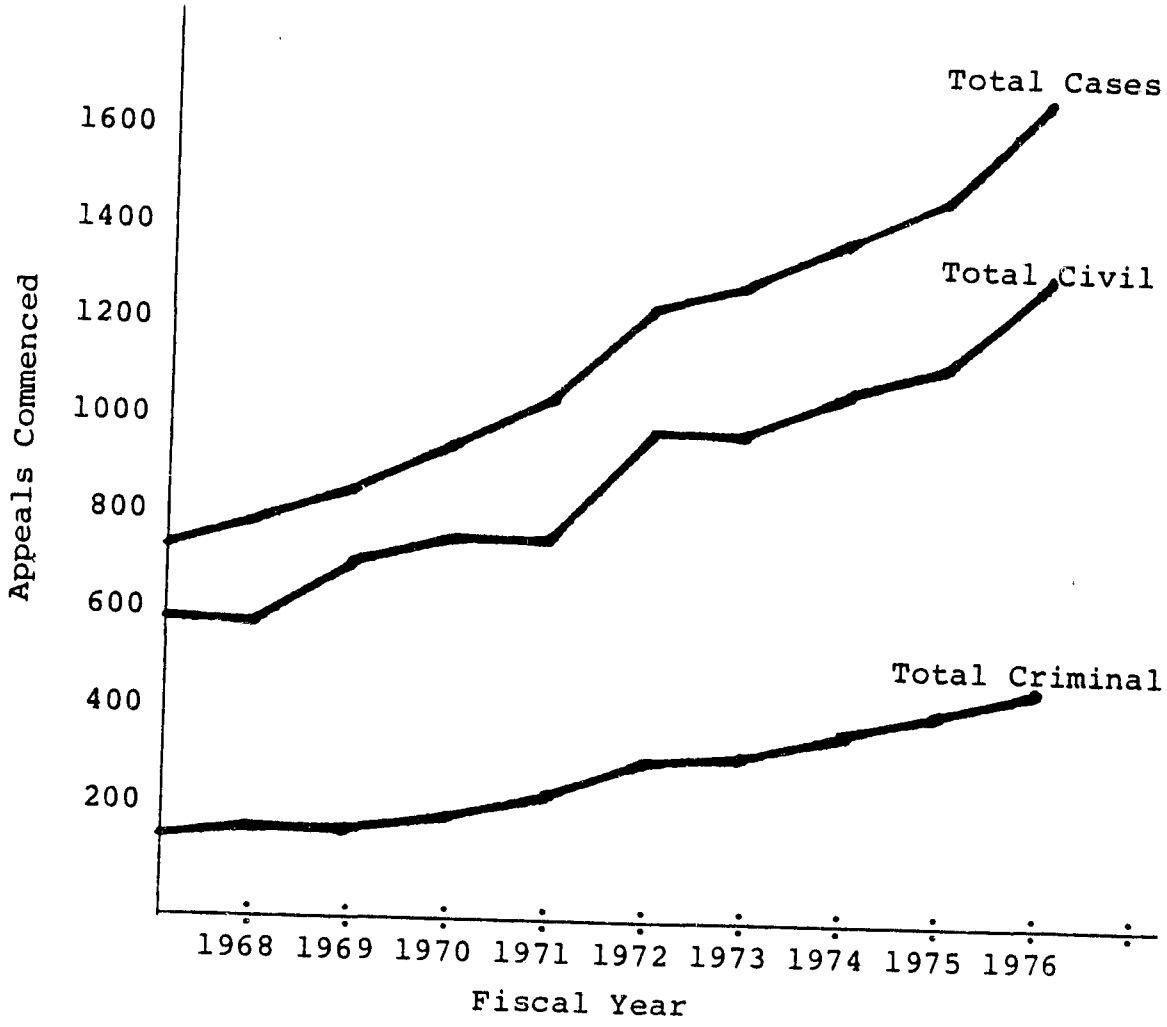


Figure 10

Appeals Commenced in the Sixth Circuit
1967 - 1976

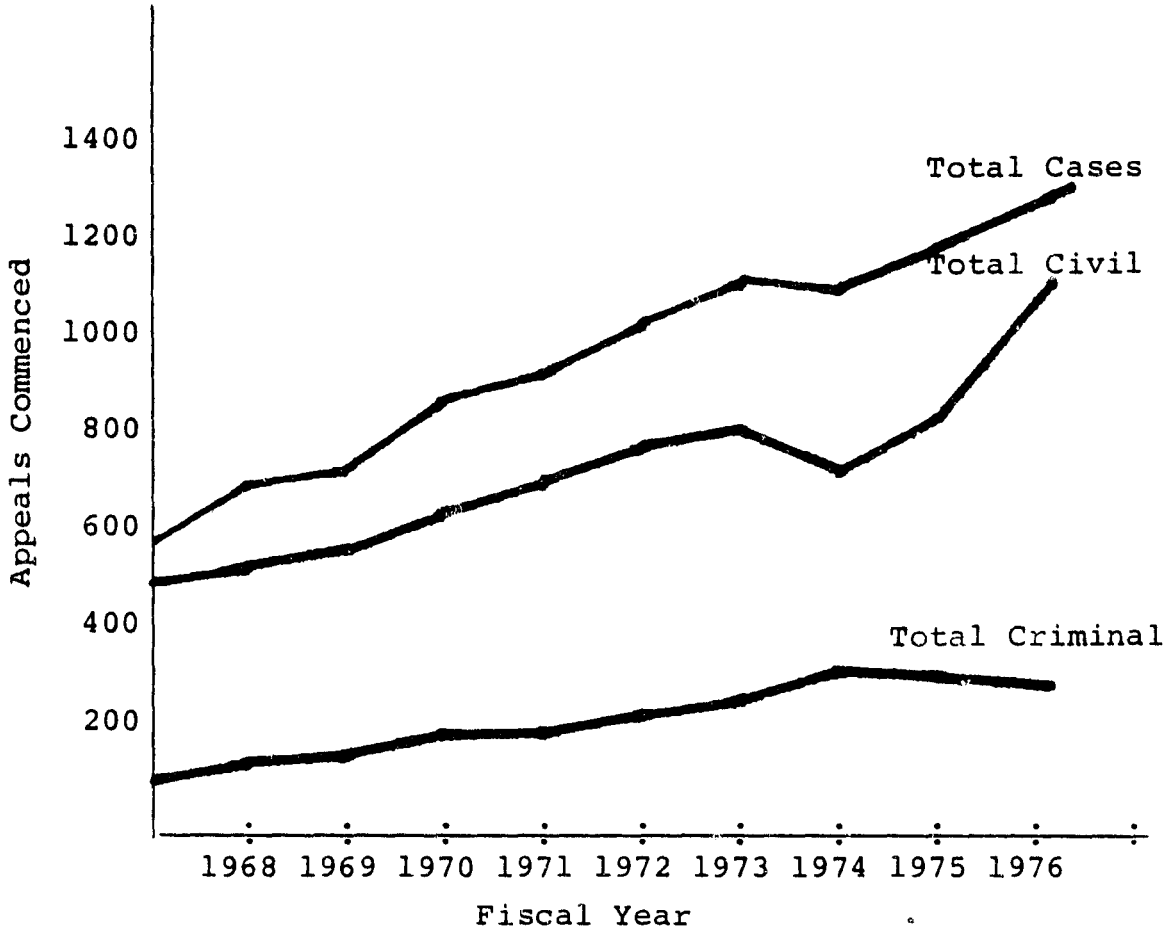


Figure 11

Appeals Commenced in the Seventh Circuit
1967 - 1976

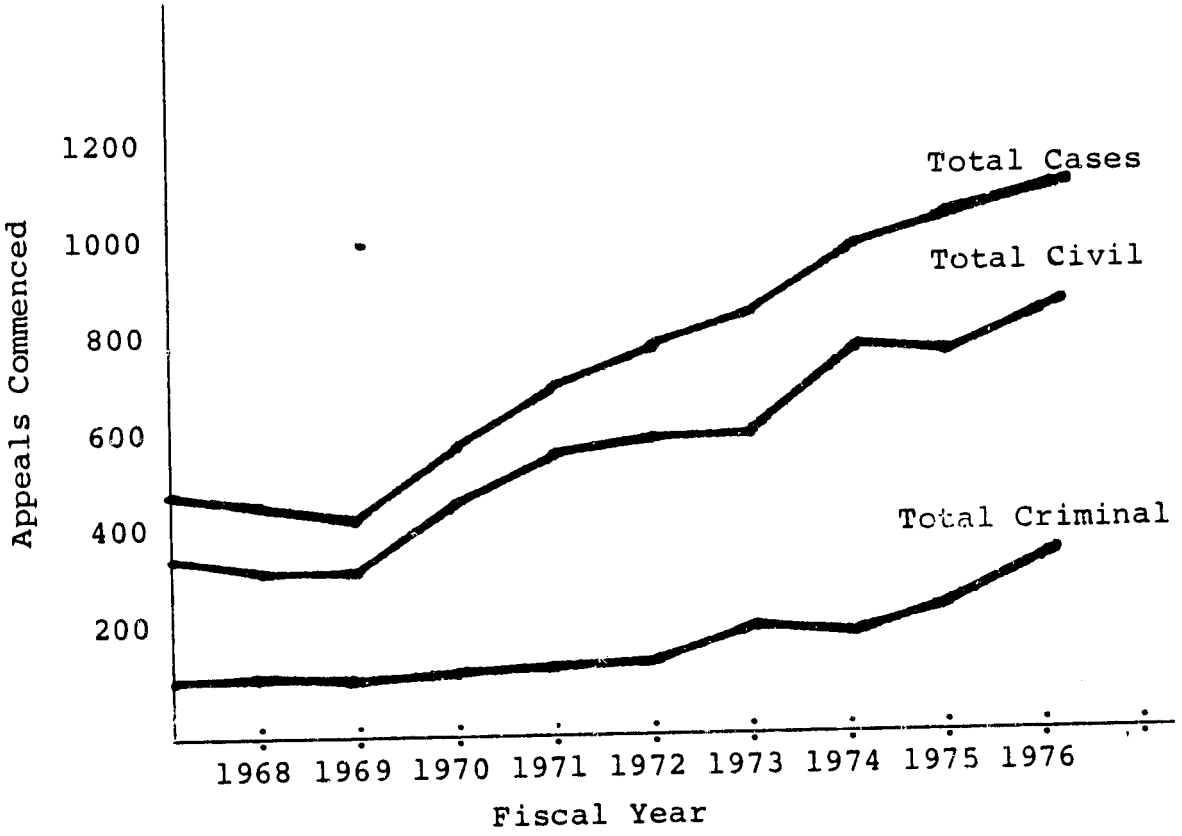


Figure 12

Appeals Commenced in the Eighth Circuit
1967 - 1976

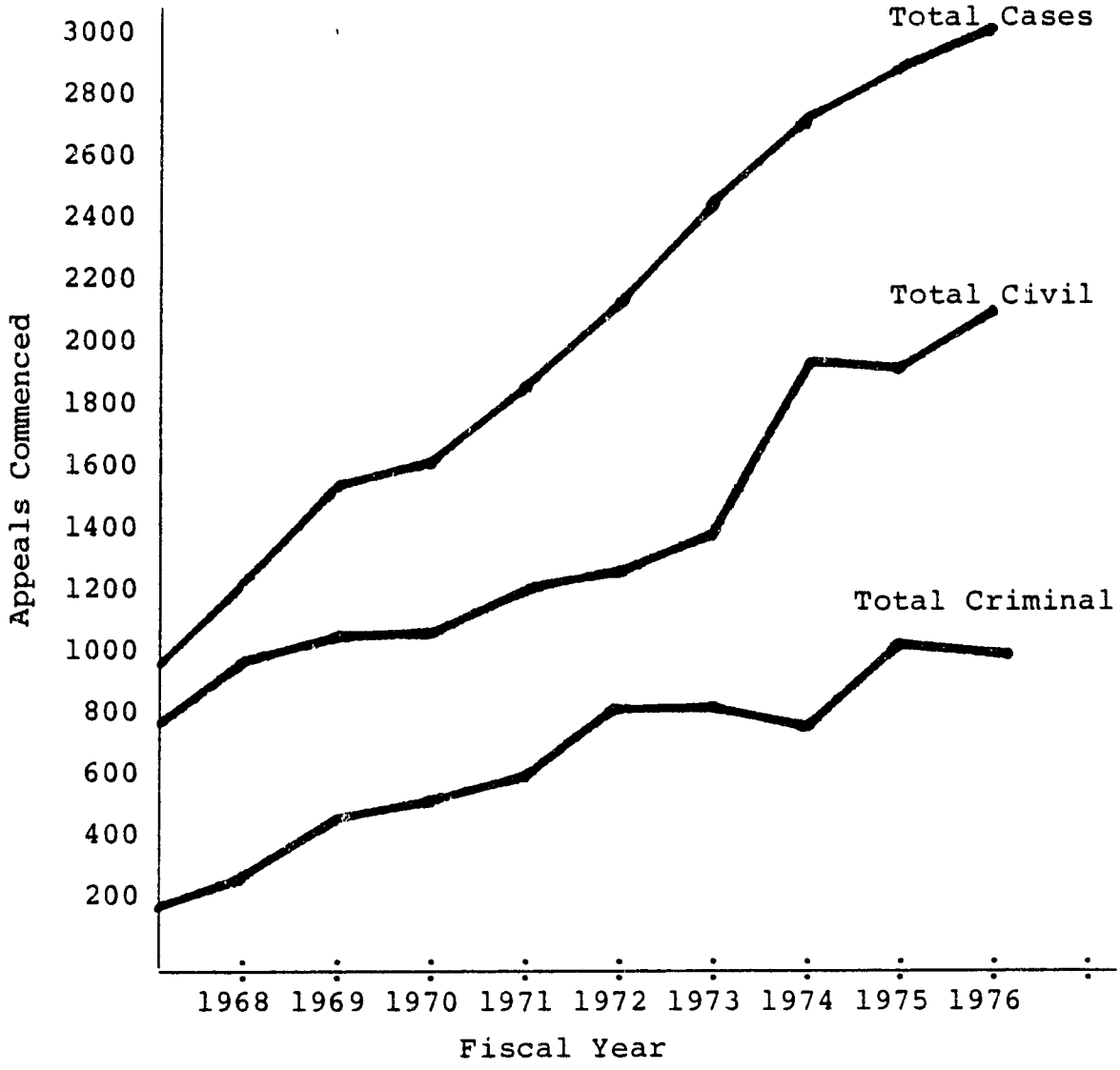


Figure 13

Appeals Commenced in the Ninth Circuit
1967 - 1976

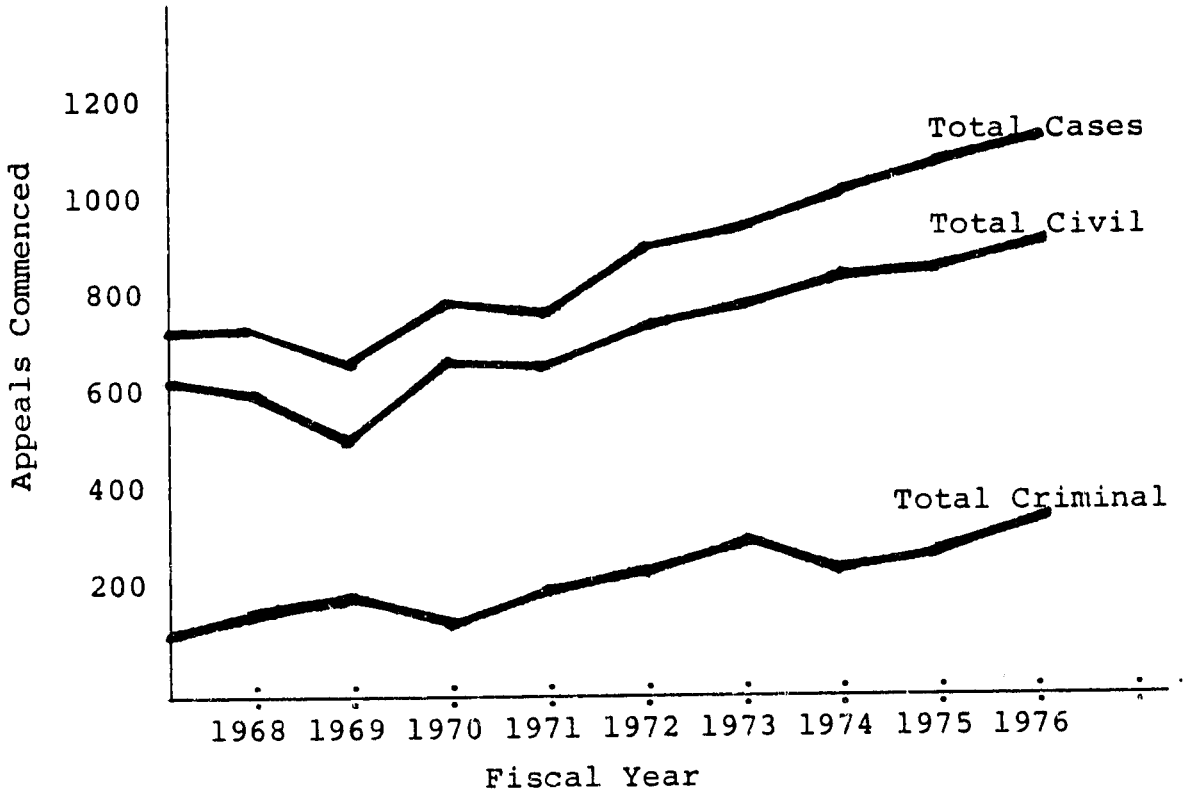


Figure 14

Appeals Commenced in the Tenth Circuit
1967 - 1976

earlier. Filings at least doubled in all courts except the District of Columbia and Tenth Circuits. In fact, in the Fifth and Ninth Circuits the filings roughly tripled.

Did circuit judges and their law clerks consider their courts "overloaded" with cases? Table 4 reports the responses to this question obtained from the mail-out questionnaires. Both judges and clerks felt their courts are overloaded. Judges also believed they are overworked, one judge in the Ninth Circuit in fact terming the workload "appalling." However, a large majority of the clerks do not think they are overworked.

Table 4

Perceptions of "Overload" in the U.S. Courts of Appeals

	Strongly Agree	Agree	No Opinion	Disagree	Strongly Disagree	Total
Court Overloaded?						
Judges (N=30)	83.3%	16.7%	0.0%	0.0%	0.0%	100.0%
Law Clerks (N=20)	45.0%	55.0%	0.0%	0.0%	0.0%	100.0%
Judges Overworked?						
Judges	70.0%	30.0%	0.0%	0.0%	0.0%	100.0%
Clerks Overworked?						
Law Clerks	0.0%	0.0%	20.0%	80.0%	0.0%	100.0%

What changes should be effected vis-a-vis the Courts of Appeals? Table 5 shows that, in the view of respondents, diversity jurisdiction is a prime candidate for elimination from the federal courts. The clerks' other suggestions implicitly criticize the judges and the ways they operate. For their part, the judges proposed additional jurisdictional changes for their courts, a more "conservative" interpretation of criminal procedures, creation of a new court or new judgeships, and higher-quality performances by attorneys.

Table 5

Suggested Changes in Operation and Jurisdiction of U.S. Courts of Appeals

JUDGES' SUGGESTIONS	No. of Mentions
1. Eliminate diversity cases	12
2. Make jurisdiction discretionary in cases arising under Civil Rights Acts	9
3. "Common sense" interpretation of the exclusionary rule	6
4. Create more circuit judgeships	6
5. Require "demonstrated prejudice" before ruling in favor of criminal defendants	5
