UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U.S. COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA PA 19106-1797

MICHAEL E. KUNZ
CLERK OF COURT

CLERK'S OFFICE
ROOM 2609
TELEPHONE
(215) 597

May 24, 1996

Mr. Abel Mattos
Administrative Office
United States Courts
Room 4-532
One Columbus Circle, NE
Washington, DC 20544

Dear Abel:

Enclosed herewith is a copy of a draft 1995 Annual Report for the Civil Justice Reform Act Advisory Group for the United States District Court for the Eastern District of Pennsylvania. Appendix A contains the report on Self-Executing Disclosure in this district. The Advisory Group is meeting on June 6th to finalize the Annual Report. I will send you a copy of the final product.

Sincerely,

Michael E. Kunz
Clerk of Court

MEK/mcm
Enclosure

CIVIL JUSTICE REFORM ACT ADVISORY GROUP
FOR
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

File
Fwd

May 24, 1996

TO: Civil Justice Reform Act
Advisory Group Members

FROM: Michael E. Kunz

SUBJ: Meeting on June 6, 1996

Enclosed herewith is the draft 1995 Annual Report which includes as Appendix A the report on Self-Executing Disclosure. The report has undergone several revisions and all members of the Advisory Group are encouraged to submit any comments on the report in writing prior to the meeting for review and discussion at the June 6th meeting. All comments should be submitted directly to Professor Leo Levin with copies to Chairman Bob Landis and other members of the Advisory Group.

There will be a preliminary discussion on Local Rule 26 Standing Order - Re: depositions and interrogatories, copies of which were forwarded to you with the April 26th memo.

I look forward to seeing you at the meeting on June 6th at 9:30 a.m. in the Ceremonial Courtroom. If you are unable to attend please contact this office at 597-8454.

Michael E. Kunz
Clerk of Court

MEK/mcm
Enclosure

DRAFT

ANNUAL REPORT

May, 1996

INTRODUCTION

The Civil Justice Reform Act of 1990 requires each United States district court that has promulgated a civil justice delay and reduction plan to reassess the state of its docket at regular intervals for the purpose of determining whether further action is needed, all in the interest of reducing "cost and delay."[1] This is the third report in that series.

It is appropriate to take this occasion to report, in addition, on developments affecting the timetable imposed by the Congress on the courts, changes in the personnel of the Advisory Group, and a major study of the operation of a highly controversial provision in the Court's plan, that governing self-executing disclosure, conducted by the Advisory Group in the discharge of its statutory obligation.

We begin with the state of the docket.

I.

THE STATE OF THE DOCKET

From the perspective of the litigants and of the bar, two measures of the state of the docket are of paramount importance. First, is the time it ordinarily takes to dispose of civil litigation, and second, because some cases await disposition for years rather than months, what percentage of the cases remain in court unresolved for more than three years. In more technical terms, the first concern is reflected in the median time from filing to disposition and, in addition, the median time from filing to trial. The second, is the number and percentage of civil cases over three years old.

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[1] 28 U.S.C. §475.

For the year ended September 30, 1995, the median time from the filing of civil cases until disposition was six months, speediest in the circuit and ranking number seven of the ninety-four United States district courts in the country.[2] This figure includes, of course, cases disposed of on motion and by settlement. For those cases that are not so disposed of, the median time from filing until trial is of central importance. In the Eastern District this figure is 12 months, the best in the circuit, fully one-third less than the national median (18 months), and ranking the court ninth in the country.

The percentage of civil cases over three years old is a minuscule 1.1%, the best record in the circuit and the sixth best in the country. The national average is more than five times as large (5.6%). Bench trials awaiting decision longer than six months are not a problem. There was one such case noted in our last annual report; currently there are none. The number of motions awaiting decision for more than 180 days did increase. There were 63 at the last reporting period. However, with the number hovering around the 300 mark in other metropolitan courts, this figure, while clearly a matter of concern, should be put in perspective.

We do not detail the data with respect to the court's record in dealing simultaneously with a heavy criminal caseload.[3] Nor does this record result from a wide discrepancy in available judicial resources.[4] On the contrary, a heavy volume of cases continue to be assigned to this district by the Panel on Multidistrict Litigation,[5] and for statistical purposes relevant to this analysis they are

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[2] Administrative Office of the U.S. Courts, Federal Court Management Statistics (1995).

[3] Median time from filing to disposition for criminal felony cases was 7.7 months, a little over one month longer than the national median. Id.

[4] Weighted caseload per judgeship for the same year, a measure reflecting the burdens to be anticipated in dealing with a multi-party anti-trust case compared to an action to recover on a defaulted government loan, was 405 for this district compared to 448 nationally. Thus, the former was slightly over 90% of the latter.

[5] See 28 U.S.C. §1407 which provides for such transfer where civil actions with common questions of fact are pending in different districts. Transfer is for purpose of consolidated pretrial proceedings. See 28 U.S.C. §1407(a). In practice, however, many of these are finally resolved in the assignee district.

The contribution of court-annexed arbitration, mandatory but non-binding, need not be rehearsed once more. Suffice it to note that the contribution remains significant. In calendar year 1995 the court referred 16% of the total number of civil cases filed.

Included in this report are graphs, prepared by the Administrative Office of the United States Courts, charting relevant data over a ten-year period and affording an easily understood visual representation of the position of the Eastern District among other courts in the Third Circuit and in the country.

II.

THE NATIONAL TIMETABLE

As originally conceived, the Civil Justice Reform Act created a three-year experiment in which every district court was to participate, but in which demonstration districts and pilot courts had a special role. The three-year experiment was to be followed by an appropriate period during which "an independent organization with expertise in the area of Federal court management"[8] would complete its evaluation of the experience of the pilot courts and submit a report to the Judicial Conference of the United States. That body was charged with submitting its report to the Congress "Not later than December 31, 1995."[9]

The schedule was unrealistic; among other things, many, if not most, of the cases most in need of study, those that tend to linger in court, would not have been terminated. The Rand Civil Justice Institute, the independent organization that was selected, asked for more time and the Congress extended the deadline by a year.[10]

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[8] P.L. 101-650 §105 (c)(1).

[9] Id.

[10] For discussion and citation of authorities, both for this amendment and one that followed a year later, see Margaret L. Sanner and Carl Tobias, The Civil Justice Reform Act Amendment Act of 1995, 164 F.R.D. 577 (1996).

A parallel study of demonstration districts was being conducted by the Federal Judicial Center, but through an oversight the legislation failed to extend this deadline as well. To correct the oversight, and to avoid a disparity in deadlines for complimentary studies, Congress enacted corrective legislation in the Civil Justice Reform Act Amendment of 1995.[11]

Based on information currently available, Rand will complete its report during the current calendar year and submit it to the Judicial Conference before the end of December, 1996. Precisely how soon thereafter the Judicial Conference will be able to submit its report to the Congress remains problematic and a further legislative extension is under discussion.

III.

SELF-EXECUTING DISCLOSURE

The most controversial provision of the Plan recommended by the Advisory Group and adopted by the court was the requirement that litigants make disclosure of specified information without awaiting a discovery request by the opposing party.[12] Those who supported such a provision envisioned increased efficiency, a reduction in the number of technical objections to discovery requests, and even the possibility of reducing acrimony and fostering a spirit of cooperation in civil litigation. Those opposed thought the rule caused additional delay and constituted a serious attack on the adversary system.

To learn more about how self-executing disclosure was working in fact in this district,[13] the Advisory Group, with the able assistance of Professor Abba Krieger, Professor of Statistics at the

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[11] Id.

[12] See § 4.01 of the Civil Justice Expense and Delay Reduction Plan. The full text is set forth in Attachment 1 of the full report of the survey, which appears at Appendix A. That report contains a more elaborate statement, with citation of authorities, of the purpose behind self-executing disclosure and of Federal Rule of Civil Procedure 26(a).

