# Managing Appeals in Federal Courts

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# Managing Appeals in Federal Courts

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# INTRODUCTION

*Robert A. Katzmann and Michael Tonry*

## The Crisis of Volume and Judicial Administration

A "crisis of volume," as Professor Daniel Meador aptly observed, has beset the federal judiciary. In a little over a decade, filings in the courts of appeals have more than doubled, from 16,658 in 1975 to 34,292 for the year ending June 30, 1986. At the same time, the number of appellate judges rose from 97 to 156—an increase of only 63 percent. Not surprisingly, the backlog of pending appeals per panel has increased—from 375 in 1975 to 486 for the fiscal year ending June 30, 1986.[1]

Growing caseloads and mounting backlogs stretch the limits of an already overworked judiciary. By now the tensions are familiar. Judges are expected to resolve large numbers of cases quickly and efficiently and with due care for the subtleties and complexities of each case, and in ways that realize the concerns of justice and of equity.[2] The appellate problem has received considerable attention in recent years.[3] But, as the Commission on Revision of the Federal Court Appellate System observed in its seminal study, "solutions are hard to come by."[4]

Only a limited number of alternatives exist to address the problems of mounting caseloads. One option is to create more judgeships. Increasing the number of judges can ameliorate some of the burdens, but that solution is not without cost. It is not certain that

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[1] These figures are drawn from the 1975 and 1986 editions of the *Annual Report of the Director* of the Administrative Office of the U.S. Courts.

[2] On the work of the appellate judge, see F. M. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench (1979).

[3] *See, e.g.*, P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal (1976). On the caseload problem in federal district and appellate courts, see, e.g., R. Posner, The Federal Courts (1985).

[4] Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 2 (1975).

the requisite political support could be secured for the funds needed to add sizable numbers of additional judicial positions. Moreover, at some point, merely enlarging the judiciary could have adverse effects—it could conceivably dilute the quality of the judiciary, erode the collegial system for deciding appeals, or upset the stability of the law in each federal circuit.

A second option could involve fundamental changes in the appellate process—in the words of the late Judge Henry J. Friendly, "averting the flood by lessening the flow." Among the ways of doing so would be to abolish or reduce diversity jurisdiction, or to fashion different avenues of review of administrative law determinations, perhaps by creating specialized courts. Another way to reduce the flow is to divert cases from formal adjudication—through mediation, arbitration, deinstitutionalization programs, and other nontraditional means of resolving disputes. Whether any of these changes is ultimately desirable will depend on a variety of factors—for instance, the extent to which the values or objectives that existing arrangements promote are worth preserving, whether new patterns can maintain those values, whether the benefits (however defined) of altering the current systems outweigh the costs (however defined). Because the ordering of preferences and values differs, so will assessments of benefits and costs. Change, in such circumstances, is not easily achieved, whether or not it is desirable.

A third option is to develop procedures for more efficient disposition of large numbers of cases. Courts have experimented with various forms of screening by judges, clerks, and staff attorneys to identify cases susceptible to summary or accelerated resolution. One strategy has sought to categorize cases on the basis of their complexity and to reserve full briefing and oral argument only for the most complex. Courts have tried in some cases to limit oral argument and written briefs. Related efforts have included sorting; screening by nonjudicial personnel; establishment and maintenance of tight briefing and argument schedules; and attempts to maximize judicial efficiency by minimizing the number of times that individual cases come before judges.

The judiciary has succeeded in increasing productivity. The average court of appeals panel terminates 650 appeals per year, in

contrast to 495 just over a decade ago.[5] But the emphasis on increased productivity may obscure its costs, for as Professor A. Leo Levin—who served as director of the Federal Judicial Center for ten years—commented, "judicial dispositions are not widgets, and at some point the optimal number of decisions per judge may be exceeded. Productivity cannot be increased indefinitely without loss in the quality of justice."[6] "The essence of judging," he noted, "requires consideration of other values."[7] "It is important," an American Bar Association task force similarly concluded, "to keep firmly in mind that neither efficiency for the sake of efficiency, nor speed of adjudication for its own sake are the ends which underlie our concern with the administration of justice in this country. The ultimate goal is to make it possible for our system to provide justice for all."[8] Injustices can result if, in the concern with case dispositions, attention to the details of particular cases is sacrificed.[9] On the other hand, a court may become so mired in its own backlog that it ceases to dispense justice.

No single approach can provide the solution to the problems of mounting caseloads, because appellate cases are not all alike. In a world in which judicial resources are not infinite, what is required is a mix of strategies, varying with the needs of particular circuits.

Judge John C. Godbold, the current director of the Federal Judicial Center, has written that an appellate court spends much of its time making distinctions and evaluating distinctions made by others—and that role is expected, indeed, taken for granted. "That same court," he continued, "can also rationally establish and apply procedures for selectively different handling of the cases before it.

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[5] These figures are drawn from the 1975 edition of the *Annual Report of the Director* of the Administrative Office of the U.S. Courts and the 1986 edition of the Administrative Office's *Federal Court Management Statistics*.

[6] Levin, *Foreword*, in J. Cecil, Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project (Federal Judicial Center 1985).

[7] Levin, *Research in Judicial Administration: The Federal Experience*, 26 N.Y.L. Sch. L. Rev. 237, 261 (1981).

[8] Rifkind, *Report of Pound Conference Follow-Up Task Force*, in The Pound Conference: Perspectives on Justice in the Future 295, 300 (A. Levin & R. Wheeler eds. 1979).

[9] On this point, see Resnik, *Managerial Judges*, 96 Harv. L. Rev. 376 (1982).

It may require a full record in some cases, abbreviated records in others. It may decide some cases without oral argument, schedule others for argument, and vary the time permitted for argument. Judges may confer face to face in one case and exchange views by memorandum or telephone in another. The court may enter a Grand Manner opinion in one case, a terse statement of reasons in another, and no written explanation in the next. An appellate court should not be denied the discretion to make these choices."[10] Whatever the approach, the court must demonstrate to the litigants and to the bar that it has given complete and fair consideration to the decision of every appeal. In comparing the effectiveness of new procedures with old ones, Judge Godbold has stated that courts, litigants, academics, and the public at large must have an open mind. That is, they should not assume without analysis that "different" is necessarily "inferior." With "surgically critical eyes," they must ask, "Is what we do, and the way we do it, really the best, or are we doing it just because it is what we always have done?"[11]

Judicial administration can assist courts in making choices, in designing systems that will enable them to resolve the disputes that come before them "justly, expeditiously and economically."[12] The discipline recognizes that organizational structure and process may affect outcomes, that it is important to understand the internal and external forces that bear upon the workings of the judicial system. Arrangements have much to do with determining how and by whom policy is made, with significant ramifications for litigants, the public, and the judicial system itself. They thus go to the heart of questions of control, the distribution of power, and autonomy. Procedures are often intricate, consisting of subtle interrelationships; a change in one part of the system can affect other parts. Thus, it is necessary to assess whether the system, on balance, is more or less effective than before as a consequence of the introduction of those remedies.

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[10] Godbold, *Improvements in Appellate Procedure: Better Use of Available Facilities*, 66 A.B.A. J. 863, 864 (1980).

[11] Godbold, *Bite Your Own Bullets*, 34 The Alabama Lawyer 143 (1973).

[12] Wheeler, *Judicial Reform: Basic Issues and References*, 8 Pol'y Stud. 134, 135 (1979).

Judicial administration appreciates as well that the seemingly most mundane, and at first blush static, research task can contribute to a system that realizes our values. To label, for example, as "mere management" a study that assesses the introduction of word processing and electronic mail ignores the range of its utility. To the extent that time can be saved through such devices, the judicial system becomes more efficient—an important objective. The quality of decisions, and therefore justice, may improve if the judiciary has more time to devote to particular cases, especially to more difficult cases.

Judicial administration, in sum, plays an important role in defining problems, clarifying choices, assessing existing procedures across various dimensions, forecasting the consequences of pursuing one option rather than another, and fashioning innovations. And it must create confidence in the options it chooses and the innovations it devises. Judicial reform, as Arthur Vanderbilt observed, is not for the short-winded; it cannot be sustained at all without the fuel and nutrients of meticulous research.

This volume makes available in one place the Federal Judicial Center's major research concerning the federal courts of appeals. All of the reports reprinted here are available from the Center; most of them are listed in the Center's annual *Catalog of Publications*. However, like many reports written by or for government agencies, some are not widely known or easily accessible to researchers, especially those who have not worked with the Center or maintained a sustained involvement in judicial administration research. The now-classic Third Circuit time study, for instance, appears here in published form for the first time.

## The Role of the Federal Judicial Center

The Federal Judicial Center occupies a special and central role in judicial administration research in the United States. Congress created the Center in 1967 within the judicial branch and vested it with the responsibility "to conduct research and study the operation

of the courts of the United States."[13] As Professor A. Leo Levin has noted, although "[r]esearch is but one of the statutorily mandated functions of the Center, . . . it is the first specified in the Center's charter."[14] The ultimate objective of the Center, in the words of Congress, is "to further the development and adoption of improved judicial administration in the courts of the United States."[15]

To respond to that legislative mandate to conduct research, the Center created a Division of Research. The staff is multidisciplinary, drawing upon the expertise of lawyers, sociologists, political scientists, psychologists, and computer scientists.[16] The research undertaken by the Center is not the traditional work of substantive law doctrine or of applicable rules, statutory or court-promulgated, that govern the resolution of particular cases. The Center does not pursue projects in the way other institutions do—that is, by making "grants to those who define the research that they want to do and the manner in which they wish to go about doing it."[17] Rather, it seeks to respond to the needs of the federal judicial system as perceived by the actors in the third branch.

The Center's responsibility is broad-ranging. The organization assists the Judicial Conference of the United States and its committees, judges of the United States district courts and courts of appeals, bankruptcy judges, probation officers, central staff attorneys, circuit executives, and the Administrative Office of the U.S. Courts. Research proposals may come from judges, courts, circuit councils, or the Center's Board. The latter, which has the task of allocating resources for research, is chaired by the Chief Justice, who serves ex officio, as does the director of the Administrative

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[13] 28 U.S.C. § 620(b)(1).

[14] Levin, *supra* note 7, at 243. What follows owes much to Professor Levin's essay.

[15] 28 U.S.C. § 620(a).

[16] The Center's other divisions are the Division of Innovations and Systems Development, the Division of Continuing Education and Training, the Division of Special Educational Services, and the Division of Inter-Judicial Affairs and Information Services.

[17] Levin, *supra* note 7, at 243.

Office of the U.S. Courts. In addition, the Judicial Conference selects as Board members two judges of the courts of appeals, three district judges, and one bankruptcy judge.

From its earliest days, the Center staff has provided support for studies of federal appellate court workloads. In 1971, the Center brought together a group of distinguished lawyers, law teachers, and judges to study American appellate systems in depth. Those who attended that conference shortly formed the Advisory Council on Appellate Justice, which in 1973 issued a report setting out recommendations for expediting criminal appeals.[18] In the early 1970s, the Center developed the statistical tables upon which the Study Group on the Caseload of the Supreme Court (the Freund Committee) based much of its analysis.[19] The Freund Committee specially commended the Center staff, particularly William B. Eldridge, the Center's director of research then and now. Two years later, the Federal Judicial Center provided staff and research to the Commission on Revision of the Federal Court Appellate System (the Hruska Commission), with A. Leo Levin, subsequently director of the Center, serving as the commission's executive director.

As the studies in this volume demonstrate, the Center is called upon to undertake projects that differ widely in nature and method. Some works assess existing procedures by examining their effects on a whole range of variables. Such studies recognize the interrelationships that bear upon outcomes—an understanding that is necessary in fashioning change. Indeed, the Center is often asked to suggest innovations, and then to evaluate over time how the new procedures have worked. The range of inquiry reinforces another aspect of administration alluded to earlier, but which cannot be overestimated: that even the seemingly most ordinary of procedures can importantly affect outcomes and policy, and ultimately the objectives and values of the judicial system itself.

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[18] Expediting Review of Felony Convictions After Trial: Report of the Committee on Criminal Appeals of the Advisory Council on Appellate Justice (Federal Judicial Center 1973).

[19] Report of the Study Group on the Caseload of the Supreme Court (Federal Judicial Center 1972).

In pursuing its work, the Center is for the most part presented by participants in the judicial system with a problem, often stated in an inchoate form. Professor Levin observed that "[i]n unexplored areas of court administration, putting the "right question' can be especially difficult, yet the need can be clearly perceived. Articulating that need in useful form becomes the task of the Center's Research Division."[20]

Apart from defining the questions sharply, and thus the scope of the project, the Center must determine the kind of research that is appropriate to address the problem under study. Because of the variety of questions that Federal Judicial Center research addresses, the research designs and final reports take a variety of forms. There have been a number of rigorous quantitative evaluations, including studies of the effects of the Second Circuit's Civil Appeals Management Plan, a procedure that involves the use of settlement conferences and scheduling orders under the direction of a staff attorney.

Many of the questions on which the Center's assistance is sought do not lend themselves to quantitative research, and as a result a number of major qualitative evaluations have been completed. Prominent among these are those investigating and assessing the contributions to court management of circuit executives, staff attorneys, judicial councils, and chief judges.

Another set of reports is in the nature of reflective essays. These documents are not themselves social science research. They are, instead, efforts to apply accumulated learning, insight, and experience to the problems confronting the decision maker.

These various kinds of analyses have had practical impact. For instance, studies of the effects of word processing and electronic mail technologies in the Third Circuit have provided a basis for decisions about technological change in all the federal circuits. The report on the Ninth Circuit's expedition of appeals resulted in permanent changes in the operations of that circuit.

The Center has sought to build credibility for its research in the judicial and academic communities. With respect to the judiciary,

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[20] Levin, *supra* note 7, at 248–49.

the Center perceives its mission in part as undertaking research that is responsive to the needs of the courts. Indeed, it is dependent on the judiciary in the sense that its Board of Directors, with one exception, is composed of sitting federal judges; its research activities are shaped largely by the suggestions, proposals, questions, and needs of federal judges and federal courts; and its research projects cannot reach completion without the cooperation of federal judges and court staff and their willingness to accept what are sometimes substantial impositions on their time and energies.

At the same time, the Center maintains a measure of independence from the judiciary. While the Center is within the judicial branch, its budgeting and appropriations are separate from those of the courts, its professional staffing is handled outside of civil service rules and regulations, and its Board of Directors is selected on the basis of statutory criteria that set it apart from the Administrative Office of the U.S. Courts and the Judicial Conference of the United States. These institutional arrangements help to ensure that the Center's research is rigorous and intellectually serious, and that its personnel are sufficiently insulated to be able to bear bad tidings if research findings are contrary to those expected by members of the federal judiciary.

Still, as Professor Levin has noted, "Structure alone will guarantee neither independence nor effectiveness."[21] "There is," he continued, "always the need to insure the freedom of the researcher to pursue the facts, to analyze the data, unconcerned with whether the conclusions that emerge support or refute a priori views."[22] Noting that research and development is a rather fragile function to maintain in an agency, Professor Levin commented that the "rigid rules and regimen that may be appropriate in a large bureaucracy oriented to production are inappropriate for research and there must be some degree of independence and freedom to pursue inquiries not at the pace predicted, but in the fashion appropriate to the particular investigation."[23]

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[21] Levin, *supra* note 7, at 260.
[22] *Id.*
[23] *Id.* at 259.

The leadership of the Center has supported the climate necessary for research. For half of its first two decades, the Center was led by A. Leo Levin, who as executive director of the Commission on Revision of the Federal Court Appellate System (the Hruska Commission), and as a University of Pennsylvania Law School professor, has long been a leading student of federal judicial administration. Professor Levin's predecessors, former Supreme Court Justice Tom Clark, Judge Alfred P. Murrah, Jr., and Judge Walter Hoffman, as well as his successor, Judge John C. Godbold, were obviously all well known within the judiciary—a familiarity that buttresses support for the Center among members of the bench. The senior staff has experienced relatively little turnover.

The Center attempts to be careful in the breadth of its research claims. When methodological problems, or the inherent nature of a project, limit the confidence with which findings can be asserted, the limitations are noted. Report after report is studded with qualifications concerning the likelihood that evidence apparently indicative of a sought-after impact of an experimental project is, instead, the result of chance variations. The restrained character of the claims likely reassures the judicial audience.

By promoting links with the academic community, the Center reinforces its professional ethos. It supports judicial fellowships and enters into contracts for specific projects with law professors, psychologists, political scientists, sociologists, and computer scientists.

Over the last twenty years, recognition of the value of judicial administration has fostered a climate in which organizations such as the Federal Judicial Center can flourish. The Center is today part of a larger research community that includes such institutions as the National Center for State Courts, the Institute of Judicial Administration, the Institute for Court Management, the State Justice Institute, the National College of Trial Judges, and the American Judicature Society. Court management has been professionalized with the advent of modern management practices; innovations in court administration; and increasing use of computerized record-keeping, management, and calendaring systems. Increased public attention

on the operation of the courts, as on so many other government institutions, has no doubt also had an impact. In a sentence, judicial administration research has matured in the last decade because of the increased openness and professionalism of the courts, the creation of cadres of researchers who have continuing interest in the courts, and the development of special-purpose institutions, devoted to examining and improving court processes and procedures.

## Organization of the Volume

A few words are in order about the organization of this volume. More than twenty-five published and unpublished reports concerning the federal appellate courts have been supported by the Federal Judicial Center in the last fifteen years. Eighteen of them are reprinted, in whole or in part, in this volume. Most of the others are described or summarized in brief introductions to each of the parts.

In addition to this introduction, the volume contains five parts. Each part contains a somewhat imprecise grouping of reports on the Center's major appellate court research. Decisions to include a report in one part rather than another are inevitably somewhat artificial. Although some of the sorting decisions are arbitrary, many are not: Much of the Center's work has been cumulative in that the writers of each successive report learned from and built upon preceding reports. In many ways these sequences, most notably those concerning case management and case weighting, chronicle the evolution of informed thinking and state-of-the-art research.

Part 1 presents four major Center reports on case management, each examining the efforts of a particular circuit—the Second (an initial and follow-up report), Seventh, and Ninth—to eliminate unnecessary issues in civil appeals, increase settlement at the appellate stage, and achieve other efficiencies. Part 2 focuses on case-weighting systems used in characterizing the workloads of different districts and circuits. Such measures can be used to ascertain priority of need for new judgeships and, at an operational level, to assign cases to panels in ways that represent a fair and manageable

distribution of burden. Reproduced in part 3 are Center reports assessing efforts to expedite appeals once they are in the judge's hands. Studies include those assessing reduced use of oral argument, appeals without briefs, and proposals to limit publication of opinions. Part 4 assesses circuit administration—the role of circuit executives, staff attorneys, circuit councils, and chief judges. The application of new technologies, notably the computer and its progeny, to judicial administration is explored in part 5.

Each part contains a brief introduction, written by the editors, describing the included materials and discussing relevant Federal Judicial Center work not reprinted.

Most of the reports have been changed in some respects in this volume from the forms in which they were previously published or distributed. A few of the previously unpublished reports have been edited and shortened. Among the published reports, several are reprinted essentially in their original form; others have had editorial changes ranging from slight to substantial. In the interest of consistency of style and format, many of the published reports have undergone minor copy-editing changes to conform to current Federal Judicial Center editing standards. An editor's note to the title of each included report describes the nature and the scope of revisions to that document in the preparation of this volume.

Michael Tonry compiled Center materials through 1983 (most of the reports reprinted in this volume), and Robert A. Katzmann assembled the studies from 1983 to 1987. For each introduction, including this one, the editors' names are listed in the order of responsibility assumed for the particular part.

# PART ONE

# CASE MANAGEMENT

# INTRODUCTION

*Michael Tonry and Robert A. Katzmann*

Most of the federal courts of appeals have developed screening programs and have otherwise attempted to expedite the processing of appeals. Four major projects in which the Federal Judicial Center was involved are particularly notable, and reports from three of them—in the Second, Seventh, and Ninth Circuits—are reprinted in this volume. Taken together, these studies cover a spectrum of research methods, including controlled experimentation, tests of statistical significance, and qualitative analysis. In each instance, the Center was asked to describe and assess a program so that the circuit involved could make informed judgments about whether to continue, expand, or even abandon the procedures under scrutiny.

The Second Circuit Court of Appeals adopted the Civil Appeals Management Plan (CAMP) on an experimental basis in 1974. It was a program designed to encourage settlement of appealed cases before judicial time and effort were expended on them, to improve the quality of briefs and arguments in those cases that were not settled, and to resolve procedural questions. CAMP included two major features: the use of a mandatory settlement conference conducted by a staff counsel and the establishment by staff counsel of scheduling orders that set briefing deadlines. The Federal Judicial Center sponsored two major evaluations of CAMP. The first, relying upon a random assignment, control group design, investigated CAMP's operation from October 1974 to October 1975 and found little evidence that CAMP reduced burdens imposed on judges or significantly improved the quality of briefs or oral argument.[1] Many of the statistical comparisons used in evaluating CAMP showed that the experimental group scored better than the control group in absolute terms. The author noted that the uniformity and the direction of the evidence might be more than the result

[1] J. Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration (Federal Judicial Center 1977).

of chance, but since the improved performance of the experimental group seldom reached levels of statistical significance, the author concluded that "CAMP has some effect on reduction in judge burden and on quality. But these effects are of a fairly small magnitude."[2]

Some years later, a second evaluation of CAMP was undertaken, investigating its impact on cases docketed between July 1, 1978, and January 19, 1979. This evaluation also used an experimental design that included random assignment to experimental and control groups, and concluded that CAMP "does result in the settlement or withdrawal of appeals that would otherwise have to be considered by three-judge panels,"[3] that "[t]he program almost certainly results in faster disposition, not only of appeals that are settled or withdrawn . . . but also of appeals that would have been settled in any event,"[4] and that most lawyers who practice before the Second Circuit regard the program favorably and believe that CAMP conferences sometimes improve the quality of briefs and oral argument. Apparently the judges of the Second Circuit regarded CAMP to be a worthwhile innovation, for they retained and expanded it, notwithstanding the lukewarm conclusions of the first evaluation. By the time of the second, more favorable evaluation, CAMP programs had spread to several federal courts of appeals.

The second major case-expedition project examined by the Federal Judicial Center was the Seventh Circuit Preappeal Program, which involved prehearing conferences conducted variously by a senior staff attorney alone or with a circuit judge. The program was intended to reduce judicial workloads by reducing "the length and frequency of submission of materials (for example, motions or briefs) submitted to the court."[5] All civil appeals for a one-year period were divided into two categories—the first being those cases in which it appeared that a prehearing conference was likely to be

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[2] *Id.* at 90.

[3] A. Partridge & A. Lind, A Reevaluation of the Civil Appeals Management Plan 5 (Federal Judicial Center 1983).

[4] *Id.*

[5] J. Goldman, The Seventh Circuit Preappeal Program: An Evaluation 2 (Federal Judicial Center 1982).

beneficial and the second being the rest. Attorneys handling cases in the first category were randomly divided into three groups: (1) those required to attend a conference with the staff attorney, or (2) those required to attend a conference with the staff attorney and the circuit judge, or (3) those assigned to a control group. In a related inquiry, attorneys handling cases in the second category were sent letters indicating that a prehearing conference could be scheduled.

The judges of the Seventh Circuit, it seems, did not expect the rate of settlement of appeals to be increased and did not make that one of the goals of the experiment. The results of the experiment were mixed. First, the prehearing conferences significantly reduced the numbers of motions, both routine and otherwise. Second, the experimental cases on average took less time from filing of the initial brief to argument (although this may be because the staff attorneys reserved hearing dates at the conclusion of the conference). Third, there was a significant reduction in the elapsed time from filing the notice of appeal to final determination. Fourth, the conference did not appear to have a significant impact on the lengths of briefs. Fifth, it did not appear that the effects of the conference were affected by the presence or absence of a circuit judge. The report of the Seventh Circuit evaluation is reprinted here.

Two other reports on screening and case expedition have been published by the Federal Judicial Center; one is reprinted later in this volume; the other is not reprinted here. In 1974 the Federal Judicial Center published a report on screening practices in the Fourth Circuit, which is reprinted in the "administration" part of this volume.[6] This was an informal study of the Fourth Circuit's use of staff attorneys to review all pro se matters and to review non-pro se cases for the purpose of developing recommendations to the court concerning whether those cases should be scheduled for oral argument.

[6] S. Flanders & J. Goldman, Screening Practices and the Use of Para-Judicial Personnel in the U.S. Courts of Appeals: A Study in the Fourth Circuit (Federal Judicial Center 1974).

The report not reprinted here is a description of the appeals expediting systems in the Second and Eighth Circuits.[7] The Eighth Circuit employs a full-time "appeals expeditor" who closely monitors compliance by counsel with stringent briefing schedules under circuit rules. The report sets out the Eighth Circuit's rules and the corresponding (but different) rules and procedures of the Second Circuit (including CAMP), and also reprints key forms and local rules. This undertaking grew out of a technical assistance project sponsored by the Federal Judicial Center to document pre-submission case management procedures in the Eighth Circuit, to develop manuals and other tools to assist with those procedures, and to recommend and evaluate techniques and concepts to improve the system.[8]

The final major case management study presented in this volume is the "Innovations Project" of the Ninth Circuit. Confronted with the largest pending caseload of any federal court, and plagued with problems of congestion and delay, the judges of the Ninth Circuit determined that they would review the court's processes and procedures with the objective of increasing productivity without impairing the quality of justice. They sought recommendations from a number of sources, including the Federal Judicial Center. The Center's paper delineating its recommendations, not reprinted here, suggested a program for screening cases from the oral argument calendaring track; argument panels that would retain their membership for a full five days of argument; modifications of publication practices to reduce the time spent drafting unpublished dispositions and the length of published opinions; a shifting of responsibility for drafting opinions to judges who have the fewest cases awaiting disposition; and limits on the length of briefs. This last recommendation was to be accomplished through a Prebriefing Conference Program, which the staff of the circuit had developed in a related effort after consulting with the Center. The Prebriefing Conference Program was later incorporated as part of the Innova-

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[7] L. Farmer, Appeals Expediting Systems: An Evaluation of Second and Eighth Circuit Procedures (Federal Judicial Center 1981).

[8] L. Farmer & W. Buckner, Eighth Circuit Expediting Project: Final Report (1979) (unpublished paper, on file at the Federal Judicial Center).

tions Project.[9] The Ninth Circuit adopted a number of the Center's proposals, and the development of the Innovations Project thus represented a truly collaborative effort.[10]

After implementing the Innovations Project, the court made considerable progress. The court eliminated its large backlog of cases awaiting submission; the median time from filing of the complete case record to disposition was reduced from 17.4 months in 1980 to 10.5 months in 1983, with the most substantial reductions occurring in the period from the filing of the last brief to submission of the case for argument.

Recognizing the value of a review and evaluation of any important changes in judicial administration, the judges of the Ninth Circuit asked the Center to assess the program that had been implemented. The report had two principal objectives. First, it explained in detail the innovations to help other courts determine whether they would benefit from similar programs. Special attention was paid to three major innovations: the Submission-Without-Argument Program, the Prebriefing Conference Program, and the modifications in calendaring of oral arguments. Second, the study described, where possible, the impact of the various innovations on case processing. The study is reprinted in large part here.[11]

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[9] M. Leavitt, Ninth Circuit Innovations Project (1981) (unpublished paper, on file at the Federal Judicial Center).

[10] For a brief and early follow-up, see M. Leavitt & C. Seron, Report on Discussions with Judges of the Court of Appeals for the Ninth Circuit on Recent Innovations in the Court (1982) (unpublished paper, on file at the Federal Judicial Center).

[11] J. Cecil, Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project (Federal Judicial Center 1985).

# AN EVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN: AN EXPERIMENT IN JUDICIAL ADMINISTRATION[1]

**Jerry Goldman**
**July 1977**
**(FJC-R-77-4)**

## II. The CAMP Evaluation Design: From Theory to Reality

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The [Civil Appeals Management Program (CAMP)[2]] was based on the use of two separate procedures: first, the use of a scheduling order to notify attorneys of deadlines in the processing of their appeals, with the threat of dismissal in the event of default; and, second, the use of rule 33 preargument conferences to discuss settlement, withdrawal, or other matters that might improve the appeal if it should be decided by a panel of judges. Of course, CAMP emphasized the conference procedure, but it is at least arguable that the scheduling procedure would discourage some appeals. Hence, it seemed only reasonable to study the effects of each procedure separately and in combination.

. . . .

CAMP began operation in April 1974 . . . .

In September, the Second Circuit consented to a scaled-down version of the classic, controlled experiment. This experiment would have two main components: (1) a single experimental group, in which eligible cases would merit *both* scheduling orders and rule 33 conferences under the auspices of the senior staff attorney, now

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[1] Chapters 1 and 6, original tables 29–33, and original related appendixes 2, 4, and 5 have been omitted from this report. Some passages have been shortened or condensed, and tables and footnotes have been renumbered. Ed.

[2] [The CAMP rules are set out in appendix A.]

known as the staff counsel; and (2) a control group of eligible cases, in which *both* scheduling orders and preargument conferences would be withheld. Judge participation in the preargument conferences was sacrificed from the evaluation. . . .

. . . .

On October 21, 1974, some six months after the start of CAMP, the experimental phase of the CAMP evaluation began. For the next twelve months, cases passing through the CAMP office would be monitored, and 302 would be randomly assigned to experimental or control categories. Evidence for the evaluation would be obtained from a variety of sources, to test the propositions:

1. that CAMP would reduce the proportion of appeals that otherwise would impose a burden on the judges
2. that CAMP would improve the quality of appeals that would be briefed and argued
3. that CAMP would improve the efficiency of civil appeals by reducing elapsed time in the appellate process.

Other propositions would be examined, but these three were the mainstays of the evaluation.

These propositions would be tested through the use of "hard" evidence about what happened to the cases, and through the use of judge and attorney questionnaires. Case-related information concerning the timing and occurrence of critical events (e.g., filing of the notice of appeal, oral argument, substantive motions activity) was obtained from the docket sheets and files in the clerk's office.

It was far more difficult to infer from the docket sheets or files whether a case had settled; settlement was one of the anticipated effects of the plan. Cases terminate short of adjudication for a variety of reasons: settlement, withdrawal without settlement, abandonment, etc. The docket sheets do not always distinguish these different terminations. Of course, the important point to note is that from the court's perspective, an increase in settlements or withdrawals entails a reduction in work for the judges who would otherwise have to decide those appeals. Therefore, whether a case is settled or abandoned or withdrawn, from the court's view, the burden on the judges will be lessened. One indicator of this burden

that can be quite accurately measured from the docket sheets is the proportion of cases that are briefed and argued. Other measures, however, may also serve as useful indicators of judge burden.

In sum, the data derived from the docket sheets can be used to determine whether CAMP reduces the burden on the judges. It is not possible to determine from the data whether a reduction in judge burden is caused by CAMP's effects on settlement, since the settlement of an appeal cannot always be determined from the docket sheets.

Information about the issuance of scheduling orders and the holding of preargument conferences was obtained from docket sheets and cross-checked in the files of the staff counsel. This verification was suggested by the staff counsel because of his concern that some immeasurable degree of error might be introduced by relying solely on the docket sheets for information about CAMP. As a rule, CAMP activities were double-checked in both the clerk's and CAMP offices. If a preargument conference was logged in the CAMP office, but not on the docket sheet, the conference was recorded as having occurred. If the docket sheet indicated that a conference had been held, but no verification could be established in the CAMP office after an exhaustive check of the daily conference schedule, the conference log, and the memorandum file, the event would not be recorded.[3] Every case was checked to determine whether or not control cases received CAMP procedures.

The case-related data collected in New York also included the names of attorneys who were responsible for each of the appeals. After the cases were terminated, those attorneys were asked to complete a confidential questionnaire about their experiences with the appeals and their reactions to the plan, if any. A review of these questionnaires will reveal that attorneys in the experimental cases were asked questions related specifically to CAMP procedures. These questions were omitted from the attorney survey in the con-

[3] As it happened, no control case received a preargument conference or a scheduling order.

trol cases, for the obvious reason that no CAMP procedures were applied.

Follow-up letters and phone calls were used to encourage attorneys to respond to the survey. Although all the data are not yet in, a substantial portion of the attorney data base is included in this report. The response rate exceeded most expectations: almost 88 percent of all surveyed attorneys responded (559 completed questionnaires were returned; 637 were mailed).

It was expected that some of the eligible cases—in the experimental and control groups—would be fully briefed and argued. A procedure was devised to alert the Center staff to the composition of the panel designated to decide the appeal. The judges were then asked to evaluate the cases they were to hear. The purpose of the survey was to determine whether the cases receiving CAMP procedures were better in quality than those in which CAMP procedures were withheld. These evaluations were solicited through a mailed questionnaire which was to be returned upon completion to the Center. Note that the questionnaire is the same for all cases, experimental as well as control: Any questionnaire variation related to the presence or absence of CAMP procedures might have biased the judge responses.

The response rate to these questionnaires also exceeded most expectations. Of 398 questionnaires mailed, 370 or 93 percent were returned completed. These figures are based on the available data; although there are still some questionnaires to be included in the analysis, the available responses represent a substantial part of the judge observations in this experiment.

It perhaps bears repeating that this evaluation's success in testing whether or not CAMP is effective rests on the random assignment of eligible cases to experimental and control categories. The procedure used here offers a breakthrough for evaluations in which units to be randomly assigned (in this evaluation, eligible civil cases) trickle into the court on a daily basis.

In most experiments, the units to be assigned are enumerated in advance and then randomly assigned to groups, but in this experiment, it was not known from one day to the next how many cases would have to be assigned or how and when to randomly divide

them after they entered the appellate process. These were the choices:

1. One out of every four cases deemed eligible for CAMP by the staff counsel would be withheld from CAMP to establish the control group. This idea was rejected because it might give the program administrator considerable discretion to alter the equivalence of the controls to the experimentals. For example, perhaps some cases are very good candidates for settlement or withdrawal and others are not. Indeed, it was known before the start of CAMP that some appeals are settled or withdrawn. If the person responsible for the random assignment selected as control cases those that were unlikely candidates for settlement, and designated as experimental cases those that were likely to settle or withdraw anyway, then no doubt at the end of the experiment, there would be proportionally more control cases that were fully briefed and argued. The unwarranted conclusion would then be reached that CAMP caused a reduction in cases that otherwise would be decided by the court, when in truth this effect would be a result of the assignment procedure.
2. Another possibility was to use the last digit of each case's docket number to determine the random assignment. But the cases would have to be screened to determine eligibility for the experiment.[4] Thus it was still possible—although unlikely—that the program personnel could alter the random assignment by providing different eligibility requirements for experimental cases than for control cases. This approach, too, was rejected because there was an increased risk that the assignment procedure might produce an unwarranted conclusion.
3. Yet another technique for achieving the random assignment was to accumulate a batch of eligible cases at fixed intervals (for instance, every week), and then have someone from the

[4] Eligibility standards are discussed [below].

evaluation staff oversee the random assignment. This alternative was rejected for two reasons. It would have introduced delay in the processing of appeals, which staff counsel viewed as unwise; and it would have tended to create distrust between CAMP personnel and Center employees, who would have been charged with overseeing the random assignment.

4. With all known conventional techniques eliminated for one reason or another, the Center staff developed a technique that assured truly random assignment but without supervision and its attendant costs. All civil appeals entering the Second Circuit were reviewed after the appropriate CAMP forms C and D were filed and, in nearly all circumstances, the docketing fee paid.[5] Once these threshold requirements were met, the case materials were then examined by staff counsel. If, in his judgment, a case merited *both* a scheduling order *and* a preargument conference, it entered the pool of eligible cases for random assignment.

Some may wonder why there was not a more specific eligibility criterion, such as a money judgment for plaintiff in the district court. Staff counsel argued that there were many factors to consider in deciding to apply CAMP procedures, especially the preargument conference. Some cases met a few requirements, others met more. Yet there was no calculable, uniform, and objective standard that, when applied to all cases, would separate the eligible from the noneligible cases. Indeed, CAMP was designed to permit this flexibility. A handbook on appeals in the Second Circuit describes the process of selection:

> The staff counsel will make the determination as to whether or not the case is appropriate for a preargument conference on the basis of his study of Forms C and D, and a copy of the docket

[5] Form C provides information about the nature of the case, its disposition in the district court, and, to some extent, the issues to be raised on appeal. Form D provides information on the ordering of the transcript. These forms must be filed and the docket fee paid within ten days of the filing of a notice of appeal in the district court, with dismissal by the clerk in the event of default.

> sheet from the District Court. Such a conference will normally be held in a private action seeking a monetary judgment, and in other actions which, in the judgment of staff counsel, seem susceptible to settlement or simplification of issues.[6]

Rather than impose arguable, objective standards as part of the evaluation, the decision as to eligibility was left to staff counsel. Under most conditions in the evaluation, the extent to which he would err in his judgment by including too many or too few cases did not matter, since more of the experimental than the control cases were expected to terminate short of panel consideration. Of course, if the pool of cases deemed eligible by staff counsel contained a substantial number that did not merit CAMP procedures, the program's effect would tend to be masked. It was reasonable to expect that staff counsel's identification of eligible cases would be based on the strong likelihood that CAMP would lead to settlement, withdrawal, or improvement in quality of those cases.

The eligibility issue was not ignored, however. It was expected that staff counsel would learn from his experience at the eligibility stage and, over time, sharpen his decisions. The evaluation tested this "learning curve" hypothesis in order to minimize possible concern over the eligibility decision.

Following staff counsel's decision that a case merited both a scheduling order and a preargument conference, a staff member from the circuit executive's office would enter the docket number with the date in a log book. The Research Division of the Center maintained a duplicate log book in Washington, but with one important difference. Each line in this log book had been designated as a control or an experimental unit. When the staff member in New York completed his log entry, he would call the Center to transmit that information to the duplicate log. Only after the docket number and date were entered in Washington was the designation of experimental or control released to New York. This technique provided the greatest possible assurance that the random assignment had been made objectively.

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[6] Appeals to the Second Circuit 15-16 (1975) (prepared by the Committee on Federal Courts of the Association of the Bar of the City of New York).

In all, 302 cases were entered in the log from October 1974 through October 1975. Of these 302 cases, 225 were designated as experimental cases, in which CAMP procedures were applied; and 77 were designated as control cases, in which CAMP procedures would be withheld. Why were 302 cases entered, divided into uneven groups of 225 and 77?

One reason for the disproportionate designation of experimental and control cases was to keep staff counsel fully engaged in CAMP activities. For every three cases designated experimental, one case was designated control.

Another reason for the 302 cases is that in social research, very large samples can produce numerous statistically significant relationships of dubious substantive value. Although larger samples than the one selected here offer greater precision in estimating program effects, such precision might be of little value if the estimated effects of the program fell below a minimum level of acceptability.

Moreover, to reduce imprecision by half, a fourfold increase in sample size would be necessary. Given the Center's limited commitment of one year, an evaluation substantially beyond one year did not seem appropriate. One must therefore ask, what minimum difference (i.e., improvement) between the control and experimental cases is valuable? (Differences of lesser magnitude would be regarded as trivial.)

