The Cases of the United States Court of Appeals for the District of Columbia Circuit

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1520 H Street, N.W.
Washington, D.C. 20005
Telephone 202/633-6011

THE CASES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

By Gordon Bermant, Patricia A. Lombard, and Carroll Seron

Assisted by Rama Bar-Adon, Joseph Matta, and Sam Spina

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FOREWORD

It is a truism that neither the number of raw filings nor the number of case terminations adequately measures the true workload of a court. Cases are not fungible; an action to recover money damages caused by a negligently operated government vehicle—a "fender bender" in the colloquial—is not the equivalent of a multiparty antitrust case. Adequate planning for needed resources requires a more refined measure of judicial burdens. With the help of the Subcommittee on Statistics of the Judicial Conference Committee on Court Administration, the Federal Judicial Center has developed tables of case weights for use in the process of determining needed district judgeships. Similarly, the Center recently completed a study of the workload of bankruptcy judges so that the Judicial Conference might comply with the mandate of Congress with respect to the need for judges for these courts.

The same need exists at the appellate level, but the problem of measuring relevant burden and then developing case weights for the appellate process has proved far more difficult. Even nonfrivolous appeals vary substantially in the burdens they impose on appellate judges. Nor is agreement among the deciding judges always an accurate indication of the burden of the case on appeal; unanimous decisions often come after great effort, and dissents are not inevitably an accurate measure of burden or complexity.

In 1977 the Center published a staff paper describing criteria for assessing appellate judicial burden. It was based on the subjective reaction of experienced judges of the United States courts of appeals. The views of those experts were helpful as an initial treatment of some of the difficult conceptual and practical aspects of the problem of measuring appellate burdens. That study did not, and did not purport to, provide enough information to allow quantification of appellate burdens in a manner adequate to produce criteria for measuring needed judicial resources.

The present study, undertaken in the summer of 1981, builds on that prior effort. The Center was asked to shed what empirical light it could on the common impression that agency cases typically impose a greater burden on the courts of appeals than do other

cases. To do so, the Center turned to the United States Court of Appeals for the District of Columbia, well known for its comparatively high proportion of agency cases. The findings on comparative burden of agency and other cases might not be duplicated in other circuits, but the D.C. Circuit was an obvious place to begin an inquiry. The judges and supporting personnel were most accommodating in providing access to the case files that contain the raw data by which to measure some aspects of the burdens that different case types impose.

The present effort is not an adequate basis for developing weighted caseloads; indeed, it focuses primarily on administrative appeals. It contributes, though, both to the development of more refined and objective criteria of burden and to an understanding of the nature and sources of burdens. It provides significant thought to the conceptualization of the problem of appellate workload, and it invites reconsideration, by the judges themselves, of the steps involved in appellate decision making and of their relative burdens. The criteria some judges thought most helpful in 1977 may not prove adequate for the problems of the mid-1980s.

The study measured two types of "burden": input burdens, such as the number of briefs, and output burdens, such as the number of written opinions. The research team used several indexes of both types of burden, but in both cases, it bears emphasis, the source of the criteria was the judges themselves, as expressed in their responses to the earlier Center study on appellate case weights. Of course, there are limits to what these measures can tell us about the burdens cases impose on judges. The most obvious is that the quantitative indexes of burden do not necessarily mirror qualitative burden. To count the number of pages in a brief is not to measure the intellectual difficulty of the pages' content. For the immediate needs that spawned this research, however, it was not thought wise to impose upon the judges for the help necessary to measure those qualitative burdens.

The report produced no startling conclusions with respect to the widely perceived fact that administrative appeals are indeed far more burdensome than the "ordinary" appellate case. Empirical research is most striking when it calls into question a tenet of the conventional wisdom. Research also serves a valuable purpose when it offers support to a commonly accepted view, indicating to policymakers that their impressions are supported by more than their own personal experience. The critical test of empirical research, however, is not whether it proves or disproves a popular assumption. The test is whether it knowledgeably selects the hypoth-

eses to be tested, carefully defines the variables to be measured, subjects the data to appropriate analysis, and appreciates the limits of the findings.

It is not surprising that the findings of the research support the basic hypothesis: On nearly every measure, agency cases imposed a greater input burden than other cases. The differences in output burdens between agency cases and other types of cases were less dramatic. As the report notes, "this difference complements our expectations about the work of judges and the influence of judicial discretion in deciding the kinds of cases that warrant close attention and the publication of decisions." The finding is rendered no less important by the relative decline in such cases on the courts' dockets.

Finally, the report analyzes a select group of very large cases thought to present extreme burdens; it offers evidence on the comparative magnitude of the burden these cases present.

The value of this report, as noted, is not that it upsets any preconceived notions as to the relative burden of agency cases and other cases. It is valuable, however, to know that nothing in this carefully executed research gives fundamental challenge to that assumption. It is also important to know that this research has addressed the difficult, albeit seemingly mundane, problems of advancing the process of defining how case burden might be measured and analyzed.

A. Leo Levin

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EXECUTIVE SUMMARY

The mix of cases appearing in the United States Court of Appeals for the District of Columbia Circuit differs markedly from the case mix of other United States courts of appeals. The case mix for the D.C. Circuit is characterized by a large proportion of cases from administrative agencies and other U.S. civil cases, which appear to present the court with an unusually demanding caseload. The purpose of this report is to assess the relative size of the materials in these cases using objective, quantitative indexes and to discuss the possible implications of the research findings for improving our understanding of court burden.

It is not a simple matter to prove that some case types are more burdensome than others. The term *burden,* whether used in reference to the work required of the panel of judges or that of supporting staff, has not been standardized for cases in the courts of appeals. And for any measure of burden, there will be overlap between case types, so that the assessment of differences between them will depend on statistical analysis.

This study is based on the assumption that burden is correlated with, though not defined by, measurable indexes of case size. The use of quantitative indexes allows us to make comparisons between various aspects of case size for different case types with specified degrees of confidence. Our assumption of a correlation between case size and burden does not imply that the variation in burden is equal to the variation in case size. Such an inference would be totally unwarranted because many elements other than case size probably affect burden at least as much as and possibly more than the case-size elements we have measured.

As an initial step toward conceptualizing burden, we distinguished between input and output burdens. *Input burden* refers to the material coming into the court for judicial consideration. We assumed that input burdens are the product of appellants and appellees. By contrast, *output burden* refers to the court's measurable response to the input. We assumed that the court exercises more control over this aspect of its workload than it does over input.

Building upon the above distinction, we considered quantitative indexes of case size that relate to input and output. Again, vari-

ations in input and output indicators of case size were expected to be correlated with, but not necessarily equal to, burden. Thus, the number of issues presented by the appellant and the length and variety of materials presented by the appellant and appellee to support their respective positions are all *input indicators* of case size that should, in most instances, also be indicative of the relative input burdens of the court. On the other hand, the type and length of a court's decision in a particular case are *output indicators* of case size that should, again in most instances, be indicative of the court's output burdens.

The focus of this study was 100 cases sampled from the population of 513 cases in the D.C. Circuit that terminated in fiscal 1980 after submission on briefs or oral argument. The number of cases sampled in each of five case types (administrative agency, U.S. civil, private civil, criminal, and other) was in proportion to the rate of appearance of each case type in the population of 513 cases. The records, briefs, and published opinions from each case were coded to reflect the burden the case placed on judicial and administrative staff. Indicators of input burden included number and aggregate length of briefs, number of issues and case citations in the appellant's lead brief, and the size of joint appendixes submitted in lieu of the complete record. Similar measures were used to assess the court's responses to these input burdens, for example, length of the published opinion, number of citations in the opinion, and whether the opinion was signed or per curiam.

Four additional cases were selected for analysis from a longer list of cases, provided by the clerk's office, that contained the most burdensome cases recently before the D.C. Circuit. The profiles of these cases were compared with the profiles obtained from our larger sample of 100 cases. In this way the size of the most burdensome cases could be compared with the size of cases drawn at random from the court's terminations.

The results of the study demonstrate that administrative agency cases, and to a slightly lesser extent, U.S. civil cases, often confront the D.C. Circuit with massive sets of material for judicial action. Agency cases involve, on the average, five lawyers and five briefs. They are more likely than other case types to involve an intervenor or amicus brief, long aggregate records on appeal, and protracted, motion-filled postdisposition periods. The findings of this study provide strong statistical evidence that agency cases are larger and therefore more burdensome, in terms of input to the court, than other case types. However, our findings for output indicators of case size are somewhat less striking in terms of differences across the sampled case types. That is, differences between case types in

output burdens are not as clear-cut. For example, criminal cases, as compared with other case types, can require large expenditures of court time and effort.

I. INTRODUCTION AND BACKGROUND

The mix of cases appearing before the United States Court of Appeals for the District of Columbia Circuit differs markedly from the case mix of the other United States courts of appeals. The D.C. Circuit's caseload includes a large number of direct appeals from administrative agencies ("agency cases") and other civil appeals in which the federal government is a party ("U.S. civil cases"), but relatively few criminal cases. Between 1976 and 1980, for example, agency cases and U.S. civil cases accounted for between 73 percent and 80 percent of annual filings in the D.C. Circuit. In the other circuits, for example, the Sixth Circuit, these types of cases constituted no more than 38 percent of the annual filings.[1]

Several factors contribute to the large number of agency and U.S. civil cases in the D.C. Circuit. The most obvious is the location of the court at the seat of the federal government. In addition, the D.C. Circuit has been given exclusive jurisdiction in cases arising under several federal statutes. (A list of the exclusive and shared jurisdictions of the court is provided in appendix A.)

In contrast to its agency and U.S. civil caseload, the D.C. Circuit has few criminal cases. During fiscal 1980, for example, the D.C. Circuit had fewer criminal filings than any other circuit, even though it ranked eighth in the eleven circuits in total filings. Since 1970, when jurisdiction over D.C. Code offenses was removed from the United States courts, the criminal jurisdiction of the United States Court of Appeals for the District of Columbia Circuit has been limited to federal violations in the District's population of fewer than 700,000 persons, which is considerably smaller than the population served by any other federal circuit court. The population served by the Tenth Circuit, for example, was greater than eleven million in 1979.[2]

There are reasons to suspect that, in general, the judicial and administrative burdens produced by agency and U.S. civil cases are greater than the burdens associated with private civil or criminal

1. Administrative Office of the United States Courts, 1976-1980 Annual Reports of the Director at table B-1.

2. World Almanac and Book of Facts (Newspaper Enterprise Ass'n ed. 1981) (published for the Washington Star).

cases. This point was highlighted by Chief Judge Spottswood W. Robinson III in his opening remarks to the 1981 Judicial Conference of the District of Columbia Circuit:

> A great number of these cases present highly complex issues, and correspondingly a built-in difficulty factor several times that possessed by an ordinary appeal. In our own experience we have found that a large proportion of these cases are ten times as demanding as run-of-the-mill litigation.

Chief Judge Robinson's mention of a factor of ten may have had reference to a 1977 staff paper by the Research Division of the Federal Judicial Center.[3] In that study, judges from three circuit courts of appeals estimated the burdens imposed on them by cases of several types, relative to the burden imposed by a "base case." For judges in the D.C. Circuit, the base case was the "typical" direct criminal appeal.[4]

Table 1, an abridgment of table I in the Center's 1977 report, shows the burdens assigned to twenty-four case types according to a consensus among judges in the D.C. Circuit. Types 3 (Power, Transportation, and Communication Cases), 4 (Health, Safety, and Environment Cases), 5 (Other Regulatory Agency Cases), 10 (Antitrust Cases), and 18 (Suits Challenging Validity of Action or Inaction of Federal Agencies or Officials), which include three classes of agency cases, a major category of U.S. civil cases, and antitrust cases, were all assigned a burden rating of approximately 10, relative to the typical direct criminal appeal. Note, however, that not all agency and U.S. civil cases were rated as very burdensome: National Labor Relations Board (NLRB) appeals (case type 2), for example, received a rating of 2.8, and some forms of U.S. civil cases were given a rating of 4.0 or less.

Because not all agency cases are estimated to produce the same amount of burden, it is important to know the mix of agency cases in the D.C. Circuit. During fiscal 1980, for example, 660 agency cases were filed in the court. The frequency of each agency case type is shown in table 2 in decreasing order.