[13] Varying standards defining precisely what has to be disclosed, make a significant difference in the implementation of the rule. The national rule, as finally promulgated, has been the object of particular criticism. A knowledgeable observer of federal civil litigation put it this way in the course of an Advisory Group discussion: "I think certainly everyone I've talked to agrees that what they put in [F.R.C.P.] 26(a) is really an abomination. The criterion for what has to be

Wharton School of the University of Pennsylvania, surveyed 4,000 attorneys of record in cases subject to the rule and received and analyzed over 1,000 usable responses. In addition, the Advisory Group sought the views of 34 judicial officers, virtually each one of whom had substantial experience with cases to which the rule applied.

The complete report of the findings of that survey, as well as supporting material concerning methodology, is to be found in Appendix A. Only a brief account of the data relevant to an understanding of the recommendation of the Advisory Group to the court and the action the court took thereafter, is included here.

On the major premise question of whether some rule mandating self-executing disclosure should remain in effect, of the 1,000-plus attorneys expressing their views, over 60% responded in the affirmative.[14] Among the 34 judicial officers surveyed, 33 of whom had experience with more than 20 cases subject to the rule, an even greater proportion -- 85% -- favored retention of some rule: 29 voted yes, as against four in the negative and one not voting.

This does not reflect an uncritical vote in favor of maintaining the status quo. Focusing on suggestions that had emerged from earlier examination of problems with the present rule, respondents were asked whether they would favor amending its provisions to provide that discovery could proceed as soon as the litigant herself had made disclosure. This would, of course, be a significant change from the present rule under which discovery typically awaits

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disclosed is just impossible, in my judgment, and completely inconsistent with the notice pleading philosophy of the Federal Rules of Civil Procedure." (tr. of meeting of Nov. 13, 1995, p. 10).

Of course, the national rule, by its terms, really offered each district court an option, allowing it to accept, modify or reject its provisions. The rule in operation in this district sets forth a very different standard for disciosure and the success or lack of success of the one is not necessarily applicable to the other.

It should also be noted that a subcommittee charged with considering whether the requirement of disclosure should be continued by the court considered whether this district should adopt the national standard, i.e. the formulation of F. R. C. P. 26(a). It recommended against that course and this recommendation was accepted by the Advisory Group.

[14] On the question of whether some rule providing for self-executing disclosure should remain in effect, 667 respondents, or 61.2%, voted yes and 423, 38.8%, voted no.

completion of disclosure by both sides.[15] Among the lawyers such a change was favored by almost three-fourths of the respondents with only 15% opposed and about 10% neutral.[16]

Among the judges, there was a similar response. Close to three-fourths of the judicial officers favored allowing discovery once the litigant had made its own disclosure with less than 12% opposed.[17]

There remained for consideration the question of whether formal discovery should be allowed even before the party seeking discovery has made disclosure. The subcommittee did not favor such a change. In its view, this entailed the risk of scuttling the entire provision for disclosure for the need to complete ones own disclosure before seeking formal discovery is a simple, powerful incentive for compliance. And the subcommittee was mindful of the very heavy affirmation by the respondents of the desirability of retaining a requirement of disclosure.

It is true that a majority of the respondents in our survey, both lawyers and judicial officers, favored allowing discovery even before a litigant had made disclosure. The votes, however, were close. Among the judges a change of one vote would have effected the opposite result.[18] Among the lawyers, the results were similar.[19] Accordingly, the subcommittee did not recommend amendment of the Plan to reflect this preference.

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[15] Section 4.01(b) of the Plan provides: "Except by leave of court or upon agreement of the parties, a party may not seek discovery from any source before making the disclosures under subdivision (a)(1), and may not seek discovery from another party before the date such disclosures have been made by, or are due from, such other party."

[16] Respondents were asked to express their feelings about the following statement: "Assuming some kind of self-executing disclosure will remain, what are your feelings about the following:.... Permit a party to institute discovery once the party has made its self-executing disclosures without necessarily waiting for the opposing party's self-executing disclosure."

[17] Specifically, 25 judicial officers favored allowing such discovery, 4 were neutral, one did not answer, and 4 were opposed.

[18] Fourteen judicial officers favored such a change, 13 were opposed and 7 were neutral.

[19] The lawyers were asked to express their feelings, see note 4 supra, with respect to the following statement: "Permit a party to institute discovery without awaiting any developments with respect to self-executing disclosure." The results: 382 (35.0.% said "strongly agree," 215 (19.7%) "mildly agree", 122 (11.2%) were neutral, 170 (15.6%) said "mildly disagree", and 201 (18.4%) said "strongly disagree."

By November, 1995 the deadlines imposed by the original statute had been extended for a year and the Advisory Group met to consider what it should recommend to the court with respect to self-executing disclosure. It had the benefit of the results of the survey and of detailed consideration by a subcommittee.

In the opinion of the subcommittee, the views expressed by the respondents to the survey, reflecting substantial experience, were entitled to far more weight than any theoretical counter-arguments that might be offered.[20] Accordingly, the subcommittee was of the view that the Advisory Group recommend to the court that the requirement of self-executing disclosure be continued but that amendment of the Plan permitting plaintiffs to initiate discovery once they had completed disclosure was desirable.

The Advisory Group readily agreed that the basic requirement of disclosure should be continued for another year, but it recommended against any amendment of its provisions at that time. A number of factors entered into the decision. First, the issue was continuation one more year, at most two, and the primary reason for the extension was to facilitate study by the Rand Corporation of the operation of plans here and elsewhere. Changes in the middle of the study period could only hamper that effort.

Then, too, the members of the Advisory Group were mindful of the expressed concern of members of the bar over the country that continual amendment and change imposed a heavy burden on litigators. Moreover, the members of the Advisory Group recognized that it takes some time for active litigators to adjust to new rules so that change would not yield new and useful data over the short range.

After weighing all the factors, the Advisory Group recommended to the judges of the Eastern District that they continue the present requirements of Section 4.01 of the Civil Expense

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[20] The subcommittee gave no serious consideration to recommending that this district adopt the pattern set forth in the national rules, which ties the commencement of discovery to the discovery conference mandated by F.R.C.P. 26(f). This seems to invite even more delay and, in any event, this district has opted out of the requirement that a discovery conference be required in virtually every case.

and Delay Reduction Plan, without amendment, but with renewed emphasis on the desirability of making perfectly clear, particularly for the benefit of lawyers from outside the district, that its provisions do not apply to cases on the Special Management Track.

We are pleased to note that by Order of December 11, 1995, the court extended the Civil Justice Expense and Delay Reduction Plan until December 31, 1997, and did so without amendment. In the course of its order it took occasion to clarify that the provisions governing self-executing disclosure do not apply to cases on the Special Management Track.

IV.

CHANGES IN THE MEMBERSHIP OF THE ADVISORY GROUP

The Civil Justice Reform Act envisioned a rotating membership for the Advisory Groups.[21] Some changes are automatic. For example, when Michael R. Stiles succeeded Michael M. Baylson as U. S. Attorney in the district, he became a member of the Advisory Group in accordance with the statute.[22] When Honorable Edward N. Cahn succeeded Honorable Louis C. Bechtle as Chief Judge of the Eastern District no change in the membership of the Advisory Group was necessary as both had been and both remained as ex-officio members.

In June 1994 Robert Robinson replaced James C. Corcoran as a member of the Advisory Group. In February 1995 Lloyd R. Ziff replaced S. Gerald Litvin and in April 1996 Francis P. Newell and Jennifer R. Clarke were added to the Advisory Group. Each is an active litigator in the court and each has a background of interest in and concern with the smooth functioning of the court in the disposition of civil litigation.

