



2006

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Recommended Citation

Richard A. Posner, *Demand and Supply Trends in Federal and State Courts over the Last Half Century*, 8 J. APP. PRAC. & PROCESS 133 (2006).

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DEMAND AND SUPPLY TRENDS IN FEDERAL AND STATE COURTS OVER THE LAST HALF CENTURY

Richard A. Posner*

I have been interested in judicial administration for many years—since long before I was a judge—and I have been a judge for twenty-four years, all on the Seventh Circuit, and so I have experienced what I shall be talking about. I will offer some reflections based on that experience, but this is primarily a statistical study. I refer you to my book for greater detail on points sketchily covered here,¹ though the book is already somewhat dated.

My discussion is keyed to a series of tables. Table 1 is a time series of cases filed in federal district courts and Table 2 is the same but for filings in state trial courts, this time series being abbreviated because the data are unavailable for the period before 1987. Note in Table 1 the inflection point around 1960 for the federal district courts, which initiates a huge growth that continues to the mid-1980s, with little growth since then. (In contrast, the caseload of the state trial courts has been growing uninterruptedly since the first data point, 1987.) Skipping ahead to Table 5, notice how easily the growth has been accommodated by the addition of federal judges, as a result of which the average caseload per district judge has not increased significantly. District judges and other first-instance judges can be added with little difficulty to absorb increases in caseload because there is no coordination problem; the judges are not a collective rulemaking body like appellate judges.

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1. Richard A. Posner, *The Federal Courts: Challenge and Reform* (Harvard U. Press 1996).

But this raises a question: Why the vanishing-trials phenomenon depicted in Table 8, that is, the sharp decline in the percentage of cases that are resolved by judgment after trial? That sounds like an adaptation to heavier caseloads, yet caseloads per district judge aren't significantly heavier.

Tables 3 and 4 are parallel to Tables 1 and 2 but their statistics are for federal and state appellate rather than trial courts. Notice the huge increase in the appeal rate² in the federal system, mysteriously coupled with an apparent fall in the appeal rate in the state system. A comparison with Table 2 reveals that the increase in the number of state-court appeals has been less than that in the number of cases at the trial-court level. In fact the number of appeals has been decreasing recently; but a limitation of the data, of course, is that they begin only in 1987.

The steep increase in the federal appeal rate is a considerable puzzle only slightly explained by the increase in the percentage of prisoner cases (both habeas corpus and civil rights), as shown in Table 7. One possibility is that with more judges there is greater uncertainty about the outcome of an appeal, and uncertainty in outcome is a big factor in generating appeals. Another possibility is the vanishing-trials phenomenon: There is a fuller consideration of the issues at the trial-court level when there is a trial, and that greater consideration should reduce uncertainty about the merits of the parties' claims and therefore about the likely outcome of an appeal. Also, there is greater appellate reluctance to upset a judgment after a trial; the judges tend to feel that the loser had his shot. Knowing this, the loser is less likely to appeal.

Table 6 depicts changes in the federal appellate caseload per judge. Because adding appellate judges to match caseload increase creates problems of increased paperwork, of coordination, and of coherence, it is resisted; and with the increase in the number of appellate judges thus lagging the increase in appellate caseload, one observes the dramatic increase in federal appellate caseloads per judge that is shown in this table.

2. This is a constructed rather than literal appeal rate. It is simply the number of appeals divided by the number of judgments in the trial court, rather than the number of appealable orders that are in fact appealed. It is a crude estimate, though the trend is probably pretty reliable.

Yet the federal courts of appeals appear to have accommodated the steep increase in caseload per judge relatively painlessly. The factors enabling this accommodation appear to be several-fold: Many federal appeals judges probably were underworked in 1960, and appeals have become on average simpler to decide because fewer cases at the district court level are decided after a full trial. Additional factors are economy measures adopted since 1960 that include the curtailment of the frequency and length of oral argument; the reduced number of cases decided by a published opinion rather than by an unpublished order; the increased number of law clerks and staff attorneys; improved information technology (e-mail, Google,TM and so forth); better screening of judicial candidates (including self-screening—the job has become less attractive because it is more demanding); and the hiring by the courts of appeals of settlement officers to try to settle appealed cases before they are argued.

Notice in Table 9 how the percentage of federal judicial employees that consists of judges has shrunk; this is one index to some of the adaptations just noted. And it is a clue to the vanishing-trials phenomenon; staff can dispose of cases pretrial but a judge is needed to preside at a trial.