6. Create National Court of Appeals	3
7. Place initial review of NLRB and Social Security litigation in district courts	2
8. Require better briefs and allow less oral argument	2
Subtotal:	44
LAW CLERKS' SUGGESTIONS	
1. Eliminate diversity cases	9
2. Use staff attorneys to handle "routine" cases	5
3. Use "computerization" of the reports	2
4. Institute "merit" selection of judges	2
5. Interpret rules of procedure in a "less prosecutorial way" (10th Cir.)	1
Subtotal:	19
TOTAL:	63

III. The Flow and Volume of Litigation: Comparisons and Proposals for Federal Reforms.

A. Comparisons Between the California and U.S. Courts of Appeals.

In criminal cases, offenses against persons and offenses against property are more of a burden on the state than on the federal courts of appeals. Morals offenses are, in percentage terms, roughly equivalent burdens upon the two levels of courts. In 1977, these crimes made up 10.7 percent of the state filings and 9.0 percent of the federal. Conversely, miscellaneous offenses placed heavier burdens upon the federal circuits than upon their California counterparts. While 8.1 percent of the filings at the federal level were for these crimes, only 1.3 percent of the state filings were in the same category.

In civil appeals, commerce, contract, and labor cases placed heavier proportionate demands upon the federal courts than they do upon the California Courts of Appeal. The following figures are for 1977:

1. Commerce U.S. 4.1% ; California .4%
2. Contract U.S. 8.5% ; California 3.1%
3. Labor U.S. 5.43%; California .9%

These differences may be due to both the extensive federal legislation and regulation of labor relations, and the volume of commerce and contract litigation arising under federal diversity jurisdiction. Of course, there is no way to determine from the data published by the AOUSC what percentage of the federal

filings are in fact diversity cases.

The burdens on the two levels of courts in 1977 were most nearly alike in the fields of property, taxation, and torts:

1. Property U.S. 1.3% ; California 1.9%
2. Taxation U.S. 1.4% ; California .7%
3. Torts U.S. 7.1% ; California 4.5%

Original proceedings are much more state than federal concerns. Since before 1977, the overall percentages of these filings were almost equal in federal and state courts, it may be that such decisions as Stone v. Powell, 49 L. Ed. 2d 1067 (1976), have had a significant effect on the federal circuits in this area.