Tables 1 and 2 demonstrate that a very large proportion of the agency cases filed in the D.C. Circuit are from agencies whose work creates the largest judicial burdens: agencies concerned with power (energy), transportation, communication, health, safety, and the en-

3. Appellate Court Caseweights Project (Federal Judicial Center 1977).
4. *Id.* at 8.

TABLE 1
Case-Type Burdens as Estimated by Judges in the United States Court of Appeals for the District of Columbia Circuit

Case Type	Burden
1. Tax Court of the United States Cases	2.8
2. NLRB Cases	2.8
3. Power, Transportation, and Communication Cases	10.1
4. Health, Safety, and Environment Cases	9.9
5. Other Regulatory Agency Cases	9.3
6. Original Proceedings	2.7
7. Civil Rights Cases	4.5
8. Prisoner Actions Other Than Collateral Attack	2.8
9. Labor Cases	3.8
10. Antitrust Cases	9.6
11. Patent Cases	4.0
12. Copyright, Trademark, and Unfair Trade Practices Cases	4.0
13. Bankruptcy Cases	3.3
14. Tax Suits	4.0
15. Securities, Commodities, Exchanges, and Stockholder Actions	4.5
16. Injury Actions by Marine and Railway Employees	3.6
17. Other Marine Actions	4.0
18. Suits Challenging Validity of Action or Inaction of Federal Agencies or Officials	9.6
19. Other Civil Actions Based on Federal Statutes	4.0
20. Other Civil Actions with United States as Plaintiff	3.5
21. Diversity Actions	2.8
22. Direct Criminal Appeals	1.0
23. Collateral Attacks	1.2
24. Freedom of Information Act Cases	6.4

SOURCE: Appellate Court Caseweights Project at table I (Federal Judicial Center 1977).
NOTE: The base case, with a weight of 1, is the direct criminal appeal.

vironment. NLRB cases, which are relatively less burdensome, are not major contributors to the agency caseload of the D.C. Circuit.

When the agency case filings in all eleven circuits are considered, the D.C. Circuit received 22.4 percent of all agency cases filed in the nation during fiscal 1980 (660 of 2,950). The proportion of cases filed in the D.C. Circuit by agencies with typically burdensome cases was even larger. Of course, the exact figure will vary according to the choice of agencies to be included in the count. Using one plausible list of thirteen agencies, we found that the pro-

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TABLE 2
Number of Administrative Agency Cases Filed in the D.C. Circuit for the Twelve-Month Period Ended June 30, 1980

Agency	Filings
Federal Energy Regulatory Commission	122
Interstate Commerce Commission	113
Federal Communications Commission	112
Environmental Protection Agency	65
National Labor Relations Board	36
Civil Aeronautics Board	27
Food and Drug Administration	21
Occupational Safety and Health Administration	13
Internal Revenue Service	11
Nuclear Regulatory Commission	9
Benefits Review Board	7
Federal Aviation Administration	5
Securities and Exchange Commission	5
Department of Agriculture	4
Department of Labor	4
Federal Energy Administration	3
Federal Reserve System	3
Department of Commerce	2
Immigration and Naturalization Service	2
Other agencies	96
Total	660

SOURCE: Administrative Office of the United States Courts, 1980 Annual Report of the Director at 48, table 5.

portion of "high-burden agency" cases filed in the D.C. Circuit was 45.3 percent.[5]

An additional factor that should be noted in the assessment of court burden is that we are examining a dynamic, not a static, process. Thus, whole new areas of regulation, and therefore appeals, may emerge as a result of the actions of Congress. For example, it is not unreasonable to assume that a case involving an environmental dispute, a type of case that was rated relatively burden-

5. A *high-burden agency* is a designation we have coined on the basis of the judges' observations of their workloads. Each of the thirteen agencies is listed here, followed by a fraction that represents the proportion of all appellate filings by that agency that were made in the D.C. Circuit: Civil Aeronautics Board (27/39), Department of Health, Education, and Welfare (0/3), Department of Transportation (0/4), Environmental Protection Agency (65/191), Federal Aviation Administration (5/16), Federal Communications Commission (112/127), Federal Coal Mine Safety Board (1/3), Food and Drug Administration (21/29), Federal Energy Administration (3/4), Federal Energy Regulatory Commission (122/275), Interstate Commerce Commission (113/274), Nuclear Regulatory Commission (9/16), Occupational Safety and Health Administration (13/102). Administrative Office of the United States Courts, 1980 Annual Report of the Director at 48, table 5.

some by the sampled judges in 1977, would have been nearly nonexistent had the same survey been taken fifteen years earlier. This suggests that developing measures of burden is difficult because of the shifting nature of both a court's caseload, particularly as it relates to administrative matters, and policies that are developed in areas far beyond a court's control. It was, in part, for this reason that we developed a more in-depth profile of the D.C. Circuit's agency cases and present those findings in a separate chapter (see chapter five *infra*).

These background data, nevertheless, lend credence to the claim that the D.C. Circuit faces an unusually large proportion of relatively burdensome cases when burden is assessed by judges. There are, however, additional avenues for examining the relative burden of cases. To this end, we will also examine the elapsed time of the court's various case types. In the next section we will consider the fate of cases filed in fiscal 1979 as of January 31, 1981. It should be noted that we recognize that this represents a somewhat arbitrary time frame. Thus, in a subsequent section we will examine the elapsed time of the court's fiscal 1980 terminations by case type.

The Fate of Filings in the D.C. Circuit, Fiscal 1979

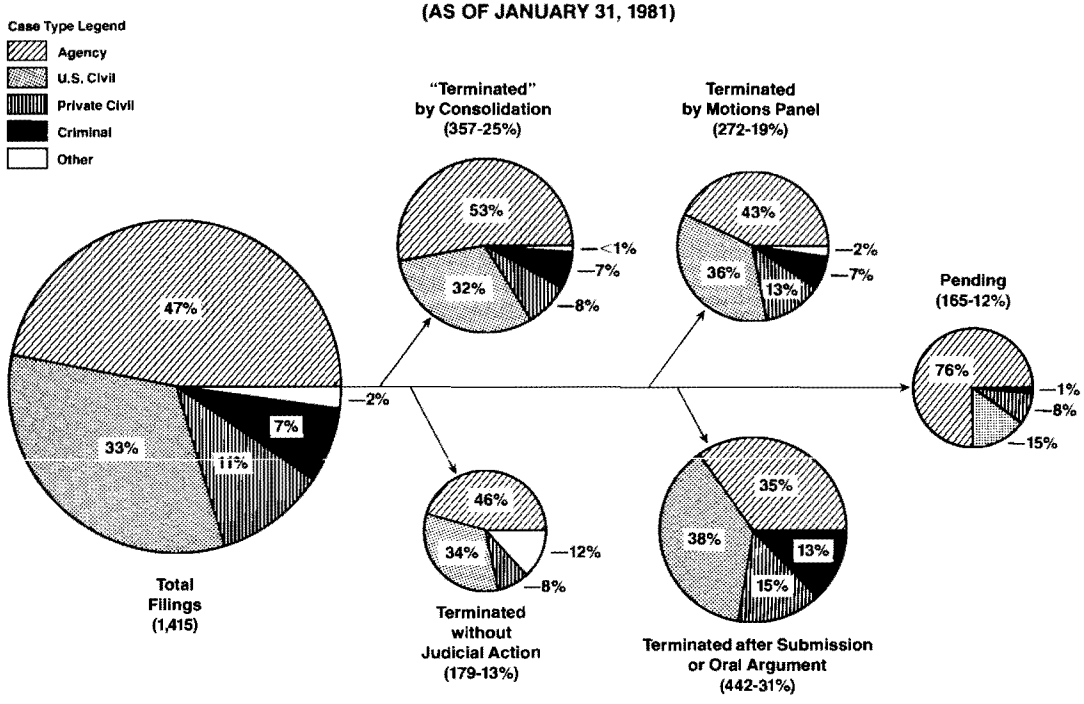
One would expect that the duration of a case (the elapsed time from filing to termination) would be longer for burdensome cases than for others. If agency cases, in particular, are more burdensome, then the time required to dispose of them should be greater than the time required for other case types. Support for this conclusion is provided in figure 1, which shows the status of all cases filed in the D.C. Circuit during fiscal 1979, as of January 31, 1981. The large pie chart on the left-hand side of the figure represents the 1,415 filings during fiscal 1979. The separate sections of the chart represent the proportion of filings for each of five case types; for example, agency cases were 47 percent of the total filings, and criminal cases were 7 percent.[6] Each of the other pie charts in the figure, with areas in proportion to the number of cases they represent, describes the status of cases filed in fiscal 1979.

Pending Cases

The pie chart on the far right of figure 1 shows the mix of case types still pending nineteen months after the end of the fiscal year

6. These figures are based on data, corresponding to the information captured on the court of appeals docket report (Form JS-34), supplied by the Administrative Office of the United States Courts.

FIGURE 1
U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT: STATUS OF APPEALS FILED IN FISCAL 1979
(AS OF JANUARY 31, 1981)



SOURCE: Based on data, corresponding to the information captured on the court of appeals docket report (Form JS-34), supplied by the Administrative Office of the United States Courts.

of filing. If all case types proceeded through the appellate system at the same rate, the proportion of each case type pending after nineteen months should equal the proportion of filings by that case type. But the pending caseload clearly does not reflect the same composition as the total filings caseload. Of the pending appeals, 76 percent are agency cases, whereas only 47 percent of the total filings are agency cases.

Thus, agency cases move more slowly through the system than do other types of cases. This finding suggests that these cases take longer to dispose of, are more difficult, and therefore, are more burdensome than other types of cases. U.S. civil cases, on the other hand, constituted 33 percent of the fiscal 1979 filings but only 15 percent of the pending caseload at the end of January 1981.[7] These cases thus appear to take less time than other types of cases, suggesting that they are, by and large, less burdensome.

Cases "Terminated" by Consolidation

One-fourth of all filings were "terminated" by consolidation (or cross-appeal). However, "termination" by consolidation must be understood as an administrative convenience rather than a reflection of the final disposition of a controversy. In agency cases, in particular, the chief staff counsel in the D.C. Circuit is active in promoting consolidation among parties with similar claims against an agency.[8] Of the 357 cases "terminated" by consolidation, slightly more than half were agency cases. The judicial effort saved by disposing of numerous separate cases with one decision and written opinion, especially when the issues are numerous and technical, must not be underestimated. For example, consolidation eliminates the possibility that different judicial panels will have to hear essentially identical claims against the same agency or private party. Consolidation can also reduce the burden on parties, in that the brief for the lead case may sometimes be used to argue all the issues for some of the consolidated cases as well.

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7. The accuracy of the analysis requires that all case types are filed at approximately the same rates during the year. If a large proportion of agency cases were filed very late in fiscal 1979, the conclusion drawn here could be wrong. Therefore, we examined the filing dates for all cases filed in fiscal 1979. We discovered that filing rates were reasonably constant for all case types throughout the year. For example, in the first six months of the year, 50.8 percent of the agency cases and 52.1 percent of the U.S. civil cases were filed. Thus, the findings are not due to different rates of filing throughout fiscal 1979.

8. The position of chief staff counsel in the D.C. Circuit's Civil Appeals Management Plan is central to the court's efforts to smooth the flow of burdensome cases through the court. A full discussion of this function is beyond the scope of this report.

Cases Terminated without Judicial Action

The second category of terminations, cases terminated without judicial action, comprises terminations resulting from consent decrees; dismissals by the clerk of court, acting as the court's representative pursuant to local rules; settlements out of court; and other dispositions, such as terminations for failure to pay filing fees, to prosecute the appeal, or to comply with federal or local regulations.[9] This is the smallest category of terminations, accounting for only 13 percent of all filings, none of which was a criminal case. Cases terminated without judicial action are not considered further in this report. They may deserve study in a fuller treatment of case burden, however, because of the effort required by court staff, law clerks in particular, to bring them to termination.

Cases Terminated by the Motions Panel

Another category of terminations is cases terminated by the motions panel. Service on the court's motions panel is an assignment rotated among the judges on a weekly schedule. The judges are aided in this work by a small group of law clerks (staff attorneys), who prepare memorandums pertaining to substantive motions or related matters. The various case types were terminated by actions of the motions panel in proportions very close to their proportions in total filings. Of all filings, 19 percent were terminated by one or more judges on the motions panel.

Cases Terminated after Submission on Briefs or Oral Argument

Terminations after submission on briefs or oral argument to a three-judge panel accounted for 31 percent of all filings. The proportion of agency appeals in this category appears to be relatively small. This figure must be interpreted with care, however, for two reasons. First, agency cases are frequently consolidated for judicial action. The number of cases terminated after submission or argument reflects "lead cases" only,[10] and other cases whose merits are

9. Administrative Office of the United States Courts, Guide to Judiciary Policies and Procedures: Statistical Analysis Manual, vol. X-19 (transmittal 30, Nov. 14, 1980). As written, the scope of the clerk's authority to terminate cases and distinctions between some of the disposition categories are unclear.

10. As used here, *lead case* refers to "[t]he single case of a group of appeals joined for the purpose of briefing, oral argument (or submission on briefs) and opinion, which is designated by the clerk as the lead case for the group. . . . Designation of the lead case is for statistical purposes only." Administrative Office of the United States Courts, Guide to Judiciary Policies and Procedures: Statistical Analysis Manual, vol. X-22A (transmittal 31, Jan. 26, 1981).

finally decided by the same action are counted as terminated by consolidation. Second, a substantial proportion of the pending agency appeals will finally be terminated after full judicial review; the proportion shown here represents the cases that were terminated between the time of filing and the time of our investigation.