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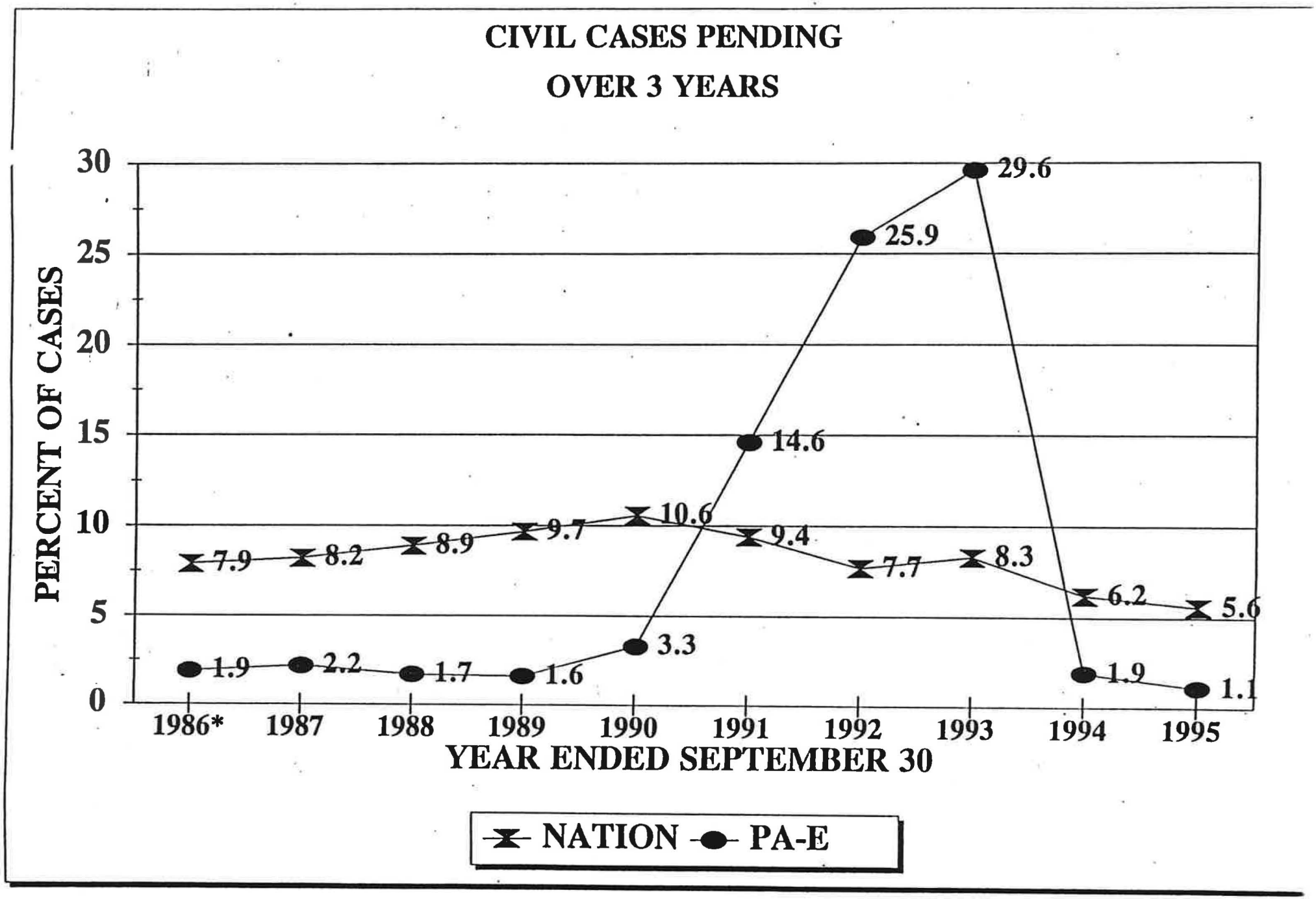
[21] See 28 U.S.C. §478(d).

[22] 28 U.S.C. §478(d).

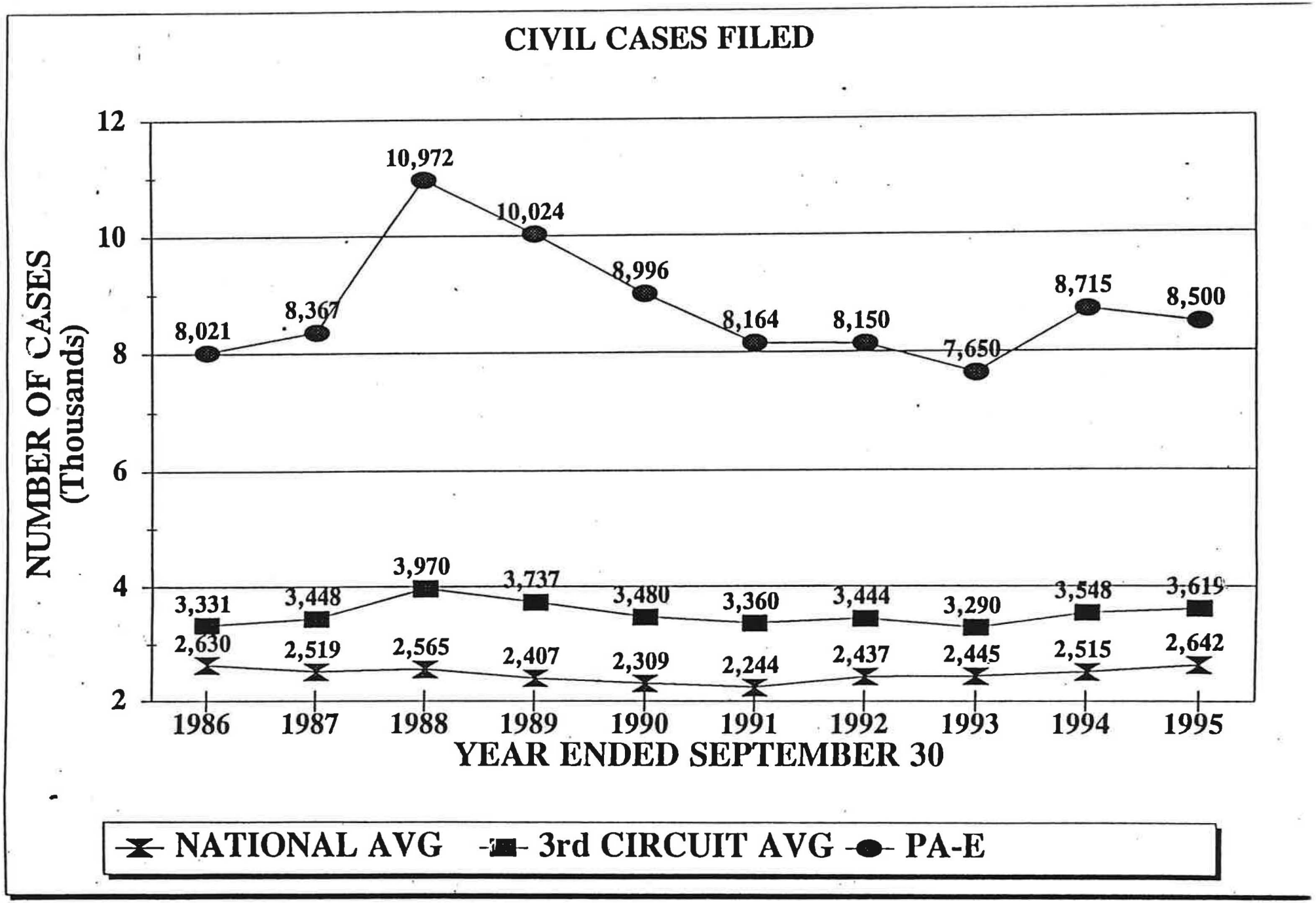
V.

CONCLUSION

On the whole, the Civil Justice Expense and Delay Reduction Plan is working well in this district. The Advisory Group recommends against amendment at this time. It is appropriate, however, to record once again the very high regard which the members of the Advisory Group and, more generally, the members of the bar, have for the judges of the Eastern District of Pennsylvania and for the staff they have assembled, all of whom make this record possible.