1. Prisoner petitions and habeas corpus, 1968--
   U.S. 17.7% ; California 16.8%
2. Prisoner petitions and habeas corpus, 1977--
   U.S. 6.3% ; California 12.6%

In sum, crimes against persons and property are more often state than federal concerns. In civil cases, the U.S. courts are much more concerned than the California courts with suits involving commerce, contract, and labor relations. Domestic relations cases are exclusively state concerns. And in property and taxation appeals, the burden on the two levels of courts are nearly equal.

Prisoner and habeas corpus petitions are of declining significance in the federal circuits. These filings now place relatively greater demands on the California intermediate tribunals than on their federal counterparts.

B. Proposals for Reforms in the U.S. Court of Appeals

The following discussion focuses upon proposals to limit the growth of caseloads in the federal circuits. The problem of burgeoning caseloads is critical in the federal appellate courts.

There are ever-increasing caseloads in both the U.S. and California Courts of Appeals and many interview respondents expressed concerns about court overload and overwork (see Table 5). Controls on caseload increases could thus legitimately be top priority items for appellate court reforms. Most proposals in this area, of course, are controversial since opponents of specific recommendations often claim that to deny particular litigants access to the appellate courts is to deny justice to the litigants.

But if caseloads are to be controlled, some potential litigants would almost automatically be affected. Stone v. Powell (1976), for instance, though limiting access of state prisoners to federal courts, presumably had the effect of reducing some of the caseload burdens on the circuit courts.

The question of caseload control is inextricably linked to the broader issue of what values are to be preferred in the judicial system. And ultimately both issues are linked to questions regarding what values are to be preferred and pursued

for American society as a whole. In any event, the following proposals are directed toward controlling appellate caseloads:

1. Diversity Jurisdiction

Diversity cases should be eliminated from or curtailed in the federal courts. This was suggested most often by circuit judges who returned questionnaires (see Table 6). Diversity suits comprise eleven percent of filings in all circuits. 12/ As one authority on federal courts of appeals has written,

> Fears of local prejudice against nonresidents, which gave rise to this overlapping jurisdiction, have receded substantially as a result of the integration of national life and improved state judiciaries.

He also noted that "abolishing diversity jurisdiction is the least painful method to trim the fat without cutting into the muscle of federal judicial power." 13/ Curtailing diversity jurisdiction would presumably reduce the percentages of filings in several areas of civil law (see Tables 3 and 4). The most direct impact would be in such fields as commerce, contracts, property, and torts.

2. The Volume of Criminal Appeals

The number of criminal offenses, especially property offenses (overall 15.4 percent of federal circuits' caseload in 1968 and 10.5 percent in 1977) and morals offenses (5.1 percent in 1968 and 9.0 percent in 1977) prosecuted in the federal courts, should be reduced. Offenses against persons were not a heavy burden in either year (excluding the D. C. Circuit, 0.9 percent in 1968 and 1.1 percent in all circuits in 1977).

In order to reduce the general burden of these cases, the ongoing review and revision of the federal criminal code must continue. Statutes for offenses which might be better left to state jurisdiction alone or which are relatively unimportant when measured against the other demands upon the federal courts should be identified and removed from the federal jurisdiction.

3. Discretionary Jurisdiction

Instituting discretionary jurisdiction in some areas of law is another possibility, albeit probably a more controversial one than the suggestions already discussed. Many of the California judges who are interviewed pointed to their discretionary control over workers' compensation appeals as a potential model for other fields of appellate litigation. Congress could consider giving the federal intermediate courts similar discretion vis-a-vis some types of appeals.

The major roadblock here is, of course, the notion, presumably widely held, that every litigant who "loses" at the trial level should have access to at least one appellate court. In California, there is actually a statutory right of appeal to the Courts of Appeal from adverse decisions in superior courts. A substantial minority of the California justices verbally supported this right of appeal. They simply felt that their primary job as intermediate judges was to serve those who wished to appeal, regardless of the "frivolous" nature of many of the appeals filed.

The concept of discretionary review in the U.S. Courts of Appeals thus would probably be a controversial one. After all, a primary reason for the creation of the federal intermediate courts was to remove the vast bulk of appeals from the U.S. Supreme Court to the intermediate judges. 14/ But the pressures on the Courts of Appeals are much heavier now than they were in past years. If one is looking for ways to contain caseload pressures, the California experience in the workers' compensation field might well provide a model for revising circuit jurisdiction. A possible starting point could be to determine the perceptions of the bench, bar, and other interested groups concerning fields of law most amenable to the discretionary control of intermediate judges.

4. Original Proceedings

One burden which the California Courts of Appeal bear which the U.S. Courts of Appeals do not and, in the interest of caseload management, should not bear is the original jurisdiction to hear petitions for "extraordinary" writs.

Under the state constitution, the California appellate courts possess original jurisdiction in habeas corpus proceedings and proceedings for extraordinary relief in the nature of mandamus, certiorari and prohibition. These proceedings constituted from 28 percent to almost 50 percent of the workload of the various state districts in 1977. In addition, the California tribunals hear appeals from actions on writs taken in the superior (county) courts. In contrast, the federal appellate courts only hear appeals concerning petitions for extraordinary writs.

The federal plan in this area is superior to the California arrangement. In fact, most of the California justices stressed the heavy demands these petitions place upon them and none claimed the practice had merit. By requiring all petitions for extraordinary writs to be filed in and filtered through the trial courts, with the possibility of eventual appeal to the higher courts, some of this burden might be reduced.

IV. Internal Decision Processes

A. California Courts of Appeal

Data on interaction in decision-making in the courts of appeal were gathered primarily in interviews with 80 percent of the sitting judges. Eighteen staff attorneys, including research assistants to the individual judges and members of the courts' central staffs were also interviewed. These interviews lasted from one hour to three and one-half hours, with the average over an hour and one-half. The growing literature on the California intermediate courts was also examined. 15/ The following discussion summarizes the study findings on decisional interactions.

1. Context of Decision-Making

There are five appellate districts in California, each with its own court of appeal. The Sacramento and Fresno districts have one "division" of judges each. The other three districts are separated into permanent work groups of four, or in one instance five, judges per division. The San Francisco district has four divisions; Los Angeles, five; and the San Diego/San Bernardino district two. In each division judges rotate among working panels of three, and every panel has the power of the full court. The divisions each have a presiding judge and operate virtually autonomously from one another.

2. Interaction Among the Judges

There appear to be a rather considerable amount of interaction among the judges on these courts, although the judges agreed that the routine nature of most of the case-load did not necessitate collegial discussion of most cases. "[There is] considerable [collegial deliberation]. Very, very much. We are continually in a state of conference." But most of the interaction over cases was informal, rather than formal. One judge stated,

> I like to walk into the author's chambers and say, "Hey, Joe, this is still fresh in your mind. It just hit my desk yesterday. So and so has signed it, but what about this?" And maybe it'll satisfy my doubts.... Much of it is informal, anyway....

Another judge pointed out that "the only rule we have here is that the door is always open; my door is never locked during business hours. There's no reason why another judge can't come into my chambers anytime he wants."

Most of this interaction is oral. As one judge commented,

> Almost all [are] oral, with some exceptions. I like to do a short memo before we get into the oral presentation, mostly because that forces me to get my authorities lined up, and it makes it a little easier to talk about. [One judge] who plays a very active role in the conference work with oral criticism, does it all orally. It differs from judge to judge.

There is, however, quite substantial variation in working styles among the judges. One respondent stated:

> [E]very judge works differently. Some judges will receive a draft, and they'll shoot a memo back. Quick memo: bang, bang, bang, bang, points one, two, three, four, and five, or whatever. Other judges will knock on the door, carrying the memo and the file, and they'll want to come in and talk, and they'll say maybe we'd better go and get so and so. All of these ways or combinations of them are ways in which the judges exchange views and seek ... generally to come to some kind of accommodation amongst themselves...."

The interaction can be both oral and written. This and other judges operated in both ways. "It depends really on with whom I'm dealing or what the particular case is," this judge indicated.

> If I have some reluctance to sign [the opinion]... I may want to sit down and write out what I think, in order really to sort my own feeling out.... Then I may just dictate it and send it on in the form of a memo to the other judges. If I'm quite certain what my problems are, the chances are... that in order to save time... I'll pick the file up and traipse down the hall and talk to the guy, and let him know what my disagreement is, or what my problem is.

Another judge emphasized that whether he wrote or communicated his comments orally depends very much on how he felt he would be most effective in making his point.

The judges reported no interdistrict communications--apart from official reports and interactions based on friendship prior to coming to the bench. 16/ There is, as well, very little interdivisional interaction. As one judge remarked:

> [Whether we have contact with members of other divisions] is principally a matter of personal acquaintanceship.... I know [a number of them] but I don't have much professional contact with many of

> them.... Each division is for all practical purposes a separate court.... I wish we could have some more knowledge of what the neighbors were doing.

This judge indicated that "once in awhile you discover that you filed almost concurrently two quite different opinions, and you have the feeling that you might have avoided that conflict if you'd known about it." But it is the practice for the presiding judge of the various divisions to meet among themselves from time to time to discuss administrative and other matters. Each district constituted a separate "culture" and within it were divisions that existed as "subcultures."

The norm, then, within divisions is a relatively high level of personal interaction over cases that are non-routine. This general tendency, however, covers several important deviant cases. For instance, in one division the judges communicate only on paper because of strong and continuing personal differences. Another division has abolished conferences and thus, much oral interaction, because one judge so dominated them -- as one of his colleagues said, "he overprepared, memorized all the cases."

There are a number of reasons for the high level of personal interaction. First, as one judge noted, the norm was that each judge keep an open door. 17/ Most of the divisions expect the judges to be at the courthouse most of the time. Second, permanent divisions facilitate the familiarity needed

to interact on an intellectually intimate level. Third, most of the judges got along well with each other. 18/ "There are internal differences of opinion," one judge commented,

> but we have very harmonious and healthy personal relationships. We're very frank in discussing our differences, and we try to integrate our views so as to come up with a common decision when possible. Our disputes and differences are all impersonal, and they don't manifest themselves in personal discord.

Smooth and non-abrasive interaction -- as the division that communicated on paper illustrated in a negative sense -- provided incentives for easy interactions. Fourth, the judges were drawn to each other because they feel their courts were very isolated from the rest of society. These judges did not have the personal contacts that a trial judge had and, in most cases, oral arguments were waived. So, fellow judges are quite often their only professional contacts.

3. Negotiations among the Judges

Do the judges, as is the practice on the United States Supreme Court, 19/ negotiate among themselves on the outcome and wording of opinions? How prevalent is this negotiating and of what sort is it? In other words, how do "elements of judicial strategy" manifest themselves on the California Courts of Appeal?