Have the adaptations I have mentioned reduced the quality of the federal judicial output? No general answer is possible. Arthur Hellman has collected data documenting the extraordinary caseloads per judge in the Fifth and Eleventh Circuits, where staff attorney/judge ratios are highest (three to one versus the normal two and one) and oral argument and published opinions rarest.³ In my court, the average number of cases per federal court of appeals judge has approximately doubled since I became a judge in 1981. Nevertheless we are not sitting more (we hear six cases a day about thirty days a year) and I do not feel that my judicial workload has increased, though this is deceptive because a judge can dispatch his work faster with more experience.

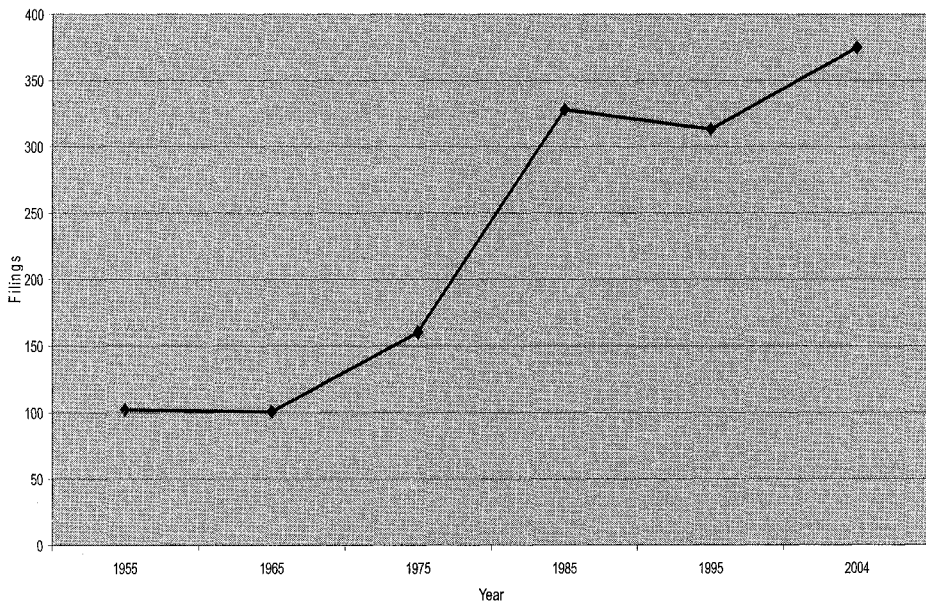
I certainly have no impression that quality has fallen.

3. Arthur D. Hellman, *Assessing Judgeship Needs in the Federal Courts of Appeals: Policy Choices and Process Concerns*, 5 J. App. Prac. & Process 239, 253-60 (2003).

I'm driven to the conclusion not so much that federal appellate judges were underworked in the old days—that's just part of the picture, and probably a small part. More important, the federal courts of appeals were inefficient—they were not exploiting ways of becoming more productive. Jolted by the sudden steep increase in caseload that began in about 1960, they have, like other "businesses," responded efficiently to cost pressures that were threatening to drive them out of business.

TABLES⁴

Table 1: Total Filings, Federal District Courts, 1955-2004 (in 000's)



4. The data in these tables were compiled by the Federal Judicial Center. See generally *1955-2004 Statistical Data regarding Federal Courts*, 8 J. App. Prac. & Process 21 (2006) (reprinting statistics provided to attendees at 2005 National Conference on Appellate Justice). Similar data appear in *Statistical Data regarding State Courts*, 8 J. App. Prac. & Process 37 (2006) (same).

Table 2: Total Filings, State Trial Courts, 1987-2002 (in 000s)

