A Tale of Two Laws Revisited: Investigating the Impact of the Prisoner Litigation Reform Act and the Antiterrorism and Effective Death Penalty

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Executive Summary

Central Findings

The United States Congress enacted two major pieces of legislation in 1996 to affect the volume and nature of prisoner litigation in the federal courts. State prisoners are able to file habeas corpus petitions challenging the validity of their convictions and to file lawsuits challenging the conditions of their confinement. Prisoners' cases are a sizable proportion of the caseload, accounting for more than one of every five civil cases in the federal trial court system.[1]

The Congress's recent statutory policies called the Antiterrorism and Effective Death Policy Act (AEDPA) and the Prisoner Litigation Reform Act (PLRA) were the first laws enacted since 1980 that focused on state prisoner litigation. In 1980, the Congress passed the Civil Rights of Institutionalized Persons Act (CRIPA). Under CRIPA, state correctional agencies could voluntarily seek certification of their grievance procedures from the Attorney General and federal courts. If certified, the procedures then would have to be exhausted prior to the filing of lawsuits against state correctional officers. CRIPA never really took hold because few states sought certification and with the exception of primarily the U.S. Court of Appeals for the Ninth Circuit, few federal judges showed an inclination to certify state mechanisms.

The Congress's actions in 1996 also followed several important U.S. Supreme Court decisions concerning both habeas corpus petitions and challenges to prison conditions. For the past twenty years, the Court had rendered a series of decisions that narrowed the scope of conditions under which prisoners could litigate. Yet, despite those efforts, the number of prisoners' cases increased consistently over time.

[1] Both types of cases are classified as civil matters by the Administrative Office of the U.S. Courts (AO) even though they are filed by prisoners and are challenges to key aspects of the state criminal justice system.

Because evidence gathered for this paper indicates that the Prisoner Litigation Reform Act achieved its intended effects, and the Antiterrorism and Effective Death Penalty Act did not achieve parallel results, the tale of the two Acts is interesting. What led to the divergent effects of the two Acts?

Overview of PLRA

The PLRA had two major features. The first focused on governing the judicial role following a court determination of unconstitutional prison conditions such as overcrowding and inadequate medical care. The second dealt with complaints brought by individual prisoners. This latter component, designed to limit "frivolous" litigation, drove much of the congressional debate and was clearly intended to reduce the number of prisoner lawsuits filed. Because a large proportion of prisoner lawsuits were being dismissed, the presumption by many drafting the PLRA was that most were frivolous and numerous examples were assembled in support of that viewpoint. As a consequence, the PLRA provisions for dealing with frivolous litigation, primarily restrictions on filing in forma pauperis for previous frivolousness and the assessment of filing fees, focused on increasing the costs to prisoners of even proceeding to the filing stage. The goal was to purge the frivolous cases before they ever entered the system.

There are three provisions of this statute especially relevant to understanding the trends in Section 1983 filings. They are:

- Inmates must exhaust all available administrative remedies before filing the case, even if a facility's grievance procedures have not been certified by the U.S. Department of Justice or a federal court.
- Inmates filing lawsuits in forma pauperis are required to pay the appropriate filing fees (and costs, where applicable) from their existing assets or any funds available to them through their trust fund accounts within the correctional system.
- Inmates are prohibited from filing lawsuits in forma pauperis (as an indigent without liability for court fees and costs) if the inmates have filed three or more actions in federal court that were dismissed as frivolous or malicious or for failing to state a claim on which relief can be granted.

The import of these requirements is that until and unless they are satisfied, federal trial courts need not accept a prisoner's Section 1983 case simply because a prisoner has filed a complaint. The courts are not required to docket the complaint as a case, give it a case number and place it in the queue for court action.

Overview of AEDPA

Key provisions of AEDPA are as follows:

- Establishment of a statute of limitations whereby both federal and state inmates have one year from the time their conviction becomes final (i.e., one year from the time their conviction becomes final and/or sentence is exhausted) to file a habeas corpus petition in federal court. In the case of prisoners under sentence of death, the petition must be filed within 180 days.
- The provision that a claim presented in a second or successive habeas corpus application that was presented in a prior application shall be dismissed.
- Federal courts are required to show deference to the determination of the state courts, provided that these determinations are neither "contrary to" nor an "unreasonable application of" clearly established federal law as determined by the Supreme Court.

Provisions of AEDPA are intended to limit the number of habeas corpus petitions filed. For example, AEDPA might reduce the number of potential late filers because the one-year filing deadline reduces the time between the exhaustion of state remedies and the filing of a petition. Because no standard time frame existed before the AEDPA, some prisoners took years after exhaustion before filing a petition. In addition, restrictions on successive petitions was expected to encourage prisoners to consolidate their issues into a single petition thereby further reducing the number of filings.

Findings

The findings of the evaluation are summarized in three parts:

- *Part I: The Effect of PLRA on the filing rate of Section 1983 Lawsuits* examines whether PLRA had its intended effect of reducing the number of Section 1983 lawsuits filed.

- *Part II: The Effect of AEDPA on the filing rate of State Prisoner Habeas Corpus Petitions* examines whether AEDPA had its intended effect of reducing the number of state prisoner habeas corpus petitions filed.

- *Part III: Conclusions* presents five lessons to be learned from this dual set of policy initiatives.

Part I: The Effect of PLRA on the Filing Rate of State Prisoner Lawsuits

Using the techniques of interrupted time series analysis, it was determined that PLRA produced a statistically significant decrease in both the volume and trend of Section 1983 lawsuits per 10,000 state prisoners nationally and in every Circuit, except the 5th . The 5th Circuit had displayed a decreasing trend prior to PLRA's implementation that continued without change after implementation. Although District Courts in all Circuits (except the 5th) showed a statistically significant drop in prisoner litigation following enactment of the PLRA, the *extent* of the decline varied considerably. The percentage change in the average monthly filing rates ranged from a decrease of 31 percent in the 9th Circuit to 74 percent in the 2nd Circuit. However, the size of the decrease in the Circuits was shown to be not related to the size of the filing rate before PLRA was adopted, although the rates varied extensively among the Circuits. Apparently the PLRA is having a differential impact across the circuits and is operating in a more subtle manner than would be expected based simply on the size of the pre-PLRA filing rate.

If the PLRA is operating as envisioned by its authors, we have certain expectations about the type of cases that will no longer be filed in federal courts or that will be summarily dismissed. If the PLRA is serving to siphon off nonmeritorious cases, then we expect that trials will account for an increased proportion of resolutions post-PLRA. If some procedurally weak cases are no longer filed, then the relative share of meritorious cases should rise and we should

see an increase in the trial rate. The results show that jury trial rates have risen in every Circuit (except the 6th, where there was little change), though the proportion of resolutions accounted for by trials remains small and varies among the circuits. Proponents of the PLRA will likely see these results as indicative of success. Fewer prisoner lawsuits are being filed, relatively more cases (presumably procedurally weak) are being dismissed earlier in the process, and relatively more cases are being resolved by jury trial.

Part II: The Effect of AEDPA on the Filing Rate of Federal Habeas Corpus Petitions

The current research has demonstrated three important relationships between AEDPA and the filing of habeas corpus petitions. First, the results demonstrate that AEDPA did not produce or contribute to an expected decrease in petitions. No set of U.S. District Courts in any circuit demonstrates a decrease in filing rates after AEDPA.

Second, we find no support for the claim made by other observers that AEDPA actually "caused" an increase in habeas corpus petition filing rate. We could not discern an increase in filing rates coincident with the immediate implementation of AEDPA either nationally or in any circuit. Further, an increasing trend in the rate of habeas corpus petitions several months after implementation of the PLRA occurred in only three of the eleven circuits.

Third, reality fits two patterns. For District Courts in most Circuits, a one-time spike occurs in filing, followed by a return to the filing rates that existed before AEDPA. And, in three of the circuits (3rd, 4th, and 9th) District Courts experienced not only a spike increase, but witnessed a step-like increase to a higher plateau in filing rates.

From our perspective, these two patterns – called delayed step and pulse models – generally corroborate the ideas and propositions in the court administration literature. An increase in prison population in the first half of the 1990s, an increase in violent offenders

throughout the 1990s, the opportunity for multiple petitions despite the tightening of restrictions on successive petitions, all played a role in maintaining or increasing the habeas corpus filing rates.

Part III: Conclusions

The U.S. Congress took an extraordinary step in 1996 by enacting two policies to regulate the use of the legal system by state prisoners. They were the Prisoner Litigation Reform Act (PLRA) and Antiterrorism and Effective Death Penalty Act (AEDPA).

The PLRA dealt with lawsuits filed by state prisoners challenging the conditions of their confinement, which are commonly called Section 1983 cases. The AEDPA focused on applications for writs of habeas corpus filed by prisoners challenging the validity of their convictions and sentences, which commonly are called habeas corpus petitions.

Because these two types of legal actions are cases filed in and resolved by federal courts, the evolving doctrines governing prisoners' legal actions traditionally have been developed by federal judiciary led by the U.S. Supreme Court. Congressional involvement in this area of public policy, which is a striking departure from the past, calls attention to these laws. Additionally, the provisions of the legislation involves choices based on fundamental values, such as the extent to which prisoners have constitutional rights while incarcerated, the amount of time and resources that should be devoted to determining whether prisoners are correctly (or wrongfully) convicted, and the degree to which federal courts should supervise state correctional institutions and state courts. As a result, these two laws are part of an ongoing national debate on important criminal justice issues and policy. Moreover, these two laws are important to understand because of their consequences.

Both the proponents and the critics of these laws expected the number of cases brought by prisoners in federal courts to decrease as a result of their provisions. Yet, whereas Section 1983 lawsuits decreased sharply in U.S. District Courts within the jurisdiction of every Circuit of the U.S. Court of Appeals after the introduction of PLRA, no glimmer of a decrease in habeas

corpus petitions occurred in District Courts within any Circuit's jurisdiction after implementation of AEDPA.

We conclude this report by offering some lessons to be learned from the consequences of this dual set of policy initiatives. From our perspective, we believe that there are five lessons that emerge from what happened to prisoner litigation after the introduction of PLRA and AEDPA

The first lesson is that intrinsic difference between a lawsuit and an application for a writ put Congress in a much better position to influence Section 1983 cases than habeas corpus petitions. Every area of civil law, including prisoners' rights, involves procedural requirements that plaintiffs must meet to have their complaints accepted by courts (i.e., docketed, placed on track or calendar and set for the first court event). As a result, Congress was able to introduce new requirements via PLRA (e.g., filing fees, exhaustion of state remedies) that ultimately proved effective. Complaints without payment of fees and exhaustion of state remedies were not accepted. In fact, these requirements likely deterred some prisoners from filing complaints because they knew they could not meet or were unwilling to satisfy those requirements.

No such filing requirements exist for habeas corpus petitions. Courts must accept applications for writs of habeas corpus petitions and docket them. Then, courts can decide whether to grant, deny or dismiss the petitions. However, Congress was in no position to intervene in the courts' decisions to accept habeas corpus petitions. Hence, the Congress faced a more daunting challenge in producing a reduction in habeas corpus petitions than it experienced in reducing Section 1983 cases.

A second lesson, which follows from the first one, is that the new exhaustion requirements incorporated in the PLRA and the pre-existing exhaustion doctrine governing

Federal habeas corpus are not equivalent. Exhaustion of state remedies for Section 1983 lawsuits and Federal habeas corpus petitions are similar in name only.

The essential difference in the meaning and application of the two exhaustion requirements is that PLRA prohibited the acceptance of Section 1983 complaints by prisoners and docketing them as court cases if administrative (correctional) grievance procedures had not been exhausted. In contrast, prisoners could have their habeas corpus petitions accepted by federal courts even if they had failed to exhaust state remedy (i.e. state appellate court review and state habeas corpus or post conviction remedies) processes. Federal courts might quickly dismiss petitions that had failed to exhaust state remedies, but there was nothing in AEDPA that prohibited the acceptance of petitions that had not met the exhaustion requirement. Consequently, the two sets of exhaustion requirements constituted two quite contrasting criteria. This distinction between them contributed to the relative success of PLRA because its provisions permitted federal courts to reject prisoner complaints which, in turn, reduced the number of Section 1983 lawsuits. Hence, unless the exhaustion doctrine for habeas corpus is modified in some way, Congress will have to find another way to see appreciable decreases in the number of petitions.

A third lesson is that the nature of the prisoner population plays a role in inhibiting the efforts to reduce the number of habeas corpus petitions, but plays no similar role in efforts to reduce Section 1983 cases. Simply stated, the composition of the correctional population independently affects the filing of habeas corpus petitions. Specifically, violent offenders with lengthy sentences are more likely to file habeas petitions than nonviolent offenders who are likely to be released before they exhaust state remedies and complete the federal court review process. Consequently, as the prison population becomes increasingly dominated by offenders

subject to long-term incarceration, the efforts to restrict habeas petitions are confronted with the increasing tendency of the prison population to file petitions. Hence, unless the Congress takes into account the varying probability of offenders to file habeas corpus petitions, and develops measures to overcome the increasing percentage of prisoners who are likely to file petitions, the effects of additional procedural requirements will not make a difference in filing rates.

A fourth lesson is that the success of PLRA and AEDPA cannot be judged by examination of only the number of prisoners' cases that are filed. The disposition of the cases also is essential to understand and to evaluate the legislation. For example, consider some of the questions that need to be addressed about habeas corpus petitions and AEDPA. Has the number and type of legal issues changed after the introduction of AEDPA? Did the AEDPA change the time taken to resolve petitions? Is the percentage of outcomes favorable to prisoners higher, lower, or the same after AEDPA? Are the grounds for dismissing petitions different or about the same after AEDPA?

Without answers to these questions, the number of petitions before and after AEDPA is a very blunt measure of the legislation's performance. Moreover, this criterion fails to provide any clues on the dynamics of the legal process. No information is gained on how and why prisoners reacted to AEDPA. Hence, Congress should be prepared to focus on the manner and outcome of case resolution as it considers future refinement in the provisions of AEDPA and PLRA.

A fifth lesson is that the U.S. Congress should be able to improve its policy initiatives in the area of prisoner litigation in the future. The current research has clarified some basic issues, and the terms of policy debates should have been advanced accordingly. We now know that it is quite possible to influence Section 1983 cases through conscious policy choices. More information is needed to know exactly how relative the importance of different legislative

provisions play in shaping case filings. However, that connection is not unknowable. For this reason, the existing legislation should be amenable to a more focused dialogue on how best to refine existing provisions. On the other hand, the impact of policy choices on habeas corpus petitions should be seen as a more complex matter than what the Congress previously might have assumed. More basic research and thought are necessary to develop provisions that have a reasonable chance of achieving the goal of a reduction in petitions. Hence, the Congress should build on its past efforts and use the knowledge gained to craft more legislation that achieves its intended objective without sacrificing the interests and rights of prisoners.

Chapter 1: Introduction

The United States Congress enacted two major pieces of legislation in 1996 to affect the volume and nature of prisoner litigation in the federal courts. State prisoners are able to file habeas corpus petitions challenging the validity of their convictions and to file lawsuits challenging the conditions of their confinement. Prisoners' cases are a sizable proportion of the caseload, accounting for more than one of every five civil cases in the federal trial court system.[1]

The Congress's recent statutory policies called the Antiterrorism and Effective Death Policy Act (AEDPA) and the Prisoner Litigation Reform Act (PLRA) were the first laws enacted since 1980 that focused on state prisoner litigation. In 1980, the Congress passed the Civil Rights of Institutionalized Persons Act (CRIPA). Under CRIPA, state correctional agencies could voluntarily seek certification of their grievance procedures from the Attorney General and federal courts. If certified, the procedures then would have to be exhausted prior to the filing of lawsuits against state correctional officers. CRIPA never really took hold because few states sought certification and with the exception of the U.S. Court of Appeals for the Ninth Circuit, few federal judges showed an inclination to certify state mechanisms.

The Congress's actions in 1996 also followed several important U.S. Supreme Court decisions concerning both habeas corpus petitions and challenges to prison conditions. For the past twenty years, the Court had rendered a series of decisions that narrowed the scope of

[1] Both types of cases are classified as civil matters by the Administrative Office of the U.S. Courts (AO) even though they are filed by prisoners and are challenges to key aspects of the state criminal justice system.

conditions under which prisoners could litigate. Yet, despite those efforts, the number of prisoners' cases increased consistently over time.

Because evidence gathered for this paper indicates that the Prisoner Litigation Reform Act achieved its intended effects, at least in the short run, and the Antiterrorism and Effective Death Penalty Act did not achieve parallel results, the tale of the two Acts is interesting. What led to the divergent effects of the two Acts?

The objectives of this report are threefold. First, we seek to understand the nature and relative influence of the underlying causes of prisoner litigation. What are the forces driving prisoner litigation filing rates? The second objective is to examine whether PLRA and AEDPA had their intended effects of reducing the number of Section 1983 lawsuits and habeas corpus petitions, respectively, at both the national and Circuit Court-levels. Are there differences among the Circuits and, if so, what accounts for them? Were there unintended as well as intended changes resulting from the two pieces of legislation? Third, the goal is to discuss the implications of the results for regulating the volume of prisoner litigation and to discuss future directions for research and policy.

1.1. Evaluation Design and Organization of the Report: The evaluation employs a combination of descriptive and analytic techniques to evaluate. To accomplish the three objectives of the research, the evaluation is divided into three distinct but interrelated parts.

Part I: Congress, Courts and Correction: An Empirical Perspective on the Prisoner Litigation Reform Act

Chapter 2 focuses on the impact of the PLRA on the filing rate of Section 1983 lawsuits, nationally and for each Circuit, and on the manner of disposition of such cases on a national-level.

Part II: Federal Habeas Corpus Petitons, Congress, and the Courts: Effects of the Antiterrorism and Effective Death Penalty Act

Chapter 3 focuses on the impact of the AEDPA on the filing rate of habeas corpus petitions, nationally and for each Circuit.

Part III: Policy Implications

Chapter 4 presents the policy implications of the research described in Chapters 2 and 3 along with suggestions for continued research on prisoner litigation.

By way of conclusion, each chapter ends with a summary of the principal issues examined. Relevant literature is reviewed and explanations of analytic techniques are provided where appropriate throughout the chapters.

Finally the executive summary provides a comprehensive overview of the complete report. This section summarizes the major issues raised in both parts and provides a complete list of policy implications and options.

Depending on the reader's preferences, this evaluation report can be read in several different ways. Readers interested in a "quick scan" can examine the principal results, issues, and policy options in the executive summary. Those interested in prisoner civil rights lawsuits will want to read the study of the PLRA (Chapter 2). Readers interested in habeas corpus will want to examine the results of the evaluation of AEDPA (Chapter 3). It is recommended that all readers attend to the policy implications and the policy options that follow from this research (Chapter 4).

1.2. Benefits of the Evaluation

This evaluation is designed primarily with an intended audience of the U.S. Congress, state and federal judges, state attorney generals, and state correctional officials, and other state policy-makers. The results provide lessons about the crafting and implementation of legislation designed to reduce the volume of prisoner litigation.

Chapter 2: Congress, Courts and Corrections – An Empirical Perspective on the Prisoner Litigation Reform Act

2.1. Introduction

Let's review the numbers. By the mid-1990s, state prisoners challenging the conditions of their confinement accounted for the single largest category of civil lawsuits filed in US District trial courts. During the peak year of 1996, the number of prisoner lawsuits filed had grown to 42,522, a total representing more than one in every six federal civil lawsuits filed that year.[1] These cases were noteworthy not only for sheer size and rapid growth, but also as the federal court case type with the lowest plaintiff win rate: prisoner litigants were successful in only 1.4% of lawsuits filed.[2] These three basic facts—volume, trend, and outcome—underlay passage by the United States Congress of the Prisoner Litigation Reform Act[3] (PLRA). Going into effect in April, 1996, the PLRA significantly altered the legal circumstances under which prisoners could file a lawsuit challenging the conditions of their confinement.[4] Four years later in 2000, the total number of prisoner lawsuits filed in federal courts had fallen by two-thirds to

[1] The Administrative Office of the U.S. Courts counts cases on July 1 to June 30 basis. Hence, the 42,522 cases represent the number of lawsuits filed by state prisoners in U.S. District Courts between July 1, 1995 and June 30, 1996. Aggregate statistics on prisoner litigation were gathered at the Federal District-Court Civil Cases website (http://teddy.law.cornell.edu:8090/questcv3.htm). This cite utilizes a database of about 5 million federal district-court civil cases terminated over the last 22 fiscal years. The data were gathered by the Administrative Office of the United States Courts, assembled by the Federal Judicial Center, and disseminated by the Inter-university Consortium for Political and Social Research.

[2] *Id*. at: http://teddy.law.cornell.edu:8090/questcv3.htm .

[3] Prisoner Litigation Reform Act (PLRA) of 1995, Pub. L. No. 104-134, 110 Stat 1321.

[4] A prisoner begins the litigation process by filing a complaint. This document is submitted to a court of clerk's office. The clerk of court makes an initial decision whether to accept the complaint and place it on the court's docket as a lawsuit with a case number. The PLRA modified the requirements for a complaint to be docketed (i.e., accepted by a court as a Section 1983 lawsuit). Failure to meet the requirements means that a complaint does not become a lawsuit. Hence, the PLRA is an effort to limit the number of lawsuits. Whether it achieves this goal depends on whether the sorts of complaints filed by prisoners meet the new requirements.

just over 14,000. Such dramatic change deserves closer scrutiny and by looking inside the numbers we gain critical perspective on the world of prisoner litigation post-PLRA.

Reaction to the PLRA was immediate and contentious. Many critics argued the Act was unconstitutional[5], while proponents heralded the PLRA as necessary and effective reform[6]. And given the substantive complexity of the PLRA, much legal scholarship has been directed to analyzing the numerous constitutional challenges resolved and being resolved in federal courts. But considerably less attention has been given another area of uncertainty; that is, the actual impact of the new legislation on volume, trend, and outcomes.

The PLRA had two major features. The first focused on governing the judicial role following a court determination of unconstitutional prison conditions such as overcrowding and inadequate medical care.[7] The second dealt with complaints brought by individual prisoners.

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[5] See for example Thomas J Butler, *The Prison Litigation Reform Act: A Separation of Powers Dile*mma, 50 ALA. L. REV. 585 (1997); Joseph T Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court—It May Be Effective, But Is It Constitutional?*, 70 TEMP. L. REV. 471 (1997).; Catherine G. Patsos, *The Constitutionality and Implications of the Prison Litigation Reform Act*, 42 N.Y.L. SCH. L. REV. 205 (1998); Julie M. Riewe, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117 (1997); James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105 (2000).

[6] See for example Peter Hobart, *The Prison Litigation Reform Act: Striking the Balance Between Law and Order*, 44 VILL. L. REV. 981 (1999); Eugene J. Kuzinski, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L. J. 361 (1998)

[7] There is a coherent body of literature on "conditions cases." Leading contributors include MALCOLM FEELEY & EDWARD RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICAN'S PRISONS (Cambridge, UK: Cambridge University Press) (1999); BRADLEY CHILTON, PRISONS UNDER THE GAVEL: THE FEDERAL TAKEOVER OF THE GEORGIA PRISONS (Columbus: Ohio State University Press) (1991); MALCOM M. FEELEY & ROGER A. HANSON, THE IMPACT OF JUDICIAL INTERVENTION ON PRISON AND JAILS: A FRAMEWORK FOR ANALYSIS AND A REVIEW OF THE LITIGATION *COURTS, CORRECTIONS, AND THE CONSTITUTION* (John J. DiIulio, Jr. ed., Oxford University Press. New York) (1990); LARRY YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM (New York: Oxford University Press) (1989); BEN CROUCH & JAMES W. MARQUART, AN APPEAL TO JUSTICE: LITIGATED REFORM OF THE TEXAS PRISONS (Austin: University of Texas Press) (1989 STEVEN J. MARTIN & SHELDON EKLAND-OLSEN. TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN (Austin: Texas Monthly Press) (1987) and JOHN DIIULIO, GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONALMANAGEMENT (1987). There are provisions in the PLRA that bear on "conditions" cases. One key provision is that time limitations are placed on the duration of court-ordered temporary injunctive and prospective relief. Additionally, limitations are placed on the amount of fees that can be paid to attorneys representing successful prisoner plaintiffs. Finally, compensatory damages to successful prisoner plaintiffs must first be paid to satisfy any outstanding restitution orders against the prisoners. Interestingly, scholars are not necessarily over anxious or fearful that these provisions spell the end of conditions cases. (See, e.g., Feeley and Rubin, 1999: 382-84). For the purposes of setting an appropriate and manageable limit to the scope of the current research, Feeley and Rubin's views of these provisions are accepted. Hence, our cynosure is dedicated

This latter component, designed to limit "frivolous" litigation, drove much of the congressional debate and was clearly intended to reduce the number of prisoner lawsuits filed. Because a large proportion of prisoner lawsuits were being dismissed, the presumption by many drafting the PLRA was that most were frivolous[8] and numerous examples were assembled in support of that viewpoint.[9] As a consequence, the PLRA provisions for dealing with frivolous litigation, primarily restrictions on filing in forma pauperis for previous frivolousness and the assessment of filing fees, focused on increasing the costs to prisoners of even proceeding to the filing stage. The goal was to purge the frivolous cases before they ever entered the system.

In this article, we step outside the larger debate on constitutionality to examine the empirical record. Our goal is to assess the manner in which the PLRA has affected the volume, trend, and outcomes of prisoner lawsuits. The specific objectives are threefold. In Section II we set the stage by examining the nature of prisoner litigation just prior to the enactment of the PLRA. This involves a recap of filing trends as well as pertinent literature, case law and congressional action in the area of prisoner litigation. The stated rationale for the PLRA was to curb "frivolous" litigation; yet, the term frivolous can be more provocative then descriptive. Prisoner lawsuits are dismissed for many reasons and the debate over the latest congressional effort at reform will benefit from a more nuanced understanding of why cases were being dismissed pre-PLRA and how the manner of disposition has changed post-PLRA. Drawing on a previous individual case level study[10] combined with data gathered by the United States

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exclusively to understanding the changes brought by the PLRA in the number of Section 1983 lawsuits filed by individual prisoners, which should bear on past policy debates among practitioners.

[8] See e.g., 141 Congressional Record S14418 (daily edition Sept. 27, 1995) Statement of Senator Hatch urging legislation to "bring relief to a civil justice system overburdened by frivolous prisoner lawsuits"

[9] See e.g., 141 Congressional Record, S14627 (daily edition Sept. 29, 1995). Proponents of the PLRA presented a "top ten" list of frivolous prisoner litigation. Making the list were cases such as a prisoner suing for the right to have smooth rather than chunky peanut butter, a suit over a Nintendo Gameboy, and a suit involving a prisoner's right to eat ice cream.