It is clear that these judges do "negotiate" among themselves, although, as we shall argue later, it happens in a minority of the cases handled. "[Negotiating] is done," one of the judges remarked.

> We'll suggest that an opinion author add so and so or remove this or that because it will detract. I don't do it to get a vote. That would be dishonest. There are other concessions, too -- you might even call them trade-offs.... This is especially likely when a judge goes beyond the facts and into the constitutional aspect of the result.

How do the judges understand the term "negotiation" or "concession?" "That's an unfortunate term," one explained;

> You never concede for the sake of disposing of a case. A better term is "persuading" where an opinion draft will come in here and I will start in total disagreement with it. I will then either talk to the man or write a memo to him, indicating the points on which I disagree, following which he may take my memo and rewrite the opinion draft. That's done constantly. And [he will] fire it back to me, in which event a large segment of my objection is gone.

There is, however, a line drawn between substance and form in bargaining. This judge continued:

> He may have made a concession and taken out a piece of reasoning ... but that does not affect the result. He may have conceded some language to me, but he didn't concede the validity of his decision. You never do that, unless you are persuaded that he's right.

Verbiage not absolutely necessary to reach a decision quite often provides currency for trades:

> There's room in the area of dicta [for bargaining]. See, appellate judges get wordy sometimes. We decide a certain way, we've cited our authority and so forth. Now we go one more, and want to state some policy, do a little essaying. In that case, we frequently run into a little trouble with each other, because the next guy doesn't want that crap in there, so he says, "Take it out'" And this is where the concession comes in; "Okay, I'll take it out."

Much tacit negotiating goes on through written exchanges on drafts of opinions: 20/

> There's a lot of that [written comment], and there's a lot of interlineation. But these are for problems which are cosmetic or perhaps are not really all that difficult to resolve. Certainly cosmetic problems can be handled by suggested interlineation, the marginal comments, that sort of thing.

But apparently most of the judges are hesitant to impose their own stylistic views on others:

> There's delicate balance to be observed here. Some commentator once said, "Style is the man himself." Well, I don't interfere with a colleague's style, even though in my own view it may be ponderous, awkward. On the other hand, if there is some clarifying notion that I might add, and if, as usually happens, he and I have good relationships, I don't hesitate to make suggestions.

Thus, most negotiating is over form, language -- in the judges words, "cosmetics" -- rather than over the results of cases.

Because most cases heard in the California Courts of Appeal are "routine," 21/ few cases present the opportunity for negotiating -- even for style.

> There are not that many cases up here in which there is that kind of room for that disagreement. Incredibly, most of the cases are really the type where you wonder who in the hell was thinking straight when he brought the appeal, or who in the hell was thinking straight when he caused the appeal by making a wrong decision down there that had to be reversed. The ones in which there has to be a concession in order to bring about unanimity ... would be one every three months in which I would participate.... Most of the time we're all pretty much in agreement...."

In that small proportion of the caseload open-textured enough to give free play to ideological differences -- and thus permitting negotiating -- the judges use a variety of strategies and tactics, all of which were common to appellate courts and other small, ongoing working groups. 22/ First, and perhaps most important, the judges attempt to use persuasion on the merits of cases. 23/ So much of the work social scientists have done on courts minimizes or ignores the impact of lawyerly argumentation; but these judges, at least on their own testimony, pay attention to such discourse. One of the respondents commented that a particular colleague was a "painstakingly thorough" lawyer, and that because of his reputation one tends to listen carefully to what he had to say. "Before we write a dissent," one judge said, "we try to change the other person's mind or change our own mind if we can by looking at [the issue]." Strategies, one judge remarked, were:

> Straight attacks on the problem itself and a dialogue which usually, though not inevitably, results in a resolution of differences.... [G]enerally it's a head-on attack on the problem without regard to extraneous influences. The influences brought to bear are well-known... [and] revealed by Justice Cardozo in The Nature of the Judicial Process....

Second, the judges often attempted to use enhancement of personal esteem as a means to their ends. 24/ Judge _____, "one of our respondents noted," will come back often carrying

your opinion in his hand, and sitting down and in a very fatherly way saying, 'You know, I think maybe if we approach this this way, we'd all be happier,' rather than putting something in writing." Because the judge referred to was one of the most esteemed members of the court, the judge on the receiving end could not help but be in his debt.

"We are all gentlemen here," one judge remarked. "The sort of dissents that Judge [Jesse] Carter used to make years ago . . . are, in my opinion, pointless. . . There's no point in saying your colleagues are stupid and that sort of thing." The enhancement of one's colleagues' esteem also ran, as it does on other appellate courts, to such things as compliments to the author on the margins of drafts of opinions. 25/

Third, much of the work of these judges was governed by the "rule of anticipated reactions." 26/ That is, to get a working majority a judge commonly crafts his opinion so as to meet objections he expects from colleagues. As one justice said:

> I do it [use strategies other than persuasion on the merits], shamelessly, and I suspect others do it. For somebody who's a strong believer in stare decisis, and a strong believer in a very narrow role of the courts, I've been incredibly activist in this one little area where I think it's my job not only to express an opinion but also to be effective. One can't get over twenty years of being a lawyer. And so I'll write a draft to get votes. I won't mess with the facts, and I'll not misquote a case or misstate a case, but if there are alternative grounds of decision, I'll go with the one that's going to get me the votes. . . I'll write it [the

> opinion] on the theory that's tenable, that is most likely to have it go my way.

Fourth, a judge might write a strong dissent, or perhaps even more effectively, might threaten to write a dissent and then not publish it. 27/ One judge explained the

> technique of not saying a thing [to his colleague]. I'll often do this: just write a searing dissent, something I would never file. . . . It isn't evident that I wouldn't file it--a blasting dissent, see, especially if it's going to be a published opinion--and I have actually filed a few of these too. And that will slow a fellow up.

Another judge spoke of a more complicated sort of situation:

> [A]n opinion draft came to me from one of my colleagues with which I disagreed. However, I was junior in line. . . This particular opinion went from the author to the one who was senior to me. Now the senior approved it. So it came to me and I was now in a dissenting position. But I also knew that my number two colleague could be persuaded. . . . I felt that he had not studied the draft carefully enough. . . . [T]he problem was how [I could persuade him]. If I were to just go in and hit it hard, and tell him, "What the hell are you signing here, you goddamned fool," I felt that I just might get his hackles up and he'd say, "No, I'm not interested." I also was afraid that if I just plain confronted him with it and started a discussion without giving him something to look at, again I might run into the same problem. So, I did the only thing. . . consistent with what had already preceded, and that was to write what I felt would be a useless dissenting opinion, highly analytical, and then I sent it by memo to both of them, asking the number two man please to reconsider his vote. And he did, he came around. So, what happens? I now get to author a brand new majority opinion, and let the number one man dissent. I had to use a little diplomacy to get that number two vote.

In a related strategy, some judges may decide that one line of authority needs to be emphasized or deemphasized and then repeatedly cite it in concurring or dissenting opinions. 28/

A fifth sort of strategy or tactic--one not often used and even then probably with little success because of the ongoing nature of these institutions--consists of intimidation. One judge observed the following:

> I was raised in a fine family in a railroad town. By the time I was six I could swear like a Texas trooper. And I find that with our finest judge, who is very moral and dignified--he just hates profanity--well, you know, when you think you're right, and you want to win an argument, you'll use anything, including a baseball bat. I have found on a number of occasions that when I resort to profanity I am more persuasive with this particular judge, who wants me to get the hell of there. He's not going to give up any big things, but he may give some little ones.

This technique, quite obviously, has but limited applicability to most situations in appellate courts, but it does suggest some outside limits on tactics judges could use with success.

These, then, are the strategies the judges of the California Courts of Appeal pursued. In most of the cases, the judges apparently do not engage in strategic behavior--bargaining is simply not done. The most important reason was the routine nature of most of the cases. 29/ Also, because the caseload of these courts is so large, judges did not have time to write concurring or dissenting opinions. And because of the size of these courts -- three-person panels -- consensus is easy to reach, and strategic behavior is not usually necessary. Fourth, permanent divisions reportedly translate into high levels of consensus; gradually, most divisions tend to become more and more homogeneous in their views. Fifth, in most cases and especially in the routine ones, the stakes are quite low. Strategic or bargaining behavior has certain

costs attached to it, and unless the benefits accruing were large enough, a judge is quite liable to forego much effort on a case.

4. Patterns of Leadership in the Courts

There is much evidence that on the United States Supreme Court and a number of other courts of last resort, chief or presiding judges exercise more influence than an individual member, i.e., the chief judge as primus inter pares is a misnomer. There is also some evidence and much speculation that on some appellate courts, intermediate and final, judges who handle the writing of the opinion for the court exercise much more influence than their colleagues, that much of choice on these courts is "one-judge" decision-making. These two questions animate part of my research, and this section presents evidence about the patterns of leadership on the California Courts of Appeal.

The office of "presiding judge" per se did not give its occupant any special influence in determining the outcome of decisions. "Like anyone else," one judge said, "he's got to do everything by his powers of persuasion."

Although the presiding judge does possess considerable administrative powers, most of these judges claimed that even these powers must be exercised through methods of persuasion. "I've got to persuade other judges if I want them to do things differently in the future," one of the presiding judges remarked. "After all, I can't fire them, and I can't give rewards to the cooperative judges or punish the uncooperative."

The presiding judge, unlike the Chief Justice of the United States," noted another, "does not assign opinions." And of course, power to assign opinions is one of the main sources of the Chief's power.

There were some exceptions. "In this court there could be some [influence by the presiding judge]," one jurist commented, "because we don't have fixed divisions. The presiding judge can and does speak out for the court on philosophic issues regarding the court. But he does not enter into the constitution of the panels. He probably could if he wanted to, but he doesn't."

The author of the court's opinion, according to my reports, has a disproportionately greater influence than his or her colleagues on the outcome of the decision in most cases. Judges attributed this influence to the intense familiarity the author allegedly developed with the facts and issues in a case. The question of whether "one-judge" decisions dominated, one judge responded, "is a legitimate concern. . . . I just don't think we have one-person opinions. The degree to which a particular judge may become involved in an opinion, of course, is going to vary. It just necessarily does."

The strain toward one-person decisions results from the workload. "We're overworked," claimed one judge. "And to the extent that there's criticism about one-judge opinions, this enters into it too. You've got your own cases to write, and you also are participating in twice that many cases. . ."

Thus, the testimonies which were received from the judges

of the California Courts of Appeal indicated, first, that the presiding judge exercises no decisional influence as a function of his office -- quite unlike the presiding officers of some state courts of last resort and, of course, the American Supreme Court -- and second, that the author of the majority opinion exercises a disproportionately large degree of influence in the decisional process. Whether the author's influence is at times "excessive" probably depends upon one's definition of what constitues "one-person" decision-making.