Together, these factors suggest that it would be a mistake to assume that the percentage of agency cases terminated after submission on briefs or oral argument, shown in the pie chart in figure 1, reflects the actual percentage of agency cases that are acted on by a full panel of judges in the court. This point is underscored as we turn to an examination of the court's terminations by case type for fiscal 1980.

Terminations in Fiscal 1980

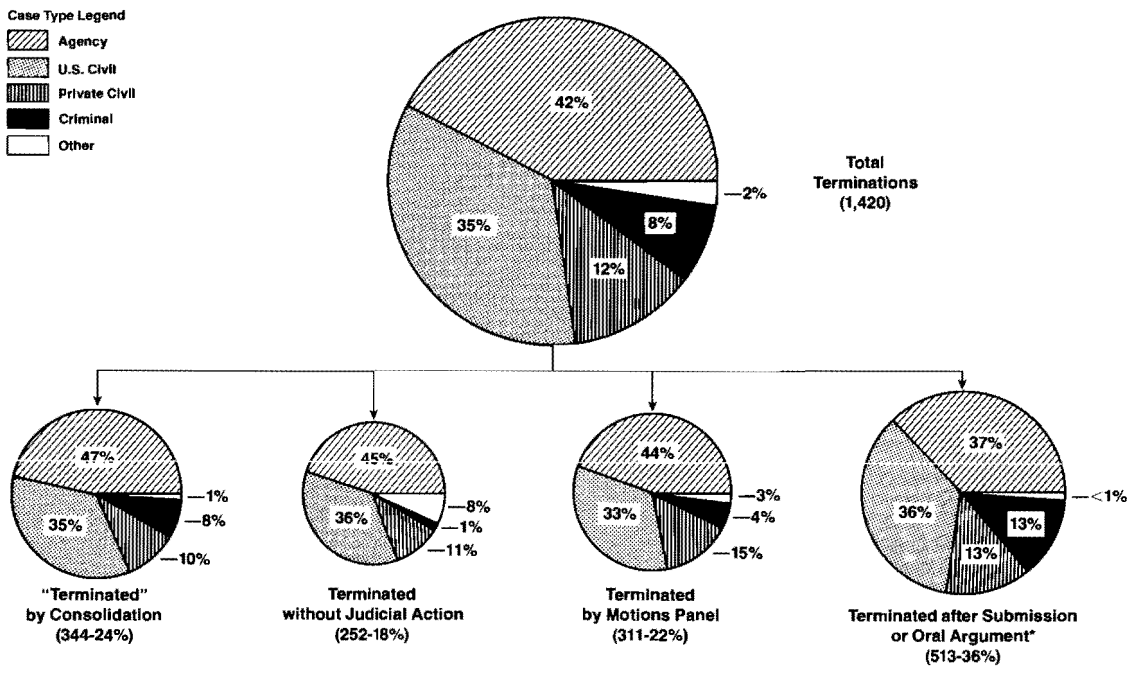
As an alternative perspective, we considered the court's caseload from the vantage of hindsight. By examining the court's terminations for a single year, we gained information unavailable from the focus on filings.

Figure 2 displays terminations in the D.C. Circuit during fiscal 1980. A comparison of this figure and figure 1 reveals that the rate of "termination" through consolidation remains the same and that it is the only mode of termination that does. Figure 2, then, shows the proportion of cases disposed of without judicial action (18 percent), by a motions panel (22 percent), and after submission on briefs or oral argument (36 percent), but does not take into account the effect of consolidations on these methods of disposition.

Terminations of Consolidated Cases

To gain further insight into the effect of consolidation on the disposition of cases, we distributed the consolidated cases into their final mode of disposition. We considered consolidations as a subset of cases that will eventually be terminated without judicial action, before a motions panel, or after submission on briefs or oral argument. Table 3 shows the actual mode of disposition of the 344 consolidations that were terminated in fiscal 1980. The data in the table indicate that most consolidations (70.3 percent) were actually disposed of after submission on briefs or oral argument. Although the proportion of criminal consolidations disposed of by a full panel (93 percent) is much larger than the proportion for all case types, the small number of criminal cases involved ($n=27$) softens the impact on the overall average.

FIGURE 2
U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT: FISCAL 1980 TERMINATIONS



SOURCE: Based on data, corresponding to the information captured on the court of appeals docket report (Form JS-34), supplied by the Administrative Office of the United States Courts.
*The sample of 100 cases was drawn from this subgroup in the indicated proportions.

TABLE 3
Fiscal 1980 Terminations: Actual Disposition of 344 Consolidated Cases

Mode of Disposition	Agency	U.S. Civil	Private Civil	Criminal	Other	All Cases
Without judicial action	14	17	3	0	0	34
By motions panel	36	13	15	2	2	68
After submission on briefs or oral argument	110	90	16	25	1	242
Total number of cases	160	120	34	27	3	344

Terminations of All Cases (Including Effect of Consolidations)

The full implications of the effect of disposition of consolidated cases on case terminations in fiscal 1980 can be gleaned from a comparison of the findings shown in table 4 with those shown in figure 2. Figure 2 indicates that of all terminations in fiscal 1980, 36 percent were disposed of after submission on briefs or oral argument. However, table 4, incorporating the effect of distributing consolidated cases to their respective points of termination, shows that terminations after submission on briefs or oral argument represented 53 percent of total terminations. This difference is explained by the fact that almost 50 percent of the consolidated cases were agency actions, and that of those, more than two-thirds were eventually terminated through oral argument or submission on briefs. Put differently, it can be concluded from these findings that most consolidations arise within the agency caseload and are eventually adjudicated by a three-judge panel.

Presumably, disposition of consolidated cases is more burdensome than disposition of any single case within the consolidation but less burdensome than the sum of burdens of disposing of each case individually. An interesting question is how burden grows with the addition of more cases in consolidation. If burden decreases with increasing numbers of cases in a consolidation, then a good strategy would be to make consolidated actions as large as feasible. If, on the other hand, burden increases with additional cases, then some optimal number of cases for consolidation would need to be sought.

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TABLE 4
Fiscal 1980 Terminations: Mode of Disposition after Distributing Consolidations

Mode of Disposition	Agency	U.S. Civil	Private Civil	Criminal	Other	All Cases	Percentage of Total Terminations
Without judicial action	127 (21%)	107 (21%)	30 (17%)	2 (2%)	20 (59%)	286	20%
By motions panel	174 (29%)	116 (23%)	63 (36%)	15 (14%)	11 (32%)	379	27%
After submission on briefs or oral argument	300 (50%)	275 (55%)	84 (47%)	93 (85%)	3 (9%)	755	53%
Total number of cases	601	498	177	110	34	1,420	
Percentage of total terminations	42%	35%	12%	8%	2%		

Age of Cases

The significance of these findings is enhanced by relating them to the ages of the cases that are involved. Given all the evidence presented so far, particularly regarding the apparent burden of agency cases, we would expect to find a disproportionate share of old agency cases. Examination of table 5 shows this to be true when agency cases are compared with other civil cases. It is not true, however, when agency cases are compared with criminal terminations. Slightly more than 23 percent of agency terminations had been filed in fiscal 1978 or before, but approximately 29 percent of all criminal terminations had been filed during that time period. This finding appears to be inconsistent with the general expectation that criminal cases receive expedited treatment.

Further investigation revealed that one of the criminal cases was terminated by a hearing en banc of a matter that had been given considerable judicial attention, in various forms, since it was originally filed in 1972.[11] In addition, six of the cases were consolidated into two groups of three cases each, even though the same appellants were in each set and the cases were decided on the same day by the same panel. This suggests that the six cases could legitimately be viewed as only two and perhaps as only one. Ten more cases had been grouped into three consolidations; without further investigation of these cases, and of the fifteen other criminal cases,

11. United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1976), filed initially in 1972, en banc judgment entered 1979. By chance, this case reappeared in our sample of 100 cases.

TABLE 5
Number of Cases Terminated in Fiscal 1980
by Filing Year and Case Type for the D.C. Circuit

Year of Filing	Agency	U.S. Civil	Private Civil	Criminal	Other	All Cases
FY 77[a]	28	6	4	6	0	44
	(4.7%)	(1.2%)	(2.3%)	(5.5%)	(0.0%)	(3.1%)
FY 78	111	53	18	26	2	210
	(18.5%)	(10.6%)	(10.2%)	(23.6%)	(5.9%)	(14.8%)
FY 79	284	224	77	39	9	633
	(47.3%)	(45.0%)	(43.5%)	(35.5%)	(26.5%)	(44.6%)
FY 80	178	215	78	39	23	533
	(29.6%)	(43.2%)	(44.1%)	(35.5%)	(67.6%)	(37.5%)
Total	601	498	177	110	34	1,420
	(42.3%)	(35.1%)	(12.5%)	(7.7%)	(2.4%)	

[a]Cases filed prior to fiscal 1977 are also included in this category.

there is no way to determine why they were not terminated before 1980. We return to the question of elapsed time for the disposition of the various case types in chapter three.

The background information presented above, which was obtained from data available in published form or on Administrative Office data tapes, is consistent with the conclusion that agency cases in the D.C. Circuit raise unusually difficult problems of administration and disposition. In this study, we attempted to measure indicators of case size, which we assumed to represent a preliminary array of quantitative surrogates of court burden imposed by cases in the D.C. Circuit. These indicators were found in the dockets, briefs, records, and published opinions associated with a sample of 100 cases that terminated in the D.C. Circuit in fiscal 1980.

As shown in figure 2, our sample of 100 cases was taken from the total of 513 that terminated after submission on briefs or oral argument in fiscal 1980. Each of the five case types was sampled in proportion to its presence in this population: thirty-seven agency cases, thirty-six U.S. civil, thirteen private civil, thirteen criminal, and one "other."[12]

In addition, we examined four cases, selected from a list provided by the court, that have been among the most burdensome in the court's recent history. The following chapters discuss our research methods and findings.

12. Note that these proportions reflect terminations exclusive of the effect of consolidations shown in table 4. The data are presented in this manner so as to eliminate sampling error resulting from the selection of the same case twice.

II. RESEARCH METHODS

Our major methodological assumptions were that the various documents remaining in the courthouse, or appearing in the official reporters after a case has terminated, contain information that can be transformed into valid quantitative indicators of case size and that case size is one useful and valid indicator of case burden. Operating on these assumptions, we developed measures of case size for 100 cases. We were guided by the results of the Center's 1977 study on appellate case weighting.[13] In that study, judges from three circuits rated the adequacy of several indicators of burden.

Table 6 lists these indicators in the order of the adequacy ratings given them by judges in the D.C. Circuit in 1977. The scores are the average values given each indicator on a scale from zero to ten. A score of zero meant that the indicator was thought to be useless; a score of ten meant that the indicator was judged to be perfectly correlated with burden. These ratings must be interpreted with caution. The numbers rank the indicators in order of their perceived importance; they do not specify anything precise about the relative distances between them.

Indicators Used in the Study

The asterisks in table 6 identify indicators that were used, sometimes with modification, in this study (see also appendix B *infra*). The indicators fall into two general categories: indicators of *input* to the court and indicators of *output* from the court. The categories are distinguished by the degree of control the court is able to exercise over them. For example, the court has more control over the length of its own publications than it does over the number of issues raised in briefs. Granting oral argument is within the court's control; the presence of the United States as appellant is not. The distinction is obvious enough; we raise it to emphasize that these indicators of burden (i.e., case size) are not all of the same kind or practical value. Also, although the indicators were rated in the earlier study, they were not tested or used in an analysis of actual

13. Appellate Court Caseweights Project, *supra* note 3.

TABLE 6
Average Adequacy Values for Indicators of Case Burden

Rank	Indicator	Value
1	Petition granted for en banc review*	8.8
2	Procedural stage at termination of appeal*	8.0
3	United States as appellant [cf. no. 16 below]*	7.7
4	Type of disposition (whether signed, per curiam, etc.)*	6.9
5	Length of disposition (number of pages, with oral dispositions given page equivalents)*	6.8
6	Aggregate length of all concurring or dissenting opinions*	6.6
7	Presence of concurring or dissenting opinions*	6.4
8	Aggregate length of all filed briefs*	6.3
9	Number of issues presented in briefs*	6.2
10	Number of motions disposed of with hearing*	6.0
11	Time used in oral argument	5.9
12	Number of cross-appeals	5.9
13	Type of counsel (retained, appointed, house, pro se, etc.)	5.4
14	Presence of opinion from district court	5.3
15	Number of amicus briefs filed*	5.2
16	United States as party [cf. no. 3 above]*	5.2
17	Number of parties before the appellate court*	5.2
18	Length of appendixes from district court*	4.5
19	Nature of relief sought in trial court (e.g., money damages, injunction)	4.2
20	Number of citations in all opinions (excluding repetitions)*	3.6
21	Number of citations in all opinions (including repetitions)	3.0
22	Petition for en banc review	1.7

SOURCE: Appellate Court Caseweights Project at table III (Federal Judicial Center 1977).
*Adapted for this study.

cases; they were the subjective estimates of experts. When put to use, some of them present measurement problems (see appendix B *infra*).