[10] ROGER A. HANSON & HENRY W.K. DALEY, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION, 1995 BJS DISCUSSION PAPER, NCJ 151652, (Washington, D.C.: U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics) (1995)

Administrative Office of the Courts (USAOC) we examine more closely the nature of prisoner litigation at the dawn of the PLRA. These results also provide a benchmark for assessing subsequent changes in filing patterns and dispositional outcomes.

In Section III we introduce an approach to modeling the trend in prisoner litigation and testing statistically the impact of the PLRA on national and Circuit Court filing patterns. The analysis uncovers and confirms the differential impact of the PLRA at the Circuit Court level. This section also provides a preliminary analysis of how the PLRA has affected the resolution of prisoner litigation. The article concludes that the impact of the PLRA on observed patterns of prisoner litigation is largely in line with the goals stated by the authors of the legislation and of particular interest given previous unsuccessful efforts by the Congress to curb prisoner lawsuits.

2.2. History, Literature, and Practice

2.2.1. A Short History: The United States Supreme Court made a series of ground-breaking decisions in the 1950s and 1960s providing a foundation for state prisoners to challenge the conditions of confinement.[11] Whereas prisoners historically had the opportunity to file writs of habeas corpus to challenge the validity of their detention and imprisonment, the parallel opportunity to challenge the conditions of confinement did not emerge until more recently. The Court reversed a hands-off approach to incarceration with its decision in 1964 that state prisoners could avail themselves of the federal trial process and file lawsuits seeking money damages when correctional policies, procedures and practices violated the prisoners' rights[12]. Beginning in the 1970s, a wide ranging category of rights became defined by the U.S. Supreme Court and

[11] The development of the prisoner rights movement, which the U.S. Supreme Court's decisions fostered, are described well in JAMES JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY, (Chicago: University of Chicago Press) (1977).
[12] Cooper v. Pate, 278 U.S. 546 (1964).

the U.S. Courts of Appeal.[13] Because these cases are filed under Section 1983 of Title 42 of the U.S. Code, they are commonly called Section 1983 lawsuits.

Initially, the number of Section 1983 lawsuits filed nationally in the 1960s was small. The Administrative Office of the U.S. Courts counted only 218 cases in all U.S. District Courts during 1966, the first year that state prisoners' lawsuits were recorded as a specific category of litigation. The debate over prisoner litigation heated up as the numbers of lawsuits filed in U.S. District Courts rose to a visible level. Within five years of *Cooper v. Pate*, the number of cases had reached approximately 2,500 and continued to grow without any appreciable decrease through 1995. Critics contend that most prisoner lawsuits are frivolous, crowd already crowded court dockets, and, in the few cases when meritorious, resemble small claims cases best handled outside the federal courts. In response, defenders of prisoners' rights asserted that Section 1983 lawsuits are not burdensome, can and should not be screened out of the court system because no one knows how many are frivolous or without merit. Furthermore, they should not be siphoned out of the federal system because the state courts might not be sufficiently independent when prisoners take the state to court.[14]

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[13] Prisoners' rights recognized in these decisions included religious freedom to members of minority religions in *Cruz v. Beto*, 405 U.S. 319 (1972), adequate medical treatment in *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), protection against excessive force by correctional officers in *Hudson v. Mcmillian*, 112 U.S. 995 (1992) or violence by other inmates in *Farmer v. Brennan*, 114 U.S. 1970 (1994), due process in disciplinary hearings in *Wolff v. McDonnell*, 418 U.S. 539 (1974), and access to law libraries in *Bounds v. Smith*, 430 U.S. 817 (1977). A description of the cases establishing prisoners' rights is available in *Krantz* (1986)

[14] The composition of the critics includes a former Chief Justice of the U.S. Supreme Court, other federal judges, law professors and correctional officials. See Warren E. Burger, A Proposal: National Conference on Correctional Problems paper presented at the American Bar Association Meeting, Dallas (1969), Warren E. Burger, *Chief Justice Burger Issues Year End Repor,t* 62 A.B.A.J. 988 (1976), and Warren E. Burger, *Agenda for Crime Prevention and Correctional Reform*, 67 A.B.A.J. 988 (1981); Federal Courts Study Committee, Judicial Conference of the United States, Report of the Federal Courts Study Committee, Washington, D.C. (1990); RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (Cambridge: Harvard University Press) (1985); Patrick Baude, *The Federal Courts and Prison Reform* 52 IND. L.J. 747 (1977); A.E. Dick Howard, I'll See You In Court: The States and the Supreme Court National Governors' Association, Washington, D.C. (1980); and John R. Manson, Statement by Federalism and the Federal Judiciary: Hearings Before the Subcommittee on the Separation of Powers of the Senate Committee in the Judiciary, 98th Congress, 1st Session (1983). Interestingly, the advocates of prisoners' rights and federal court resolution of Section 1983 lawsuits look very similar to the critics in terms of their positions. The advocates include a former Associate Justice of the U.S. Supreme Court; other federal judges and law professors. See Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights"—Will The Statue Remain Alive or Fade*

A major congressional response to the increasing volume of prisoner litigation occurred in 1980 when the U.S. Congress passed the Civil Rights of Institutionalized Person Act (CRIPA).[15] Under CRIPA, state correctional agencies could voluntarily seek certification of their grievance procedures from the Attorney General and federal courts. If certified, the procedures then would have to be exhausted prior to the filing of lawsuits against state correctional officers. CRIPA never really took hold because few states sought certification and with the exception of the U.S. Court of Appeals for the Ninth Circuit, few federal judges showed an inclination to certify state mechanisms.

The expansion of prisoners' rights and the limited impact of CRIPA created the potential for increasing prisoner lawsuits, but it was unprecedented growth in prison population that made it a reality. Between 1972 and 1996,[16] the number of state prisoner Section 1983 lawsuits filed in U.S. District Courts increased by 1,153 percent (from 3,348 to 42,522), while state prison population increased by 517 percent (from 174,379 to 1,076,625). As shown in Figure 2-1, the increase in both trends was remarkably consistent until the enactment of the PLRA in 1996. The close visual correspondence between the number of state prisoners and the number of Section 1983 lawsuits since the early 1970s is borne out by statistical analysis.[17]

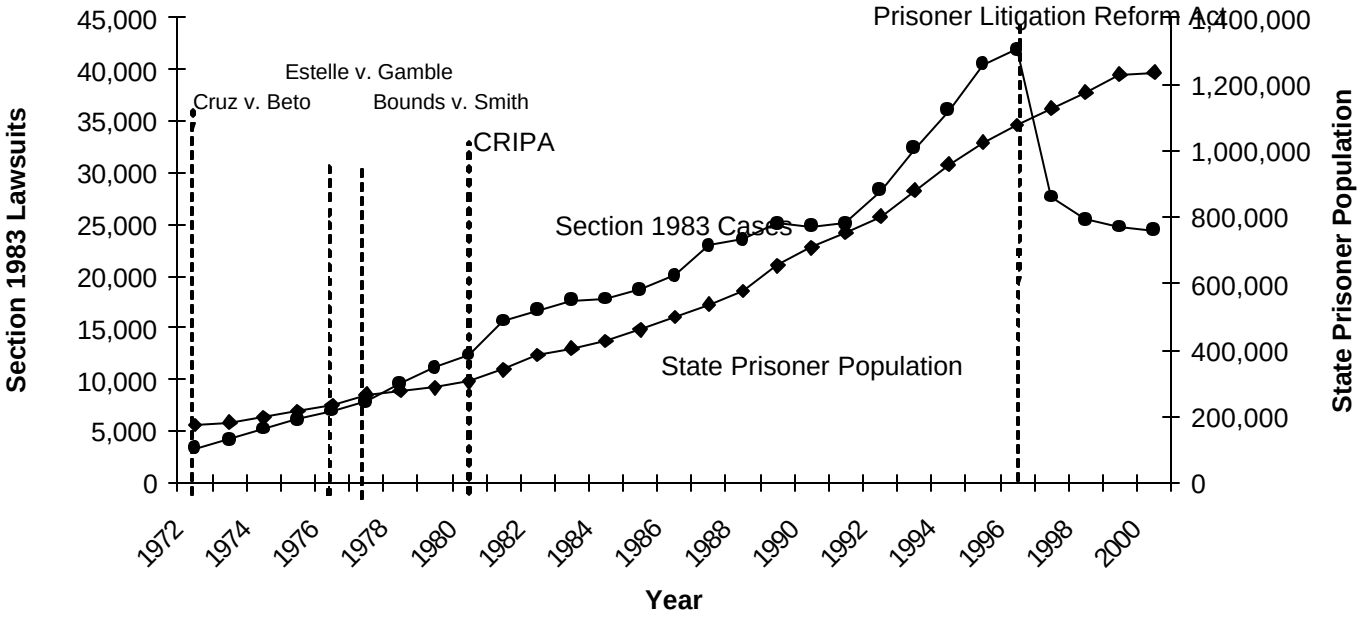
Away? 60 N.Y.U. L. REV. (1985); Harry Edwards, *The Rising Workload and Perceived 'Bureaucracy' of the Federal Courts: A Causation-Based Approach to the Search for Remedies,* 68 IOWA L. REV. 871 (1983); and William Bennett Turner, *When Prisoner Sue: Section 1983 Suits in the Federal Courts,* 92 HARV. L. REV. 610 (1979).

[15] Civil Rights of Institutionalized Persons Act (CRIPA) 1980, Pub L No 96-247, 94 Stat 349.

[16] While 1966 was the first year that state prisoners' lawsuits were recorded as a specific category of litigation by the Administrative Office of the U.S. Courts (AO), data supplied by the AO commenced in 1972.

[17] See Fred Cheesman, II, Roger A. Hanson, and Brian J. Ostrom, *A Tale of Two Laws: The U.S. Congress Confronts Habeas Corpus Petitions and Section 1983 Lawsuits*, 22 LAW & POLICY 89 (2000) for a complete analysis of the link between prison population and the volume of prisoner litigation. Cheesman et al developed a dynamic regression model using state prisoner population as the independent variable to forecast the expected number of prisoner lawsuits in the future. In addition, the model was used to estimate the volume of prisoner litigation ten years down the road. The approach used was based on the observed trend in prisoner litigation following the implementation of the PLRA, an appreciation for the initial uncertainty in the litigation environment created by the passage of new law, and the strong established relationship between prison

Figure 2-1: Number of Section 1983 Lawsuits Filed by State Prisoners and State Prisoner Population, 1972-2000



Lukens succinctly sums up the perspective of reformers in the mid-1990s: "Because the number of state and federal prisoners continue[d] to rise at an alarming rate, it [was] clear that Congress had to take some steps to address the increasing burden of the federal courts arising out of the tremendous increase in prisoner civil rights litigation."[18] And the PLRA was born.

2.2.2. PLRA Provisions: There are three provisions of this statute especially relevant to understanding the trends in case filings. They are:

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population and the volume of prisoner litigation. Finally, this effort to chart the future course of prisoner litigation was the basis for estimating how changing filing patterns affected the work of the federal bench.

[18]Lukens *supra* note 5 at 491

- Inmates must exhaust all available administrative remedies before filing the case, even if a facility's grievance procedures have not been certified by the U.S. Department of Justice or a federal court. [19]

- Inmates filing lawsuits in forma pauperis are required to pay the appropriate filing fees (and costs, where applicable) from their existing assets or any funds available to them through their trust fund accounts within the correctional system. [20]

- Inmates are prohibited from filing lawsuits in forma pauperis (as an indigent without liability for court fees and costs) if the inmates have filed three or more actions in federal court that were dismissed as frivolous or malicious or for failing to state a claim on which relief can be granted. [21]

The import of these requirements is that until and unless they are satisfied, federal trial courts need not accept a prisoner's rights case simply because a prisoner has filed a complaint. The courts are not required to docket the complaint as a case, give it a case number and place it in the queue for court action.

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[19] The PLRA amended Sec.7. Suits by Prisoners of the Civil Rights of Institutionalized Persons Act. Specifically, 42 U.S.C. 1997e was amended. The PLRA added the following language: "(a) Applicability of Administrative Remedies. ___ No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other federal law, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies are available and exhausted." This provision does not prohibit prisoners from bringing challenges to prison conditions under a state law or constitution without exhausting state remedies, but that action would be precluded from being filed in federal court. It would have to be filed in state court.

[20] The PLRA amended Section 1915 of title 28, United States Code,. The following language was added: "(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee." Procedures were specified in the PLRA on how the fees were to be paid.

[21] The PLRA amended Section 1915 of title 28, United States Code by adding the following language "(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has on 3 or more occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." Again, this provision pertains to complaints filed in federal court and does not bear on suits filed in state court.
The PLRA amended Chapter 123 of title 28 United States Code. The following language was added "§ Screening. (a) Screening. --- The court shall review, before docketing, if feasible, or in any event, as soon as practical after docketing a complaint in a civil action in which a prisoner seeks redress from a governmental entity."

"(b) Grounds for dismissal. --- On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint ---

"(1) is frivolous, malicious, or fails to state a claim on which relief may be granted, or"

"(2) seeks monetary relief from a defendant who is immune from such relief."

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2.2.3. Literature: The plain language of the PLRA is to reduce the volume of prisoner litigation.[22] While the post-PLRA decline in prisoner lawsuits is apparent now, at the time the legislation was introduced there was considerable uncertainty over whether the PLRA would lead to a decrease, increase, or no change in the volume of prisoner litigation.[23] Yet this issue has received little attention in the academic literature. Because the primary focus of the sizable and growing number of law review articles on the PLRA tends toward critical analysis of the PLRA's constitutional validity, the authors are typically agnostic or silent on the legislation's observable effects on the volume of litigation.[24] This brief review of the literature helps shape the subsequent analyses by making explicit several issues that are best addressed through empirical study.

Initial skepticism over the impact of the PLRA on prisoner litigation was stated most cogently and bluntly in a closely reasoned analysis of the new law conducted by Tushnet and

[22] See e.g., Kincaide v. Sparkman, 117 F.3d 949, 951 (6th Circuit 1997: "the text of the Prisoner Litigation Reform Act itself reflects the that the drafters' primary objective was to curb prison condition litigation"; Mitchell v. Farcass, 112 F.3d 1483 1488 (11th Circuit 1997): "Congress promulgated the act to curtail abusive prisoner litigation."; Hampton v. Hobbs, 106 F3d 1281, 1286 (6th Circuit 1997): "The legislation was aimed at the skyrocketing numbers of claims filed by prisoners—many of which are meritless—and the corresponding burden those filings have placed on the federal courts." Reprinted in James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105 (2000), p. 113, footnote 53.

[23] While many in the 104th Congress argued the PLRA would reduce the number of Section 1983 cases filed, others disagreed. During congressional debate, Senator Paul Simon stated his concern that the new legislation would actually increase the volume of lawsuits (142 Congressional Record S2297(daily edition March 19, 1996)

[24] See, for example, Gigetle M. Bejin, *The 1995 Legislation for Prisoner Litigation Reform: Has the Pendulum Swing the Other Way?* 74 U. DET. MERCY L. REV. 557 (1997); Hobart *supra* note 6; Jason E. Pepe, *Challenging Congress's Latest Attempt to Confine Prisoners' Constitutional Rights: Equal Protection and the Prison Litigation Reform Act*, HEMILE L. REV. 59 (1999); Robertson *supra* note 6. In contrast, practitioners who have been following the trends in prisoner litigation and who are aware of past debates understandably are more cognizant of possible and actual changes in the number of lawsuits than either legal scholars for the law and society scholars focused on conditions cases). As it turns out, Chief William Rhenquist Justice of the U.S. Supreme Court, who fits the description of an interested practitioner, responded with alacrity to the immediate consequences of PLRA. He extolled and heralded the changes that he could discern (See William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976)). Media covering the PLRA and its impact actually responded even more quickly. (See "Reform Act Cuts Prisoner Law Suits," NATIONAL LAW JOURNAL, August 18, 1997). Interestingly, legal scholars continued to be skeptical of the PLRA's effects on the trends in filings. For example, Tushnet and Yackle observed that despite the report of a decrease in filing rates by the NATIONAL LAW JOURNAL that they "think that evidence from a rare extended period of time is necessary before one could confidently attribute such a decline to the statute." (Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act*, 41 DUKE L. J. 1 (1997) at 64).

Yackle[25]. They argued that the federal courts will work to "harmonize the [PLRA's] provisions with preexisting law," therefore leading courts to interpret the new provision in a manner as to make only "marginal changes to preexisting law."[26] They go on to predict that the "PLRA's provisions dealing with frivolous individual litigation will have [little] practical impact…" and will result in "little change" in the volume of prisoner litigation. While it is difficult to say how individual judges gauge the statutory consequence of individual provisions of the PLRA, it is possible to measure the change in the number of Section 1983 lawsuits filed. By benefit of hindsight we know the number of prisoner lawsuits has fallen, but statistical analysis is needed to determine whether the decline is only "marginal" or if the PLRA marks a significant breaking point in the long-term trend of prisoner litigation.

Many authors examine constitutional challenges to the PLRA and often reference the variation in interpretation at the Circuit Court level. Butler neatly summarizes the legal environment following passage of the PLRA: "the Act raised constitutional separation of powers concerns immediately after it was passed. As a result, prison rights activists began challenging the PLRA…[and] the current status of PLRA litigation varies from Circuit to circuit."[27] Hobart goes further to analyze the current state of the PLRA with respect to eleven separate provisions of the Act. His analysis is necessarily at the Circuit level as he explores the extent of agreement and disagreement over interpretation of each provision.[28] Such analysis carries the assumption, at least implicitly, that judicial interpretation of the PLRA provisions affects the operation of the

[25]Tushnet and Yackle, *supra* note 24

[26] Tushnet and Yackle, *supra* note 24, at. 58. In summary, they state: "Whatever the PLRA achieves, then, cannot be very far different from what existing law prescribes—or what the courts themselves prescribe were they faced with some of the issues that statute addresses. The basic standard set out in the PLRA…either restates existing law, is unconstitutional, or changes existing law in minor ways."

[27] Butler *supra* note 5, at 586

[28] Hobart *supra* note 6, at 986-987. E.g.,, "Like many other aspects of the PLRA, controversy revolves around the retroactivity of the attorney fee provision. For example, the US Court of Appeals for the Fourth Circuit has concluded that all attorney fees awarded after the passage of the PLRA must conform to its restrictions. Conversely, the US Court of Appeals for the Seventh and Eighth Circuit maintain that is would be manifestly unjust to apply the PLRA's restrictions to cases pending at the time of passage."

law in practice. Given non-uniformity in legal interpretation at the Circuit level, a natural question is whether this translates into differences in observed patterns of prisoner litigation at the Circuit level.

As the observed reality of a decline in prisoner lawsuits became apparent, some authors raised the fundamental question of whether the PLRA was sufficient to differentiate the frivolous from the meritorious. Lukens dissents and states the PLRA "is much broader than necessary to achieve the intended reduction in frivolous prisoner litigation, and brings within its broad sweep meritorious claims as well as frivolous claims."[29] The concern is that the blunt character of the PLRA restrictions will allow the circuits to too easily reject a prisoner's lawsuit regardless of merit. A somewhat different tack is taken by Kuzinski who argues "[h]owever deserving some claims are, the majority of inmate claims are either meritless or overtly frivolous."[30] As a consequence, courts are awash in "junk litigation"[31] to the detriment of prisoners with valid claims. Recognizing that an overabundance of lawsuits without merit can usurp the meritorious, one Circuit judge notes the prisoner with a valid claim "must hope that in the sea of frivolous prisoner complaints, [their] lone, legitimate cry for relief will be heard by a clerk, magistrate or judge grown weary of battling the waves of frivolity."[32] The empirical question, then, is how does the composition of prisoner lawsuits pre-PLRA compare to the composition post-PLRA? One measure of success for proponents of the PLRA is showing that the elimination of frivolous lawsuits has been the source of decline in Section 1983 filings.

2.2.4. Practice: Understanding the reality of prisoner litigation requires taking a closer look at how, in fact, Section 1983 cases are resolved. Examining the data compiled by the AO (Table 2-

[29] Lukens *supra* note 5, at 472.
[30] Kuzinski *supra* note 6, at 364.
[31] J.W. HOWARD JR., COURTS OF APPEAL IN THE FEDERAL JUDICIAL SYSTEM (Princeton: Princeton University Press) (1981). He argues prisoner litigation is an exemplar of "junk litigation," forcing virtually all Federal Circuit Courts to shift part of their business from hand-crafted to mass-production decision techniques.
[32] Reported in Kuzinski *supra* note 6, at 369.

1) for the years immediately proceeding enactment of the PLRA confirms the majority of prisoner lawsuits are dismissed outright (71% in 1993) or resolved by judgment on a defendant's motion that also typically results in dismissal (26% in 1993). Only about 3 percent were resolved by jury or non-jury trial in 1993. Moreover, the manner of disposition is very consistent for the period 1993-1996.

Table 2-1: Manner of Disposition for Section 1983 Cases[33]

Year	Dismissal		Judgment on Defendant Motion		Jury Verdict		Directed Verdict		Non-Jury Verdict		Total Dispositions	
Pre-PLRA	#	%	#	%	#	%	#	%	#	%	#	%
1993	22,509	71%	8,338	26%	263	1%	43	0%	501	2%	31,654	100%
1994	25,922	72%	9,176	25%	381	1%	48	0%	571	2%	36,098	100%
1995	29,142	71%	11,069	27%	338	1%	36	0%	616	1%	41,201	100%
1996	30,422	72%	11,072	26%	380	1%	54	0%	594	1%	42,522	100%
Post-PLRA												
1997	22,235	72%	7,545	25%	400	1%	28	0%	481	2%	30,689	100%
1998	14,461	75%	4,083	21%	351	2%	35	0%	245	1%	19,175	100%
1999	12,016	79%	2,830	18%	284	2%	27	0%	147	1%	15,304	100%
2000	11,149	79%	2,548	18%	250	2%	20	0%	104	1%	14,071	100%

For the period following the enactment of the PLRA (1997-2000), the most obvious change, of course, has been the rapid and precipitous decline in the volume of prisoner litigation. Courts are using the PLRA: "Given the crush of inmate litigation, it was quite predictable that judges would be quick to use this new weapon to clear their dockets…The courts have also started apprising inmate litigants of the law's ramifications, in an attempt to have the inmates regulate their own actions before the new procedures authorized by the PLRA are used against

[33] *Op. Cit. 2* http://teddy.law.cornell.edu:8090/questcv3.htm . The manner of disposition categories shown condense and summarize the categories used by the USAOC. Dismissal includes: dismissed for want of prosecution; dismissed for lack of jurisdiction; dismissed: voluntarily; dismissed: settled; dismissed: other; remanded; transfer; and statistical closing. Judgment on Defendant Motion includes: judgment on defendant motion, judgment on consent, judgment on default.

them."[34] If inmates observe the provisions of the PLRA and listen to warnings emanating from the courts, the observed drop should primarily be a drop in frivolous litigation. Although the overarching pattern of dispositions remains unchanged (most cases are dismissed and few cases are resolved at trial), subtle and suggestive changes have occurred. Relatively more cases are being dismissed with little or no judicial involvement (e.g., dismissed for want of prosecution and for lack of jurisdiction), fewer cases are being resolved by judgment on defendant motion, and jury trial rates are up. A later section provides a more detailed look at the resolution of Section 1983 lawsuits post-PLRA at the Circuit Court level.

The data clearly show the prevalence of dismissals in the resolution of Section 1983 lawsuits. As a consequence, speculation on the potential impact of the PLRA would benefit from a more nuanced understanding of the lawsuits being dismissed. What is the reason for dismissal? What share of the cases meet even the most basic procedural requirements and would remain eligible under the provisions of the PLRA? While the AO does not compile this information, one extensive study casts light on the nature of prisoner litigation prior to the enactment of PLRA. Hanson and Daley examined over 2,700 Section 1983 cases resolved by U.S. District Courts in nine states (Alabama, California, Florida, Indiana, Louisiana, Missouri, New York, Pennsylvania and Texas) during 1993.[35]

Focusing strictly on the cases dismissed, Hanson and Daley's careful review of case files showed (Table 2-2) the most frequent reason for a court's decision to dismiss a Section 1983

[34] Kuzinski *supra* note 6, at. 387-388.

[35] ROGER A. HANSON & HENRY W.K. DALEY, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION, 1995 BJS DISCUSSION PAPER, NCJ 151652, (Washington, D.C.: U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics) (1995). The case level analysis conducted by Hanson and Daley found disposition patterns closely in line with data reported by the AO: 74 percent of Section 1983 lawsuits were subject to a court dismissal, 20 percent were dismissed on defendant's motion, 4 percent were stipulated dismissals and 2 percent were resolved at trial.

lawsuit was because the prisoner failed to respond to a court order within a required time period.[36]

Table 2-2: Reasons for court dismissals of Section 1983 lawsuits[37]

Reasons	n=3136
Plaintiff failed to comply with court rules (e.g., did not respond to court's requests for information in a timely manner, nonindigent prisoner failed to pay filing fees)	38%
No evidence of constitutional rights violation (e.g., action by correctional officer might have been negligent but there is no evidence of a deliberate intent to harm the prisoner)	19%
Frivolous (i.e., no arguable basis in law or fact)	19%
Issue is noncognizable under Section 1983 (e.g., habeas corpus)	7%
Defendant has immunity (e.g., judge, prosecutor)	4%
Defendant is not acting under color of state law (e.g., wife, fellow prisoner)	3%
Other reasons (e.g., the issue if moot because the prisoner is no longer incarcerated and sought declaratory relief)	9%
Total	99%

Additionally, if the court could determine no evidence of a constitutional rights violation, the case was dismissed (19%).[38] Other reasons for court dismissals were that the lawsuits were truly frivolous (e.g., the prisoner complained because he received chunky rather than creamy peanut butter) (19%). Alternatively, the issue raised was not covered by the scope of Section 1983 (e.g. the case is a challenge to the validity of conviction) (7%); the defendant (e.g., state trial judge) had immunity (4%); or the defendant (e.g., privately retained criminal defense attorney) was not acting under color of state law (3%).

What emerges from Table 2-2 is that only 19 percent of the dismissed cases survived even the most elemental procedural or substantive hurdles. This fraction was not dismissed

[36] For example, a prisoner might have failed to respond to a report prepared by the correctional institution on the treatment of the prisoner. The court notifies the prisoner that the report will be treated as a motion for summary judgment and that the motion will be granted, unless the prisoner files an objection. If the court neither receives a response to the notice nor receives any objection to the motion, the court thereby grants the motion.