* YEAR ENDED JUNE 30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(Thousands)
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8
6
4
2
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10,972
10,024
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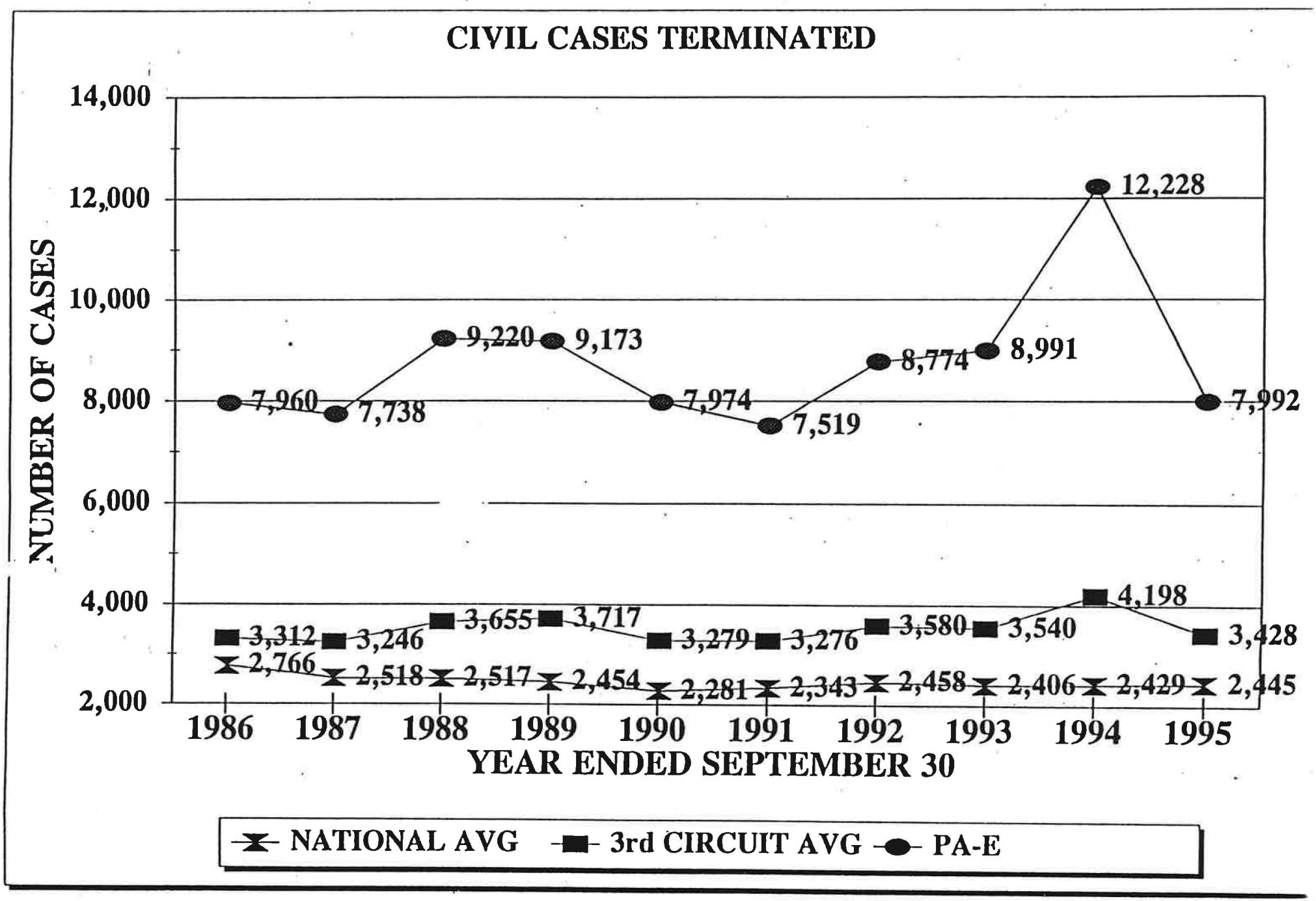
8,164
8,150
7,650
8,715
8,500
3,331
3,448
3,970
3,737
3,480
3,360
3,444
3,290
3,548
3,619
2,630
2,519
2,565
2,407
2,309
2,244
2,437
2,445
2,515
2,642
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
YEAR ENDED SEPTEMBER 30
NATIONAL AVG
3rd CIRCUIT AVG