The indicators listed in table 7 provide the basis for this study. Note that we added two indicators of burden to those shown in table 6; they are duration of postdisposition period and number of postdisposition motions. The indicators were defined as follows:

1. The *number of lawyers* in a case is the sum of different legal representatives in a case as indicated on the docket. Attorneys from each office were treated as a separate unit; there-

TABLE 7
Indicators Used in the Study

I. Indicators of Input Burden

1. Number of lawyers
2. Number of briefs (appellant, appellee, cross-appellant, amicus, intervenor)
3. Aggregate length of briefs
4. Number of issues in briefs
5. Number of case citations in briefs
6. Form of record on appeal
7. Aggregate length of record on appeal
8. Duration of a case
9. Duration of postdisposition period
10. Number of postdisposition motions
11. Presence of United States government as a party

II. Indicators of Output Burden

12. Form of opinions
13. Number of opinions
14. Aggregate length of opinions
15. Number of citations in opinions

fore, two attorneys representing the Justice Department were counted as one.

2. The *number of briefs* is the sum of all possible types of briefs in a case, including appellant, appellee, cross-appellant, amicus, or intervenor.

3. The *aggregate length of briefs* is the sum of pages of all briefs filed in a case. (Page standardization is discussed in appendix B.)

4. The *number of issues in briefs* is the total number of legal questions presented in the lead brief of the appellant. (See appendix B for a discussion of the relationship between the number of appellants' and number of appellees' issues.)

5. The *number of case citations in briefs* is the number of court decisions discussed in the lead brief of the appellant. The count included citations to court cases only.

6. The *form of record on appeal* is the presence or absence of either a transcript or a joint appendix from the lower court or agency.

7. The *aggregate length of the record on appeal* is the total number of pages of all transcripts and joint appendixes filed in a case. (Page standardization is discussed in appendix B.)

8. The *duration of a case* is the number of calendar days from docketing in the court of appeals to date of final judgment.

9. The *duration of the postdisposition period* is the number of calendar days from the date of final judgment to the last date on the docket.

10. The *number of postdisposition motions* is the number of actions requested by the parties to a case after the final date of judgment as reported on the docket sheet. (Administrative or court-initiated docket items were not counted.)

11. The *presence of the United States government as a party* to a case refers to the government's presence as either appellant or appellee. (The appearance of the United States attorney representing a third party or intervenor was not considered in determining this item.)

12. The *form of opinions* is the form of the judgment (signed opinion, per curiam opinion, or memo order) as well as its publication status (published in official reporter, slip opinion, not published). In the case of published opinions, the form of opinions may also include dissenting and concurring opinions.

13. The *number of opinions* is the sum of all opinions, dissents, and concurrences in published opinions.

14. The *aggregate length of opinions* is the number of pages in all published opinions for a given case, including dissents and concurrences when they occur.

15. The *number of citations in opinions* is the number of unique citations per opinion per case. (The number of different citations in an opinion of the court was counted separately from the number of different citations in a concurrence or dissent.)

A Note on Statistical Method

Much of the discussion in the following chapters centers on apparent similarities and differences between case types, based on our sample of 100 cases. The question arises, How confident can we be that the results obtained from our sample fairly represent the

entire population? This section describes the rationales we have employed in answering that question.

To begin, we should be explicit about what the total population of interest is. For purposes of this study, it is the cases of the D.C. Circuit only. We make no claim that cases within a case type in the D.C. Circuit are equivalent to cases in that case type in other circuits. In fact, given the results of the 1977 appellate case weights study,[14] we have reason to believe that agency cases in the D.C. Circuit are, on the average, more burdensome than agency cases in at least some other circuits, and it may be that some other case type, for example, criminal, is, on the average, less burdensome in the D.C. Circuit than it is in other circuits. None of our comparisons should be taken to imply conclusions about similarities or differences among the twelve circuit courts of appeals.

Because so much of the interest in and prior discussion of the D.C. Circuit's caseload has centered on the burden of agency cases, we have focused our statistical analysis on that case type. Our primary statistical technique was to test the differences in average values of the various indicia of burden between agency cases and all other case types considered as a group.[15] What the analysis provides is a measure of the reliability of our result; that is, the observed difference between agency cases and other types of cases is not simply due to the luck of our draw of those 100 cases from the fiscal 1980 terminations after submission on briefs or oral argument.

The small size of the sample produces a conservative effect on the statistical outcomes. In sampling only 100 cases, we run the risk of incorrectly dismissing observed differences between agency cases and the other cases.[16] Note also that we dropped our single case in the category of "other," a bankruptcy case, from all statistical analyses; however, we include information about it in the descriptive tables.

The tables in the following chapters also report the minimum and maximum values for the variables used in this study. An im-

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14. *Id.*

15. For a description of the procedure used, see N.N. Nie, C.H. Hull, J.G. Jenkins, K. Steinbrenner, & D.H. Bent, Statistical Package for the Social Sciences 425-26 (1975). The specific statistical method employed was an a priori contrast (reported as a t statistic) accompanying an analysis of variance; the specific means contrasted are reported. Because our analysis was guided by specific theoretical assumptions, we have reported one-tailed probability estimates. Also, depending on the results of tests of the homogeneity of variance, either pooled or separate variance estimates are cited.

16. For a fuller account, see J. Cohen, Statistical Power Analysis for the Behavioral Sciences (rev. ed. 1977), in particular 273-88.

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portant goal of this study was to gain some understanding of the effect of extreme cases on the day-to-day burdens of the court; thus, special attention is given to extreme agency cases in chapter five. Recognizing, however, that such extremes are possible in all areas of the court's docket, we report minimum and maximum figures for each case type for each variable.

Before concluding this section, we must remark on the inherent limitations of this approach to the topic of case burden and, in particular, the poor fit between a "case" as defined by a docket number and a "case" as representing the activities of parties and the court to resolve a dispute. Repeatedly in this study we encountered circumstances that made close fits between a single dispute and a single docket number hard to sustain. Consolidations into lead and trailing cases is one example. Different actions in the same general dispute being resolved at different times is another. In some instances, our sampling gave us a docket number that the files showed to be a minor action in a massive litigation. We were concerned about being fair to the complexity of the material before us while retaining the integrity of our sampling technique.

In general, then, the figures given here are probably best seen as low-side estimates of the amount of paperwork and time demanded by cases in the D.C. Circuit. It was partly to remedy this problem that we asked the clerk's office to supply us with a list of the cases the court considered the most demanding. We treat those cases in a separate chapter, in order to paint a more accurate picture of truly huge cases. We analyzed only four of the cases from the list of thirty-three we were provided, but we are confident that the unexamined cases are similarly large.

III. INPUT BURDEN: RESULTS FROM THE SAMPLE OF 100 CASES

This chapter describes measurements of the input burden of the 100-case sample generated from fiscal 1980 terminations in the D.C. Circuit after submission on briefs or oral argument. (A list of the sample cases and their docket numbers, organized by case type, is contained in appendix C.) Overall, we found strong evidence to support the claim that the D.C. Circuit's agency cases are larger than other types of civil and criminal cases. Agency cases tend to have more lawyers, present more and longer briefs, raise more issues, incorporate longer records in the form of transcripts and appendixes, and take longer to be decided. The following discussion details these findings.

Number of Lawyers

There are two reasons to expect that the number of lawyers in agency cases will be larger than it is in other case types. When cases are consolidated into a single action, more lawyers will be active in the case than would otherwise be true. Also, the stakes in many agency cases are very high, as for example when a group of manufacturers sues to reverse an Environmental Protection Agency ruling. With high stakes comes extensive legal representation. Table 8 shows the number of lawyers per case in each of the five case types. Agency cases involved, on the average, approximately five lawyers, twice the average number in criminal cases. An average of approximately four lawyers participated in U.S. civil cases and an average of approximately three lawyers were involved in private civil cases. The findings shown in table 8 are statistically significant.[17]

17. In making this statement, we are asserting that we have rejected the null hypothesis that the observed difference between agency cases and all other case types in the average number of lawyers is an artifact of the sample drawn. In the following sections we simply report whether the findings shown are or are not significant, accompanied by the appropriate statistics reported in the respective tables. The reader should recall that the comparisons reported are based on the contrast between agency cases and U.S. civil, private civil, and criminal cases taken as a group. See pages 18-20 *supra*.

TABLE 8
Number of Lawyers per Case by Frequency of Cases in Each Case Type

Number of Lawyers	Agency	U.S. Civil	Private Civil	Criminal	Other	All Cases
2	7 (19%)	18 (50%)	7 (54%)	10 (77%)	1 (100%)	43 (43%)
3	8 (22%)	7 (19%)	3 (23%)	2 (15%)	0	20 (20%)
4	12 (32%)	3 (8%)	1 (8%)	0	0	16 (16%)
5–9	7 (19%)	6 (17%)	2 (15%)	1 (8%)	0	16 (16%)
10–26	3 (8%)	2 (5%)	0	0	0	5 (5%)
Summary Findings						
Number of cases	37	36	13	13	1	100
Average number of lawyers per case[1]	5.0	3.9	2.8	2.5	2.0	4.0
Minimum number of lawyers	2	2	2	2	2	2
Maximum number of lawyers	26	18	5	6	2	26

[1] $p = .012$; $t = 2.35$; df = 42.6; separate variance estimate; means contrasted: 5.0 and 3.1.

Number of Briefs

Table 9 displays the number of briefs filed in each case type. Included in the count were the briefs of appellants, coappellants, appellees, cross-appellants, amici, and intervenors. There were, on the average, almost five briefs filed for each agency case; the averages for the other case types ranged between three and four. The differences between the aggregate averages are statistically significant.

Intervenors' briefs were the major contributor to the larger number of briefs in agency cases. Nineteen intervenors' briefs and four amicus briefs were filed in the group of thirty-seven agency cases. Among the thirty-six U.S. civil cases, there were two intervenors' briefs and six amicus briefs. The group of thirteen criminal cases contained one brief of each sort; among the thirteen private civil cases, there were none of either type. One cross-appellant's brief was submitted in each of the four case types. The single case

in the "other" category, a bankruptcy appeal, involved no briefs other than those presented by appellant and appellee.

TABLE 9
Number of Briefs per Case by Frequency of Cases in Each Case Type

Number of Briefs	Agency	U.S. Civil	Private Civil	Criminal	Other	All Cases
2	3 (8%)	6 (17%)	2 (15%)	4 (31%)	0	15 (15%)
3	12 (32%)	14 (39%)	9 (69%)	6 (46%)	1 (100%)	42 (42%)
4	7 (19%)	7 (19%)	2 (15%)	1 (8%)	0	17 (17%)
5–9	13 (35%)	8 (22%)	0	1 (8%)	0	22 (22%)
11–13	2 (5%)	1 (3%)	0	1 (8%)	0	4 (4%)
Summary Findings						
Number of cases	37	36	13	13	1	100
Average number of briefs per case[1]	4.9	3.9	3.0	3.7	3.0	4.1
Minimum number of briefs	2	2	2	2	3	2
Maximum number of briefs	13	12	4	12	3	13

NOTE: Included in the count of briefs were appellant, coappellant, appellee, cross-appellant, amicus, and intervenor briefs.

[1] $p = .006$; $t = 2.61$; $df = 53.8$; separate variance estimate; means contrasted: 4.9 and 3.5.

Aggregate Length of Briefs

Table 10 confirms our expectation that the larger number of briefs in agency cases would aggregate to more pages of brief material. In table 10, the cases are organized by case type and by total number of brief pages. One-fourth of all cases contained aggregated briefs of fewer than 58 pages, one-fourth were between 58 and 92 pages, one-fourth were between 93 and 157 pages, and the remaining fourth were longer than 157 pages up to a maximum of 750 pages. Agency cases contained 183 pages of briefs, on the average, which is approximately 45 percent greater than the average number of pages in U.S. civil briefs and more than twice as great as the values for criminal and private civil cases. The mean

number of brief pages for agency cases was also significantly different from the mean value for all other cases combined.[18]

TABLE 10
Aggregate Length (in Pages) of All Briefs per Case by Frequency of Cases in Each Case Type

Aggregate Length of Briefs	Agency	U.S. Civil	Private Civil	Criminal	Other	All Cases
0–57	6 (16%)	7 (19%)	5 (38%)	6 (46%)	1 (100%)	25 (25%)
58–92	6 (16%)	12 (33%)	2 (15%)	5 (38%)	0	25 (25%)
93–157	10 (27%)	9 (25%)	5 (38%)	1 (8%)	0	25 (25%)
158–750	15 (41%)	8 (22%)	1 (8%)	1 (8%)	0	25 (25%)
Summary Findings						
Number of cases	37	36	13	13	1	100
Average number of brief pages per case[1]	183.2	126.4	86.9	77.5	32.0	135.0
Minimum number of brief pages	26	16	27	26	32	16
Maximum number of brief pages	750	586	158	286	32	750

[1] $p = .002$; $t = 3.13$; $df = 47.2$; separate variance estimate; means contrasted: 183.2 and 97.2.