In this experiment, differences of less than about 10 percent between experimental and control groups would make justification of CAMP especially difficult in terms of practical importance. This was accepted as the minimum observable difference for concluding that CAMP was effective in reducing the burden on the judges.

If the observed difference between the two groups fell below the minimum, there would be two possible conclusions. One would be to conclude that CAMP had no effect whatsoever. The other would be to suspend judgment about CAMP effectiveness, i.e., to render a Scotch verdict of "effectiveness not proved." To state this issue another way, observed differences of 2 or 3 percent between experimentals and controls seemed too small to support a conclusion regarding the effectiveness of CAMP.

It would have been possible to substantially increase the number of cases in the eligible pool by continuing the experiment for three or four years. One might have then reached the conclusion that CAMP was effective when there were observed differences of about 2 or 3 percent between groups. Justifying the substantiality of effects, however, might have been especially difficult in practical terms, such as costs to the litigants and to the government. Few can take issue, however, with this experiment, which was designed to conclude that CAMP was effective if observed differences were, at minimum, in the 10 percent range.

Following the random assignment, cases designated as part of the experimental pool proceeded through the CAMP program and were subject to the scheduling order and preargument conference procedures. The control cases followed a different course. The case file and all forms were removed from the CAMP office. The docket sheet was "flagged" with the following information to prevent accidental "contamination" with CAMP procedures:

> This case is not to be processed under CAMP rules. Staff counsel must not be contacted concerning the proceedings in this case.

The question arose whether attorneys in the control cases should be notified that those cases were not to be subject to CAMP procedures. The proponents of notification took the position that CAMP had been in operation for nearly six months. During this period, some unknown number of attorneys could have altered their expectations about Second Circuit procedures to the extent that they might violate the Federal Rules of Appellate Procedure in anticipation of a CAMP scheduling order or a preargument conference.

The opponents argued that the notice would affect attorney behavior by encouraging greater attention to the Federal Rules of Appellate Procedure and the local rules, thus altering the control cases, which should ideally reflect only the absence of CAMP. In weighing the possibility of introducing positive bias (in experimental research, this is known as the Hawthorne effect) in relation to the possibility of jeopardizing the appeal because of Federal Rules of

Appellate Procedure violations, the importance of the notice outweighed the bias it might introduce.

This notice excluded control cases from the scheduling order requirement for all civil appeals. Since the CAMP rules left convening the preargument conference entirely to the staff counsel's discretion, it was unnecessary to mention withholding the conference in the notice.

The 302 cases were randomly assigned in such a way that they could be divided into three groups, generally based on the chronological order in which they entered the Second Circuit. The first and second groups of 100 cases could each be analyzed separately, comparing 75 experimental with 25 control cases; and the last 102 cases to enter the experiment could also be analyzed separately, comparing 75 experimental with 27 control cases. Thus, each subgroup in the experiment could be analyzed separately to determine changes in the effect of CAMP as the program matured through the year of evaluation, and the results could be analyzed in total by combining the subgroups to test the program's effectiveness over the entire evaluation period.

Although 302 cases were included in this experiment, a number were excluded for various reasons. These reasons should be articulated to explain why this description of CAMP, while necessarily incomplete, is still reasonably accurate.

. . . Approximately 400 cases were excluded because, in staff counsel's judgment, they merited either a scheduling order or a preargument conference, but not both. Of these 400 cases, nearly all were deemed eligible for scheduling orders. Occasionally, a case which was first designated as meriting only a scheduling order was later given a preargument conference. These cases, although infrequent, were nevertheless excluded from the experiment, since it was felt that the scheduling-order-first, preargument-conference-later cases (or vice versa) would be different—in ways that could not be estimated—from cases that were initially viewed by staff counsel as meriting both procedures.

In addition, some cases that merited both procedures were excluded because the issues were of such moment or the matters were so urgent that designation to the control group might—if the pro-

gram really worked—pose a threat to the justice of the appeal. When a case of this magnitude arose, it was excluded from the experiment entirely. Fortunately, this occurred so infrequently (not more than five times during the year) that these exclusions from the experiment will not bias the judgment to be reached regarding CAMP effects on the nonexceptional cases.

These reasons justified excluding certain kinds of cases from the experiment; some justification should be offered for including the cases meriting both CAMP procedures. It was of paramount importance to determine whether the CAMP idea was effective at all, even under the most favorable circumstances—that is, when the two available procedures were applied in combination. Although one could argue that the scheduling order alone, or the preargument conference and nothing more, could be an effective device to reduce the burden on the judges or to improve the quality of appeals, it was desirable to apply the maximum effort to each experimental case (or withhold it for the controls) and verify the unproved proposition: CAMP is an effective way to reduce the proportion of cases that otherwise will run the gamut of the appellate process and to improve the cases that do go the distance.

Some attention should be given to the soundness of the experiment and its successful execution. One threat to this experiment was the possibility of contamination. If the cases designated as controls were to inadvertently receive CAMP procedures (especially the preargument conference), comparisons between the experimental and control cases would be suspect. Fortunately, this form of contamination did not occur.

Another form of contamination was more difficult to assess. If attorneys became familiar with CAMP procedures because they practiced frequently in the Second Circuit, there might arguably have been some lingering CAMP effect when those attorneys were later involved in control cases. Although there are some frequent litigators in the Second Circuit, the average attorney is involved in only one case in a given year.[7] A review of the attorneys who par-

[7] Extrapolation from a Federal Judicial Center tabulation, Attorney Population—Second Circuit for Fiscal 1973; and Attorney Attitudes Toward

ticipated in cases in the experimental and control groups, and were surveyed, suggests that some attorneys were "repeaters," but they rarely appeared in an experimental case first, then a control case.

Still, it was possible for attorneys in the control group to have gained some experience with CAMP procedures prior to the October 1974 starting date for the experiment. The claim that CAMP affected attorney behavior during the experiment, however, requires further proof. First, the average attorney appears before the court of appeals once in a given year. This alone casts doubt on the claims of contamination. Second, if no case had been resolved short of briefing and argument prior to the start of the plan in April 1974, the attorney contamination argument might be on firmer logical footing. But since a substantial proportion of cases terminated short of argument even before the plan began,[8] it is far more difficult to leap to the conclusion that CAMP contaminated attorney behavior in the control cases. On the basis of the evidence, it would seem far more plausible that the pre-CAMP experience of attorneys simply continued after the plan went into operation. The evaluation will determine whether CAMP improves this given level of dispute resolution.

With true random assignment of the cases assured and threats to the validity of the experiment by contamination minimized, it is legitimate to examine the evidence to determine the program's effectiveness in the disposition of appeals.

Before analyzing the evidence from the controlled experiment, it seems worthwhile to briefly describe the operation of the plan as seen by Center observers during the course of the evaluation.

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Limitation of Oral Argument and Written Opinion in Three U.S. Courts of Appeals 4 (1974) (prepared by the Bureau of Social Science Research, Inc. for The Commission on Revision of the Federal Court Appellate System, under Federal Judicial Center contract no. 1040928-4-05-2501-11776).

[8] For the three-year period from fiscal 1972 to fiscal 1974, 43 percent of Second Circuit civil appeals from the district courts terminated short of oral argument. Administrative Office of the United States Courts, Annual Report of the Director (1972, 1973, 1974) (table B-1 (excludes consolidations)).

# III. CAMP in Practice

When the evaluation began in October 1974—some six months after the implementation of CAMP—a number of Second Circuit functions were controlled by the plan. Nathaniel Fensterstock, who serves as staff counsel, and his assistants completed each of the scheduling orders required for all civil cases under CAMP rules. Mr. Fensterstock conducted the preargument conferences, which were arranged by his staff following his review of the CAMP forms.

. . . .

Civil appeals in the Second Circuit are reviewed by the docket clerks following the filing of the notice of appeal to determine compliance with CAMP rules concerning the filing of CAMP forms C and D and the payment (or waiver) of the docketing fee. Failure to meet these requirements results in dismissal of the appeal by the clerk. Once an appeal meets these requirements, the docket clerks draft a scheduling order and send it to the CAMP office for completion. Staff counsel determines the dates for filing the record and the briefs, and the earliest week for oral argument. These dates are embodied in the scheduling order.

If, in the judgment of staff counsel, an appeal should be given a preargument conference, the staff will make the necessary arrangements and appointments. The decision to hold the conference is usually made early in the life of the appeal, on the ground that the parties are more willing to consider a compromise when their investment in the appeal is still small. During the year of evaluation, nearly all the conferences were scheduled in the CAMP office in the United States courthouse.

A number of observed preargument conferences generally proceeded in the following manner. Attorneys attending a pre-argument conference would enter their names in the daily log, and, at the appointed time, they would be invited into staff counsel's office. Mr. Fensterstock would begin the conference with an introduction explaining the procedures, since many attorneys were new to the program.

Mr. Fensterstock would state that all matters discussed at the conference would remain confidential and that nothing that transpired would be communicated to the court, except for a monthly report that would briefly state the matters at issue and the likelihood of settlement, withdrawal, or other action.[9] Usually, the appellant would state his theory of error in the district court; the appellee would respond; and staff counsel would pose questions to both parties as they presented their opposing views.

Following the release of the association's report, procedures in the CAMP office were altered to satisfy the concerns raised by the attorney assessments.

It is impossible to generalize about successful techniques for settlement discussion from observing these conferences. Without some uniformity in attorneys, in requested relief, or in techniques to reach settlement, it seems best to describe some of the approaches staff counsel used during the conference. Some overall impressions are possible. Frequently, Mr. Fensterstock would ask if there was a possibility of settling the appeal and, if so, how far apart the parties might be. Occasionally, he would place the parties in different rooms and discuss the possibilities with each party. If some movement toward compromise was made, he would then bring the parties together to hammer out a solution.

Sometimes, staff counsel would approach a complex set of issues one at a time. On other occasions, he would treat a complex set of issues interdependently, trying to resolve them as a whole rather than piecemeal. Occasionally, a stubborn client stood in the way of a settlement. In some cases, the stumbling block was a district court opinion with potentially troublesome consequences for the appellant. Mr. Fensterstock would volunteer to discuss the ap-

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[9] This report caused some attorneys concern: They felt the court would be biased by the failure to settle or withdraw appeals in conformity with staff counsel's suggestions. The Association of the Bar of the City of New York noted this concern in its generally favorable evaluation of CAMP. Comm. on Fed. Courts, The Ass'n of the Bar of the City of New York, The Pre-Argument Conference Experiment of the Second Circuit Court of Appeals: A Report on a Sampling of Attorneys' Assessments of the Pre-Argument Conference Procedure (June 24, 1975).

peal and possible compromise with the client; and, on appropriate occasions, he would discuss the possibility of having a judgment in the trial court vacated, simultaneously exploring the disadvantages of a circuitwide decision if the appeal were affirmed with an opinion.

Staff counsel would also inquire of the appellant whether the court of appeals had jurisdiction. If indeed some prerequisite was absent, this would give the appellant a chance to withdraw, or would encourage the appellee to move to dismiss in the event that the appeal was pressed.

Free, frank discussion seems essential to the conference procedure. In most of the conferences observed by Center staff, Mr. Fensterstock would offer his views on the merits; those views ranged from uncertainty regarding the outcome, to incredulity that the parties would press such appeals. In sum, if the appeal was viewed by staff counsel as without merit, or of so little merit as not to warrant the time of the judges to decide the appeal, staff counsel would—with rhetoric and logic—urge the appellant to withdraw or encourage the parties to accept a compromise solution.

Staff counsel would also draft and redraft scheduling orders as a consequence of his conference activities. For example, if counsel expressed the possibility of settlement, Mr. Fensterstock would hold the operating scheduling order in abeyance, and arrange for the key parties to report to him within a reasonable period about settlement. He would also redraft scheduling orders for advanced briefing schedules, or extend time for briefing and argument if he felt the additional time was warranted.

In general, staff counsel made his office available for follow-up conferences, conference calls, and discussions with clients, if such efforts would enhance the possibility of terminating the appeal without briefs and argument.

Staff counsel's duties went beyond the conference and scheduling procedures. He would also make recommendations to the clerk on procedural motions, such as motions for filing of exhibits and motions for permission to file oversized briefs. All matters related to the deadline for filing materials and arguing the appeal, which prior to CAMP would have been handled by motions,

would now be resolved by an altered scheduling order executed by staff counsel.

With this capsule description of CAMP activities in mind, it is now time to examine the evidence concerning the effectiveness of the plan in operation.

## IV. Measuring CAMP Effects: Evidence from the Cases

The CAMP experiment began on October 21, 1974, when the first case deemed eligible by staff counsel for both a scheduling order and a preargument conference was randomly assigned to the experimental group. Over the next twelve months, a total of 302 cases were randomly assigned to experimental or control groups, to determine the plan's effectiveness.

The experiment's total number of cases was chosen to assure the accuracy of the research findings. There was some evidence suggesting the plan would increase settlements and withdrawals, in cases meriting CAMP procedures, by as little as 15 or as much as 25 percent.[10] The 302 cases in the experiment were adequate to test this minimum suggested effect, as well as effects of lesser magnitude if they had occurred.

It took exactly one year to reach the goal of 302 cases.[11] During this period, for every three cases identified by staff counsel as meriting both CAMP procedures, there were four cases that, in his view, merited either one or the other but not both. This evaluation focused on appeals meriting both CAMP procedures, since this is the maximum "treatment" the plan can provide. By examining the

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[10] Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform,* 74 Colum. L. Rev. 1094, 1100 n.17 (1974); Kaufman, State of the Judicial Business in the Second Circuit 10-11 (1975) (unpublished address to the Judicial Conference of the Second Circuit, Sept. 1975).

[11] Initially, the goal was set at 300 cases, but it was decided to randomly assign a few more, to give some leeway for consolidations and other unforeseen events. There were few consolidations, however, leaving 302 cases in the experiment. These were divided into 225 experimentals and 77 controls.

effectiveness of CAMP under the most favorable conditions, the most convincing possible test was given the plan.

. . . CAMP procedures applied to the experimental cases only. Hence, beyond a certain point determined by the laws of chance, observed differences between the experimental and control groups warrant a conclusion that CAMP is effective. In short, when the difference between the two groups of cases is sufficiently large, it can be said with some confidence that CAMP procedures were responsible for a particular effect, such as a reduction in briefed and argued appeals or an increase in the quality of appeals.

Precisely how are such conclusions reached? The first step is the formulation of a hypothesis, i.e., a statement that a certain situation might be true. An alternative hypothesis, which would necessarily be true if the first hypothesis is rejected as false, is also formulated. The next step is to examine the empirical evidence on the assumption that the initial hypothesis is true. If the evidence would be highly unlikely under the assumption, the initial hypothesis is rejected, and its alternative is accepted.

One hypothesis was that CAMP has no effect on the proportion of briefed and argued cases.[12] (The alternative hypothesis was that CAMP has an effect on the proportion of briefed and argued cases.) If the empirical evidence is consistent with the initial hypothesis, it stands. If the evidence is inconsistent with this hypothesis, it is rejected in favor of its alternative. For example, if the evidence is that 50 percent of the experimental cases and 50 percent of the control cases were briefed and argued, the initial hypothesis (that CAMP has no effect) probably should be retained. If the evidence is that 40 percent of the experimental cases and 75 percent of the control cases were briefed and argued, the initial hypothesis

[12] The "no difference" or "no effect" starting point is a common feature of scientific research. This seems like an extremely devious way of proceeding, but we must remember that we shall not be in a position to establish directly that there is a difference [between groups]. To avoid the fallacy of affirming the consequent, we must proceed by the elimination of false hypotheses. In this case there are logically only two possibilities, there either is or is not a difference. If the latter possibility can be eliminated, we can then conclude that some difference in fact exists. Blalock, Social Statistics 95 (1960).

probably should be rejected in favor of its alternative. It is also possible that the evidence might not squarely support either the initial hypothesis or its alternative. In that case, a judgment about program effects would be suspended.

This basic approach to evaluating the evidence from an experiment can be altered to reflect the precision of the hypothesis. For example, one might expect that CAMP procedures would be effective in a particular way or direction, such as by *reducing* the proportion of briefed and argued appeals or by *increasing* the quality of briefed and argued cases. The statistical tests employed permitted evaluation of the likelihood of observing differences of varying magnitudes between the experimental and control groups.[13]

In general, the greater the difference between groups, the less likely that the initial "no effect" hypothesis remains valid. But at what point is the initial view rejected? There is no clear and convincing answer to this question. By convention, most social scientists claim that, given the initial assumption, if the likelihood of observing a difference between groups is less than 5 times in 100, the assumption should be rejected. There is nothing sacred or absolute in the standard of less than 5 times in 100, but there are strong reasons for having adopted this convention in the CAMP experiment.

When a decision to reject or to accept the initial hypothesis is made, the researcher must face the possibility of making either of two errors: rejecting the initial (no effect) hypothesis when it is in fact true; or accepting the initial hypothesis when it is in fact false. The 5-in-100 standard minimizes the first error; and, in general, the sizes of the experimental and control groups minimize the second. For social programs, the first error seems to be more threatening than the second. Keeping the potential for the first error small protects against drawing the false inference that CAMP is effective when in fact it is not.

Of course, it is possible to err by concluding that CAMP has no effect when in fact it does. For experiments in court administration,

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[13] For a discussion of the statistical tests employed here, *see* Blalock, Social Statistics 176-79 (1960); and Hays, Statistics for the Social Sciences 389-428 (2d ed. 1973).

however, this second error may be less critical "since the more important policy problem would seem to be how to avoid the disappointment, frustrated effort and wasted resources caused by making [the first error], that is, adopting an ineffective treatment as a social program."[14]

Thus, in the CAMP experiment, the observed differences between experimental and control groups were treated as significant in the statistical sense only if the difference could have occurred by chance fewer than 5 times in 100. This standard for statistical significance is really a procedure for ruling out the possibility that chance factors might have caused differences between the experimental and control cases.

This issue can be explained in another way. The observations made in controlled experiments are subject to a certain degree of error. This is so because repetition of an experiment will not always produce exactly the same results. Although chances are that repeated experiments will produce similar results, the laws of probability permit an estimate of the range of possible values likely to occur, without having to repeat experiments. Limits can be calculated with the assurance that, nine times out of ten—or two times out of three, or any other degree of assurance one cares to impose—the true value will fall within a specified range, called a confidence interval.

In the CAMP experiment, interest centered on the differences between the experimental cases and the control cases. Confidence intervals were calculated for these differences. Of course, if the confidence interval included zero, there was the distinct possibility that the program has no effect: A rejection of the initial ("no effect") hypothesis would not be warranted. But failure to reject the initial hypothesis does not automatically mean it is correct. Under some conditions, it may be appropriate to suspend judgment rather than risk the erroneous conclusion that CAMP has no effect whatsoever.

It must be stated once again that conclusions about statistical significance say absolutely nothing about practical or substantive

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[14] Social Experimentation: A Method for Planning and Evaluating Social Intervention 77 (Reicken & Boruch eds. 1974).

value. But once one reaches a conclusion that the findings are statistically significant, the next required step is to determine the magnitude of the plan's effect. One way to measure the magnitude of the causal relationship between CAMP procedures and briefed and argued appeals, or between CAMP procedures and quality of briefed and argued appeals, is to estimate how much improvement can be made in predicting whether cases will be briefed and argued (or will be improved) when CAMP procedures have been applied, compared to similar cases in which CAMP procedures have been withheld. The merit in this approach is that improvement in prediction falls on a scale between 0 and 100 percent. For example, if no experimental case were briefed and argued and every control case were briefed and argued, the improvement in prediction of briefed and argued cases would be 100 percent, since knowledge about which cases did or did not receive CAMP provides a perfect prediction of plenary review. If the same proportion of cases were briefed and argued in both experimental and control groups, the ability to improve the prediction of which cases will be briefed and argued would be zero, since knowledge about the cases receiving CAMP procedures will not affect the prediction.[15]

With these three concepts in mind—statistical significance, confidence intervals, and improvement in prediction—it is now time to turn to the data to assay the effects of the plan.

CAMP was designed in part to conserve sparse judicial resources. It was not feasible to directly test the plan's effectiveness by measuring the investment of effort by the judges and their staffs in the experimental and control groups. Inferences must be drawn from other evidence to conclude that judicial resources have or have not been conserved. When this experiment was designed in 1974, a number of assumptions were made, based on previous research and available evidence, from which inferences about judge burden could reasonably be drawn.

The view was that if CAMP was effective, it would substantially reduce the proportion of cases that otherwise would be adju-

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[15] This index of predictive association is discussed in Blalock, *supra* note 12, at 232-34, and in Hays, *supra* note 13, at 745-49.

dicated by three-judge panels. A case was considered adjudicated when a judgment by three judges terminated the appeal on a nonprocedural matter. For example, an appeal was deemed adjudicated if it was decided on the merits after briefs and oral argument, or if it was dismissed on a motion for lack of jurisdiction. An appeal was not considered adjudicated if it was dismissed by an order of three judges for failure to prosecute.

Distinctions between settled and withdrawn appeals were of no consequence, since it was assumed that neither settlements nor withdrawals entail judge effort. Experience has shown that this assumption and the inferences drawn from it are sometimes inappropriate. Settlements or withdrawals may occur after substantial judge effort has been expended. This analysis began, however, by examining the data according to the early view that settled and withdrawn appeals entail no judge effort.

The initial hypothesis was that CAMP has no effect on the proportion of appeals adjudicated by a panel of three judges.

As shown in table 1, 54 percent of the cases in the experimental group were adjudicated. In the control group, in which CAMP procedures were withheld, 62 percent of the cases were adjudicated. The difference of 8 percent between the experimental and control groups is not statistically significant, that is, the difference could likely occur by chance more frequently than 5 times in 100. A difference of 11 percent or more would be needed to reject the initial hypothesis.

**TABLE 1**
**Percentage of Adjudicated Appeals**

| Experimental Cases ($N$ = 225) | | Control Cases ($N$ = 77) |
|---|---|---|
| 54% | | 62% |
| | $p^*$ = .11 | |

*The $p$ value represents the probability of observing a difference of the magnitude found in the table, given the initial assumption. An observed difference between the two groups of cases is treated as significant only if there are fewer than 5 chances in 100 that the difference could have occurred by chance. If the $p$ value is greater than .05, the results are not considered statistically significant. If the $p$ value is less than .05, the results are deemed statistically significant.

To state the proposition another way, about nine times out of ten, the true difference between experimental and control groups will fall within a range of – 19 to + 4 percent. Since the confidence interval includes zero and positive values, there is a chance that CAMP has no effect or may even increase adjudications. Given the wide range of negative values captured by the confidence interval, there is also a possibility that the program is indeed effective in reducing adjudications. Therefore, although there are proportionally fewer adjudicated appeals in the experimental group, the evidence warrants neither a rejection nor an acceptance of the initial hypothesis that CAMP has no effect in reducing the proportion of adjudicated decisions. The best that can be offered is a Scotch verdict.

The presentation of this evidence is based on the view that appeals terminated by settlement or withdrawal entail no investment of judicial effort and judicial effort is invested only in adjudicated appeals. Evidence suggests that this view is unwarranted. Two appeals were settled or withdrawn well after oral argument. Clearly, there was some investment of judicial resources in those appeals: The briefs were read by judges and clerks, bench memorandums were prepared, and oral argument was heard. Since the cases terminated some time after they were argued, it is reasonable to presume that conference memorandums were prepared and a conference was held. It would seem unwarranted to equate these two cases with cases that were settled or withdrawn (although that is indeed how they were terminated), when they in fact did entail some effort of a three-judge panel.

Judge Kaufman has mentioned that CAMP is valuable in fostering early settlements or withdrawals, since the greater the involvement in the appellate process before settlement or withdrawal, the greater the investment on the part of the litigants and the greater the probability that judicial resources will be tapped, even though the appeal may ultimately be resolved by the parties.[16] This suggests that the way an appeal terminates affects the amount of bur-

[16] Kaufman, *supra* note 10, at 1095, 1096.

den on the court, depending upon the procedural stage at which it terminates.

A more difficult judgment is required concerning another appeal, which was withdrawn in open court on the day of oral argument. Presumably, the judges had read the briefs and had called upon their clerks to prepare bench memorandums. While the withdrawal did save judicial resources, since, at minimum, the judges were spared oral argument, one cannot gainsay the investment made by the judges in this appeal.

If the cases in the experiment are examined according to whether or not some judge effort was invested (without attempting to determine the magnitude of the effort), another perspective on CAMP is revealed. Table 2 provides this perspective. Note that an appeal was counted as consuming judge effort if it involved (at minimum) an opposed substantive motion requiring the decision of three judges.

**TABLE 2**
**Percentage of Appeals Involving Some Judge Effort**

| Experimental Cases ($N$ = 225) | | Control Cases ($N$ = 77) |
|---|---|---|
| 57% | | 65% |
| | $p$ = .11 | |

Fifty-seven percent of the experimental cases, compared to 65 percent of the control cases, involved some judge effort. A difference of 11 percent or more would be needed to reject the initial hypothesis. As in the previous table, the difference of 8 percent between experimental and control cases is not statistically significant. On the basis of the evidence in table 2, about nine times out of ten, the true difference between experimental and control groups will fall within a range of – 19 to + 3 percent. Since the confidence interval includes zero and positive values, there is the possibility that CAMP has no effect or may even be counterproductive.

The evidence does not warrant a judgment that CAMP reduces the burden on the judges. But the substantial range of the confidence interval suggests it would be inappropriate to accept the view that CAMP has no effect whatsoever. In short, suspended judgment may be called for here, as well.

Of course, the investment of judge effort varies among appeals and among judges. It may be worthwhile, however, to separate the cases in this experiment according to a general principle concerning the relative investment required for some appeals compared to others. To the extent that fully briefed and argued appeals are relatively more burdensome than other cases, it seems incumbent to focus attention on the briefed and argued appeals to isolate CAMP effects.

The data in table 3 offer yet another perspective on the effectiveness of the plan; in this area, CAMP held the most promise for the court, for it would seem that the greatest amount of judge effort would ordinarily be spent in appeals perfected through the stage of briefing and oral argument.

**TABLE 3**
**Percentage of Appeals Terminated after Briefing and Oral Argument**

| Experimental Cases* ($N = 225$) | Control Cases ($N = 77$) |
|---|---|
| 54% | 57% |
| $p = .32$ | |

*Includes two cases that were settled after oral argument.

Fifty-four percent of the experimental cases, compared to 57 percent of the control cases, were briefed and argued in the Second Circuit. The difference between experimentals and controls is not significant. Here, too, a minimum difference of about 11 percent would be needed before the initial hypothesis could be rejected. Even if the two cases in the experimental group that were settled after oral argument were removed, by the standards employed in the evaluation, it would still not be possible to conclude that CAMP

reduces the proportion of appeals which otherwise would run the entire gamut from record transcription and briefing to argument and opinion.

About nine times out of ten, the true difference between groups will fall between – 14 and + 8 percent. Once again, the confidence interval includes zero and positive values and, hence, there is a possibility that CAMP is ineffective or counterproductive. But in this situation, the range of values "capturing" the true effect of CAMP does not touch the range of expected improvement of 15 to 25 percent. By the measure of briefed and argued appeals, CAMP does not yet seem to live up to its promise. Given the modest 3 percent difference between experimental and control groups and the anticipated range of improvement expected of the program, the most appropriate conclusion would seem to be that CAMP has little or no effect on reducing the proportion of briefed and argued appeals.

The case data provide an opportunity to analyze the eligibility decisions of staff counsel to determine whether there were marked shifts in the pool of cases over the year of the evaluation. If staff counsel had substantially broadened his criteria for the inclusion of cases capable of settlement or withdrawal, we would expect an increased proportion of adjudicated cases (or a declining proportion of settled or withdrawn cases) across the year. Recall that the experiment can be divided into three separate experiments, each covering approximately a four-month segment of the evaluation year.

The data in table 4 show that the percentage of appeals adjudicated in each of the time periods was almost exactly the same. In the first time period, 56 percent of the appeals were adjudicated by a panel of three judges; in the second period, 57 percent; and in the third period, 55 percent. This evidence is consistent with the initial view that the eligibility criteria for the admission of appeals into the experimental pool remained fairly constant during the year.

It is also possible to examine the data within time periods to determine (1) whether the plan increased in effectiveness across the year, and (2) whether CAMP was effective in any one time period, with the expectation that it would probably be most effective in the last period, when the plan had fully matured through experience.

**TABLE 4**
**Adjudicated Appeals by Time Periods**

| | Percentage of Appeals Adjudicated* |
|---|---|
| Period one: October 1974–February 1975 | 56% ($N = 100$) |
| Period two: February 1975–May 1975 | 57% ($N = 100$) |
| Period three: June 1975–October 1975 | 55% ($N = 102$) |
| Total for all periods | 56% ($N = 302$) |

*Terminated by a decision of three judges on a nonprocedural matter.

Table 5 separates the percentage of adjudicated appeals into experimental and control groups.

**TABLE 5**
**Adjudicated Appeals by Group and Time Periods**

| | Experimental Cases | | Control Cases |
|---|---|---|---|
| Period one: October 1974–February 1975 | 53% ($N = 75$) | | 64% ($N = 25$) |
| | | $p = .18$ | |
| Period two: February 1975–May 1975 | 55% ($N = 75$) | | 64% ($N = 25$) |
| | | $p = .23$ | |
| Period three: June 1975–October 1975 | 53% ($N = 75$) | | 59% ($N = 27$) |
| | | $p = .30$ | |
| Total for all time periods | 54% ($N = 225$) | | 62% ($N = 77$) |
| | | $p = .11$ | |

According to data in table 5, there were fewer adjudicated appeals in the experimental group than in the control group within each time period. The difference between groups in the first period was 11 percent; in the second period, 9 percent; and in the third period, 6 percent. It is clear from this evidence that there was no trend toward increasing effectiveness of the plan across time peri-

ods. And, within any one time period, there was no significant difference, between experimental and control groups, in the proportion of adjudicated appeals. (Within any time period, a minimum difference of about 18 percent would be needed to reject the initial hypothesis.)

This evidence does not support the propositions that CAMP effectiveness improved over time or that CAMP was effective in one period rather than another. But the proportion of adjudicated appeals may be an inadequate indicator of judge burden, and the use of that indicator may have affected the results.

The data in tables 6 and 7 use the alternative measures suggested earlier: the proportion of appeals involving some judge effort and the proportion of appeals decided after briefing and oral argument. As in the earlier analysis, the initial hypotheses were that CAMP effectiveness does not improve over time and that CAMP is not effective within any time period. Are the data inconsistent with these hypotheses?

**TABLE 6**
**Appeals Requiring Some Judge Effort, Arranged by Group and Time Periods**

| | Experimental Cases | | Control Cases |
|---|---|---|---|
| Period one: October 1974–February 1975 | 60% ($N = 75$) | $p = .24$ | 68% ($N = 25$) |
| Period two: February 1975–May 1975 | 56% ($N = 75$) | $p = .15$ | 68% ($N = 25$) |
| Period three: June 1975–October 1975 | 55% ($N = 75$) | $p = .36$ | 59% ($N = 27$) |
| Total for all time periods | 57% ($N = 225$) | $p = .11$ | 65% ($N = 77$) |

According to the data in table 6, there were proportionally fewer appeals requiring some judge effort in the experimental group than in the control group within each of the time periods. In the first time period, the difference between groups was 8 percent.

In the second period, the difference was 12 percent. In the third and last period, the difference declined to 4 percent. Hence, the evidence shows no significant increase in effectiveness across the time periods, as measured by the percentage of appeals involving some judge effort. The data also reveal no significant difference in favor of CAMP within any one period, as measured by the percentage of appeals involving some judge effort.

Table 7 shows the cases by the proportion of appeals that were briefed and argued.

The data in table 7 show proportionally fewer briefed and argued appeals in the experimental group than in the control group, for periods one and two. In the first period, the difference between groups was 8 percent; in the second period, the difference declined slightly, to 5 percent. In the last time period, there were proportionally more briefed and argued appeals in the experimental group than in the control group. Once again, the data are consistent with the initial views that CAMP effectiveness in reducing the proportion of argued and briefed cases did not improve significantly over time, and that within any one period CAMP did not reduce the proportion of cases that otherwise were briefed and argued.

**TABLE 7**
**Briefed and Argued Appeals by Group and Time Periods**

| | Experimental Cases* | | Control Cases |
|---|---|---|---|
| Period one: October 1974–February 1975 | 52% ($N$ = 75) | $p$ = .25 | 60% ($N$ = 25) |
| Period two: February 1975–May 1975 | 55% ($N$ = 75) | $p$ = .33 | 60% ($N$ = 25) |
| Period three: June 1975–October 1975 | 55% ($N$ = 75) | $p$ = .60 | 52% ($N$ = 27) |
| Total for all time periods | 54% ($N$ = 225) | $p$ = .32 | 57% ($N$ = 77) |

*Includes two cases that were settled after oral argument.

In the data, there is a suggestion that CAMP may reduce the proportion of appeals that a panel of judges dismissed, prior to briefing and argument on the merits, on contested substantive motions. These are motions for substantive relief within the Second Circuit's Rule 27. The frequency of such dispositions is very small, requiring a different test for statistical significance.[17]

In the experimental group, 3 of the 225 appeals (or about 1 percent) were dismissed on contested substantive motions by a panel of three judges before briefs were filed or oral argument was heard. Five out of 77 appeals (or about 6 percent) in the control group were dismissed in this manner. The initial hypothesis was that the experimental and control groups were not significantly different. The probability of observing three or *fewer* terminations of this type out of the 225 cases in the experimental group, when the expected proportion (determined by combining 3 in 225 and 5 in 77) is almost 3 percent, is greater than 5 times in 100. Thus, by the standard applied for all the tests, the difference between groups is not significant. This sustains the hypothesis that CAMP does not significantly affect the proportion of dispositions on contested substantive motions.

It perhaps bears noting that, with one exception, the experimental cases showed consistent improvement over the control cases in all the related measures employed to this point, but in no circumstance were the observed differences sufficiently great to rule out chance as their cause.

One hallmark of CAMP is the use of scheduling orders to control and monitor the progress of appeals. This is a dramatic departure from tradition for the appellate process. Prior to the use of such orders under CAMP, attorneys would be left on their own to follow the Federal Rules of Appellate Procedure and the local rules of the Second Circuit. Attorneys retained maximum flexibility in the timely processing of appeals, but this flexibility permitted some appeals to languish on the docket. The scheduling order—coupled with CAMP rule 7(b)'s threat of dismissal in the event of default—

[17] The test to be applied is based on the Poisson approximation to the binomial distribution. It is discussed in Hays, *supra* note 13, at 206-08.

may draw more attention to the requirements of the appellate process.

The use of scheduling orders under CAMP should reduce the time for appeals to be processed. How should this time be measured? Quite simply, the commonsense approach would be to determine the number of days from the start to the end of the process, from the filing of the notice of appeal in the district court to the termination of the appeal in the Second Circuit. The cases in the CAMP evaluation were analyzed by comparing the median time[18] between these two events—the beginning and the end of the appeal—in a number of settings.

As in the earlier analyses, the initial view was that the cases in the experimental and control groups are equivalent with respect to the elapsed time from notice to termination. Analysis of the evidence determined whether this view should be rejected.

Table 8 presents the median time from notice to termination for experimental and control cases.[19]

The median time for cases receiving CAMP procedures was 154 days; the median time for cases in which CAMP procedures were withheld was 215 days. This difference is sufficient to warrant a rejection of the initial view, since the probability of such observations occurring by chance is far less than 5 times in 100. CAMP reduces, by a statistically significant amount, the time for processing civil appeals.

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[18] Suppose all the cases were ranked according to the number of days between filing the notice and termination. The median would be the value that divides the rank list in half, i.e., there would be as many cases above the median value on the list as below that value. The median is the appropriate statistic to use because it is less sensitive to extremely high or low values.

[19] Note that the cases in the experimental and control groups total 260, or about 86 percent of the 302 cases analyzed earlier in this chapter. The discrepancy reflects the time required to transform the data into machine-readable form for analysis on the Center's computer. The earlier analysis—using all 302 cases in the evaluation—was done by hand. The analysis measuring time between events required the use of the Center's computer, which had about 86 percent of the data on file. This should give a fairly accurate view of CAMP, although it will be subject to change as the rest of the data are included in subsequent analysis.

**TABLE 8**
**Median Time from Notice of Appeal to Termination: All Appeals**

| Experimental Cases ($N = 195$) | Control Cases ($N = 65$) |
|---|---|
| 154 days | 215 days |
| $p = .02$ | |

How much of a processing-time reduction does CAMP cause? If all the experimental cases fell below the overall median and all control cases fell above the overall median, one could make a perfect prediction of where a case would fall relative to the median, when CAMP procedures were used. But if both the experimental and the control cases were equally divided around the overall median, there would be no improvement in the prediction of where a case would fall relative to the median, even when CAMP procedures were used. In the present example, this prediction was improved by 13 percent for cases that received CAMP procedures.

It seems appropriate to ask whether this processing-time reduction affects both appeals that run the gamut of the appellate process and appeals resolved by settlement or withdrawal, without court attention. Table 9 provides information on the median time from notice to termination of appeals in which there was no court attention.

**TABLE 9**
**Median Time from Notice of Appeal to Termination: Appeals Settled or Withdrawn without Court Attention**

| Experimental Cases ($N = 88$) | Control Cases ($N = 22$) |
|---|---|
| 77 days | 120 days |
| $p = .01$ | |

As shown in the table, settled or withdrawn cases in the experimental group took 77 days from notice to termination, while equivalent cases in the control group took 120 days. The conclusion here, too, is that CAMP produced a statistically significant reduction in the time required to terminate settled or withdrawn appeals. Knowing that CAMP procedures have been applied improves a prediction of where the cases will fall in relation to the overall median by about 18 percent.

These data are subject to three alternative interpretations. The experimental cases may have been settled or withdrawn earlier in the process than were the control cases; or, information about settlement or withdrawal of the experimental cases reached the court sooner than that about the control cases, because of the CAMP sanctions in the event of default of a scheduling order; or, both earlier resolutions and improved, expedited reporting of those resolutions occurred in the experimental cases, but not in the controls. The data do not aid choosing among these alternatives. All that can be said with assurance is that CAMP was responsible for reducing the lives of these appeals. If earlier settlements do, indeed, result from CAMP, the litigants might (arguably) benefit.

Table 10 provides time information on the briefed and argued appeals. Is CAMP effective in expediting these cases?

**TABLE 10**
**Median Time from Notice of Appeal to Termination: Briefed and Argued Appeals**

| Experimental Cases ($N = 104$) | | Control Cases ($N = 37$) |
|---|---|---|
| 223 days | | 246 days |
| | $p = .30$ | |

The median time to disposition was 223 days for the cases receiving CAMP procedures and 246 days for the cases in which CAMP procedures were withheld. There is no statistically significant difference in median times between the groups. Thus, the initial view remains in force: CAMP has no effect on appeals that run

the gamut of the appellate process. To put the matter another way, if an appeal is to proceed through argument and decision by a panel of judges, CAMP procedures cannot be counted on to quicken the pace.