PA-E


CIVIL CASES TERMINATED
NUMBER OF CASES
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12,000
10,000
8,000
6,000
4,000
2,000
7,960
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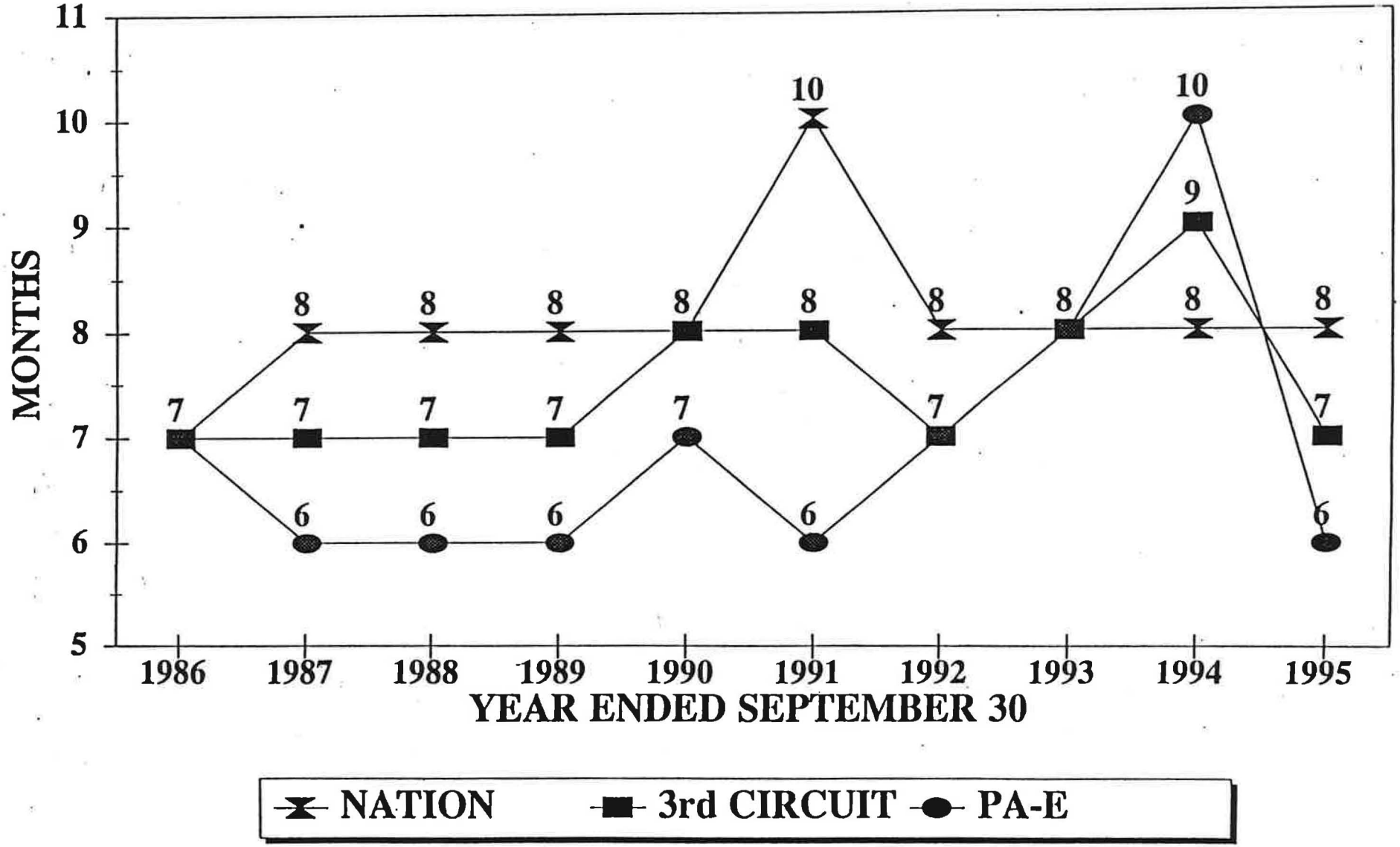
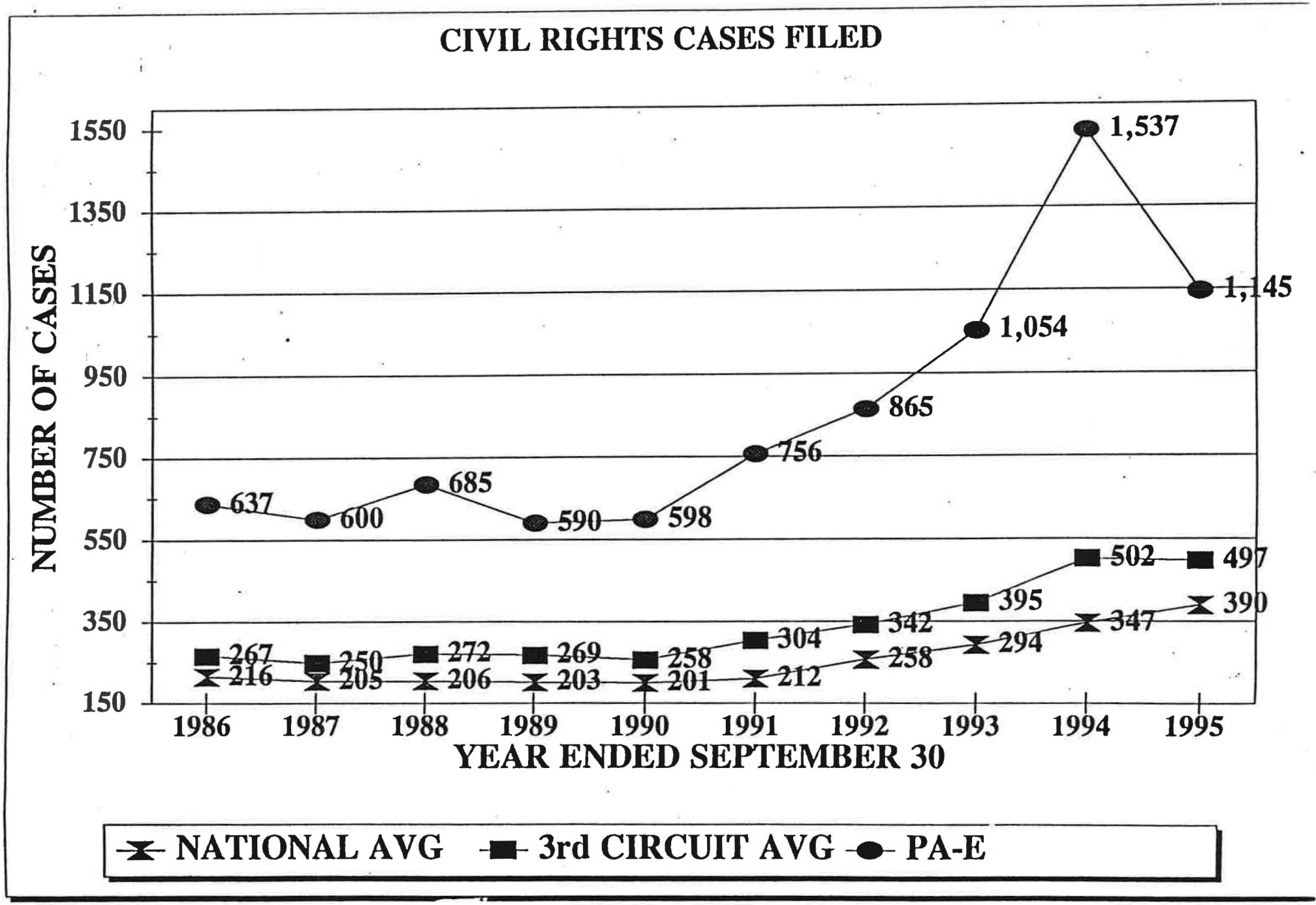
9,220
9,173
7,974
7,519
8,774
8,991
12,228
7,992
3,312
3,246
3,655
3,717
3,279
3,276
3,580
3,540
4,198
3,428
2,766
2,518
2,517
2,454
2,281
2,343
2,458
2,406
2,429
2,445
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
YEAR ENDED SEPTEMBER 30
NATIONAL AVG
3rd CIRCUIT AVG
PA-E