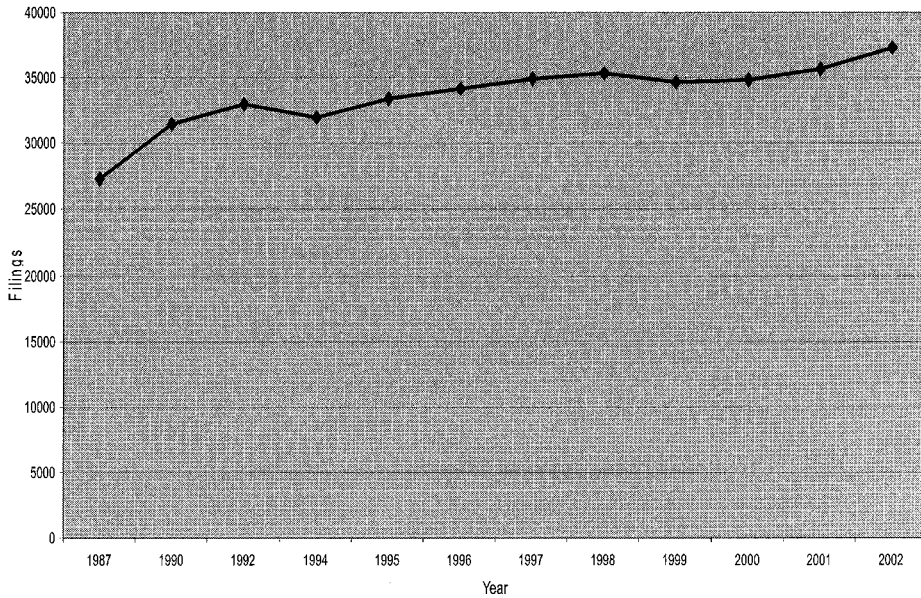


Table 3: Total Filings, Federal Courts of Appeals, 1955-2004 (in 000s)

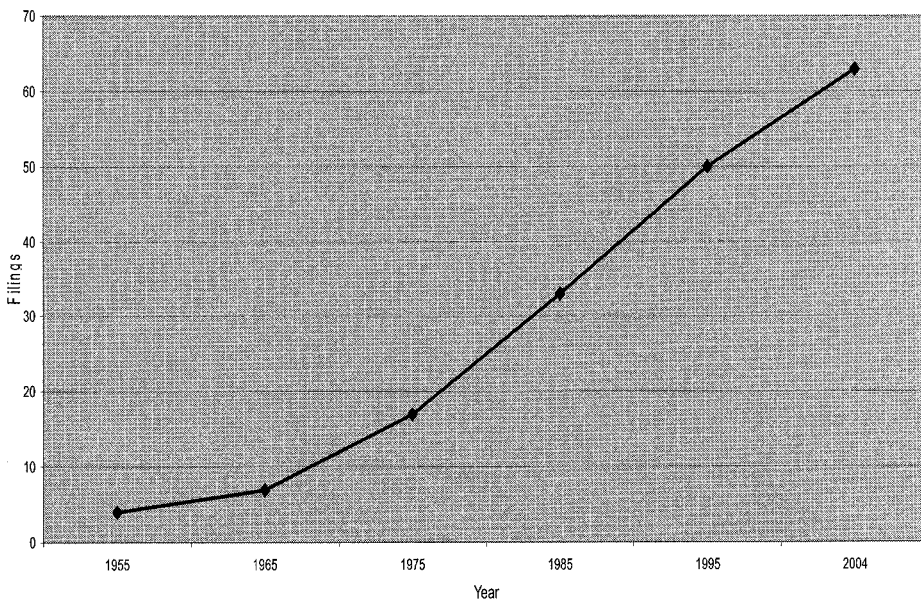


Table 4: Filings in State Appellate Courts, 1987-2002 (in 000s)