Number of Issues in Briefs

Table 11 lists the number of cases in each case type with the corresponding number of issues presented in the lead brief of the appellant. (A preliminary analysis of issues in appellees' briefs showed that, almost without exception, the number of issues equaled or was less than the number raised by the appellant.) Agency cases presented the largest number of issues, on the average more than three. U.S. civil cases were not distinguishable from private civil or criminal cases, averaging between 2.5 and 2.7 issues

18. As noted in chapter two, we recognized the importance of considering the idiosyncratic effect of outlying cases; therefore, we decided to report minimums and maximums. In keeping with this procedure, we also analyzed some of the variables of input, specifically (1) aggregate length of all briefs, (2) number of case citations in appellant's lead brief, (3) aggregate length of record on appeal, and (4) duration in days, without the outlying case. In no instance did this affect the direction or the significance of our findings.

per case. The difference between agency and nonagency cases in average number of issues is statistically significant.

TABLE 11
Number of Issues in Appellant's Lead Brief by Frequency of Cases in Each Case Type

Number of Issues	Agency	U.S. Civil	Private Civil	Criminal	Other	All Cases
1	8 (22%)	9 (25%)	3 (23%)	3 (23%)	0	23 (23%)
2	5 (14%)	16 (44%)	4 (31%)	6 (46%)	0	31 (31%)
3	9 (24%)	2 (6%)	1 (8%)	2 (15%)	0	14 (14%)
4	5 (14%)	3 (8%)	4 (31%)	0	1 (100%)	13 (13%)
5	6 (55%)	3 (8%)	1 (8%)	1 (8%)	0	11 (11%)
6	4 (11%)	2 (6%)	0	1 (8%)	0	7 (7%)
7	0	1 (3%)	0	0	0	1 (1%)
Summary Findings						
Number of cases	37	36	13	13	1	100
Average number of issues per case[1]	3.2	2.6	2.7	2.5	4	2.8
Minimum number of issues	1	1	1	1	4	1
Maximum number of issues	6	7	5	6	4	7

[1] $p = .035$; $t = 1.83$; df = 95; pooled variance estimate; means contrasted: 3.2 and 2.6

Number of Case Citations in Briefs

Table 12 demonstrates a reversal of the pattern that tends to characterize the other indicators. Agency cases do not contain the largest number of case citations in the appellant's lead brief. On the contrary, U.S. civil cases show the largest number of citations, approximately twenty-seven, whereas agency cases have the second largest number of citations, twenty-four, and private civil and criminal cases both have the next largest numbers, approximately nineteen and twenty, respectively. It is our impression, however, that agency cases contain a large number of citations to adminis-

trative rulings and statutes that are not found in other case types. The differences observed for this indicator are not statistically significant.

TABLE 12
Number of Case Citations in Appellant's Lead Brief by Frequency of Cases in Each Case Type

Number of Citations	Agency	U.S. Civil	Private Civil	Criminal	Other	All Cases
0–10	11 (30%)	7 (19%)	4 (31%)	2 (15%)	1 (100%)	25 (25%)
11–17	9 (24%)	3 (8%)	6 (46%)	6 (46%)	0	24 (24%)
18–28	9 (24%)	12 (33%)	0	3 (23%)	0	24 (24%)
29–139	8 (22%)	14 (39%)	3 (23%)	2 (15%)	0	27 (27%)
Summary Findings						
Number of cases	37	36	13	13	1	100
Average number of citations per case[1]	24.2	27.2	19.1	19.8	8.0	23.9
Minimum number of citations	3	0	1	1	8	0
Maximum number of citations	139	83	58	50	8	139

[1] $p = .327$; $t = .451$; df = 57.9; separate variance estimate; means contrasted: 24.2 and 22.1.

Form and Aggregate Length of Record on Appeal

Except in criminal cases, the usual method of supplying information from proceedings below is via the joint appendix. The need for the appendix is especially pressing in agency cases because the complete record of the earlier proceedings may, literally, occupy a truckload of space. All of the thirty-seven agency cases included a joint appendix in the material filed with the court. Two agency cases also filed a separate transcript from proceedings below. The two other groups of civil cases also had routine filings of joint appendixes, and in each case type there was a single example of an additional filing of an extensive transcript in the record from below. However, two U.S. civil cases apparently went to hearing with neither a joint appendix nor a trial transcript. Only one of the thirteen criminal cases included a joint appendix; the others relied

on trial transcripts. The single bankruptcy case (the "other" group) also included a joint appendix.

In appendix B we describe our methods of page counting for the joint appendixes and transcript from the record on appeal. There is also an apparent qualitative difference between typical appendix material and transcript material. It is our impression that the amount of useful material per page of transcript is less than that per page of appendix, even after correction for different numbers of words per page of the two forms of documents. It appears that trial transcripts in criminal cases are usually less "dense" or "difficult," in terms of legally useful information, than are joint appendixes. Or at least it seems so to us. This is a matter that could be put to the judges themselves. At this point we report only our impression.

Table 13 displays the total number of pages of appendix and transcript forwarded on appeal. The page numbers are grouped, with the longest 10 percent of the aggregated pages (748 pages or more) placed in a separate category. Although agency cases account for half of all the cases that fall into this final 10 percent, and the average page length for agency cases (434.4) is approximately 64 percent greater than the approximately 265-page average recorded for criminal cases, the group differences for this indicator are not statistically significant.

Duration of Sample Cases

In chapter one we suggested that agency cases took longer to work their way through the system than did other case types, although we were uncertain about the importance of the number of relatively old criminal cases terminating in 1980. The data in table 14 show that, for the sample of 100 cases, the average elapsed time from filing to termination for agency cases is longer than that for other case types. Considering all of the findings together, we feel confident that agency cases, on the average, move more slowly through the court than do all the other major case types combined; the observed differences are statistically significant.

Duration of Postdisposition Period and Number of Postdisposition Motions

Termination on the JS-34 form does not always mark the end of the court's effort in a case. Frequently, postdisposition motions will require time and attention from the clerk's office and, perhaps, a motions panel of judges. We calculated the number of days between the termination dates of the cases and the last date entered on the

TABLE 13
Aggregate Length (in Pages) of Record on Appeal by Frequency of Cases in Each Case Type

Aggregate Length of Record	Agency	U.S. Civil	Private Civil	Criminal	Other	All Cases
0–64	7 (19%)	10 (28%)	2 (15%)	5 (39%)	1 (100%)	25 (25%)
65–162	11 (30%)	7 (19%)	5 (39%)	2 (15%)	0	25 (25%)
163–357	6 (16%)	13 (36%)	3 (23%)	3 (23%)	0	25 (25%)
358–748	8 (22%)	3 (8%)	2 (15%)	2 (15%)	0	15 (15%)
749–4,405	5 (14%)	3 (8%)	1 (8%)	1 (8%)	0	10 (10%)
Summary Findings						
Number of cases	37	36	13	13	1	100
Average number of pages in record per case[1]	434.4	243.4	263.3	265.4	42.0	317.5
Minimum number of record pages	5	0	28	15	42	0
Maximum number of record pages	4,405	1,348	1,249	1,253	42	4,405

[1] $p = .096$; $t = 1.33$; df = 46.2; separate variance estimate; means contrasted: 434.4 and 257.2.

docket sheet. As shown in table 15, the average number of days for the U.S. civil cases was just under 190, whereas the average numbers for the other three case types were approximately 113 (criminal), 126 (private civil), and 128 (agency).

We counted the number of postdisposition motions in each case to determine if these motions might account for the differences between U.S. civil and other case types. The mean number of motions ranged from 1.60 (agency) to 1.0 (private civil). Comparisons of the average values for agency cases with the values for other case types combined did not result in statistically significant differences for either duration of postdisposition period or number of postdisposition motions.[19]

19. For the number of postdisposition motions, the statistical results were: $p = .256$; $t = .660$; df = 51.2; separate variance estimate; means contrasted: 1.6 and 1.2.

TABLE 14
Case Duration (in Days) from Filing to Date of Final Judgment by Frequency of Cases in Each Case Type

Case Duration	Agency	U.S. Civil	Private Civil	Criminal	Other	All Cases
0–341	1 (3%)	9 (25%)	7 (54%)	8 (62%)	0	25 (25%)
342–445	10 (27%)	11 (31%)	4 (31%)	0	0	25 (25%)
446–623	13 (35%)	10 (28%)	2 (15%)	0	0	25 (25%)
624–1,325	13 (35%)	6 (17%)	0	5 (38%)	1 (100%)	25 (25%)
Summary Findings						
Number of cases	37	36	13	13	1	100
Average number of days per case[1]	559.7	471.6	351.7	438.4	785.0	445.5
Minimum number of days	205	28	183	139	785	28
Maximum number of days	1,041	1,325	553	897	785	1,325

[1] $p = .002$; $t = 3.10$; df = 49.2; separate variance estimate; means contrasted: 559.7 and 421.1.

United States Government as a Party

Across all case types, the United States was a party in 86 of the 100 cases: seventy-seven times as appellee and nine times as appellant. On the basis of judges' ratings of indicators of case burden (see table 6), we had some reason to expect that United States appellant cases would be larger than United States appellee cases. We compared the two groups of cases on several measures, including the number of pages in briefs per case, the size of the record on appeal, and the number and length of published opinions per case.

We were unable to confirm that United States appellant cases were larger than United States appellee cases. There were no statistically significant differences between the groups on any measure, and all the observed differences were in the direction opposite from the expectation. The results may mean that, contrary to expectation, United States appellant cases are not more burdensome than United States appellee cases; on the other hand, they may mean that our indicators are inadequate for that measurement

TABLE 15
Duration of Postdisposition Period (in Days) by Frequency of Cases in Each Case Type

Duration of Postdisposition Period	Agency	U.S. Civil	Private Civil	Criminal	Other	All Cases
0–66	16 (43%)	6 (17%)	2 (15%)	1 (8%)	1 (100%)	26 (26%)
67–108	7 (19%)	6 (17%)	4 (31%)	8 (62%)	0	25 (25%)
109–202	7 (19%)	10 (28%)	5 (38%)	3 (23%)	0	25 (25%)
203–484	7 (19%)	14 (39%)	2 (15%)	1 (8%)	0	24 (24%)
Summary Findings						
Number of cases	37	36	13	13	1	100
Average number of days per case[1]	127.9	189.5	125.6	112.6	41.0	147.0
Minimum number of days	0	29	35	64	41	0
Maximum number of days	484	450	292	230	41	484

NOTE: Because this comparison was in the opposite direction than expected, a two-tailed probability estimate is cited. See *supra* note 15.

[1] $p = .516$ (two-tailed); $t = -.654$; df = 53.7; separate variance estimate; means contrasted: 127.9 and 143.1.

task, particularly with such a small sample of United States appellant cases.

Conclusion

The data, based on a proportional sample of 100 cases, support the conclusion that agency cases, and U.S. civil cases to a lesser extent, present larger amounts of input material to judges and court administrators than do other types of cases. For nearly every variable selected, agency cases show the maximum size—be it the number of lawyers (26) or the number of pages in briefs (750). Although the amount of materials generated in U.S. civil cases should not be overlooked, by and large it appears that the extremes, at least for the D.C. Circuit, are the result of agency matters, a point we will return to in chapter five. This conclusion is congruent with the impressions and expert opinion prevailing among the judges and staff of the D.C. Circuit.

IV. OUTPUT BURDEN: RESULTS FROM THE SAMPLE OF 100 CASES

It may be recalled that the indicators of output burden measure the work of judges and court staff in terms of the form, type, and length of appeal dispositions. In applying these indicators in our analysis, we make the assumption that the court is able to exercise greater control over output burden than it can over the input burden discussed in chapter three. In general, we found that administrative cases remain burdensome, as measured by indicators of output, but that the differences among the sample case types are less dramatic than those found for indicators of input.