[37] Taken from Hanson & Daley *supra* note 25, at 25

[38] For example, a prisoner may be injured after slipping on a wet floor outside the cell. The court will dismiss this claim if there is no evidence of deliberate intent by correctional officials to harm the prisoner by failing to maintain adequate physical conditions. The slippery floor might be the result of negligence, but ordinary negligence is not a

because the prisoner plaintiff failed to comply with court rules or because the case was found to be without a basis in fact or law. Instead, a court found that these cases failed to meet the criterion of implicating a constitutional standard. For example, a prison official might have been negligent in allowing water to remain on a walkway, but a prisoner did not show that such conduct was a product of deliberate indifference or wanton neglect. What this extensive case study suggests is that just prior to the enactment of the PLRA, a sizable percentage of the prisoners' Section 1983 lawsuits dismissed, perhaps as high as 81 percent, would likely find it difficult to satisfy additional procedural requirements, such as those eventually established under PLRA.

This empirical profile of how prisoner litigation was resolved pre-PLRA provides a framework and benchmark for examining prisoner litigation in the post-PLRA world. As such, it provides three testable propositions. First, if the PLRA is implemented in good faith, we would expect to see an immediate and significant drop in the number of prisoner litigation filings. The Hanson and Daly results suggest that the number of lawsuits that will not sustain additional and new procedural scrutiny may well be a majority of the cases. Of the 74 percent of cases dismissed by a court before the enactment of the PLRA, as few as 19 percent were potentially robust enough to sustain strengthened procedural review. Hence, if the PLRA operates as conceived by its authors, as many as 60 percent fewer Section 1983 lawsuits will be filed after PLRA than before.[39]

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cognizable cause of action under Section 1983. For this reason, the federal court will dismiss the case as an invalid Section 1983 cause of action and might suggest that the prisoner pursue the matter as a tort action in state court.

[39] Taking 81 percent of 74 percent yields 60 percent. The upper bound prediction of a 60 percent decrease is a mid- to long-term projection. Initially, the decrease could be considerable because many prisoners will be filing complaints with limited information on the PLRA's provisions. As a result, in the short run there may be more than a sixty percent decrease in the number of Section 1983 lawsuits as the initial wave of post-PLRA petitions fail one or more of the new provisions and, thus, are not accepted as Section 1983 lawsuits. Overtime prisoners will gain information on the new rules (e.g., from jail house lawyers, prisoner assistance groups). It is likely that, ultimately, prisoners will adapt to the new system and file complaints that meet the new requirements. As a result, the trend in Section l983 lawsuits will eventually reach a new, albeit lower, equilibrium relationship with prison population.

Second, the twin factors of unsettled law and judicial independence lead us to expect non-uniformity in the trend and disposition of prisoner lawsuits at the Circuit level. The constitutional legitimacy of the PLRA and its provisions is still being determined in the federal courts. Although a majority of federal circuits have upheld the PLRA and many constitutional challenges have been settled, the circuits have moved at varying speeds and with varying levels of internal opposition. Each Circuit has evolved its own style in implementing the PLRA. This is hardly surprising given the substantive complexity of the Act and, that by virtue of jurisdictional and administrative independence, no two Circuit Courts are alike.[40]

Despite the adoption of uniform rules of appellate procedure in 1968, the power of Circuit Courts to define subsidiary rules lends surprisingly little standardization to internal decision-making or administrative practice. Therefore, the characteristics of each region of the country within the jurisdiction of a particular Circuit tend to be reflected in the business of each Court.[41] To understand the regional forces underlying the national trend and to understand differences in the implementation strategies of different circuits, we conduct an analysis of the impact of the PLRA at the Circuit Court level. This analysis also contributes to our knowledge about policy-implementation in the Federal Court System.

Third, if the PLRA is operating as intended, we have definite expectations for where the decrease in filings should occur: the procedurally weak cases. To conclude that the PLRA is meeting a sound and legitimate public policy goal, it is necessary to show that the new provisions succeed in differentiating and eliminating the non-meritorious cases. The odds that federal judges will successfully discern the meritorious cases increases considerably if the system is not overcrowded with the frivolous. Therefore, to fully evaluate the impact of the

[40] J.W. HOWARD JR. *supra* note 31

[41] Among Circuit Courts, differences in the composition of caseloads (see Lawrence Baum, Sheldon Goldman, and Austin Sarat, *The Evolution of Litigation in the Federal Courts of Appeals: 1895-1975*, 16 LAW & SOC'Y REV.

PLRA, it will be necessary to determine whether the nature of prisoner lawsuits, their handling and outcomes have changed in line with stated goals.

2.3. The Results

2.3.1. National Trends: Two previous studies examined the effects of the PLRA on a national level. An inquiry by Cheesman, Hanson and Ostrom[42] examined historical patterns of filing of Section 1983 lawsuits in U.S. District Courts as well as factors that were hypothesized to influence the rate of filing. They established a clear and strong relationship between the size of the state prison population and the number of Section 1983 lawsuits filed. What is not obvious about this relationship is that it persisted over previous decades despite substantial changes in legal doctrines and legislation (e.g., CRIPA) designed to affect the rate of filing of such lawsuits, until the implementation of the PLRA.

Although Cheesman et al find that the PLRA has significantly lowered the number of prisoner lawsuits filed, they hypothesize that the new lower, stable level of filings is a short-run phenomenon.[43] They assert that prisoner litigation filing rates remain tied to the number of state prisoners: the PLRA has merely altered the proportion of inmates eligible or able to afford to litigate. The PLRA is designed to discourage frivolous lawsuits, not all lawsuits. Provisions of the PLRA will not affect all prisoners in the same way. "Hence, whereas some share of the original pool of prisoners filing Section 1983 lawsuits will be eliminated because of eligibility or fiscal restrictions, prisoner litigation will remain related to state prison population."[44] Cheesman et al hypothesize that the fundamental linkage between state prison population and the number of

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291 (1981)) and the rate at which litigants challenged decisions subject to appeal (J.W. HOWARD JR. *supra* note 31) have been previously documented.

[42] Cheesman, Hanson, & Ostrom *supra* note 17.

[43] "Examining monthly data over the last six years shows that the PLRA produced an immediate drop in the volume of Section 1983 lawsuits. It also is evident that the decreasing trend in the number of Section 1983 lawsuits ended around March of 1997—almost exactly one year after the enactment of the PLRA. Since then, the number of lawsuits has [stabilized at] between 2,000 and 2,500 per month." (Cheesman, Hanson, & Ostrom *supra* note 17 at 96).

Section 1983 lawsuits has not been broken, and that future increases in prison population will lead to more lawsuits, albeit from a smaller proportion of prisoners.

Scalia[45] provides a second and refined study. He examines the rate of monthly Section 1983 case filings from October 1991 to September 2000. Using the statistical technique of interrupted time-series analysis[46], Scalia demonstrates that the observed decline in Section 1983 lawsuits that occurred after the implementation of the PLRA was statistically significant. Scalia[47], measuring the filing rate as the number Section 1983 lawsuits per 1,000 prisoners, concludes "the PLRA resulted in 3.4 fewer civil rights petitions filed per month for every 3,000 state prison inmates."

Our analysis of the national trend in prisoner lawsuits extends the work of Scalia to determine the size of the drop as well as examining the trend for evidence that it has re-established its relationship with state prison population. We define the pre-PLRA period from April 1992 to April 1996 and the post-PLRA period from May 1996 to December 2000, a slightly different time period than Scalia employed.[48] The following analyses are based on the number of lawsuits per 1,000 prisoners (national level) and per 10,000 prisoners (Circuit Court level). It is appropriate to compare filing rates when examining the possible effects of the PLRA because, as discussed above, there is evidence that the number of lawsuits is propelled by the

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[44] Cheesman, Hanson, & Ostrom *supra* note 17 at 95.

[45] JOHN SCALIA, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000 WITH TRENDS 1980-2000, NCJ 189430 (Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics) (2001).

[46] Essentially, interrupted time series involves three steps: (1) Fitting an ARIMA model to the pre-intervention time series, (2) modeling the intervention, usually as a persistent change in level (a "step") or a temporary change in level (a "pulse"), and (3) assessing the fit of the pre-intervention ARIMA model combined with the intervention model for the combined pre- and post-intervention time series. The test of significance for the intervention factor can be interpreted to assess the impact of the intervention. The time series data must either be stationary or be made stationary (usually by "differencing") before the interrupted time series can be performed. The Augmented Dickey-Fuller test is often used to test for stationarity.

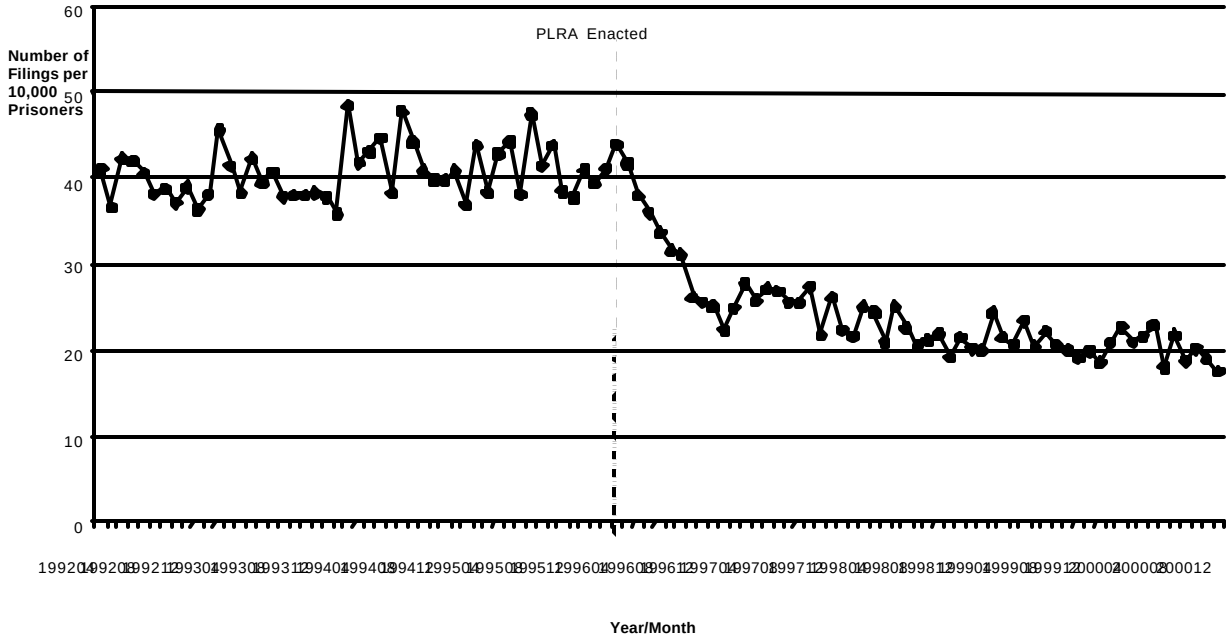
[47] Scalia *supra* note 45 at 7.

[48] We also use the technique of interrupted time-series analysis that Scalia employs, after first conducting unit root tests to determine whether the national time series is stationary (see, e.g., J. G. MACKINNON, CRITICAL VALUES FOR COINTEGRATION TESTS, *LONG –RUN ECONOMIC RELATIONSHIPS: READINGS IN*

number of prisoners.[49] The use of rates minimize the chances of confusing the effects of a change in prisoner population with the effects of PLRA.

As shown in Figure 2-2, the number of Section 1983 lawsuits decreased abruptly after enactment of PLRA. The trend continues to be downward, although at a slower pace, during the remainder of the post-implementation period (i.e., after April, 1996). There is a considerable difference in the average monthly number of lawsuits when the pre- and post-implementation periods are compared (4.1 vs. 2.4 lawsuits per 1,000 prisoners, respectively).

Figure 2-2
Average number of Section 1983 law suits filed in all U.S. District Courts per 1,000 prisoners nationally (by Month, April 1992 - December 2000)



Pre-PLRA period Average: 4.1

Standard Deviation: .31

Post-PLRA period Average: 2.43

Standard Deviation: .56

COINTEGRATION (R.F. Engle and C.W.J. Granger eds., Oxford University Press. New York) (1991). The Augmented Dickey-Fuller test indicated that the national time series was stationary

[49] See Cheesman, Hanson, & Ostrom *supra* note 17 at 98-102.

Section 1983 lawsuits have dropped significantly since passage of the PLRA, confirming our first testable proposition at the national level.[50] Figure 4 reveals that the PLRA has affected both the volume and trend of prisoner litigation: The PLRA has resulted in a 40 percent decrease in the average monthly number of Section 1983 cases filed nationally.

The post-PLRA trend is suggestive for two related issues. First, based on the analysis of Section 1983 cases dismissed pre-PLRA (Figure 3), we hypothesized that as many as 60 percent of Section 1983 complaints might not withstand the additional procedural requirements established by the PLRA. Clearly the size of the decrease is in line with this prediction. But the extent to which the drop in Section 1983 filings constitutes a drop in the volume of "frivolous" litigation awaits further inquiry. The precise nature of the cases *not* filed because of the PLRAs provisions (meritorious v. nonmeritorious) is unknowable. However, in a subsequent section of this article, we infer how the PLRA has affected the handling of prisoner lawsuits filed when we compare the manner of disposition for Section 1983 lawsuits pre- and post-PLRA. Second, there is no evidence that the number of Section 1983 lawsuits filed has resumed its earlier linkage with state prison population. Given that the provisions of the PLRA remain a somewhat unsettled area of law, it remains an open question as to whether the PLRA has successfully broken the connection with state prison population.

2.3.2. Circuit Trends: The Circuits of the U.S. Court of Appeal are prisms through which to see the effects of the Prisoner Litigation Reform Act (PLRA) on the filing rates in U.S. District Courts.[51] Variation in terms of geography and demographics provide one rationale for

[50] *P<.05;* See Figure 16 for details.

[51] In this section of the article, we continue to use an U.S. District Court database. The national level findings discussed above is that the national level is an aggregation of all U.S. District Courts whereas this section is grouping U.S. District Courts into one of eleven sets with each set corresponding to the boundaries of a particular Circuit's jurisdiction. Hence, the data presented in this section are not appeals filed by prisoners under Section 1983 in each of the Circuits. They remain U.S. District Court case filings.

decomposing the national data on Section 1983 filing trends to the Circuit Court level.[52] Of more importance, though, the Circuits are recognized as the legal policy-making bodies in the federal court system. They are in fact, if not in theory, the final arbiters of most legal disputes. They are in a position to render their distinctive takes on doctrine and to inform and guide U.S. District Courts within their respective jurisdictions.[53] Most of the expansion and the delineation of prisoners' rights have been the product of Circuit Court decisions with U.S. Supreme Court rendering a handful of landmark decisions. As noted, because the Courts of Appeal have differed in their interpretation of the PLRA provisions[54], it bears investigating whether the impact of the PLRA on prisoner litigation filing trends is consistent across the Circuits. Thus, because the Circuits reflect possible variations both in context and statutory interpretation, an issue for examination is whether the consequences of the PLRA are similar or different in the U.S. District Courts among the Circuits.[55]

The basic research question of whether all individual Circuits experienced a decrease in Section 1983 lawsuits similar to that observed at the national level is answered using interrupted

[52] Even conceding the arguable claim that the United States has a relatively homogenous culture compared to other countries, the states comprising virtually every pair of non-adjoining Circuits intuitively seem different. For example, contrast the Second Circuit (New York, Connecticut) and the Eighth Circuit (North Dakota, South Dakota, Nebraska, Missouri and Arkansas). Or the Eleventh Circuit (Florida and Georgia) and the First Circuit (Maine, New Hampshire, Vermont, Massachusetts and Rhode Island).

[53] Recent literature on the U.S. Courts of Appeal concludes that doctrinal differences among the Circuits have declined in the last seventy years. However, differences are believed to remain especially in the area of constitutional rights (DONALD SONGER, REGINALD S. SHEEHAN, & SUSAN B. HAIRE, CONTINUITY AND CHANGE IN THE U.S. COURTS OF APPEAL (Ann Arbor: University of Michigan Press) (2000)), which seemingly includes Section 1983 and the new provisions of the PLRA.

[54] Butler *supra* note 5, at 586

[55] Court scholars make a dual assertion on how Circuits manage to influence U.S. District Courts in desired ways. One element of influence is that the leadership of each Circuit's bench (i.e., chief judge, and senior judges) will assign themselves opinion writing opportunities and will author precedent-setting opinions that define the law and settle issues. Those opinions become cues for the U.S. District Courts to use in resolving cases before them by applying the law in a way consistent with the Circuit decisions (see, J.W. HOWARD JR. *supra* note 31). Additionally, each Circuit is viewed by some scholars as separate, closed system of communication. U.S. District Court judges look first and primarily to decisions by their respective Circuit judges, who, in turn, look first and primarily to their respective colleagues. See e.g., Robert Carp, *The Scope and Function of Intra-circuit Judicial Communication: A Case Study of the Eighth Circuit*, 6 LAW & SOC'Y REV. 405 (1972). Following the suggestions of this literature, the current research discusses legal decisions concerning the PLRA by Circuit Courts of Appeals judges. That discussion follows the analysis of the trends among the Circuits.

time-series analysis (also known as "intervention analysis"). The individual Circuit Court filing trends are shown in Figures 2-3 to 2-13. Table 2-3 displays the statistical results that confirm the drop in the rate of prisoner litigation filings observed following the passage of the PLRA is statistically significant at the Circuit level.[56]

[56] Prior to the interrupted time series analysis, the pre-intervention times series for each Circuit was pre-tested for staionarity using the Augmented Dickey-Fuller test, after the recommended procedure of Francis X. Diebold & Lutz Kilian, Unit Root Tests are Useful for Selecting Forecasting Models, paper published on the World Wide Web (http://www.ssc.upenn.edu/~diebold/) (1999). These tests revealed that the time series for each Circuit were stationary.