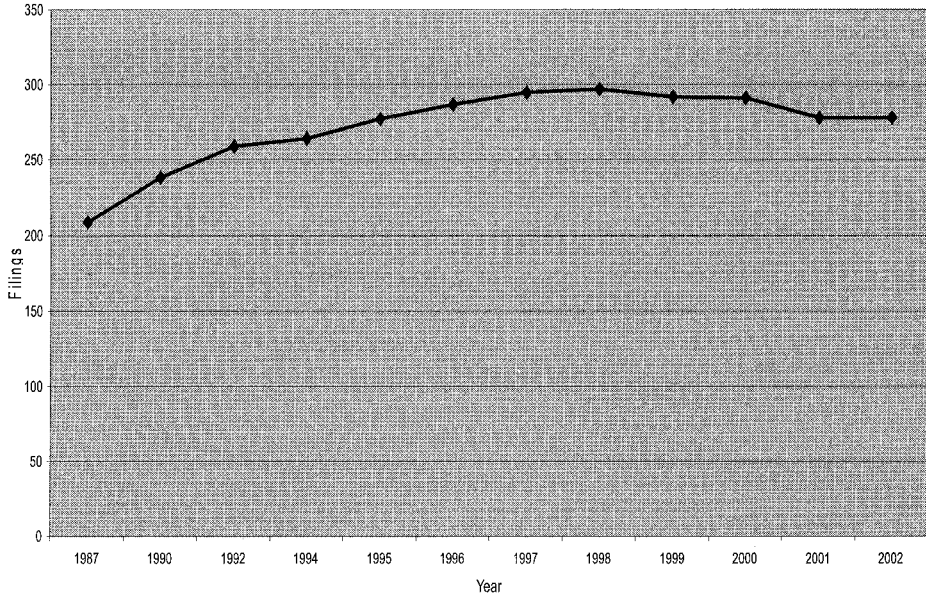


Table 5: Federal District Judges and Filings per Judge, 1955-2004

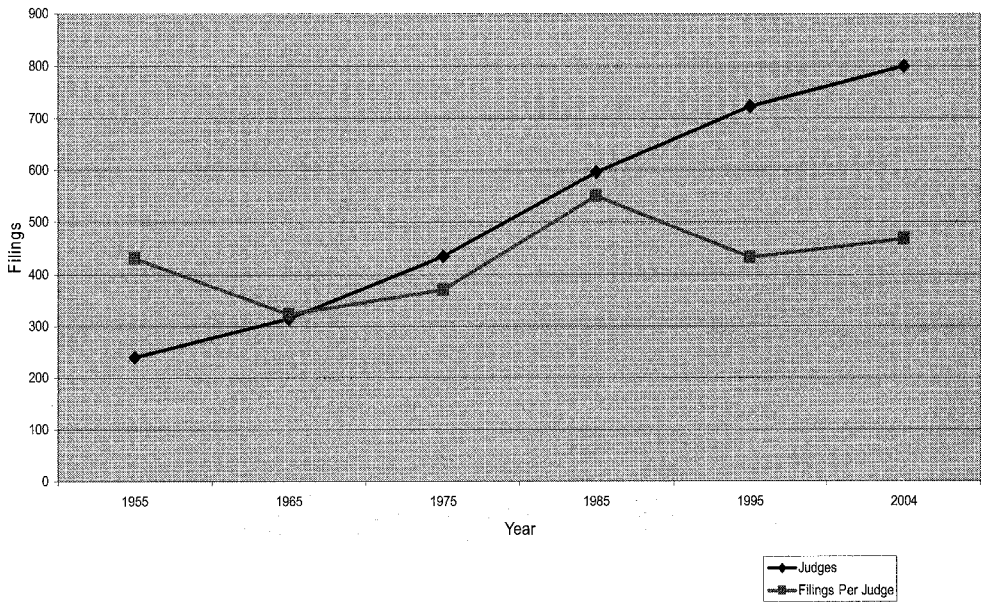


Table 6: Federal Circuit Judges and Filings per Judge, 1955-2004

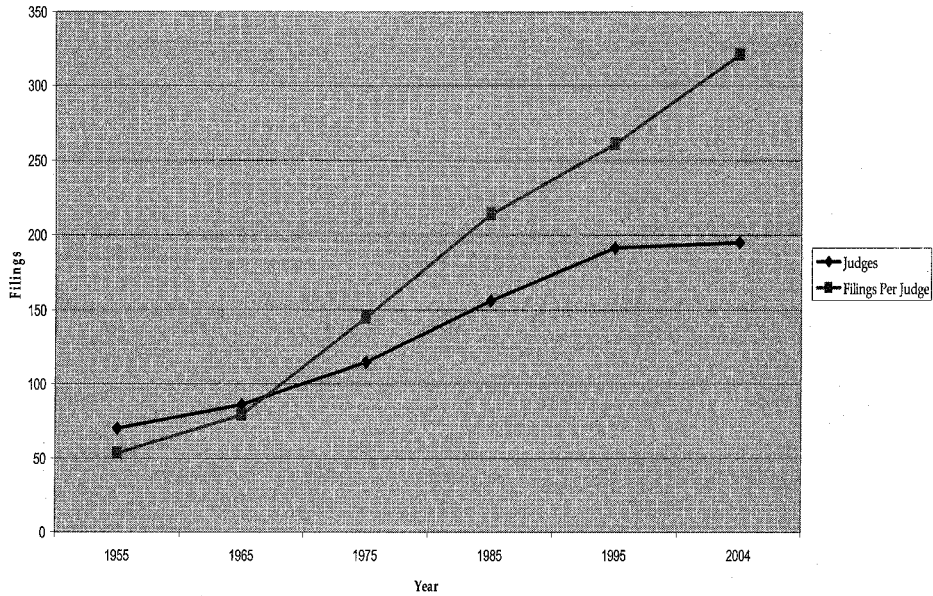
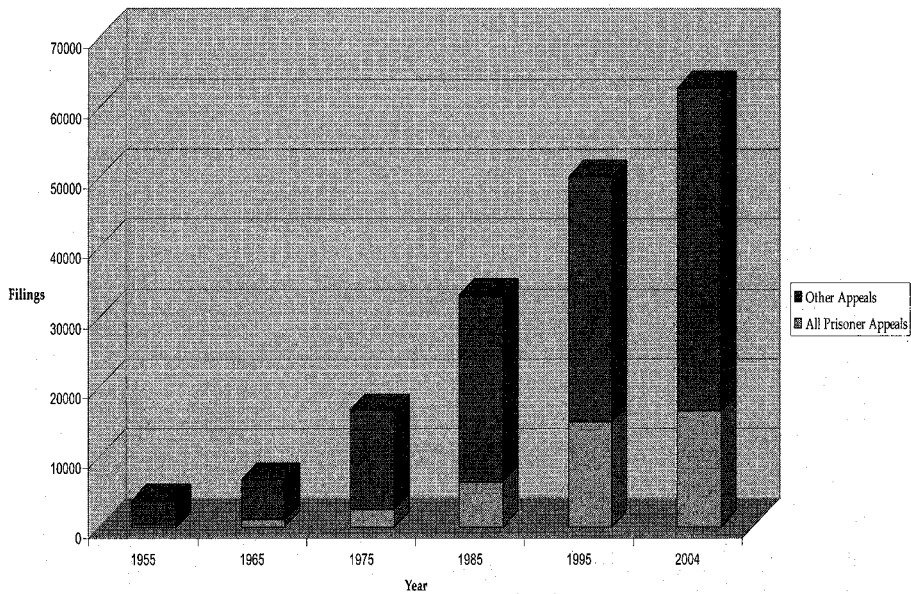