MEDIAN DISPOSITION TIME

CIVIL CASES



EXCLUDES: LAND CONDEMNATION, PRISONER PETITIONS, AND DEPORTATION REVIEWS


CIVIL RIGHTS CASES FILED
NUMBER OF CASES
1550
1350
1150
950
750
550
350
150
1,537
1,145
1,054
865
756
685
637
600
590
598
502
497
395
390
347
342
304
294
267
250
272
269
258
258
216
205
206
203
201
212
1986
1987
1988
1989
1990
1991
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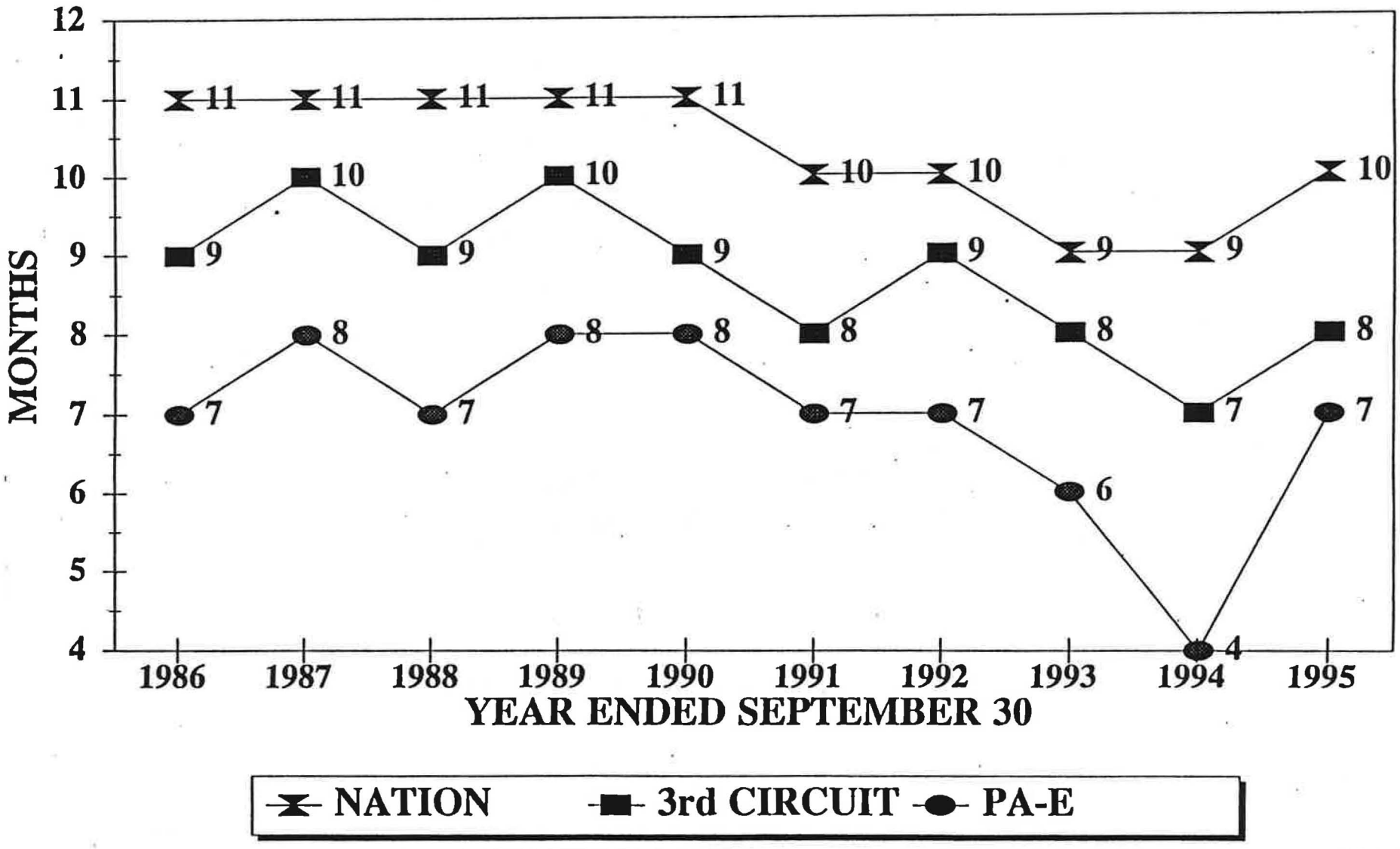
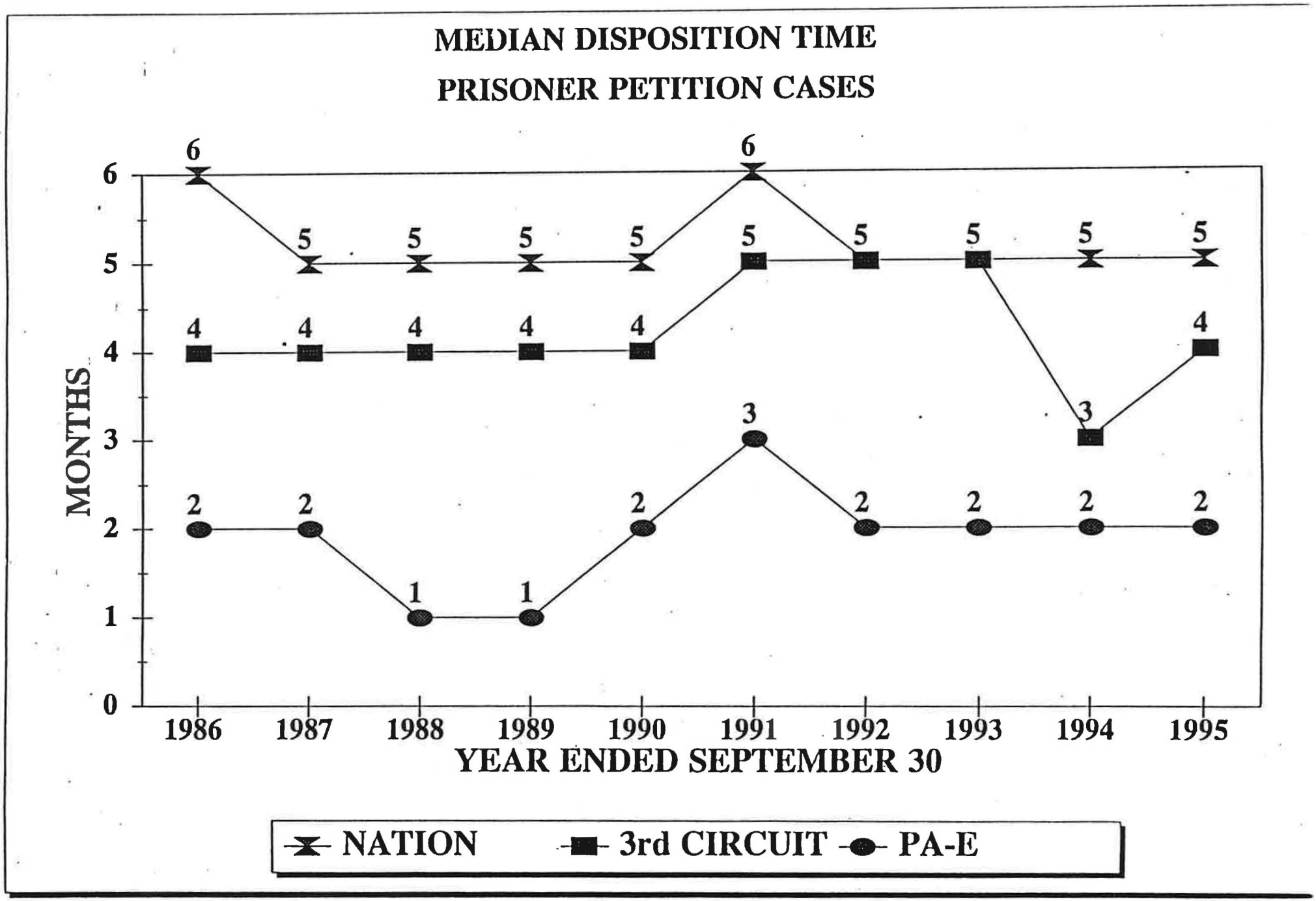
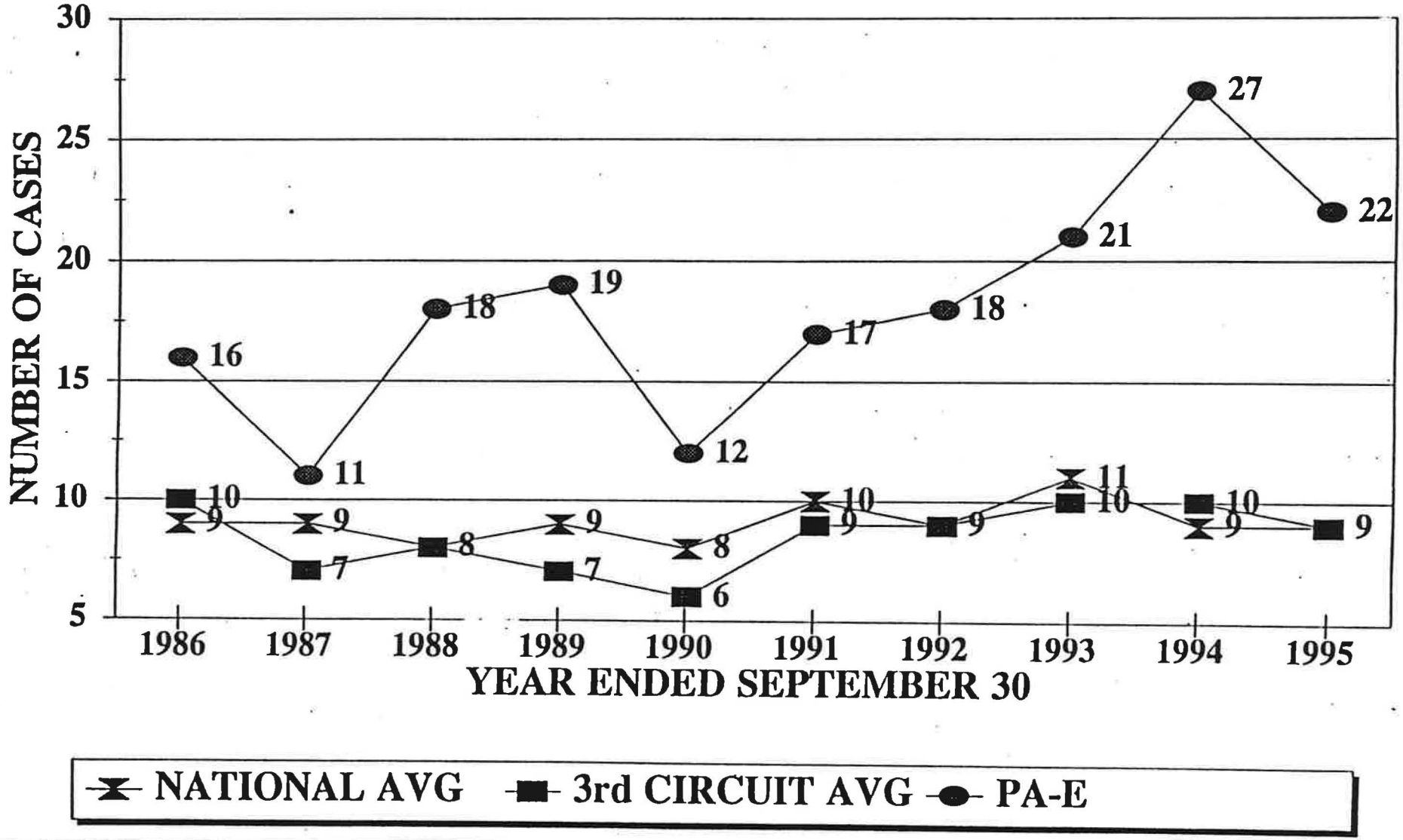
1995
YEAR ENDED SEPTEMBER 30
NATIONAL AVG
3rd CIRCUIT AVG
PA-E