This evidence on the briefed and argued cases, when viewed in relation to the evidence on settled or withdrawn cases, strongly suggests that the time CAMP saved in civil appeals processing can be accounted for by the time reductions achieved in the settled or withdrawn cases.

## Conclusion

This chapter has analyzed CAMP's effectiveness in cases that were assigned by a truly random process to experimental or control groups. The experimental cases received scheduling orders and preargument conferences as provided under the CAMP rules; both procedures were withheld from the control cases.

One CAMP goal was to reduce the burden on the judges by eliminating appeals that otherwise would require judge attention; the evidence in support of that goal appears wanting. No statistically significant improvement was detected, using a variety of measures. This study measured three categories to infer a reduction of judge burden: appeals adjudicated, appeals involving at least minimal judge effort, and appeals fully briefed and argued. Research results using the first two categories were sufficiently ambiguous to warrant a suspended judgment on CAMP effectiveness: It is not yet warranted to conclude that CAMP is effective, but it is not possible to say that CAMP is ineffective. In the third category (appeals briefed and argued), the evidence strongly suggests that CAMP does little or nothing to remove these most burdensome cases from the court's docket. By this measure, the data do not support earlier expectations.

The cases were divided into separate chronological periods and analyzed both across and within these periods. There was no statistically significant improvement either across time periods or within any time period, suggesting no increased effectiveness as a result of "on the job" experience.

CAMP did cause a reduction in elapsed time from filing the notice of appeal through termination, but this seems to be a result of significant reductions in elapsed time for settled or withdrawn appeals. CAMP did not prove effective in expediting the appellate process for cases which ran the entire appellate gamut, from notice through argument and decision.

The evaluation of CAMP ought not to be based solely on the evidence from the cases. CAMP was also intended to improve the quality of appeals. The next chapter will examine this issue as seen by the judges of the Second Circuit.

## V. Measuring CAMP Effects: Evidence from the Judges

CAMP's potential value extends beyond reducing the flow of cases through the appellate process or expediting appeals to oral argument. CAMP may also be an effective device to improve the quality of appeals reaching the court for decision. Theoretically, this improvement can be achieved through the preargument conference, when counsel can examine the issues to be raised on appeal, and can benefit from the candid views of staff counsel. These free and open exchanges can highlight weaknesses or omissions that otherwise might have been overlooked. The forum provided by CAMP also permits counsel to agree on designating the record, filing a joint appendix, or removing some procedural snag encumbering the appeal.

In some respects, this theory of CAMP can only be validated by the participants themselves. But it is reasonable to assume that if CAMP improves the quality of appeals, the judges should be able to discern this improvement, and the researchers should be able to measure it.

Of course, some would argue that CAMP cannot change a poor advocate into a great one, and any search for improvement would be a foolish exercise. The plan's goal is not to remake counsel, however, but to bring about some modest yet measurable difference in the presentation of appeals.

Measuring the quality of appeals is no small task, and guidance is wanting. A serious question raised at the outset was whether judges would be consistent in their responses to CAMP. Thoroughly inconsistent responses concerning the same appeal would limit or foreclose analysis. It was also plausible that one judge would operate according to one set of standards, and a different judge to another set. But even if the standards applied by the judges varied, it was hoped that the group of all judges would find CAMP noticeably improved cases. Of course, some judges, by experience or inclination, may be more sensitive to questions of quality than are others. This suggests that some judges would discern significant improvement, while others would not.

The device for assessing the quality issue was a questionnaire administered to all judges in all briefed and argued cases in the experimental and control groups.[20] All the judges on a panel were asked to complete the questionnaire, to determine the consistency of responses among judges hearing the same appeal.

The system used to manage this phase of the experiment should not go unmentioned, since it may account in part for the judges' extraordinary response rate. Copies of the day calendar (the weekly panel designations and cases to be argued each day) were regularly sent to the Federal Judicial Center. Only the appeals in the experimental and control groups (not every appeal on the calendar) were evaluated. Once a case was identified as belonging to the evaluation pool of cases, letters were drafted to each judge on the panel, indicating the need for an evaluation of one or more appeals set for argument that day. These letters were timed to reach the court shortly before the day of argument. All letters were sent to the United States courthouse, to reduce mishaps such as misplaced or forgotten evaluations—especially for the judges whose chambers were located outside New York City.

Each letter was accompanied by one or more questionnaires for each case to be argued that day. Every questionnaire contained a docket number and an evaluation control number which, in coded form, identified both the case as experimental or control and the

[20] The questionnaire is in appendix B.

name of the judge completing the form. The questionnaires were logged both when they were mailed and when they were returned. If a questionnaire was not returned within a reasonable period, the judge was alerted to the missing form.

These elaborate management efforts were designed to achieve a high response rate—this kind of exercise especially held the potential for a diminishing rate of response across time. The actual response rate of 93 percent surpassed all expectations. The judges are commended for bearing this burden, which helped to rigorously examine their court's procedures.

The questionnaire was designed to determine whether statistically significant differences in quality could be discerned between experimental and control cases. But what constitutes quality in an appeal and how would you recognize it if you saw it? An appeal would seem of superior quality if all the issues necessary and sufficient to decide the appeal were clearly and concisely presented, both in briefs and oral argument. This suggested a series of questions about the presence or absence of particular quality components. The presence of clarity was good; its absence, bad. The absence of redundant arguments marked a good appeal; their existence marked a poor one. The lack of undisputed or extraneous issues pointed to a strong presentation; presence of such issues suggested a weak one. The omission of essential issues was a sign of a poor appeal; inclusion of all essential issues was a sign of a strong appeal. Hence, the presence or absence of these components in briefs and oral argument would provide a reasonable basis for concluding that one group of cases was or was not superior in quality to the other.

It was quite possible to err in observing the presence or absence of these attributes of quality. As a check against such errors, two questions were included to evaluate the preparation by appellant's and appellee's counsel. Another question was added to provide an overall evaluation of the appeal, on the ground that it might be easier to evaluate an appeal than to identify components of quality in it.

The questionnaire also provided an opportunity to check the judges' views of staff counsel's screening decision and his relative effectiveness. One question asked whether the appeal could have

been improved further; another inquired whether it could have settled.

In sum, this judge survey was designed to systematically obtain judge impressions of CAMP in briefed and argued appeals. The answers would determine whether, by omission or commission, in particular or in general, the experimental cases were significantly better prepared and argued than the control cases.

At the beginning of this phase of the evaluation, the assumption was made that the judges would not know whether the cases being evaluated were experimentals or controls. If some judges knew of the random assignment prior to completing the survey, their responses might be biased. The questionnaire form was revised, shortly after the first sets of questionnaires were mailed, to remove this possibility of bias. From the 382 judge responses, a handful, in which prior knowledge of the random assignment may have affected judgments of quality, were isolated. These 16 responses were removed from the analysis.

It is important to remember that the analysis in this chapter is based on judge observations of quality, not on cases. On the basis of these judge observations, inferences are drawn that the cases were or were not improved because of CAMP.

The information analyzed here is based on fewer than all judge observations in the evaluation. The difference between the total pool of judge responses and the smaller set available for analysis here results from the time lag in preparing the questionnaires for use on the Federal Judicial Center computer. The information pool consists of 382 returned judge questionnaires commenting on 134 argued appeals, of a possible 495 for the 165 briefed and argued cases in the study. This means that, at minimum, estimates of CAMP's effect on quality of appeals will be based on about 77 percent of the possible data.

Three hundred ninety-eight questionnaires were mailed to the judges who sat in the 134 appeals. Of the 382 questionnaires returned, 370 were completed, giving a response rate of nearly 93 percent. Whatever weaknesses can be found in this part of the evaluation, bias resulting from failure to complete and return the questionnaire is not one.

A preliminary issue must be addressed before comparing the data on quality of appeals in the experimental and control groups. If the respondents in this survey always agreed with each other when asked to rate the same appeal, the propositions that the survey questions are clear and that the criteria for judgment are similar for each panel of judges would tend to be supported. On the other hand, constant disagreement among the judges asked to rate the same appeal would tend to cast doubt on the precision of the questions or on the criteria the judges employed in determining their answers.

What is the extent of agreement and disagreement in this survey? Table 11 presents a summary of agreement and disagreement on appeals rated by at least two judges. In this table, and in all others in this chapter, sixteen responses were excluded because the judges indicated they had prior knowledge of the random assignment. (Seven appeals were rated by only one judge. These were excluded from table 11.)

**TABLE 11**
**Agreement and Disagreement on Appeals Rated by Two or Three Judges**

| | Survey Questions | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1* | 2* | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 12* | 13 | 14 |
| Three judges rated | | | | | | | | | | | | | |
| Total agreement | 33 | 42 | 75 | 65 | 60 | 64 | 66 | 74 | 73 | 41 | 32 | 54 | 58 |
| Some disagreement | 58 | 51 | 26 | 33 | 40 | 35 | 33 | 24 | 25 | 56 | 60 | 35 | 20 |
| Extreme disagreement | 7 | 3 | — | — | — | — | — | — | — | — | 3 | — | — |
| Two judges rated | | | | | | | | | | | | | |
| Total agreement | 13 | 12 | 17 | 15 | 17 | 18 | 16 | 17 | 16 | 15 | 15 | 15 | 15 |
| Some disagreement | 8 | 8 | 5 | 7 | 5 | 4 | 5 | 4 | 6 | 7 | 6 | 7 | 4 |
| Extreme disagreement | 0 | 0 | — | — | — | — | — | — | — | — | 1 | — | — |
| Total cases rated by two or more judges | 119 | 116 | 123 | 120 | 122 | 121 | 120 | 119 | 120 | 119 | 117 | 111 | 97 |

NOTE: The questionnaire is in appendix B.

*Three possible choices were offered in these questions. The judges were to select one of the three. In all other questions, only two choices were offered.

"Total agreement" was defined as "identical judge responses to the same question in the same appeal." "Some disagreement" was defined as "different judge responses to the same question in the same appeal." "Extreme disagreement" (for questions offering three possible answers) meant "different judge responses that encompassed the range of answers to the same question in the same appeal." Of course, any disagreement in a two-choice question could be interpreted as extreme disagreement. But by these definitions, "extreme disagreement" was intended to exclude "some disagreement."

The frequency of agreement and disagreement was determined for the questions in the judge survey; it corresponds to the categories in the left margin of table 11. Except on questions 1, 2, 10, and 12, there was far more agreement than disagreement among judges rating the same appeal. The questions calling for judgments on overall quality (questions 1, 2, and 12) provoked more frequent disagreement than most of the questions calling for identification of particular components of quality (questions 3-9). The differences in frequency of agreement (or disagreement) between quality and component questions may be a function of the greater number of choices offered in the quality questions, compared to that in the component questions. They may also reflect fundamental distinctions between qualitative decisions and component recognition.

The greatest threat to this survey's reliability would have been substantial extreme disagreement on all questions. This would have strongly suggested that the judges are so inconsistent that interpretation of the responses becomes equivalent to divination. On the questions of overall quality (in which the respondents were given three choices), there is relatively little extreme disagreement; that is, the responses rarely encompassed the entire range of answers to the same question on the same appeal. In only one two-choice question (question 10) was there more frequent disagreement than agreement. This question was eventually removed from the analysis because of this disagreement, which may plausibly be attributed to imprecision in the question itself.

With some assurance that interpretation of the data is possible, what do the responses reveal about the quality of CAMP cases

compared to that of the controls? The following analysis first examines the particular components of quality, followed by consideration of the qualitative judgments.

One element of a superior appeal is the clarity with which the issues are presented to the court, both in briefs and in oral argument. If judge observations of clarity are found in significantly greater proportion for the experimental group of cases, compared to the control group, one can infer that (1) the first group is superior in quality to the second, and (2) the improvement in quality is caused by CAMP.

Table 12 summarizes the judge responses to the question: Were the issues raised in the appeal clearly brought out in the briefs?

**TABLE 12**
**Percentage of Judge Responses Affirming Clarity in Briefs**

| Experimental Group ($N$ = 262) | | Control Group ($N$ = 90) |
|---|---|---|
| 85% | | 84% |
| | $p$ = .40 | |

The observed presence of clarity in the briefs is almost exactly the same in the experimental group as it is in the control group. . . . The difference between groups is not statistically significant, since a difference of the magnitude observed here could occur by chance more frequently than 5 times in 100.

The judges were also asked: Were the issues raised in the appeal clearly brought out in the argument? Table 13 presents the affirmative answers to this question. If the percentages in the experimental group are significantly greater than those in the control group, the improvement in clarity can be attributed to CAMP.

**TABLE 13**
**Percentage of Judge Responses Affirming Clarity in Argument**

| Experimental Group ($N$ = 258) | | Control Group ($N$ = 91) |
|---|---|---|
| 85% | | 84% |
| | $p$ = .34 | |

The percentages of affirmative responses are the same in answer to this question as they were in answer to the preceding one. . . . Since clarity of argument seems to be present to almost exactly the same degree whether CAMP applies or not, one cannot conclude that CAMP procedures make arguments on appeal clear, at least according to the judges. Of course, it could be argued that CAMP improves the relative degree of clarity. While most appeals meet minimum standards for clarity, CAMP may enhance that clarity. The relative degree of clarity is not addressed in this questionnaire, which attempts to identify the presence or absence of clarity in briefs and arguments.

Some readers may wonder why these separate questions elicited exactly the same proportional responses. Certainly, when one finds a clearly presented brief, one will tend to find a clearly presented oral argument. The two observations are not perfectly correlated, however. Judges sometimes observed clarity in arguments but not in the briefs, and vice versa.[21]

The presence of clarity was taken as an indicator of quality in analyzing the responses to the preceding questions. Certain components, by their absence, can also be used as indicia of quality. One such indicator is the absence of undisputed or extraneous issues. Is CAMP helpful in eliminating such issues from appeals that

[21] The correlation coefficient, which measures the association between the clarity-of-briefs and the clarity-of-argument responses, is fairly high ($r$ = .72). When the answers match perfectly, the correlation coefficient is one. The complete absence of association produces a correlation coefficient of zero.

would otherwise raise them? The judges were asked: Were undisputed or extraneous issues briefed? If CAMP is effective in this area, there should have been significantly more negative responses in the experimental group than in the control group. Table 14 summarizes the judge responses to this question.

**TABLE 14**
**Percentage of Judge Responses Indicating Undisputed or Extraneous Issues Were Not Briefed**

| Experimental Group ($N$ = 262) | | Control Group ($N$ = 92) |
|---|---|---|
| 82% | | 75% |
| | $p$ = .06 | |

Eighty-two percent of the judge observations in the experimental group and 75 percent of the judge observations in the control group noted the absence of undisputed or extraneous issues in the briefs. But since the likelihood of observing a difference of this magnitude or greater is more than 5 in 100, it is unwarranted to conclude that CAMP reduced the briefing of undisputed or extraneous issues.

A similar question was posed to the judges concerning oral argument: Were undisputed or extraneous issues argued? Table 15 offers a summary of these responses. The greater the proportion of negative responses, the better the appeals.

. . . The experimental group scored better than the control group, but the difference was not sufficient to meet the threshold of statistical significance. Perhaps because these last two questions are nearly identical in focus, phrasing, and location in the questionnaire, it is not surprising to see similarities in the pattern of answers.[22]

[22] The correlation coefficient for these two questions is also high ($r$ = .80).

**TABLE 15**
**Percentage of Judge Responses Indicating Undisputed or Extraneous Issues Were Not Argued**

| Experimental Group ($N$ = 259) | | Control Group ($N$ = 92) |
|---|---|---|
| 85% | | 78% |
| | $p$ = .07 | |

The absence of redundant issues is also an indicator of quality. In theory, CAMP should help focus attention on the central issues, and perhaps dispose of unnecessary, including redundant, issues.

The judges were asked: Were any briefed issues redundant? The extent to which appeals lacked redundancies can be found in table 16. The greater the proportion of negative responses, the better the appeals.

**TABLE 16**
**Percentage of Judge Responses Indicating Redundant Issues Were Not Briefed**

| Experimental Group ($N$ = 260) | | Control Group ($N$ = 92) |
|---|---|---|
| 85% | | 74% |
| | $p$ = .01 | |

. . . The experimental group scored significantly better, in the statistical sense, than the control group. Differences of this magnitude or greater could happen by chance fewer than 5 in 100 times. Hence, CAMP can be credited with the relatively greater absence of redundant issues in the briefs, as observed by the judges.

. . . .

. . . Based on the evidence in table 16, knowledge that CAMP procedures were applied to an appeal will improve by about 1 percent the likelihood that that appeal will not contain redundant issues.

How can such a trivial improvement be statistically significant? Remember that significance in the statistical sense has absolutely nothing to do with practical or research significance. In this context, statistical significance merely assures that CAMP has an effect greater than zero. As a general rule, the greater the number of units to be analyzed in the experiment, the smaller the effect required to demonstrate statistical significance. With more than 350 judge observations analyzed in this experiment, minute effects can be identified and labeled statistically significant. Estimating the strength of an association takes on paramount importance and searching for statistical significance becomes less important as the number of observations increases.[23]

The absence of redundant issues in oral argument was also used as an indicator of quality. The judges were asked the following question: Were any argued issues redundant? The responses will be found in table 17. The greater the proportion of negative responses, the better the appeals.

The experimental group scored higher on this indicator (90 percent) than did the control group (84 percent), but the difference in scores is not statistically significant.

This question and its mate (concerning redundant issues in briefs) are also strongly correlated with each other. The absence of

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[23] "All too often the experimenter . . . 'kids himself' into thinking that he has discovered some relationship observable to the 'naked eye,' which will be applicable in some real-world situation. Plainly, this is not necessarily true. The [index of predictive association] . . . suggests just how much the relationship found implies about real predictions, and how much one attribute actually does tell us about the other. Such indices are a most important corrective to the experimenter's tendency to confuse statistical significance with the importance of results for actual prediction. Virtually any statistical relation will show up as highly significant given a sufficient sample size, but it takes a relationship of considerable strength to enhance our ability to predict in real, uncontrolled situations." Hays, *supra* note 13, at 749.

redundant issues in briefs implies a great probability that the argument will not contain redundant issues.[24]

**TABLE 17**
**Percentage of Judge Responses Indicating Redundant Issues Were Not Argued**

| Experimental Group ($N$ = 257) | | Control Group ($N$ = 92) |
|---|---|---|
| 90% | | 84% |
| | $p$ = .06 | |

It is intriguing that of the three components of quality analyzed so far—clarity, extraneousness, and redundancy—oral argument scored as well or better in quality than briefs, in both the control and experimental groups. This may suggest that judges apply different standards when identifying the same indicators of quality for briefs and for oral argument. If the standards do not vary between briefs and oral argument, however, the data suggest an oral presentation may be better, in some respects, than a written one.

Another question in the evaluation focused on the presence or absence of essential issues in the briefs. The theory behind CAMP was that the preargument conference would reduce the issues to the essentials and focus on them. Would CAMP significantly reduce the omission of essential issues? The judges were asked: Were any essential issues omitted from the briefs? The greater the proportion of negative responses, the better the quality of the appeals, as viewed by the judges. Table 18 summarizes the answers to this question.

The results here are not significant and are counterintuitive. Eighty-three percent of the judge observations in the experimental group noted no omission of essential issues, while 89 percent of the observations in the control group noted no omission.

[24] The correlation coefficient for these two questions is .76.

**TABLE 18**
**Percentage of Judge Responses Indicating No Omission of Essential Issues from Briefs**

| Experimental Group ($N$ = 260) | | Control Group ($N$ = 91) |
|---|---|---|
| 83% | | 89% |
| | $p$ = .94 | |

The analysis in this chapter has focused on the ability to identify certain features of appellate advocacy. These features, by their presence or absence, could function as indicators of quality in appellate litigation. Except in one question concerning redundancies in briefs, there was no statistically significant difference between the experimental and the control groups. In the one circumstance where statistically significant results were observed, the degree of association between CAMP and the indicator was slight.

These slender results may mean the identification of quality indicators is not an easy task. Even if expected differences cannot be found in these indicators, one can nevertheless measure differences in quality independently of underlying components that may give rise to quality appeals. In addition to being asked to note the presence or absence of indicators, the judges were asked qualitative questions about three facets of each appeal. Two of these centered on counsel's efforts; the other required an overall assessment of quality for each appeal.

The first of these questions was: Was the preparation of appellant's counsel (1) better than average; (2) average; or (3) worse than average, for cases of approximately the same complexity?

The choices were coded: "better than average" was given a value of 1, "average" was given a value of "2," and "worse than average" was given a value of "3." If CAMP improves counsel's preparation, there should have been a significantly lower average

score for observations in the experimental group than in the control group. Table 19 summarizes the results.

**TABLE 19**
**Preparation of Appellant's Counsel: Average Score**

| Experimental Group ($N$ = 259) | | Control Group ($N$ = 92) |
|---|---|---|
| 1.85 | | 2.09 |
| | $p$ = .001 | |

Analysis of the results demonstrates that the average experimental group score was significantly better than the control group score. Thus, the improvement in the preparation by counsel is attributable to CAMP.

How much does CAMP aid prediction of the quality of counsel's preparation? To put the matter another way, how much variation in quality is explained by the presence (or absence) of CAMP procedures? For example, if all the judges rated the experimental cases above average and the control cases below average, the fact that CAMP procedures were applied in an appeal would provide certainty about the quality of the cases as viewed by the judges. If all the judges rated experimental and control cases exactly the same, however, use of CAMP procedures in an appeal would provide no assistance in determining its quality as seen by the judges. The estimated improvement in predicting CAMP's effect on the quality of counsel's preparation is about 3 percent.

The judges were also asked to evaluate appellee's counsel: Was the preparation of appellee's counsel (1) better than average; (2) average; or (3) worse than average, for cases of approximately the same degree of complexity?

The scoring scheme used for the preceding evaluation question was also employed here. Table 20 sets out the results.

The difference between scores is statistically significant. CAMP procedures improve the preparation by appellee's counsel.[25] The estimated strength of this relationship between CAMP and counsel preparation is about 3 percent: There is improvement, but it is on a fairly low order of magnitude, as best it can be measured.

**TABLE 20**
**Preparation of Appellee's Counsel: Average Score**

| Experimental Group ($N = 255$) | | Control Group ($N = 91$) |
|---|---|---|
| 1.75 | | 1.96 |
| | $p = .001$ | |

The last question called for an evaluation of the appeal as a whole: Overall, how would you rate the quality of this appeal with respect to the presentation of issues (both written and oral) to the court: (1) above average; (2) average; or (3) below average? The scoring scheme was the same as that for the two preceding questions: The better appeal was given the lower score. The results are summarized in table 21.

The difference between average scores is sufficient to warrant the conclusion that the relationship between CAMP procedures and quality is statistically significant. Again, CAMP improves overall quality by about 3 percent.

Conclusions drawn from all three of the evaluation questions—in contrast to most of the indicator questions—supported CAMP effectiveness. Although nearly all the results for indicator questions were unable to meet the minimum threshold requirement for statistical significance, the data favored CAMP in most cases.

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[25] The correlation coefficient for appellant's and appellee's counsel evaluations is .60. This means that when appellant's counsel is either well or ill prepared, there is no guarantee (but some assurance) that his adversary will follow the same path.

**TABLE 21**
**Overall Judgment of Quality:**
**Average Score**

| Experimental Group ($N$ = 257) | | Control Group ($N$ = 90) |
|---|---|---|
| 1.87 | | 2.12 |
| | $p$ = .001 | |

Are general evaluative questions better than the search for quality indicators as a means of measuring quality in appeals? If so, perhaps the results across all questions—both general and specific—are consistent. The specific indicator questions produced positive but weak results in favor of CAMP—too weak to reach statistical significance. The general evaluative questions passed the significance threshold, but further examination of that data indicates that whatever improvement CAMP brings about is slight. One can only speculate that had the presence or absence of indicators revealed greater differences between groups, the predictive power of CAMP for the general questions would have increased.

Sixteen judges from the Second Circuit participated in this evaluation. The set of responses from each was analyzed separately to determine whether any judges consistently found the experimental group to be significantly better in quality than the control group. Of course, with fewer observations from any one judge, the differences between groups would have to have been much greater to reach statistical significance. Of the thirteen judges who evaluated at least ten cases, none rated the experimental group consistently better in quality than the controls.

Certainly, statistical significance was achieved in favor of CAMP on some questions, but occasionally the controls were viewed as better than the experimentals. If the plan has a substantial effect on the quality of appeals, it seems reasonable to have expected statistically significant differences between groups as viewed by at least some of the individual judges. The absence of

such significant differences for any of the judges (those who evaluated at least ten cases) suggests that the plan's effect on quality is so slight that it was not consistently discernible to a single judge. The aggregated judge observations produced some statistically significant differences, but the improvement caused by CAMP seems slight. This observation is consistent with the analysis of individual judge observations.

The judge evaluation served yet another purpose. CAMP was based on the view that perfected appeals—those that are briefed and argued—are amenable to private dispute resolution if efforts are made early in the life of the appeal to encourage settlement or withdrawal. If CAMP works effectively to eliminate cases that otherwise would be argued and decided, there should have been more expectations of settlement or withdrawal in the control group than in the experimental group. As another check on the case evidence, the judges were asked: Would you have expected a preargument conference before the filing of briefs to result in a settlement or withdrawal of this appeal? The answers are summarized in table 22.

**TABLE 22**
**Percentage of Judge Responses Affirming Expectation of Settlement or Withdrawal**

| Experimental Group ($N$ = 236) | | Control Group ($N$ = 81) |
|---|---|---|
| 13% | | 15% |
| | $p$ = .35 | |

The data point in the anticipated direction, with more expectations for settlement in the controls (15 percent) than in the experimentals (13 percent), but the difference is not statistically significant. This is consistent with the findings in chapter 3, in which analysis of the case information suggested CAMP causes no statistically significant reduction in briefed and argued cases.

The judges were also asked: Would you have expected a preargument conference to improve the quality of this appeal beyond that which was presented to you in briefs and oral argument? This question also attempted to cross-check CAMP effectiveness in the improvement of appeals. If CAMP significantly improves the quality of appeals, there should have been proportionally more expectations of improvement for controls than for experimentals. Table 23 summarizes these results.

**TABLE 23**
**Percentage of Judge Responses Affirming Expectation of Further Improvement**

| Experimental Group ($N = 254$) | | Control Group ($N = 86$) |
|---|---|---|
| 15% | | 14% |
| | $p = .55$ | |

The levels of expectation were nearly the same whether CAMP was applied or withheld, although the results are slightly counterintuitive (the judges' expectations were greater for experimentals than controls). About 15 percent in each group of observations noted an expectation of further improvement.

Once again, the judges were unable to discern any substantial benefits (at least any that have been ascribed to CAMP) from the program.

## Conclusion

This chapter has analyzed CAMP's effectiveness as viewed by judges who sat on appeals to which CAMP procedures were applied or withheld according to a truly random process. The primary question considered here was whether CAMP has an appreciable effect on the quality of appeals. Quality was measured by judge observations of the presence or absence of specific indicators or components of quality in appellate litigation. From the degree of

presence or absence of these indicators, one can make relative judgments about the quality of the experimental cases (to which CAMP procedures were applied) and that of the control cases (from which CAMP procedures were withheld).

Of the eight specific indicator questions, only one warranted the conclusion that the experimental group was superior in quality to the control group. The judges were also asked three questions about overall quality. These observations supported the view that CAMP causes a statistically significant improvement in the quality of counsel preparation and in the overall quality of the appeal. Further analysis suggests that the plan's effect on quality—either as observed in any of the specific indicator questions or in the three general evaluative questions—is of a fairly low order of magnitude.

This evidence is also consistent with the analysis of observations by each judge who participated in the evaluation. On some questions, judges observed significant differences in favor of CAMP (although the ratio sometimes favored the control cases). But no judge consistently observed the experimental cases to be substantially better in quality across more than a few indicators or general questions of quality. In sum, the evidence across all judges does not warrant the conclusion that CAMP substantially improves the quality of appeals in the Second Circuit.

. . . .

## VII. Conclusions and Recommendations

This evaluation has examined CAMP from a number of complementary perspectives. Each of these views is premised on the unique feature of this evaluation: the random assignment of appeals to experimental and control groups. This method provides the clearest proof of CAMP's effectiveness, compared to all other competing research approaches.

Based on the collected evidence concerning the 302 cases in the experiment, it would be unwarranted to conclude that CAMP reduces the burden on the judges. The reduction in burden was measured by three different standards: the proportion of adjudicated appeals, the proportion of appeals requiring some (minimal) judi-

cial effort, and the proportion of appeals that were fully briefed and argued.

The plan was also designed to improve the quality of appeals that were fully briefed and argued. Quality was measured by comparing judge observations of quality components in experimental and control groups. The evidence here warrants a conclusion that CAMP improves overall performance, but the magnitude of improvement is slight. The judge responses also corroborated the evidence, drawn from the cases, that there was no discernible difference between experimental and control cases in the likelihood of settlement.

The analysis of the attorney responses indicates that issues on appeal are infrequently modified and that the modifications that do occur are not brought about by CAMP. When issues are modified, however, CAMP enhances clarification. Approximately half the attorneys in this survey also indicated they met with their adversaries to discuss settlement, and about a quarter of them revealed they met to limit or otherwise narrow issues. This was true for attorneys in both the experimental and control cases. These observations suggest that the premise "But for CAMP, attorneys would not confer" is without empirical support.

A substantial proportion of the attorney respondents in the experimental group felt CAMP was a causative factor in the settlement or withdrawal of their appeals. This is consistent with the impression drawn from a separate survey of the bar, and it does not refute the evidence on CAMP effectiveness, which was based on analyses of the cases in the experiment and the judge observations of quality.

Many, if not most, of the tests used to evaluate CAMP performance generally point in favor of the plan. The experimental group frequently scored better than the control group, occasionally rising to statistically significant levels. Although such uniformity in the direction of the evidence may be just a product of chance, it nevertheless suggests that CAMP has some effect on reduction in judge burden and on quality. But these effects are of a fairly small mag-

nitude. The effect of the plan falls below preliminary suggestions;[26] indeed, if there is an effect, it is smaller than the more conservative estimates upon which the experiment was designed.

Is CAMP a failure? An easy answer is not possible. The evidence from this experiment certainly suggests that the plan does not yet live up to expectations. Frankly, it is difficult to find positive evidence of substantive value for the plan during the period of the evaluation. This does not warrant an immediate rejection of the CAMP idea, however. Further analysis may suggest conditions that could facilitate substantial effectiveness.

First, the initial enthusiasm for the CAMP idea was a product of judge participation in the preargument conference. Yet judge participation was not evaluated in this experiment. One can conclude only that staff-controlled conferences did not seem to significantly reduce the burden on the judges. This experiment suggests that judge participation may be needed to achieve the desired reduction in overall judge burden.

Second, judges and administrators ought to examine the extent to which adversaries in appellate litigation communicate with each other, before the CAMP idea is adopted or rejected. One premise of CAMP is that the appellate process is "lonely." The evidence from the attorney survey suggests this is not so. If there are jurisdictions where the premise holds, and further, where encouragement of adversary communication will facilitate informal resolution or improvement of litigation, a CAMP program may be beneficial.

The lack of support for one of the important premises of the plan overlaps another concern that some observers may offer to limit further application of the CAMP idea. The Second Circuit, it is said, is *sui generis*. It derives nearly all its business from New York City, and most of that business comes from the Southern District of New York, the biggest of all the federal trial courts. The nature of appellate litigation is shaped by New York's commercial activities, which no other court's jurisdiction can equal. If the CAMP idea cannot work in New York, where conditions seem

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[26] Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 Colum. L. Rev. 1094, 1100 n.17 (1974).

most favorable to the program—given the concentration of attorneys and the potential for conciliation in commercial claims—it cannot work anywhere. But this argument presumes that the concentration of attorneys and litigation is advantageous to the program. It is at least arguable that this concentration is the reason for the substantial amount of communication between adversaries. In other circumstances—where greater physical distance separates an attorney from the courthouse and from his adversary—CAMP procedures may be useful.

Third, this evaluation is incomplete in some respects. Although it covers many of the central issues, others remain to be analyzed. One of these other issues was considered in the research design and suggested by a number of attorneys responding to the survey, but lack of satisfactory evidence prevented its empirical verification. Essentially, the issue in question is as follows. A plausible side effect from the plan is that it would encourage attorneys to pursue appeals that otherwise would not be pursued. The availability of a court-suggested compromise might return to a losing plaintiff a part of his investment in the litigation. CAMP might also encourage a losing defendant to take an appeal to diminish a trial court judgment through a settlement suggested by the appellate court. In short, there is something to be gained by appealing, at the cost of filing the notice of appeal and paying the docket fee. If CAMP were to induce appeals, the plan would be self-fulfilling. It would encourage the filing of appeals that CAMP would then resolve, but the plan would not in fact accomplish very much for the court.

The evidence needed to test this untoward by-product would be far less precise than the evidence drawn from this controlled experiment. At best, evidence would be suggestive, not probative, of the possibility of induced appeals.

The first step would be to measure and analyze the rate of appeal in civil cases for a period of years preceding the adoption of the plan. If this rate of appeal were fairly constant for the years prior to CAMP, but increased sharply for the years after the plan went into operation, it might be suggested that induced demand had been fostered. Unfortunately, the information needed to test this proposition is not readily available. Further experimentation with

the CAMP idea should incorporate the induced demand issue into the research design, and efforts should be made to obtain the necessary evidence to confirm or disconfirm the proposition.

Fourth, Circuit Executive Robert D. Lipscher and his staff have collected additional information about the 302 cases in the CAMP experiment, in an effort to determine the circumstances under which the CAMP idea might fruitfully be continued. The analysis that follows is based on these data.

According to the theory justifying CAMP efforts at settlement, appeals involving money judgments should be the appeals most amenable to informal resolution. When money is not the central issue in a dispute (as in "public interest" litigation), the chances for compromise seem much more remote. The matters in dispute were not central to this evaluation, because it was presumed that cases involving money judgments would be selected for the preargument conference. . . .

The 302 appeals were sorted into two mutually exclusive categories: 77 of the 302 appeals (25 percent) belong to the first category, in which a money judgment was awarded by the district court; and the remaining 225 appeals (75 percent) belonged to the other, in which no money judgment was awarded. It was not possible to determine from the additional information whether money was at issue but not awarded. Certainly, there were appeals in which money damages were sought but not awarded. These appeals were included in the "no money judgment awarded" category.

If CAMP is especially effective in the informal resolution of disputes involving the award of money, there should have been significantly fewer briefed and argued appeals in the experimental group than in the control group, of all money judgment appeals. Table 24 presents these data.

. . . The evidence points in the anticipated direction, with 5 percent fewer experimental cases being briefed and argued. This difference is not statistically significant, however. A difference of this magnitude or greater could occur by chance about 40 percent of the time. Because of the small number of appeals analyzed here, the confidence interval in which the true difference between groups would be "captured" is considerable. About nine out of ten times,

the true difference will fall in the interval from – 27 percent to + 20 percent. Given this wide range of values, it seems better to suspend judgment than to conclude that CAMP is without any effect whatsoever.

**TABLE 24**
**Appeals in Which Money Judgments Were Awarded in the District Court**

| | Experimental Group* ($N$ = 62) | Control Group ($N$ = 15) |
|---|---|---|
| Percentage of appeals that terminated after briefing and oral argument | 48% | 53% |
| | $p$ = .40 | |

*Includes one case that was settled after oral argument.

It should be noted that a surprisingly small proportion of appeals in the experiment (about 25 percent) involved money judgments. If the staff counsel routinely selected money judgment cases for inclusion in the experiment, as descriptions of the plan imply, it seems that an expansion of CAMP activities to additional money judgment cases does not hold much promise.

What differences were observed across groups when money judgments were not awarded? Table 25 summarizes the evidence.

Again, slightly fewer experimental cases than control cases were perfected through briefing and oral argument when money judgments were not at issue. This difference is not statistically significant, and, therefore, it is unwarranted to conclude that the program effectively reduces the burden on the judges.

Another suggestion has emerged from these data: It concerns the stage in the course of the trial court litigation at which the appeal is taken. Arguably, the benefit of CAMP intervention varies with the willingness of the parties to compromise. Such compromises might be more readily accepted after the adversaries have been put to the ordeal of a trial and must confront, on appeal, a decision of judge and/or jury. At that point, the trial has, in effect, placed all

the cards on the table. The estimation of risk in pursuing an appeal would seem more realistic and calculable following a final decision after trial. In an appeal from a pretrial judgment, however, the district court's decision might suggest that the issues were so clear as to warrant summary disposition. The likelihood of altering such a decision on appeal would therefore seem small. Given a pretrial judgment, it seems there would be little likelihood that the winning party would compromise, because of his higher expectation of affirmance on appeal. If the appeal were taken from an order of the district court, the merits of the dispute might have yet to be addressed. Hence, there would seem to be greater uncertainty about how the matter will be resolved. Why should the parties hammer out a settlement when there is a substantial chance of vindication by judge or jury?

**TABLE 25**
**Appeals in Which No Money Judgments Were Awarded in the District Court**

| | Experimental Group* ($N$ = 163) | Control Group ($N$ = 62) |
|---|---|---|
| Percentage of appeals that terminated after briefing and oral argument | 56% | 58% |
| | $p$ = .40 | |

*Includes one case that was settled after oral argument.

This speculation suggests that appeals from trial judgments would be most amenable to CAMP procedures, while appeals from orders and pretrial judgments would be less likely candidates. At what stage in trial litigation were appeals taken for the 302 cases in the CAMP experiment? In 69 of the 302 cases (or 23 percent), appeals were taken from orders. Appeals arose from pretrial judgments in 116 out of the 302 cases (or 38 percent of the total), and in the remaining 117 cases (or 39 percent), appeals were taken from trial judgments.

Table 26 shows the effects of the plan on appeals arising from district court orders. If CAMP is effective, there should have been a substantially smaller proportion of briefed and argued appeals in the experimental group than in the control group.

**TABLE 26**
**Appeals from Orders**

| | Experimental Group* ($N = 46$) | Control Group ($N = 23$) |
|---|---|---|
| Percentage of appeals that terminated after briefing and oral argument | 46% | 48% |
| | $p = .48$ | |

*Includes one case that was settled after oral argument.

As shown in the table, there were fewer briefed and argued appeals in the experimental group, but the difference of only 2 percent is not sufficient to rule out chance as the explanation. The result seems consistent with previous speculation that CAMP effects would not be substantial here.

Table 27 examines the effectiveness of the plan for appeals arising from pretrial judgments.

**TABLE 27**
**Appeals Arising from Pretrial Judgments**

| | Experimental Group ($N = 85$) | Control Group ($N = 31$) |
|---|---|---|
| Percentage of appeals that terminated after briefing and oral argument | 59% | 55% |
| | $p = .66$ | |

The results reported in the table are counterintuitive. Four percent more of the experimental pretrial judgment appeals than the

equivalent control cases survived through briefing and oral argument. Previous speculation would suggest that CAMP should have minimal effects here, too. These results are inconsistent with that speculation.