5. Interaction Between Judges and Staff Attorneys

The courts' staff attorneys are composed of lawyers on the central staff and research assistants to the individual judges. The former served at the pleasure of the entire court, the latter at the discretion of the particular judge for which he or she was working. The central staff works on a daily basis under the primary direction of the presiding justice. Most staff attorneys serve only one to two years, although an increasing number -- now approaching one-half -- are serving longer periods and view their jobs as career positions.

Attorneys on the central staff handle the so-called "routine" appeals. 30/ Although the process varies somewhat among divisions, typically the principal attorney screens incoming appeals and proposes which cases were to be handled through the "routine disposition" method. The principal attorney's suggestions must be approved by the presiding judges and, in at least one division, also by a panel of three judges.

"Routine" appeals are then initially handled by lawyers on

the central staff. These attorneys researched the cases and prepared memoranda or drafts of "By-the-court" opinions. Proposed "By-the-Court" opinions cannot become the opinions of the court until they are reviewed and approved by a panel of three judges. Each lawyer on the central staff is typically responsible for about six or seven cases per month.

Appeals not disposed of by the "routine disposition" method are sent directly to the research assistant of an individual judge. Research assistants research each case they received, prepare memoranda or even proposed opinions, and deliver these to their judge. The workload of each assistant is approximately one appeal per week.

The subsequent interaction between judges and their assistants varies. Some judges reportedly interact extensively with their researcher on every case. "We talk and fight all the time," said one assistant in Fresno. Others apparently do not typically consult with their researcher concerning completed memoranda. The influence of research assistants, in other words, depends fundamentally on the style and wishes of the individual judges for whom they work.

6. Proposed Reforms

The judges, in responding to questions about the operations of the court, had a number of proposals that involved changes in public policies:

. A number suggested that more staff - judges, staff attorneys, and law clerks--were necessary to process the workload.

. Some indicated that methods should be developed that permit the judges to devote most of their time to the decisions that would be published. The others, along with the officially

"routine" cases, would be processed alternatively, presumably by staff.

. One judge argued that the divisional structure of his district should be abolished. Fewer divisions, the line of reasoning continued, would translate into few decisional conflicts among divisions and would tend to minimize parochialism.

. There was a consensus that much administrative work that now falls to the judges, and especially the presiding judge, could be delegated to others and that the jurists could then devote all of their time to their "judging" duties.

. One judge argued for discretion in allowing appeals to come to the intermediate courts. "We should have the discretionary appeal, as many states have, instead of letting everybody in. You can shoot a man right in the street with twenty-five witnesses and you can be as sane as we hope we are, and you can appeal and tie up the whole judicial process."

But for the most part, judges did not object to the virtual "right to appeal" that now exists. One judge noted, "Let them [petitioners] in," "and we'll do the screening here."

B. United States Courts of Appeals

The questionnaire mailed to the active and senior judges of the U.S. Courts of Appeal and to the judges' law clerks covered several basic aspects of decisional interaction in the courts. 31/ It included items probing the respondents' views regarding the volume of "routine" and "nonmeritorious" cases in their court, the scope of intellectual exchange within panels, and the importance of several factors in the process of several factors in the process of formulating opinions. In an opened item, general comments concerning the decisional process were also sought.

Table 6 shows judges' and attorneys' perceptions of the proportions of their caseload consisting of "routine" appeals,

Table 6

Perceptions of "Routine" and "Nonmeritorious" Cases in the U.S. Courts of Appeals

	% of Total Cases (Mean Est.)	% of Criminal Cases (Mean Est.)	% of Civil Cases (Mean Est.)
"Routine" Cases			
Judges (N=30)	20.8%	36.8%	17.2%
Law Clerks (N=20)	36.7%	37.5%	24.5%
"Nonmeritorious" Cases			
Judges	10.5%	25.2%	7.3%
Law Clerks	10.0%	13.3%	8.3%

i.e., "'cut-and-dried' cases which can be decided summarily or relatively easily." The table also reports views regarding "nonmeritorious" appeals, i.e., "appeals that [the respondents] feel are without merit."

The data suggest several things. First, overall judicial and staff perceptions of "routine" and "meritless" cases are roughly similar. However, the law clerks consider a higher percentage of the total civil caseload to be "routine," while they believe a smaller proportion of the criminal workload to be "nonmeritorious."

Second, the respondents apparently perceive a much smaller percentage of their caseload to be "routine" than did their counterparts on the California Courts of Appeal. California justices assert that from 50% to 90% of their cases were "routine," and that from two-thirds to 90% of their criminal appeals fall into the same category. For whatever reasons, the state judges apparently see their possibilities for decisional creativity as much more limited than do the sample of U.S. circuit judges. 32/

Table 7 compares circuit judges' and their assistants' views on the amount of intellectual exchange among jurists in decision making. The only basic difference is that law clerks tend to see interaction as more extensive than the judges themselves. Otherwise, respondents tend to view the degree of exchange as less extensive in "routine" appeals than overall, and as even less extensive in "meritless" than in "routine" cases.

Table 7

Perceptions of Scope of Intellectual Exchange within Panels, U.S. Courts of Appeals

	Very Extensive	Moderately Extensive	Not Extensive	Total
In All Cases				
Judges (N=30)	16.7%	66.7%	16.7%	100.1%
Law Clerks (N=20)	55.0%	45.0%	0.0%	100.0%
In "Routine" Cases				
Judges	0.0%	50.0%	50.0%	100.0%
Law Clerks	0.0%	55.0%	45.0%	100.0%
In "Nonmeritorious" Cases				
Judges	0.0%	33.3%	66.7%	100.0%
Law Clerks	0.0%	30.0%	70.0%	100.0%

The perceived importance of four factors in decision making is shown in Table 8. The responses suggest that those inside the courts saw the author of the opinion as the most important of the various influences. For students of the judiciary, this finding should not be surprising. Likewise unsurprising are the views that the chief judgeship does not convey particular influence in the decisional process. Perhaps also to be expected, although nonetheless interesting are the differences between judges' and the law clerks' role in decisions. Clerks regard their own role much more highly than do their "bosses." On the open-ended question, the judges' most frequent comments were that their court has too many cases, and that quality is often sacrificed to volume. Another claim was that the "real cruncher" confronting their courts is the "varying productivity" of individual judges.

Many law clerks claimed that the judges tend to spend unnecessary amounts of time on "unimportant" cases, and that judges are "perfectionist" and refused "to sacrifice some excellence in the name of expediency." Several clerks also felt judges should rely more heavily on their assistants than at present in "routine" cases.

In all, the data present a portrait, albeit only a partial one, of courts in which "insiders" consider a large majority of their appeals to be "nonroutine" and merited, the amount of intellectual exchange among them to be moderately high, and the author of the court's opinion to be particularly influential in the decisional process.

Table 8

Perceived Importance of Selected Factors in Formulating Opinions, U.S. Courts of Appeals

	Very Important	Moderately Important	Not Important	Total
Author of Opinion				
Judges (N=30)	63.3%	36.7%	0.0%	100.0%
Law Clerks (N=20)	80.0%	20.0%	0.0%	100.0%
Method of Selecting Panels				
Judges	23.3%	23.3%	53.3%	99.9%
Law Clerks	25.0%	25.0%	50.0%	100.0%
Chief Judge				
Judges	0.0%	23.3%	76.7%	100.0%
Law Clerks	0.0%	50.0%	50.0%	100.0%
Law Clerks				
Judges	0.0%	76.7%	23.3%	100.0%
Law Clerks	55.0%	45.0%	0.0%	100.0%

V. Internal Decisional Processes: Proposals for Federal Reforms.

Several basic aspects of the California system might serve as models for at least some of the federal circuits, and especially for those with the largest volume of cases. The following section discusses the most significant proposals identified in studying the California tribunals.

A. Permanent Divisions Within Circuits

On balance, permanent divisions within an intermmediate court seemed preferable to continual rotation among all judges in the court. Compared to its alternative, the permanent division arrangement seems to produce three major benefits: (1) it facilitates greater interaction among judges in the decisional process; (2) it helps conserve the time and financial resources of the judicial system; and (3) it helps enhance the morale of the judiciary.

The California Courts of Appeal are divided into permanent divisions of only four or five justices per division. This arrangement facilitates the familiarity necessary for the judges to interact on an intimate level intellectually.

As a result, justices presumably spend more time personally interacting with their associates than they would if the personnel on panels were continually changing. The California judges themselves strongly endorsed the divisional arrangement. In fact, only one interviewee called for outright abolition of the existing organizational system.

Observations made throughout the study support the meritoriousness of the divisional structure. The judges obviously did appear to converse about cases frequently and at length. This divisional arrangement in California also seems to conserve time and monetary resources of the courts. Justices in a given division worked together in the same city, and rotation of panels of three occurred only within each division. Thus, logistical problems were minimized, and decisional panels were always easily available in each city.

The California judges frequently contrasted their arrangement with the system in the U.S. Ninth Circuit, where judges allegedly spent a "horrendous" amount of time simply travelling from one panel to the next. One California judge related that his secretary, while working for a circuit judge in San Francisco, "had spent most of her time just making airline reservations for her boss." Another judge added,

> Under our system we can produce a great deal more work than the Ninth. The rotational system, at least as they employ it, encourages the kind of insanity that that court demonstrates.

Of course, all federal circuits were not necessarily like the Ninth. But logistical problems presumably plague all circuits in which panels sit in various cities and in which judges rotate continuously. All in all, the California system may be more cost-effective in terms of the use of both court time and financial resources.

The divisional structure may also help to enhance the morale of the judges. California judges reportedly know each other well and in nearly all instances, they also come to like the colleagues in their division.

A common complaint of appellate judges in general is that they are, and of necessity must be, physically isolated from much of the rest of society. For many California justices, their division provides a work environment which is very supportive in both psychological and emotional terms.

Admittedly, there are, drawbacks to the divisional systems as there would be with any institutional structure. Two are especially noteworthy. First, it is possible that the divisions in the California appellate courts may become too ingrown. Justices may know or care little about the decisional orientations of other divisions, even those in their own district. Over time, decisional orientations among divisions may come to differ substantially in some areas of the law. Decisional conflicts among divisions could then develop, and litigants could be at the mercy of the decisional approach of the particular division handling their case.

Nonetheless, the extent of these problems was reportedly negligible overall. Decisional conflicts allegedly occurred only infrequently, and Supreme Court review was always available to "correct" the problem when it developed.

Second, judges' familiarity with divisional colleagues possibly enhanced the likelihood of one-judge opinions. Close acquaintance might at times lead jurists to rely excessively

on the opinion writer.

However, this type of over-reliance reportedly did not occur very frequently. And wholly different institutional arrangements were susceptible to the same vice. For instance, Howard noted that one-judge opinions were sometimes authored in the U.S. Fifth Circuit, where all judges rotated among panels and had very little face-to-face contact with each other during the process of opinion-writing. 33/

In sum, the divisional structure of the California tribunals may be superior to the federal arrangements. The California system appeared to help facilitate personal interaction among panel judges, save judicial time and fiscal resources, and enhance judicial morale.