Figure 2-3

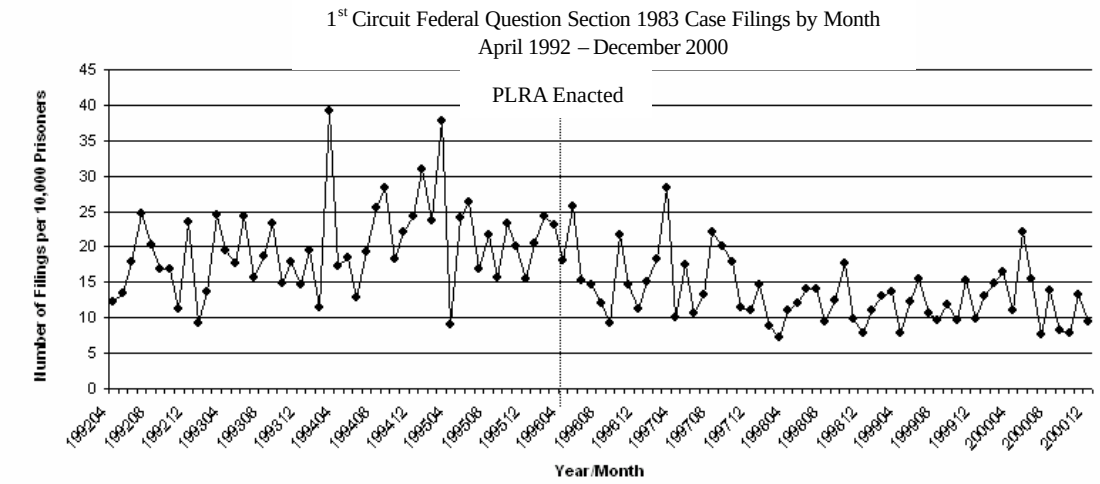


Figure 2-4

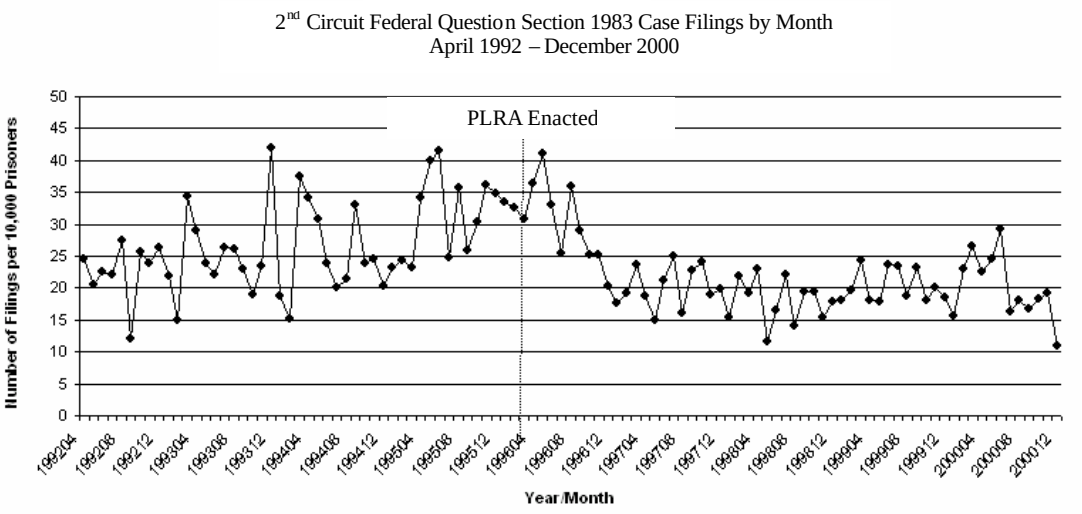


Figure 2-5

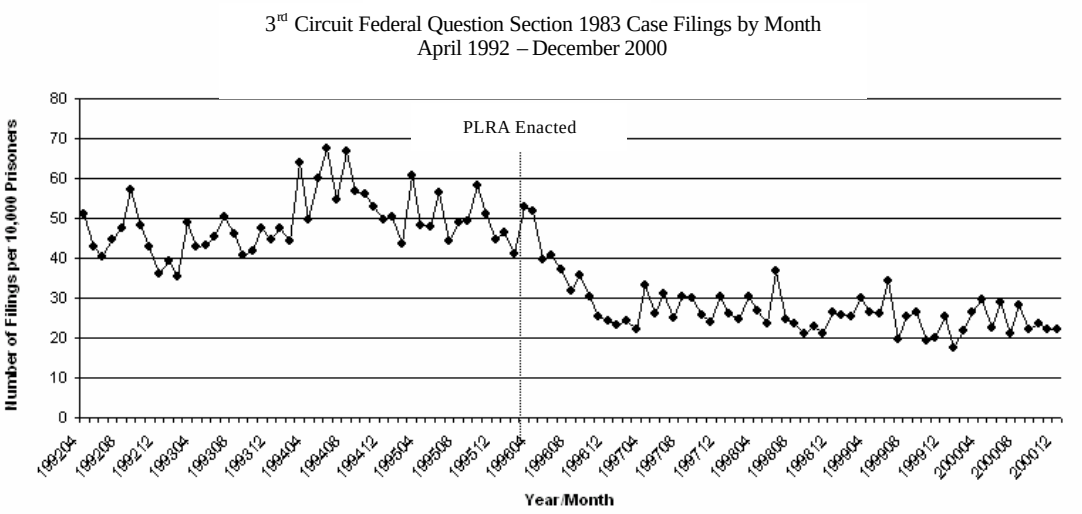


Figure 2-6

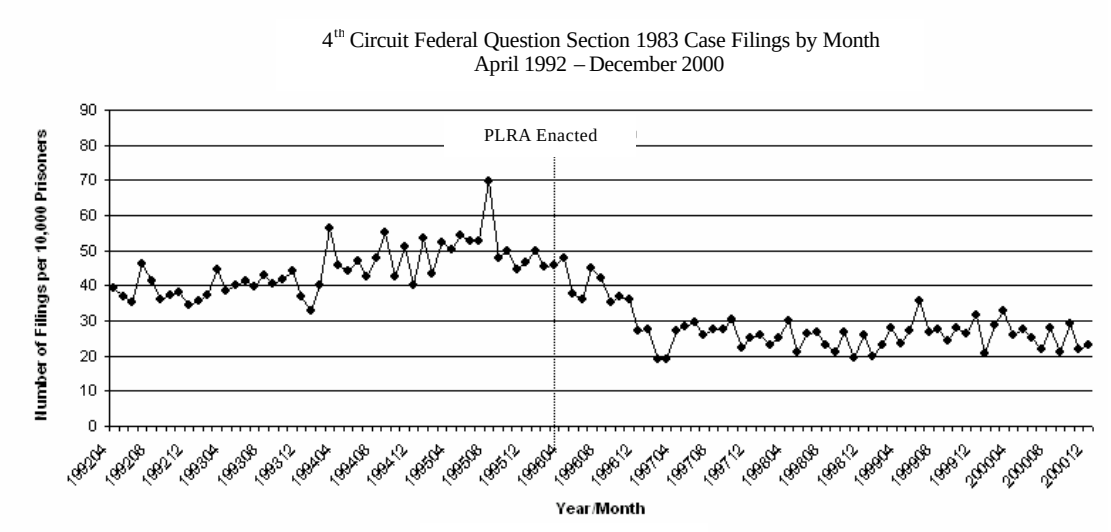


Figure 2-7

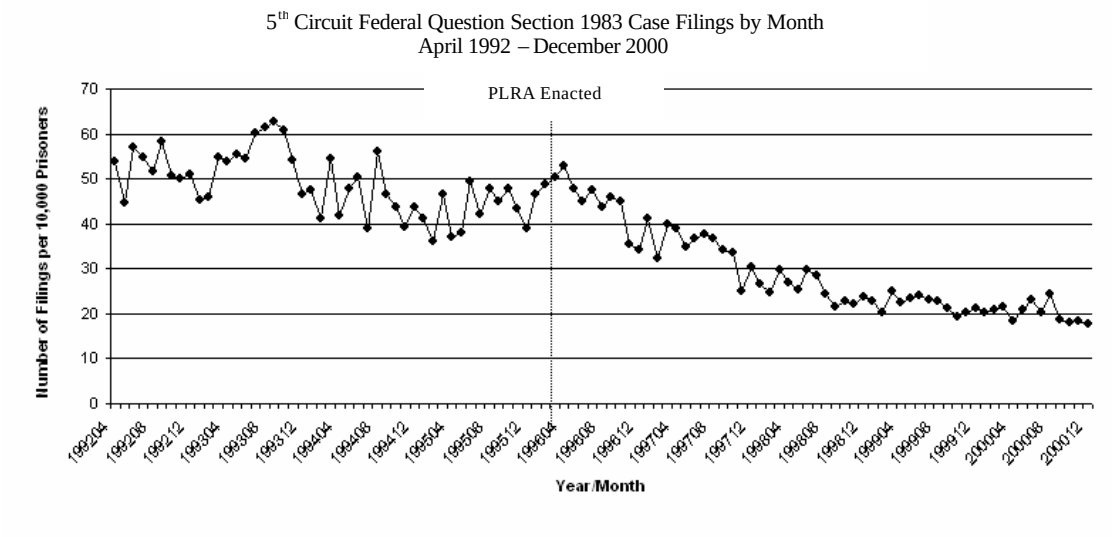


Figure 2-8

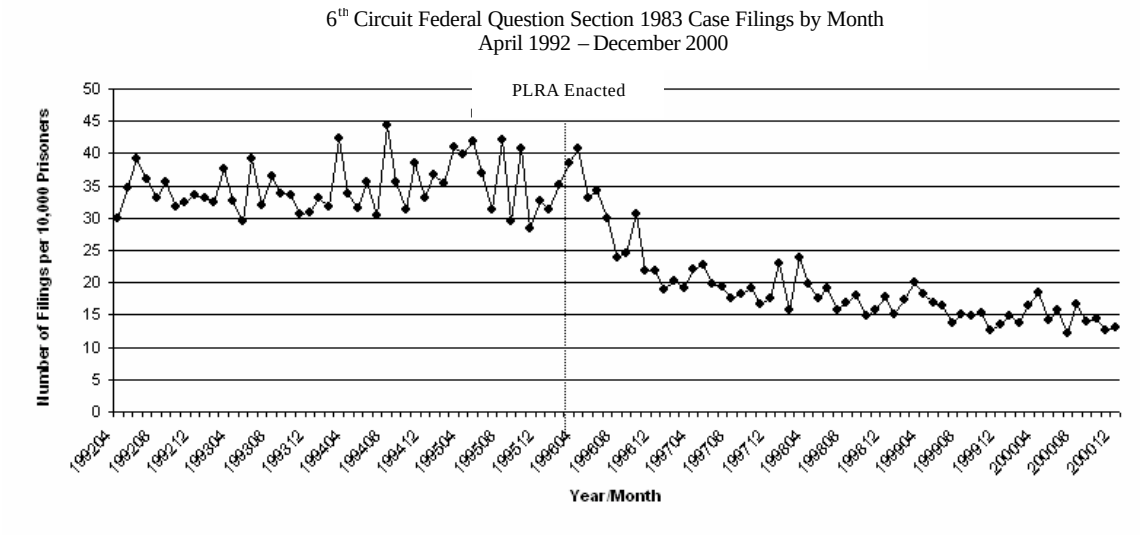


Figure 2-9

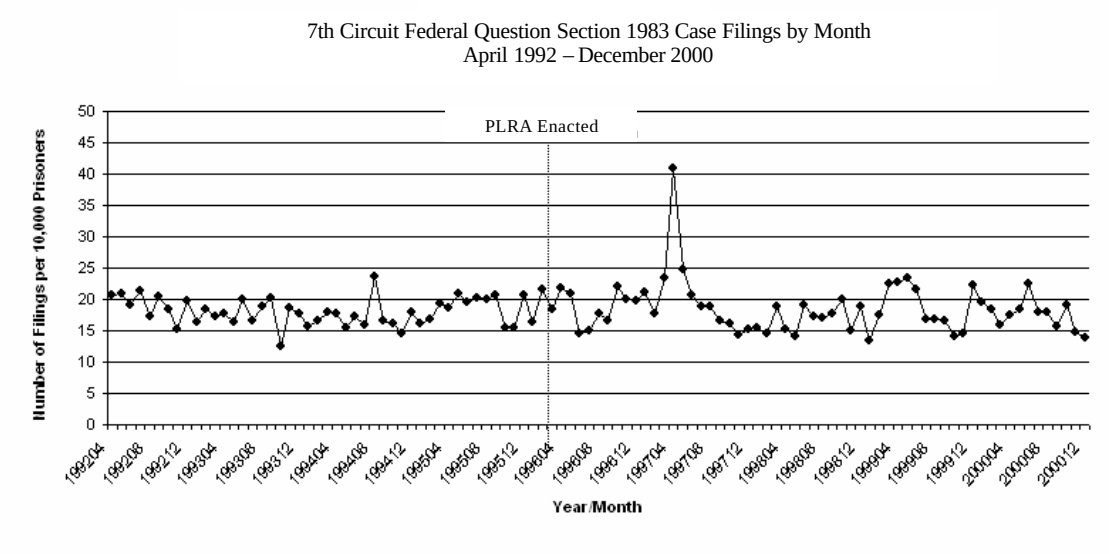


Figure 2-10

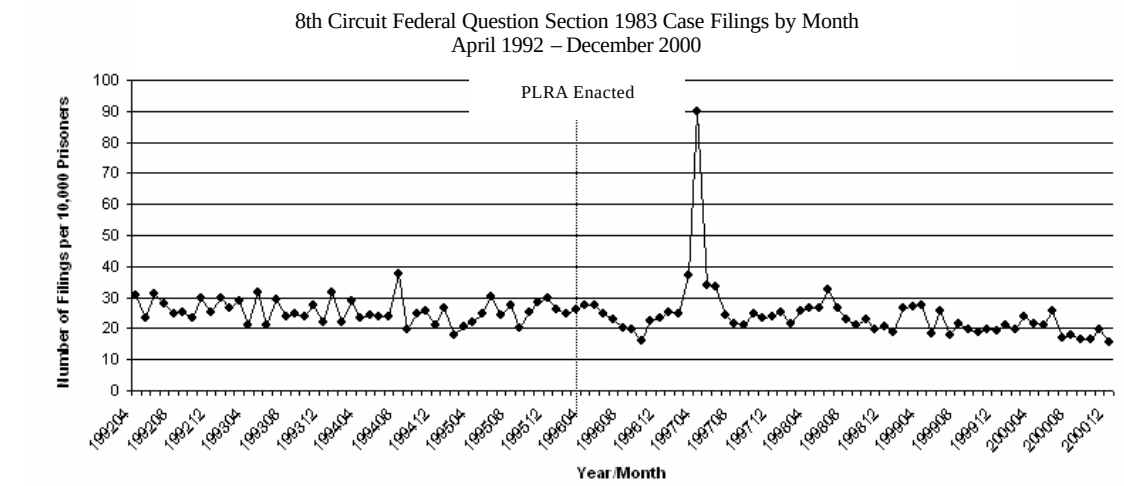


Figure 2-11

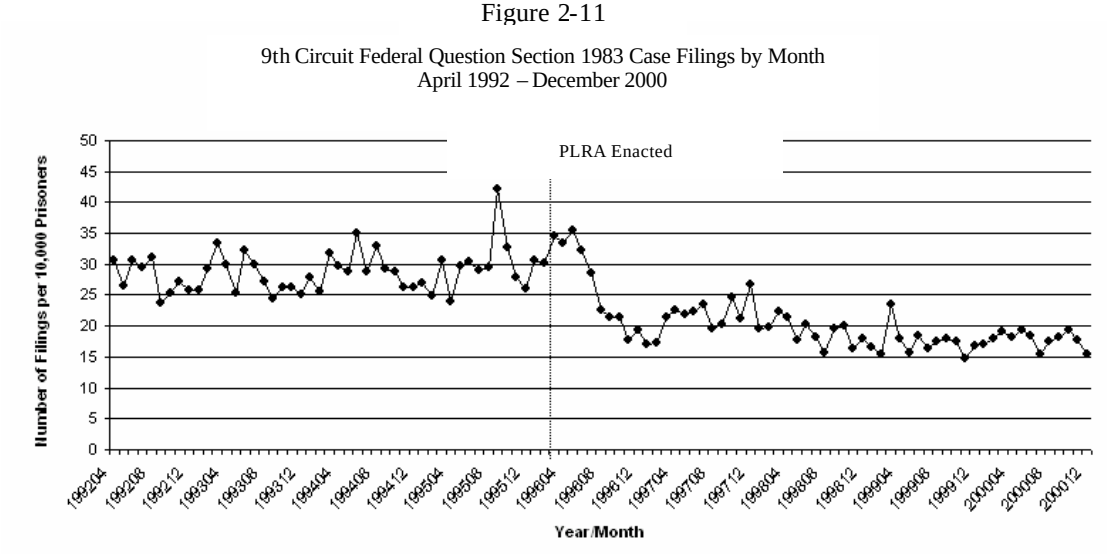


Figure 2-12

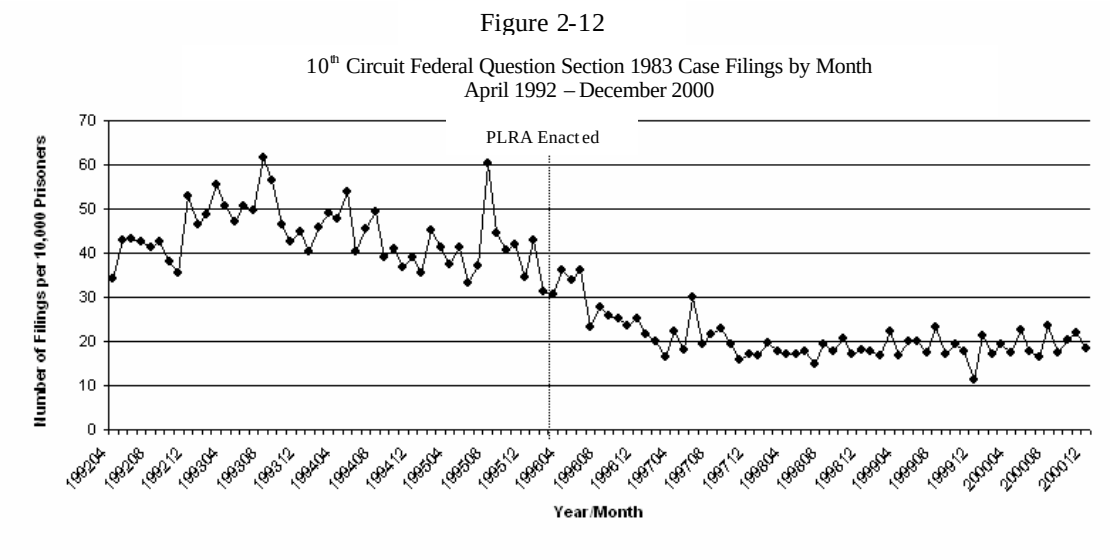
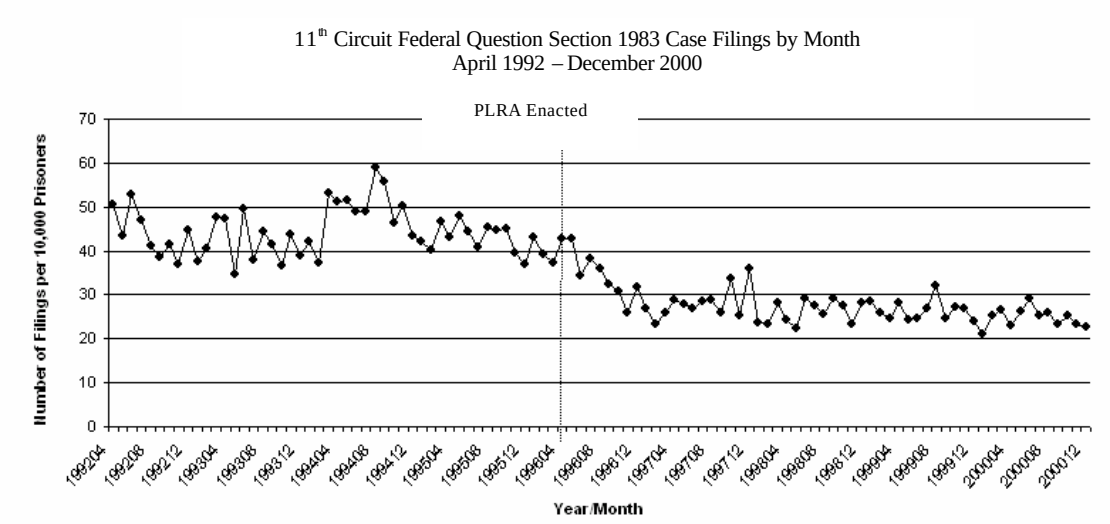


Figure 2-13



The lone exception is the Fifth Circuit[57], although the trend in that Circuit was downward before the enactment of PLRA and has since continued apace. Hence, there is overall consistency in the sense that, apart from the Fifth Circuit, the PLRA produced both a statistically significant decrease in the volume and trend of Section 1983 lawsuits per 10,000 state prisoners in all Circuits.

Although all Circuits (except the fifth) showed a statistically significant drop in prisoner litigation following enactment of the PLRA, the *extent* of the decline varied considerably. As shown in Table 2-3, the percentage change in the average monthly filing rates ranged from a decrease of 31 percent in the Ninth Circuit to 74 percent in the Second Circuit. The size of the drop between the pre-PLRA and post-PLRA time periods is measured using the "step" statistic. A negative and statistically significant step indicates that the PLRA demarcates a fundamental decrease in the filing rate. The larger the value of the step statistic, the greater the difference in the trends. As Figure 16 shows, the step statistic is significant in all but the Fifth Circuit and the size of the step varies from –47.84 in the Eighth Circuit to –5.39 in the Second Circuit.

[57] To understand the unexpected results for the Fifth Circuit, we examined filing patterns in the three states that comprise this Circuit (Texas, Louisiana and Mississippi) by means of interrupted time series analyses. While statistically significant declines were noted for both Louisiana and Mississippi, the decline was not significant in Texas. Since Texas has a much larger prison population than either of the other two states, the pattern noted for this state tended to define the pattern observed for the entire circuit. It is not clear at the present time why the PLRA did not impact the filing rate of Section 1983 Lawsuits in Texas.

Table 2-3: Section 1983 Law Suits Per 10,000 Prisoners Before And After PLRA

Circuit[1,2]	PRE (April 1992-March 1996) Average	POST (April 1996 - December 2000) Average	Percent Change: Pre- to Post-PLRA	Step	Standardized Step
1	20.02	13.54	-32.37	-5.94	-0.30
2	26.78	21.31	-20.43	-5.39	-0.20
3	48.96	27.01	-44.84	-17.99	-0.37
4	44.49	27.64	-37.86	-12.11	-0.27
5	48.72	28.65	-41.19	-0.2 (NS)	0.00
6	34.81	18.87	-45.78	-14.06	-0.40
7	49.23	24.03	-51.19	-18.88	-0.38
8	87.10	34.48	-60.41	-47.84	-0.55
9	28.88	20.06	-30.54	-8.66	-0.30
10	43.73	20.49	-53.16	-22.02	-0.50
11	44.18	27.73	-37.23	-13.99	-0.32
National	4.08	2.43	-40.41	-1.36	-0.33

1. Circuits are rate of filing per 10,000 prisoners
2. National are rate of filing per 1,000 prisoners

NS: No statistically significant change between the before and after trends

The step statistic confirms that the PLRA has led to a significant decrease in Section 1983 cases in all Circuits (except the Fifth), but that the level of change varies by Circuit. In addition, this analysis helps clarify whether the extent of change in each Circuit post-PLRA is related to the volume of litigation pre-PLRA. Perhaps circuits with high pre-PLRA filing rates (e.g., the Eighth Circuit) had proportionately more filings of procedurally weak lawsuits than circuits with low filing rates (e.g., the First Circuit), and so would be impacted more profoundly by the PLRA than circuits with low filing rates. To adjust for the pre-PLRA Section 1983 caseload volume, a standardized measure of change is calculated. This measure—the "standardized step"—is the ratio of the step to the average pre-PLRA filing rate for each Circuit. The circuits were ranked according to the size of their standardized step and also by their pre-PLRA Section 1983 Lawsuit filing rate and the rankings. Spearman's Rank Order Correlation was then calculated between the two sets of rankings and found to be non-significant

(Sprearman's r=.382, $p<.247$). Thus, the Section 1983 Lawsuit filing rate prior to the PLRA is not significantly related to the size of the decrease in prisoner litigation post-PLRA. We can conclude, then, that the PLRA is having a differential impact in the Circuits and is operating in a more subtle manner than would be expected based on the size of the pre-PLRA filing rate alone.[58]

2.3.3. Manner of Disposition: If the PLRA is operating as envisioned by its authors, we have certain expectations about the types of cases that will no longer be filed in the federal courts or that will be summarily dismissed. The Act prohibits inmates from bringing suit until all available administrative remedies have been exhausted as well as mandating dismissal for claims found to be frivolous, malicious, or failing to state a claim. Such a change in filing behavior would also be expected to produce a corresponding change in the pattern of case resolutions in U.S. District Courts. For example, if the PLRA is serving to distinguish and reduce the number of nonmeritorious cases relative to meritorious cases, there should be relatively fewer court dismissals for frivolousness, relatively more cases dismissed for failure to implicate a constitutional standard, and relatively more trials than before the PLRA. While a complete analysis of this issue will require systematic investigation at the individual case level, we can examine AO data on the manner of resolution to gain preliminary insight into the changing nature of prisoner litigation.

The level of aggregation employed by the USAOC in reporting resolutions of Section 1983 cases permit us to examine changes in dismissal rates, the relationship between early dismissals and later dismissals (typically) following a motion filed by the defendant, and jury

[58] Potential (but currently unmeasured) factors that may explain the size of the standardized step include differences in (1) the vigor with which the circuits have implemented the provisions of the PLRA; (2) the composition of Section 1983 Lawsuits at the Circuit level, particularly with regards to the proportion that could be classified as frivolous; and (3) the availability of procedural remedies for inmates to resolve their grievances without recourse to federal courts. In addition, several states have implemented their own versions of the PLRA and such legislation

trial rates. Using the AO data we compare the manner of resolution at the Circuit Court level of cases resolved in 1995 (the last full year before implementation of the PLRA) with those resolved in 2000 (the latest year for which resolution data were available).[59] A "test of proportions" was used to determine whether there was a statistically significant change in the composition of dispositions pre- and post-PLRA. The test confirms that the manner in which Section 1983 lawsuits are disposed has changed in consistent and significant ways between 1995 and 2000 in all Circuit Courts.[60]

Figure 2-14 shows that outright dismissals have increased proportionately in every Circuit except the Second (where they decreased)[61]. In contrast, judgments on defendants' motions (Figure 2-15) have decreased proportionately in every circuit, except the Second (where they increased). It appears that more cases are being dismissed at earlier stages of the process by court actions instead of rulings on a defendant's motion, likely filed at a later stage. This change should result in decreased workload for U.S. District Courts because dismissed cases typically require less work than cases involving judgments on defendants' motions.

If the PLRA is serving to siphon off nonmeritorious cases, then we expect that trials will account for an increased proportion of resolutions post-PLRA. If some procedurally weak cases are no longer filed, then the relative share of meritorious cases should rise and we should see an increase in the trial rate. Figure 2-16 shows that jury trial rates have risen in every Circuit (except the Sixth, where there was little change), though the proportion of resolutions accounted for by trials remains small and varies among the circuits. Proponents of the PLRA will likely see

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may be associated with larger decreases in Section 1983 Lawsuits. "From 1994 through 1996, 21 states had passed or were considering legislation similar to the PLRA." *Kuzinski* supra note 6 at 375.

[59] Aggregate statistics at the national level are shown in Figure 2.

[60] $P < .05$. The two exceptions are the proportion of dismissals in the First Circuit and the proportion of jury trials in the Sixth Circuit.

[61] Circuits with the largest increase in dismissal rates tended to be circuits with the largest standardized step change, perhaps reflecting that circuits embracing the PLRA most vigorously before filing (as evidenced by their relative decline in filing rates), continue their vigorous embrace after the case has been filed.

these results as indicative of success. Fewer prisoner lawsuits are being filed, relatively more cases (presumably procedurally weak) are being dismissed earlier in the process, and relatively more cases are being resolved by jury trial.

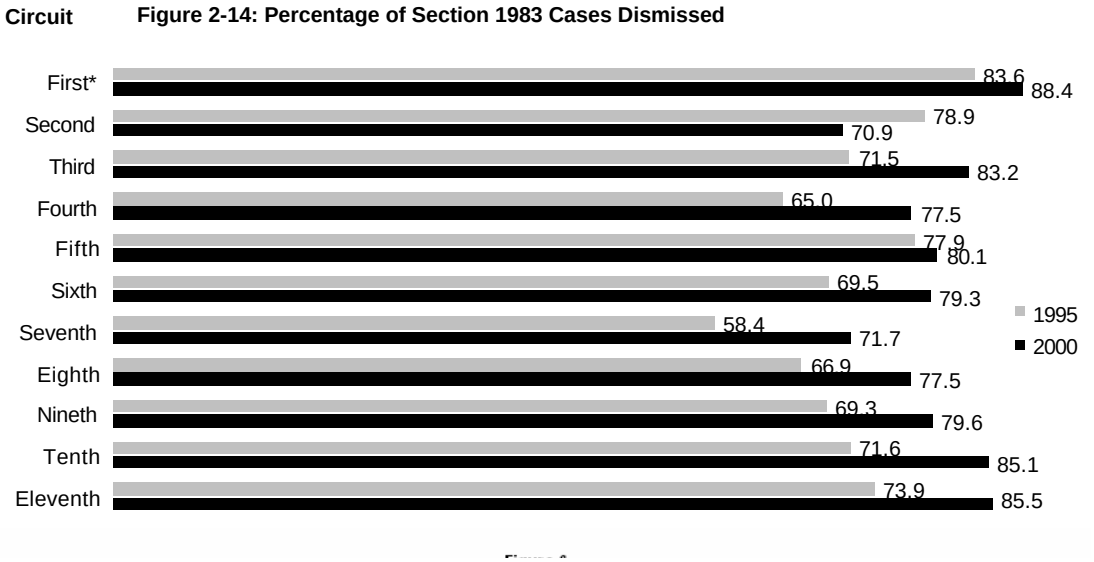


Figure 2-14: Percentage of Section 1983 Cases Dismissed

Figure 2-15: Percentage of Section 1983 Cases Disposed by Judgment on Defendant Motion

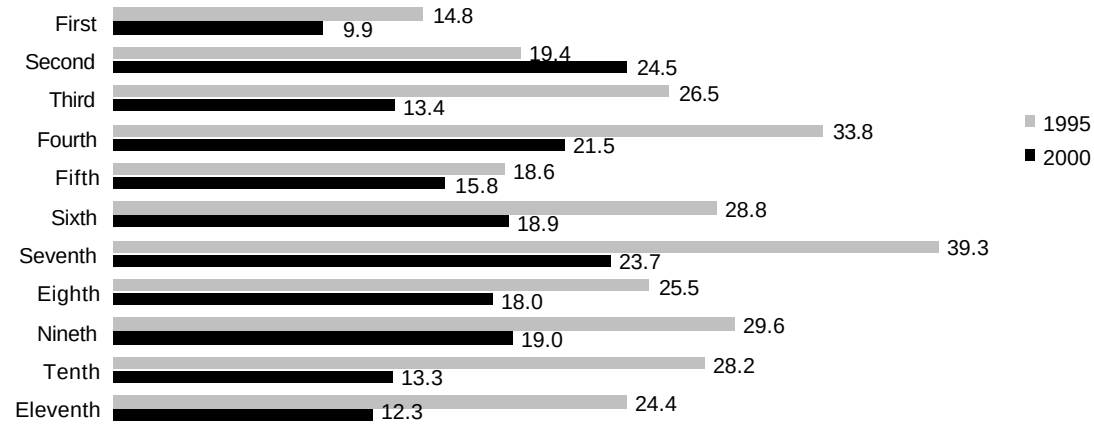
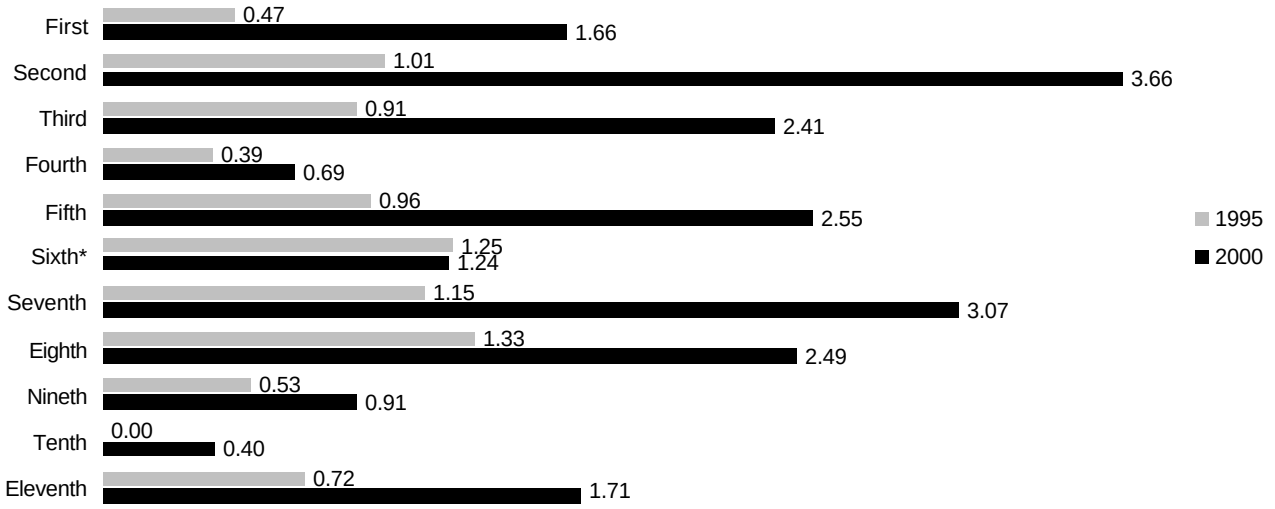


Figure 2-16: Percentage of Section 1983 Cases Disposed by Jury Verdict



2.4. Conclusion

The Prisoner Litigation Reform Act has produced a significant reduction in the number of prisoner lawsuits coming to the federal courts. There are simply fewer cases filed under Section 1983 of the U.S. Code in US District Courts than there were before the provisions of the PLRA took effect. This paper documents that the decrease in Section 1983 litigation, which occurred throughout the U.S. Circuit Courts of Appeal, is striking in both magnitude and scope. The Fifth Circuit is an exception, where a decrease in Section 1983 filings occurred before the new law was adopted and continued after the law was passed.

Proponents of the PLRA will point to this dramatic change in the volume and trend of prisoner litigation as evidence of the Act's success. A two-thirds reduction in filings means prisoner lawsuits have dropped from one in every six federal cases in 1996 to about one in eighteen in the year 2000. Clearly, the goal of reducing the share of federal judicial workload devoted to prisoner litigation has been achieved. Moreover, supporters of the PLRA can justify the rationale for the decrease: most cases filed pre-PLRA did not meet basic procedural

requirements and were resolved by court dismissal. The problematic nature of these lawsuits was clarified in the findings of Hanson and Daley[62]. Their extensive examination of prisoner lawsuits filed just prior to the PLRA show few able to withstand scrutiny and pass the basic, existing requirements of suing someone acting under color of state law without immunity over an issue cognizable under Section 1983 that rises to the level of a deprivation of their constitutional rights.

Yet, individuals with less sanguine views of the PLRA will no doubt note that, at this point, we don't know the nature of the lawsuits no longer filed or summarily dismissed through the new procedures authorized by the PLRA. The chief concern is that the new provisions such as those related to filing fees and three-strikes will preclude filing of the meritorious as well as the frivolous. Proponents have not shown that the elimination of frivolous lawsuits has been the source of the drop in Section 1983 filings. Looking to the available data is suggestive but incomplete.