What is the evidence for appeals taken from trial judgments, the stage at which appeals may be most amenable to CAMP intervention? Table 28 presents the evidence.

**TABLE 28**
**Appeals from Trial Judgments**

| | Experimental Group* ($N = 94$) | Control Group ($N = 23$) |
|---|---|---|
| Percentage of appeals that terminated after briefing and oral argument | 53% | 70% |
| | $p = .07$ | |

*Includes one case that was settled after oral argument.

According to the data in the table, there were 17 percent fewer briefed and argued appeals in the experimental group than in the controls. The difference between groups is greatest here. Because of the smaller number of cases in this part of the analysis (117 out of 302), this 17 percent difference is not statistically significant. Again, it would be unwarranted to conclude the plan is effective in reducing judge burden, but it would also be unwise to conclude that CAMP has no effect whatsoever.

The results across each stage—appeals from orders, appeals from pretrial judgments, and appeals from trial judgments—are nearly consistent with previous speculation. Although clearly not probative, the data suggest CAMP's promise may be fulfilled by a concentrated effort on appeals taken after trial judgment. If it is assumed that staff counsel selected every appeal in which there was a chance of informal resolution, it is not unreasonable to infer that most of the appeals from trial judgments that were amenable to compromise were "captured" by the experiment. In one year of experience, roughly 40 percent of the cases fell into the "appeals from

trial judgment" category. If CAMP settlement activities were to be concentrated only on these (arguably) more promising appeals, staff counsel's remaining time could be used effectively in other areas. This evidence also suggests that jurisdictions with substantially more appeals from trial judgments than the Second Circuit might find it useful to experiment with CAMP-type procedures on a full-time basis.

## Conclusion

No one can deny that appellate procedural reforms should be carefully and critically examined. Generation of the best possible evidence to illuminate the critical issues may move even the most ardent supporters and the most vociferous detractors to recognize and accept the success (or, perhaps, the failure) of such reforms. This enlightened attitude will guarantee better decisions about how, when, and where to administer justice on appeal.

The Second Circuit's willingness to innovate with creative proposals for troublesome appellate problems must be commended and encouraged. That CAMP does not yet live up to its promise is valuable knowledge, for the problem CAMP addressed still remains, and can be approached anew with as much—if not more—enthusiasm and support as before.

This evaluation may suggest a replication of CAMP in a different setting, a fundamental modification of the plan, or, perhaps, an entirely new approach. Whatever steps might now be taken should be based on rigorously constructed evaluation. Without it, effective reform of the appellate process will remain an elusive goal.

# Appendix A: CAMP Rules

These rules were amended on October 23, 1975, in order to place within the ambit of the plan review of administrative agency orders, applications for enforcement, and appeals from the Tax Court. These changes were effective as of January 1, 1976. They did not affect the plan or its administration during the evaluation.

# UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## Civil Appeals Management Plan

*The United States Court of Appeals for the Second Circuit has adopted the following plan to expedite the processing of civil appeals, said plan to have the force and effect of a local rule adopted pursuant to Rule 47 of the Federal Rules of Appellate Procedure.*

1. *Notice of Appeal, Transmission of Copy and Entry by Court of Appeals.*

*Upon the filing of a notice of appeal in a civil case, the clerk of the district court shall forthwith transmit a copy of the notice of appeal to the Clerk of the Court of Appeals, who shall promptly enter the appeal upon the appropriate records of the Court of Appeals.*

2. *Appointment of Counsel for Indigent, Advice by District Court Judge.*

*If the appeal is in an action in which the appellant may be entitled to the discretionary appointment of counsel under 18 U.S.C. §3006(A)(g) but has not had such counsel in the district court and there has been any indication that he may be indigent, the judge who heard the case shall advise the Clerk of the Court of Appeals whether in his judgment such appointment would be in the interests of justice.*

3. *Docketing the Appeal; Filing Pre-argument Statement; Ordering Transcript.*

*Within ten days after filing the notice of appeal, the appellant shall cause the appeal to be docketed by taking the following actions:*

*a) filing with the Clerk of the Court of Appeals and serving on other parties a pre-argument statement (in the form*

*attached hereto as Form C with such changes as the Chief Judge of this Court may from time to time direct) detailing information needed for the prompt disposition of an appeal;*

*b) ordering from the court reporter on a form to be provided by the Clerk of the Court of Appeals (Form D), a transcript of the proceedings pursuant to FRAP 10(b). If desirable the transcript production schedule and the portions of the proceedings to be transcribed shall be subject to determination at the pre-argument conference, if one should be held, unless the appellant directs the court reporter to begin transcribing the proceedings immediately;*

*c) certifying that satisfactory arrangements have been or will be made with the court reporter for payment of the cost of the transcript;*

*d) paying the docket fee fixed by the Judicial Conference of the United States pursuant to 28 U.S.C. 1913 (except when the appellant is authorized to prosecute the appeal without payment of fees).*

*4. Scheduling Order; Contents.*

*a) In all civil appeals the staff counsel of the Court of Appeals shall issue a scheduling order as soon as practicable after the pre-argument statement has been filed unless a pre-argument conference has been directed in which event the scheduling order may be deferred until the time of the conference in which case the scheduling order may be entered as part of the pre-argument conference order.*

*b) The scheduling order shall set forth the dates on or before which the record on appeal, the brief and appendix of the appellant, and the brief of the appellee shall be filed and also shall designate the week during which argument of the appeal shall be ready to be heard.*

*5. Pre-argument Conference; Pre-argument Conference Order.*

*a) In cases where he may deem this desirable, the staff counsel may direct the attorneys to attend a pre-argument*

*conference to be held as soon as practicable before him or a judge designated by the Chief Judge to consider the possibility of settlement, the simplification of the issues, and any other matters which the staff counsel determines may aid in the handling or the disposition of the proceeding.*

*b) At the conclusion of the conference the staff counsel shall enter a pre-argument conference order which shall control the subsequent course of the proceeding.*

*6. District Court Extension of Time; Notification by Clerk.*

*In the event the district court grants an extension of time for transmitting the record pursuant to FRAP 11(d), the clerk of the district court shall promptly notify the Clerk of the Court of Appeals to that effect.*

*7. Non-Compliance Sanctions.*

*a) If the appellant has not taken each of the actions set forth in paragraph 3 of this Plan within the time therein specified, the appeal may be dismissed by the Clerk without further notice.*

*b) With respect to docketed appeals in which a scheduling order has been entered, the Clerk shall dismiss the appeal upon default of the appellant regarding any provision of the schedule calling for action on his part, unless extended by the Court. An appellee who fails to file his brief within the time limited by a scheduling order or, if the time has been extended as provided by paragraphs 6 or 8, within the time as so extended, will be subjected to such sanctions as the Court may deem appropriate, including those provided in FRAP 31(c) or FRAP 39(a) or Rule 38 of the Local Rules of this Court supplementing FRAP or the imposition of a fine.*

*c) In the event of default in any action required by a pre-argument conference order not the subject of the scheduling order, the Clerk shall issue a notice to the appellant that the appeal will be dismissed unless, within ten days thereafter, the appellant shall file an affidavit showing good cause for the default and indicating when the required action will*

*be taken. The staff counsel shall thereupon prepare a recommendation on the basis of which the Chief Judge or any other judge of this Court designated by him shall take appropriate action.*

*8. Motions.*

*Motions for leave to file oversized briefs, to postpone the date on which briefs are required to be filed, or to alter the date on which argument is to be heard, shall be accompanied by an affidavit or other statement and shall be made not later than two weeks before the brief is due or the argument is scheduled unless exceptional circumstances exist. Motions not conforming to this requirement will be denied. Motions to alter the date of arguments placed on the calendar are not viewed with favor and will be granted only under extraordinary circumstances.*

*9. Submission on Briefs; Assignment to Panel.*

*When the parties agree to submit the appeal on briefs, they shall promptly notify the Clerk, who will cause the appeal to be assigned to the first panel available after the time fixed for the filing of all briefs.*

*10. Effective Date.*

*The foregoing Civil Appeals Management Program shall be applicable to all civil appeals to the Court of Appeals from the district courts in the Second Circuit, in which the Notice of Appeal is filed on or after April 15, 1974.*

*By Order of the Court:*

/s/ IRVING R. KAUFMAN
*Chief Judge*

***April 9, 1974***

# Appendix B: Judge Questionnaire

## CAMP Questionnaire Form B

Please answer the following questions based upon your experience in:

_____ v._____

Docket Number: _____

Date Argued: _____

1. Was the preparation of appellant's counsel
   ____ better than average
   ____ average
   ____ worse than average for cases of approximately the same degree of complexity?
2. Was the preparation of appellee's counsel
   ____ better than average
   ____ average
   ____ worse than average for cases of approximately the same degree of complexity?
3. Were the issues raised in the appeal clearly brought out in the briefs? YES ____ NO ____
4. Were the issues raised in the appeal clearly brought out in the argument? YES ____ NO ____
5. Were undisputed or extraneous issues briefed?
   YES ____ NO ____
6. Were undisputed or extraneous issues argued?
   YES ____ ____NO
7. Were any briefed issues redundant? YES ____ NO ____
8. Were any argued issues redundant? YES ____ NO ____
9. Were any essential issues omitted from the briefs?
   YES ____ NO ____
10. Did the court have to direct counsel to critical issues during argument? YES ____ NO _____

Some appeals have received CAMP procedures, others have not. In answering the remaining questions, please do not check the record to determine whether CAMP procedures have been applied in this appeal.

11. Do you know whether CAMP procedures (scheduling orders and/or preargument conferences) have or have not been applied in this appeal? DO KNOW ____ DON'T KNOW ____
12. Overall, how would you rate the quality of this appeal with respect to the presentation of issues (both written and oral) to the court?
    ____ above average
    ____ average
    ____ below average
13. Would you have expected a preargument conference to improve the quality of this appeal beyond that which was presented to you in briefs and oral argument? YES ____ NO ____
    If you answered YES, please indicate the way(s) the quality of this appeal could have been improved. [E.g., the number of issues presented for decision could have been reduced.]
14. Would you have expected a preargument conference before the filing of briefs to result in a settlement or a withdrawal of this appeal? YES ____ NO ____

If you have any comments about this appeal or about this questionnaire, please enter them below. Thank you for completing this questionnaire.

# A REEVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN[1]

**Anthony Partridge and Allan Lind**
**August 1983**
**(FJC-R-83-2)**

## Introduction

The Civil Appeals Management Plan of the United States Court of Appeals for the Second Circuit . . . began operation in April 1974. For a period of about a year, from October 1974 to October 1975, appeals selected by staff counsel Nathaniel Fensterstock as promising candidates for CAMP treatment were randomly divided, for evaluation purposes, into a group of 225 appeals that in fact received the treatment and a group of 77 appeals that were processed in accordance with preexisting procedures of the court. An analysis of the progress of these 302 appeals, supplemented by questionnaires addressed to lawyers involved in the appeals and to judges who heard the appeals that reached argument, formed the basis for an evaluation of the program published by the Federal Judicial Center in 1977.[2]

. . . .

The court continued its commitment to the CAMP program and, indeed, expanded it in 1977 by appointing a second staff counsel, Frank J. Scardilli. In 1978, a second experiment was begun, in

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[1] Some passages of this report relating to the original CAMP evaluation have been omitted because they are more fully available in the version of the Goldman (1977) report that is reprinted in this volume. Other material omissions include much of the original chapter 6, on the results of a questionnaire probing lawyers' reactions to the program, and appendixes B and C. Many footnotes have been omitted, and the remaining footnotes have been renumbered. Ed.

[2] J. Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration (Federal Judicial Center 1977).

which CAMP treatment was withheld from one-third of the appeals that would otherwise have been subject to it. This experiment was developed by Robert D. Lipscher, then the circuit executive, and Ida Smyer, then the senior staff attorney, with the assistance of a Research Advisory Committee whose members were Maurice Rosenberg and Allen H. Barton of Columbia University and Alvin K. Hellerstein of the New York bar. It was implemented by court of appeals staff under the direction of Ms. Smyer.

The experiment was intended to apply to appeals docketed in the year beginning July 1, 1978. It was abandoned, however, with respect to appeals docketed after January 19, 1979, because of the reluctance of the court to continue to exempt one-third of the appeals from the CAMP program.

Immediately before the period of the Goldman experiment, the practice had been for the staff counsel to call preargument conferences only in appeals that he thought, after reviewing papers filed in the case, to be promising candidates for conferencing. The Goldman evaluation therefore provided for both experimental and control groups to be drawn from appeals considered promising by Mr. Fensterstock. In contrast, in 1978, immediately before commencement of the second experiment, the practice was to provide CAMP treatment to all cases in certain objectively defined categories, without the use of a judgmental screen. The design of the second experiment reflected that practice. Hence, although the 1978-79 sample was selected from cases docketed over six and one-half months while the earlier sample was selected from cases docketed over a year, the 1978-79 sample is in fact substantially larger. Some 470 appeals were included in the study, compared with 302 in the earlier evaluation.

In December 1980, the circuit executive for the Second Circuit, Steven Flanders, asked the Research Division of the Federal Judicial Center to undertake an analysis of the data that had been collected by court personnel in the second experiment. The present report is the product of that request.

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# I. Findings and Conclusions

Our analysis of the data from the second experiment indicates that the Civil Appeals Management Plan has a number of beneficial effects. The program does result in the settlement or withdrawal of appeals that would otherwise have to be considered by three-judge panels, an effect that must generally be regarded as beneficial to litigants in addition to its value in assisting the court to handle its workload. The program almost certainly results in faster disposition, not only of appeals that are settled or withdrawn as a result of staff counsel intervention but also of appeals that would have been settled in any event; it probably results in faster disposition of appeals that are argued. Lawyers find that the CAMP conferences help improve the quality of briefs and argument in some appeals, and in some they find staff counsel helpful in resolving procedural problems. Most lawyers who practice before the court of appeals regard the program favorably, and some are lavish in their praise.

The program also has costs, of course. For the court itself, the principal costs are the salaries of staff counsel and related overhead. For litigants, there are costs involved in having their lawyers attend the CAMP conferences. And if unfavorable reaction by members of the bar is a cost to be weighed in the balance, it should be noted that some lawyers who practice before the court of appeals are offended by what they regard as undue pressure to settle.

The present evaluation was designed principally to determine whether the program produces the benefits expected of it. We do know something about the program's cost to the court and we have some reactions to the program from lawyers, but there are no data available on the cost of the program to litigants.

Although we can be quite confident that the hoped-for benefits have materialized in some degree, there remains a wide range of uncertainty about their magnitude. This uncertainty is primarily a result of the limited number of appeals included in the experiment. With respect to data based on the questionnaire responses of lawyers who appeared in connection with appeals in the experiment, additional uncertainty is created by the fact that only about half the lawyers responded to the questionnaire. We have no solid

basis for assessing whether the views of the lawyers who responded were representative of the views of all the lawyers in the appeals included in the experiment and, if not, the direction of any bias that may have been introduced.

The best single estimate we can derive from the experimental data is that the program diverts from the argument calendar about 10 percent of the appeals that are eligible for CAMP. We estimate that about 60 percent of the appeals in the eligible group would reach oral argument or submission on the briefs in the absence of CAMP intervention, with the remainder disposed of through settlement, withdrawal, or dismissal. Our best estimate is that CAMP drops the argument rate to 50 percent. If these estimates are on target, the change would represent a reduction of about one-sixth in the number of these appeals argued to the court: Of each sixty appeals that would have been argued (whether orally or by submission), ten are taken off the calendar. For one of the two staff counsel, the best estimate is higher, suggesting a reduction of one-fourth in the number of eligible appeals that reach argument panels. It bears emphasis that these estimates of the program's effect are not based on crediting CAMP with settling every conferenced case that is in fact settled. They are estimates that take full account of the fact that many appeals would settle even in the absence of the program.

About one thousand appeals a year are currently assigned to CAMP, so the best projection from our 1978-79 data is that CAMP currently diverts about one hundred appeals a year from argument. Viewed in terms of the court's entire calendar—including criminal appeals and others not eligible for the CAMP program—this figure represents a reduction of about 8 percent from the number of appeals that would have been argued in the absence of CAMP in the 1982 statistical year.

Given a sample that included 318 appeals assigned to CAMP and only 152 assigned to a control group, the possible error in these best estimates remains very large. On the assumption that one thousand appeals are assigned to CAMP treatment each year, and putting aside the problems of projecting to a 1983 universe from a 1979 sample, we can say that the probability is 95 percent that

CAMP disposes of something between 2 and 192 appeals annually. We can say that the probability is about two-thirds that it disposes of something between 50 and 147 of them.

With regard to the elapsed time to disposition of an appeal, our best single estimate is that the program reduces the average time by about six weeks. The accuracy of this estimate is affected not only by the sample size but by the fact that the sample did not include a full year's cycle of filings; our data may not accurately reflect seasonal variations in CAMP's effect on the pace of appellate litigation. If the sample were representative of the year, we could say with 95 percent confidence that the average reduction in disposition time is somewhere between three weeks and nine and one-half weeks. This reduction is partly a by-product of the faster disposition that is likely to result when a case is diverted from the argument calendar and disposed of through settlement or withdrawal. It is also almost surely the case that appeals that would have been settled or withdrawn in any event are disposed of more quickly as a consequence of CAMP intervention. It is less clear that CAMP accelerates the pace of appeals that go to argument. If there was such an effect during the period of the experiment, it was almost certainly measured in terms of weeks rather than months.

Lawyers who practice before the Court of Appeals for the Second Circuit seem to regard settlement as the major purpose of CAMP. It seems clear, even taking account of the problem of the limited response to the questionnaire, that on the whole they favor the program and, if given the choice, would rather have their appeals conferenced than not. A number of them, as has been noted above, volunteered lavish praise for the program and for the individual staff counsel. On the other hand, about 4 percent of the questionnaire respondents volunteered lavish damnation, indicating that they took offense at what they regarded as inappropriate pressure. The level of strongly felt discontent among members of the bar may be either higher or lower than that number suggests. Since staff counsel are often in the position of forcefully expressing their independent assessment of the merits of a lawyer's case—frequently in the presence of opposing counsel—it is not surprising that some lawyers find the process annoying or even humiliating.

Whether the frequency of strongly felt discontent could be reduced without diminishing the program's effectiveness is something we cannot say. Some level of discontent seems inevitable.

. . . .

## Implications for the Second Circuit

Although reduction in the argument rate is not the only objective of the Civil Appeals Management Plan, it appears to us that the program's impact on the argument rate is nevertheless the major question to be asked about the program's success. It was the hoped-for reduction in the number of appeals presented to the court that was the principal justification for the program initially, and it is this reduction—it seems to us—that must provide the continuing justification for maintaining the program in its present form. If the court were interested only in the other benefits that staff counsel provide, it is doubtful indeed that two experienced and (by government standards) highly paid lawyers would be employed and given staff assistance to conduct mandatory face-to-face conferences with the lawyers for the parties to an appeal. If it were concluded that substantial reduction in the number of arguments was an unattainable objective, major redesign of the program would have at least to be seriously considered.

While the present evaluation allows us to state confidently that the program does reduce the number of appeals that reach argument, it leaves considerable uncertainty about the magnitude of that reduction. The policy question for the court is how to deal with that uncertainty. We have no serious doubt that if the decision were ours, we would maintain the program in essentially its present form. Although it comes in for some strongly expressed criticism, it is generally well received by members of the appellate bar. It achieves some reduction in the number of arguments, and the reduction may well be very substantial. And while the other program benefits standing alone would probably not warrant a continuation of the program in its present form, their existence contributes to the conclusion that the program is probably worth its cost.

We do believe that the problems of out-of-town lawyers deserve to be taken seriously. It does not diminish the program's ac-

complishments to note that if our single best estimate is accurate, ten appeals are put through the CAMP procedure for each one that staff counsel settle; where travel expenses and time are involved, the cost to the parties in the other nine appeals may be considerable.

Both staff counsel state that they have responded to this concern, and that they agree to telephone conferences considerably more often today than they did at the time of the experiment. Mr. Scardilli reports that he now schedules telephone conferences routinely if out-of-town lawyers request them. We have no basis for an independent judgment about the extent to which the more liberal use of the telephone has alleviated the problems of out-of-town lawyers. The telephone conference is quite probably a less effective settlement mechanism than a face-to-face conference, however, and we think it should not lightly be accepted as the only way of dealing with this problem.

One solution that might work for some appeals would be to conduct conferences outside New York from time to time. This practice is specifically contemplated by the court's June 1982 guidelines, but virtually all conferences are still held in New York. A regular policy of holding conferences in other locations might well require a change in the system for assigning appeals to staff counsel, so that one staff counsel would be assigned all the cases, for example, to be conferenced in New Haven. We have not collected information about the frequency with which lawyers are from outside New York City or about the frequency with which all lawyers in a case are from the same area. But we believe this possibility is worthy of exploration. It would no doubt entail delaying the conferences in some appeals, but might nevertheless be preferable to increased use of the telephone.

Another approach might be to increase scheduling flexibility to accommodate the schedules of the out-of-town lawyers, so that they would more often be able to combine the CAMP conference with other business requiring their presence in New York. Once again, the acceptance of some delay in conferencing is implicit.

. . . .

## Implications for Other Courts of Appeals

In considering the transferability of CAMP to other circuits, it is important to consider possible differences in the environment in which the program would operate. The two major issues that come to mind are backlog and geography.

The Court of Appeals for the Second Circuit has a long history of disposing of appeals relatively promptly. It was a relatively fast court both before CAMP was inaugurated and during the period of the second experiment, and it is a relatively fast court today. One problem in considering the transferability of the CAMP experience is that it may not work in the same way in a backlogged court.

To a court that has a backlog of cases awaiting argument, the CAMP objective of accelerating lawyers' readiness for argument has no immediate relevance.[3] But for such a court, the possibility of removing some appeals from the argument queue has to be an enticing one. The data from the Second Circuit suggest the possibility, at least, of disposing of substantial numbers of appeals in this manner. But it is not wholly clear that the settlement experience of a fast court is transferable to a backlogged court. Some parties to litigation will have much less incentive to settle an appeal before briefing when a long delay can be anticipated between briefing and the decision in the case. There are no doubt also cases in which both parties would like to see the matter disposed of and in which the prospect of delay becomes an impetus to settlement rather than an obstacle. We simply do not know whether, in the face of these differences, CAMP-like programs would increase the settlement rate in backlogged courts.

The problem of geography, of course, is that many other circuits are less compact than the Second, and the lawyers who practice before them are more widely dispersed. In considering whether

[3] In his study of the Seventh Circuit's TRACE program, Goldman found that conferenced appeals reached argument more quickly than appeals in a control group. J. Goldman, The Seventh Circuit Preappeal Program: An Evaluation 26-28 (Federal Judicial Center 1982). But there can be no doubt that the conferenced cases were accelerated at the expense of unconferenced cases; they were simply given preferential treatment in getting on the argument queue. It is hard to see what interest is served by such a practice.

to adopt the CAMP model, such courts will have to consider the extent to which it is practicable to require face-to-face conferences. The feasibility of having the staff counsel ride circuit is worthy of investigation in that regard. As has been noted above, it is possible to conduct conferences over the telephone, but the telephone conferences are probably less effective in producing settlements than face-to-face conferences.

Although we cannot affirm with confidence that the CAMP program has a large effect on the argument rate even in the Second Circuit, the effect is probably substantial and may be very large indeed. As has already been observed, our best single estimate is that the program disposes of one-sixth of the appeals assigned to it that would otherwise have gone to argument, and the best estimate for one staff counsel is one-fourth. Given the possibility of impact of these magnitudes, it seems to us that other courts of appeals would be well advised to experiment with similar efforts to encourage settlement or withdrawal of appeals. We believe, however, that careful, controlled experimentation is the appropriate course for a court that would introduce the program in an environment substantially different from that of the Second Circuit. There is no question at all in our minds that conferences of the CAMP type can be the *occasion* for producing settlements in any court. That being the case, both the court employee conducting the conferences and the lawyers for the parties are quite likely to believe that the conferences are producing settlements, even if in fact the conferences are merely accelerating decisions that would have been made in any event. If the desirability of the program turns on whether settlements are really produced, there can be no substitute for a well-designed control group experiment.

We recognize, of course, that experimentation is a form of equivocation about the immediate policy decision. As the uncertainty we have reported here suggests, a considerably larger sample would be required if reasonably precise conclusions are to be drawn. A total sample of 1,500 or more appeals would be required, for example, to permit us to say with 95 percent confidence that the true difference in argument rate between CAMP appeals and controls was within about 5 percentage points of the difference ob-

served in the experiment. Moreover, in courts with significant backlog, there may be substantial delay before it can be known whether the argument rate has been reduced. However, given the substantial range of uncertainty about the magnitude of CAMP effects in the Second Circuit, and the further uncertainty that would be added by introducing the program in other contexts, we believe that a balanced decision for most other courts of appeals would be to institute CAMP-like programs but not to go full speed ahead.

## II. Description of the CAMP Program

As has already been observed, the Civil Appeals Management Plan was inaugurated by the Court of Appeals for the Second Circuit in 1974. In the intervening years, it not only has expanded through the addition of a second staff counsel, but has evolved in a number of ways. Nevertheless, the two features that were central to the plan in 1974 remain central today: first, the use of conferences conducted under the auspices of staff counsel in which participation by the lawyers for appellants and appellees is mandatory and, second, the use of scheduling orders, issued by staff counsel, to impose briefing schedules that differ from case to case depending on the needs of the particular appeal and the argument schedule of the court.[4]

Since 1974, a number of other federal courts of appeals have inaugurated programs that include prebriefing conferences, and at least one has borrowed the Second Circuit's title and called its program a Civil Appeals Management Plan. Prebriefing conferences are also used in a number of state appellate courts. It is important to recognize that the programs adopted by other courts, although they may have a surface similarity to CAMP in the Second Circuit, do not necessarily have the same objectives. In the Seventh and Ninth Circuits, for example, prebriefing conferences are held in which settlement of appeals is not a major goal. To the best of our knowl-

[4] During the 1978-79 period embraced by the second experiment, the CAMP program also included rules, whose operation is not considered in the present study, designed to limit the period from the filing of a notice of appeal to the docketing of the appeal.

edge, only the Eighth Circuit employs scheduling orders in a manner similar to that used in the Second Circuit; indeed, most of the courts of appeals have backlogs of appeals that are ready for argument and are not in a position to accelerate the consideration of appeals by accelerating their readiness for argument. Thus, it should be understood that the present study is not about prebriefing conferences or civil appeals management plans generically, but is a study of a particular plan that has particular goals.

In the Second Circuit, four major objectives can be identified:

*Encouraging the resolution of appeals without court action.* This is accomplished through efforts to foster settlements and efforts to persuade appellants to withdraw appeals that appear to have jurisdictional defects or to be without substantive merit.

*Accelerating the consideration and disposition of those appeals that go to argument.* This is done through the use of scheduling orders, issued by staff counsel, that tailor briefing schedules to the needs of the particular appeal and the argument schedule of the court.

*Clarifying the issues in appeals that go to argument.* Such clarification, it is hoped, is one product of the CAMP conferences, which provide opposing lawyers an opportunity to test arguments on each other and on a neutral third party.

*Resolving a variety of procedural matters in an informal manner and without the necessity for judicial participation.* These matters range from determining the contents of the joint appendix to arranging agreements that the judgment below will be informally stayed pending disposition of the appeal.

. . . .

The main elements of the CAMP program are managed by the two staff counsel—court employees who devote their full time to CAMP activity. These positions have been established at grade JSP-15 (which currently has a salary range of $48,553 to $63,115). Each staff counsel is provided a full-time legal assistant who also provides secretarial support. The total cost of the program to the court is estimated by court personnel at approximately $200,000 annually.

The staff counsel positions are still held by their original occupants, both of whom were experienced litigating lawyers before assuming this function. The scope of the program and its procedures today are for the most part unchanged from 1978, when the second experiment was initiated. CAMP applies to all civil matters docketed in the court except for original proceedings (such as petitions for mandamus), prisoner petitions, and summary enforcement actions of the National Labor Relations Board. In addition to the docketed matters, some predocketing motions are referred to staff counsel by the clerk's office. In the case of appeals taken pro se, the role of CAMP is limited to the issuance of scheduling orders by the clerk's office, and no prebriefing conferences are held. In the present evaluation, the application of the program to pro se appeals and predocketing motions has not been studied.[5]

Cases are generally assigned to staff counsel on the basis of their docket numbers: Appeals with odd docket numbers are assigned to Mr. Scardilli, and those with even docket numbers to Mr. Fensterstock. Exceptions are made so that appeals in consolidated groups stay together, following the assignment of the lead case, and cases related to matters previously handled by staff counsel are assigned to the staff counsel already familiar with the issues.

The two staff counsel work individually rather than as a team, although they necessarily fill in for one another from time to time because of illness or other causes of unavailability.

Characteristically, the staff counsel to whom an appeal is assigned issues a scheduling order and a conference order within a few days after receiving papers in the case from the clerk's office. During the period covered by the study, the clerk forwarded papers upon the docketing of the appeal, which occurred only after the CAMP forms had been filed; a scheduling order was often issued on the day of docketing or the next business day thereafter, and it was rare that more than a few days elapsed. As a result of the rules change noted earlier, appeals are now docketed without regard to

[5] At times during the life of the program, staff counsel have conferenced pro se appeals in which the appellant was a lawyer. No such appeals are included in the present experiment.

whether forms C and D have been filed. Since the clerk forwards papers to staff counsel only after receipt of these forms, the elapsed time between docketing and the issuance of scheduling orders tends to be greater today than it was at the time covered by the study. It is to be noted, however, that this change does not represent a lengthening of the entire appellate process; it is simply a result of the fact that formal docketing takes place earlier in the process than it used to.

The scheduling order sets forth a deadline for the filing of the record by the appellant if it has not already been filed, the schedule for appellant's and appellee's briefs, and a date on which the parties are to be ready for argument. The conference order sets forth a date and time for a CAMP conference.

Although rule 11 of the Federal Rules of Appellate Procedure contemplates that the clerk of the district court will "assemble and transmit the record," it is the practice in the Second Circuit for the appellant's lawyer to prepare the record on appeal, and the role of the district court clerk is limited to transmitting the record to the court of appeals. In this context, it is practicable to impose upon the appellant a deadline for filing the record, even though the rules impose the duty on the clerk of the district court. Delay by court reporters in preparing transcripts is of course outside the control of the appellant and occasionally necessitates amendment of the scheduling order.

The CAMP conference is generally scheduled for well in advance of the due date of the appellant's brief, often before the date for filing the record. In the period of the second experiment, the average (mean) time from docketing to conference in cases assigned to Mr. Fensterstock was seventeen days, and in cases assigned to Mr. Scardilli twenty-three days. The objective of staff counsel is to hold the conference before the parties have made a substantial investment in the appeal. Participation by the attorneys is mandatory if a conference is deemed desirable by staff counsel, which it almost always is. During the period of the experiment, staff counsel generally required attorneys to attend in person. Some exceptions were made, but both staff counsel state that they are more amenable now than they were then to conducting conferences

over the telephone to accommodate lawyers from outside New York City. This accommodation might be expected to diminish the effectiveness of the conference in producing settlements and withdrawals. Not only are eye contact and body language lost, but Mr. Scardilli observes that it is not practicable to talk with the parties separately in the course of a telephone conference.

The conference is regarded as confidential. Staff counsel do not report to the court what has been said in the conference, and the lawyers for the parties are instructed not to do so.

The styles of the two staff counsel in the face-to-face conferences are somewhat different, but do not appear to be greatly so. Mr. Fensterstock has a conference table in his office that runs parallel to his desk and is separated from it by perhaps five feet. He has the lawyers sit at the far side of the conference table while he sits at his desk. This arrangement fosters an atmosphere in which the lawyers speak almost exclusively to staff counsel rather than to each other and in which they do most of their speaking when invited to do so by staff counsel.

Mr. Fensterstock generally schedules his conferences to last an hour. After some preliminaries about the purposes of the conference and the confidentiality rules, he characteristically begins by asking the attorney for the appellant to state the facts, and tends to be insistent that the discussion remain factual for a while. At some point, however, he is likely to lead the conference into a discussion of the legal issues, largely by asking pointed questions of the lawyers.

Mr. Scardilli has the parties' lawyers sit at opposite sides of a conference table in his office. The conference table has a lectern at one end, and Mr. Scardilli usually stands at the lectern while conducting the conference. Once again, this physical arrangement tends to foster an atmosphere in which most of the dialogue is between an attorney and staff counsel rather than directly between the parties' attorneys. Sometimes Mr. Scardilli sits at the same table with the lawyers for the parties, creating a somewhat less formal atmosphere; during the period of the second experiment, that was his customary practice.

Mr. Scardilli generally schedules his conferences for an hour and a half. After discussing the confidentiality rules, he characteristically begins by asking the appellant's lawyer to say why he or she disagrees with the decision of the trial court, and thus gets into legal issues somewhat more quickly than Mr. Fensterstock. He, too, is inclined to interrupt with pointed questions. Both staff counsel state that they spend little time preparing for conferences. Briefs, of course, are not available to them at this stage. Even the opinion below is not normally in the appellate file. Mr. Scardilli makes it a standard practice to obtain and read the opinion below if there is one; Mr. Fensterstock does not. The staff counsel may refresh themselves on a few relevant precedents, but they do not usually undertake substantial legal research or try to master factual records. Mr. Scardilli states that familiarity with the opinion below is important to him, and that he would do more research if time permitted. Both staff counsel, however, are heavily reliant on the oral presentations of the lawyers and their own knowledge of Second Circuit precedents and other legal doctrine.

The discussions of legal issues tend to have something of a Socratic flavor. Not only is the dialogue principally between attorney and staff counsel, but it is for the most part led by staff counsel. Both staff counsel are assertive about expressing their own opinions, and neither hesitates to express skepticism or even amazement about arguments made by the parties' lawyers. If they believe an appeal is wholly without merit, they often say so forcefully. Both are quick on their feet and seem adept at identifying weak links in arguments.

During the course of the discussion of legal issues, staff counsel in some cases strongly recommend that an appellant's attorney recommend to the client that the appeal be withdrawn. Attorneys sometimes agree to do so. If withdrawal of the appeal either is not recommended by staff counsel or is recommended but not agreed to, staff counsel are likely to ask, toward the end of the conference, whether there is a basis for resolution. Sometimes they ask the lawyers for one side to leave the room so that they can discuss the possibilities with one side outside the presence of the other.

One of the innovations developed in the CAMP program is the use of a stipulation that an appeal will be withdrawn without prejudice to reinstatement, either within a fixed time period or within a time after the occurrence of a certain event, or occasionally without any limit at all. Such a stipulation is often written in the course of a prehearing conference, although it is generally not signed until the attorneys have had an opportunity to consult with their clients. The stipulations are used for a variety of purposes in situations in which there is a reasonable likelihood that an appeal will be mooted: to hold an appeal in abeyance pending a Supreme Court decision in a controlling case; to hold it in abeyance pending some other decision of an administrative agency or court that might make pursuit of the appeal unnecessary; to give the parties time to seek amendment of the district court judgment to reflect the terms of a settlement agreed upon at the appellate level, while preserving the right to pursue the appeal if the district court should decline to amend. Most of the appeals withdrawn on this kind of stipulation are not reinstated, and the withdrawal on stipulation thus becomes the final disposition of the appeal. There are also many appeals, of course, in which withdrawals are without reservation of the right of reinstatement.

The advantages of the stipulation procedure appear to be largely administrative. The procedure permits the clerk's office to treat the case as closed unless the appellant takes the initiative to reopen it; support personnel are thereby relieved of the need to monitor some appeals that may not be pursued. However, the device may also add some impetus to the effort to resolve appeals without judicial intervention.

Naturally, the lawyer for the appellant more often than not is the primary target of staff counsel's efforts at persuasion. An appellant may be persuaded that an appeal has no merit, for example, but it would be a rare case in which an appellee could be persuaded to give up a victory won below. In cases in which staff counsel perceives that there is a serious issue for the appellate court, the efforts to persuade will be more equally distributed, but the appellee's advantage is inevitably a factor.

Toward the close of the conference, staff counsel is likely to instruct the lawyers for one or both sides to consult with their

clients, and perhaps talk more with each other, and to report the results of such discussions back to staff counsel by a certain date. Mr. Fensterstock uses a one-page report form that he has developed, and he asks lawyers for all parties to submit it. He states that he generally does not persist if the lawyers report that no progress toward settlement seems possible. Mr. Scardilli usually asks for an oral report from one of the lawyers. On the basis of that report, he decides how to proceed further: He may ask the reporting lawyer to call the other lawyer or lawyers in the case, he may make such a call himself, he may call an additional conference, or he may simply desist. On the whole, it appears that Mr. Scardilli is the more perseverant mediator—less likely to take "no" for an answer.

If settlement or withdrawal has not been tentatively agreed upon at the initial conference, staff counsel is also likely toward the end of the conference to ask whether the original scheduling order is satisfactory and to issue a revised scheduling order if that seems appropriate. If settlement or withdrawal is being considered, a revised scheduling order may be intended to provide some time for consideration of such a disposition without requiring the appellant to go to work on a brief. In other cases, a revision of the schedule may be made simply to accommodate problems of the lawyers. Such amendments to scheduling orders seem to be granted quite freely, and it is not unusual to have three or four amended scheduling orders in the course of an appeal. The willingness of staff counsel to allow additional time is partly dependent upon the state of the court's argument calendar. Generally, there is more flexibility toward the beginning of the court's term than later on.

Clarification of the issues in appeals that are briefed and argued may be a product of the discussions in CAMP conferences, but is not commonly something that is made explicit. Staff counsel do not generally seek prior agreements on what issues will be briefed, for example. If the presentation of argued appeals is improved by the conference, it is principally because the lawyers benefit from any improved understanding of their adversaries' positions, from the reaction of staff counsel to positions that they put forward, or both.

Finally, a significant role of staff counsel is to assist in the resolution of a variety of procedural matters. A motion for a stay of a

district court judgment can sometimes be disposed of by consent even though the underlying appeal is not resolved; in some cases, an expedited argument schedule will provide the basis for an appellee to agree not to enforce the judgment. Sometimes, agreements are reached about the contents of a joint appendix, bypassing the formal procedures of rule 30(b) of the Federal Rules of Appellate Procedure. In appeals with multiple parties, agreements can be reached about who will carry the burden of arguing particular points in which more than one party has a common interest. The resolution of procedural matters of this type and the scheduling flexibility that has been delegated to staff counsel make it possible for many matters to be treated informally, without the need for the filing of written motions or exchange of other writings by the lawyers for the parties.

In summary, although the encouragement of nonjudicial resolution of appeals is a very important goal of the Civil Appeals Management Plan, it is important to keep in mind that it is not the only goal. The plan is viewed by staff counsel and court personnel as an effort to bring a variety of tools to bear upon improving the management of the court's civil docket.

## III. Method of the Evaluation

The analysis in this report reflects primarily two kinds of data: data from the records of the court about 470 appeals and responses to a questionnaire that was sent to the lawyers in those appeals. We have done a limited amount of observation of the CAMP conferences, but that took place more than two years after most of the conferences in the studied cases had been held. Hence, for our understanding of the program as it operated while these appeals were in the pipeline, we have relied largely on discussions with court personnel.