B. Judges Working in Proximity to Each Other

The California practice of having judges in a given division work in the same building, in proximity to each other, may be superior to alternative arrangements. In four appellate districts in California, judges in each district were housed in the same building. The remaining district--the Fourth Appellate District--was split between San Diego and San Bernardino, though judges in each division worked in the same building as their associates. In all but two of the state's thirteen divisions, judges said they expected colleagues to spend workdays in their chambers and to remain available for personal consultation during those hours.

The physical proximity of the judges' chambers, and the

norms concerning attendance and availability, seem to affect significantly the quantity and quality of judicial interaction. In quantitative terms, give-and-take among the judges is reportedly much more frequent than it would have been under other arrangements. In qualitative terms, judges are apparently able to rely heavily upon informal, oral communication rather than upon formal, written interaction. The judges thus have easy access to each other and usually were able to avoid the cumbersomeness of communication through writing.

The California system contrasts with arrangements in at least some of the federal circuits. In the Fifth and Ninth Circuits, for example, judges do not necessarily live and work in the same locale as other members of the court. Lack of proximity presumably forces judges to rely more than their California counterparts upon written memoranda and telephone conversations. These forms of communications, however skillfully exploited, are probably less effective and more time-consuming than face-to-face interaction among members of the decisional group. 34/

The argument for physical proximity among the judges reinforces the earlier argument for permanent decisional groups. Permanent divisional assignments, or at least infrequent rotation among panels, seems to be almost a precondition for significant face-to-face contact among judges.

All federal circuits are not necessarily plagued by a lack of personal interaction among judges. Judges in the First and

District of Columbia Circuits, for instance, apparently enjoy ample informal interaction among themselves. Nonetheless, the operating procedures of several circuits might be improved considerably were Congress or the courts to adopt reforms designed to augment informal judicial contacts in the opinion process.

C. Negligible Decisional Influence of Presiding Judge

The negligible decisional influence of the office of presiding judge in California seems a desirable arrangement. The position of presiding judge in the California Courts of Appeal per se confers no special decisional influence upon its incumbent. Presiding judges bear administrative duties their associates do not shoulder, but they reportedly are not automatically able to exercise a disproportionately large influence in decision-making.

Three primary factors had apparently molded this situation. First, presiding judges apparently can not determine the composition of decisional panels. With the exception of the Third Appellate District in Sacramento, 35/ the California districts are separated into divisions of four or five justices each. Every division had its own presiding judge. Rotation among judges in each division is automatic, and reportedly the order of rotation could not be affected by the presiding judge.

Rumors persist, however, that chief judges influence the composition of panels in some of the federal circuits.

That is, assignments allegedly have not always been made on a random basis. 36/ Whatever the accuracy of these allegations, the opportunities for such "tinkering" by presiding judges presumably are more abundant in larger than in smaller courts. Among other things, "tinkering" is probably less obvious to the associates judges themselves in a large tribunal.

To reduce the decisional influence of chief judges, several alternative approaches are available. The appeals courts for example, could be divided into divisions. Alternatively, a panel-assignment scheme designed to guarantee randomness in the process could be legislated.

Secondly, presiding judges in the California courts do not assign "outside" judges to their courts to fill temporary vacancies. Assignments of "pro tems" are made by the Chief Justice of the state.

In the U.S. Courts of Appeals, the chief judge may assign senior judges or active district judges to appellate panels on a temporary basis. This power which, as Richardson and Vines noted, "gives to the chief judge a potentially enormous influence over the disposition of the docket," 37/ may be altered.

Additionally, presiding justices in California do not assign opinions to individual justices. Opinion assignment occurs within each decisional panel itself.

In sum, presiding justices in the California Courts of

Appeal apparently cannot directly influence the decisional process merely by virtue of their position. In comparison, chief judges at the federal level seem to enjoy opportunities to affect decisional outcomes in their circuits. It may be useful to reduce or eliminate these opportunities.

D. Method of "Routine Decision Making" in California Courts of Appeal

The California method of "routine decision making" for possible adoption in the U.S. Courts of Appeals should also be considered in the development of reforms. With two exceptions, divisions of the California Courts of Appeal employ a process of "routine decision making" for appeals that appear facially to have little chance of success. Nearly all of these so-called "routine" cases are criminal appeals. Interviewees alleged that in "routine" appeals, litigants are often merely "going through the motions," i.e., exercising their statutory right to an appeal, typically at public expense, primarily because they "have nothing to lose" in doing so. The claims raised in these cases reportedly are often repetitious and ill-founded.

Nearly all the California justices interviewed regarded a substantial percentage of their cases to be "routine." Perceptions on this item were virtually uniform, and did not vary with the justices' partisan affiliations, stated ideological orientations, or other background factors.

"Routine" appeals and the courts' methods of deciding them are discussed earlier in this report. The California procedure involves screening of cases by attorneys on the central staff

under the direction of the presiding justice or a panel of three justices. Staff attorneys then prepare draft opinions for the appeals designated "routine". These drafts are reviewed by panels of judges who must approve the memoranda before they can become "By-the-Court" opinions.

Such "routine decision-making" as practiced in California has several strengths. Among these are that it frees judges to spend most of their time on complex and demanding cases. Furthermore, the procedure is a rational one for screening and disposing of the most uncomplicated and least demanding appeals. In short, "routine decision-making" constitutes a method for rapidly handling a large volume of appeals while at the same time guaranteeing ultimate involvement in and decisional authority to the judges themselves.

The method is, of course, not without potential drawbacks. For example, staff screening and drafting could degenerate into de facto staff decision-making, with only pro forma approval of the staff products by the judges. Likewise, initial classification of an appeal as "routine" could lead to superficial treatment, thus preventing the discovery of the occasional "routine" case that should not have been classified as "routine" in the first place.

All judges and staff attorneys who were interviewed insisted that neither of these possible outcomes had, in fact, occurred. Several practicing attorneys, both private lawyers and deputy public defenders, did allege that the Courts of

Appeal had given only superficial and inadequate consideration to some of their criminal appeals. It was difficult, if not impossible, to assess the validity of these lawyers' claims, 38/ and in any event, their views were definitely in the minority among all interviewees.

In sum, the California method of "routine decision-making" has much to commend it. Many federal judges apparently may not see themselves as heavily burdened by "routine" or meritless" appeals as their California counterparts. Furthermore, for some circuits, other procedures may be more suitable. But, for the circuits under the greatest caseload pressures, the "routine" method may be an excellent means of expediting the flow of appeals while preserving judicial control over ultimate decision-making.

VI. The Costs of Appellate Litigation

Costs of litigation are measured in this study in terms of costs per hour of attorney time rather than in terms of overall costs per case. The personal interviews indicated that regardless of whether attorneys had represented appellate litigants on appointment or on a private basis, the "average" length of time they had expended on any particular type of case could not be estimated. There appeared to be little or no relationship between the time required and the subject matter of the case, the experience of the attorney, or other variables. One experienced lawyer in San Francisco commented:

> The time involved really varies according to the case, regardless of the subject matter I'm dealing with. Some involve enormous records and a lot of delay. Others involve simple pleading questions and can be disposed of quickly. I could try to generalize but I'm afraid it wouldn't be terribly helpful.

Other attorneys in northern California gave similar accounts. One lawyer, a specialist in appellate litigation in a large firm, observed that:

> The time depends on the type of case. But a lot of time is required--a lot. They never take less than week--even the simplest case takes that long. They can take over a month. Antitrust cases, for example, take forever, though even they vary in length. Some case just come along faster than others.

One Los Angeles specialist in labor litigation commented,

> The time varies all over the map. L----- v. L----, which I just finished, required only four hours of time. But it's not unusual to spend 40, 50, or 60 hours, and I've gone as high as spending hundreds of hours in a few cases.

The interviews also indicated that private attorneys typically charged clients by the hour, and that the amount of these charges was related to several identifiable variables. Subsequent conversations in the south reinforced the notion that attorneys' fees are related to a number of specific factors. These interviews also support the earlier conclusion as to the difficulties encountered in trying to generalize average costs per case. However, the notion that hourly fees are used exclusively needs to be altered. Many attorneys apparently work almost solely on a contingency-fee basis and seldom charge by the hour. The following section details the different methods lawyers employed in setting fees, as well as several factors that influenced the amounts they charged.

A. Private Attorneys

Seventeen, or about 81%, of the respondents stated that their fees are almost always determined on an hourly basis. Those in most law firms claimed that their colleagues' fees are set in a similar fashion. In fact, the attorneys said that the standard practice was to charge virtually every minute spent on a client's case to the client.

Some cases admittedly are handled on a contingency basis in firms that typically charged by the hour. However, these are described as rare occurrences in such firms--infrequent exceptions to the norm of hourly fees.

According to lawyers in firms organized on a "hierarchical" basis, their fee structures are determined annually through careful calculation. One attorney, whose views were typical,

related the two factors his firm felt are most critical in setting fees:

> 'What the market will bear;
>
> "You have to look around and make sure you don't price yourself out of the market. Of course, there are some markets we want to price ourselves out of. . ."
>
> 'The amount by which the firm wished to exceed overhead;
>
> We base this on a number of things, including what our friends make and what we made in the last year. . . "

This lawyer's particular firm actually employs a budget analyst "who calculates all these things for us."

All respondents asserted that any information they possess as to the fees of other attorneys with comparable practices have been merely pieced together. "We don't call and ask," said one. "That would involve price-fixing and would probably violate the antitrust laws." Except for information on the fees of personal friends, data on what "outside" attorneys charged reportedly come only through hearsay.

Solo practitioners and partners in two-person firms of course determine their own fees. But in larger firms, composed of both partners and associates, the hourly rate of associates apparently is always determined by the senior partners. These fees are set periodically for each associate in the firm. The rates of an associate applies, with rare exceptions, to all cases and clients he or she handled during a given period.

Assignments of cases to associates in the larger firms apparently are also made by the senior partners. In many

instances, of course, assignments of a specific case to a particular associate would be virtually automatic. For example, if an associate is the only specialist in taxation litigation in his or her firm, then tax cases automatically are assigned to him or her. In other words, during the time they are with a given firm, associates are apparently very dependent on the senior partners for their workloads and levels of remuneration.

1. Type of practice

In interviewing attorneys in southern California, several instances were uncovered in which lawyers practice almost solely on a contingency-fee basis. Those who operate on this basis are all specialists in labor relations litigation. All represent groups of or individual employees engaged in legal embroilments with employers. For example, one attorney handles only cases involving either labor relations in the public sector or the disability-retirement claims of individual public employees. Another interviewee specializes in workers' compensation claims brought to the administrative Appeals Board or the Court of Appeal. In each instance, the type of practice these lawyers engages in at least influences, and perhaps even predetermines, their basis for setting fees.