On the surface, there is evidence of little change when the manner of disposition for prisoner litigation is compared pre- and post-PLRA. The proportion of cases dismissed outright or following judgment on defendants' motions remains at about 95 percent. It appears prisoners continue to file procedurally weak lawsuits in large numbers and, in response, they continue to be dismissed by the U.S. District Courts.

However, going inside the manner of disposition numbers, offers some solace to those concerned that the PLRA has not helped meritorious claims in their battle for recognition. If operating as intended, the new PLRA provisions allow the federal courts to deny complaints that in the past were accepted only to be dismissed for having fundamental flaws. The AO disposition data show that outright dismissals have proportionately increased in every circuit

[62]Hanson & Daley *supra* note 25

(except the Second) and judgments on defendants' motions have proportionately declined in every circuit (except the Second). It would appear that more prisoner requests to proceed are being immediately denied (and dismissed) prior to payment of the filing fee. The end effect is likely more judicial time to gauge and resolve the meritorious cases. This interpretation of improved judicial review receives some support from the finding that jury trial rates more than doubled in most Circuits.

This paper goes a long way in informing the affect of the PLRA on the volume, trend, and outcome of prisoner litigation. And focuses attention on directions for future inquiry. The dramatic change in volume and trend highlights the need to better understand the implementation process of the PLRA and the roles of key constituencies that stood to benefit most from the legislation (U.S. District and Circuit Court judges, states attorneys general, and state and local correctional officials). The apparent success of the PLRA in accomplishing the primary objective of reducing the volume of section 1983 litigation in federal courts is remarkable given Congress' previous unsuccessful efforts to regulate prisoner lawsuits.

A comprehensive assessment of the change in the manner of case resolution pre- and post-PLRA demands a case-level examination of its effect on the composition of Section 1983 lawsuits docketed and resolved. Have the cases changed in subject matter of the issues? Which cases are resolved quickly under the PLRA? And which ones go to trial? Is the number of prisoners who prevail at trial after the PLRA larger, smaller, or about the same as before the PLRA? Answers to these questions are ultimately needed to assess the fairness and "efficiency" of the PLRA in eliminating procedurally weak cases but not impeding the flow of meritorious cases into federal courts. Until these questions are addressed-through case level inquiry-the final chapter on the PLRA cannot be written.

Chapter 3: The Antiterrorism and Effective Death Penalty Act of 1996 Meets Habeas Corpus

3.1. Introduction

A seminal value of American jurisprudence is that no one should be convicted wrongfully of a crime that they did not commit. The U. S. Constitution enshrines this principle. According to Article I, Section 9, Clause 2 of the Constitution, "(t)he Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the Public safety may require it."

In support of this value, federal courts in the American federal system of government review the validity of state court convictions and sentences. Have the state courts erroneously convicted and incarcerated a criminal defendant? Recent advancements in forensic technology (most notably DNA testing) demonstrate dramatically that wrongful convictions are an unfortunate, if infrequent, reality in our justice system.[1]

Prisoners generally first challenge their convictions by filing appeals and post-conviction relief in the intermediate appellate and supreme court in the state where they were convicted. After exhausting the state appellate process, an inmate then can file petitions for writs of habeas corpus in U. S. District Courts claiming that his or her U. S. constitutional rights were violated and that the state courts did not correct these errors. The constitutional deprivations include actions by the police (e.g., coerced confession), prosecution (e.g., knowing use of perjured testimony) or the trial court process (e.g., denial of effective assistance of counsel).[2] Therefore, a prisoner petitions a federal court to reverse or modify the state trial court decision. In a real

[1] J. Liebman, *Rates of Reversible Error and the Risk of Wrongful Execution*. 86 JUDICATURE, 78-82 (2002).
[2] There is a parallel process for federal prisoners to challenge their convictions for violations of their constitutional rights. However, they technically do not file petitions for writs of habeas corpus. They file motions to vacate, set aside or correct their sentences. The scope of this article is limited to state prisoners and writs of habeas corpus because the overwhelming majority of criminal convictions are rendered in state courts and the overwhelming majority of post-conviction challenges arise from state prisoners.

sense, the prisoner seeks to relitigate issues that previously were examined by state courts. Indeed, one of basic legal doctrines of habeas corpus is that the petitioner must first exhaust all state remedies before submitting a petition to a federal court.[3]

U. S. District Courts can dismiss, deny or grant habeas corpus petitions. A petition denied on the merits can then be filed with the U. S. Court of Appeals. And if that appeal is denied, a challenge to that decision can be lodged with the U.S. Supreme Court.[4]

Stakes in habeas corpus petitions are extraordinarily high. A prisoner who succeeds in gaining a favorable decision from a federal court stands to be released from confinement, gain a new trial, or have a sentence remanded for a new sentencing hearing. A federal judge's granting of a prisoner's petition and issuance of a writ of habeas corpus ordering a prisoner's release or another proceeding countermands all previous state decisions. On the other hand, while the federal habeas corpus process is underway, validity of a state trial conviction remains uncertain. Because more than one federal court might be involved in this process, postponement of validity extends for a considerably long period of time.

Therefore, it is understandable that federal habeas legal policies and procedures have been part of a developmental process and that the issues revolving around the grounds or procedural requirements for the filing of these cases are never fully settled. The history of habeas corpus reform has been one of continuous efforts to either loosen or tighten the requirements. The U.S. Supreme Court has both expanded and limited the criteria under which

[3]In place since the decision in 1886 of the U.S. Supreme Court in *Ex parte Royall*, the exhaustion doctrine is grounded in the principle of comity and the understanding that state courts, like federal courts, are required to uphold and enforce constitutional requirements. *See* M. O'Neill, Esq., *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV.1493-1547 (1996).

[4]A state prisoner can file a challenge directly to the U.S. Supreme Court by submitting an application for a writ of certiorari. However, the likelihood that the Supreme Court will accept this application under its discretionary review authority is small because of the large number of other cases competing for attention. In fact, this situation is part of what prompted the Supreme Court to decree that habeas corpus petitions could be filed in lower federal courts (e.g. *Fay v. Noia, Townsend v. Sain, and Sanders v. United States*).

petitions can be filed in federal court. Moreover, the federal courts have tried to recommend changes to the law through administrative committees. However, what is striking about the nature of the most recent change is that the source of the new provisions of habeas corpus law is the U. S. Congress's direct involvement. Passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) marks the first time that the national legislative branch of government has introduced substantial change in an effort to siphon off petitions because they are not timely or do not meet other filing standards. Because every modification to habeas corpus law is worth noting, this Congressional initiative is doubly important because it represents the introduction of ideas from one branch of government into what is the business of another branch.

The purpose of the current research is to address two questions. Did the AEDPA have its intended effect of reducing the number of habeas corpus petitions filed by state prisoners in U.S. District Courts? Or, did habeas corpus petitions continue to be filed at the same or greater rates despite the allegedly restrictive provisions of AEDPA? To achieve this objective, we use the statistical technique of interrupted time series analysis, where the enactment of AEDPA separates the filing of habeas corpus petitions into a before and an after period. Graphic displays of the before and after trends in habeas corpus petitions are presented, along with quantitative measures of whether, and how, AEDPA altered the before and after trends in a substantial manner.

We review four key important aspects of the habeas corpus landscape to put the quantitative analysis in context: (1) national historical trends in habeas corpus petitions, (2) competing legal perspectives on habeas corpus, (3) AEDPA provisions and a quick look at their possible effect and (4) previous court administrative studies on habeas corpus. Each of these

areas offers a basis for anticipating the nature of the statistical results and interpreting the observed patterns.

3.2. Background

3.2.1. National Historical Trends In Habeas Corpus Petitions: The U.S. Supreme Court has been the primary engine of doctrinal developments.[5] A substantial departure from past legal policy making occurred in 1995 with the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA). With the passage of this Act (Pub. L.104-132), the U.S. Congress became a prime mover in shaping habeas corpus. The new provisions took effect in 1996.

Prior to AEDPA, modern habeas corpus doctrine and litigation evolved in two distinct phases: (1) increased availability of federal habeas corpus relief to state prisoners during the Warren Court era (1953-1969)[6] and (2) retreat and retrenchment from an expansive federal role in habeas litigation under the Burger and Rehnquist Courts, 1970 to the present[7] The two distinct philosophies promulgated by the Supreme Court during these phases had a very evident effect on the number and rate of filing of all types (including death penalty) of habeas corpus petitions by state prisoners in U.S. District courts, as shown in Figure 3-1.

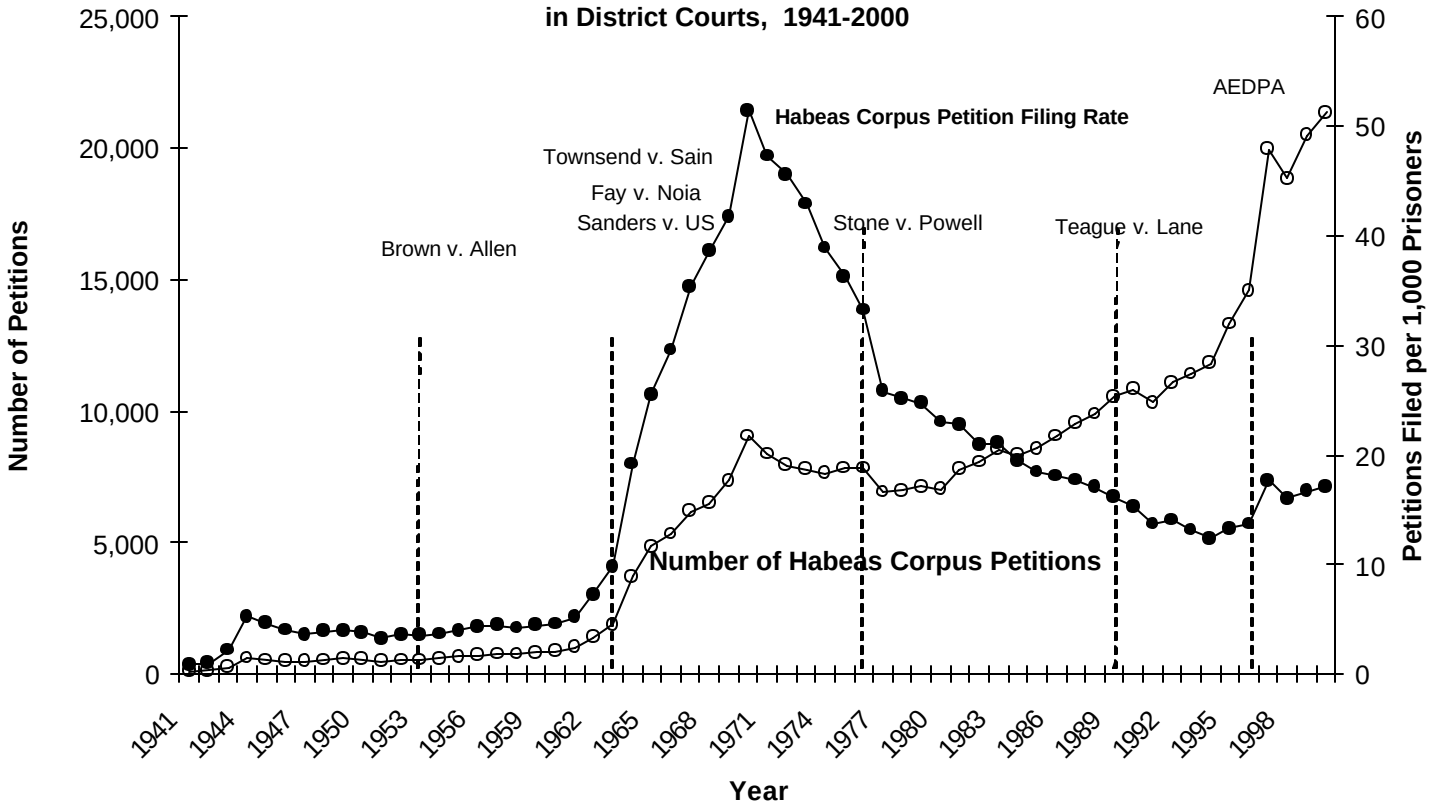
[5] M. O'Neill, Esq., *Supra* note 3, at 1493-1547.

[6] The modern American history of habeas corpus begins with the Supreme Court decision in *Brown v. Allen*, which expanded the scope of the writ from a narrow focus on jurisdictional error to claims of constitutional error brought by prisoners in state custody. That decision empowered District Courts to redetermine the merits of constitutional issues arising in the courts of state criminal prosecutions even if the state has corrective procedures and the conviction was proper according to those procedures.

[7] M. Hartman and J. Nyden, *Habeas Corpus and the New Federalism after the Anti-terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV., 337-387 (1997).

Both the number of petitions filed and the rate of filing (number of petitions per prison population) beginning in 1963 increased sharply concomitantly with the *Fay v. Noia*,[8] *Townsend v. Sain*,[9] and *Sanders v. United States*[10] decisions of the Warren Court. Hartman and Nyden[11] point out that, "In the aggregate, these cases cut through "the procedural thicket of state comity and state concerns about finality and mandated federal relief from state court decisions that violated the Federal Constitution or the Bill of Rights." In other words, these decisions widened the opportunities for habeas corpus litigation by state prisoners in District Courts.

Figure 3-1: Habeas Corpus Petitions Filed by State Prisoners in District Courts, 1941-2000



[8] 372 U.S. 391 (1963), *overruled by Keeney v. Tamayo-Reyes*.
[9] 372 U.S. 293 (1963)
[10] 373 U.S. 1 (1963).
[11] Hartman & Nyden, *supra* note 7, at 340.

The idea of expanded opportunities was met with dismay in some quarters. Even the Supreme Court decision establishing the principle of federal court review of state court convictions in *Brown v. Allen* was considered an invitation for the filing of an unmanageable habeas corpus caseload. Associate Justice Robert Jackson, in his separate opinion in *Brown v. Allen*, complained bitterly that judicial modification of habeas corpus jurisdiction resulted in "floods of stale, frivolous, and repetitious petitions [that] inundate the docket of the lower courts and swell our own."[12] However, as O'Neill[13] points out, the "flood" that Justice Jackson referred to consisted of only 541 petitions filed in 1952, the year preceding *Brown v. Allen*. Jackson's metaphor of a flood of work seems to be both an exaggeration of the situation in the 1950s and a prescient claim of what happened in the next few decades. For example by 2000, there were 21,345 petitions. Many observers likely agree with O'Neill's[14] sentiment that prisoner petitions undermine confidence in the criminal justice system, waste precious judicial resources, and, as a result, may diminish the amount of time spent reviewing potentially meritorious claims.[15]

To understand the trend in habeas corpus petitions more fully, the number of petitions needs to be examined in conjunction with the rate of prisoners or the number of prisoners. Are the absolute numbers and the rates increasing or decreasing together? Or are there different

[12] *Brown*, 344 U.S. at 536 (Jackson, J., concurring).
[13] O'Neill, *supra* note 3
[14] *See id*, at 1577
[15] A reasonable question to ask is whether concern over the number of petitioners should be based exclusively on filing patterns. Or, does the "problem" of too many petitions require information on the resolution of dispositions of petitions? Hanson and Daley found that the courts granted only one percent of the habeas corpus issues raised in state prisoner petitions and remanded only another one percent to the state courts for further proceedings in their study of a random sample of approximately 2,337 petitions resolved during 1992 in 18 U.S. District courts in nine selected states. *See*, e.g. ROGER A. HANSON & HENRY W.K. DALEY, BUREAU OF JUSTICE STATISTICS, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS, BJS DISCUSSION PAPER, NCJ 155504(1995). Sixty-three percent of the issues were dismissed either by the court or by the petitioner. Virtually all other issues were denied on their merits. Hence, filing patterns are a critical, and perhaps the first element to understand the effects of AEDPA on habeas corpus petitions but, ultimately, information on filing needs to be complemented with data on dispositions.

trends for each one? Certainly concern over whether there are too many petitions requires information on trends in filing rates. Looking at Figure 3-1, the rapid increases in the number and the rate of habeas corpus petitions filed reached their respective peaks in 1970,[16] the first year after the end of the Warren Court, and generally decreased throughout the 1970s. The decrease in filing rates extended from 1971 until 1995. In contrast, while the number of petitions filed, like the filing rate, generally decreased between 1971 and 1980, after 1980 the number increased almost every year through 2000.

As a result, it is difficult to specify the true consequences of efforts by the Burger and Rehnquist courts to set more restrictive conditions on the filing of petitions. The decisions made by those courts occurred after the decrease in filing rates began in 1971. Nevertheless, some observers believe that several decisions contributed in some way to the continuation of the decreasing trend.[17] Decisions believed to have had some effect in reducing the filing rates include *Stone v. Powell,* wherein state prisoners seeking federal habeas corpus relief on Fourth Amendment grounds of illegal search and seizure would not be granted relief as long as state courts provided the prisoners with the opportunity for full and fair litigation of this claim. Other decisions include *Rose v. Lundy*, petitions can be dismissed if they contain any unexhausted claims; *Engle v*. *Issac*, prisoners must bring a constitutional claim to federal court after state procedural default to demonstrate cause and actual prejudice before relief is granted; *Marshall v. Lonberger,* federal courts need to conclude that state court findings lacked "fair support" in the record, rather than simple disagreement with the state court, before state factual determinations

[16] In 1970, habeas corpus petitions accounted for slightly more than ten percent of the total civil filings in U.S. District Courts.
[17] V. FLANGO, HABEAS CORPUS IN STATE AND FEDERAL COURTS, Williamsburg, VA: National Center for State Courts (1994).

are rejected; and *Teague v. Lane*, "new rules" of constitutional law are not applicable to earlier habeas petitions pending review (with two exceptions).

Yet, despite the difficulties in pinning down the effects of these decisions on habeas corpus filing rates, many observers criticized the decisions for placing restrictions on the filing process. Tabak and Lane[18] for example, bemoaned the Rehnquist Court's efforts to limit application of the "Great Writ of Liberty", asserting that "since Chief Justice Rehnquist joined the Court, habeas corpus has been rendered more complex, more time-consuming, and substantially more arbitrary, capricious, and unfair." Such commentary is part of an ongoing debate over the use of habeas corpus that warrants some attention because it provides competing views on the direction of changes in habeas corpus doctrine.

3.2.2. Competing Legal Perspectives: When one examines commentaries on the Warren, Burger and Rehnquist Courts, they reveal an ongoing tension between two competing values: the necessity for a means to correct errors in state trial court convictions versus the need for "finality" of state court convictions. Those favoring the expansive use of habeas corpus promote the use of the federal writ of habeas corpus as the most certain way to correct errors in state trial court convictions, regardless of the time and resources consumed. From this perspective, state courts by themselves simply will not correct all of the reversible errors that occur, but the federal courts will be able to correct some of the errors that the state courts missed. Consequently, barriers to the filing of petitions should be limited.[19] Some adherents of this perspective argue that this position is justified because alternative remedies, including state post-conviction

[18] R. Tabak and J. Lane, Judicial activism and legislative "reform" of federal habeas corpus: A critical analysis of recent developments and current proposals, 55 ALB. L. REV., 1-95 (1991).
[19] L. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U.L. Rev. 991 (1985).

remedies, are either deficient or not within a prisoner's access.[20] If anything, the process should be altered by appointing attorneys to represent indigent prisoners, most certainly in capital cases.[21]

Those favoring finality hold that the process of federal habeas corpus review should not take endlessly to complete because the validity of the state criminal justice process and its imposition of punishment are suspended while the review is ongoing.[22] Additionally, those favoring "finality" hold that some errors in the legal process are inevitable and that the courts efforts are better directed toward managing the processes that lead to errors rather than attempting to eliminate every error. From this perspective, time and resources are important considerations when deciding how far to pursue the objective of minimizing state trial court errors. In support of this position, advocates often cite the very limited number of habeas corpus petitions that are granted.[23] Yet, despite contrasting views on efforts to limit habeas corpus case filings, the legal perspectives seldom discuss exactly the extent to which the number of filing rates of habeas corpus petitions will be affected. In fact, the critical commentaries on AEDPA reveal a similar lack of specificity on the likely consequences of the legislation's provisions.

[20] Curtis R. Reitz, *Federal Habeas Corpus: Post Conviction Remedy for State Prisoners*, 108 U. PA. L. Rev. (1960).
[21] Alexander Rundlet, *Student Comment, Opting for Death: State Responses to the AEDPA's Opt-in Provisions and the Need for a Right to Postconviction Relief, 1* J. CONSTITUTIONAL L. 661 (1998).
[22] See e.g., Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners.* 76 HARV. L. Rev. 441 (1963); Daniel J. Meador, *Straightening out Federal Review of State Criminal Cases.* 44 OHIO ST. L. J. 273-285 (1983); James D. Hopkins, *Federal Habeas Corpus: Easing the Tension between State and Federal Courts*, 44 ST. JOHN'S L. REV. 660 (1970)
[23] O'Neill, *supra* note 3.

3.2.3. AEDPA – An Overview of Intended and Actual Results: The most recent clash between the expansive and the finality perspectives occurred over the drafting, enactment and implementation of the Antiterrorism and Effective Death Penalty Act (AEDPA). Key provisions of AEDPA are as follows:

- Establishment of a statute of limitations whereby both federal and state inmates have one year from the time their conviction becomes final (i.e., one year from the time their conviction becomes final and/or sentence is exhausted) to file a habeas corpus petition in federal court. In the case of prisoners under sentence of death, the petition must be filed within 180 days.
- The provision that a claim presented in a second or successive habeas corpus application that was presented in a prior application shall be dismissed.
- Federal courts are required to show deference to the determination of the state courts, provided that these determinations are neither "contrary to" nor an "unreasonable application of" clearly established federal law as determined by the Supreme Court.

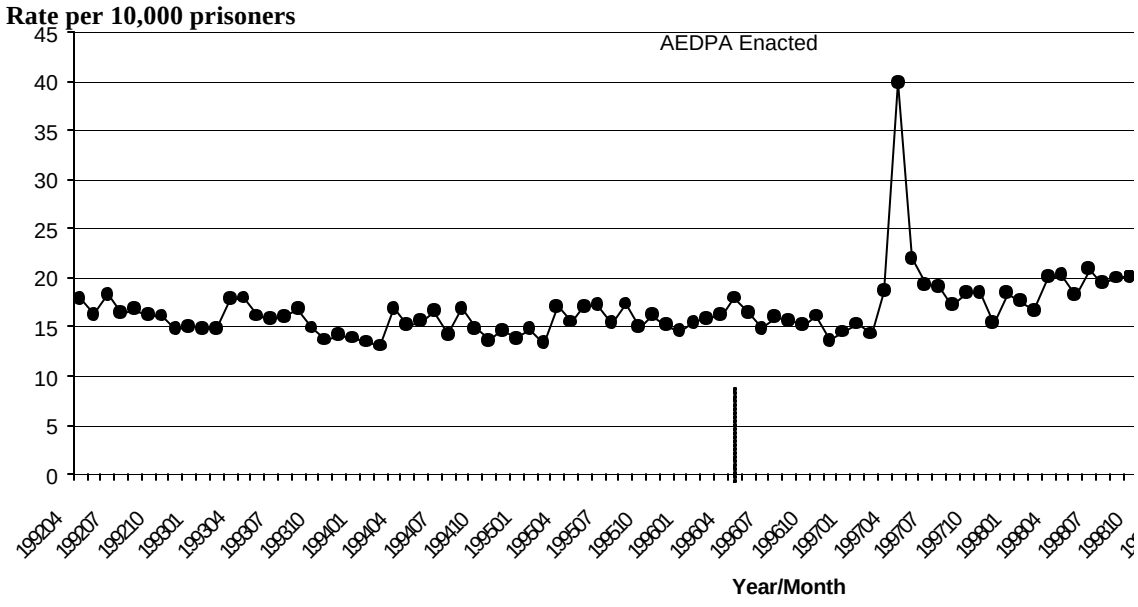
Provisions of AEDPA are intended to limit the number of habeas corpus petitions filed and, consequently, reflect an endorsement of the finality perspective. For example, the one-year filing deadline promotes finality by reducing the time between the exhaustion of state remedies and the filing of a petition. Because no standard time frame existed before the AEDPA, some prisoners took years after exhaustion before filing a petition. After the AEDPA, the one-year deadline might reduce the number of potential late filers. In addition, restrictions on successive petitions should encourage prisoners to consolidate their issues into a single petition thereby further reducing the number of filings.

While there is general agreement that the intended effect of AEDPA is to decrease the number of petitions, the expansive and finality perspectives will obviously differ on the desirability of these results. Those in the finality camp welcome the reductions, but to those holding to the expansive perspective[24], any reduction in the volume of petitions resulting from

[24]See e.g., Deborah L. Stahlkopf, *A Dark Day for Habeas,* ARIZ. L. REV., 1114 (1998)

AEDPA would occur at the expense of justice. Blumberg[25] stated that if "fairness, federalism and finality" were once the guiding principles of habeas[26], then "the AEDPA ushers in a new era where finality reigns supreme." Despite the certainty of these opinions, these critical commentaries offer few estimates of the effect of AEDPA. However, a quick look at actual filing rates of federal habeas corpus petitions in the nation's District Courts reveals a dramatic "spike" occurring in April 1997. An undeniable increase in habeas corpus petitions occurred on the first anniversary of the legislation's one-year statute of limitations when prisoners could file petitions.

Figure 3-2: National Habeas Corpus Monthly Filing Rate Before and After Al
April 1992 - December 2000
All U.S. District Courts



[25] D. Blumberg, *Habeas Leaps from the Pan and into the Fire: Jacobs v. Scott and the Antiterrorism and Effective Death Penalty Act of 1996.* 61 ALB. L. Rev. 557 (1997)
[26] B. Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, CAL. L. REV. 545 (1995) (quoting *Withrow v. Williams,* 507 U.S. 680, 697 (1993)).

In April 1997, many state prison inmates apparently initiated habeas corpus proceedings out of concern they might be forfeiting their opportunity to file such suits in the future if they did not meet this deadline. As a result of this apparent "rush to file," the total number of habeas corpus petitions filed in 1997 was 30 percent higher than the level in 1996. The unanticipated spike in filings lasted only one month (April 1997) but afterwards filings seemed to be more numerous than before the spike.

Two types of prisoners likely contributed to the phenomenon occurring in April 1997: (1) prisoners convicted prior to AEDPA implementation but who had not exhausted state remedies and (2) prisoners convicted prior to AEDPA and who had exhausted state remedies before the implementation of AEDPA. Concerning the first group, some prisoners apparently filed on the AEDPA's one-year anniversary date in 1997 even though they had not exhausted the state process. We believe that they did so because of their possible confusion over basic rules (e.g., failure to understand that they should not file a habeas petition, even under the AEDPA, until they satisfy the exhaustion requirement). Since most prisoners have no attorney to inform them of the meaning of pertinent Congressional laws on the complex subject of habeas corpus, they were taking no chances that they would loose their opportunity to file a petition.