Most of the analysis is based upon characterization of the second experiment as a control-group experiment. The assumption behind that characterization is that the groups of cases assigned to each of the two staff counsel and to the control group were similar groups of appeals, and that the only differences among the three

groups at the time of docketing were those inevitable differences that are the product of chance. Later in this chapter, we discuss the assignment system actually used and conclude that the assumption was substantially met. For the reader more interested in the impact of CAMP than in evaluation methodology, however, the more important question is what the statistical data should be taken to mean.

## Understanding the Statistics

All of the statistical tests used in this report are basically efforts to assess the possibility that observed differences in outcomes resulted from the operation of chance in the division of the appeals into three groups. Even if the system for dividing the appeals into these groups was entirely unbiased—an honest deal from a well-shuffled deck—the groups are not likely to have been identical at the time of docketing. One group, for example, may have drawn a disproportionate share of appeals having characteristics that made settlement unlikely. What the statistical tests do is provide an estimate of the likelihood that an observed difference in outcome between groups—such as a difference in the proportions of appeals reaching argument—could reflect differences among the groups that existed at the time of docketing. Only if we can reject that possibility can we attribute differences in outcomes to differences in the processing of the appeals.[6]

We have followed common convention and used a 95 percent confidence level to decide whether an observed difference between CAMP cases and control cases is statistically significant. That means that we do not treat a difference between CAMP cases and control cases in the sample as persuasive evidence of a CAMP effect unless the chance is smaller than 5 percent that a difference of the observed magnitude would be observed in the absence of a CAMP effect. This a reasonably tough standard. It reflects the view that we should not regard the success of an innovation as having been demonstrated unless we are quite sure that we have observed

[6] The appendix contains a technical discussion of the statistical techniques employed in the study, as well as less technical material on the sources and reliability of some of the data.

something more than a fortuity. The reader should understand that the failure of an observed difference to pass the test of statistical significance does not mean that CAMP does not have the effect being tested for. It simply means that we are unwilling to affirm such an effect on the basis of a sample of the size available for analysis. Indeed, the failure to observe an effect at all among the sampled cases may also reflect the operation of chance. A real impact of CAMP, one that would be observed in a much larger sample, may by chance not be reflected in our sample at all.

Thus, if a statistically significant difference between the CAMP group and the control group is demonstrated at the 95 percent level, we accept that as demonstrating the existence of a CAMP effect. Even in the absence of a statistically significant difference between the entire CAMP group and the control group, however, we have proceeded to test for significant differences between each staff counsel and the control group. In those tests, we have used a 97.5 percent significance level: If the likelihood of a difference of a certain magnitude occurring by chance is 2.5 percent when Mr. Scardilli is compared with the controls and 2.5 percent when Mr. Fensterstock is compared with the controls, the likelihood of its occurring by chance in at least one of the two comparisons is approximately 5 percent. Nevertheless, the rigor of the 95 percent significance level is somewhat relaxed by our decision to accept, as persuasive evidence of a CAMP effect, either a difference between both staff counsel and controls or a difference between one staff counsel and controls.

Another problem of interpreting the statistical data results from the fact that we are analyzing a variety of possible CAMP effects. If we are prepared to conclude that a program effect exists on the basis of 95 percent probability, we are prepared to accept a 5 percent chance of finding an effect when there is none. When we test for many possible effects, the chance that we will find some effects that do not really exist is obviously increased. Hence, even statistically significant findings should be regarded with some skepticism. Where the data have been available, we have tried to protect ourselves by analyzing more than one measure of the same general characteristic—for example, more than one measure of case com-

plexity. Moreover, we regard it as always appropriate to question statistically significant results if they seem to defy logical explanation.

None of the foregoing makes us doubt the value of controlled experiments to test the effectiveness of innovations in the judicial system. People who develop innovations have a strong tendency to believe in the efficacy of what they do, and the statistical analysis that controlled experimentation makes possible is a powerful machine for separating the wheat from the chaff. We merely wish to emphasize that the statistical analysis is an aid to judgment and not a substitute for it. A number of our conclusions ultimately rest on the application of judgment to the statistical findings. We invite our readers to test our judgment against their own.

## Division of the Appeals into Three Groups

The civil cases subject to CAMP treatment are routinely divided into four categories for docketing purposes: appeals from (or petitions to enforce) decisions of administrative agencies; bankruptcy appeals; appeals in other cases in which the United States government is a party; and appeals in disputes between private litigants. Each of these categories has its own series of docket numbers, identified by the first digit of the four-digit number. As was previously noted, the basic assignment rule has been that appeals with odd docket numbers are assigned to Mr. Scardilli and those with even docket numbers are assigned to Mr. Fensterstock. This basic assignment system was maintained during the period of the experiment, except that every third docket number was denominated a control number. Hence, the repeated pattern of assignment was as follows:

| | |
|---|---|
| Odd | Scardilli |
| Even | Fensterstock |
| Odd | Control |
| Even | Fensterstock |
| Odd | Scardilli |
| Even | Control |

Appeals in the control group were subject to scheduling orders issued by the clerk that incorporated the time limits of the Federal Rules of Appellate Procedure; they were not subject to staff counsel intervention.

Pro se appeals and National Labor Relations Board summary enforcement petitions were assigned docket numbers in the same manner as other appeals, but were excluded from the experiment entirely. Hence, if the third appeal in the above sequence had been pro se, it would not have been assigned to either staff counsel or the control group; the fourth appeal would nevertheless have been assigned to Mr. Fensterstock.

On January 1, 1979, with the introduction of a new year's series of docket numbers, the pattern was interrupted by assigning the first 1979 appeal in each category to Mr. Scardilli.

Although this assignment system is not technically a random system, we are satisfied that it produces an unbiased division of the studied appeals into three groups and can be treated as random for statistical purposes. Under the research design approved by the Second Circuit's Research Advisory Committee, however, several exceptions were made to this basic pattern. Some of them were consistent with maintaining an unbiased division. Others, in our opinion, were not, and we have made compensating adjustments in our analysis.

The first exception was that appeals in groups that were consolidated were assigned docket numbers in normal sequence, but all appeals in the consolidation were assigned to staff counsel or the control group according to the assignment of the first appeal to be docketed. This treatment of consolidations conformed with the practice before the experiment and was a practical necessity; it would be hard to contemplate separate and inconsistent processing of the appeals in a consolidated group.

When separate appeals (often an appeal and a cross-appeal) are taken from a single order of a district court, the appeals are consolidated automatically in the clerk's office. In such cases, we have treated the consolidated group as a single unit for purposes of our analysis and included the unit in the study if the lead case was docketed between July 1, 1978, and January 19, 1979. Since the

lead cases were assigned according to the basic docket-number pattern described above, this treatment is consistent with the objective of maintaining equality of the three groups of appeals, subject only to natural variation as of the time of docketing.

In the case of appeals that were consolidated by motion after the lead appeal had been docketed, we have treated the appeals as separate units of analysis and placed each in the group to which it would have been assigned on the basis of its own docket number. Since consolidation occurred after docketing (and sometimes after the lead case had been conferenced), we regarded this as necessary to maintain the equality of the groups as of the time of docketing.

Another exception made in the design of the Research Advisory Committee was that appeals "related to" earlier appeals were assigned in the same manner as the earlier appeals, regardless of the assignment called for by the docket number. The definition of a "related appeal" was somewhat vague, but one category of such appeals comprised appeals from district court cases from which there had been earlier appeals. Hence if an appeal from an order of the district court had previously been handled by a particular staff counsel, a subsequent appeal from another order in the same case was also assigned to that staff counsel. This was done for the purpose of maintaining a control group that was as insulated as possible from the influence of CAMP. But it is a design feature inconsistent with the goal of equality of groups as of the time of docketing, subject only to natural variation. Because many of the earlier appeals had been docketed before the beginning of the experiment, at a time when there was no control group, this rule in fact resulted in a disproportionate number of the subsequent appeals being assigned to staff counsel. If there was a tendency for these appeals to be more argument-prone than others, staff counsel were assigned less digestible fare than the control group; if there was a tendency for them to be less argument-prone, the converse was true. To avoid this effect, we have treated these cases for purposes of analysis in accordance with their original docket-number assignment. However, in the case of appeals from administrative agencies, where the rules for automatic consolidation of appeals are not the same as the rules that apply to appeals from courts, we treated

related groups of cases as consolidated groups in circumstances in which the automatic consolidation rules would have applied to appeals from a court.

Finally, in the course of the administration of the program, a number of other appeals were assigned inconsistently with their docket numbers. Some appeals that would normally have been assigned to Mr. Scardilli were assigned to Mr. Fensterstock because of the former's illness; some were assigned to a staff counsel because he had handled an emergency motion in the case before the appeal was docketed; some were assigned in conflict with the docket number for reasons that cannot now be reconstructed. In the September 1981 report of the Research Advisory Committee, such appeals were treated in accordance with their actual assignment, except that six were eliminated from the tabulations entirely because they were handled in ways that were not easily characterized as either CAMP or control. In our analysis, all of these appeals have been treated according to the docket-number assignment.

In sum, we conclude that the assignment of automatically consolidated appeals was consistent with maintaining an unbiased division into three groups. We conclude that the assignment of appeals consolidated by motion was not consistent with that goal, even though it was a practical necessity, and we have compensated in our analysis by treating each appeal in these consolidated groups separately and classifying it with the group called for by its docket number. Similarly, other appeals that were assigned inconsistently with their docket numbers have been classified, for purposes of analysis, as if the exceptions had not been made. The overall result is that our sample of 470 appeals includes 54 that we have classified one way although actually treated another way.

To the extent that we have classified appeals inconsistently with the way they were actually handled, our analysis probably tends to understate any effects of the CAMP program. If CAMP treatment reduces the likelihood that an appeal will be argued, for example, and if some appeals counted as controls were in fact conferenced by staff counsel, the control group will have a lower argument rate than it would have had if all the control appeals had been withheld from CAMP treatment, and the observed difference in argument

rates between the CAMP appeals and the control appeals will be smaller.[7]

The conclusion that the division into three groups is unbiased depends, of course, on the assumption that docket numbers were assigned in the order in which the appeals were perfected by payment of the docketing fee and the filing of CAMP forms C and D—or, at least, that departures from that order were themselves unbiased. The present authors were not in a position to monitor the assignment process as it occurred, since we came on the scene about two years after assignments in accordance with the experiment had stopped. Through a variety of checks of data and through interviews with personnel in the clerk's office, however, we have concluded that docket numbers were in fact assigned in an unbiased manner.

However, we have somewhat less confidence in that conclusion than we would like. The principal doubt on this score arises from our finding that of the first twenty-two private civil appeals that were lead appeals in consolidated groups (not counting groups consolidated after docketing), only one was assigned a control number. If assignments were made in an unbiased manner, the likelihood of such a distribution was less than one in two hundred. Random assignment does sometimes produce long-shot results, just as honestly dealt card games produce long-shot hands. We believe that is what happened in this instance. Indeed, we have been unable to develop any plausible explanation of this pattern that is based on the assumption of departure from the normal assignment rules. But we did find that, during the experiment, some departures from the design were made without documentation of the reasons. We also found that memories in the winter of 1980-81 about the

[7] If CAMP treatment generally tended to reduce the likelihood of argument, but for some reason tended to increase the likelihood of argument in the group of control appeals that received CAMP treatment, this logic would not apply. The control group would then have a higher argument rate than it would have had if all the control appeals had been withheld from CAMP treatment, and magnitude of the favorable CAMP effect would consequently be overstated. We do not believe that this theoretical possibility should be a subject of serious concern.

procedures employed during the period of the experiment were unreliable. When we combine these observations with the observation of a statistically improbable distribution, we cannot wholly put our reservations aside.

We emphasize that our concern is not that someone may have tried to influence the results of the experiment by interfering with the assignment scheme. It is, rather, that the experiment could have been compromised by actions taken that made good sense from the standpoint of day-to-day court management. At some point after the experiment, for example, the docket clerks adopted the practice of assigning docket numbers out of order so that an appeal that was to be assigned to Mr. Scardilli under the "related case" rule got the next odd number and an appeal that was to be assigned to Mr. Fensterstock got the next even number. We are reasonably certain that this practice was not followed at any time during the period of the experiment. If it had been, our classification of these appeals would not assure the unbiased division that we have sought.

We have also devoted considerable attention to the possibility that the CAMP program had an effect on the recording of the number of appeals docketed. Under the stipulation procedure described in the previous chapter, an appeal may be withdrawn subject to reinstatement upon notice to the clerk. If reinstatement occurs, the appeal is reopened under the old docket number. In such cases, the original withdrawal has been ignored in the data used for the evaluation, and we have looked to the nature and timing of the ultimate disposition. Our principal concern was that, in somewhat similar circumstances, a control appeal might have been withdrawn without prejudice but without any understanding about possible reinstatement and, if it returned to the court, would have been docketed as a new appeal. If that occurred, the initial withdrawal would have been counted as an unargued appeal if in the control group but would not have been counted at all if in the CAMP group. Another unwelcome conservative bias would have been introduced. We have satisfied ourselves that effects of this type were extremely rare, if they occurred at all, and could not have had a substantial impact on the data.

Because docket numbers were assigned to a number of appeals that were excluded from the experiment, there was no guarantee that the three groups would be of equal size. As it turned out, 169 appeals were assigned to Mr. Scardilli and only 149 were assigned to Mr. Fensterstock. Since the assignment system will over the long run assign equal numbers of appeals to the two staff counsel, we have made adjustments in our analysis to give each staff counsel equal weight in the estimates of CAMP effects.

## Questionnaire Data

Data about the studied cases obtained from court records are supplemented by the responses to a questionnaire that was sent by the court of appeals staff to the lawyers in the appeals included in the experiment. This questionnaire had three forms—one for attorneys in control cases, one for attorneys in treatment cases that were conferenced, and one for attorneys in treatment cases that for one reason or another were not conferenced. The questionnaires were mailed to the lawyers upon termination of each appeal. Lawyers in 346 appeals returned 609 usable questionnaires to the court.

No record was kept of the number of questionnaires mailed out to attorneys, and we have not tried to reconstruct that number from docket sheets. Our rough estimate based on a sample of docket sheets is that the response rate was in the neighborhood of 50 percent. Moreover, although the caption and docket number of each appeal were typed on the questionnaire before it was mailed out, there was no identification of the lawyer; unless the lawyer indicated his or her role in the "comments" section, we have no way of knowing whether the response is from the appellant's lawyer or the appellee's lawyer. We have no basis for making informed judgments about the respects in which our respondents may be unrepresentative of the larger group, and the responses cannot safely be treated as representative of the sample of the lawyers who appeared in civil cases.[8] Nevertheless, giving due recognition to the

[8] [For the reasons noted earlier, much of chapter 6 of the original report has been omitted. Interested readers should consult the original report for a fuller presentation of the findings. Ed.]

response-rate problem, we believe the questionnaire responses provide a substantial enrichment of the data obtained from court files.

. . . .

For the most part, however, we have not used the questionnaires to make statistical statements about what happened to the appeals in the three groups. In most of the analysis of the questionnaire data, therefore, we have not classified responses by the groups that the appeals would have been assigned to if strict docket-number assignment had been followed. We merely report what the lawyers said about the experience they actually had.

## IV. Impact of CAMP on the Number of Appeals That Reach Argument

### The Existence and Magnitude of a Program Effect

Table 1 presents the differences between the CAMP appeals and the control appeals with regard to mode of disposition. The top of the table shows the proportion of the appeals in the study that were argued (a term used throughout this report to include both appeals argued orally and those submitted on the briefs); the bottom shows the proportion that were argued or dismissed on motion.

With regard to the proportion argued, the data show 61.2 percent of the control appeals argued but only 51.3 percent of the CAMP appeals argued, for a difference of 9.9 percent. Confidence intervals for the difference are also displayed. At the 95 percent confidence level, the interval is from –19.2 to –0.2 percent. On the assumption that the appeals docketed in the period of the study can be treated as a representative sample of the business of the court over a longer term, this can be interpreted as saying that there is a 95 percent probability that CAMP's effect on the argument rate lies within that range. Since the range does not include zero, the effect is statistically significant at the 95 percent confidence level, pro-

viding strong evidence that the program does reduce the argument rate. But the range of possible magnitudes of that effect is substantial. The 68 percent confidence interval is also displayed, and can be interpreted as saying that the probability is about two-thirds that CAMP reduces the number of appeals argued by between 14.7 and 5.0 percent of the appeals.

**TABLE 1**
**Mode of Disposition of Appeals**

| | **Percentage Argued** |
|---|---|
| CAMP | 51.3% (*/318) |
| Control | 61.2% (93/152) |
| Difference | −9.9% |
| 95% confidence interval | −19.2% to −0.2% |
| 68% confidence interval | −14.7% to −5.0% |
| | **Percentage Argued or Dismissed on Motion** |
| CAMP | 54.0% (*/318) |
| Control | 67.1% (102/152) |
| Difference | −13.1% |
| 95% confidence interval | −22.1% to −3.5% |
| 68% confidence interval | −17.8% to −8.3% |

*The computation of the CAMP proportion includes an adjustment to compensate for the fact that the two staff counsel were assigned unequal numbers of appeals in the experiment.

The lower portion of table 1 presents similar data for the proportions of appeals that were argued or dismissed on motion. As contrasted with the upper portion, the lower portion treats dismissals on motion as more like arguments than like default dismissals and consent dispositions.

Appeals dismissed on motion have been defined as those that were dismissed or remanded by panels of three judges. Generally, that there were three judges indicates that the motion was contested, although one appeal is included in which dismissal was neither actively opposed nor agreed to, and another is included in which the

parties had reached agreement but in which, for reasons that are unclear, oral argument on the motion was held.

Something of an anomaly is involved in treating appeals dismissed on motion as analogous to argued appeals. The argued appeals are regarded as argued regardless of the court's decision on the matter. The dismissal motions are treated as analogous to arguments, however, only in those cases in which the motion was granted. It has been suggested that this is appropriate because the grant of a dismissal motion generally indicates substantial court involvement, while denial may indicate only that the panel has deferred a jurisdictional issue until argument on the merits.

Inclusion of the motions makes the demonstration of the CAMP effect somewhat stronger. There is a suggestion here that staff counsel may be more than usually successful in disposing of appeals with jurisdictional defects. The difference between the proportion of CAMP appeals dismissed on motion and the proportion of control appeals so dismissed is not statistically significant, however. Given the small number of cases (nine) dismissed on motion even in the control group, a larger experiment would be required to speak with confidence about whether CAMP reduces the number of such dismissals.

Table 2 presents the table 1 data separately for each of the staff counsel. As table 2 shows, appeals in the sample that were assigned to either of the staff counsel had both a lower argument rate and a lower argument-and-dismissal rate than appeals in the control group. For Mr. Fensterstock, however, the difference is not statistically significant, while for Mr. Scardilli it is. It does not follow, however, that there is a statistically significant difference in the performance of the two staff counsel. In fact, although Mr. Scardilli's argument rate in the sample is enough lower than the control group argument rate to produce a statistically significant difference between his appeals and the control appeals, it is not enough lower than Mr. Fensterstock's argument rate to produce a statistically significant difference between the two staff counsel. It would thus be consistent with our data if both staff counsel were settling about the same numbers of cases.

**TABLE 2**
**Mode of Disposition of Appeals:**
**Individual Staff Counsel Shown Separately**

| | Percentage Argued | |
|---|---|---|
| | Fensterstock | Scardilli |
| CAMP | 56.4% (84/149) | 46.2% (78/169) |
| Control | 61.2% (93/152) | 61.2% (93/152) |
| Difference | −4.8% | −15.0% |
| 95% confidence interval | −16.0% to +6.2% | −25.7% to −4.0% |
| 68% confidence interval | −10.5% to +0.9% | −20.6% to −9.5% |

| | Percentage Argued or Dismissed on Motion | |
|---|---|---|
| | Fensterstock | Scardilli |
| CAMP | 57.7% (86/149) | 50.3% (85/169) |
| Control | 67.1% (102/152) | 67.1% (102/152) |
| Difference | −9.4% | −16.8% |
| 95% confidence interval | −20.5% to +1.5% | −27.6% to −5.9% |
| 68% confidence interval | −15.0% to −3.7% | −22.4% to −11.3% |

The data for Mr. Fensterstock in the upper portion of table 2 are quite consistent with the data reported by Goldman. In table 3 of his 1977 study, Goldman reported a 3 percent difference in argument rates between Mr. Fensterstock and the control group. The program was operated somewhat differently when the Goldman study was done, of course. The principal change relevant here is that the present experiment did not include a judgmental screening of appeals to assess their amenability to CAMP treatment; all appeals were considered eligible except for certain clearly delimited categories, such as prisoner petitions. One might expect this change to have diminished Mr. Fensterstock's effectiveness in reducing the argument rate by requiring him to include less tractable matters in

his caseload. In fact, the observed effectiveness is somewhat greater in the present study. Nevertheless, allowing for natural variation in samples, the results of these two studies seem fundamentally consistent, suggesting that Mr. Fensterstock's effect on the argument rate is probably not very close to either of the outer limits of the reported 95 percent confidence interval.

From the standpoint of the workload of the judges of the court of appeals, the figures in tables 1 and 2 may be regarded as understating the magnitude of the program's effect. If CAMP indeed reduces the number of appeals argued from approximately 60 percent of filings to approximately 50 percent, it is diverting from argument approximately one-sixth of the CAMP-eligible appeals that would have been argued in the absence of the program. Thus, although our best single estimate is that staff counsel intervention produces settlement or withdrawal of about 10 percent of the appeals assigned to the CAMP program, that amounts to a reduction of about 16 percent in the number of CAMP-eligible cases on the argument calendar. Table 3 presents the data from the earlier tables in these terms. The observed reduction in appeals argued is merely a reformulation of the data presented in tables 1 and 2: The differences between the CAMP proportions and the control proportions reported in those tables are divided by the reported control proportions. (The confidence intervals reported in table 3 were developed in a manner such that they should be regarded as only approximate.)

As has already been noted, Mr. Scardilli's impact on the argument rate is statistically significant at the 95 percent level. Beyond that, the data suggest the possibility of a very large effect. As table 3 shows, the best single estimate from the experiment is that Mr. Scardilli diverts from argument almost a quarter of the appeals that would have been argued in the absence of his intervention. That would have to be regarded as a stunning success. However, the confidence interval is wide enough so that this remains a tantalizing possibility rather than an unambiguous finding. Mr. Scardilli's impact is quite probably substantial, but there can be no assurance that it is as great as it appears.

**TABLE 3**
**Mode of Disposition: Impact on the Court's Calendar**

| | Percent Change in Eligible Appeals Argued | | |
|---|---|---|---|
| | CAMP | Fensterstock | Scardilli |
| Observed change | −16.2% | −7.9% | −24.6% |
| 95% confidence interval | −29.0% to −0.8% | −24.0% to +11.4% | −39.0% to −7.8% |
| 68% confidence interval | −23.0% to −8.8% | −16.4% to +2.0% | −32.3% to −16.3% |
| | **Percent Change in Eligible Appeals Argued or Dismissed on Motion** | | |
| | CAMP | Fensterstock | Scardilli |
| Observed change | −19.5% | −14.0% | −25.0% |
| 95% confidence interval | −30.7% to −6.1% | −28.3% to +2.0% | −38.2% to −10.1% |
| 68% confidence interval | −25.5% to −13.1% | −21.5% to −6.0% | −31.9% to −17.6% |

NOTE: The confidence intervals in this table should be regarded as approximate.

The figures in table 3, of course, are based only on appeals that were regarded as eligible for CAMP treatment and therefore included in the experiment. Our best estimate, therefore, is that about 16 percent of the appeals in that class that would otherwise have been argued are diverted as a result of CAMP intervention. At the present time, approximately 1,000 appeals per year (counting consolidated appeals as units) are being given CAMP processing. If our best estimate for the period of the experiment were used to project the present effect of CAMP, it would be concluded that the program diverts about 100 appeals a year from the argument list. This can be compared with a figure of 1,119 oral hearings and submissions on briefs for the statistical year ended June 30, 1982,[9] suggesting that the court's load of arguments is about 8 percent

[9] Administrative Office of the United States Courts, 1982 Annual Report of the Director 87, at table 8.

lower than it would be in the absence of CAMP. Another basis for comparison is with the case participation rate of active judges. An active circuit judge in the Second Circuit sits on approximately 210 argued or submitted appeals per year. Since three judges participate in each appeal, the 100 cases that CAMP is estimated to dispose of represent 300 participations, the work of 1.4 active circuit judges.

We have no particular reason to doubt the validity of making rough projections to the current year from the experimental data. In particular, as will be seen, we did not find persuasive evidence that changes in the case mix that may have occurred over the intervening years would affect the 100-appeal figure. Some diminution in the program's effectiveness may have resulted from the greater liberality today about conducting conferences on the telephone, and it is possible that there have been other changes over time that would affect CAMP's impact. But in our judgment, the more important qualification to these projections lies in the wide range of uncertainty about the magnitude of the CAMP effect even at the time of the experiment. The data reported in table 1 tell us that if 1,000 cases a year are assigned to CAMP, we can say with a 95 percent probability of being correct only that CAMP disposes of between 2 and 192 appeals, and with a 68 percent probability that it disposes of between 50 and 147. The figures are somewhat higher, of course, if both argued appeals and those dismissed on motion are counted. But in either case, the data from this experiment are consistent with both a very large settlement effect and a very small one. This wide range of uncertainty results from the relatively small number of appeals in the experiment, particularly in the control group.

Not every appeal comes to the court with equal potential for occupying the time of judges. Counting each appeal (or automatically consolidated group) as equal, as we have in the preceding analysis, is clearly a very rough way of measuring the extent to which the program reduces the burden on appellate judges. If there were an accepted system of appellate case weights, we would certainly wish to analyze CAMP's impact on the weighted caseload reaching argument as well as on the raw count. In the absence of

such a system, we have made a number of efforts to try to refine the analysis based simply on case count.

One effort made to measure the impact on judge burden involves an analysis of brief length. Not only does brief length offer an alternative measure of burden on the court, but it permits the use of statistical tests that are in theory more powerful than those that can be applied to the raw case count. It must be recognized, however, that brief length is not necessarily a good surrogate for burden on the court. As is discussed in the appendix, moreover, our method of measuring aggregate brief length was itself imperfect.

Using microfiche records of Second Circuit briefs that are maintained by the Library of Congress, we were able to determine the aggregate length of the briefs filed in 234 of the 255 argued appeals in the experiment. This figure includes all briefs filed in the appeal, including reply briefs and amicus briefs. We counted each printed page as the equivalent of 1.5 typed pages and worked in typed-page equivalents, but we have satisfied ourselves that our conclusions would be the same if we had used either 1.25 or 1.75 as the basis for conversion. Because we were interested in the burden of brief reading rather than the burden of brief writing, we treated the brief length as zero in each appeal that did not reach argument or submission. We then computed an average aggregate brief length for each appeal docketed, including those not argued.

The results of these computations are shown in table 4. Surprisingly, in view of the lower argument rate observed in the CAMP cases in the experiment, the average aggregate brief length in CAMP appeals is only one page shorter than in control appeals. The explanation of this figure apparently lies in the fact that the aggregate brief length per appeal is a highly variable number. It ranges from 12 pages to 789 pages (in typed-page equivalents) in the argued appeals that we studied. The fifteen appeals that had more than 250 pages of briefs were not evenly distributed among the two staff counsel and the control group, and they had a very substantial influence on the averages. Since we have no reason to think that exposure to CAMP tends to increase the aggregate length of briefs in those appeals that reach argument, we persist in the belief that removing a sixth of the appeals from the argument calendar

must result in a greater reduction of the judges' reading matter. But we are unable to speak to the magnitude of that reduction.

**TABLE 4**
**Average Aggregate Brief Length: Appeals Docketed**

| | Typed Pages or Equivalent |
|---|---|
| CAMP* (309 appeals) | 57.6 |
| Control (140 appeals) | 58.7 |
| Difference | −1.1 |

NOTE: Nine CAMP and twelve control appeals are omitted from this table because aggregate brief length could not be determined.

*The computation of the CAMP average includes an adjustment to compensate for the fact that the two staff counsel were assigned unequal numbers of appeals in the experiment.

Another way to look at brief length is to examine the average aggregate length in those appeals that are argued. If the appeals that are settled or withdrawn as a result of CAMP are principally appeals that are relatively uncomplex, one might expect the aggregate length of briefs in an argued CAMP appeal to be greater on the average than the aggregate length in an argued control. Such a tendency could be offset, however, if CAMP tends to reduce the brief length in argued cases through simplification of issues or encouraging joint briefing of common issues. If there is such an offset, we have no way of measuring its separate effect.

Table 5 shows the average aggregate brief length per argued appeal. Average brief length is greater in argued CAMP appeals than in argued control appeals by approximately 14 pages. If the staff counsel are looked at individually, the difference for Mr. Fensterstock is quite small (1.7 pages) and for Mr. Scardilli quite large (29.8 pages). However, both the overall difference for CAMP and the individual difference for Mr. Scardilli fall short of meeting our standard of statistical significance. Moreover, as was previously noted, the brief length data are heavily influenced by a maldistribu-

tion in the sample of the relatively few appeals with aggregate brief lengths of more than 250 pages. Hence, we do not find the data persuasive that there is a tendency for the briefs in argued cases exposed to CAMP to be longer than the briefs in argued cases not exposed to CAMP. If there is such an effect at all, we are highly skeptical of the proposition that it is as large as it appears in the sample data.

**TABLE 5**
**Average Aggregate Brief Length: Appeals Argued**

| | Typed Pages or Equivalent |
|---|---|
| CAMP* (153 appeals) | 115.6 |
| Control (81 appeals) | 101.4 |
| Difference | +14.2 |

NOTE: Nine CAMP and twelve control appeals are omitted from this table because aggregate brief length could not be determined.

*The computation of the CAMP average includes an adjustment to compensate for the fact that the two staff counsel were assigned unequal numbers of appeals in the experiment.

Another possible surrogate for the burden an appeal imposes on the court is whether the court decided the appeal with a written opinion as contrasted with a memorandum order or even a decision from the bench. The preparation of a written opinion is a substantial effort. If the appeals settled or withdrawn as a consequence of the CAMP program were largely appeals in which no opinion would have been written, the consequent relief to the court would be somewhat less than is indicated by the raw count of appeals withdrawn from the argument calendar. If that were true, we would expect to find, among the appeals reaching argument, that a higher proportion were decided with written opinions in the CAMP groups than in the control group. Implicit in this logic is the assumption that CAMP does not directly affect the likelihood that the court will decide to issue a written opinion—an assumption that

seems reasonable for working purposes, although is perhaps not beyond dispute.

As table 6 indicates, we found that the CAMP cases reaching argument were in fact slightly less likely than controls to be decided with written opinions. The observed difference is not statistically significant, but there is certainly no evidence here that the appeals disposed of by CAMP intervention are those that would have been relatively unburdensome in any event.

**TABLE 6**
**Decisions with Written Opinions: Appeals Argued**

| | Percentage Decided with Written Opinion |
|---|---|
| CAMP | 50.0% (*/162) |
| Control | 52.7% (49/93) |
| Difference | −2.7% |

*The computation of the CAMP proportion includes an adjustment to compensate for the fact that the two staff counsel were assigned unequal numbers of appeals in the experiment.

The final effort to refine the measure of CAMP's effect on the argument rate was based on lawyers' responses to questionnaire questions asking them to rate the complexity of the factual and legal issues in the appeal. We have not compared the responses to these questions for argued and unargued appeals; we were concerned that the lawyers' responses might have been affected by the course that the case actually took. There might be a tendency, for example, to regard argued cases as relatively complex and unargued cases as relatively uncomplex simply because more research gets done in appeals that go to argument. However, it does seem reasonable to compare the responses to the complexity question for the argued appeals in the control group and those in the CAMP group. The logic is much the same as it was for the question of whether the appeal was decided with a written opinion. If CAMP tends to dis-

pose of less complex appeals, we would expect to find that the appeals that go the full course in the CAMP group are more complex, on the average, than those that go the full course in the control group. Once again, however, we must recognize the possibility of a confounding tendency. If CAMP tends to produce simplification of the issues in those CAMP appeals that go to argument, it presumably tends to make an argued CAMP appeal less complex.

One of the questionnaire questions asked the lawyers to "rate overall the complexity of the factual issues in this appeal." It offered a scale ranging from 1, labeled as "simple," to 5, labeled as "complex," and provided a place for the respondent to indicate that there were no factual issues in the case. Using 342 ratings received from lawyers in 193 argued appeals, and treating the "no factual issues" response as a rating of zero, we calculated an average rating for each of the appeals. If only one lawyer rated the complexity of the factual issues in the appeal, his or her rating was taken as the rating for the appeal; if two or more lawyers rated the complexity of the factual issues, their ratings were averaged. Then, giving each appeal equal weight regardless of the number of lawyers who rated it, we computed average ratings for the CAMP appeals and control appeals.

The other question asked the lawyers to "rate overall the complexity of the legal issues in this appeal." It used a scale from 1 to 5, similar to that used for rating factual issues, but did not include a "no legal issues" alternative. We followed a similar procedure to arrive at the average complexity rating for CAMP appeals and control appeals. Three hundred forty-one lawyers rated complexity of legal issues in 193 appeals.

Table 7 displays the results of these computations. It shows that the argued CAMP appeals were rated as slightly less complex, on the average, than the argued control appeals with regard to both factual issues and legal issues. The data thus do not confirm that the cases settled or withdrawn as a result of CAMP tend to be the less complex cases.

**TABLE 7**
**Lawyers' Ratings of Complexity: Appeals Argued**

| | Average Rating of Complexity | |
|---|---|---|
| | Factual Issues | Legal Issues |
| CAMP* | 1.9 | 3.0 |
| Control | 2.0 | 3.2 |
| Difference | −0.1 | −0.2 |

NOTE: The ratings of complexity of factual issues are based on 120 CAMP appeals and 73 control appeals. The ratings of complexity of legal issues are based on 121 CAMP appeals and 72 control appeals. There were 154 argued CAMP appeals and 89 argued control appeals in the questionnaire sample (in which appeals consolidated by motion were not counted separately). The appeals not included in the table were those for which we did not have complexity ratings.

*The computation of the CAMP average includes an adjustment to compensate for the fact that the two staff counsel were assigned unequal numbers of appeals in the experiment.

. . . .

We do not find persuasive evidence in the experiment that this effect of CAMP operates only or primarily on appeals that are not complex. The data do not enable us to dismiss that possibility, but they do not offer any considerable support for it.

It remains to take note of a theory put forth by Professor Goldman and by at least one of our questionnaire respondents, to the effect that the existence of the CAMP program may invite the filing of appeals by offering an inexpensive forum in which, short of filing briefs or arguing the appeal, the losing party in the trial court might salvage something. We have no way of testing such a possible effect with the data from the present experiment. We do not believe, however, that the possible existence of such an effect is a threat to the validity of the findings here. If litigants indeed file appeals in the hope of achieving something in the CAMP conference but without any intention of pursuing the matter through briefing and argument, there is no reason to expect that the practice would increase the number of arguments heard by the court. During the period of the experiment, if such an appeal was assigned to

CAMP, it seems reasonable to assume that it was ultimately settled or withdrawn. If it was assigned as a control, it presumably would have been withdrawn when the appellant's lawyer learned that the inexpensive forum was not to be available. Hence, even if the hypothesized effect does exist, the finding stands that CAMP reduces the number of appeals reaching argument.

## Types of Cases for Which CAMP Produces Settlement or Withdrawal

The idea is persistent that if staff counsel intervention can produce settlement or withdrawal of appeals that would otherwise be argued, it may be possible to select groups of appeals that are more promising candidates for intervention than others. When the program was inaugurated in 1974, Mr. Fensterstock made judgments based on papers filed, and on the basis of those judgments decided whether an appeal should be included in the program. The program as currently implemented does not involve a judgmental screening. A number of people—including many of the questionnaire respondents in the present study—have suggested more mechanical screening devices. It has been suggested, for example, that appeals from decisions of administrative agencies are unpromising candidates for CAMP treatment because of the lack of freedom that agency counsel have to talk about settlement of a matter adjudicated by the agency. It has been argued that cases involving money judgments may be more amenable to CAMP treatment than cases involving injunctive relief, on the ground that it is easier to fashion compromises when the question is "how much?" We have tested a number of these relationships, and we find no persuasive evidence in support of any of these mechanical screening theories. This may be partly a function of the size of our sample. We have already seen how wide the confidence limits are around the estimate of CAMP's effect on the argument rate, even when the entire sample of 470 appeals is considered. When we seek to divide that sample into subsamples with particular characteristics, we increase the difficulty of eliminating chance as an explanation of observed differences.

Table 8 shows the argument rate separately for the four major classifications of civil appeals that are used in statistics of the Administrative Office of the United States Courts. It should be noted at the outset that 290 of the 470 appeals in the sample are private civil appeals, so the samples of the other types are somewhat small. The result is that we are unable to say that CAMP has a greater impact on some types of appeals than on others. At the extreme, the bankruptcy sample includes only 19 CAMP cases and 9 controls, and the reported reduction in the argument rate for bankruptcy cases is obviously a figure subject to substantial variation. It is not so readily obvious that the difference in effect between appeals in which the United States is a party and appeals in the other categories is also unreliable. However, when the increase in the observed argument rate for United States appeals is compared with the decrease in the observed argument rate for other appeals in the sample, the comparison does not come close to the threshold of statistical significance.

**TABLE 8**
**Argument Rate by Type of Appeal**

| | Percentage Argued | | | |
|---|---|---|---|---|
| | Private Civil | United States a Party | Administrative Agency | Bankruptcy |
| CAMP | 51.8% (*/198) | 60.0% (*/60) | 39.2% (*/41) | 42.8% (*/19) |
| Control | 64.1% (59/92) | 56.7% (17/30) | 47.6% (10/21) | 77.8% (7/9) |
| Difference | −12.4% | +3.3% | −8.5% | −35.0% |

*The computation of the CAMP proportion includes an adjustment to compensate for the fact that the two staff counsel were assigned unequal numbers of appeals in the experiment.

Table 9 provides a further division of the private civil appeals, distinguishing between those based on the federal question jurisdiction and those based on the diversity jurisdiction. The information about basis of jurisdiction was generally derived from the assertion made by the appellant's lawyer on CAMP form C. The table shows that the observed difference in argument rates between

CAMP cases and control cases is approximately the same for both categories.

**TABLE 9**
**Argument Rate by Basis of District Court Jurisdiction: Private Civil Appeals**

| | Percentage Argued | |
|---|---|---|
| | Federal Question | Diversity of Citizenship |
| CAMP | 56.2% (*/126) | 43.9% (*/67) |
| Control | 67.2% (41/61) | 56.7% (17/30) |
| Difference | −11.0% | −12.8% |

NOTE: Five CAMP appeals and one control appeal are omitted from this table because information about the basis of jurisdiction was not available.