In what ways? In some cases, contingency fees are reportedly the result of clients' inability to pay an hourly fee. Workers' Compensation claimants are typical examples of clients with limited means. However, several attorneys assert that many groups of employees are also unable to pay hourly fees. One noted:

> An average type fee in this area is $85 per hour. But public employees can't afford that. And the unions can't either. So, someone such as I must work on the basis of contingent compensation.

In addition, the Court of Appeal has ruled that, in class-action cases, attorneys may enter a contract with the class regarding the size of the fee. 39/ Several attorneys claimed that they, and many of their colleagues who also represent "underdog" employees in class-action suits, frequently take advantage of the opportunities provided by the Melendres decision.

Some lawyers who use contingency fees do so because such a fee system is allegedly required by the formal rules in their field. In Workers' Compensation cases, for example, the determination of actual fees is within the province of the Workers' Compensation Appeals Board. Respondents claimed that the WCAB typically set their fee at 9% to 12% of the award. If cases are appealed to and won in the Court of Appeal, 40/ the court reportedly allows up to 15% of the final "winnings."

In sum, the variation among attorneys in terms of fee setting is greater than was concluded earlier. The type of practice an attorney engaged in apparently is the critical factor underlying his or her use of either hourly charges or contingency fees. Yet despite the variations in their fee systems, all attorneys agreed that the notion of "average" or "typical" overall costs was not a useful concept.

2. Location

Different cities or geographical areas appeared to have

different ranges of attorneys' fees. The ranges apparently varied from city to city, and appear to be higher in cities than in small towns and rural areas. There does appear, however, to be considerable overlap in ranges of fees among different geographical areas.

This conclusion, tentatively reached after the early interviews, is reinforced by the more recent conversations with attorneys. The relationship between locale and the size of hourly rates in fact is fairly strong. In an eleven-person firm in Fresno, for example, the fees range from $30 to $75 per hour. The breakdown was as follows:

Senior partners: $75/hour

Very experienced associates and junior partners: $60-$65/hour

Experienced associates (with over five years' experience): $40-$50/hour

New associates: $30/hour

The fees in another Fresno firm of comparable size range from $30 to $90 per hour. Fresno attorneys estimated that the average fee for local lawyers with at least five years' experience is $55 to $60 per hour.

In contrast, attorneys' hourly fees in a twelve-person firm in San Francisco are higher overall. Fees begin at $55 per hour for an incoming associate and are as high as $130 per hour for one senior partner, a specialist in taxation law. The average fee for a senior partner in this firm is $100 per hour.

Likewise, attorneys in one twenty-member firm in San Francisco typically charge from $60 to $85 per hour, with

several senior partners charging $95 per hour for specialty work. And the range of fees in a third San Francisco firm is $45 per hour for the services of a paralegal, around $90 per hour for an associate, and up to $125 per hour for a senior partner. This firm is among the largest in the city.

The range of charges in the Los Angeles area is comparable to that in the Bay Area. Attorneys reported that fees typically run from $55 to $125 per hour, with the "average" rate in Los Angeles running about $85 per hour.

Fees in San Diego and Sacramento are middle-range, i.e., fees for lawyers of comparable stature and experience are typically higher than charges in Fresno but lower than those in San Francisco and Los Angeles.

3. Length of professional experience

The levels of fees for individual attorneys are positively related to the length of their professional experience. This relationship was, of course, observed in the preceding section. Less experienced lawyers command lower fees than their more experienced colleagues. For instance, many respondents state that lawyers would often be willing to handle cases "for virtually nothing" during their first few years of practice. This is especially true for attorneys in solo practices. Experienced attorneys in all types of practice also claimed that they were much more willing in the early years of their professional lives than they were now to take appellate cases on low-paying assignment. (See the discussion of appointed counsel, infra.) "I would take

another appointive case," stated one San Francisco lawyer with seven years' experience, "only if the issue were sufficiently interesting or if there were the possibility of really adequate compensation."

Length of experience was also related to the level of fees in southern California.

4. Specialist v. non-specialist

Legal specialists, or at least specialists in certain fields, apparently tend in all sections of the state to charge higher fees than non-specialists. In one firm, for example, a specialist in tax law reportedly has a fee $30 per hour higher than his fellow partners with equivalent experience ($130 per hour v. $100 per hour). In another, an expert in dissolution (divorce) work charges $10 to $15 per hour more than the other senior partners. In a third firm, attorneys with specialties typically demand $10 per hour more for their services than fellow partners ($95 as opposed to $85).

Furthermore, a twelve-person firm in San Francisco sometimes charges "premiums" for certain services regardless of who performed them. These premiums are frequently required for such services as pretrial remedies and for opinion letters in. e.g., medical malpractice cases.

5. Special circumstances

Each law firm or solo attorney has some flexibility with respect to charges for particular types of clients or in certain types of cases. For example, some occasionally are willing to negotiate a reduction in fees when they feel the client would

CONTINUED

1 OF 2

otherwise be unable to pay. In one Sacramento firm this "courtesy discount," as it was termed runs as high as thirty percent.

A San Francisco firm charges institutional clients a flat fee of $300 for pretrial work in uncomplicated cases. However, the firm "rigidly controlled" these cases so that no more than four hours of attorneys' time is consumed. Likewise, a member of another firm in San Francisco said his organization would "eat some of the time" in cases where the partners felt a portion of the attorneys' work had been "performed inefficiently." The partners reportedly would do the same thing when cases in progress are transferred from one lawyer to another.

While other accounts of flexibility in charging were uncovered, respondents emphasized that departures from the predetermined fee structure were infrequent and exceptional. In all but a few instances, it was reported that clients are charged the prevailing hourly fee for the particular attorney handling their case.

B. Appointed Counsel

Litigants who have "lost" in the California Superior Courts, the state's trial courts of general jurisdiction, have a statutory right of appeal to the Courts of Appeal. For many criminal defendants this right is exercised in an appeal taken at public expense to the intermediate tribunals. As is reported elsewhere:

> Indigent criminal defendants have the right on appeal to a "free" lawyer and transcript of the trial record. They also must be informed by the trial judge

> after conviction that they may take a "free" appeal to the intermediate courts. Thus, indigent defendants appear to have nothing to lose in seeking appellate review. 41/

Before 1975, when the Legislature created the office of the State Public Defender, indigents were represented on appeal only by private attorneys appointed by the appellate courts. Depending upon the assignment of cases by the courts, indigents have since been represented by either appointed counsel or deputy public defenders.

Twelve of the private attorneys who were interviewed had represented indigents on appointment in criminal appeals. The following discussion summarizes data gathered from these lawyers or from actual records in criminal cases in the files of the various court clerks.

The Courts of Appeal currently pay appointed counsel $20 per hour for their services in criminal appeals. Taken alone, however, this information is apparently somewhat misleading, because respondents and case records indicated that the courts often did not compensate attorneys for the total hours they billed.

The appellate courts in fact are not bound by an attorney's account of his or her expenditures of time and money. The courts reportedly employ standardized schedules in determining compensation for specific tasks. Items in this schedule are ostensibly based upon the time that an "experienced" attorney would typically spend in reading the record, preparing briefs, preparing for oral argument, etc.

The Courts of Appeal nearly always determined attorneys' compensation independently of the formal bill submitted. The attorney has the right to challenge the remuneration granted but, as several respondents claimed, "very few do so."

Perhaps not surprisingly, many lawyers complained vigorously about the courts' policy concerning pay. Several alleged that they had not even been able to meet their expenses in some of the cases they had handled on appointment.

An account given by one Sacramento attorney illustrates the dissatisfaction expressed by many lawyers. One of the cases this attorney had handled in the appellate court assertedly was the result of "the biggest case ever" in the trial courts of one southern California county. The lawyer claimed to have expended 564-3/4 hours on the case and to have incurred $323 in expenses. He had submitted a bill for $11,618. 42/ According to this attorney (and his files):

> They paid me $7500 for 359 hours. I couldn't believe it. I thought they'd at least pay me $10,000 so I'd break even. You know, not only did they do this to me, but in addition they actually haven't increased the amount paid per hour since 1975. . .

Why, then, do the attorneys take cases on appointment? Some apparently are satisfied with the income that appointive cases periodically provide. 43/ They do not expect their work in these cases to be compensated "fully." Also, several attorneys in civil practice said they liked to handle criminal cases once in awhile "because it keeps you on your toes," or "because, if you're not a criminal attorney, it forces you to keep up with

law."

Notwithstanding the tales of respondents, data from a sample of actual case records indicate that the judges do not always reduce the amounts billed by attorneys, but in many instances had actually increased the compensation beyond the amounts lawyers had requested. Table 9 presents an overview of the hours billed and the compensation allowed in selected criminal cases decided by the Los Angeles and San Diego courts. 44/

The similarities in the data on hourly billings from the two cities should be noted. Differences in the figures on costs billed by attorneys are also important. Most important, however, is the wide range in the amount of compensation the judges awarded per hour of time billed by the lawyers. The range in Los Angeles is from $1.89 to $37.50, and in San Diego from $6.82 to $50.00. In other words, although many attorneys' requests were cut below the standard of $20 per hour, over half (52%) of the lawyers actually are paid above the $20 mark (44%) or were awarded exactly $20 per hour vis-a-vis their requests (8%).

In sum, the data do confirm respondents' claims that the courts usually paid appointed counsel what the judges thought particular cases were "worth." One bill, which was paid at the rate of $1.89 per hour of claimed attorney time, had elicited the written comment of one judge that the lawyer's time "was not well spent." The courts, in any event, obviously award fees according to their own lights and not necessarily those of the attorneys they appoint.

Table 9

Attorney Billing and Compensation Allowed in Selected Cases: Los Angeles and San Diego (1977)

Item	Los Angeles (N=18)	San Diego (N=7)
HOURS BILLED BY ATTORNEYS		
Range	8-100	6-66
Mean	32.1	28.43
Median	24.5	24.25
COSTS BILLED BY ATTORNEYS		
Range	$0.00 to $105.38	$0.00 to $10.00
Range: costs billed per hour of attorney time billed	$0.00 to $ 3.28	$0.00 to $ 0.77
Median: costs billed per hour of attorney time billed	$ 1.48	$ 0.10
COMPENSATION ALLOWED BY COURT		
Range: total compensation	$100 to $1,000	$226 to $500
Range: in $ per hour billed	$ 1.89 to $ 37.50	$6.82 to $50.00
Mean: $ per hour billed	$18.52	$18.41
Median: $ per hour billed	$20.30	$12.66

C. Deputy State Public Defenders

Created in 1975, the office of the State Public Defender bears increasing responsibilities for representation of indigent criminal defendants at the appellate level. 45/ The size of the staff and the office's total funding have increased annually since its conception. In fiscal year 1977, for example, the Public Defender had 94 full-time equivalent positions and an appropriation of about $2.4 million; in fiscal year 1978, 156 positions and about $4.4 million; and in fiscal year 1979, 233.8 positions and about $7.7 million. 46/

There are several possible ways to define costs for each case handled by deputy public defenders. One way is in terms of the caseloads handled by individual deputies and the range of deputies' salaries. Deputies each handle two appeals per month; their salary range is currently from $2012 - $3487 per month. Therefore, if defined strictly in terms of attorneys' monthly salaries--exclusive of fringe benefits, secretarial and clerical costs, and office expenditures--the cost per appeal in cases handled by the deputy public defenders is between $1,000 and $1,744. 47/

VII. Alternative Approaches to Studying Costs of Appellate Litigation

Based upon the findings reported in Chapter VI, the following proposals are made with respect to the study of litigation costs. While not exhaustive, these remarks may be useful in subsequent research on this topic.