The petitions filed by this group will be dismissed because of failure to exhaust. However, the goal of finality is not achieved immediately in regard to this group since they can file (at least) a second petition after exhaustion has been achieved.[27] Even though AEDPA places limits on the number of successive petitions, the Supreme Court has held that a petitioner can raise any claim in a petition subsequent to a petition dismissed for failure to exhaust

[27] Finality might be achieved in the case of same prisoners who had either never initiated state remedies or had abandoned them at some point. Because state remedies operate on a clock, prisoners might not be able to go back and exhaust state remedies if they missed state time deadlines or failed to comply with other state procedures.

remedies.[28] Hence, subsequent petitions could contribute conceivably not only to a spike phenomenon, but they could contribute to an increasing trend in the filing after AEDPA.[29]

Concerning the second group, we believe that prisoners convicted before 1996 that had exhausted state remedies but not yet filed a habeas petition contributed to the spike in filings. Prior to the enactment of AEDPA, there was no limitation on when a prisoner could file an original action for habeas corpus relief in federal court[30]. In the view of many, this lack of time limits thwarted the goal of finality[31]. Associate Justice Powell, who had chaired the so-called "Powell Commission," which searched for ways to reform federal habeas practice, observed:

> Another cause of overload of the federal system is [28 U.S.C.] § 2254, conferring federal habeas corpus jurisdiction to review state court criminal convictions. There is no statute of limitations, and no finality of review of state convictions. Thus, repetitive recourse is commonplace. I know of no other system of justice structured in a way that assures no end to the litigation of a criminal conviction. Our practice in this respect is viewed with disbelief by lawyers and judges in other countries. Nor does the Constitution require this sort of redundancy.[32]

The time limits for filing established by AEDPA applied to the prisoners convicted before 1996 who had exhausted state remedies but not yet filed a habeas petition (see Glaid, 2001, Court of Appeals, the 11th Circuit on this subject).[33] This group would include an accumulation of prisoners who might have exhausted state remedies as far back as 1990. Presumably these late filers were serving very long prison terms and would have had to file petitions no later than April 1997 to beat the one-year time limit.

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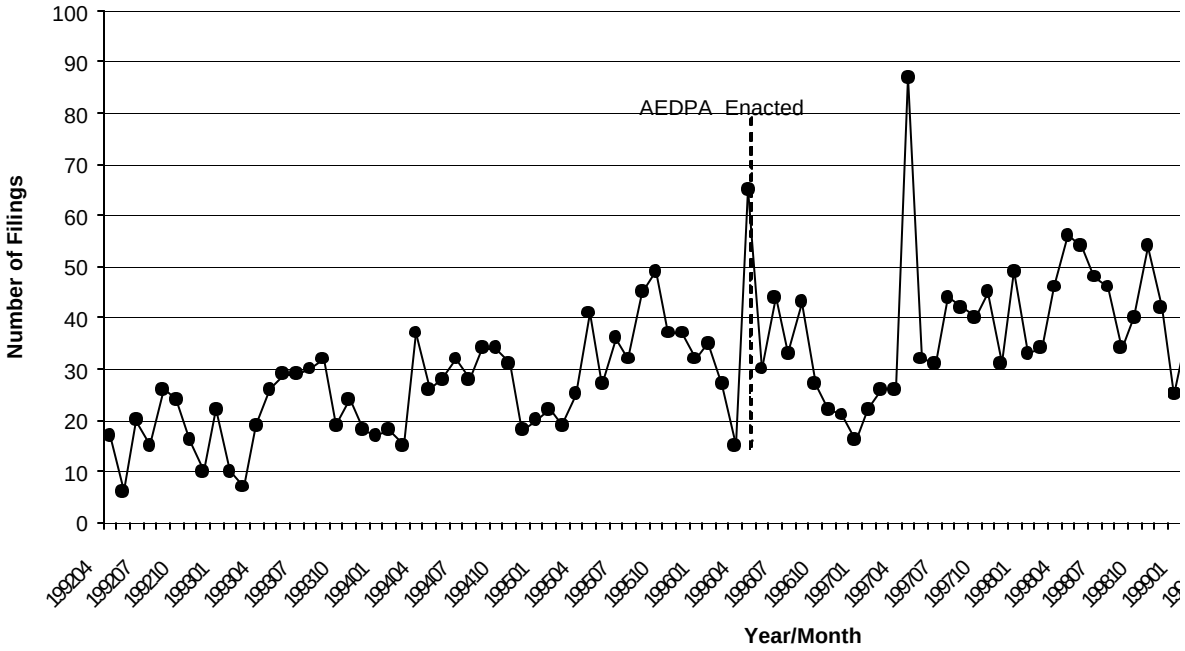
[28] See *Slack v. McDaniel*, 120 S. Ct. 1595, 1604-06 (2000).
[29] Hanson and Daley reported that among the 63 percent of all habeas petitions dismissed, 57 percent are dismissed because of failure to exhaust. See *Supra* note 15, at 17. Consequently, one can estimate that about 36 percent of all habeas petitions filed in U.S. District Courts before AEDPA failed to exhaust state remedies. At the upper limit, then, about a third of the petitions filed each year before 1996 could be filed again, if the petitioners are still incarcerated.
[30] Hartman & Nyden, *supra* note 7.
[31] O'Neil, *supra* note 3
[32] Lewis Powell, Address Before the American Bar Association Division of Judicial Administration (Aug. 8, 1982).
[33] In the event a habeas petitioner's conviction predated the enactment of the AEDPA, he or she is entitled to a "grace period" of one year from the date of enactment, i.e., until April 23, 1997 to file his or her federal habeas petition excluding any time during which a "properly filed" application for collateral relief was "pending" (see *Goodman v. United States*, 151 F.3d 1335, 1337 (11th Cir. 1998).

Interestingly, the spike phenomenon observed for petitioners (Figure 2) occurred for the particular subgroup of petitioners who had received death penalty sentences. According to AEDPA, prisoners challenging death penalty convictions and sentences were required to meet a 180-day deadline for filing a petition after exhausting state remedies.[34] The most striking change in the number of habeas corpus petitions filed by prisoners sentenced to death occurred in April, 1997, the first anniversary of AEDPA, as shown in Figure 3-3.[35] Apparently, this particular set of prisoners was seeking to meet the same one-year deadline that applied actually to prisoners with sentences of imprisonment.[36]

Figure 3-3: Number of Habeas Corpus Petitions Filed Monthly by State Prisoners Sentenced to Death April 1992-December 2000



[34] 28 U.S.C.A. [sections} 2261 (b).

[35] The number of petitions rather than the rate of filing is presented because the population of prisoners with death sentences is elusive.

[36] There is a second noticeable spike in the number of petitions filed by prisoners with death sentences that occurs on April, 1996, the month that AEDPA first went into effect. It appears that some inmates with death sentences were taking no chance of having their petitions dismissed given their considerable stakes in the U.S. District Courts' handling of their cases. However, the filing rate in April, 1996 is appreciably less than the rate reached in April, 1997, which coincides with the anniversary of the one-year time deadline for all other petitioners occurred.

To some observers of Figure 3, the absence of a spike corresponding to October 1996, six months after the implementation of AEDPA and coincident with the 180 day limit on filing habeas corpus death penalty petitions might be surprising. Presumably, such a spike would have been created by a "rush" of death row inmates who had exhausted state remedies but had not yet filed federal petitions. However, this particular provision applies only if the state offers to provide legal assistance to death-row petitioners who cannot afford privately-retained counsel.[37] Because states have not rushed to provide this assistance, the 180-day time limit for the filing of habeas death penalty petitions does not apply anywhere in the U.S.[38]

Thus, Figures 3-1, 3-2, and 3-3 indicate that, at least on the national level, AEDPA has not had its intended effect of reducing the number of habeas corpus petitions filed in District Courts by state prisoners. Interestingly, both the "expansive" and "finality" perspectives seem to have misjudged the consequences of the law since both sides expected filings to decrease as a result of AEDPA. To understand why the expected results were not obtained and to get a better understanding of the forces actually shaping habeas filing trends, we next examine another relevant body of literature, court administration studies. This literature describes particular variables that influence filing rates.[39]

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[37] 28 U.S.C.A. [sections] 2261 (b).

[38] Thomas (1998) argues that federal judges, who are charged with the responsibility of determining whether a state has met the requirements of providing counsel to prisoner petitioners with death penalty sentences, are resisting certifying states as being in compliance because of the discipline that it imposes on them. A. Thomas, *Penalty Box*, 50(8) NATIONAL REVIEW, May 4, 1998, at 40-41. AEDPA requires U.S. District court judges to render a decision on a capital habeas petition within 180 days of its filing. The Courts of Appeals were given 120 days to hand down their rulings after the reply brief was filed.

[39] The legal perspective and the court administration literature do have similarities in their basic subject matter. Some observers have noted that the wall of separation between them is odd given that they sometimes pursue the same questions. For example, Anne Voights writes: "It is worth noting the few empirical studies have been done despite the fact most of the hotly contested issues in the debate over habeas corpus involve empirical questions." See *Narrowing the Eye of the Needle: Procedural Default, Habeas Corpus, and Claims of* Counsel, 99 COLUM. L. REV. 1109 (1999). A general objective of this article is to encourage a closer nexus between doctrinal and quantitative studies, although the main research questions this essay seeks to address were not formulated for that purpose.

3.2.4. Court Administration Studies On Habeas Corpus Petitions: A number of court administration studies have been devoted to understanding the trends observed for the filing of habeas corpus petitions.[40] Several of these studies provide primarily descriptions of trends in processing and filing of habeas petitions[41] (e.g., Scalia, 1997), while others[42] discuss the possible causal mechanisms influencing filing rates. One study[43] provides a formal assessment of the impact of AEDPA on national habeas corpus petition filing rates. Using interrupted time series analysis, Scalia[44] concluded "The 1996 Antiterrorism and Effective Death Penalty Act appears to have resulted in an increase in the number of habeas corpus petitions filed by State prison inmates." Scalia clearly implicates AEDPA as the agent behind the increased national habeas corpus filing rates since April 1996, but he does not specify what and how aspects of AEDPA produced this effect.

Collectively, court administration studies have identified three variables that underlie the filing of habeas corpus petitions though they are rarely discussed in the legal literature: (1) the direct (but lagged) relationship between the number of state prisoners and the number of petitions filed, (2) the direct relationship between the number of prisoners sentenced to periods of long-term incarceration (e.g., seven years or longer) and the likelihood of petitions being filed, and (3) conditions under which state prisoners can file multiple petitions. Each of the three

[40] David Shapiro, *Federal Habeas Cropus: A Study in Massachusetts,* 87 HARV. L. REV. 321 (1973), Paul Robinson, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS, (U.S. Department of Justice: Washington, D.C.) (1979), Richard Faust, Tina J. Rubenstein & Larry Yackle, *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate,* 18 N.Y.U. REV. L. & SOC. CHANGE 649-710 (1990-1991), Victor Flango, *supra* note 17, Hanson & Daley, *supra* note 15, John Scalia, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980-96, NCJ 164615, Washington, D.C.: Bureau of Justice (1997) and Scalia, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000 WITH TRENDS 1980-2000, NCJ 189430, Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Bureau of Justics Statistics, 2 (2002), and Fred Cheesman, Roger Hanson and Brian Ostrom, *A Tale of Two Laws: The U.S. Congress Cconfronts Habeas Corpus Petitions and Section 1983 Lawsuits,* 22 LAW & POL'Y, 89-113 (2000).
[41] Scalia (1997), *supra* note 40.
[42] Cheesman, et al, supra note 40.
[43] Scalia (2002), *supra* note 40.
[44] See *id*.

variables suggests how the filing of habeas corpus petitions might be influenced independently and more influentially than by the provisions of AEDPA.

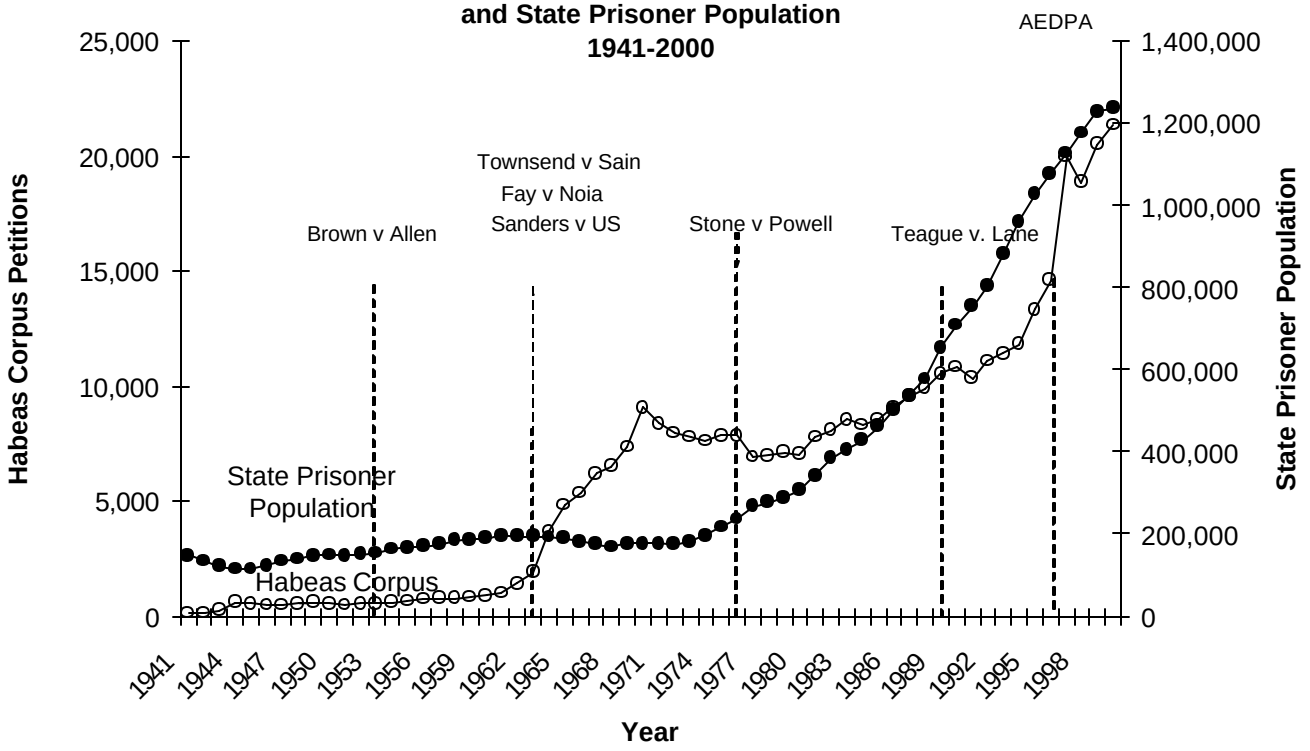
First, an examination of the number of habeas corpus petitions filed each year from 1941 to 2000 indicates that trends are shaped by the number of inmates in state prisons in previous years, as shown in Figure 3-4. Specifically, the number of habeas corpus petitions in a given year is closely associated with the number of prisoners approximately six years previously.[45] This lagged relationship coincides with the time that it takes a prisoner to exhaust state remedies and then to submit a petition to a U.S. District Court. The average time from the date of conviction to the filing of a petition is slightly over five years.[46]

The fact that the relationship between the number of petitions filed and number of state prisoners is lagged also suggests that manipulating the length of the lag will impact the number of petitions filed. Shortening the amount of time between conviction and the filing of a habeas corpus petition in District Court will cause an increase in the number of filings while lengthening the lag will cause a decrease. Thus, both the number of state prisoners and the average amount of time between conviction and the filing of a petition in District Court will influence the number of petitions filed at any given point in time.

These results provide fairly strong grounds for the proposition that the size of the prison population drives the absolute number of petitions. *This finding suggests that a continuing increase in prison population size will inhibit the intent of AEDPA to reduce the number of petitions.*

[45]Cross correlations indicated that the strongest relationship between prison population and the number of habeas corpus filings in a given year was obtained when prison population was lagged by six years. Cross-correlation coefficients are special types of correlation coefficients used to establish the strength of the relationship between variables measured with time series data. Cheesman, Hanson, & Ostrom, *Supra* note 42.
[46]Hanson & Daley, *supra* note 15.

Figure 3-4: Habeas Corpus Petitions and State Prisoner Population 1941-2000



A second variable concerns the propensity of state prisoners to file petitions. Specifically, prisoners sentenced to long periods of incarceration (because of convictions for violent offenses, three strikes, or mandatory minimums) are more likely to file a habeas petition than other prisoners. This proposition is supported by Hanson and Daley's[47] finding that approximately 62 percent of petitioners were convicted violent offenders and slightly more than 20 percent had received strictly life sentences (life with and without the possibility of parole, life and an additional number of years).

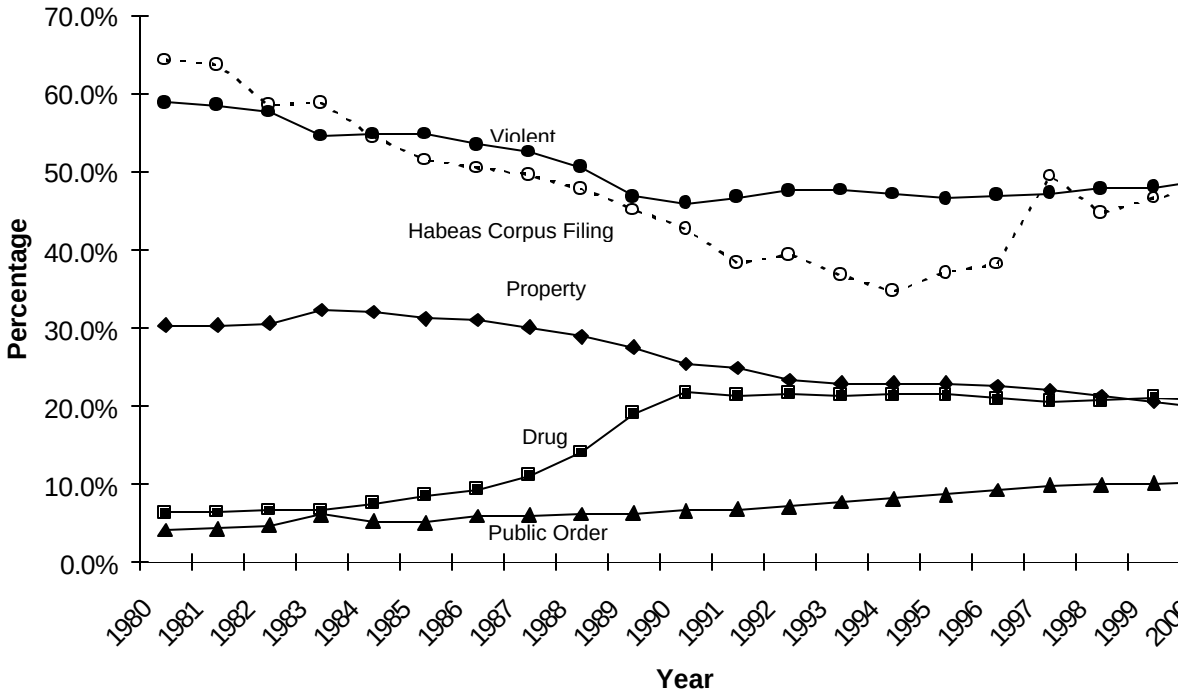
Additional support for this proposition is found when the habeas corpus filing rates are juxtapositioned with the changing composition of the state prisoner population. Habeas corpus filing rates decline during periods when the proportion of state prisoners that are violent offenders decreases (e.g., 1980-1990) and rise when the proportion increases (e.g., 1996-2000),

[47] Hanson and Daley, *supra* note 15

as shown in Figure 5. *This finding suggests that any effects of AEDPA will be attenuated by the increasing changes in the percentage of prisoners with long-term sentences of incarceration.*[48]

[48] Not only is the percentage of violent offenders in prisons increasing, but their sentences have become longer, increasing the chances that they will file a habeas corpus petition. According to statistics from the National Corrections Reporting Program (NCRP), the average time served by male first releases from state prisons increased from 37 months in 1993 to 45 months in 1999. Data from the NCRP is available from the Inter-University Consortium for Political and Social Research (ICPSR) through the University of Michigan (http://www.icpsr.umich.edu).

Figure 3-5: Percentage of State Prison Population by Offense Type and Habeas Corpus Filing Rate per 1000 State Prisoners, 1980-2000



Concerning the likelihood that prisoners will file multiple petitions, AEDPA does not prohibit prisoners from contesting each of the multiple convictions that resulted in their confinement as a "habitual offender" or for "three strikes". The extent to which prisoners choose to challenge each of their multiple convictions will influence both the number of petitions filed and the filing rate. If the number of state prisoners convicted on the basis of three strikes or habitual offender statutes increases, an increase in the number of petitions filed and the filing rate should result.[46]

Second, we note that AEDPA's restrictions will not apply to many petitions. Based on past research by Hanson and Daley[47], there are very few petitions that are dismissed on grounds that they are successive. Only three percent of petitions examined in a previous national study were dismissed because they were successive, as shown in Table 3-1.

[46] Hanson and Daley, *supra* note 15
[47] *See id*

Table 3-1: Reason for Dismissal of Habeas Corpus Issues	Percent of Issues
Failure to exhaust State remedies	57%
Procedural default	12
Failure to meet court deadlines or court rules	7
Issues not cognizable	6
Abuse of writ	5
Government's motion to dismiss granted	3
Prisoner not in custody	3
Jurisdictional bar	1
Petition is moot	1
Other reasons (such as prisoners moves to dismiss)	3
Number of issues	3,068

Source: Roger A. Hanson and Henry W.K. Daley (1995) Federal Habeas Corpus Review: Challenging State Convictions. Discussion Paper. Bureau of Justice Statistics, Washington, D.C.

A third reason why AEDPA's provision on successive petitions might not have its intended effect lies in the fact that most petitions are dismissed for failure to exhaust state remedies. Fifty-seven percent of the dismissals or approximately 33 percent of all petitions filed are filed prematurely. This sizable body of petitions could be re-filed after completing the exhaustion process and not be subject to the new criteria on the banning of successive petitions.[48]

As a result, there should have been an appreciable number of prisoners who first filed in 1993, 1994 or 1995 who could have filed a subsequent petition after the AEDPA went into effect in 1996. This group includes prisoners whose petitions were dismissed because they had exhausted some but not all of the issues in their first petition. The subsequent petitions would be added to those from prisoners who were filing their initial petition. *Hence, prisoners filing*

[48] Randal S. Jeffrey, *Successive habeas corpus petitions and Section 2255 motions after the Antiterrorism and Effective Death Penalty Act of 1996: Emerging procedural and substantive issues,* 84 MARQ. L. REV., 43-140 (2000).

successive petitions (after an earlier dismissal for failure to exhaust) should contribute to an increase in the filing rate of petitions after passage of AEDPA.

Court administration studies are useful in drawing attention to variables that shape a prisoner's decision to file a petition quite independent of even the most restrictive formal provisions of the law. Three variables identified in court administration studies provide a basis for expecting increases in the number and filing rate of habeas corpus petitions after AEDPA. As the number of state prisoners increases and, more importantly, as the number of state prisoners sentenced to long-term incarceration for the conviction of violent offenses increases, the number of habeas corpus filings should increase. Additionally, the extent to which prisoners file multiple petitions will also affect the number of petitions filed and the filing rate. Multiple petitions by prisoners can be filed by prisoners who challenge each of the multiple convictions that resulted in their confinement as a "habitual offender" or for "three strikes". Finally, subsequent petitions can be filed by prisoners whose previous petitions were dismissed because of failure to exhaust.

However, the national trends in the number of petitions filed and the filing rate just examined may not be representative of the trends in the individual District Courts. AEDPA might have a greater impact in some circuits of the U.S. Court of Appeals than others. Differences among circuit courts regarding the composition of caseloads[49] (and the rate at which litigants challenged decisions subject to appeal[50] have been previously documented.[51] It is

[49] Lawrence Baum, Sheldon Goldman, and Austin Sarat, *The Evolution of Litigation in the Federal Courts of Appeals:* 1895-1975, 16 LAW & SOC'Y. REV. 291 (1981).
[50] J. W. HOWARD, JR., COURTS OF APPEAL IN THE FEDERAL JUDICIAL SYSTEM (Princeton: Princeton University Press) (1981).
[51] Howard points out that by virtue of jurisdiction and administrative independence, no two circuit courts are alike. See *id*. The characteristics of each region of the country within the jurisdiction of a particular circuit tend to be

possible that some circuits interpreted AEDPA differently and these differences were communicated to their respective District Courts. As a result, the national patterns might not hold true uniformly across District Courts. To understand the consequences of AEDPA on a regional basis, the current research examines the rate of filing of habeas corpus petitions by state prisoners in District Courts[52] within each of eleven numbered circuits.

3.3. Data and Methodology

3.3.1. Data: Data on the number of habeas corpus petitions filed by state prisoners in District Courts during April 1992 to December 2000 (including those filed by inmates sentenced to death) were obtained from the Research and Statistics Division of the Administrative Office of the U.S. Courts. They are organized into monthly increments to capture the occurrence of both short-term and long-term changes in filing patters and to provide a sufficient number of data points to conduct the analysis.

3.3.2. Methodology: The trends in habeas corpus petitions are displayed graphically and measured by the number of petitions filed per 10,000 state prisoners. Prison population size is an essential denominator to use in calculating a filing rate because the number of prisoners is the pool from which potential filers arise. Filing rates are measured at the level of District Courts grouped together by the circuit court that has jurisdiction over them. Consequently, eleven basic before and after graphs (Figures 3-6 to 3-16) correspond to the eleven numbered circuit courts.

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reflected in the business of each court. Despite the adoption of uniform rules of appellate procedure in 1968, the power of circuit courts to define subsidiary rules lends surprisingly little standardization to internal decision-making or administrative practice. Howard also maintains that regionalism also affects the operation of these courts. One thing that these courts have in common, however, is that habeas corpus petitions and prisoner lawsuits account for a significant proportion of their overall caseloads.

[52] The District of Columbia Circuit of the U.S. Court of Appeals was excluded from the analysis due to the small number of petitions filed.

This level of analysis avoids the limitations of a strictly national examination, and averts the unmanageable problem of trying to see patterns among nearly 100 District Courts.

To assess the impact of AEDPA on the rate of filing of habeas corpus petitions (i.e., the number of petitions filed per 10,000 prisoners) at both the national and circuit level, interrupted time series analyses were conducted[53]. This statistical approach generates a mathematical representation of an intervention, [54] and assesses how well the representation describes the actual time series data. Interrupted time series is conducted in three stages: (1) Fitting an ARIMA model to the pre-intervention time series (in the present case, habeas corpus filings before enactment of AEDPA), (2) modeling the effect of an intervention, usually either as a persistent change (increase or decrease) in level called a "step"[55] or a temporary change (increase or decrease) in level called a "pulse",[56] often occurring over a single time period, and (3) combining the pre-intervention model and the intervention model into a single model of the entire time series and assessing the fit of this model to the actual time series. The test of significance for the intervention factor is used to assess the impact of the intervention. The time series data must either be stationary[57] or be made stationary (usually by "differencing"[58]) before the interrupted

[53] See e.g., D. MCDOWALL, MCCLEARY, E. MEIDINGER, and R. HAY, INTERRUPTED TIME SERIES. (Newbury Park, CA: Sage Publications, Inc.) (1980).