*The computation of the CAMP proportion includes an adjustment to compensate for the fact that the two staff counsel were assigned unequal numbers of appeals in the experiment.

Table 10 shows the argument rate separately for appeals in which only money damages were sought and those in which other relief was sought. Again, the data are derived from CAMP form C. The theory of interest here is that appeals involving money damages are more easily settled because there is an obvious range of possible compromises. The data point in the direction contrary to that predicted by the theory, suggesting that CAMP may be more effective with regard to cases in which relief other than money damages is sought. However, once again, the results are not statistically significant. They do not support the theory, but they cannot be taken as disproving it.

Table 11 shows the argument rate separately for appeals from decisions before trial and those from decisions rendered after a trial. One theory here is that parties have a greater investment in cases that have gone to trial below, and may therefore be more willing in such cases to make the additional investment in an appeal that runs the full course. A contrary theory is that the likelihood of affirmance of an order or judgment issued before trial is greater

**TABLE 10**
**Argument Rate by Nature of Relief Sought Below: Private Civil Appeals and Appeals in Which the United States Is a Party**

| | Percentage Argued | |
|---|---|---|
| | Money Damages Only | Other Relief |
| CAMP | 54.6% (*/118) | 53.6% (*/137) |
| Control | 60.3% (35/58) | 66.1% (41/62) |
| Difference | −5.7% | −12.6% |

NOTE: Administrative agency appeals are not included in this table because form C-A, the version of form C used for those appeals, does not ask about the relief sought. Bankruptcy appeals are excluded because we found it extremely difficult to code the responses with confidence. In addition, three CAMP and two control appeals are omitted because information about the nature of relief sought was not available.

*The computation of the CAMP proportion includes an adjustment to compensate for the fact that the two staff counsel were assigned unequal numbers of appeals in the experiment.

**TABLE 11**
**Argument Rate by Stage of Litigation Below: Private Civil Appeals, Bankruptcy Appeals, and Appeals in Which the United States Is a Party**

| | Percentage Argued | |
|---|---|---|
| | Appeal before Trial | Appeal after Trial |
| CAMP | 50.6% (*/161) | 59.1% (*/110) |
| Control | 58.8% (47/80) | 68.1% (32/47) |
| Difference | −8.2% | −9.0% |

NOTE: Administrative agency appeals are not included in this table because form C-A, the version of form C used for those appeals, does not ask about the stage of litigation at the agency level. In addition, five CAMP and four control appeals are omitted because information about the stage below was not available. An additional CAMP appeal is omitted because the stage was "midtrial."

*The computation of the CAMP proportion includes an adjustment to compensate for the fact that the two staff counsel were assigned unequal numbers of appeals in the experiment.

than the likelihood of affirmance of a judgment after trial, and that there may therefore be less willingness to compromise an appeal from a pretrial decision. The table shows that the observed reduction in the argument rate when CAMP cases are compared with controls is practically the same in either case. For reasons discussed in the appendix, however, we regard the data on which this comparison is based as quite unreliable.

In table 12, the appeals from pretrial decisions are further broken down into those denominated by the appellant's attorney as interlocutory appeals and those denominated as appeals from final decisions. At this point, the subsamples have become quite small. Once again, the apparent difference in the magnitude of the CAMP effect is not statistically significant.

**TABLE 12**
**Argument Rate in Appeals from Pretrial Decisions by Basis of Appellate Jurisdiction: Private Civil Appeals, Bankruptcy Appeals, and Appeals in Which the United States Is a Party**

| | Percentage Argued | |
|---|---|---|
| | Interlocutory Appeals | Appeals from Final Decisions |
| CAMP | 34.8% (*/47) | 57.3% (*/113) |
| Control | 36.4% (8/22) | 67.9% (38/56) |
| Difference | −1.5% | −10.6% |

NOTE: Of the appeals classified as "before trial" in table 11, one CAMP appeal and two control appeals are omitted from this table because information about the basis of appellate jurisdiction was not available.

*The computation of the CAMP proportion includes an adjustment to compensate for the fact that the two staff counsel were assigned unequal numbers of appeals in the experiment.

As table 11 suggests, it is quite possible that appeals from decisions before trial are more likely to be settled or withdrawn than others and at the same time for staff counsel intervention to be equally effective in both categories. The figures in the table are subject to substantial variation, of course, and the suggested rela-

tionships may not in fact prevail, but the table does provide an illustration of the difficulty of many theories that have been advanced. The simple fact is that appeals of all kinds are withdrawn and/or settled, perhaps in differing proportions, with or without CAMP. To say that an appeal from a decision before trial is more likely to be settled or withdrawn than an appeal from a decision after trial is to answer the wrong question. The real question of interest is whether intervention by staff counsel is more likely to affect the course of events in appeals from decisions before trial. The questionnaire responses occasionally addressed that question. For the most part, however, it seems to us that the theories advanced about kinds of cases in which CAMP is likely to be effective do not have a strong logical foundation. Even if they are based on valid assumptions about the differential likelihood that various classes of appeals will be settled or withdrawn, they do not address the question of differential effectiveness of staff counsel intervention.

Our tests of several of the theories are fundamentally inconclusive because of the insufficient size of the sample. Even though we have not been able to confirm it, it remains possible that there are some categories of appeals for which CAMP has little or no impact on the argument rate and other categories for which it has relatively great impact. We think, however, that all such theories should be regarded with considerable skepticism.

## Settlement or Withdrawal

A final question of interest about the nature of the program's impact on the argument rate is whether staff counsel produce principally unilateral withdrawals or principally negotiated settlements.

Most of the appeals that are neither argued nor dismissed on motion are withdrawn by consent of the parties. A few are dismissed for failure to adhere to scheduling orders, but the court is reasonably liberal about permitting reinstatement of appeals dismissed for violation of scheduling orders, so it can probably be assumed that almost all the appeals in which such dismissal stood as the final disposition were appeals that had been deliberately abandoned. When an appeal is withdrawn or abandoned, it is not always clear from court records whether the withdrawal was a

unilateral decision on the part of the appellant or whether it resulted from some kind of compromise. The questionnaire administered as part of the experiment included an effort to cast light on that distinction. . . .

. . . .

. . . Unfortunately, [the relevant question was ambiguously phrased.] . . . There were 108 [appeals] in which we were able to determine, within the limits of the accuracy of the questionnaire data, whether the outcome reflected mutual resolution of the controversy or unilateral withdrawal. Only 18 of the 108 appeals were in the control group, providing a very small sample whose distribution could be quite unrepresentative of a larger population. We are thus unable to say whether the CAMP effect on the argument rate is produced principally through increasing the number of unilateral withdrawals, principally through increasing the number of negotiated settlements, or with substantial elements of both.

## V. Effect on Disposition Time

Generally, an effort to evaluate an innovative program is an effort to compare the program with the status quo ante. The control group in an experiment is handled in the old way while the experimental group is handled in the new way. The second CAMP experiment was somewhat unusual in that it was designed after the program had been in place for some time. In a sense, CAMP represented the status quo, and the control group was carved out as what might be termed a counterinnovation.

In considering the effect of CAMP on the argument rate, we have taken for granted that CAMP was to be compared with a system in which there were no prebriefing conferences. In considering CAMP's effect on disposition time, it is necessary to describe the alternative with which it was compared.

As has already been noted, the clerk was instructed to issue scheduling orders in control appeals that reflected the time limits of the Federal Rules of Appellate Procedure. This was done so that the clerk could use the authority of the CAMP rules to dismiss appeals for failure to comply with the schedule. But the clerk was

also told to be more lenient about dismissing control appeals for failure to comply. A design document for the evaluation contained the following statement:

> Control cases will not, however, be dismissed immediately upon default. Given the more liberal time limits within which a control appeal must be prosecuted and the absence of staff counsel's assistance in resolving procedural difficulties and in encouraging early settlement, it is likely that control cases will take longer than CAMP cases to proceed to argument or to settle. Control cases would not have sufficient time for settlements to mature if they were dismissed immediately upon scheduling order default. A reasonable amount of time for settlement or prosecution will be allowed to pass before default dismissal.

There does not appear to have been any fixed time within which the clerk was to dismiss a control appeal for a scheduling order violation. One of these appeals was dismissed sixty-six days after docketing, about five weeks after the appellant had failed to file the record according to the scheduling order. Another was dismissed more than six months after docketing, more than four months after a similar failure to file the record.

Control appeals were thus subject to scheduling orders incorporating the time limits of the Federal Rules of Appellate Procedure, but were not to be dismissed as quickly as CAMP cases for failure to comply. The lawyers were not informed of the relaxed policy about dismissals, however, and those familiar with CAMP procedures presumably acted on the assumption of more rigorous enforcement.

According to A. Daniel Fusaro, the clerk of the court, the practice before CAMP was instituted was simply to review the docket from time to time looking for long-dormant appeals, and then to contact the attorneys in such appeals with a view to either prodding them forward or encouraging withdrawal. The only formal rule authorizing dismissal for failure to prosecute an appeal was Second Circuit rule 0.18(7), which permits the clerk to dismiss nine months after docketing if the appellant's brief has not been filed. With regard to monitoring, therefore, it appears that the procedure

prior to CAMP was more relaxed than the procedure applied to the control group during the experiment.

Extensions of time in control appeals were granted in response to motions, as contrasted with the informal procedures for amending scheduling orders in CAMP appeals. The motion system was essentially the system that prevailed before the CAMP program was initiated. Review of the docket sheets in the control appeals indicates that motions were granted quite freely, which also appears to have been the case before CAMP.

An unmeasurable factor that may influence the comparison of CAMP appeals and controls is that CAMP, during the years the program has been operating, may have changed lawyers' expectations about the pace of appellate litigation and thereby changed their behavior. Control group lawyers may, for example, have filed fewer motions for extensions of time than they would have before CAMP. If CAMP has indeed accelerated the pace, therefore, this factor may cause us to understate the magnitude of the change. We have no way of assessing that possibility.

On the whole, we regard it as unlikely that the management of the control appeals in the experiment was more relaxed than the pre-CAMP status quo. Comparison of CAMP and control appeals probably provides a conservative measure, therefore, of the program's effect on disposition time as compared with the court's procedures before 1974. We note that in a broad sense our conclusions about the program's effect on disposition times are consistent with Goldman's; since Goldman studied the program almost at its inception, his control group more nearly represented the pre-CAMP status quo.

A final concern about the data on which this chapter is based is that we did not observe an entire year's appeals. Because the court hears few arguments in routine civil appeals in July and August, there is a seasonal influence on case schedules. More important, there is a seasonal influence on staff counsel's efforts to keep appeals moving. When the argument calendar is full, as it tends to be in the fall, staff counsel are likely to be more generous with extensions of time. As the end of the term approaches in the spring, their docket-management responsibilities assume greater importance.

With an experiment based on appeals docketed from July 1 to January 19, we are unable to say whether the CAMP effects observed in a full-year study would have been larger or smaller than the effects we observed.

Table 13 presents data about the elapsed time from docketing to disposition of CAMP appeals and control appeals. The upper portion of the table displays the cumulative frequency distribution. It may be read, for example, as saying that 45.1 percent of the CAMP appeals were disposed of within 90 days of docketing, but that only 20.5 percent of the control appeals were. The lower portion of the table shows the average time from docketing to disposition. The average has the advantage of summarizing the data in a single number. In addition, the statistics available for examining the difference between the CAMP and control averages are relatively powerful statistics. But it is important to note that "average" does not mean "typical." The average is influenced disproportionately by those cases that took a very long time. In both CAMP and control categories, more than half the appeals were disposed of in considerably less than the average time.

In examining this table and similar tables that follow, we have applied two statistical tests. One is a test to determine whether the cumulative distributions are so divergent that the differences are not likely to have occurred as a result of chance in drawing the samples. The question is whether the largest difference between the CAMP and control appeals (including not only those differences we have displayed here but also those at intermediate points) is large enough so that it is unlikely to have occurred as a result of chance. The other test is a test to determine whether the difference in the average number of days is likely to have occurred by chance. Both tests indicate that the differences in table 13 are statistically significant. At the 95 percent confidence level, the average disposition time for CAMP appeals is shorter by somewhere between 21 and 67 days than the time for appeals handled the way the control appeals were. The disposition times are quite similar for both staff counsel.

## TABLE 13
## Time from Docketing to Disposition

| | Cumulative Percentage of Appeals Disposed of within— | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | 30 Days | 60 Days | 90 Days | 120 Days | 150 Days | 180 Days | 210 Days | 240 Days |
| CAMP* (317 appeals) | 13.7% | 33.8% | 45.1% | 58.0% | 71.0% | 77.3% | 82.6% | 87.8% |
| Control (151 appeals) | 4.0% | 12.6% | 20.5% | 30.5% | 47.0% | 58.3% | 72.2% | 78.8% |
| Difference | 9.7% | 21.2% | 24.5% | 27.6% | 24.0% | 19.0% | 10.5% | 9.0% |

| | Average Time |
|---|---|
| CAMP* (317 appeals) | 131 days |
| Control (151 appeals) | 175 days |
| Difference | −44 days |
| 95% confidence interval | −67 to −21 days |
| 68% confidence interval | −56 to −32 days |

NOTE: One CAMP and one control appeal, both consolidated by motion with earlier appeals, are omitted. In one, the docketing date is unknown; the other appeal was docketed after disposition, apparently correcting an error.

*The computations of the CAMP proportion and average include adjustments to compensate for the fact that the two staff counsel were assigned unequal numbers of appeals in the experiment.

Table 14 displays the same data for appeals that did not go to argument. Once again, the shorter times for CAMP appeals than controls are statistically significant by both tests; there are no statistically significant differences between the two staff counsel.

Because of CAMP's effect on the argument rate, the CAMP and control groups in table 14 are not groups that were the same, subject to random variation, at the beginning of the experiment. Indeed, according to our best estimate, about one-fifth of the appeals in the CAMP group are appeals that were removed from the argument calendar as a result of staff counsel intervention. Since CAMP conferences typically take place quite soon after docketing, it would not be surprising if the appeals settled or withdrawn as a result of CAMP tended to be among those with relatively short disposition times. In view of the magnitude of the differences between CAMP appeals and controls on this measure, we are quite confident that the reduction in disposition time reflects not only a reduction through removal of appeals from the argument calendar but also a reduction for those appeals that would have been settled or withdrawn even in the absence of CAMP.

Accelerated disposition of appeals that would in any event terminate without argument may well result in cost savings to litigants by reducing the amount of work performed by their lawyers. We do not, of course, have direct measures of cost. We did tabulate the number of unargued appeals in which briefs were filed, with the expectation that accelerated disposition might reduce that number. Of the fifty-nine unargued appeals in the control group, the appellants filed briefs in eight, or 13.6 percent. The proportions for both staff counsel were smaller, but the differences were not statistically significant. Although the 13.6 percent figure does not suggest a great potential for reducing cost by reducing the number of appeals that are briefed but not argued, it should be recognized that the figure is subject to considerable sampling variability; the true proportion could be in excess of 20 percent.

## TABLE 14
## Time from Docketing to Disposition: Appeals Not Argued

| | Cumulative Percentage of Appeals Disposed of within— | | | | | |
|---|---|---|---|---|---|---|
| | 30 Days | 60 Days | 90 Days | 120 Days | 150 Days | 180 Days |
| CAMP* (156 appeals) | 24.7% | 60.6% | 78.9% | 91.1% | 96.1% | 96.8% |
| Control (59 appeals) | 10.2% | 27.1% | 44.1% | 61.0% | 72.9% | 79.7% |
| Difference | 14.5% | 33.5% | 34.8% | 30.1% | 23.2% | 17.1% |

| | Average Time |
|---|---|
| CAMP* (156 appeals) | 65 days |
| Control (59 appeals) | 129 days |
| Difference | −64 days |
| 95% confidence interval | −95 to −33 days |
| 68% confidence interval | −80 to −48 days |

*The computations of the CAMP proportion and average include adjustments to compensate for the fact that the two staff counsel were assigned unequal numbers of appeals in the experiment.

## TABLE 15
## Time from Docketing to Disposition: Appeals Argued

| | Cumulative Percentage of Appeals Disposed of within— | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | 60 Days | 90 Days | 120 Days | 150 Days | 180 Days | 210 Days | 240 Days | 270 Days | 300 Days |
| CAMP* (161 appeals) | 8.2% | 12.7% | 26.4% | 47.0% | 58.7% | 67.9% | 77.4% | 82.5% | 87.8% |
| Control (92 appeals) | 3.3% | 5.4% | 10.9% | 30.4% | 44.6% | 62.0% | 72.8% | 77.2% | 84.8% |
| Difference | 5.0% | 7.3% | 15.5% | 16.6% | 14.1% | 6.0% | 4.5% | 5.3% | 3.1% |

| | Average Time |
|---|---|
| CAMP* (161 appeals) | 194 days |
| Control (92 appeals) | 205 days |
| Difference | −11 days |
| 95% confidence interval | −37 to +16 days |
| 68% confidence interval | −24 to +2 days |

NOTE: One CAMP and one control appeal, both consolidated by motion with earlier appeals, are omitted. In one, the docketing date is unknown; the other appeal was docketed after disposition, apparently correcting an error.

*The computations of the CAMP proportion and average include adjustments to compensate for the fact that the two staff counsel were assigned unequal numbers of appeals in the experiment.

Table 15 presents similar disposition time data for the appeals that were argued. Once again, it has to be recognized that the argued appeals assigned to CAMP were not, as a group, equivalent to the argued control appeals, since CAMP removed some appeals from this category. But we have no reason to think that the appeals settled or withdrawn as a result of CAMP were disproportionately composed of appeals that would have taken a long time to get to argument had they been argued. Hence, if we observe a statistically significant acceleration of the pace in comparing the two groups of argued appeals, we can be quite comfortable in concluding that the observation is not a by-product of the settlement or withdrawal effect.

Using the test based on means, the differences are not significant. Using the test based on the cumulative distributions, on the other hand, the overall comparison of CAMP with controls is just short of significance, and the fast pace of Mr. Fensterstock's appeals, when compared with controls, is significant at the 97.5 percent confidence level.

Tables 16 and 17 present further breakdowns of the time for disposition in argued appeals. Table 16 shows the time from docketing to argument. Conceivably, if staff counsel are successful in sharpening the issues in appeals that reach argument, there may be a consequent impact on the time from argument to disposition. But if staff counsel do have an impact on the pace in cases that go to argument, we would expect to find it principally in the period from docketing to argument, shown in table 16.

The practice in the Second Circuit, moreover, is to schedule an appeal for argument at the time the appellant's brief is filed, without waiting for the appellee's brief. Scheduling is done by the clerk's office, and staff counsel are not routinely involved, although they will try to get an early place on the calendar on occasion when that is an important consideration. We would therefore expect the time to argument from the filing of the appellant's brief to be largely (but not wholly) out of the control of staff counsel. Table 17 therefore shows the time from docketing through the filing of appellant's brief.

## TABLE 16
## Time from Docketing to Argument: Appeals Argued

| | Cumulative Percentage of Appeals Argued within— | | | | | |
|---|---|---|---|---|---|---|
| | 60 Days | 90 Days | 120 Days | 150 Days | 180 Days | 210 Days |
| CAMP* (161 appeals) | 12.0% | 24.4% | 52.2% | 77.9% | 83.5% | 88.9% |
| Control (92 appeals) | 6.5% | 10.9% | 23.9% | 62.0% | 78.3% | 87.0% |
| Difference | 5.4% | 13.6% | 28.2% | 15.9% | 5.3% | 2.0% |

| | Average Time |
|---|---|
| CAMP* (161 appeals) | 137 days |
| Control (92 appeals) | 154 days |
| Difference | −17 days |
| 95% confidence interval | −41 to +7 days |
| 68% confidence interval | −29 to −5 days |

NOTE: The two appeals omitted from table 15 are also omitted here.

*The computations of the CAMP proportion and average include adjustments to compensate for the fact that the two staff counsel were assigned unequal numbers of appeals in the experiment.

**TABLE 17**
**Time from Docketing to Filing of Appellant's Brief: Appeals Argued**

| | Cumulative Percentage of Briefs Filed within— | | | | |
|---|---|---|---|---|---|
| | 30 Days | 60 Days | 90 Days | 120 Days | 150 Days |
| CAMP* (161 appeals) | 19.4% | 61.0% | 83.3% | 91.5% | 93.9% |
| Control (91 appeals) | 7.7% | 26.4% | 70.3% | 85.7% | 94.5% |
| Difference | 11.7% | 34.6% | 13.0% | 5.8% | −0.6% |

| | Average Time |
|---|---|
| CAMP* (161 appeals) | 71 days |
| Control (91 appeals) | 82 days |
| Difference | −11 days |
| 95% confidence interval | −29 to +7 days |
| 68% confidence interval | −20 to −2 days |

NOTE: In addition to the two appeals omitted from table 16, a control appeal, consolidated by motion with an earlier appeal, is omitted because the appellant's brief in the consolidation was filed before the appeal was docketed.

*The computations of the CAMP proportion and average include adjustments to compensate for the fact that the two staff counsel were assigned unequal numbers of appeals in the experiment.

The differences in both tables 16 and 17 are statistically significant when the distributions are compared but not significant when the means are compared. The interpretation of those findings is not without risk, but we are persuaded that the argued CAMP cases did move somewhat more quickly than the argued controls. The probable magnitude of the CAMP advantage is not very great, however; we are almost surely talking in terms of weeks rather than months.

We noted earlier that Mr. Fensterstock's advantage over the controls in disposition time for argued cases is statistically significant when the distributions are compared but that Mr. Scardilli's is not. The difference between the two staff counsel persists when we consider time from docketing to argument rather than time from docketing to disposition, and for this period the difference is statistically significant at the 95 percent level. However, with regard to

the time between docketing and the filing of the appellant's brief, the data for the two staff counsel are very similar, and both have a statistically significant advantage over the controls. Further investigation discloses that Mr. Fensterstock's relative advantage appears in the interval between the filing of the appellant's brief and the argument. In that period, Mr. Scardilli's appeals moved more slowly than the controls while Mr. Fensterstock's moved more quickly. Neither of these comparisons with the control group is statistically significant, but the comparison of times for the two staff counsel is. Since we have no plausible explanation other than chance variation for the observation that Mr. Scardilli's time in this interval was slower than the time for the control group, we are inclined to accept chance variation as the explanation of the data for Mr. Scardilli. That in turn leads us to question the finding of significance in the comparison of the two staff counsel. It may be, however, that Mr. Fensterstock takes more advantage than Mr. Scardilli of the opportunity to participate in the scheduling of arguments in circumstances in which early argument can be used to settle or forestall a motion for a stay.

In summary, then, we conclude that appeals are processed more quickly if handled under the CAMP program than if handled in the manner in which the control appeals were handled in the experiment. At the 95 percent confidence level, the average saving is between twenty-one and sixty-seven days, with the best single estimate being forty-four days. Since appeals that do not reach argument are likely to be disposed of earlier than those that do, some reduction in disposition time is a by-product of the fact that CAMP results in the settlement or withdrawal of appeals that would otherwise be argued. We are quite confident that there is also an acceleration of the disposition time of those appeals that would ultimately settle or be withdrawn in any event. And we believe that there is an acceleration of the disposition time of appeals that reach argument, but we strongly suspect that the average gain is to be measured in weeks, not months.

As was noted earlier, we think the control group appeals probably moved more quickly than they would have under pre-CAMP procedures, thereby introducing a conservative element if the anal-

ysis is taken as a comparison of CAMP procedures with the pre-1974 status quo. However, an element of uncertainty is introduced by the fact that we did not have a full year's observation of a phenomenon with seasonal characteristics. That uncertainty does not raise doubts about whether CAMP accelerates appeals, but does suggest caution in interpreting our estimates of the magnitude of the acceleration.

## VI. Lawyers' Views of the CAMP Program

It seems clear that most lawyers who practice in the Second Circuit like the CAMP program, and that they like it primarily because they believe (correctly) that it fosters the nonjudicial resolution of some appeals.[10] Other lawyers do not favor the program because they regard it as ineffective. And a minority find the conferences objectionable, basically on the ground of "undue pressure," sometimes more colorfully expressed. Most lawyers apparently find staff counsel's aggressive pursuit of settlement desirable and many find it highly praiseworthy, but it must be recognized that there is a group that does not.

In reporting on the particular appeals that were the subject of the study, about a quarter of the responding lawyers in conferenced appeals that reached argument said that they thought the program had resulted in improvement of the quality of the brief or oral argument. About 30 percent reported that the program had resulted in resolution of various procedural issues; beyond that, a number of favorable comments about this aspect of the program were received.

One of the questions on the attorney questionnaires was, "Do you prefer participation in CAMP?" By a substantial margin, the responding lawyers indicated that they do. Of 584 respondents, 311 (53.3%) answered "yes," 123 (21.1%) answered "no" and

[10] [This chapter is presented in edited and abbreviated form. Readers who are interested in a detailed presentation of the findings on lawyers' views should consult chapter 6 of the original report. Ed.]

150 (25.7%) either did not respond or responded with a comment rather than checking "yes" or "no." The comments were generally of a "sometimes yes, sometimes no" nature.

. . . .

## Reactions to Efforts to Encourage Settlement or Withdrawal

The responses to the structured questions on the questionnaire are illuminated by unstructured responses to the questionnaire's invitation to comment. In considering the lawyers' comments, as in considering their responses to the question about preference, it must of course be understood that advocates are not necessarily unbiased observers. In the course of CAMP conferences, staff counsel often express their own views on the merits of appeals; this practice is quite likely to irritate the lawyer for one side while pleasing the lawyer for the other. When staff counsel persevere in pursuing the possibility of settlement in an appeal that the lawyers regard as unsettleable, the perseverance may be regarded as brilliant if successful and bullheaded if unsuccessful. The lawyers' comments thus enrich our understanding of lawyers' reactions to the program, but neither favorable nor unfavorable remarks are necessarily to be taken at face value.

Comments were offered on 328 of the 609 questionnaires received. They varied greatly, as would be expected, in the specificity of the views expressed. Some comments, moreover, were about the conference in the appeal that was the subject of the questionnaire while others were about the program in general.

Most of the comments—both favorable and unfavorable—were addressed to the program's potential for achieving nonjudicial resolution. As would be expected in the light of the preference for CAMP among the responding lawyers, many more of the comments were favorable than unfavorable. Many responses indicated that the conference had been useful in producing settlement or withdrawal of the appeal, and still others praised the effort even when it was unsuccessful. . . .

. . . .

The respondents offering unfavorable comments about the efforts to achieve nonjudicial resolution fell into two categories. One category comprised respondents who felt that the program was a waste of time in the particular appeal, or in some class of appeals, or as a general proposition. The other category, which included about 40 of the 328 respondents offering comments, comprised respondents who expressed concern about what they regarded as undue pressure to settle. About 25 of the comments in this group appear to have been written in anger, and were laced with words such as "browbeat," "bludgeon," "strong-arm tactics," and "arm-twisting." . . .

. . . .

Some lawyers objected to requests by staff counsel for permission to talk with their clients. . . . Complaints about this practice have been reported elsewhere.[11] It is clear that some members of the bar regard even a request for permission as a threat to their relationships with their clients. In the "Guidelines for Conduct of Pre-Argument Conferences" adopted by the Second Circuit in June 1982, the practice of requesting clients to attend conferences—presumably including telephone conferences—was specifically authorized. Staff counsel are not permitted to talk with clients without their lawyers present.

. . . .

Whatever misunderstandings there may have been about staff counsel's authority to speak for the court seem likely to be cleared up by the practice, currently in effect, of enclosing the court's June 1982 guidelines with the first conference order. Lawyers may have doubts about how much credence to give to the views of staff counsel, but it is made very clear in the guidelines that the staff counsel's views are his own and are not communicated to the court.

Finally, among the strongly negative comments about the efforts of staff counsel to achieve settlement or withdrawal were a

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[11] *See* Federal Courts Committee, New York County Lawyers' Association, The Operation of the Second Circuit Civil Appeals Management Plan 16-17 (1982) (available from the FJC's Information Services Office).

handful in which the assurances of confidentiality were questioned.

. . . .

It deserves emphasis that the strong negative reactions to the program were in a distinct minority. After eliminating the questionnaires of respondents who said they had used the form before (and may thus be regarded as voting a second time), we had 584 questionnaires, 312 of which included comments. Only about 25 of them contained comments that suggested that the lawyer was offended by the handling of the conference. Many . . . contained lavish praise. We see no indication, moreover, that either the very favorable comments or the very unfavorable ones were focused on a particular staff counsel. Both Mr. Fensterstock and Mr. Scardilli were the subjects of both kinds of comment.

The responses to the court's questionnaire were substantially more favorable to CAMP than data reported last year by the Federal Courts Committee of the New York County Lawyers' Association.[12] That committee asked lawyers whether "the conference by Staff Counsel with respect to the Civil Appeals Management Plan was satisfactorily conducted." Twenty-nine percent of their respondents in a sample selected from docket sheets answered that it had not been, and 45 percent of the respondents from the federal court committees of three bar associations answered that way. Lawyers who thought that the conference had not been satisfactorily conducted were asked a series of questions to further refine their complaints. Although the responses to the specific questions were not tabulated in the committee's report, the committee indicated that undue pressure to settle, speaking to clients or threatening to do so, and acting in a manner thought to be "unfair, burdensome, or in your opinion unacceptable" were common complaints.

As we noted in chapter 3, we have no sound basis for making judgments about the representative quality of the responses to the court of appeals' questionnaire. However, we do regard the response to the court of appeals' questionnaire as more reliable than the response to the Federal Courts Committee questionnaire. First, the court of appeals' response rate was about 50 percent, while the

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[12] *Id.*

Federal Courts Committee's response rate was under 30 percent of a much smaller sample. Second, the court of appeals' questionnaire was neutrally drafted, while the Federal Courts Committee's seemed designed to invite unfavorable responses. We recognize the possibility that some lawyers may have been reluctant to express negative views on the court of appeals' questionnaire in spite of assurances that the responses would be kept confidential from staff counsel and judges. But on the whole, it must be regarded as the better survey.

. . . .

## The Role of CAMP in Clarifying Issues

One of the questions on the questionnaire sent to lawyers in conferenced appeals was as follows:

> Did the CAMP conference or other contact with Staff Counsel result in:
>
> ( ) Improvement of the quality of the brief or oral argument by clarifying or changing the emphasis on certain issues.

Of 203 respondents in appeals that were conferenced and that went to argument, 47 checked this item, indicating that they thought the quality of the brief or oral argument had been improved as a result of the conference. The remaining 156 left the box unchecked. The questionnaire asked respondents to check the item to indicate an affirmative response and had no place to indicate a negative response. It therefore is not possible to distinguish a negative response from a failure to respond to the question. But it seems safe to assume that in the great bulk of the cases the unchecked box did represent a negative. Thus, about a quarter of those responding believed that the quality of briefs or argument was improved as a result of the conference.

The second experiment did not include a questionnaire to judges sitting on appellate panels, but Goldman's study did. Judges were asked a number of questions relating to the quality of the presentation in the appeals that were argued, and comparisons were made between the responses in CAMP and control appeals. In his tables 16, 19, 20, and 21, Goldman found the judges' ratings

of CAMP appeals to be better than their ratings of control appeals, and concluded that the difference was statistically significant. We believe that the statistical tests were incorrectly applied. Upon reanalysis of the Goldman data, we conclude that it has not been demonstrated that CAMP improves the quality of presentations in ways that are perceptible to the judges.[13] To say that, however, is not to deny that some lawyers genuinely find the conferences helpful in the preparation of their appeals.

## CAMP's Role in Resolving Scheduling and Procedural Matters

Lawyers in conferenced appeals were also asked [several] questions about the role of staff counsel in resolving procedural problems and scheduling matters.

. . . .

Even though the percentage of lawyers saying that CAMP had assisted in the resolution of procedural problems was not high, there were quite a few favorable comments about this aspect of the program and particularly about the informality with which scheduling matters can be handled, obviating the need for motions to the court to make minor changes in the schedule. . . .

. . . .

Other respondents mentioned avoiding arguments about the contents of the joint appendix and the informal handling of stays pending appeal as advantages of the program.

Some of the lawyers responding found the CAMP scheduling practices objectionable. A number complained that the emphasis on

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[13] If the question to be answered is whether the quality of appeals has in some way been improved, the appropriate unit of observation is the appeal, and statistical tests should be based on the number of appeals in the sample. Goldman applied the statistics to the number of judge ratings. In effect, this inflated the size of the sample and made relatively small differences in observed effects appear to be statistically significant. One of the present authors—Mr. Partridge—reviewed the Goldman manuscript for the Center before its publication and overlooked the error. In spite of Goldman's traditional statement accepting responsibility for error, it should not be treated as his alone.

Our method of reanalysis is discussed in the appendix.

speed is overdone; one referred to the "frenzied pace" at which staff counsel require appeals to be prepared for argument. There were a few complaints about CAMP conferences themselves being called on very short notice.

A view expressed occasionally is that staff counsel deliberately impose unreasonable time requirements as part of the strategy of fostering settlement. Staff counsel state that this is not the case. But they do sometimes relax the briefing schedule if it appears that more time for discussion may make settlement possible. It is not wholly surprising in that context if some lawyers regard a tight schedule as the penalty for lack of interest in settlement.

## Problems and Suggestions

The comments on the questionnaires contained a number of suggestions for improving the administration of the program that were premised on the assumption that the program is basically sound.

One theme that recurred with some frequency was a plea for relief from lawyers not located in New York City. Although a few CAMP conferences have been convened at locations outside New York City and some are held on the telephone, staff counsel generally required during the period of the second experiment that at least the first conference be held in person at the courthouse in Foley Square. When lawyers are from outside New York City, the burden imposed by attendance at the conference obviously becomes greater. A lawyer from midtown or downtown Manhattan will not normally devote much more than two hours to attending a conference, including travel time. A lawyer from Rochester or Hartford or Burlington or Washington, D.C., is likely to be taken out of his or her office for the entire day.

A variety of possible solutions for this problem were proposed. These included greater use of telephone conferences, more flexibility in canceling conferences where it is clear that a case is not settleable, and a proposal that conferences be held outside New York City on a regular basis. One out-of-town lawyer asked that consideration be given to not requiring a personal appearance at more than one conference.

The proposal that conferences be held outside New York City would of course not solve the problem in cases in which the opposing lawyers are not from the same area, and it is not clear to us whether the volume of appeals in which this practice would be helpful is enough to support a reasonable schedule of circuit-riding. . . . The two staff counsel have responded to the problem by increasing their willingness to conduct conferences over the telephone when out-of-town lawyers are involved. Telephone conferences seem likely to be less effective than face-to-face conferences, however. If a schedule of conferences outside New York City could practicably be arranged, it might be desirable to do so.

Several lawyers attending their first conferences indicated that the conference would have been more fruitful if they had been better informed beforehand of what would take place there. . . . The inclusion of the court's June 1982 guidelines with the initial conference orders should go a long way toward alleviating any misunderstandings on this score.

A number of lawyers expressed concern that the lawyers who attend conferences sometimes do not have serious negotiating authority. This apparently occurs in both public and private litigation, although there is some reason to think that it is more common in public litigation because of the bureaucratic processes involved in the government's reaching settlement decisions. One respondent suggested that government lawyers should be required to come to the conference with someone from the agency being represented.

Some lawyers suggested that litigants should regularly attend the conferences. Others, as has already been noted, are troubled by what they regard as an interference in the lawyer-client relationship when staff counsel do ask litigants to attend.

Finally, there were several suggestions to the effect that staff counsel should be better prepared, including one suggestion that the parties be required to submit two-or-three-page summaries of the issues and one suggestion that staff counsel be given law clerk assistance.

# Appendix: Technical Notes

## Notes to Chapter 3

### Statistical Analysis of Categorical Data

The categorical data presented in tables 1, 2, 6, and 8 through 12 were analyzed using what are termed log-linear analysis procedures. These procedures were used because they made it possible to test for whether CAMP is more effective in some circumstances than in others. The procedures test whether each of several characteristics of a case (such as its case type or its assignment to staff counsel or the control group) helps predict whether it will be argued. The tests are conducted by estimating the effect of each characteristic on the argument rate and then determining whether that effect is sufficiently large to be unlikely to have resulted from chance.

In conducting the analysis, one of the characteristics, or "sample factors," was always the three-level treatment factor (Fensterstock, Scardilli, or control). When a second sample factor was used, it was a characteristic, such as case type or basis of jurisdiction, that might interact with the treatment. If the dependent variable was not dichotomous, it was rendered dichotomous by combining categories prior to performing the analysis. Contrasts were generated that compared either the entire CAMP group with the control group or each staff counsel separately with the control group. As is discussed below, when the entire CAMP group was compared with the control group, the data were adjusted so that each staff counsel was given the weight he would have had if both had been assigned equal numbers of appeals in the experiment.

Models were generated and their fit with the observed data was tested according to the following sequences of contrast specification:

1. For comparison of CAMP appeals with controls: CAMP vs. control contrast, Fensterstock vs. Scardilli contrast, all second sample factor contrasts, second sample factor contrast

interactions with CAMP vs. control contrast, second sample factor contrasts with Fensterstock vs. Scardilli contrast.

2. For comparison of Fensterstock appeals with controls: Scardilli vs. control contrast, Fensterstock vs. control contrast, all second sample factor contrasts, all interaction contrasts (entered simultaneously).
3. For comparison of Scardilli appeals with controls: Fensterstock vs. control contrast, Scardilli vs. control contrast, all second sample factor contrasts, all interaction contrasts (entered simultaneously).

Significance testing was conducted in two ways. First, we tested the marginal decrease in the maximum-likelihood chi-square when the contrast in question was included in the model. In other words, we tested whether inclusion of a particular case characteristic resulted in significant improvement in the capacity of the model to account for variation in argument rates. Second, the estimated effect of the contrast in the full model was divided by its standard error and the resulting value was evaluated as a standard normal (z) statistic. This is logically equivalent to constructing a confidence interval around the estimated effect and assessing whether it includes zero, or no effect. In all instances, these two types of significance testing led to the same conclusion.

To generate confidence intervals for the various argument-rate comparisons we report, we first generated estimates of the effects in log-linear models. The models used included only the assignment categories (staff counsel or control) as potential explanations of argument-rate differences. (The confidence limits were constructed only after we had determined that there were no significant interactions between assignment and other case characteristics.) The log-linear estimate of the comparison in question was then changed by adding or subtracting 1.96 or 1.0 times the standard error of the estimate. The resulting value was reentered in the log-linear model formula and used to estimate first the odds ratio and then the raw proportion in each condition in the comparison. The values shown in the tables for confidence intervals are the values

obtained for the differences in estimated proportions computed in this fashion.

## Statistical Analysis of Noncategorical Data

Measures of brief length in chapter 4 and elapsed time in chapter 5 were analyzed with both parametric and nonparametric procedures.