Form of the Court's Opinions

Table 16 shows the form of the judgment for the sample of 100 cases, grouped according to three categories: signed, published opinion; per curiam, published opinion; and unpublished opinion. Fifty-four percent of the agency cases and 53 percent of the U.S. civil cases ended with published opinions, whereas only 31 percent of the private civil and criminal cases were accorded that conclusion. Our one bankruptcy case (the "other" group) included one published opinion. In sum, published opinions were issued in 48 of 100 cases.[20]

In chapter three we reported that agency cases in the D.C. Circuit are uniquely large and, in most respects, statistically different from all other case types. These findings suggest that there is, in fact, an informal division within the court's caseload; that is, there is a de facto division between agency and nonagency cases.

From the standpoint of output, it is reasonable to assume that, by and large, a case that results in a published opinion is more demanding than one that results in an unpublished opinion. Before turning to a more detailed analysis of measures of output, it may be useful to consider the twofold relationship shown in table 17. These findings reveal that when compared with other case types as a group, agency cases are clearly a smaller proportion of the court's docket; at the same time, however, agency cases are more

20. We use "opinion" generically, including memorandum opinions and orders.

TABLE 16
Form of Lead Opinion by Frequency of Cases in Each Case Type

Form of Opinion	Agency Cases	Nonagency Cases					All Cases
		U.S. Civil	Private Civil	Criminal	Other	Total	
Published							
Signed	17 (46%)	13 (36%)	3 (23%)	3 (23%)	1 (100%)	20 (32%)	37
Per curiam	3 (8%)	6 (17%)	1 (8%)	1 (8%)	0	8 (13%)	11
Unpublished	17 (46%)	17 (47%)	9 (69%)	9 (69%)	0	35 (56%)	52
Total number of cases	37	36	13	13	1	63	100

likely to result in published opinions. Approximately 54 percent of the agency caseload produced published opinions, whereas approximately 44 percent of nonagency cases resulted in published opinions. Although this distinction is noteworthy, it should be emphasized that the differences shown in table 17 do not approach a level of statistical significance.

TABLE 17
Number of Agency and Nonagency Cases in the Sample with Published and Unpublished Opinions

Form of Opinion	Agency	Nonagency	Total
Published	20 (54%)	28 (44%)	48
Unpublished	17 (46%)	35 (56%)	52
Total[1]	37	63	100

NOTE: Unlike the other statistical analyses presented in this report, the analysis in this table includes the effect of the one bankruptcy case in the nonagency category. See *supra* note 15.

[1] $p = .47$; $chi^2 = .520$; df = 1.

In addition, the percentages of cases in each case type in the sample resulting in published opinions partially underrepresent the percentages of cases in each case type in the entire population of 513 cases terminated in fiscal 1980 after submission on briefs or oral argument. For the entire population, 55 percent of the terminated cases had at least one published opinion. By case type, the percentages were as follows: agency, 57 percent (108/190); U.S. civil, 57 percent (105/185); private civil, 49 percent (33/68); criminal, 51 percent (35/68); other, 50 percent (1/2). The large underre-

presentation in percentage terms of criminal and private civil cases is due to the small number of cases sampled in these case types. We do not know whether the underrepresentation of criminal and private civil cases with published opinions biases the following analyses; they should be read with this caveat in mind.

The 48 cases, from our original sample of 100 cases, that had published lead opinions provide the data base for table 18 and the focus for the following discussion.

TABLE 18
Characteristics of Published Opinions by Case Type: Summary Findings

Characteristic	Agency	U.S. Civil	Private Civil	Criminal	Other	All Cases
Average number of opinions[1]	1.2	1.4	1.0	2.4	1.0	1.3
Average number of pages in combined opinions[2]	13.1	6.4	4.4	30.9	3.0	11.0
Average number of citations in combined opinions[3]	36.3	20.9	18.3	142.7	13.0	37.1
Number of cases with published opinions	20	19	4	4	1	48

NOTE: Because the comparisons were in the opposite direction than expected, two-tailed probability estimates are cited in this analysis. See *supra* note 15.

[1] $p = .239$; $t = -1.384$; df = 3.6; separate variance estimate; means contrasted: 1.2 and 1.6.

[2] $p = .937$; $t = -.086$; df = 3.4; separate variance estimate; means contrasted: 13.1 and 13.8.

[3] $p = .489$; $t = -.786$; df = 3.1; separate variance estimate; means contrasted: 36.3 and 60.3.

Number of Opinions

Cases occasionally generate more than one opinion, in the form of concurrences or dissents. We counted all published opinions per case (i.e., for the docket number that corresponded to the case in our sample) separately and arrived at the following averages for published opinions per case (see table 18): agency, 1.2 (23 opinions in 20 cases); U.S. civil, 1.4 (26 opinions in 19 cases); private civil, 1.0 (4 opinions in 4 cases); criminal, 2.4 (9.5 opinions in 4 cases); other, 1.0 (1 opinion in 1 case).[21]

21. The "half opinion" in the criminal category arose from a unique circumstance in *United States v. Alston* (609 F.2d 531 (D.C. Cir. 1979)), in which a judge concurred with the majority on all but two points, dissenting briefly on those; the dissent was given a score of 0.5.

The presence of an extreme en banc proceeding within the criminal case type elevated the number of opinions in the criminal category considerably: The publication[22] included a signed opinion for the court, two separate concurrences, one separate dissent, and an additional statement by three judges expanding points made in earlier portions of the publication. To substantiate the impact of the one extremely burdensome criminal case, we determined the mean number of opinions in criminal cases excluding the extreme case; it was 1.5. This is still larger than the means for the other case types, but is considerably less than the 2.4 value shown in table 18. Despite the influence of the criminal appeals, a statistical comparison employing all forty-eight cases did not reveal a significant difference between the average number of opinions in agency cases and the average number in the other case types taken as a unit.[23]

Aggregate Length of Published Opinions

Table 18 also summarizes our findings for the average length of combined opinions in pages and number of citations for the various case types. When the page counts for each case are aggregated and an average is calculated, the results are as follows: agency, 13.1 pages; U.S. civil, 6.4 pages; private civil, 4.4 pages; criminal, 30.9 pages; and other, 3.0 pages. Again, the one unusually lengthy criminal case, alluded to earlier, is likely to have contributed to the apparent predominance of long publications for criminal cases; the mean number of pages in criminal case opinions drops to 7.4 when this case is removed, a notable reduction from the earlier mean.

The difference between the average opinion length for agency cases and the average value for other cases is not statistically significant if all cases are included in the calculation. However, if the unusual criminal case is removed, the new value for this comparison is significant ($p=.001$; $t=3.57$; $df=23.8$; separate variance estimate; means contrasted: 13.1 and 6.0).

Number of Citations in Opinions

When citation counts for each case are aggregated and an average is calculated for each case type, the results are as follows (see

22. United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1976).

23. We have analyzed all of the output indicators with and without *DeCoster* because this case clearly posed an unusual burden for the court. If the results of the statistical testing done on the reduced sample of cases were substantially different from those obtained for the full sample of forty-eight cases, the change is noted in text. Note that a similar procedure was used in chapter three, in which it was necessary to remove the effect of extreme agency cases for selected variables of input burden (see note 18 *supra*).

table 18): agency, 36.3; U.S. civil, 20.9; private civil, 18.3; criminal, 142.7; and other, 13.0. Again, the one lengthy criminal case contributed to the average for that case type, accounting for a total of almost 400 citations in the various opinions contained in the single publication from an en banc hearing. If the case is removed, however, the mean number of citations for criminal cases drops to 52.3; like the comparable mean for number of opinions, this is still large, but again substantially less than the earlier figure of 142.7 citations. The mean group differences calculated for this indicator are not statistically significant.

Conclusion

For the sample, it appears that the burden of publication for criminal cases is greater than it is for other case types. However, for the reasons stated, we are not comfortable with this conclusion. A fuller survey of the criminal caseload is required to clarify the issue.

There is one conclusion that does emerge from the results reported in this chapter and the reflections they induce: There is no necessary, a priori connection between indicators of input case size and indicators of output case size. The court may take on the issues arising in a criminal case forwarded with relatively few input materials, at least as measured by our quantitative indicators, and expose it to laborious judicial scrutiny, including full en banc review with separate concurrences and dissents. The court may also review a case that is presented along with substantial material from below and arrive at a succinctly stated, uncontested decision. This conclusion is, after all, a confirmation of a positive trait in any court, which is to give to each case the attention it deserves, regardless of the trappings with which it is filed.

Indeed, it is possible that there is an interaction, unmeasured in this study, between input and output sizes that could, if measured, provide a significant indicator of case burden *on the judges.* Let us suppose that some group of cases (or case types) can be identified as representing "typically burdensome" cases, and we find that the size of input burdens and the size of output burdens, as measured in this report or otherwise, display a stable relationship to each other throughout the groups. It is conceivable that the "unusually burdensome" cases or case types might demonstrate relationships between the two measures that are substantially different from the postulated standard. That is, cases with small input burdens and large output burdens may call upon judges to perform substantial work with less assistance from counsel. Conversely, cases with large input burdens and small output burdens may call upon

judges to distill masses of materials and inadequately focused briefs to produce a judgment that resolves the issues and limits future controversy by clear and succinct clarification of the law. Thus, either of these possibilities may create unusually large burdens for the court. Fashioning measures that would capture court experience would clearly be a difficult task, but it would be valuable if it could be achieved.

V. EXTREME CASES

The rationale behind our selection of the sample of 100 cases was to avoid any special considerations or points of view in arriving at a portrayal of the size of the cases before the court. As shown in chapters three and four, this objective sampling scheme revealed that agency cases tend to be larger, in several important respects, than other case types. In this chapter we extend the analysis to examples of agency cases that, in the opinion of court officials, have provided the largest input problems for judicial management. Extreme cases burden the court out of proportion to their numbers. Even a relatively small number of them arising during the year can, at least potentially, drain resources away from the management and disposition of the larger number of cases that may be less burdensome but not less deserving of full judicial treatment.

We began with a list of thirty-three extreme cases supplied by court officials.[24] A quick survey of the cases' contents and a realistic appraisal of the time required to code them according to our procedures led to the decision to concentrate our analysis on four cases from the list. Our choice was guided by the desire to capture cases that exemplified the problems facing the court in its attention to large agency matters. Discussions with court officials suggested, for example, that we should include two cases concerning the interpretation of provisions of the Clean Air Act.[25] We therefore chose *Citizens to Save Spencer County v. EPA*[26] and *Alabama Power Co. v. EPA.*[27] The other cases were randomly drawn; they were *United Steelworkers of America v. Marshall*[28] and *United States v. FCC.*[29] The complete list of extreme cases is included in this report as appendix D.

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24. We thank Mr. Robert Bonner, deputy clerk, for supplying the list of extreme cases.

25. Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C.A. §§ 7401-7462 (1978)).

26. 600 F.2d 844 (D.C. Cir. 1979).

27. 606 F.2d 1068 (D.C. Cir. 1979).

28. No. 79-1048, slip op. (D.C. Cir. Aug. 15, 1980).

29. No. 77-1249, slip op. (D.C. Cir. Mar. 7, 1980); see 1978-2 Trade Cas. ¶ 62,205; 1980-1 Trade Cas. ¶ 63,264.

Table 19 displays input and output burden indicators for the four extreme cases. We will discuss the magnitude of the indicators in relation to the values already reported for the sample of 100 cases.

TABLE 19
Burdens of Four Extreme Agency Cases

Type of Burden	Citizens to Save	Alabama Power	United Steelworkers	U.S. v. FCC
Input Burden				
Number of consolidations	16	37	15	3
Number of lawyers	26	40	39	11
Number of briefs				
Appellant	10	16	3	4
Appellee	1	1	1	3
Amicus	0	0	3	2
Intervenor	3	4	1	3
Total number of briefs	14	21	8	12
Aggregate length of briefs (in pages)	928	1,704	1,167	716
Number of issues in briefs	4	11	10	13
Number of case citations in briefs	50	154	69	26
Aggregate length of record on appeal (in pages)				
Appendixes	1,290	2,155	5,022	1,784
Transcripts	0	0	2,720	0
Duration of case (in days)				
Filing to final judgment	448	531	581	302
Final judgment to last docket entry	213	407	287	81
Number of postdisposition motions	15	37	27	1
Output Burden				
Number of opinions	3	1	2	2
Aggregate length of opinions (in pages)	54.5	68.5	138.3	69.5
Number of citations in opinions	131	101	142	137

Input Burden

Consolidations. Each of the cases is a consolidated action involving from three to thirty-seven cases; this is a minimum estimate of the number of parties, for one docket may represent the claims of numerous parties.

Number of lawyers. The number of lawyers listed on the docket (see appendix B for counting conventions) ranged from eleven to forty. Five of the cases in the sample had ten or more lawyers listed, but none had more than twenty-six (see table 8). The aver-

age number of lawyers in the extreme cases was twenty-nine, almost six times the average of the agency cases in the sample (see table 8).