[54] An "intervention" is a known, non-random event that is thought to have caused a change in the time series. In the present case, the non-random event would be the effective date of AEDPA, April 1, 1996.

[55] A "step" intervention implies that an event has caused a permanent shift in the "level" of a time series, i.e., a permanent shift in the mean of the time series.

[56] A "pulse" intervention implies that an event has caused an abrupt, temporary shift in the level of a time series.

[57] A time series is *stationary* if the statistical properties (for example, the mean and the variance) of the time series are essentially constant overtime.

[58] *Non-stationary* time series can sometimes be transformed into *stationary* time series by *first differencing.* The *first differences* of the time series values $y_1, y_2, \ldots, y_n$ are $z_t = y_t - y_{t-1}$ where $t = 2, \ldots, n$. Sometimes it is necessary to take *second differences* (the first differences of first differences) of the original time series and very rarely higher order differencing is required to make a time series stationary.

time series can be performed. The Augmented Dickey-Fuller test[59] was used to test for stationarity.[60]

Three models were examined to see how closely they fit the monthly filing rates of habeas corpus petitions for District Courts organized by circuit and nationally. The first two models are step models. Both indicate that there was a permanent change in the filing rates after enactment of AEDPA. However, one model suggests that the change occurred immediately upon implementation of AEDPA and the other suggests that the change occurred one year after AEDPA implementation. The third model indicates that any change was temporary as a one-time pulse increase. Each model is described as follows:

(1) Bureau of Justice Statistics (BJS) Model. A step model beginning April 1996, the month of AEDPA's enactment. This model suggests a permanent change in the rate of filing, commencing with AEDPA's immediate implementation. This is the model developed by Scalia (2002) to test the impact of AEDPA on a national level.

(2) Delayed Step Model. This is a step model but it begins in April 1997, one year after AEDPA's enactment. This model was suggested by the pattern of filings observed in Figures 6-16. The difference between the BJS model and the Delayed Step model is the timing of the intervention, the former commencing in April 1996 and the latter in April 1997. The Delayed Step Model suggests that the rate of filing changed significantly and permanently one year after AEDPA's enactment.

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[59]The *Augmented Dickey-Fuller Test* is a test for "*unit roots*" in order to identify the appropriate degree of differencing (first, second, and so on) required to make the time series stationary. A time series is said to be integrated of order *d* (denoted by *I(d)*) (*d*=1, 2, …) if after the time series has been differenced *d* times it becomes stationary. A special case is when *d*=1, called a "unit root process". The Dickey-Fuller test is one of the most common used tests for a unit root. D.A. Dickey & W.A. Fuller, *Distribution of the Estimators for Autoregressive Time Series with a Unit Root*, 74 J. AMER. STAT. ASN. 427 (1979). The Dickey-Fuller test is based on the regression of the observed variable on its one-period lagged value, sometimes including an intercept and time trend. In an important extension of Dickey and Fuller, Said and Dickey show that the Dickey-Fuller *t*-test for a unit root, which was originally developed for AR (autoregressive) representations of known order, remains asymptotically valid for a general ARMA (autoregressive moving average) process of unknown order. E. Said & David A. Dickey, *Testing for Unit Roots in Autoregressive Moving Average Models of Unknown Order*, 71 BIOMETRICA 599 (1984). This *t*-test is usually called the Augmented Dickey-Fuller (ADF) test.

[60] In response to the results from the Augmented Dickey-Fuller test, the time series for Circuits 5,7,10, and 11 were first differenced, the standard corrective action for non-stationary time series.

(3) Pulse Model. This model suggests a change occurred in April 1997, one year after AEDPA's enactment, and lasted only one month. This model was also suggested by the pattern of filings observed in Figures 6-16. The pulse models suggests a one shot change followed by a resumption of the trend that existed before the enactment of AEDPA.

To determine which model provided the best fit to the time series for each circuit and also nationally, the log likelihoods, Akaike Information Criterion (AIC), and the Schwartz Baysian Criterion (SBC) were calculated.[61] Our methodology contrasts with the only other quantitative assessment of the affect of AEDPA on habeas corpus petition filing rates[62]. Scalia considered only whether the BJS model, but not the other two models, provided a significant fit to the national data. Scalia also did not examine District Court patterns by circuit.

3.4. Results and Discussion

A visual inspection of the data is a basic way to examine the effect of AEDPA on the habeas filing rate trends. At first glance, there appears to be little deviation from the national trend, particularly with respect to the distinctive spike in the filing rate occurring in April 1997, as shown in Figures 6-16. Hence, the spike is a general phenomenon, evident in the habeas filing rates shown in every figure. The filing rate trends appear to be relatively stable and unchanging prior to the spike but differences emerge during the period after the spike. District Courts in some circuits (e.g., the U.S. Court of Appeals for the 2nd Circuit) tend to return to a stable rate of

[61]Log likelihoods, Akaike Information Criterion (AIC), and the Schwartz Baysian Criterion (SBC) are all measures of *goodness-of-fit*. The goodness-of-fit of a statistical model refers to its capacity to reproduce the data. The log likelihood ratio is the probability of obtaining the observed results, given the parameter estimates of the calculated ARIMA model. Since the likelihood ratio is a small number less than one, it is customary to use –2 times the log of the likelihood ratio *(-2 X LLR)* as a measure of how well the estimated model fits the data. The Akaike information criterion (AIC) and the Schwartz Bayesian criterion (SBC) are also commonly used measures of goodness-of-fit. They measure how well the model fits the series, taking into account that a more elaborate model is expected to fit better. Generally speaking, the AIC is for autoregressive models while the SBC is a more general criterion. The model with the lowest AIC or SBC is the best.

[62] See *supra* note 43.

filing (though the rate after the spike is often higher than the rate before the spike) while others (e.g., the U.S. Court of Appeals for the 9th Circuit) seem to display an increasing rate of filing.

Visual inspection of the data nationally and by each circuit provides scant support for the BJS model of habeas filing rates increasing as soon as AEDPA was implemented in April 1996. The first sign of any impact of AEDPA appears to be the spike in filings that occurred in April 1997. However, visual inspection alone is insufficient to determine which model provides the best fit to the patterns of habeas filing rates observed nationally and by circuit. Do the consequences of AEDPA fit the pattern of rates commencing with AEDPA's enactment in April 1996 (BJS model) or is the most common pattern an increase commencing one year after AEDPA's enactment in April 1997 (Delayed Step model)? Or, is the more common pattern a one-time spike in filings occurring in April 1997 that is followed by a return to the before-AEDPA trend (Pulse model)?

Figure 3-6: Habeas Corpus Petitions Filed Monthly Per 10,000 State Prisoners in District Courts in the Court of Appeals for the 1st Circuit, April 1992 - December 2000

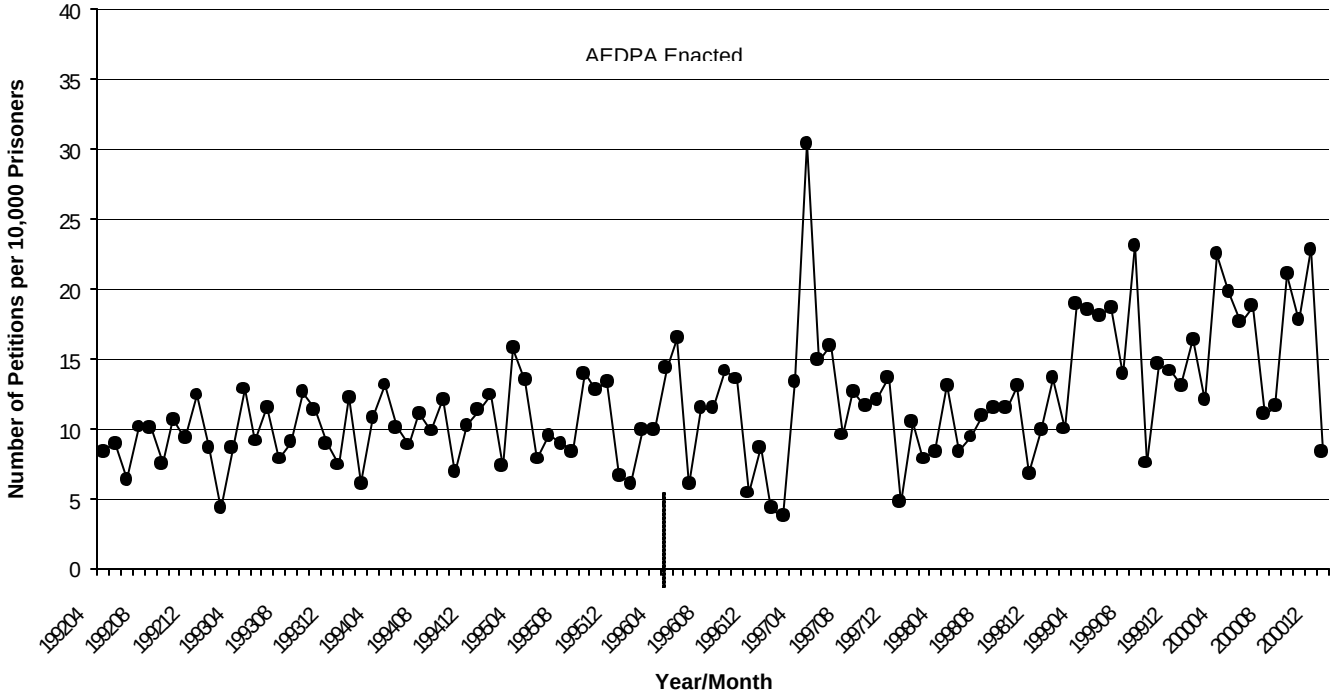


Figure 3-7: Habeas Corpus Petitions Filed Monthly per 10,000 State Prisoners in District Courts in the Court of Appeals, 2nd Circuit, April 1992 - December 2000

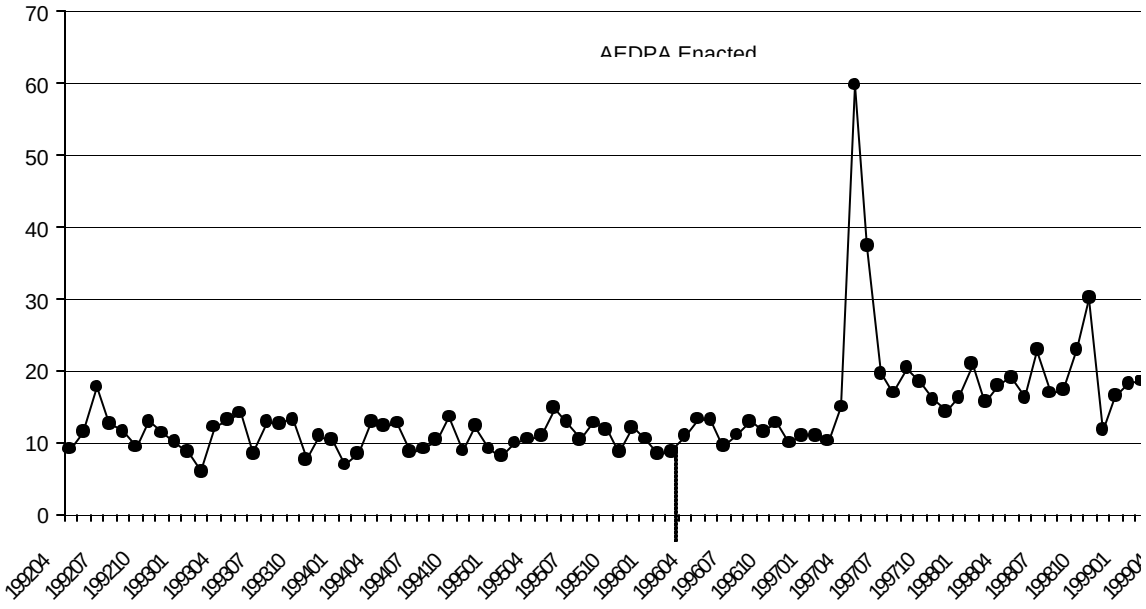


Figure 3-8: Habeas Corpus Petitions Filed Monthly per 10,000 State Prisoners in District Courts in the Court of Appeals, 3rd Circuit, April 1992 - December 2000

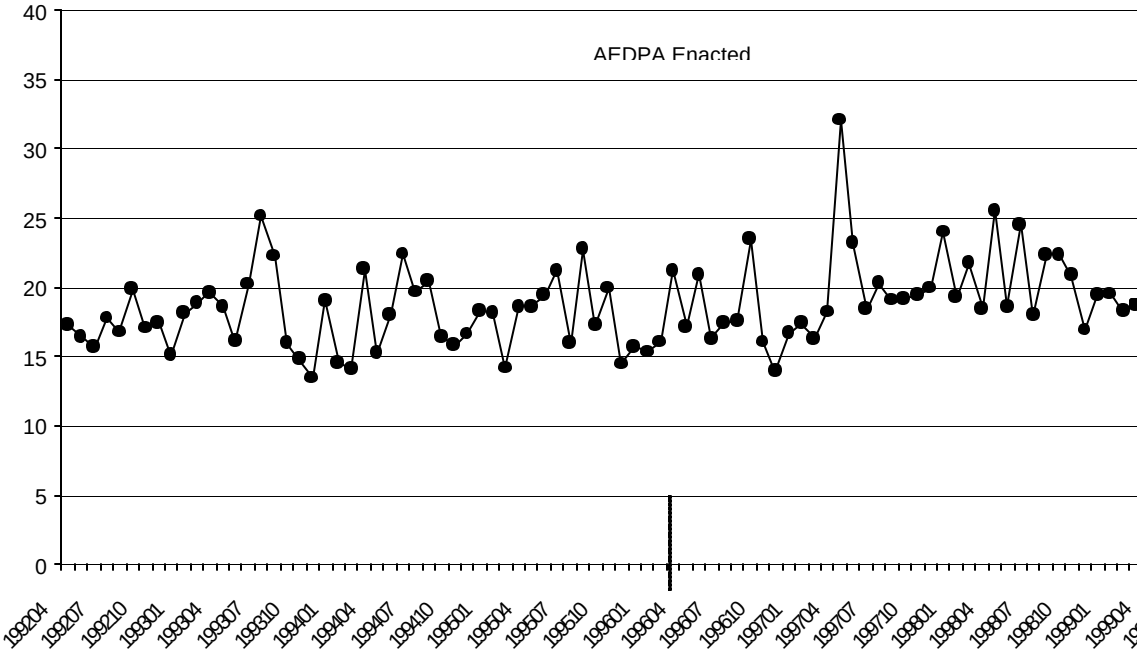


Figure 3-9: Habeas Corpus Petitions Filed Monthly in District Courts in the 4th Circuit Per 10,000 State Prisoners April 1992 - December 2000

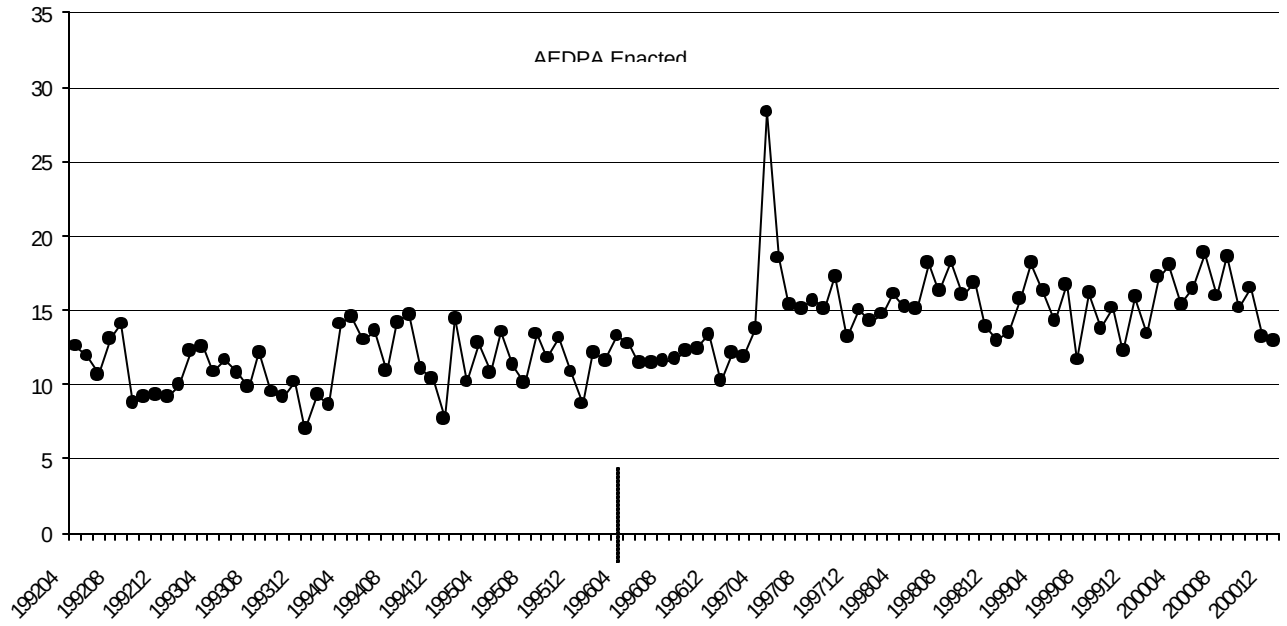


Figure 3-10: Habeas Corpus Petitions Filed Monthly in District Courts in the 5th Circuit Per 10,000 State Prisoners April 1992 - December 2000

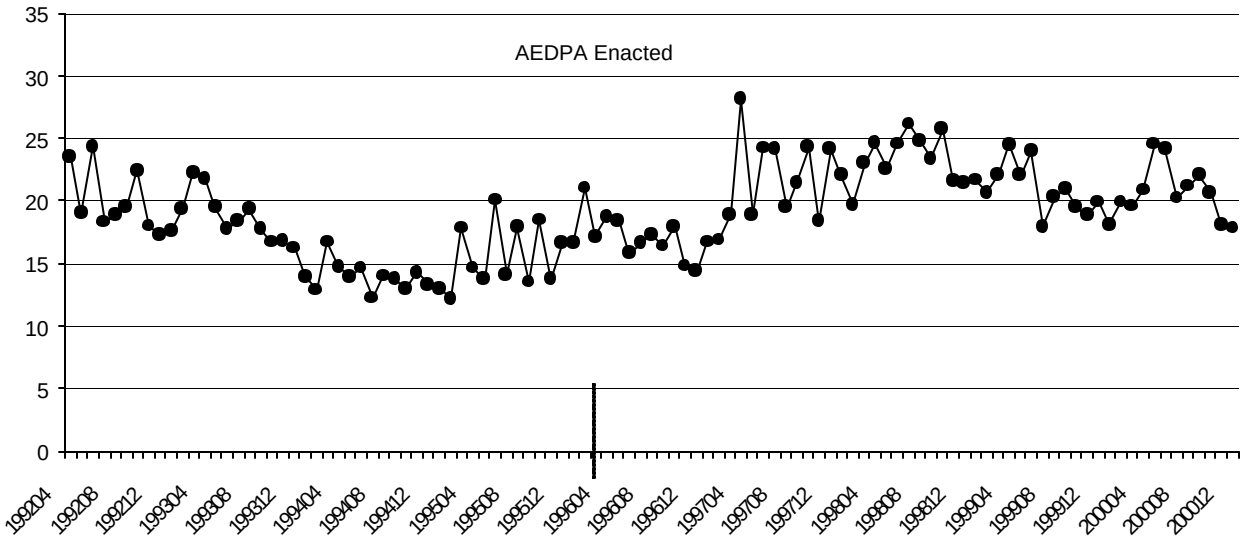


Figure 3-11: Habeas Corpus Petitions Filed Monthly in District Courts in the 6th Circuit Per 10,000 State Prisoners April 1992 - December 2000

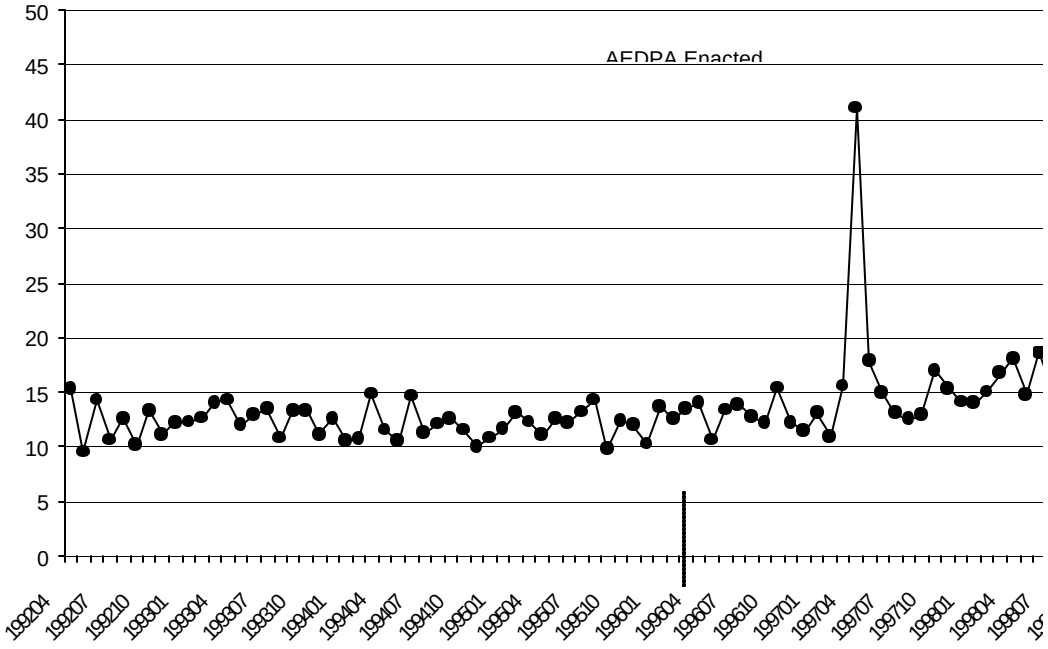


Figure 3-12: Habaes Corpus Petitions Filed Monthly in District Courts in the 7th Circuit Per 10,000 State Prisoners April 1992 - December 2000

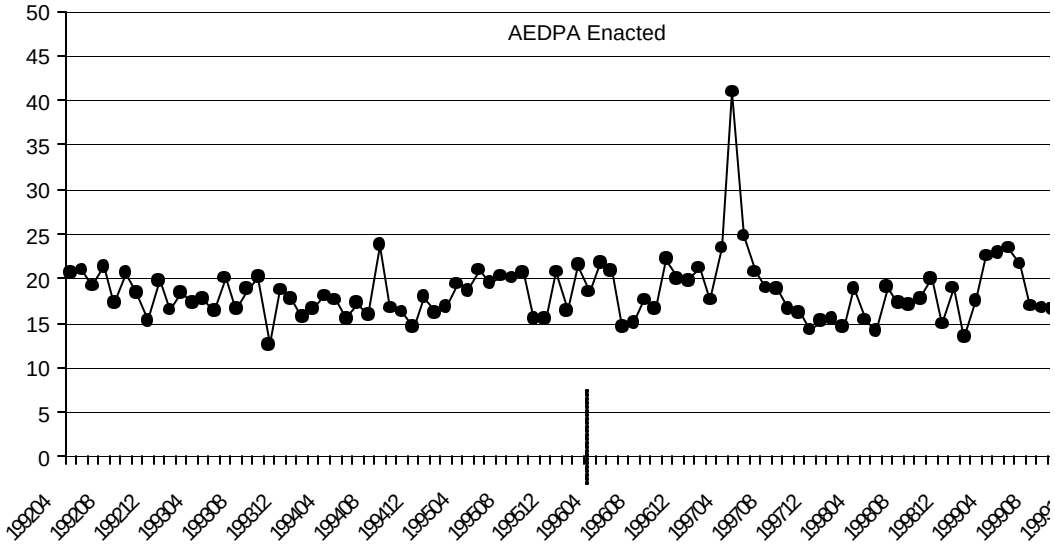


Figure 3-13: Habeas Corpus Petitions Filed Monthly per 10,000 State Prisoners in District Courts in the Court of Appeals, 8th Circuit, April 1992 - December 2000

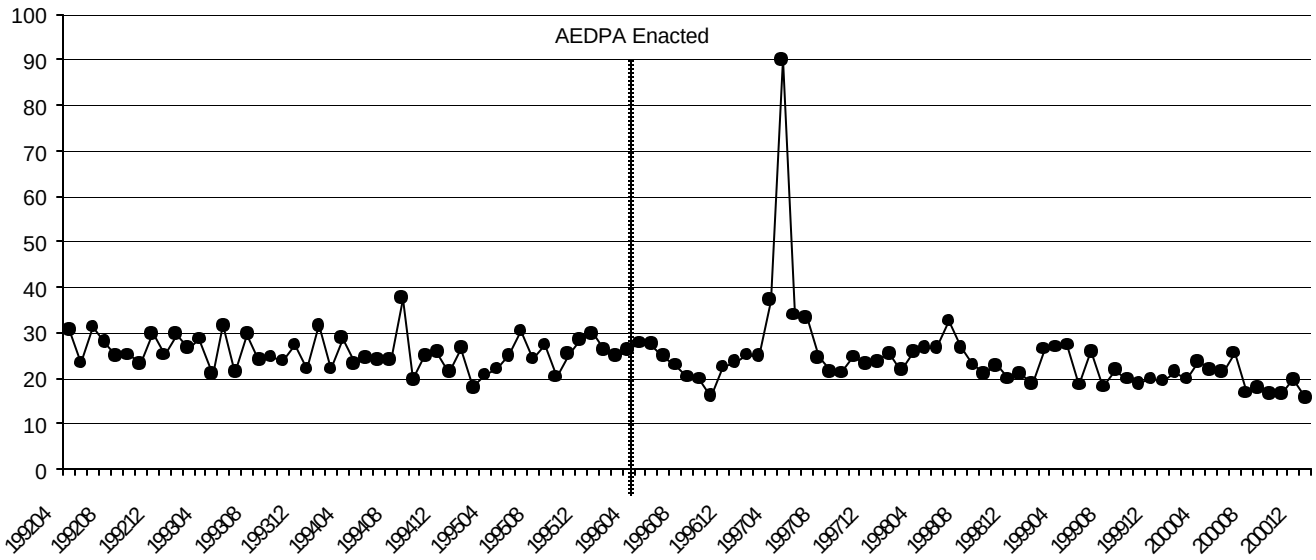


Figure 3-14: Habeas Corpus Petitions Filed Monthly per 10,000 State Prisoners in District Courts in the Court of Appeals, 9th Circuit, April 1992 - December 2000