The parametric procedures were based on analysis-of-variance methods. The tests followed what is termed the regression approach and used sequences of model construction identical to those noted above; final tests of the contrasts were computed as F tests with a single degree of freedom. The confidence intervals were constructed using the observed differences between groups of cases and, as an estimate of the standard error of the difference, the usual formula for pooled variance estimates for groups of unequal size.[14]

The brief length and elapsed time data were generally nonnormal in their distribution; often they showed considerable skew. The analysis-of-variance techniques were used in spite of this violation of one of the assumptions of the procedure because the large, more or less equal, samples in the two staff counsel groups and the control group provided some assurance that significance tests would not be much affected by the nonnormalcy. However, the substantial variability of the brief length and elapsed time data rendered analysis of variance less powerful than it might otherwise have been. For this reason, the analysis-of-variance techniques were supplemented by use of the Kolmogorov-Smirnov test.

Basically, this test involves developing a cumulative distribution of a staff counsel's cases (or all CAMP cases) and a similar distribution of control cases on the basis of the brief length or elapsed time variable, and determining whether the largest distance between two cumulative distributions exceeds the test statistic. Because it examines all points on the cumulative distribution, we regarded it as preferable to a test of medians. The Kolmogorov-Smirnov test assumes a continuous variable, and our data contained

[14] *See* W. Hays, Statistics 464-65 (1973).

instances in which more than one appeal had the same aggregate brief length or elapsed time. We resolved ties in a conservative manner (i.e., so as to minimize the observed difference between the two cumulative distributions).

With regard to the measures of brief length, the Kolmogorov-Smirnov test confirmed the results of the parametric tests, which found no significant effects. We therefore do not refer to the Kolmogorov-Smirnov test in the discussions of brief length in the text of chapter 4. It is referred to, however, in the discussion of elapsed time in chapter 5.

## Nonindependence of Comparisons

The three comparisons (CAMP with controls, Fensterstock with controls, and Scardilli with controls) used most often in the analysis of the data were not orthogonal. We have undertaken some correction for the nonindependence of our tests by placing more stringent criteria for significance on the two comparisons involving individual staff counsel: These are tested at the .025 level. In addition, in the parametric hypothesis tests and the log-linear tests, program effects in these two comparisons have usually been estimated in a way that renders them independent of each other (although not independent of the comparison of CAMP with controls). Independent estimation could not be done for the Kolmogorov-Smirnov test.

For two reasons, we report the results of all three comparisons without attempting any further correction. First, we believe that the various formulas that exist for correcting the results of such radically nonorthogonal tests result in an overcorrection that would produce undue conservatism in the analysis of the program effects. Second, although each of the comparisons provides a somewhat different perspective on the effects of CAMP, we note that our conclusions would be little altered if we had used only the comparison of CAMP with controls. We have presented all three comparisons in order to describe the effects of the program in what seems to us to be a conservative, but not overly conservative, fashion.

## Nonindependence of Some Data

The assumption of independence of cases is common to all the statistical procedures we have used. Our decision to retain in the study as distinct units of analysis cases that were consolidated with others by motion or that were "related to" other cases raises the question whether this assumption has been fully met. Appeals consolidated by motion almost surely tended to be argued together or settled together; that was probably also true of some groups of appeals that were treated as "related."

When appeals were consolidated automatically, the problem of lack of independence was resolved by treating the consolidated group as a single unit for purposes of the analysis. This could not be done for groups of "related cases," since court records identified appeals as related to earlier appeals only if they had been excepted on that ground from assignment according to docket number: There was no identifiable universe of "related cases" that included pairs or larger groups that fortuitously received the same assignment. With regard to appeals consolidated by motion, we were concerned that the fact of consolidation may have been a result of CAMP treatment.

Our solution was to classify the later-filed appeals in groups of related appeals, and in groups of appeals consolidated by motion, according to their docket number rather than their actual assignment to a staff counsel or the control group. (The actual assignment followed the assignment of the lead appeal.) Under this solution, there was no systematic tendency for cases within a related or consolidated group to be classified in the same way.[15] Moreover, there was no systematic tendency for outcome measures for these appeals, such as mode of disposition, to be correlated with the classification we used—a classification that did not in fact affect the way an appeal was processed. The problem of nonindependence thus takes on an unusual form.

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[15] Indeed, it appears that there may have been some tendency for them to be classified in different ways: If two appeals were filed at the same time and received consecutive docket numbers, both could not be assigned to the same staff counsel or to the control group.

With regard to the data about mode of disposition, we simulated the statistical consequences of our assignment procedure on a variety of assumptions, and we were able to satisfy ourselves that the procedure results in more conservative estimates of significance than would have been obtained had we been able to treat these groups of related cases as single units of analysis. We have not been able to conduct a similar simulation with the parametric data. However, we regard it as unlikely that the impact on significance estimates was great.

Our data include thirteen trailing appeals in groups consolidated by motion, of which ten were classified inconsistently with their actual assignments. Of the appeals assigned inconsistently with their docket numbers because "related" to earlier appeals, many were related to appeals docketed before the study began. So long as only one appeal in a related group was included in the study, the problem of independence is of course not raised. The data include about twenty appeals that were assigned inconsistently with their docket numbers and are likely to have been related to other appeals in the study. This number, which includes appeals for which the reason for an inconsistent assignment is unknown, suggests that there may have been thirty appeals in all that were related to prior appeals also included in the study (ten of which fortuitously received docket numbers that produced the same assignment as the lead appeal).

## Corrections for Differences in Sample Size in Some Analyses

The sample included 169 appeals that were classified as assigned to Mr. Scardilli and 149 that were classified as assigned to Mr. Fensterstock. Over a longer term, however, the assignment system should result in assignment of equal numbers of appeals to the two staff counsel. Hence, in analyzing the impact of the program we have, where feasible, adjusted the data to compensate for the unequal numbers in the sample. In a table such as table 1, which deals with the percentage that were argued of all appeals in the sample, the adjustment is easily made: The CAMP percentage is simply the average of the separate percentages for the two staff

counsel. In a table such as table 6, however, that involves only argued cases, the problem is more complex: Giving equal weight to the separately computed percentage of written opinions for each staff counsel would ignore the fact that, in the sample data, the two staff counsel had different proportions of appeals reaching argument.

In such cases, it can be shown that the weighted fraction, $F$, is expressed by the formula

$$F = \frac{149N_S + 169N_F}{149D_S + 169D_F}$$

where $N_S$ and $N_F$ are the numerators and $D_S$ and $D_F$ the denominators of the fractions computed separately for the individual staff counsel. It is immaterial whether the fraction, $F$, represents the calculation of a mean or a percentage, and the formula has been used for both kinds of data.

The simple average of the separate proportions or means for the two staff counsel was used to make the adjustment in analyses in which CAMP could not have affected the composition of the group being analyzed—specifically in tables 1, 3, 4, and 8 through 13. The above formula was used to make the adjustment in tables 5 through 7 and 14 through 17.

The methods described above for testing significance and calculating confidence limits are such that the adjustment is reflected in them.

## Notes to Chapter 4

### Generation of Confidence Intervals Reported in Table 3

The confidence intervals reported in table 3 were generated through the use of a Monte Carlo simulation developed by our colleague John Shapard.

The fraction of interest may be expressed as

$$\frac{T-C}{C} \quad \text{or} \quad \frac{T}{C} - 1$$

where $T$ is the proportion of treatment (CAMP) cases argued and $C$ is the proportion of control cases argued. In the simulation, 200,000 samples are drawn from a population in which the proportion of CAMP cases argued and the proportion of control cases argued are the proportions that we actually observed in the experiment. Each sample contains 152 control cases and the appropriate number of CAMP cases for the analysis being performed. The ratio $T/C$ is computed for each sample, and the confidence limits are based on the distribution of the 200,000 computed ratios. (In generating confidence intervals for the comparison of CAMP appeals with controls, we used the adjusted CAMP proportion from table 1 as the value of $T$ and 318 appeals as the number of CAMP cases in the sample.)

Strictly speaking, the simulation provides a distribution of experimental observations based on samples drawn from a universe in which the true values are known. That is not the same as finding the confidence interval for the true value when the observed value is known. Since our observed values of $T$ and $C$ were not extreme (ranging from 46.2% to 67.1%), we suspected that the limits generated by the simulation would be close approximations of the theoretically correct limits. We subsequently confirmed that belief by entering into the simulation values of $T$ and $C$ that would produce values of $T/C$ equal to the computed confidence limits. This procedure provided a test of whether our actual observations in the CAMP experiment were consistent with the alternative hypotheses, first, that the true value was the computed upper limit and, second, that the true value was the computed lower limit. In performing this test, we first set $T$ at the value we actually observed and $C$ at the value necessary to make $T/C$ equal to a computed confidence limit; we then reversed the procedure. We thereby tested with the most extreme values of $T$ and $C$ that would produce a ratio equal to the computed limit.

In all cases, the new confidence limits, based on the assumption that the true value was equal to the computed limit, were within about 2.5 percentage points of the observed value, and in most cases they were considerably closer. While the confidence intervals

reported in table 3 are thus approximations, we believe that they are quite respectable ones.

## Measuring Brief Lengths

The measures of brief length were developed by examining microfiche records of Second Circuit briefs that are maintained by the Library of Congress. Information from docket sheets was used to check on the completeness of the microfiche records. For 1978 docket numbers, the library's collection was virtually complete. For 1979 docket numbers, it was much less complete. There were also some cases in which the microfiche record of an individual case did not contain all the briefs shown on the docket sheet, and in which we could therefore not develop an aggregate brief length; generally, these were cases with large numbers of briefs. Further detective work at the courthouse in Foley Square probably would have allowed us to obtain brief lengths in nearly all the argued cases, but the analysis we did on the 92 percent sample we had did not suggest that this was likely to add to our knowledge. There is reason to suspect that the missing 8 percent had longer aggregate brief lengths, on the average, than the 92 percent, but there is no reason whatever to believe that any systematic bias was introduced into the comparison of CAMP and control appeals.

In counting pages, we excluded brief covers and blank pages (including pages that had only a printer's logo). We included everything else that was shown on the microfiche as having been included in the briefs, including certificates of service and appendixes that were printed as integral parts of the briefs. This rule was necessitated by the fact that we were counting microfiched pages without putting the fiche in a reader. Using this technique, we were not able to distinguish one printed page from another, or one typed page from another, on the basis of their content. The result, however, is that we have an imperfect count of something that is arguably not a good surrogate in any event for the burden or complexity of an appeal.

With regard to cases consolidated by motion, the aggregate brief length was evenly divided among the consolidated cases, since we treated the individual appeals as separate units of analysis.

The decision to treat one printed page as the equivalent of 1.5 typed pages was based on counting the number of words on a full page of text in small samples of printed and typed briefs. Obviously, we are dealing in somewhat rough measures: A typed page in one brief may not be the equivalent of a typed page in another. As is noted in the text, we established that our conclusions would be the same if we had used either 1.25 typed pages or 1.75 typed pages as the basis of conversion.

### Information on Basis of Jurisdiction

CAMP form C, filed by the appellant's lawyer, inquires about the basis of trial court jurisdiction of the case. The alternatives offered are "U.S. a party," "federal question (U.S. not a party)," "diversity," and "other (specify)."

We did not second-guess lawyers' jurisdictional assertions. However, if the question was not answered on form C, we did make an effort to fill in the missing data from briefs or other papers filed in the case.

If both "federal question" and "diversity" were checked, the case was coded as "federal question." In addition, if the lawyer checked "Other" and wrote in either "admiralty" or "Jones Act," the case was treated as a federal question case.

### Whether Only a Money Judgment Was Sought

CAMP form C also asks whether damages were sought in the court below and whether an injunction was sought. On many of the forms, this question was left unanswered. On others, it became clear from the narrative statement about the case that the answer to the question was incomplete. Hence, our coding was based on a combination of the answers to the specific question and the narrative statement on form C, sometimes supplemented with information from the briefs or case files. We excluded administrative agency appeals from this exercise because form C-A, the version of form C used for such appeals, does not ask the question. We excluded bankruptcy appeals because we found it extremely difficult to code them with confidence.

Generally, the effort was to determine whether the underlying dispute was one in which a judgment for the plaintiff would produce only a money judgment. Therefore, an appeal was treated as "money only" even though the appeal may have been interlocutory and thus not been an appeal from a money judgment or the denial of one. However, if the appeal involved a collateral issue that appeared to have the potential for independent settlement, it was classified according to that issue. A claim for attorneys' fees arising out of a lawsuit in which injunctive relief was sought, for example, was treated as a "money only" appeal.

A substantial number of cases were difficult to classify, and there may be a number of errors in the data. The expected result of such misclassification would be understatement of any difference that existed between "money only" and other appeals.

A motion to compel or confirm an arbitration award was treated as "money only" only if it clearly appeared that just money was at stake; frequently it was not clear from form C in such a case what the underlying issue was. Lien and foreclosure cases were treated as "money only"; condemnation cases were not. Social Security appeals were not treated as "money only" because they generally involve eligibility questions that have no middle ground: There is no possibility of settling them by agreeing on reduced benefits.

## Stage of Litigation

Information on the stage of litigation in the trial court at the time the appeal was taken was also based on information provided by the appellant's attorney on form C. Since the version of the form for administrative agency appeals does not ask the question, these appeals have been excluded from the analysis.

The alternatives offered on form C are "pretrial," "during trial," and "after trial." Examination of the forms suggests that the responses to this question were probably subject to a high error rate. It appears that many lawyers had difficulty when the order below was issued without a trial but was dispositive of the litigation. Although motions leading to such orders are commonly characterized as pretrial motions in the profession, the lawyers apparently did not find it easy to characterize as "pretrial" a decision that obviated the

need for a trial. Hence, we found some questionnaires in which a judgment on the pleadings was labeled "after trial" and a number in which lawyers struck out "after trial" and wrote in "after hearing" without indicating whether the hearing was evidentiary.

Our general coding policy with regard to this question was to take the lawyer's response at face value unless it was clearly erroneous. Our suspicion is that a good deal of error remains.

### Whether the Appeal Was from a Final Order or an Interlocutory One

Form C asks the appellant's lawyer to characterize the decision below as "final" or "interlocutory." The distinction is, of course, a technical one: Some decisions characterized as "final" may not be dispositive of the underlying litigation, and some characterized as "interlocutory" may for all practical purposes be dispositive. In analyzing the responses to this question, we did not second-guess. We regarded the lawyer's response as his or her claim that there was appellate jurisdiction in the case, and let it stand even where it seemed plainly wrong (e.g., an appeal from a preliminary injunction labeled as final and an appeal that was dismissed for lack of appellate jurisdiction). However, where the lawyer did not complete the form, or where there was an inconsistency in the forms filed for cases that were automatically consolidated, we did make some judgments on the basis of other information on the form or in the file or brief. We do not believe the error rate was high.

## Note to Chapter 5

### Data on Case Duration

The data on case duration were taken from docket sheets. They appear to be highly reliable.

Where more than one appellant filed a principal brief, the date recorded is the date of the last appellant's brief. Briefs filed by intervenors and amici curiae were ignored, however. If a brief was first filed in page proof, the filing date was recorded as the date of the page proof; delays from page proof to printed brief were typically only a few days.

Some cases were withdrawn or dismissed after briefing but subsequently reinstated and argued. In those cases, the filing dates that we recorded were the dates for the second round of briefs. Two of these appeals were withdrawn or dismissed after argument and subsequently reinstated and reargued; for those we recorded the dates of the second argument and the second round of briefs. For appeals in which the court reached a decision after an argument, however, we ignored subsequent proceedings; the original briefs and arguments were counted even though a rehearing may have been granted or a new argument held after Supreme Court review.

Disposition dates in appeals that were withdrawn or dismissed and subsequently reinstated are the dates of the action following reinstatement. Where automatically consolidated appeals had different disposition dates, the later date was used.

## Notes to Chapter 6

### Expressions of Preference on Attorney Questionnaire

Among the respondents who did not provide a "yes" or "no" answer to the preference question, several provided answers suggesting that CAMP conferences are valuable in some kinds of cases but not others. Perhaps the most common suggestion was that the program is useful primarily where the appeal is frivolous. Others suggested that staff counsel should make a judgment about whether there is a possibility of "give" in a case and decide on that basis whether to call a conference. This was in fact done in the early days of the CAMP program.

As is noted in the text, twenty-five questionnaires were eliminated from the tabulations about preference because the respondents indicated that they had previously sent in questionnaires as part of the study. Excluding these questionnaires was an effort to implement the "one lawyer, one vote" principle. However, it seems probable that the principle has not been fully implemented and that some duplication remains in the count. Each of the three questionnaire forms provided an opportunity to "check here if you have used this form before." The box was checked only on the twenty-

five questionnaires that have been excluded. However, the absence of a check mark could represent a failure to respond to the question rather than an indication that the lawyer had not previously returned a questionnaire. Since the opportunity to indicate prior use of the form was on the back of the questionnaire, following the space for comments, one might expect a rate of nonresponse somewhat higher than that found for questions on the face of the form. Moreover, on thirty-two forms, the back of the questionnaire did not print, and the question was not asked at all. Finally, if the lawyers were conscious of the fact that the forms for unconferenced cases were different from the forms for conferenced cases, they might properly have indicated that they had not used "this form" before even though they had previously filed one of the other forms of the questionnaire.

If duplication does remain, the resulting tendency would be for lawyers who are regulars in the court of appeals to be overrepresented in the preference poll.

Even though we have been unable to analyze the rate of nonresponse to the questionnaire and there is probably some double counting in the preference poll, it seems quite clear that most lawyers who practice in the Second Circuit Court of Appeals look upon the CAMP program favorably.

## Reanalysis of the Goldman Data about the Quality of Appeals

As is discussed in the text, Goldman's 1977 study included a questionnaire to judges sitting on appellate panels. In the questionnaire, judges were asked a number of questions about the quality of the appeals that came before them. For many of the appeals in the sample, there were ratings of the relevant characteristics by two or three judges. By treating the questionnaire as the unit of analysis in statistical tests of differences in means and proportions, Goldman overlooked the lack of independence in the responses of two or three judges to a question about the same appeal. In effect, he treated each rating as if it concerned a separate appeal, which had the effect of magnifying the size of the sample.

For the four quality measures for which Goldman found a statistically significant difference between CAMP cases and control cases—those tabulated in tables 16, 19, 20, and 21 of his study—we have reanalyzed the data using multiple regression. The dependent variable in the regression equation was the rating. The independent variables were the treatment the appeal received (CAMP or control), the identity of the rating judge (handled by using a dummy variable for each judge who heard appeals), and an interaction term combining judge identity and treatment.

Goldman's tables 19, 20, and 21 were based on a three-point rating scale: "Better than average" was scored as 1, "average" was scored as 2, and "worse than average" was scored as 3. Because this may not be a true interval scale, we ran the regressions using not only the three-point scale but also two-point scales constructed from it: one scale in which "average" was combined with "better than average" and one in which "average" was combined with "worse than average." We thus had three regression equations for each of these three dependent variables. In no case did CAMP intervention have a statistically significant effect on the quality measure.

Goldman's table 16 was based on a "yes" or "no" question, which we converted into values of 1 and 2. Once again, there was no statistically significant difference between CAMP and control appeals.

Use of the regression approach moderates the impact of lack of independence, but does not eliminate the problem entirely. Except for the possibility of averaging the answers of the judges who rated a particular appeal, we were unable to find a technique that would wholly eliminate the impact of nonindependence. We were reluctant to use the averaging approach because it ignores differences among judges in their rating standards rather than taking account of them; there were in fact statistically significant differences among judges. In view of the finding that there were no significant differences between CAMP and control appeals when the regression approach was used, we need not be concerned about whether it provides a sufficiently rigorous significance test.

# THE SEVENTH CIRCUIT PREAPPEAL PROGRAM: AN EVALUATION[1]

**Jerry Goldman**
**May 1982**
**(FJC-R-82-4)**

## I. Approach and Objectives of the Preappeal Program

In 1978, the United States Court of Appeals for the Seventh Circuit conducted a study of the prehearing conference for federal appeals. The court developed a preappeal program based on Federal Rule of Appellate Procedure 33.[2] The program implemented by the court departed in two substantial ways from preappeal programs in other federal and state courts. First, the court evaluated the Seventh Circuit program according to a set of specific expectations that the court believed could justify continuation of the program. Second, the evaluation of the program attempted to compare the effectiveness of prehearing conferences conducted jointly by a circuit judge and a senior staff attorney with the effectiveness of conferences conducted by a senior staff attorney alone.

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[1] This report is reprinted substantially in its original version. Footnotes have been renumbered and original appendixes C and D have been omitted. Ed.

[2] Federal Rule of Appellate Procedure 33 states that "[t]he court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice."

This report documents the results of this investigation. It is divided into four parts: a summary of the approach and objectives of the preappeal program; a methodological section detailing the evaluation of the program; an examination of the evidence from case files and an attorney survey addressing the effectiveness of the program; and an assessment of the benefits of the program in relation to its costs.

The purpose of the evaluation was to determine whether and to what extent prehearing conferences conducted by a senior staff attorney, or by a senior staff attorney in collaboration with a circuit judge, are effective in reducing the workloads of Seventh Circuit judges. The reduction in workloads was expected to result from a reduction in the length and frequency of submission of materials (for example, motions or briefs) submitted to the court.

The court was unconvinced that staff intervention through prehearing conferences could encourage informal dispute resolution on appeal, an oft-repeated claim of proponents of the preappeal conference. Although the court recognized that such dispute resolution might be encouraged by its program, the court's main objective for the program was to achieve substantial reductions in the workloads of the circuit judges independent of the settlement or withdrawal of appeals.

All civil appeal notices filed from February 1978 through March 1979 (excluding pro se and 28 U.S.C. § 2255 applications) were reviewed by the court's senior staff attorney and sorted into two mutually exclusive categories. The first category contained all appeals in which a prehearing conference was likely to be beneficial. An appeal was placed in this category if it satisfied one or more of the following criteria:

1. The case involved multiple parties
2. The case was a multiple appeal
3. No transcript of the case was needed or a complete transcript was available
4. Favorable settlement possibilities were present
5. The case involved broad public interest or public impact
6. Expeditiousness in the appeal was deemed essential

7. The case raised an issue of appellate jurisdiction.

Appeals identified as satisfying one or more of the eligibility criteria totaled 230.[3] These cases constituted the sample for the "mandatory-conference" segment of the study.

A substantial number of appeals did not satisfy any of the screening criteria; the court did not require a prehearing conference for these cases. However, the court decided to test whether providing attorneys in these cases with the opportunity to hold an elective conference would affect the outcome of the cases. During the period investigated, 420 appeals were designated for the "elective-conference" segment of the study.

In summary, two separate investigations of the preappeal program were undertaken. The first examined the effects on the appeal process of a mandatory conference for appeals that were arguably improvable; the second explored the effects of an elective conference for appeals in which the court could not argue that its intervention was likely to be helpful.

## II. Methodology and Design

In both the mandatory-conference and the elective-conference segments of the evaluation, a control group was designated in order to provide a basis of comparison on the performance measure (reduced workloads of judges) identified by the court in advance of the study.

The cases in both segments of the study were randomly assigned to groups according to a plan used in a previous investigation of appellate procedure. After the cases were screened by the senior staff attorney, their docket numbers were entered in a log (one for the mandatory-conference segment and one for the elective-conference segment). The cases in each of the logs were then

[3] All cases were screened by John W. Cooley, in his capacity as senior staff attorney. At the end of this screening phase, Mr. Cooley was appointed United States magistrate for the Northern District of Illinois. His replacement, John Gubbins, conducted the few remaining conferences according to the evaluation plan. (Most of the conferences were conducted by John Cooley, however.)

randomly assigned to groups by the Research Division of the Federal Judicial Center.[4]

The senior staff attorney dictated memos in every conference case.[5] The conferences lasted from fifteen to forty-five minutes; a typical conference was twenty to thirty minutes in duration. The conferences concentrated on scheduling matters and, when appropriate, accelerating appeals. Attorneys occasionally resisted efforts by the court to accelerate appeals. Once an agreement was struck, however, the attorneys were reminded of their commitment to the expedited schedule and to the likely dates for oral argument. This commitment was reinforced by Judge Luther M. Swygert in the conferences in which he participated.

The possibility of jurisdictional defects arose at several conferences, and alternative courses of action were explored. These discussions seemed especially valuable to attorneys who were unfamiliar with federal appellate practice; these attorneys were provided with information on circuit rules and requirements for perfecting their appeals.

The possibility of settlement was a frequently raised issue. In nearly all cases, settlement discussions had already occurred prior to the conference. On a few occasions, attorneys were urged to consider settlement, especially in cases in which the matter in controversy was negligible. In no circumstance, however, did the court badger attorneys to settle the dispute or suggest disfavor with the continuation of an appeal.

The senior staff attorney also assisted in coordinating the activities of co-counsel and moderating the adversariness of opposing counsel who were deeply committed to their clients' causes.

## The Mandatory-Conference Segment of the Study

In the mandatory-conference part of the investigation, appeals were assigned at random to one of three groups (see table 1).

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[4] *See* J. Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration 18-19 (Federal Judicial Center 1977).

[5] A collection of these memos is on file with the Center's Research Division; copies are available on request.

Appeals cases assigned to group A were designated for prehearing conferences, which were to be conducted by the court's senior staff attorney. The attorneys involved in these cases were notified by letter (see appendix A) of the court's intention to schedule a conference, which was to be held in the United States courthouse if the attorneys were within reasonable traveling distance of the court. If excessive distance or other matters prevented a face-to-face conference, a telephone conference was to be arranged. The letter to the attorneys also listed the conference agenda and actions that counsel should take prior to the conference.

**TABLE 1**
**Assignment of Cases to Groups in the Mandatory-Conference Segment of the Study**

| Group | Condition | Number of Cases Assigned | Number (and Percentage) of Assigned Cases Analyzed |
|---|---|---|---|
| A | Staff attorney conference | 77 | 70 (90.9%) |
| B | Staff attorney and circuit judge conference | 76 | 64 (84.2%) |
| C | Memo (control) | 77 | 65 (84.4%) |
| All cases | | 230 | 199 (86.5%) |

Appeals cases assigned to group B were treated in much the same manner as those in group A, with the exception that Judge Swygert was to be asked to participate in the conferences. The attorneys whose cases were assigned to group B were sent the same letter that was sent to attorneys in group A, except that it included a notation that informed the attorneys of Judge Swygert's expected participation in the conference.

Prior to the implementation of the preappeal program, attorneys in the Seventh Circuit had not been given any guidance from the court in perfecting their appeals. With implementation of the program, however, the court felt that all attorneys should be made aware of the court's expectations under the Federal Rules of Appellate Procedure and local rules. Therefore, a memorandum

was sent to attorneys in group C explaining in detail many of the issues that would have been considered at a conference, had one been held (see appendix B). The memorandum urged counsel to examine jurisdictional issues, transcript preparation, docketing, appearances, brief and appendix preparation, consolidation issues, and the possibility of settlement.

The memorandum to counsel added no appreciable burden to the court's work; the court therefore decided that it was desirable to compare the effectiveness of the conference (groups A and B) with that of the written communication (group C) on the ground that issuing the memorandum was an appropriate base policy for the court to follow and did not need to be justified empirically. Thus, the mandatory-conference part of the preappeal program study tested (1) the efficacy of the conference compared with that of the detailed memorandum to counsel and (2) the efficacy of conferences in which a judge participated compared with that of conferences that were conducted by a staff attorney alone.

Approximately 14 percent of the 230 cases in the mandatory-conference segment of the study were not included in this report because the information on these cases was incomplete. Because the evaluation design called for 70 cases per group, the absence of case information may mask real benefits or suggest effects that may prove to be false. These problems are unlikely, however. The distributions of eligibility criteria for the missing and analyzed cases are similar, which suggests that distortion of the findings is unlikely. Most of the missing cases were among the last to be randomly assigned, although there are fewer missing staff-attorney conference (group A) cases.

This suggests what the evidence indicates: that the cases in group A were handled more expeditiously than the cases in the other groups (groups B and C). Unless the missing cases in groups B and C were resolved with far greater dispatch at the end of the study than they were at the beginning, the absence of such cases would be unlikely to encourage false conclusions concerning the effects of the program. To be sure, the only way to resolve remaining doubts, no matter how small the probabilities, would be to include all randomly assigned cases in the analysis. The evidence at

hand provides a reasonably complete impression of the Seventh Circuit program, however.

## The Elective-Conference Segment of the Study

The second part of the evaluation concentrated on the appeals that offered no prima facie reason for a prehearing conference. These cases were randomly divided into two groups (group D and group E; see table 2).

**TABLE 2**
**Assignment of Cases to Groups in the Elective-Conference Segment of the Study**

| Group | Condition | Number of Cases Assigned | Number (and Percentage) of Assigned Cases Analyzed |
|---|---|---|---|
| D | Memo only | 209 | 181 (86.6%) |
| E | Memo, including invitation to request a conference | 211 | 185 (87.7%) |
| All cases | | 420 | 366 (87.1%) |

Approximately 13 percent of the cases in the elective-conference part of the study were not included in this report. However, because no minimum number of elective-conference cases was specified in the evaluation design, the analysis of those cases that were included in the study can proceed without further consideration of their number.

Attorneys in group D received a memorandum identical to the one that was sent to attorneys in group C of the mandatory-conference segment of the study (see appendix B). Attorneys in group E received the same memorandum, except that a paragraph was added informing them that they could request a prehearing conference (see appendix B):

> (7) Any party may request a docketing conference pursuant to Rule 33, Fed. R. App. P., or file a motion to expedite the appeal. The conference may serve as a forum for settlement discussions, and for streamlining or otherwise improving the

> appeal. You may arrange to schedule a conference by contacting the secretary to John W. Cooley, Senior Staff Attorney (312-435-5804) (FTS 8-387-5804).

Thus, the only systematic difference in this second part of the evaluation was that attorneys in half of the appeals were invited to request a conference.

The elective-conference segment of the study also provided a rough check on the criteria employed by the senior staff attorney in screening cases for assignment to mandatory conferences. Recall that appeals that failed to meet any of the criteria were placed in the elective-conference sample. If the criteria were too restrictive, and, more important, if the attorneys in group E, who received the memorandum that included an invitation to request a conference, were following the measures described in the memorandum, one would expect a substantial number of conference requests to be made. (One could not infer that the screening criteria were too liberal from the observation that few attorneys accepted the invitation to confer, however.)

The assumption behind the elective-conference component of the evaluation was that counsel would be in a position equivalent to the court's in determining the potential usefulness of the conference program. It would appear to be a waste of resources to use the conference in every case, when there is nothing in the appeal record to justify the court's intervention.

## The Attorney Survey

A survey of attorneys was conducted during the course of the investigation to reinforce and inform the judgments based on the data derived from case files. All attorneys involved in appeals selected for the mandatory-conference or elective-conference components of the study were asked to respond to a questionnaire that was mailed to them.[6] An unknown proportion of attorneys had only minimal involvement in the appeals included in the study; unfortunately, it was not possible to screen out with consistency the

[6] [The questionnaire, which is not reprinted in this volume, can be found in appendix C to the original version of this report. Ed.]

attorneys who lacked the experience in specific cases to answer the survey questions thoughtfully.[7] However, the memorandum accompanying the questionnaire, which was signed by the circuit executive, recommended that if the attorney who received the questionnaire was only minimally involved in the appeal, the attorney should direct the questionnaire to the principal attorney in that office.

## III. Evidence of Program Effects

### The Mandatory-Conference Segment of the Study

Table 3 reports the extent to which cases in the mandatory-conference segment of the study satisfied the eligibility criteria formulated by the court and administered by the senior staff attorney in assigning cases to groups. The need for expeditiousness stands out as the single most important criterion used in assigning cases, and the public interest criterion appears to have been used with the least frequency. If the appeals included in the mandatory-conference part of the study satisfied only one criterion each, their distribution across the three groups could be challenged for three of the criteria (had favorable settlement possibilities, involved broad public interest, and expeditiousness deemed essential) because the percentages of cases are more dissimilar than would be expected if they were distributed entirely by chance. Given the inter-correlation of the criteria and their compensating distributions, the unequal frequencies across groups should not be problematic for the overall analysis. Care should be exercised, however, when comparing subsets of unequally distributed appeals.

Do these criteria exhaust the supply of appeals that could benefit from a rule 33 conference? The elective-conference set of appeals provides a possible answer to that question. . . . [A]ppeals in this part of the study were assigned to either the group that received

[7] There were obvious exceptions to this procedure. United States attorneys and state attorneys general were often listed as counsel, although their participation was likely to be minimal. They were not surveyed.

**TABLE 3**
**Basis of Eligibility for Mandatory Conference by Group: Percentage of Cases in Each Group with the Given Eligibility Criterion**

| Eligibility Criterion | All Groups (A + B + C) | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference | Group C: Memo | Chi-Square (2 df) | *p* Value |
|---|---|---|---|---|---|---|
| Involved multiple parties | 23% | 30% | 14% | 25% | 4.7 | n.s. |
| Involved a multiple appeal | 21% | 26% | 22% | 14% | 3.0 | n.s. |
| No transcript needed or complete transcript available | 19% | 20% | 21% | 17% | .3 | n.s. |
| Had favorable settlement possibilities | 18% | 27% | 14% | 12% | 5.9 | .05 |
| Involved broad public interest | 7% | 1% | 6% | 14% | 8.0 | .02 |
| Expeditiousness deemed essential | 57% | 50% | 70% | 51% | 6.6 | .04 |
| Raised issue of jurisdiction | 24% | 24% | 14% | 34% | 4.0 | n.s. |
| Number of cases | 199 | 70 | 64 | 65 | | |

NOTE: Because appeals usually satisfied several criteria, the column percentages do not sum to 100.

the memorandum only (group D) or the group that received the memorandum with an invitation to request a conference (group E). . . . [I]f the criteria for assigning cases to mandatory conferences were too restrictive, one might find a substantial number of conference requests made by group E. But as is shown later in the discussion of the elective-conference findings, conferences were requested in only 6 percent of the appeals in group E, which is con-

sistent with the assumption that the mandatory-conference appeals criteria were fairly exhaustive.[8]

The court expected benefits from the conferences in three main areas: reduction in the length and frequency of submission of materials for judicial examination and reduction in case time. Before the cases used to test these objectives are examined, the frequency and character of the conferences should be discussed to determine whether the conferences were implemented properly. Table 4 summarizes the frequency and character of the conferences.

**TABLE 4**
**Conference Group Characteristics: Percentage of Conferences in Each Conference Group with the Given Characteristic**

| Characteristic | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference |
|---|---|---|
| Conferences held | 94% | 92% |
| | (70) | (64) |
| Of conferences held: | | |
| Face-to-face | 36% | 41% |
| By telephone | 64% | 59% |
| | (66) | (59) |
| Judge participation | — | 68% |
| | | (59) |

NOTE: Numbers in parentheses indicate number of cases.

Conferences were held in more than 90 percent of the appeals in both group A and group B. The attrition of 8 percent in group B and 6 percent in group A is attributable to dismissals prior to the scheduling of the conference or prior to the conference itself. The distribution of face-to-face and telephone conferences is also comparable across groups A and B.

Judge Swygert's nonparticipation in over 30 percent of the group B conferences weakens inferences concerning the effects of

[8] This assumes that attorneys who received the court's memorandum that included an invitation to request a conference understood the purpose of the conference and judged that their cases would not benefit from such a meeting.

judge participation in the conference. Comparisons can be made between the group in which Judge Swygert participated and groups A and C only if there is no systematic difference between the subset of group B appeals in which he participated and the subset of group B appeals in which he was absent from the conference.

When the problem of Judge Swygert's nonparticipation in several of the group B conferences was first considered, it seemed clear that his decision not to participate in these conferences was based on matters independent of the cases set for the conference. Although not reported here, analysis of the group B cases, comparing eligibility criteria in the judge-present and judge-absent subsets, reinforces this preliminary view.[9] The cases are distributed within bounds expected by chance for six of the seven criteria.

## Data Analysis

Two different sets of comparisons were conducted on the data in this investigation. The two primary comparisons are between groups A and B, to determine the effects of judge participation,[10] and between the two conference groups combined (A + B) and group C, to discover the effects of the conference per se.

## Motions

The court anticipated a reduction in routine motions as a consequence of the prehearing conference. Typical routine motions are (a) stipulations to dismiss under Federal Rule of Appellate Procedure 42(b), (b) stipulations to supplement the record, (c) extensions of time to file briefs, and (d) extensions of time to file the transcript. Table 5 presents the average number of routine motions for the different groups.

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[9] Separate comparisons were conducted with the judge-present subset in order to determine whether the judge's presence had any bearing on conference effects beyond those resulting from his being scheduled to be present. The findings resulting from these comparisons are reported in subsequent footnotes.

[10] Comparisons will also be made in subsequent notes between group A and the judge-participation subset of group B (hereafter referred to as the $B_1$ subset) in order to examine more fully the effects of judge participation.

**TABLE 5**
**Average Number of Routine Motions**

| Comparison | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference | Groups A + B: Conference | Group C: Memo |
|---|---|---|---|---|
| A vs. B | 1.3 (70) | 1.3 (63) | | |
| | | $t = 0.10$ n.s. | | |
| A + B vs. C | | | 1.3 (133) | 2.4 (65) |
| | | | $t = 3.41$ $p < .001$ | |

NOTE: Numbers in parentheses indicate number of cases.

The data in the first row of table 5 show that motions activity in group A and group B is virtually identical. It can therefore be assumed that no benefit was derived, in terms of a reduction in motions, from the judge's participation in the conferences.[11] A comparison of the motions activity of the conference groups (A + B) with that of group C reveals significant differences, however. The effect of the conference in reducing routine motions is estimated to be 1.1 ± 0.3 motions per case.[12] Thus, if a reduction of 1.1 motions per case is used as a standard, conducting conferences in all eligible appeals filed in a year (approximately 230) would result in a savings of 253 routine motions.

The court also expected a reduction in the number of nonroutine (that is, substantive) motions in appeals cases as a result of the prehearing conferences. Typical nonroutine motions are (a) mo-

[11] If the $B_1$ subset is used in place of B, the average motions activity increases slightly to 1.4. The conclusion—that the judge's participation provides no added benefit—remains unchanged.

[12] In other words, repeated tests would reveal (95 percent of the time) that there would be an average of between 0.8 and 1.4 fewer motions per case. (Whenever we use a range of motions or days in this report, it will refer to the 95 percent confidence interval of the *t* statistic used to determine whether the difference is statistically significant.)

tions for stays, (b) injunctions, (c) bond pending appeal, (d) the filing of amicus briefs, and (e) the filing of oversize briefs. Table 6 presents the average number of nonroutine motions for each group. There is little difference between groups A and B in nonroutine motions activity. Again, no benefit appears to have been derived from the judge's participation in the prehearing conferences.[13] A comparison of the conference groups (A + B) with group C reveals that there were significantly fewer nonroutine motions in the appeals in which conferences were held; this finding supports the claim that the prehearing conference is effective in reducing the number of nonroutine motions in appeals cases. The estimated reduction in nonroutine motions per case is $0.9 \pm 0.2$. If the 0.9 reduction is taken as the standard, the conference procedure (with or without judge participation) should result in a yearly reduction of 207 nonroutine motions (assuming approximately 230 appeals are filed in a year).