MEDIAN DISPOSITION TIME
CIVIL RIGHTS CASES

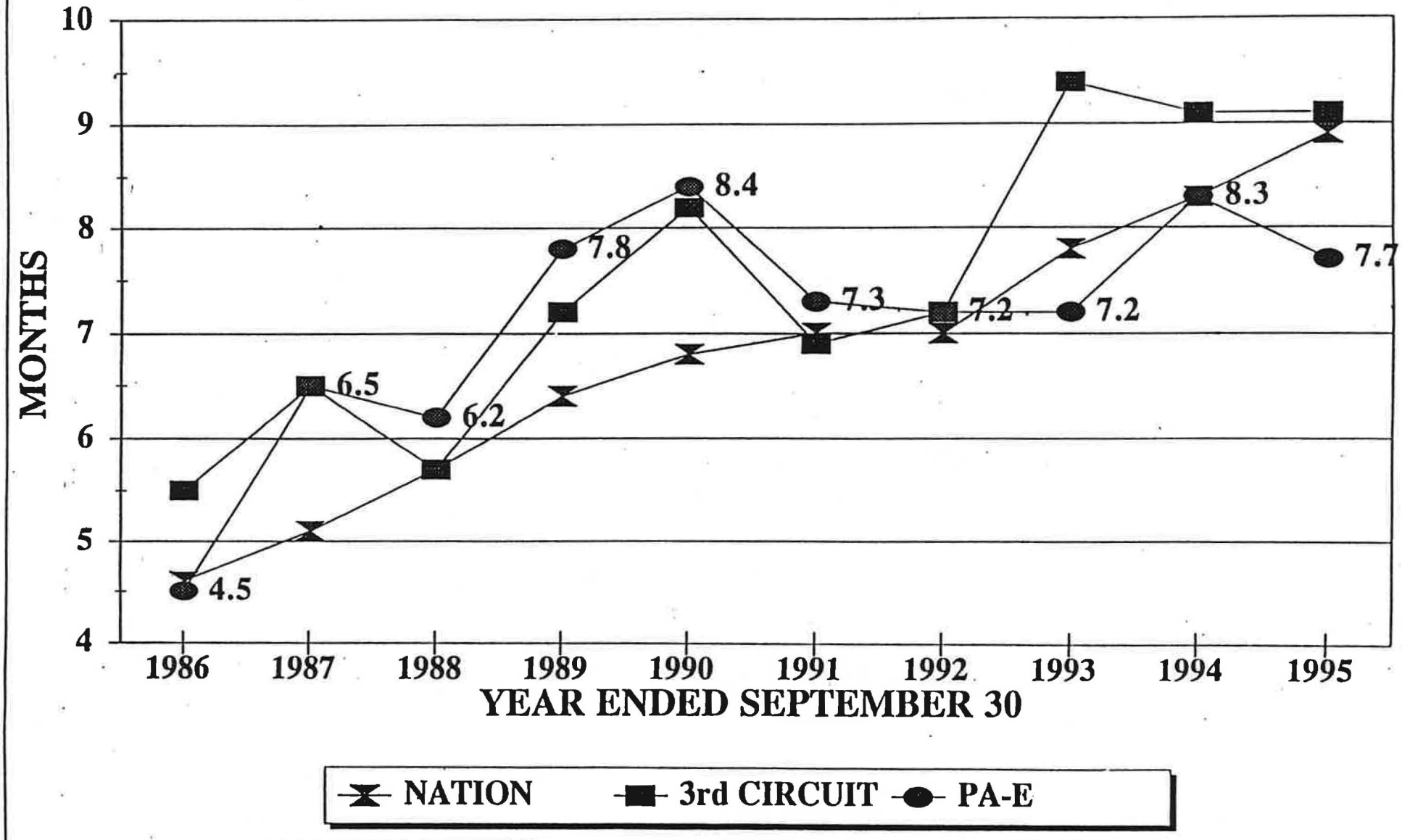



MEDIAN DISPOSITION TIME
PRISONER PETITION CASES
MONTHS
0
1
2
3
4
5
6
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
YEAR ENDED SEPTEMBER 30
NATION
3rd CIRCUIT
PA-E

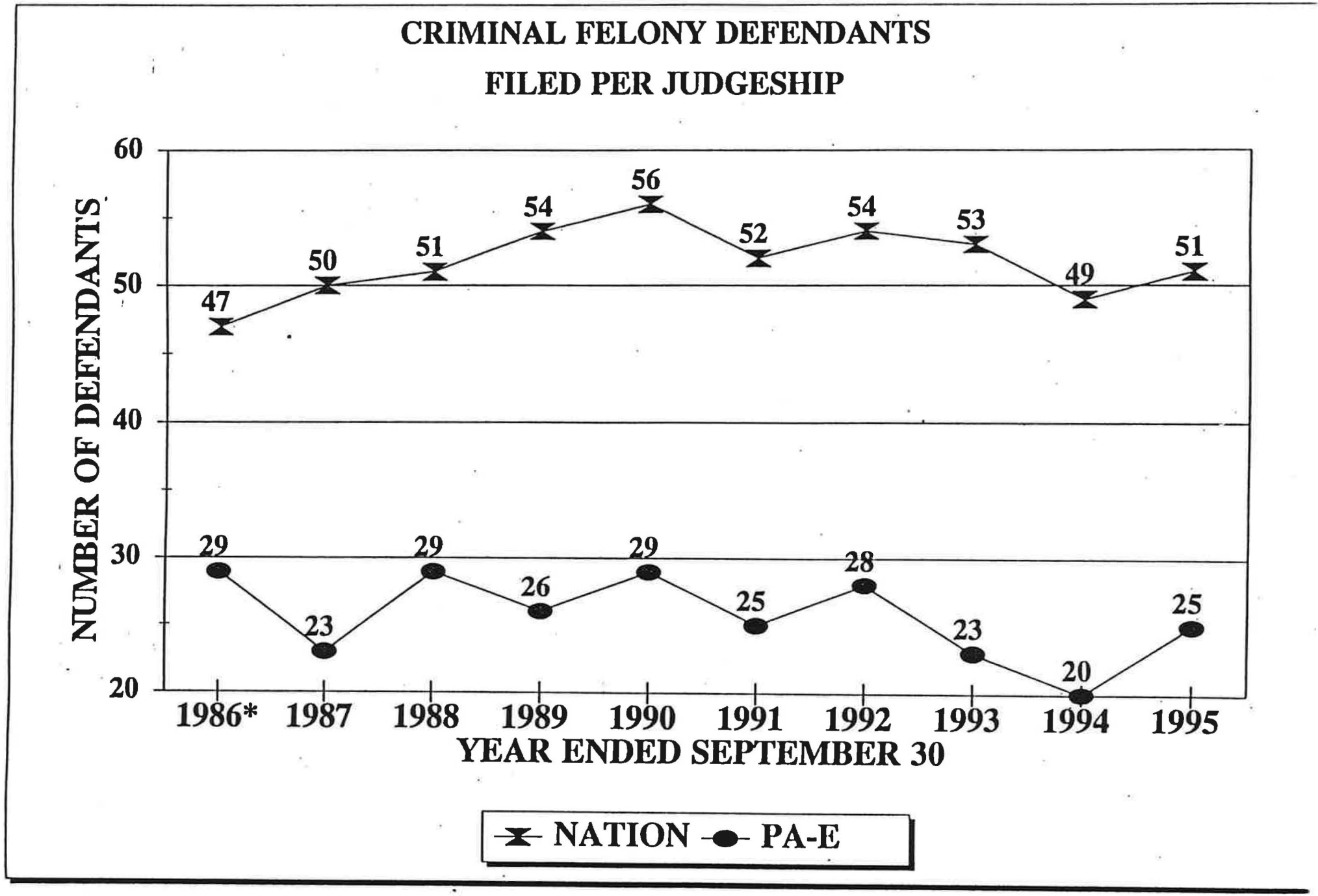
CRIMINAL CASES CLOSED
WITH MORE THAN 3 DEFENDANTS