A. Conventional Sources of Data on Litigation Costs

1. Interviewing Attorneys

Interviewing attorneys on the subject of litigation costs is a potentially fruitful avenue to follow. Attorneys are the vital "middle-persons" between litigants and other components in the judicial system. They presumably know more about participants' costs than other actors in the process. When cooperative, they can provide excellent "portraits" of individual cases, including information on the costs incurred by their clients in completing each step in the proceedings. Each attorney can provide data on many more cases than can the typical litigant. Also, in most appellate cases the overall attorney fee presumably comprises the total direct costs incurred by his or her client.

In this study, the only successful way to obtain data on litigation costs was through face-to-face personal interviews. Telephone interviews were unproductive, as were questionnaires. And even in face-to-face situations, several attorneys were unwilling to divulge information on financial matters. The subject of financial costs seems to be one of the most sensitive topics in discussions with lawyers.

2. Interviewing Litigants

Litigants themselves presumably are excellent sources of information regarding litigation costs. How do they, the "consumers" of the judicial process, perceive costs to themselves, opponents, and perhaps the judicial system as a whole? What other direct costs besides those billed by attorneys do they bear? What indirect "costs", e.g., loss of pay or future financial prospects, do they incur? What regional variations, if any, exist in terms of litigant costs?

3. Interviewing Judges

California judges in each of the five districts were queried on their conceptions of litigation costs. This question was one the judges uniformly felt ill-equipped to answer. The judges stated candidly that they were not accustomed to thinking in terms of "costs" for the system and that they knew little, if anything, about costs for participants. Judges were a poor potential source of data on appellate costs.

4. Examining Court Records

Case files in the California Courts of Appeal contain limited data concerning litigation costs. The files were valuable sources of information regarding the compensation of appointed counsel in criminal appeals. But the records are otherwise of little help in determining costs, despite their voluminous nature. The extent and types of data on costs contained in appellate files in other jurisdictions and, in particular, at the federal level

are unknown.

B. Other Proposals: New Sources of Data on Litigation Costs

1. National Survey of Appellate Litigants

A survey of litigants, past and present, should be conducted. This survey should focus on a substantial number of individuals who have brought appeals to the various federal circuits. Businesses that have litigated might also be included. The primary survey questions could be those already mentioned.

(1) How do litigants define the "costs" in the appellate process? (2) What kinds of costs do litigants incur in taking appeals? (3) Are financial costs incurred other than the charges billed by the attorneys? If so, which of these are direct financial costs and which are indirect, e.g., "opportunity" costs? (4) Are non-financial "costs" incurred? If so, what types are there and how frequently are they borne?, and (5) What recommendations do litigants have concerning changes that could contain costs?

From these data, profiles of litigants' cases could be compiled in geographic terms -- by federal circuit, by area (urban v. small town v. rural), and by region; in socio-economic terms, i.e., according to the socioeconomic status of the various litigants; by type of counsel, i.e., according to the type of attorney hired (solo practitioner, partner, member of a large firm, etc.); by field of litigation, i.e., according to the type of case (contract, tort, labor, etc.); or in terms of other variables.

2. Public Collecting and Reporting of Data on Attorneys' Fees

Instituting a program for collecting and reporting information concerning fees attorneys charge in cases litigated in the federal courts should also be considered. This information presumably would not be difficult or expensive to collect and file with the records of individual cases. Aggregate data could be compiled and reported by the Administrative Office of the Courts.

To meet attorneys' possible objections to establishing the system, reasonable limitations could be placed from the outset upon the use of the data. For example, the anonymity of individual lawyers could be protected through prohibition of the use of individuals' names by anyone permitted access to the files.

Among the presumed benefits of the system would be the following:

. It would provide nationwide and ongoing information on the costs of litigation in federal tribunals from the standpoint of attorneys' fees.

. It would provide relatively easy access to data on fees by those legitimately interested in such data.

. It would presumably be comparatively simple and inexpensive to administer. Attorneys could merely submit their breakdown of fees at the conclusion of court proceedings; this information could then be placed in the case file along with other records from the litigation.

For scholars, the system could virtually obviate the gleaning of cost data from lawyers themselves. Lawyers are often unwilling to talk about these matters. Also, rather than gathering information on fees in only a sample of cases, scholars could

potentially gather information on the entire population of cases from given time periods in individual courts. Presumably, such data on attorneys' fees and other litigant costs could be used to propose reforms aimed at containing costs overall or for some categories of litigants.

FOOTNOTES

1/ Throughout the text of this report, the term "judge" is used to refer to jurists on both the California and and United States Courts of Appeal.

2/ The sample was 5% in Los Angeles for FY 1977.

3/ J. Woodford Howard, Jr., "Litigation Flow in Three United States Courts of Appeals, "8 Law and Society Review 33, at 38 (Fall 1973).

4/ Dates here and in the following material refer to fiscal years.

5/ "Perceptions of Routine Decision-Making in Five California Courts of Appeal," forthcoming in Polity; with Greg A. Caldeira.

6/ Concerning the increasing importance of criminal cases in the appellate courts of four other states, see Daniel J. Meador, Appellate Courts: Staff and Process in the Crisis of Volume (St. Paul, Minn.: West Publishing Co., 1974), pp. 138-139.

7/ Data in Figures 1 and 2 were derived from tabular information in the Judicial Council Reports (Sacramento: Judicial Council of California, 1968-1978).

8/ See the corroborating data in the Judicial Council Report (1978), p. 72.

9/ The judges more frequently called for added staff attorneys rather than more judgeships.

10/ See note 2.

11/ These data were adapted from the Annual Reports of the U.S. Administrative Office of the Courts. (1968-1978).

12/ J. Woodford Howard, Jr., Courts of Appeals in the Federal Judicial System: A Study of Litigation Flow and Judicial Roles in the Second, Fifth, and District of Columbia Circuits (unpublished manuscript), p. IX-43.

13/ Ibid.

14/ See, e.g., Richard J. Richardson and Kenneth N. Vines, The Politics of Federal Courts (Boston: Little, Brown, 1970), pp. 26-31 and passim.

15/ See, e.g., The California Courts of Appeal (Denver: National Center for State Courts, 1974); Winslow Christian, "Delay in Criminal Appeals: A Functional Analysis of One Court's Work," 23 Stanford L. Rev. 676 (1971); Carlo S. Fowler, "Mandamus as an Original Proceeding in the California Appellate Courts," 15 Hastings L. J. 177 (1963); Roy A. Gustafson, "Some Observations about the California Courts of Appeal," 57 Calif. L. Rev. 606 (1971); John E. Molinari, "The Decisionmaking Conference of the California Courts of Appeal," 57 Calif. L. Rev. 606 (1969); Robert S. Thompson, "Selection of Judges of the California Courts of Appeal" 48 California St. Bar J. 381 (1973), and "One Judge and No Judge Appellate Decisions," 50 California St. Bar J. 476 (1975).

16/ Cf. Robert Carp, "The Scope and Function of Intra-Circuit Judicial Communication: A Cast Study in the Eighth Circuit," 6 Law & Society Review 406 (1972).

17/ Cf. Edward Beiser, "The Rhode Island Supreme Court: A Well-Integrated Political System," 8 Law & Society Review 167 (1973).

18/ Propinquity seems to make a difference in levels of interaction; see David Adamany, "The Party Variable in Judges' Voting: Some Conceptual Notes and a Case Study," 63 American Political Science Review 57 (1969).

19/ See Walter F. Murphy, Elements of Judicial Strategy (Chicago: Univ. of Chicago Press, 1965), passim.

20/ See ibid.

21/ See John T. Wold and Greg Caldeira, "Perceptions of Routine Decision-Making in Five California Courts of Appeal" (forthcoming in Polity).

22/ S. Sidney Ulmer, Courts as Small and Not so Small Groups (New York: General Learning Press, 1971).

23/ Murphy, op. cit.

24/ Ibid.

25/ Ibid. See also Marvin Schick, Learned Hand's Court (Baltimore: Johns Hopkins University Press, 1970), passim.

26/ Carl J. Friedrich, Constitutional Government and Democracy (New York: Blaisdell Pub. Co., 1950), pp. 49, 398.

27/ Regarding this tactic, See Alexander M. Bickel, The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work (Chicago: University of Chicago Press, 1957).

28/ Brandeis and Chief Justice Stone used this tactic to good ends. See Bickel, op. cit., and Alpheus Thomas Mason, Harlan Fiske Stone, Pillar of the Law (New York: Viking Press, 1956).

29/ Wold and Caldeira, op. cit.

30/ Ibid.

31/ Many of the senior judges no longer had law clerks.

32/ A caveat should be entered regarding comparisons of the state and federal data, since the state data were gathered in personal interviews, while the other were drawn from written questionnaires.

33/ Howard, Courts of Appeals in the Federal Judicial System, p. VIII-52.

34/ In California, individual judges still use written comments when they feel these advantageous from a strategic standpoint.

35/ The Sacramento District, consisting of one division of seven judges, is organizationally more similar to the U.S. Courts of Appeals than to any of its sister districts.

36/ See, e.g., Richardson and Vines, op. cit., pp. 123-124.

37/ Ibid, p. 124.

38/ The lawyers' complaints were directed toward only three of the thirteen appellate divisions.

39/ Melendres v. City of Los Angeles, 45 Cal. App. 3d 267, 119 Cal. Rptr. 713 (1975).

40/ Workers' compensation appeals are within the discretionary jurisdiction of the California intermediate courts.

41/ John T. Wold, "Going Through the Motions: The Monotony of Appellate Court Decisionmaking," 62 Judicature 58, at 60-61 (August 1978).

42/ The figures on the time sheet for this case were the same as attorney's verbal statements.

43/ Attorneys apparently did not receive cases on appointment from any particular appellate district more frequently than once every three months.

44/ The records in the clerks' offices were examined. The attorneys estimates of their costs were not used in my computations regarding compensation, since the courts had merely awarded compensation without itemizing components or explaining their reasons for allowing specific amounts of money. From all appearances, the lawyers' statements concerning costs did not seem to be factors in the justices' determination of compensation.

45/ Representation of indigents at the trial level is provided by the public defenders' offices at the county level.

46/ Governor's Budget, State of California, Fiscal Year 1979.

47/ There are undoubtedly other possible ways to define litigation costs vis-a-vis representation by the Public Defender's office.