Number of briefs. Each of the extreme cases had at least 1 intervenor's brief, and 2 cases had 5 amicus briefs between them. The range of all briefs in the extreme cases was from 8 to 21. The sample of 100 cases included 22 cases with from 5 to 10 briefs and 4 cases with more than 10 briefs (see table 9). However, the average number of briefs filed in extreme cases was approximately 2.8 times greater than the average number filed in the agency cases in the sample (the average for extreme cases was 13.75; the average for agency cases was 4.9).

Aggregate length of briefs. The average number of pages in all the briefs filed in the extreme cases was 1,129; the range was from 716 to 1,704. There was almost no overlap between extreme and sample cases on this measure; only one sample case had more than 716 pages. Thus, the average page count for the extreme cases was more than six times greater than the average count for the agency cases in the sample (see table 10).

Number of issues in briefs. The number of issues in the appellant's lead brief ranged from 4 to 13 in the extreme cases, with an average of 9.5. This is almost three times the average for the agency cases in the sample (reported as 3.2 in table 11). In the entire sample of 100 cases, only 1 case, in the U.S. civil group, had as many as 7 issues in the appellant's lead brief.

Number of case citations. On the average, extreme cases cited almost 75 cases. In addition, of course, there were many citations to rules, regulations, statutes, legislative histories, scientific literature, and legal commentary (see appendix B for an explanation of the rationale for including only case citations). The range of case citations in the extreme cases was from 26 to 154. Among the sample cases, twenty-seven contained at least 29 references, thus falling within the range of the extreme cases (see table 12). One sample case contained 139 citations, but on the average, the sample cases contained slightly fewer than 24 case citations.

Aggregate length of record on appeal. The total number of pages of the record on appeal, including transcript as well as appendix material, ranged from 1,290 to 7,742 for the extreme cases. No sample case had a record of more than 4,405 pages (see table 13). Indeed, the smallest extreme case presented more pages of material in the record than all but the three largest sample cases.

Duration of cases. On the average, the four extreme cases moved from filing to final judgment in 466 days, or approximately 15.5 months. The fastest case proceeded in 302 days and the slowest in

581 days. Sample cases proceeded at almost the same average rate, 445.5 days, but with a range of from 28 to 1,325 days (see table 14). After final judgment, however, extreme cases appear to move more slowly through the system, taking 247 days on the average, with a range of from 81 to 407 days. Among the sample cases, the U.S. civil case type had the longest average postdisposition period, approximately 190 days. The protraction in postdisposition duration appears to be related to the number of postdisposition motions, as shown in table 19. The extreme cases averaged twenty postdisposition motions, in contrast to the average of between one and two for the sample cases.

Output Burden

Number and aggregate length of opinions. Extreme cases tended to produce more opinions than did most sample cases. In the sample, criminal cases (including *DeCoster*) averaged about 31 pages and agency cases about 13 (see table 18). But the shortest opinion page sum in the extreme cases was 54.5 pages; these cases averaged 82.7 pages per case. By this measure, the extreme cases surely deserve their title.

Number of citations in opinions. As expected, the number of citations in opinions in the extreme cases was also very large, averaging 128; in the sample, the average number of citations was 37.

Conclusion

Taken together, these findings lend strong support to the claim of court officials that agency cases can produce a disproportionately large impact upon the operation of the court. The overwhelming difference between the size of any one of the extreme cases and the more typical case underscores the importance of analyzing such cases as an ongoing aspect of the D.C. Circuit caseload. We note with interest, however, that the court, in moving these cases from filing to termination at the same average speed as cases of normal size, may experience an additional surcharge on its resources.

VI. CONCLUSION

In this study we developed a framework for quantifying input and output indicators of case size for appellate courts with a view toward describing a single important dimension of a court's overall burdens. As a step toward conceptualizing the problem we began by distinguishing between input and output burdens and the different degrees to which judges exercise control over such elements of their workload. By the same token, we argued that case size, an aspect of case burden, may also be distinguished in terms of input and output factors.

Throughout this study there remains an unresolved and inherent tension between the qualitative and quantitative dimensions of case burden. This tension is illustrated if we consider the indicator of transcripts and appendixes. If, as we learned in the process of conducting this study, some cases do in fact generate appendixes that fill a room, one might, quite reasonably, conclude that one will simply know a burdensome case when one sees it. This line of reasoning assumes that bulk is one and the same thing as burden. We are not yet prepared to draw that conclusion. For, although we took pains to standardize the page counts used in this study, we left untouched the whole question of how we might standardize the analysis of the *content* of those pages. In this sense, a research design is needed to begin to evaluate the qualitative, as well as the quantitative, dimensions of case burden. This example points as much to what we have learned about studying courts as to what we have left to learn.

Thus, at this stage in the development of our knowledge in this area, we made the decision to limit our analysis to input and output measures of case size. For example, the number, length, and variety of appellants' and appellees' briefs capture input indicators of case size; whether an opinion was published or not, the form of the lead opinion, the number of opinions per case, the number of citations opinions contain, and the length of opinions in a case capture output indicators.

This study also represents an important, albeit small, step in developing our understanding of the burdens a court confronts. Whereas earlier work asked judges to rank case types as more or

less burdensome as well as to rank those factors presented in an appeal that make a case more or less difficult, this study tested, as it were, the impression of experts. In taking this step, we make the assumption that input and output indicators of case size, the focus of this study, are important aspects of case burden. Finally, a study of the sort undertaken in the D.C. Circuit will, it is hoped, shed light on how future studies might make further refinements in terms of both conceptualization of the issue and implementation for research.

In particular, we have used these measures to gain a better understanding of the nature of the caseload confronting the D.C. Circuit Court of Appeals. To this end, we selected a proportional sample of 100 cases composed of administrative agency, U.S. civil, private civil, criminal, and "other" case types. In addition, we examined four extreme cases from the court's agency docket because there is much evidence to suggest that these cases play a special role in this court.

In general, our findings supported our initial hypothesis. To summarize briefly, we found that for nearly every measure of input, agency cases were the most burdensome, whereas for measures of output, the differences between agency cases and other types of cases were less dramatic. In a very important sense, this difference complements our expectations about the work of judges and the influence of judicial discretion in deciding the kinds of cases that warrant close attention and the publication of decisions.

At the same time, the analysis of a selected group of the D.C. Circuit's extreme agency cases underscores the unique effect such cases can have upon the court. As the findings in table 19 make clear, any one agency case, of the magnitude of these extreme cases, may have a dramatic impact upon the workload of both judges and administrative staff. Such cases are usually the product of consolidated matters in which many issues are being posed, accompanied by long and technical appendixes for the judges' consideration.

In closing, a proviso is in order: This study has answered some questions about the *intracircuit* burdens of the D.C. Circuit Court of Appeals. It leaves unanswered all questions of *intercircuit* comparisons and the thorny problems that such questions present. Nevertheless, we hope that the research framework we have employed may provide some useful strategies to this end.

APPENDIX A

Exclusive and Shared Jurisdictions of the United States Court of Appeals for the District of Columbia Circuit

Exclusive

Alaska Gas Transportation Act of 1976	15 U.S.C. §719h
Automobile Fuel Efficiency Act of 1980	15 U.S.C. §2003(b)
Civil Service Reform Act of 1978	5 U.S.C. §7703(d)[30]
Communications Act Amendments of 1952	47 U.S.C. §402(b)
Department of Energy Organization Act	15 U.S.C. §766(c)
Energy Policy Conservation Act	42 U.S.C. §6384(b)
Federal Election Campaign Act Amendments of 1974	26 U.S.C. §9011
Foreign Service Act of 1980	22 U.S.C. §4109(a), (b)
Government in the Sunshine Act	5 U.S.C. §552b(g)
International Claims Settlement Act of 1949	22 U.S.C. §1631f(b)
Merchant Marine Act of 1936	46 U.S.C. §1181
Noise Control Act of 1972	42 U.S.C. §4915
Ocean Thermal Energy Conservation Act	42 U.S.C. §9125
Outer Continental Shelf Lands Act Amendments of 1978	43 U.S.C. §1349(c)
Resource Conservation and Recovery Act of 1976	42 U.S.C. §6976
Safe Drinking Water Act	42 U.S.C. §300J-7
Subversive Activities Control Act of 1950	50 U.S.C. §793[31]

30. Under this section, the director of the Office of Personnel Management may obtain review of any final order or decision of the Merit Systems Protection Board by filing a petition for judicial review in the United States Court of Appeals for the District of Columbia Circuit if the director determines that the board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the board's decision will have a substantial impact on civil service law. The granting of the director's petition for judicial review is at the discretion of the court of appeals.

31. The court has discretion to transfer the action to the circuit in which the petitioner resides.

Shared

Act for the Prevention and Punishment of Crimes against Internationally Protected Persons	155 U.S.C. §2615(a)
Animal Welfare Act of 1970	7 U.S.C. §2149(b)
Automobile Fuel Efficiency Act of 1980	15 U.S.C. §2002(k)
Bank Holding Company Act	12 U.S.C. §1848
Black Lung Benefits Reform Act of 1977	30 U.S.C. §931(b)
Civil Service Reform Act of 1978	5 U.S.C. §7123(a)
Comprehensive Drug Abuse Prevention and Control Act of 1970	21 U.S.C. §877
Consumer Product Safety Commission Improvements Act of 1976	15 U.S.C. §2060(a)
The Customs Courts Act of 1970	19 U.S.C. §1641(b)
Depository Institutions Deregulation and Monetary Control Act of 1980	12 U.S.C. §505
Drug Amendments of 1962	21 U.S.C. §355
Egg Product Inspection Act	21 U.S.C. §1036 21 U.S.C. §1047
Egg Research and Consumer Information Act Amendments of 1980	7 U.S.C. §2714(b)
Employment Security Amendments of 1970	26 U.S.C. §3310 42 U.S.C. §504
Energy Policy and Conservation Act	15 U.S.C. §2004(a) 15 U.S.C. §2008(a), (c)
Fair Labor Standards Act of 1938	29 U.S.C. §210(a)
Federal Alcohol Administration Act	27 U.S.C. §204(h)
Federal Aviation Act of 1958	49 U.S.C. §1486(a)-(b)
Federal Coal Mine Health and Safety Act of 1969	30 U.S.C. §816 30 U.S.C. §953
The Federal Food, Drug, and Cosmetic Act	21 U.S.C. §346a(i)
The Federal Insecticide, Fungicide, and Rodenticide Act—Economic Poisons—Labeling	7 U.S.C. §135(b)
Federal Meat Inspection Act—Meat Inspection State Programs	21 U.S.C. §607(e)
Federal Power Act	16 U.S.C. §825(l)
Federal Trade Commission Improvement Act	15 U.S.C. §57a(e)

Financial Institutions Regulatory and Interest Rate Control Act of 1978	12 U.S.C. §504(d) 12 U.S.C. §1464(d) 12 U.S.C. §1730(j), (k), (q) 12 U.S.C. §1786(i)-(j) 12 U.S.C. §1817(j) 12 U.S.C. §1818(h), (j) 12 U.S.C. §1828(j)
Food Additives Amendment of 1958	21 U.S.C. §348(g)
General Accounting Office Personnel Act of 1980	31 U.S.C. §52-3(l)
Horse Protection Act Amendments of 1976	15 U.S.C. §1825(b)
Housing and Community Development Act of 1974	42 U.S.C. §5311(c)
Housing and Urban Development Act of 1968	15 U.S.C. §1710(a)
Investment Company Act of 1940	15 U.S.C. §80B-13(a)
Investment Company Act of 1970	15 U.S.C. §80A-42(a)
Justice System Improvement Act of 1979	42 U.S.C. §3785(a)
Medical Device Amendments of 1976	21 U.S.C. §360g(a)
Merchant Marine Act of 1970	33 U.S.C. §988(a)
Motor Vehicle Information and Cost Savings Act	15 U.S.C. §1913(a)
National Labor Relations Act	29 U.S.C. §160(f)
Natural Gas Act	15 U.S.C. §717r(b)
Natural Gas Pipeline Safety Act of 1968	49 U.S.C. §1675(a)
Natural Gas Policy Act of 1978	15 U.S.C. §3413(b) 15 U.S.C. §3416(a)
Occupational Safety and Health Act of 1970	29 U.S.C. §660(a)
Pipeline Safety Act of 1979	49 U.S.C. §2005(a)
Public Utility Holding Act of 1935	15 U.S.C. §79X(a)
Railway Labor Act	45 U.S.C. §355(f)
Review of Federal Agency Orders	28 U.S.C. §2343[32]

32. The exclusive jurisdiction of the court of appeals to enjoin, set aside, suspend, or determine the validity of final orders of certain government agencies is set forth in section 2342 of this title. The instant section establishes that alternate venue for such review proceedings lies in the United States Court of Appeals for the District of Columbia Circuit.