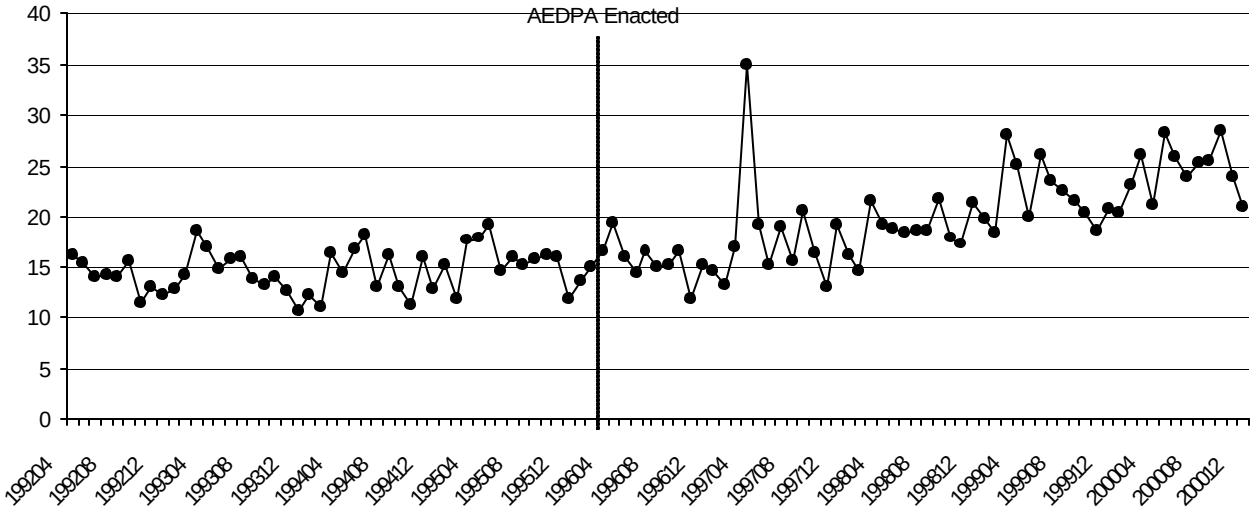


Figure 3-15: Habeas Corpus Petitions Filed Monthly in U.S. District Courts in the 10th Circuit Per 10,000 State Prisoners April 1992 - December 2000

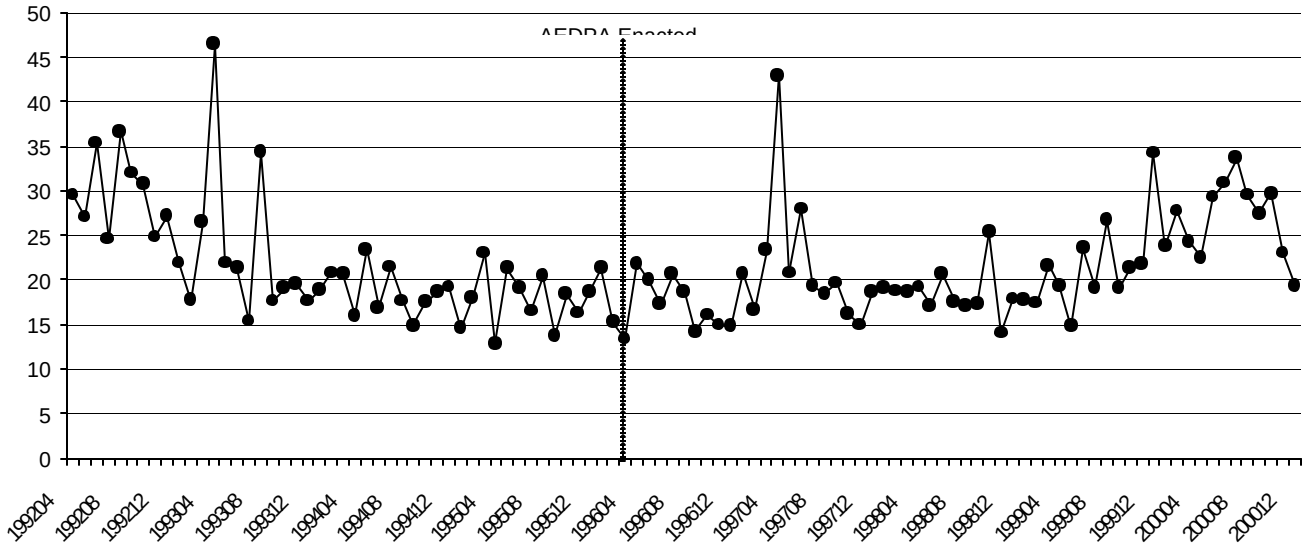
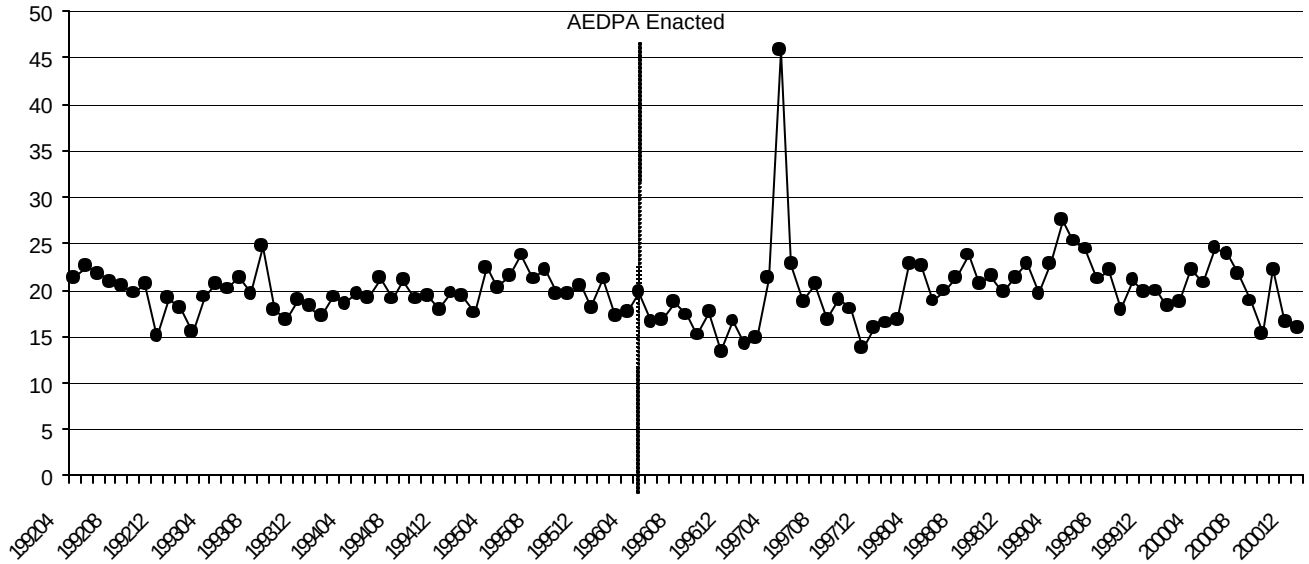


Figure 3-16: Habeas Corpus Peitions Filed Monthly in U.S. District Courts in the 11th Circuit Per 10,000 State Prisoners April 1992 - December 2000



For every circuit and also nationally, the BJS Model provided the poorest fit because there was very minimal change in the filing rates during the first year of AEDPA. Pulse models provided superior fits nationally and for District Courts within most circuits (1st, 2nd, 5th, 6th, 7th, 8th, 10th, and 11th). The Delayed Step Model provided a superior fit in the other (3rd, 4th, and 9th). In other words, a permanent increase in the level of the habeas corpus filing rate occurred after April 1997 in District Courts in three circuits, while the pattern nationally and in eight circuits is best described as a one-time spike occurring in April 1997 with basically the same trend in filings occurring before and after the spike.

Table 3-2: Which Alternative Statistical Model Best Fits the Data on the Patterns of Filing Rates Before and After AEDPA?

Goodness of Fit Measures*

BJS Model	Delayed Step Model	Pulse Model
508.9	483.7	390.9
597.3	591.1	582.1
664.9	640.7	628
526.5	511.7	519.4
489.8	460.1	467.8
484.9	471	467.7
539.2	524.1	450.5
556.3	545.8	502.2
722.5	723.1	604.5
566.6	537.7	552.8
649.8	645.9	626.8
583.8	562.2	482.7

*The numbers in the table are based on an application of the Akaike Information Criterion (AIC). The smaller the value, the closer the fit. Either or both of the Delayed Step and Pulse Models have smaller values than the BJS model for every grouping of District Courts, with the slight exception of those within the U.S. Court of Appeals for the 8th Circuit. The AIC value for the BJS model is smaller (722.5) than the value for the Delayed Step Model (723.1). However, the Pulse Model remains the best fit (604.5).

The District Courts in the Court of Appeals for the 3rd, 4th and 9th Circuits deserve attention because the quantitative results indicate that filing rates increased to a higher plateau after enactment of AEDPA. Instead of being reduced in accordance with legislative intent, the rate of filing increased to a new level. Not only was there a dramatic spike increased but the spike was followed by a rate that surpassed the level before AEDPA. This result leads to the next question, which of the District Courts experienced the greatest step increase?

Table 3-3 provides information on the Delayed Step Model for the courts where it provided the best fit to the data. The size of the increase between the before AEDPA and after AEDPA time periods is measured using the "step" statistic. A positive and statistically significant step indicates that a fundamental and permanent increase in the filing rate has occurred, beginning one year after AEDPA's enactment. The value of the step statistic indicates the amount of change between the filing rates before and after AEDPA.

Table 3-3: District Courts in which Circuits Experienced the Greatest Change in Filing Rates After AEDPA?

Circuit	Average Filing Rate April 1992-March 1997	Average Filing Rate April 1997-December 2000	Percent Change:	Step Statistic	Standardized Step
3rd	17.81	20.92	17.5%	3.21	0.18
4th	11.49	15.83	37.7%	4.38	0.38
9th	14.74	21.23	44.0%	6.29	0.43

The step statistic confirms that the AEDPA is associated with a statistically significant increase in filings one year after its implementation in District Courts with three particular circuits, but that the level of change varies. For example, the step statistic is greater for U.S. District Courts in the Court of Appeals, 9th Circuit (6.29) than for those in the Court of Appeals, 4th Circuit (4.38) or Court of Appeals, 3rd Circuit (3.21). However, the filing rates varied before the AEDPA. For example, did the District Courts in the Court of Appeals, 9th Circuit have the

greatest change (44 percent increase) because its average rate (14 percent) before AEDPA was lower than these in the Court of Appeals, 3rd Circuit (17.81)? To take these differences into account, a standardized measure of change is calculated. This measure—the "standardized step"—is the ratio of the step to the average before AEDPA filing rate. On the basis of the standardized step, the largest relative increase in levels occurred in the District Courts in the Court of Appeals, 9th Circuit (.43) and 4th Circuit (.38), while the change was less substantial in the Court of Appeals, 3rd Circuit (.18).

The more commonly observed pulse models also deserve particular attention. Of special interest is the question of which group of District Courts experienced the greatest pulse increase? Or was there uniformity in how far the pulse increased? To provide a comparable measure of the relative impact of AEDPA, the size of the "spike" is standardized by dividing the size of the spike by the average filing rate before AEDPA, as shown in Table 3-4. Though all eight circuit groupings and the national picture showed a statistically significant increase in filing rates one year after the enactment of the AEDPA, the extent of the increase varied considerably. The largest relative spikes (comparing the size of the spike to the grand average, minus the spike)

Table 3-4: District Courts in Which Circuits Experienced the Greatest Pulse Increase After AEDPA?

Circuit	Average Before Filing Rate	Magnitude of Spike	Average After Filing Rate	Grand Average (minus spike)	Pulse	Spike/Grand Average
National	15.61	39.85	19.61	13.43	18.76	2.97
1st	9.96	30.42	13.64	11.52	18.34	2.64
2nd	11.08	59.79	19.43	14.61	44.26	4.09
5th*	16.92	28.13	21.68	18.94	8.75	1.49
6th	12.38	41.04	16.28	14.03	24.65	2.93
7th*	18.34	40.93	17.79	18.11	21.1	2.26
8th	25.44	89.99	22.66	17.35	59.1	5.19
10th*	20.89	42.90	21.72	21.24	23.36	2.02
11th*	19.11	45.81	20.32	19.62	28.05	2.33

*Time series was first-differenced.

were observed in the Court of Appeals, the 8th and 2nd Circuits. The relative sizes of the spikes in the other circuits (and nationally) were roughly similar with the exception of the Court of Appeals, 5th Circuit, which had a smaller spike.

The current research has demonstrated three important relationships between AEDPA and the filing of habeas corpus petitions. First, the results confirm the basic proposition that AEDPA did not produce or contribute to a reduction in petitions. No set of U.S. District Courts in any circuit demonstrates a decrease in filing rates after AEDPA.

Second, we find no support for the claim made by other observers[61] that AEDPA "caused" an increase in habeas corpus petition filing rate. We could not discern an increase in filing rates coincident with the immediate implementation of AEDPA either nationally or in any circuit. Further, an increasing trend did not occur in District Courts for every circuit.

Third, reality fits two patterns. For District Courts in most Circuits, a one-time spike occurs in filing, followed by a return to the filing rates that existed before AEDPA. And, in three of the circuits (3rd, 4th, and 9th) District Courts experienced not only a spike increase, but witnessed a step-like increase to a higher plateau in filing rates.

From our perspective, these two patterns – called delayed step and pulse models – generally corroborate the ideas and propositions in the court administration literature. An increase in prison population in the first half of the 1990s, an increase in violent offenders throughout the 1990s, the opportunity for multiple petitions despite the tightening of restrictions on successive petitions, all played a role in maintaining or increasing the habeas corpus filing rates.

[61] See Scalia(2002) *supra* note 40

3.5. Conclusion, Policy Implications, and Future Inquiry

3.5.1. Summary: AEDPA represents a legislative attempt to resolve the ongoing tension between the finality and expansive perspectives on the use of habeas corpus by state prisoners in federal courts in favor of finality. It is a rare foray by Congress into the complexities of habeas corpus doctrine with the intent to limit the filing of habeas corpus petitions by state prisoners in federal courts. Prior to AEDPA, federal courts had attempted to limit filings by means of administrative rules and a series of decisions that set more restrictive conditions on the filing of petitions. The effectiveness of the court's efforts in this regard is somewhat subject to dispute but it is clear the filings continued to increase despite those initiatives.

If the current research results were reduced to a single and succinct proposition, it likely would be that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) did not produce an expected decrease in federal habeas corpus petitions. This finding, which is supported by systematic data from an examination of trends in the rates at which petitions are filed, calls into question the effectiveness of the legislation's key provisions that had prompted many acute observers to attack the Act for being unduly restrictive. Those provisions include the setting of time deadline lines for filing, placement of tighter controls on the acceptability of successive petitions and the explicit encouragement to federal courts to give greater deference to state courts and their appellate review of convictions and sentences. Thus, the goal of AEDPA remains unrealized.

However, there is no evidence that AEDPA "caused" the filing rate to increase in District Courts in the Court of Appeals, the 3rd, 4th, and 9th Circuits, which would be just the opposite of the intentions of the framers of the new law. Instead, we believe that the explanation for the increases lies with a growing subgroup of prisoners who are more likely to file a petition than the

"average" prisoner. Simply stated, prisoners convicted of violent offenses, usually with lengthy sentences are more likely to file because they remain in prison after the elapsed number of years required to complete exhaustion of state remedies (usually five to six years). Because an increasing proportion of the prison population nationally was occurring just as AEDPA was enacted, the effect of AEDPA was attenuated by the countervailing force of an increasing proportion of likely filers.

3.5.2. Policy Implications: Results from the current inquiry have at least four broad implications for both the understanding of habeas corpus and the reform of this area of law. The most fundamental lesson to be learned is that state criminal justice system policies influence the number of state prison inmates who are likely to avail themselves of the federal habeas review process. Incarceration and the length of custodial sentences are products of state decisions. As a result, the pool of the most likely filers can increase (or decrease) independently of procedures established through judicial doctrine or legislative provisions. For example, as the composition of prison population changes with an increasing percentage of violent offenders, the filing rate should increase accordingly. Moreover, the strength of the social forces contributing to this increase should not be underestimated. It is not an exaggeration to say that state criminal justice policies today reflect years of development. Hence, it is not surprising that the Congress's rare attempt at habeas policy making did not have its intended effect.

A second lesson is that the contemporary trend in state incarceration policies portends a continuing increase in the time to be taken to complete the habeas review process. Both the process of exhausting state remedies and an initial District Court review take longer for violent offenders who tend to have longer sentences than other offenders. We know, for example, that direct appeals in state intermediate appeals courts of homicide convictions take considerably

longer to resolve than an appeal of a less serious offense. This is true for virtually all state appellate courts that have been examined for their degree of timeliness. Hence, the proportion of inmates convicted of violent offenses increases, the elapsed time from conviction to the filing and resolution of a federal habeas corpus petition should be expected to increase. Hence, if the Congress decides to revise AEDPA and modify key provisions, it will be confronting a more daunting challenge to achieve finality than it faced in 1995.

A third lesson to be learned is that any intervention to manipulate the rate of filing of habeas corpus petitions, legislative or otherwise, should be based on a thorough understanding of the forces that influence this rate. A focus on the forces that previous research demonstrated as influencing the habeas corpus filing rate might have contributed to the design of more effective provisions than those enacted by AEDPA.

A fourth lesson to be learned revolves around the limitations of aggregate data on habeas corpus petitions. All petitions are not equivalent. It is important, if not essential, to have information on the resolution of petitions, not just information or the number of petitions filed. Petitions can be granted, denied, or dismissed for a variety of reasons. Unless we know more specifically how petitions are resolved, estimating how and why legal provisions will affect habeas corpus petitions will be hazardous and incomplete. Aggregate data, as used in the current inquiry, can illuminate the impact of AEDPA in the broadest sense, but more specifically detailed information concerning the dynamics of the legislation's effects on the prisoners' decisions on whether, when and how they will challenge their convictions requires individual level data.

3.5.3. Future Inquiry: To fully understand the connection between legal provisions and the use of the habeas corpus process by prisoners, it will be necessary to move beyond the aggregate-level data examined in this study to an examination of petitions filed by individual prisoners. Only data measured at this level will be able to answer questions such as:

(1) Has the proportion of all habeas corpus petitions that are first petitions changed since AEDPA's implementation?

(2) Has there been a change in how habeas corpus petitions are resolved (for example, dismissed, denied on the merits, granted on the merits, or remanded to state courts) since AEDPA's implementation?

(3) Have the reasons for dismissal of habeas corpus petitions (e.g., failure to exhaust, procedural default, failure to meet court deadlines or court rules, issues are non-recognizable, abuse of writ, government's motion to dismiss granted, prisoner not in custody, successive petition, jurisdictional bar, petition is moot, prisoner moves to dismiss, and failure to meet a one-year filing deadline under AEDPA) changed since AEDPA's implementation?

(4) Has there been a change in the proportion of petitioners whose most serious offense is a violent crime (rather than burglary/theft, drug sale or possession, weapons, or some other offense) since AEDPA's implementation?

(5) Has the amount of time between conviction and the filing of a habeas corpus petition changed since AEDPA's implementation?

(6) Has there been a change in the proportion of petitioners that are challenging the first, second, or third conviction under some form of a habitual offender statute since AEDPA's implementation?

If we knew what the composition and status of habeas corpus petitions we could begin to sort out what aspects, if any, of the habeas corpus litigation dynamics changed after AEDPA. To measure possible changes, the information on the composition and status of petitions needs to be captured at different points in time after AEDPA. Previous research by Hanson and Daley[62] provides a benchmark against which these variables can be compared to gauge the extent of the change. Their research assessed the nature of habeas corpus petitions with the same or similar categories for the first five variables mentioned above. Only the sixth variable is a new indicator.

[62] Hanson & Daley, *supra* note 15

Hence, it seems quite feasible to gain a clearer sense of what has transpired in reaction to AEDPA by replicating previous work.

Chapter 4: Conclusion

The U.S. Congress took an extraordinary, if not unprecedented, step in 1996 by enacting two policies to regulate the use of the legal system by state prisoners. They were the Prisoner Litigation Reform Act (PLRA) and Antiterrorism and Effective Death Penalty Act (AEDPA).

The PLRA dealt with lawsuits filed by state prisoners challenging the conditions of their confinement, which are commonly called Section 1983 cases. The AEDPA focused on applications for writs of habeas corpus filed by prisoners challenging the validity of their convictions and sentences, which commonly are called habeas corpus petitions.

Because these two types of legal actions are cases filed in and resolved by federal courts, the evolving doctrines governing prisoners' legal actions traditionally have been developed by federal judiciary led by the U.S. Supreme Court. Congressional involvement in this area of public policy, which is a striking departure from the past, calls attention to these laws. Additionally, the provisions of the legislation involves choices based on fundamental values, such as the extent to which prisoners have constitutional rights while incarcerated, the amount of time and resources that should be devoted to determining whether prisoners are correctly (or wrongfully) convicted, and the degree to which Federal courts should supervise state correctional institutions and state courts. As a result, these two laws are part of an ongoing national debate on important criminal justice issues and policy. Moreover, these two laws are important to understand because of their consequences.

Both the proponents and the critics of these laws expected the number of cases brought by prisoners in federal courts to decrease as a result of their provisions. Yet, whereas Section 1983 lawsuits decreased sharply in U.S. District Courts within the jurisdiction of every Circuit of the U.S. Court of Appeals after the introduction of PLRA, no glimmer of a decrease in habeas

corpus petitions occurred in District Courts within any Circuit's jurisdiction after implementation of AEDPA.

We conclude this report by offering some lessons to be learned from the consequences of this dual set of policy initiatives. From our perspective, we believe that there are five lessons that emerge from what happened to prisoner litigation after the introduction of PLRA and AEDPA

The first lesson is that intrinsic difference between a lawsuit and an application for a writ put Congress in a much better position to influence the rate of filing Section 1983 cases than habeas corpus petitions. Every area of civil law involves procedural requirements that plaintiffs must meet to have their complaints accepted by courts (i.e., docketed, placed on track or calendar and set for the first court event). As a result, Congress was able to introduce new requirements via PLRA (e.g., filing fees, exhaustion of state remedies) that ultimately proved effective. Complaints without payment of fees and exhaustion of state remedies were not accepted. In fact, these requirements likely deterred some prisoners from filing complaints because they knew they could not meet or were unwilling to satisfy those requirements.

No such filing requirements that might screen out cases exist for habeas corpus petitions. Courts must accept applications for writs of habeas corpus petitions and docket them. Then, courts can decide whether to grant, deny or dismiss the petitions. However, Congress was in no position to intervene in the courts' decisions to accept habeas corpus petitions. Hence, the Congress faces a more daunting challenge in producing a reduction in habeas corpus petitions than it experienced in reducing Section 1983 cases.

A second lesson, which follows from the first one, is that the new exhaustion requirements incorporated in the PLRA and the pre-existing exhaustion doctrine governing

Federal habeas corpus are not equivalent. Exhaustion of state remedies for Section 1983 lawsuits and Federal habeas corpus petitions are similar in name only.

The essential difference in the meaning and application of the two exhaustion requirements is that PLRA prohibited the acceptance of Section 1983 complaints by prisoners and docketing them as court cases if administrative (correctional) grievance procedures had not been exhausted. In contrast, prisoners could have their habeas corpus petitions accepted by federal courts even if they had failed to exhaust state remedy (i.e. state appellate court review and state habeas corpus or post conviction remedies) processes. Federal courts might quickly dismiss petitions that had failed to exhaust state remedies, but there was nothing in AEDPA that prohibited the acceptance of such petitions. Consequently, the two sets of exhaustion requirements constituted two quite contrasting criteria. This distinction between them contributed to the relative success of PLRA because its provisions permitted Federal courts to reject prisoner complaints which, in turn, reduced the number of Section 1983 lawsuits. Hence, until and unless the exhaustion doctrine for habeas corpus is modified in some way, Congress will have to find another way to see appreciable decreases in the number of petitions.

A third lesson is that the nature of the prisoner population plays a role in inhibiting the efforts to reduce the number of habeas corpus petitions, but plays no similar role in efforts to reduce Section 1983 cases. Simply stated, the composition of the correctional population independently affects the filing of habeas corpus petitions. For example, violent offenders have a much greater incentive to file a habeas petition than nonviolent offenders with shorter sentences. As a result, there is an inherent aspect of the prison population that provides a countervailing force to the provisions of AEDPA. Moreover, as the prison population becomes increasingly dominated by offenders subject to long-term incarceration, the efforts to restrict

habeas petitions will be confronted by an even stronger opposing force. Hence, unless the Congress takes into account the varying probability of offenders to file habeas corpus petitions, and develops measures that will overcome the strong motivation and incentive of some prisoners to file petitions, the effects of procedural requirements to prevent the filing of petitions will be attenuated.

A fourth lesson is that the success of PLRA and AEDPA cannot be judged by examination of only the number of prisoners' cases that are filed. The disposition of the cases also are essential to understand and evaluate the two sets of legislation. For example, consider some of the questions that need to be addressed about habeas corpus petitions and AEDPA. Has the number and type of legal issues changed after the introduction of AEDPA? Did the AEDPA change the time taken to resolve petitions? Is the percentage of outcomes favorable to prisoners higher, lower, or the same after AEDPA? Are the grounds for dismissing petitions different or about the same after AEDPA?

Without answers to these questions, the number of petitions before and after AEDPA is a very blunt measure of the legislation's performance. Moreover, this criterion fails to provide any clues on the dynamics of the legal process. No information is gained on how and why prisoners reacted to AEDPA. Hence, Congress should be prepared to focus on the manner and outcome of case resolution as it considers future refinement in the provisions of AEDPA and PLRA.

A fifth lesson is that the U.S. Congress should be able to improve its policy initiatives in the area of prisoner litigation in the future. The current research has clarified some basic issues, and the terms of policy debates should have been advanced accordingly. We now know that it is quite possible to influence Section 1983 cases through conscious policy choices. More information is needed to know exactly how relative the importance of different legislative

provisions play in shaping case filings. However, that connection is not unknowable. For this reason, the existing legislation should be amenable to a more focused dialogue on how best to refine existing provisions. On the other hand, the impact of conscious policy choices in habeas corpus petitions should be seen as a more complex matter than what the Congress previously might have assumed. More basic research and thought are necessary to develop provisions that have a reasonable chance of achieving the goal of a reduction in petitions. Hence, the Congress should build on its past efforts and use the knowledge gained to craft more legislation that achieves its intended objective without sacrificing the interests and rights of prisoners.