Table 7: Changes in Federal Appellate Caseload Composition, 1955-2004



**Table 8: Percentage of Federal and State Dispositions Terminated with Trial
1955-2004 (Federal) 1987-2002 (State)**

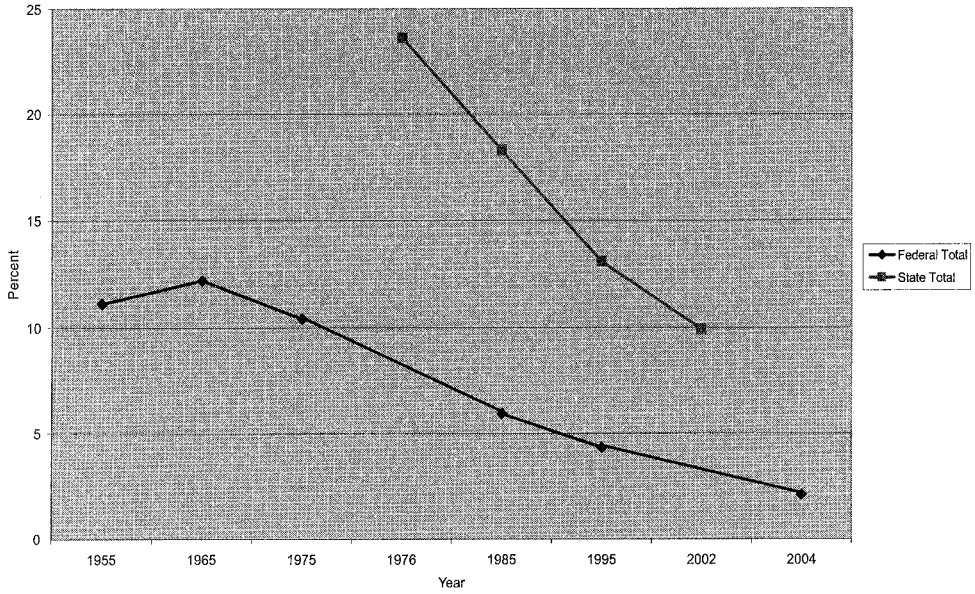


Table 9: Active Federal Judges and Non-judge Staff, 1955-2004