MEDIAN DISPOSITION TIME OF CRIMINAL CASES WITH MORE THAN 3 DEFENDANTS



MEDIAN TIME COMPUTED ONLY WHERE THERE ARE 10 OR MORE CASES



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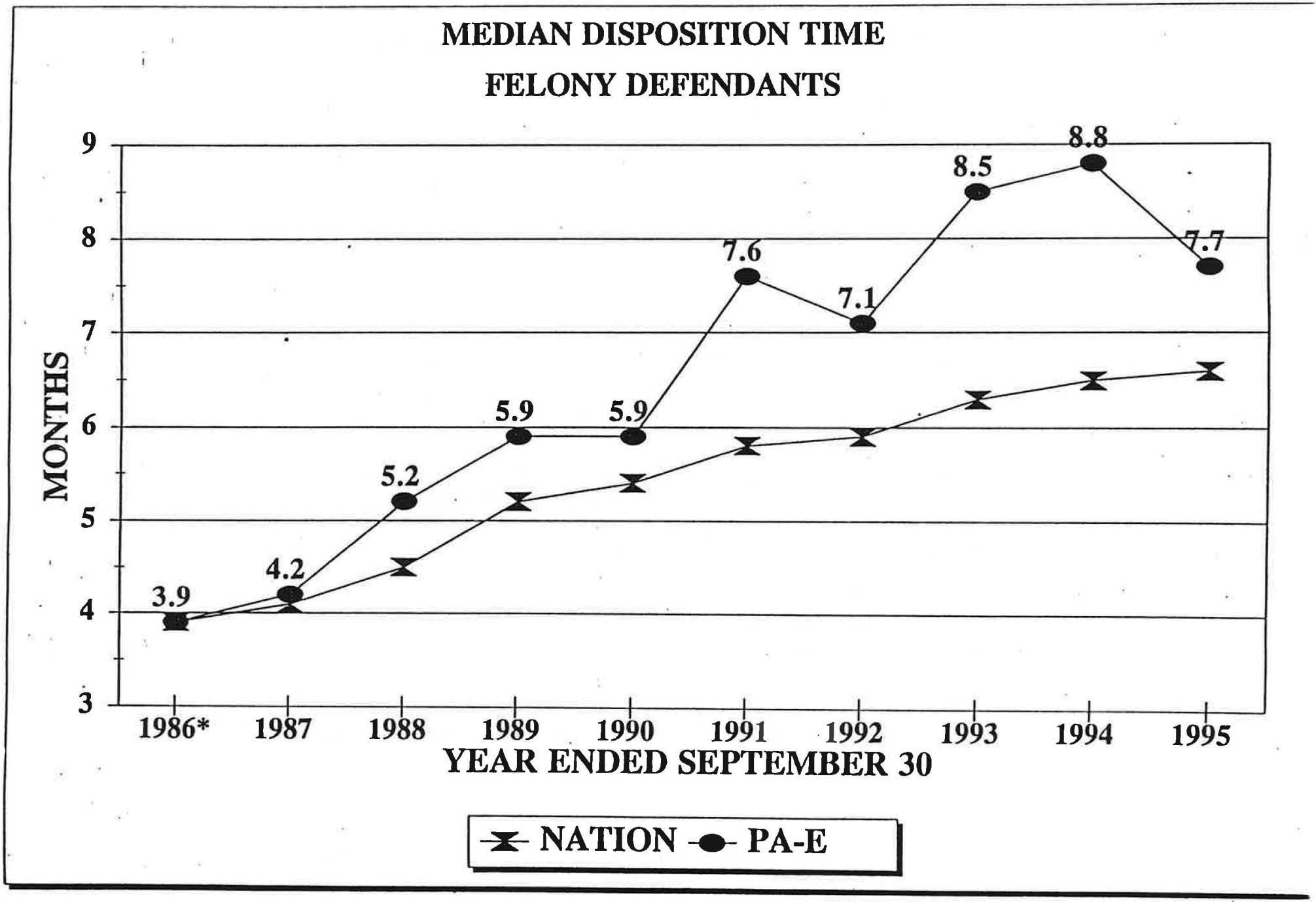

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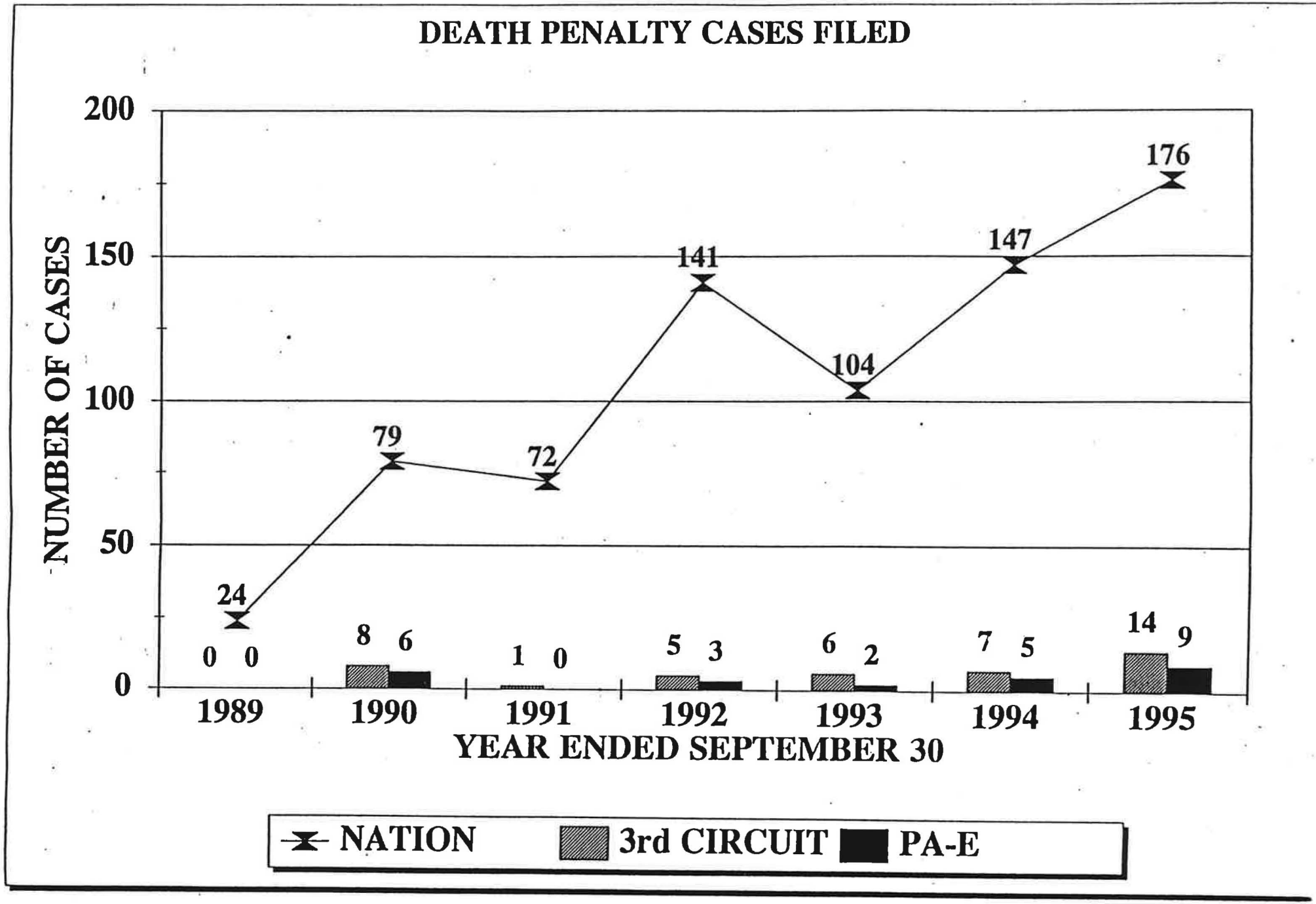
DEATH PENALTY CASES FILED
NUMBER OF CASES
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150
100
50
0
24
79
72
141
104
147
176
0 0
8 6
1 0
5 3
6 2
7 5
14 9
1989
1990
1991
1992
1993
1994
1995
YEAR ENDED SEPTEMBER 30
NATION
3rd CIRCUIT
PA-E