Savings and Loan Holding Company Amendments of 1967	12 U.S.C. §1730a(k)
Securities Act of 1933	15 U.S.C. §77i(a)
Securities Exchange Act of 1934	15 U.S.C. §78y(a)
Small Business Investment Act Amendments of 1966	15 U.S.C. §687e(f)
State and Local Fiscal Assistance Act of 1972	26 U.S.C. §6363(d)
Toxic Substances Control Act	15 U.S.C. §2618(a)
Trade Act of 1974	19 U.S.C. §2322(a)
Transportation Safety Act of 1974	49 U.S.C. §1903(d)
Wholesome Poultry Products Act	21 U.S.C. §457(d)

APPENDIX B

Problems of Measurement and Specification

There were, as indicated in the body of this report, a number of data collection problems that emerged in the course of the study. The discussion that follows indicates any special or unusual steps that were necessary. Where quantifying the indicator was straightforward, we have not included it in the discussion that follows.

1. Number of lawyers. The type of counsel was not uniformly discernible from docket or other records kept in the courthouse. However, we did count the number of lawyers associated with each case. Our counts were based on the lawyers' names listed on the docket sheets, according to the following rule: We counted only one lawyer from any office or agency. This rule prevented some obvious inflationary errors. Otherwise, for example, we would have had to count the United States attorney for the District of Columbia in many cases in which it is safe to assume that his assistants carried out most of the labor. We also cross-checked the number of lawyers counted on the docket sheets with the number counted on opinions of published cases. In almost two-thirds of the cases, the numbers were not in exact agreement. This may have been due to different methods of recording lawyers' names in the two documents, to changes in lawyers between the time their names were entered on the docket and the time their names were submitted to West for publication, similar differences internal to the operation of the publication process, or measurement error on our part. As noted in the body of the report, however, differences between case types in the number of lawyers participating are large enough to warrant the drawing of conclusions, regardless of the measurement problem.

2. Aggregate length of briefs. We counted the length, in pages, of all briefs associated with the docket number of the cases in our sample. In some instances briefs were contained in the files from earlier, related actions; these briefs were not included in our page counts unless the new docket numbers appeared on them, indicating that the briefs were also part of the current action. Not all briefs are presented to the court in the same page format. In count-

ing the number of pages in briefs, we used a standard of a "unit page" of one double-spaced manuscript page on standard-size paper (8½ by 11 inches), and actual page counts were converted to this standard. It should be noted that the standard page size used for counting pages of briefs (and records on appeal, see number 4 below) was not the same as that used for counting pages of opinions.

3. **Number of issues and case citations in briefs.** In counting the number of issues in briefs, we counted only the issues presented in appellants' briefs, including coappellants and cross-appellants. We discovered early in the work that the number of issues presented by appellees is virtually always equal to or less than the number presented by appellants—in that sense, the number of appellee's issues is predictable from the appellant's number. The number of case citations in briefs was also determined from appellants' briefs. In this study we were not able to achieve reliable counts of administrative rulings, statutes, and other sorts of reference material; however, our initial impressions lead us to believe that such factors should be included in any future work of this kind.

It should be noted that cross-appellants are also appellees. In the few cases with cross-appellants, we divided the number of issues and citations in half, crediting half to the cross-appellant for counting purposes.

4. **Aggregate length of record on appeal.** To count the number of pages of appendixes, we used a standard of a "unit page" of one double-spaced manuscript page on standard-size paper (8½ by 11 inches) (approximately 300 words; this is the same unit page described in number 2 above). We converted material to this standard to account for the various forms of materials in the appendixes: scientific articles, excerpts of statutes, the *Federal Register,* congressional testimony, and so on. Our counts are only approximate; however, as shown in the body of the report, differences between case types regarding length of joint appendixes are large enough to warrant drawing conclusions, regardless of the lack of precision in our counting methods.

5. **Number of postdisposition motions.** Dockets list motions and hearings, but they do not indicate which motions were, or were not, disposed of at any hearing. Further inquiries regarding this information would have been beyond the scope of this study. We did measure, however, the number of motions filed after the termination date of the case as recorded on the JS-34 form. This is a matter of some interest and concern to the clerk's office because work done under a particular docket number after termination (in the sense that the case is labeled terminated on the JS-34) is not

credited to the circuit by the Administrative Office. We did not explore this matter in detail during the study, but we believe it is worth further inquiry.

6. Aggregate length of opinions. To determine the length of opinions, for published dispositions only, we counted the number of pages as they appeared in the *Federal Reporter* or in a slip opinion. (Two slip opinion pages equal one page in F.2d.)

7. Number of citations in opinions. We counted citations in all published opinions. Some reliability checking showed that highly reliable counts are difficult to achieve in long opinions, at least without resorting to machine methods of search. We claim only approximate accuracy of the counts shown. However, our counting difficulties were unbiased with regard to case type.

8. Petitions granted for en banc hearing. When one of our sampled cases (docket numbers) terminated with en banc review, we coded it, but there were too few instances for this to be a major indicator in this work. As a matter of background, we note that a total of seven cases terminated by en banc review in fiscal 1980. Four of these were "lead cases," and the other three were consolidated under them. By chance our sample included two of the four, and the list of extreme cases provided by the clerk's office contained another.

9. Procedural stage at termination of appeal. Our sample was drawn only from cases that terminated after submission on briefs or oral argument. Thus it represents only the relatively burdensome cases in all case types. Figures 1 and 2 in chapter one display relationships between case types and forms of termination.

Measurement problems precluded the use of the remaining indicators shown in table 6.

APPENDIX C

List of Sample Cases

Administrative Cases

Docket Number	Case Title
76-1937	Papago Trial Utility Authority v. Federal Power Commission
76-2015	Retail Store Employees Union, Local 1001 v. NLRB
77-1184	Committee to Elect Lyndon LaRouche v. Federal Election Commission
77-1596	National Railroad Corp. v. ICC
77-1600	White Corp. v. NLRB
77-1635	City of Groton v. Federal Power Commission
77-1907	Aetna Freight Lines v. ICC
77-1914	Central Iowa Power Cooperative v. Federal Energy Regulatory Commission
77-1969	American Cynamid Co. v. FDA
78-1356	Panhandle Eastern Pipeline Co. v. Federal Energy Regulatory Commission
78-1443	Harborlite Corp. v. ICC
78-1461	American Optometric Ass'n v. FTC
78-1506	Teamsters Local 20 v. NLRB
78-1562	AFL-CIO v. Marshall
78-1589	Investors Research Corp. v. SEC
78-1628	International Transport Inc. v. ICC
78-1653	School District No. 1, City & County of Denver v. FCC
78-1667	NLRB v. Maywood Plant of Grede Plastics
78-1677	Leflore Broadcasting Co. v. FCC
78-1690	Pan American Health Organization v. Federal Maritime Commission
78-1709	NLRB v. Mount Vernon College
78-1778	Shankman v. Secretary of Labor
78-1794	Motor & Equipment Manufacturers Ass'n v. EPA
78-1898	Manchester Tower Grove Community Organization/Acorn v. Board of Governors of Federal Reserve System

78-1936 NGP-LNG, Inc. v. Federal Energy Regulatory Commission
78-1978 Puerto Rico Port Authority v. Federal Maritime Commission
78-2063 Ashland Exploration, Inc. v. Federal Energy Regulatory Commission
78-2200 Crouse Cartage Co. v. ICC
78-2271 Sea Land Service, Inc. v. Federal Maritime Commission
78-2297 NLRB v. Catholic University
78-2303 National Distributing Co. v. United States Department of Treasury
79-1023 Greyhound Corp. v. ICC
79-1090 Truck Transport Inc. v. ICC
79-1192 Diamond International Corp. v. FCC
79-1280 Independent Insurance Agents of America, Inc. v. Board of Governors of Federal Reserve System
79-1445 Freightways Express, Inc. v. ICC
79-1692 Whirlpool Corp. v. Occupational Safety and Health Review Commission

U.S. Civil Cases

76-1142 Ashton v. Levi
77-1273 National Black Police Ass'n v. Velde
77-1852 Air Line Pilots Ass'n v. Bond
77-1941 Six Nations Confederacy v. Secretary of Interior
77-2138 Los Angeles v. Marshall
78-1200 Irons & Sears v. Dann
78-1271 Marshall v. Federal Highway Administration
78-1332 Statile Association Inc. v. Panama Canal
78-1440 Osceola v. Kuykendall
78-1490 Kranidas v. Harris
78-1691 Contact Inc. v. Adams
78-1694 Mobil Oil Corp. v. Marshall
78-1702 Dresser Industries v. SEC
78-1779 Mansfield v. Iannone
78-1797 Schuler v. United States
78-1842 Utah Power & Light Co. v. Natural Resources Defense Council, Inc.
78-1858 Halperin v. National Security Council
78-1963 Joseph v. Bond
78-2039 United States v. Andrulis
78-2148 Pendleton v. Rumsfield
78-2169 Fenster v. Brown

78-2217 Kennedy v. Andrus
79-1043 Briggs v. United States
79-1086 National Treasury Employees Union v. Kurtz
79-1154 Johnson v. United States
79-1206 Macellard v. Goldman
79-1209 Leib v. United States
79-1223 Banner v. Hirschfield
79-1467 Falstaff v. SEC
79-1646 Gulf Western Industries v. United States
79-1781 Martin Marietta Corp. v. FTC
79-1801 Williams v. United States
79-1802 Hudspeth Sawmill Co. v. Bergland
79-1931 United States v. Atlantic Container Line, Ltd.
79-2073 Peabody Coal Co. v. Andrus
80-1458 District of Columbia v. Phillips

Private Civil Cases

78-1108 Shear v. NRA
78-1421 Southern Railway v. Seaboard Coast Line Railroad
78-1856 Hozie v. Rykhus
78-2313 Upton v. Empire of Iran
79-1004 Spencer, John (Complaint against him as member of Bar of District Court)
79-1159 Revere Copper & Brass, Inc. v. Overseas Private Investment Corp.
79-1451 Sparks v. Western Shore Publishing Co.
79-1519 Morton v. Providence Hospital
79-1572 McKenzie v. Alla-Ohio Valley Coals, Inc.
79-1616 Key West & Caribbean Trading Co. v. Keegal
79-1668 Fry Trucking Co. v. Shenandoah Quarry, Inc.
79-1828 Kassatly v. Ogem
79-2040 Reitz v. Radio Free Europe/Radio Liberty, Inc.

Criminal Cases

72-1283 DeCoster v. United States
77-1589 Williams v. United States
77-2050 Alston v. United States
77-2106 Brown v. United States
78-1193 Ford v. United States
79-1341 Warren v. United States

79-1376 Malloy v. United States
79-1532 Spearman v. United States
79-1633 Jordon v. United States
79-1872 Harris v. United States
79-1884 Nelson v. United States
79-2019 Thompson v. United States
79-2229 United States v. Martin

Other Case

77-2116 In re Buckingham

APPENDIX D

List of Extreme Cases

Docket Number	Case Title
76-2102	North Carolina v. Federal Energy Regulatory Commission
76-2119	NOW v. Social Security Administration
77-1249	United States v. FCC
77-1666	Elizabethtown Gas Co. v. Federal Energy Regulatory Commission
77-1915	Las Cruces TV Cable v. FCC
78-1002	Citizens to Save Spencer County v. EPA
78-1006	Alabama Power Co. v. EPA
78-1364	Pepsico, Inc. v. FTC
78-1697	Western Union International, Inc. v. FCC
78-1715	Communications Investment Corp. v. FCC
78-2067	International Union of Electrical, Radio, & Machine Workers v. NLRB
78-2177	Donald Schriver, Inc. v. NLRB
78-2265	Potomac Electric Power Co. v. ICC
79-1048	United Steelworkers of America v. Marshall
79-1194	Interpool Ltd. v. Federal Maritime Commission
79-1261	ABC, Inc. v. FCC
79-1267	National Association of Recycling Industries, Inc. v. Federal Maritime Commission
79-1299	United States v. Federal Maritime Commission
79-1393	National Association of Recycling Industries, Inc. v. ICC
79-1487	Lincoln Telephone & Telegraph Co. v. FCC
79-1580	Environmental Defense Fund v. EPA
79-1590	Atchison, Topeka & Santa Fe Railway v. ICC
79-1643	Texaco, Inc. v. Department of Energy
79-1859	Melton Truck Lines v. ICC
79-2182	Public Service Commission v. Federal Energy Regulatory Commission
79-2312	United States v. Hubbard
79-2512	Defenders of Wildlife Inc. v. Endangered Species Scientific Authority

80-1123 Environmental Defense Fund v. Higginson
80-1148 National Wildlife Federation v. Andrus
80-1390 Monongahela Power v. FCC
80-1691 Sholey v. NRC
80-1779 American International Group, Inc. v. Islamic Republic of Iran
80-1844 Schneider v. Lockheed Aircraft Corp.

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