**TABLE 6**
**Average Number of Nonroutine Motions**

| Comparison | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference | Groups A + B: Conference | Group C: Memo |
|---|---|---|---|---|
| A vs. B | 1.0 (70) | 0.9 (63) | | |
| | $t = 0.34$ n.s. | | | |
| A + B vs. C | | | 0.9 (133) | 1.8 (65) |
| | | | $t = 2.89$ $p < .005$ | |

NOTE: Numbers in parentheses indicate number of cases.

[13] If the $B_1$ subset is used in place of B, average nonroutine motions activity increases slightly. The conclusion—that the judge's participation provides no added benefit—also remains unchanged.

## Brief Length

Table 7 presents the average number of pages in briefs (appellant's, appellee's, and combined) for the appeals cases in each group. The average number of brief pages for group A is smaller than that for group B for all three measures in table 7, but the differences are too small to rule out chance as the source of the observed differences.[14] Comparison of the conference groups (A + B) with group C does not reveal significant differences, however; therefore the court's expectation that the conferences would be effective in reducing brief length is not supported.

**TABLE 7**
**Average Number of Pages in Appellant's, Appellee's, and Combined Briefs**

| Comparison | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference | Groups A + B: Conference | Group C: Memo |
|---|---|---|---|---|
| Appellant's brief | | | | |
| A vs. B | 41 (44) | 47 (42) | | |
| | $t = -0.87$, n.s. | | | |
| A + B vs. C | | | 44 (86) | 45 (40) |
| | | | $t = -0.16$, n.s. | |
| Appellee's brief | | | | |
| A vs. B | 36 (43) | 38 (41) | | |
| | $t = -0.43$, n.s. | | | |
| A + B vs. C | | | 37 (84) | 36 (38) |
| | | | $t = 0.11$, n.s. | |
| Combined briefs | | | | |
| A vs. B | 78 (43) | 85 (41) | | |
| | $t = -0.73$, n.s. | | | |
| A + B vs. C | | | 82 (84) | 84 (37) |
| | | | $t = -0.22$, n.s. | |

NOTE: Numbers in parentheses indicate number of cases.

[14] The differences between groups in brief length increase slightly if $B_1$ replaces B, but the data do not support the contention that group A differs significantly from group $B_1$ on this measure.

Cases were selected for the mandatory-conference part of the study based on varying criteria. Some criteria were related to brief reduction; others were not. It is plausible that examining brief lengths of only those appeals selected because they were likely candidates for brief-length reduction might be fruitful.

**TABLE 8**
**Average Number of Pages in Appellant's, Appellee's, and Combined Briefs in Multiple Appeals or Appeals with Multiple Parties**

| Comparison | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference | Groups A + B: Conference | Group C: Memo |
|---|---|---|---|---|
| Appellant's brief | | | | |
| A vs. B | 48 (25) | 61 (15) | | |
| | $t = -1.23$, n.s. | | | |
| A + B vs. C | | | 55 (40) | 60 (10) |
| | | | $t = -0.41$, n.s. | |
| Appellee's brief | | | | |
| A vs. B | 39 (25) | 51 (15) | | |
| | $t = -1.32$, n.s. | | | |
| A + B vs. C | | | 45 (40) | 51 (11) |
| | | | $t = -0.61$, n.s. | |
| Combined briefs | | | | |
| A vs. B | 87 (25) | 113 (15) | | |
| | $t = -1.40$, n.s. | | | |
| A + B vs. C | | | 100 (40) | 113 (10) |
| | | | $t = -0.66$, n.s. | |

NOTE: Numbers in parentheses indicate number of cases.

Table 8 presents the average number of pages in briefs for cases involving multiple appeals or appeals with multiple parties. The larger differences here are encouraging, but because the findings do not pass the threshold of statistical significance, the evidence can only suggest that conferences held with a staff attorney

may be more efficacious in reducing the number of briefs in a case than are conferences held jointly with a staff attorney and a judge.[15]

## Appendix Length

A clearer impression of the effects of the conference on the appeals process can be found in table 9, which reports the average length of appendixes for each group. The means for groups A and B for all appeals cases are significantly different from each other. For all appeals, the difference between the average length of appendixes for the conference groups (A + B) and the average length of appendixes for the control group (C) approaches, but does not reach, the level of statistical significance.

The second part of table 9 reports average appendix length for appeals that were selected because they involved either multiple parties or multiple appeals. In these appeals, there is a possibility that a single appendix can be negotiated among the many parties. The differences between groups in length of appendixes for these cases are quite dramatic: The group A mean is almost half the group C mean, and the group B mean is almost half the group A mean. The statistical test permits the conclusion that the conference groups (A + B) submitted appendixes that were significantly shorter than those of the control group (C),[16] but because of the relatively few cases in this subsample (multiple appeals or appeals with multiple parties), one cannot draw that conclusion for the effect of the judge's presence.

The expected reduction in appendix length as a result of the conference procedure is $125 \pm 90$ pages per case. This range is unlikely to be very helpful for practical purposes. Its great width is a reflection of the small number of cases that satisfied the multiple parties or multiple appeals screening criteria and also had appendixes filed (fifty cases in all). It would be difficult to extrapolate

[15] These findings remain unchanged when group B cases are replaced by the $B_1$ cases in the analysis.

[16] No additional benefits in terms of appendix length are derived from an analysis of the $B_1$ subset in lieu of group B cases.

precisely the benefits of this salutary effect to a larger caseload; but no one can gainsay the importance of the benefits in this subset of appeals.

**TABLE 9**
**Average Number of Pages in Appendixes for All Appeals and for Multiple Appeals or Appeals with Multiple Parties**

| Comparison | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference | Groups A + B: Conference | Group C: Memo |
|---|---|---|---|---|
| All appeals | | | | |
| A vs. B | 93 | 55 | | |
| | (44) | (40) | | |
| | $t = 2.00, p < .05$ | | | |
| A + B vs. C | | | 74 | 108 |
| | | | (84) | (39) |
| | | | $t = -1.49$, n.s. | |
| Multiple appeals or appeals with multiple parties | | | | |
| A vs. B | 104 | 55 | | |
| | (25) | (14) | | |
| | $t = 1.58$, n.s. | | | |
| A + B vs. C | | | 80 | 205 |
| | | | (39) | (11) |
| | | | $t = -2.09, p < .05$ | |

NOTE: Numbers in parentheses indicate number of cases.

## Elapsed Time

The court expected the conference procedure to reduce the elapsed time of appeals. This reduction would be achieved by the parties' agreement to a schedule proposed by the senior staff attorney at the conference. Each group's mean and median elapsed times for the five stages in the appeals process are shown in table 10.

A quick examination of the table reveals little difference between groups at the notice-to-docket stage. This was expected because the conference order would normally address matters only after appeals had been docketed. The next two stages (docket to record and record to appellant's brief) suggest counterintuitive processes. Group B's median and mean elapsed times for these stages

were greater than those of group A. The differences approach the significance threshold in the latter and surpass it in the former. These findings suggest that the attention given to scheduling the transmittal of the record in joint conferences may have required more time than it did in conferences in which a judge did not participate.

The most striking finding in the table is the dramatic reduction in the elapsed time from the filing of the appellant's brief to argument or submission that occurs as a result of the conferences. It is obvious that the conferences had a powerful effect on the expediting of appeals at this stage of the process.

**TABLE 10**
**Mean and Median Elapsed Times (in Days) for Appellate Stages**

| Appellate Stage | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference | Groups A + B: Conference | Group C: Memo |
|---|---|---|---|---|
| Notice to docket | | | | |
| Number | 70 | 64 | 134 | 64 |
| Median | 17 | 18 | 18 | 17 |
| Mean | 19 | 21 | 20 | 18 |
| | $t = -0.45$, n.s. | | $t = 0.88$, n.s. | |
| Docket to record | | | | |
| Number | 26 | 28 | 54 | 27 |
| Median | 30 | 45 | 35 | 38 |
| Mean | 56 | 77 | 59 | 49 |
| | $t = -2.23, p < .02$ | | $t = 0.75$, n.s. | |
| Record to appellant's brief | | | | |
| Number | 18 | 10 | 28 | 16 |
| Median | 34 | 50 | 38 | 23 |
| Mean | 38 | 55 | 44 | 33 |
| | $t = -1.28$, n.s. | | $t = 1.31$, n.s. | |
| Appellant's brief to argument or submission | | | | |
| Number | 42 | 39 | 80 | 35 |
| Median | 76 | 81 | 79 | 157 |
| Mean | 96 | 86 | 91 | 148 |
| | $t = 1.18$, n.s. | | $t = -4.87, p < .001$ | |
| Argument or submission to termination | | | | |
| Number | 43 | 41 | 84 | 39 |
| Median | 69 | 59 | 66 | 71 |
| Mean | 77 | 77 | 77 | 79 |
| | $t = 0.01$, n.s. | | $t = -0.13$, n.s. | |

NOTE: Although the table reports both mean and median times, the statistical test compares only the means.

The expected benefits resulting from a judge's participation in the conference are not supported by the findings: Group B's mean elapsed times are greater than group A's for the first three stages, and although they are equal to or less than group A's for the last two stages, in these latter stages the differences do not pass the significance threshold.

But the conferences taken as a whole have a dramatic bearing on the expeditiousness of appeals. How much of the reduction in elapsed time for the appeals process can be attributed to the conferences? Conferences appear to reduce the time required for appeals by between 47 and 67 days. The improvement results from the setting of the argument calendar during the conference. In those cases in which any agreement on scheduling was reached at the conference, an order that often recommended a particular week for oral argument was issued. The circuit executive would reserve slots for these cases when he prepared the calendar. In the remaining cases, for which a date for oral argument was not recommended, the assignment to the calendar would occur upon the filing of the appellant's brief. Again, the conference order would operate to assure the filing of the remaining briefs on schedule. In the control group cases, however, calendaring did not occur until briefing was completed. Thus, the conference enabled the early calendaring of appeals by holding places in advance or by increasing the predictability of ready cases at the time that the appellant's brief was filed.

An examination of appeals in the mandatory-conference group satisfying the expediting criterion reveals the same patterns reported for all the cases, although the differences in the subset are slightly larger.

The effects of the conference can also be examined from another perspective. Table 11 reports the mean and median elapsed times from notice of appeal to termination for each group. The first row of means in table 11 shows that for all appeals, the group B mean elapsed time from notice of appeal to termination is greater than the group A time, but the difference is within the range expected by chance. Group C's mean elapsed time for all appeals is significantly greater than that of the conference groups (A + B).

The estimated reduction in mean elapsed time for all appeals as a result of the conference is 43 ± 37 days.

This expeditiousness is attributable largely to reductions in appeals that run the gamut of the appellate process and, to a lesser extent, to appeals that terminate short of decision on the merits. The second row of means in table 11 reveals a significant difference between the mean elapsed time for appeals decided on the merits in the conference groups (A + B) and the mean elapsed time for the control group (C). The estimated reduction in elapsed time for these appeals as a result of the conference is 75 ± 37 days.

**TABLE 11**
**Mean and Median Elapsed Times (in Days) from Notice of Appeal to Termination**

| Appeals | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference | Groups A + B: Conference | Group C: Memo |
|---|---|---|---|---|
| All appeals | | | | |
| Number | 70 | 62 | 132 | 63 |
| Median | 165 | 177 | 175 | 248 |
| Mean | 185 | 195 | 189 | 232 |
| | $t = -0.47$, n.s. | | $t = -2.26, p < .01$ | |
| All appeals decided on the merits | | | | |
| Number | 41 | 39 | 80 | 34 |
| Median | 238 | 248 | 238 | 323 |
| Mean | 257 | 256 | 256 | 331 |
| | $t = 0.08$, n.s. | | $t = -3.87, p < .001$ | |
| All appeals not decided on the merits | | | | |
| Number | 29 | 23 | 52 | 29 |
| Median | 69 | 83 | 77 | 80 |
| Mean | 82 | 92 | 86 | 117 |
| | $t = -0.87$, n.s. | | $t = -2.26, p < .01$ | |

NOTE: Although the table reports both mean and median times, the statistical test compares only the means.

The findings are more equivocal for appeals that are not decided on the merits. The average elapsed time from notice of appeal to termination in the conference groups (A + B) is significantly different from the average time in the control group (C), but the median values for each group are not significantly different from each other. Thus, the expeditiousness achieved by the conference

cases should be attributed to the substantial gains in appeals that are decided on the merits.

## Manner of Disposition

The court chose not to follow the path taken by other appeals courts in the encouragement of settlements. Nevertheless, the conference may have benignly fostered such an outcome. Table 12 reports the manner of disposition for appeals in the mandatory-conference segment of the study.

**TABLE 12**
**Differences in the Disposition of Appeals by Group: Percentage of Each Group Disposed of in Different Ways**

| Disposition | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference | Group C: Memo |
|---|---|---|---|
| Decided on the merits | 59% | 64% | 52% |
| Settled, withdrawn, or dismissed for failure to prosecute | 34% | 34% | 35% |
| Dismissed for lack of jurisdiction | 7% | 2% | 12% |
| Number of cases | 70 | 64 | 65 |

The proportion of appeals settled, withdrawn, or dismissed for failure to prosecute is virtually identical across the three groups; yet the proportion of appeals decided on the merits is greater for the conference groups than it is for the control group. Although the differences are still within the bounds of random variation, the speculation that holding prehearing conferences encourages litigation on the merits cannot be avoided.[17] The final row of table 12

[17] Substituting the $B_1$ subset for group B makes this observation more pronounced, although still within the bounds expected by chance:

Decided on the merits: 75%

Settled, withdrawn, or dismissed for failure to prosecute: 25%

may provide an explanation for this curious anomaly. There were fewer dismissals for lack of jurisdiction in the conference groups than there were in the control group. A review of the case files suggests that an appeal lacking jurisdictional prerequisites (for example, Federal Rule of Civil Procedure 54(b) order) is held in abeyance by conference action until the condition is fulfilled. Then the appeal proceeds on the merits. In the control group, the only legitimate action is a motion to dismiss for lack of jurisdiction, which is granted in the absence of a rule 54(b) order. The appellant returns to the district judge for the order, and then a new appeal is docketed. In short, the prehearing conference may act as a holding pen for appeals until initial jurisdiction is resolved. The gains for litigants from this approach are obvious.

## The Elective-Conference Segment of the Study

. . . .

Tables 13 and 14 summarize the findings for the elective-conference segment of the study. Conferences were requested in only 6 percent of the appeals in group E; this suggests that the court's initial screening was nearly exhaustive. In light of this finding—that few attorneys in group E requested and attended prehearing conferences—it is not surprising that groups D and E do not differ significantly on the various measures identified in tables 13 and 14: percentage of cases in which conferences were held, average number of motions, average number of pages in briefs and appendixes, and mean and median elapsed times for appellate stages.

Group D tended to produce shorter briefs and take less time for some stages than did group E, but none of the differences reached the level of statistical significance. Overall, the preappeal conference program in the Seventh Circuit has demonstrated significant effects for many of the court's expectations.

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Dismissed for lack of jurisdiction: 0%
Number of cases: 40

**TABLE 13**
**Summary of Findings in the Elective-Conference Segment of the Study: Characteristics of Cases**

| Characteristic | Group D: Memo | Group E: Memo with Invitation |
|---|---|---|
| Number of cases assigned to groups | 181 | 185 |
| Percentage of cases in which conferences held | — | 6% |
| Average number of motions | | |
| Routine motions | 2.0 | 2.0 |
| Nonroutine motions | 0.8 | 0.9 |
| Average number of pages in briefs | | |
| Appellant's brief | 35 | 46 |
| Appellee's brief | 31 | 28 |
| Combined | 67 | 76 |
| Average number of pages in appendixes | 57 | 67 |

**TABLE 14**
**Summary of Findings in the Elective-Conference Segment of the Study: Mean and Median Elapsed Time (in Days) for Appellate Stages**

| | Group D: Memo | | Group E: Memo with Invitation | |
|---|---|---|---|---|
| Appellate Stage | Mean | Median | Mean | Median |
| Notice to docket | 18 | 15 | 19 | 15 |
| Docket to record | 68 | 33 | 72 | 43 |
| Record to appellant's brief | 60 | 42 | 53 | 34 |
| Appellant's brief to argument | 166 | 165 | 151 | 142 |
| Argument to termination | 55 | 38 | 74 | 51 |
| Notice to termination | 247 | 251 | 269 | 267 |

## The Attorney Survey

. . . [A]ll of the attorneys who participated in the study were surveyed by mail to reinforce the study data and to obtain their views of the procedure. This approach—surveying all attorneys—tends to diminish the response rate of the survey by inflating the number of those surveyed. Attorneys would occasionally return their surveys without completing them, indicating only that their involvement was slight.[18] The overall response rate of the survey was 59 percent. Under ordinary survey circumstances, this rate raises doubt as to the representativeness of the sample. But the "shotgun" approach used in this survey tends to depress the "true" response rate for knowledgeable attorneys.

. . . The attorney survey, although informative, was not essential to the central components of the investigation. The survey evidence should be examined with this limited purpose in mind. Tests of statistical significance were excluded to emphasize the nondispositive character of this evidence.

Table 15 reports information on the backgrounds of attorneys in groups A, B, and C and the attorneys' related experience in the use of rule 33 conferences. The data in the table should be examined to satisfy a concern that the groups of attorneys were comparable. With but one exception, the backgrounds and prior experience of these groups of respondents are virtually identical.

Table 16 reports the nature of attorneys' specific experience in appeals cases. The data in the table reveal a striking similarity among the three groups of attorneys in court-related experience in specific Seventh Circuit cases.

[18] Respondents returned the surveys to the evaluator rather than the court to assure that the court's promise of anonymity would be preserved.

**TABLE 15**
**Attorneys' Backgrounds and Related Experience**

| Background and Experience | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference | Group C: Memo |
|---|---|---|---|
| Mean percentage of legal work spent in federal appellate practice | 15% (103) | 13% (72) | 15% (124) |
| Mean number of years of practice in the Seventh Circuit | 12 (104) | 10 (72) | 10 (123) |
| Mean number of previous conferences in the Seventh Circuit | 1.5 (104) | 1.6 (71) | 1.6 (122) |
| Percentage affirming previous conference experience outside Seventh Circuit | 25% (107) | 27% (75) | 24% (128) |
| Mean number of conference appearances in federal court | 2 (22) | 2 (14) | 2 (21) |
| Mean number of conference appearances in state appellate court | 4 (11) | 2 (10) | 1 (12) |

NOTE: Numbers in parentheses indicate number of attorneys.

**TABLE 16**
**Nature of Attorneys' Specific Appellate Experience: Percentage of Attorneys in Each Group Who Had the Appellate Experience**

| Experience | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference | Group C: Memo |
|---|---|---|---|
| Preparation of briefs | 88% (94) | 84% (62) | 85% (106) |
| Presentation of oral arguments | 65% (81) | 62% (55) | 63% (86) |
| Other participation | 61% (38) | 62% (29) | 61% (43) |

NOTE: Numbers in parentheses indicate number of attorneys.

Table 17 explores the experience of the respondents outside the traditional forms of appellate practice. Two observations are warranted from this table. First, attorneys in the joint conference group (staff attorney and circuit judge) explored settlement with substantially greater frequency than did attorneys in either group A or group C. Second, more attorneys in the staff-attorney conference group met with their adversaries for purposes other than settlement or issue discussion than did attorneys in the other groups. At the least, there is a substantial amount of contact between adversaries on appeal.

**TABLE 17**
**Informal Contacts of Attorneys: Percentage of Attorneys in Each Group Who Affirmed Conferring with Opposing Counsel**

| Contact | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference | Group C: Memo |
|---|---|---|---|
| To explore settlement | 35% (104) | 55% (73) | 33% (122) |
| To limit or otherwise narrow issues | 16% (90) | 22% (56) | 16% (108) |
| For some other purpose | 62% (90) | 46% (56) | 38% (108) |

NOTE: Numbers in parentheses indicate number of attorneys.

An assertion frequently made in discussions of the use of the preappeal conference to foster settlement is that a third party is necessary to raise the issue of settlement because the parties themselves will not raise it, fearing that it would appear to be an innuendo of the weakness of their position. Table 18 offers some evidence for this common assumption.

More than half of the respondents identified themselves as the initiators of settlement discussion, casting doubt on the "innuendo-of-weakness" assertion. Furthermore, if the higher frequency of settlement discussions in group B (see table 17) was a result of the conference, the percentage of attorneys in group B who identified

other parties as the source of that discussion should have been higher than the percentage of attorneys in group A or group C who did so. This expectation is not fully confirmed by the data. Attributing the greater frequency of settlement discussions in group B to the joint conference is not fully warranted.

**TABLE 18**
**Identity of Person First Raising Settlement Discussion: Percentage of Attorneys in Each Group**

| Person | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference | Group C: Memo |
|---|---|---|---|
| Respondent | 54% | 63% | 58% |
| Other counsel | 32% | 26% | 33% |
| Other party | 14% | 11% | 8% |
| Number of respondents | 37 | 37 | 40 |

In an effort to determine whether it would be fruitful to place greater emphasis on settlement discussions, we asked attorneys who indicated that settlement discussions were not held to respond to the following question: "Why did you not raise the subject of settlement with opposing counsel?" The answers are summarized in table 19. The extremes are illuminating. At one end, settlement was not pursued because respondents felt that it was impossible. At the other end, the innuendo-of-weakness claim was rarely offered as the reason for not entering settlement discussions.

The survey was also used to gain feedback from the attorneys on the utility of the conference. Of the respondents in groups A and B, 87 percent indicated that they would request a conference if they were starting their appeals anew.

**TABLE 19**
**Attorneys' Reasons for Not Raising the Issue of Settlement: Percentage of Attorneys in Each Group**

| Reason | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference | Group C: Memo |
|---|---|---|---|
| Client instructed against it | 3% | 6% | 8% |
| Believed settlement to be impossible | 41% | 38% | 43% |
| Case concerned an important issue of law | 12% | 22% | 21% |
| Money damages were not involved | 11% | 3% | 7% |
| Raising settlement would indicate to opponent the possible weakness of position on appeal | 2% | 0% | 0% |
| Other reasons | 32% | 31% | 22% |
| Number of respondents | 66 | 41 | 73 |

Table 20 provides guidance on the emphasis to be given to the conference agenda. Simplification and acceleration lead the list of preferences of respondents with specific experience in the Seventh Circuit program. A third to a half as many respondents urged emphasis on withdrawal or settlement.

**TABLE 20**
**Attorney Suggestions for Conference Concentration**

| Conference Conceivably Could Have: | Group A: Staff Attorney Conference | Group B: Staff Attorney and Circuit Judge Conference |
|---|---|---|
| Fostered withdrawal | 10% | 11% |
| Fostered settlement | 12% | 15% |
| Simplified the process | 31% | 32% |
| Accelerated the process | 36% | 34% |
| Other | 12% | 9% |
| Number of respondents | 78 | 47 |

The general impression created from the survey findings and the additional comments provided by respondents is that the conference is regarded as a useful device, aimed at the right concerns, and conducted efficiently by a well-qualified attorney who earned much praise and no hostility from his fellow attorneys. Praise for the conference was a common feature; criticism of any sort was the exception. In sum, the conference is highly regarded by attorneys who are familiar with it. . . .

## IV. Conclusions: Benefits in Relation to Costs

When the evaluation of the preappeal program was negotiated, the court was asked to identify and justify the minimum improvements that would have to occur in order to continue the program. Each measure was considered independently of every other in these calculations, although it was possible for modest improvements to be realized on some measures, which would nevertheless cumulate to substantial benefits without being dispositive on any one ground. . . .

The effects of the Seventh Circuit program are fairly clear. The prehearing conference had a significant effect in reducing the number of motions—both routine and nonroutine—that judges had to hear. The conference did not appear to have a significant effect on the length of briefs. It did, however, result in significantly shorter appendixes in cases with multiple parties or multiple appeals. There was also a significant reduction in elapsed time from the filing of the appellant's brief to argument as a result of the conference, although this reduction may have been due to the staff attorney's reserving a hearing date at the conclusion of the conference. There was also, consequently, a significant reduction in the elapsed time from filing the notice of appeal to termination. There were no significant differences between the groups in the rates of settlement of appeals.

There were no situations in which having the circuit judge either scheduled or actually present at the conference changed

significantly any of the results found for the conference group in which only the staff attorney participated.

For the reduction of nonroutine motions, the study evidence seems to satisfy the court's minimum expectations. The salutary effects on routine motions and expeditiousness increase the benefits without additional cost. Although other goals were not realized in full, the benefits of the program appear to outweigh the costs, and, thus, it is recommended that the program be continued.

# Appendix A: Letter Sent to Attorneys Whose Cases Were Assigned to Group A or Group B

Dear _____ :

A notice of appeal has been filed on ____ by counsel for _____. Pursuant to Fed. R. App. P. 33, I will conduct a [telephonic] docketing conference on ____ with counsel for all parties to this appeal.[19]

The purposes of the conference are: (1) to discuss the possibility of settlement of this appeal; (2) to inquire as to whether this court has jurisdiction of the appeal; (3) to work out a schedule for filing of the record with any necessary transcript and to ensure that the record and transcripts are ordered; (4) to work out a schedule for the filing of the briefs on this appeal; and (5) to give parties an estimate as to when this court will hear oral argument in the appeal.

If you will not be available for the conference, will you please call and inform my secretary that you will not be available at the scheduled time (312/435-5804). I should receive notice of your unavailability at least one day prior to the [telephone] conference. My secretary will then reschedule a new date for the telephonic conference by notifying each of the parties.

If you are not going to be counsel for the appeal or if your client will not be a party to the appeal, please immediately notify my office by telephone.

Prior to the conference it is expected that you will contact opposing counsel concerning the possibility of settlement.

Counsel for the appellant should be prepared at the conference after having talked to the court reporter to give the date by which

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[19] The letter to attorneys in group A included this sentence. The letter to attorneys in group B substituted the following sentence for the one given above: "Pursuant to Fed. R. App. P. 33, Judge Luther M. Swygert and I will jointly conduct a [telephonic] docketing conference on _____ with counsel for all parties to this appeal."

necessary transcripts will be prepared and filed. Counsel should also be prepared to file a stipulation or a designation of the record with the district court clerk pursuant to Circuit Rule 4(a).

[USE FOLLOWING PARAGRAPH ONLY FOR PERSONAL CONFERENCES]

On the scheduled date, please come to the Clerk's Office on the 27th floor of the Everett Dirksen Federal Building and sign in a few minutes prior to the scheduled time for conference. Then proceed to the attorney's waiting room and make yourself comfortable until your case is called.

It is hoped that through these conferences we will work out a schedule which meets the individual needs of the clients, the counsel, and the court.

Thank you for your cooperation.

Sincerely,

John W. Cooley

## Appendix B: Memorandum Sent to Attorneys Whose Cases Were Assigned to Group C, Group D, or Group E

MEMORANDUM TO COUNSEL

This appeal was docketed on the date indicated on the enclosed "APPEARANCE FORM." Counsel are requested to take the following measures to assist the court in minimizing judicial and administrative workload, and in reducing appellate costs and appeal processing time:

(1) All counsel should carefully examine whether this court has jurisdiction. (See Rules 3 and 4 of the Federal Rules of Appellate Procedure; Rules 54(b) and 58, Federal Rules of Civil Procedure; 28 U.S.C. Sections 1291 and 1292).

(2) Unless already accomplished, appellant's counsel should order transcript, if appropriate, and ensure that the transcript is filed in this Court within 40 days of the filing of the notice of appeal. Unless already accomplished, the appellant must immediately pay the required $50.00 docketing fee to the Clerk of the Court (unless proceeding in forma pauperis). (Cir. R. 26.) All counsel should file written appearances with the Clerk within 10 days after the appeal is docketed. (Cir. R. 5.) Additionally, please read carefully the notices on the bottom of the "APPEARANCE FORM."

(3) Unless otherwise ordered, appellant should file his brief within 40 days after docketing. The appellee then has 30 days to file his brief and appellant has 14 more days to file the optional reply brief. (Rule 31, Fed. R. App. P.) Only 15 copies of the brief must be filed and the briefs may be photocopied. (Cir. R. 9(g) and Rule 28(g), Fed. R. App. P.)

(4) Briefs are not required to be accompanied by a full appendix, but the appellant must submit, either bound with his brief or as a separate document, an appendix containing the judgment or order under review and any opinion, memorandum of decision, findings of fact and conclusions of law, or oral statement of reasons delivered by the trial court or administrative agency upon the rendering of that judgment or order. It is preferred but not required

that the appendix also include any other short excerpts from the record, such as essential portions of the pleading or charge, disputed provisions of a contract, pertinent patent drawings or pictures, or brief portions of the transcript, that are important to a consideration of the issues raised on appeal. In lieu of an appellant's appendix, the parties may file a stipulated joint appendix or proceed in accordance with paragraphs (a) and (b) or paragraph (c) of Rule 30, Fed. R. App. P. Costs for a lengthy appendix will not be awarded. (See Cir. R. 12.)

(5) In cases involving multiple appeals or multiple parties, counsel should move to consolidate the appeals and should cooperate to avoid repetition through joint and adopted statements of facts and arguments.

(6) All counsel are requested to talk to their clients about settlement and make a good faith effort to settle the appeal.[20]

Thank you very much for your cooperation.

Thomas F. Strubbe

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[20] The memorandum sent to attorneys in group E included the following additional paragraph: "(7) Any party may request a docketing conference pursuant to Rule 33, Fed. R. App. P., or file a motion to expedite the appeal. The conference may serve as a forum for settlement discussions, and for streamlining or otherwise improving the appeal. You may arrange to schedule a conference by contacting the secretary to John W. Cooley, Senior Staff Attorney (312-435-5804) (FTS 8-387-5804)."

# ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT[1]

Joe S. Cecil
1985
(FJC-R-85-2)

## I. Introduction

As an appellate court grows in size, steps must be taken to maintain proper judge collegiality and productivity, and to deal with the increased burdens of court administration. The Ninth Circuit Court of Appeals—the largest appellate court in the federal system—recently adopted a number of practices that resulted in notable improvements in the court's performance. Some of these practices differ greatly from the traditional procedures used by federal circuit courts. This report describes these innovations and their effect on the Ninth Circuit.

For many years nine judges was deemed the maximum size for a federal appellate court. Courts of more than nine judges were considered incapable of efficient administration, cooperative collegiality, and effective participation in the development of a consistent body of circuit law. When the Commission on Revision of the Federal Court Appellate System, commonly known as the Hruska Commission, considered this issue in 1975, it recommended nine judges as the optimal size of a federal appellate court, but acknowledged the need for larger circuits in certain circumstances. The commission also recommended the adoption of a limited-membership en banc panel.

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[1] This report is reprinted in substantially its original form. The only material omissions are some footnotes and the appendixes. Remaining footnotes have been renumbered. Ed.

Congress recognized the concern over the growing size of federal appellate courts when it considered the need for additional circuit court judges. The Omnibus Judgeship Act of 1978 § 6, 28 U.S.C. § 41 (1982), invited circuits with more than fifteen active circuit court judges to experiment with solutions to the problems inherent in managing large appellate courts.

At the time of this legislation only the Ninth Circuit Court of Appeals and the old Fifth Circuit Court of Appeals had more than fifteen active circuit court judges. After considering the limited-membership en banc panel, the Fifth Circuit chose to continue the traditional en banc procedure in which all active judges participate. However, the first en banc session following the appointment of new judges revealed a problem: In a court of this size, the time and effort required in assembling the twenty-four participating judges, obtaining a consensus in the conference, and circulating a draft of the concurring and dissenting opinions made the traditional en banc procedure impractical. The Fifth Circuit Court of Appeals petitioned Congress to divide the circuit.

On October 14, 1980, Congress passed the Fifth Circuit Court of Appeals Reorganization Act of 1980, which, on October 1, 1981, divided the Fifth Circuit into a new Fifth Circuit, composed of Texas, Louisiana, and Mississippi, and the new Eleventh Circuit, composed of Alabama, Georgia, and Florida. Recent congressional testimony indicates that the reorganization eliminated the difficulties encountered by the old Fifth Circuit.

After the division, the Ninth Circuit Court of Appeals became the largest circuit court in the federal system. Almost twice as many appeals are filed in the Ninth Circuit as in the average federal circuit. The Ninth Circuit has twenty-three active circuit court judges and soon will have twenty-eight active judges, more than three times the number of judges previously considered the ideal number for a federal circuit court.[2] The judges of the court reside in thirteen cities spread across nine states. Appeals are heard from fifteen fed-

[2] With the recently approved increase in federal appellate judgeships, eleven of the twelve federal circuit courts of appeals, as well as the Court of Appeals for the Federal Circuit, now exceed the nine-judge standard.

eral districts, extending from Alaska to Arizona and from Montana to Guam.

In addition to being the largest, in 1980 the Ninth Circuit Court of Appeals was also among the poorest circuits in common measures of court performance. The median elapsed time from filing of the complete record in an appeal to disposition was 17.4 months, the longest of all the federal circuits and almost twice the national average. The Ninth Circuit had the second highest number of pending appeals per judgeship and was among the lowest in terms of the number of case participations per active circuit court judge. Visiting judges participated in approximately one-fourth of the cases.

The judges of the Ninth Circuit Court of Appeals, under the leadership of Chief Judge James R. Browning, accepted Congress's invitation to develop procedures and practices for the administration of large circuit courts. In 1980 the court adopted a local rule and operating procedures permitting limited-membership en banc panels, and undertook an extensive effort to modify existing practices to permit more effective administration and greater productivity. The court adopted many of the recommendations of the Hruska Commission for internal procedures and management of a large circuit. The internal structure of the court was modified to include three administrative divisions, and an expanded role for the central legal staff was developed. In 1982 the Ninth Circuit implemented a number of recommendations made by the staff of the Federal Judicial Center, as well as procedures developed by the court to help reduce the backlog of cases awaiting argument. These changes, collectively described as the "Innovations Project," are the subject of this report.

Written in response to a request by the Ninth Circuit Court of Appeals, this report serves two purposes. First, it describes the innovations in detail in order to help other courts determine whether they would benefit from similar programs. Particular attention is paid to the details of three major innovations: the Submission-Without-Argument Program, the Prebriefing Conference Program, and the modifications in calendaring of oral arguments. The overall structure of the court also is outlined.

Second, the report describes, where possible, the effect of the various innovations on case processing. Because many of the new procedures were adopted simultaneously, it is difficult to determine their independent effects. Almost all of the analyses compare the functioning of the Ninth Circuit Court of Appeals before and after the adoption of the innovations; there are few comparisons of the performance of the Ninth Circuit with that of other federal appellate courts.

This report does not address whether the Ninth Circuit should be divided. Division of the circuit involves the consideration of issues beyond the scope of this study.

Information for this report was gathered through personal interviews with the judges and staff of the Ninth Circuit Court of Appeals, examination of documents and records compiled by the court, and analysis of data contained in the court's automated case record system, which provides a detailed record of the characteristics of each case and the actions taken by the court in resolving the appeal. Several days in November 1983 were spent interviewing the staff of the court and collecting information and reports that describe the various programs. From January to February 1984, all of the Ninth Circuit judges were interviewed, either in person or by telephone. The average interview lasted forty-five minutes, though several were cut short by the press of judicial duties.

Information was also obtained from the June 1982 report to Congress, submitted by the Ninth Circuit and the Judicial Council, describing the circuit's efforts to implement the administrative innovations in the Omnibus Judgeship Act of 1978; the 1982 evaluation of the Prebriefing Conference Program conducted by the office of the circuit executive; and various sections of the Ninth Circuit's Handbook for Court Law Clerks. Comparisons of the effects of the programs were developed independently using the Automated Record Management System (ARMS) and the Staff Attorneys Data Base (SADB), unless otherwise noted.

## II. Findings and Conclusions

After the implementation of the Innovations Project, and despite a period of increasing case filings and reduced reliance on visiting judges, the Ninth Circuit Court of Appeals was successful in eliminating its large backlog of cases awaiting submission. The median time from filing of the complete case record to disposition was reduced from 17.4 months in 1980 to 10.5 months in 1983, with the greatest reductions occurring in the period from filing of the last brief to submission of the case for argument.

The most important factor leading to this improvement was the increase in the number of active judges in the circuit from 1979 through 1980, aided by increases in the productivity of individual judges. The average number of case participations by active circuit court judges increased by 27 percent, from 229 cases in 1981 to 291 cases in 1982, while the number of case participations by visiting judges was cut in half. Comparisons of average participations in single and lead cases (excluding associated cases) in other circuits for court year 1983 (July 1, 1982, through June 30, 1983) indicate that the Ninth Circuit Court of Appeals ranked sixth among the twelve federal circuit courts, with an average of 259 participations.

Three procedures—the modification of oral argument calendaring practices, the Submission-Without-Argument Program, and the Prebriefing Conference Program—constitute the core of the Innovations Project. The oral argument calendar was increased to permit the judges to sit for more days of argument and hear a more demanding argument calendar each day. The judges also remained together as a panel for a full five days of oral argument rather than changing panels at the end of each day. These practices permitted the active circuit court judges to hear oral argument in an average of twenty-one more cases per year, an increase of approximately 11 percent over the previous year. This increase underestimates the actual rise in judge productivity because the revised oral argument calendars were composed of more difficult cases. Furthermore, it was achieved without increasing the median time from submission

to disposition. However, the consensus of the court is that the upper limit in oral argument participations has been reached.

The Ninth Circuit also adopted a number of innovations to guard against conflicting decisions by circuit panels. As much as possible, similar cases are placed before the same panel, which also receives notice if a case involving a similar issue already is under consideration by another panel. When conflicts must be resolved, the court convenes a "limited en banc" panel composed of the chief judge and ten active circuit court judges selected by lot. In the four years following the adoption of this program, the court voted to hear thirty-seven cases en banc and has disposed of cases in approximately half the time required under the previous procedure. The limited en banc procedure is far less burdensome than convening the entire court, and all but one of the judges agreed that it has proven to be a satisfactory substitute for the full en banc panel. Despite several close votes, no judge has requested a full en banc to reconsider a decision by the limited en banc panel.

The Submission-Without-Argument or Screening Program requires separate standing panels of three circuit court judges for considering cases submitted without oral argument. Eligible cases are identified by staff attorneys and referred directly to the panels, whose members consider these cases either sequentially or simultaneously. Any panel member who determines that a case is not suitable for submission on the briefs may reject the case from the program and have it placed on the argument calendar. Following the implementation of the Screening Program, the average number of cases considered on the briefs by active judges more than doubled, from thirty-five cases per judge in the year prior to the program to seventy-three cases in the program's first year. Fifty-three of these cases were decided through the Screening Program. Disposition of almost all the cases submitted to the screening panels is by unpublished memorandum.

Although there initially was opposition to the Screening Program, after two years all the judges agree that it should be used for some cases. However, several judges indicated that their support is contingent on the right an individual judge has to reject any case he or she determines inappropriate for the program. Approximately 18

percent of the cases referred by the staff attorneys to the Screening Program were returned by the judges to be placed on the oral argument calendar. Although this rejection rate indicates the judges are carefully reviewing the submitted cases, it diminishes the efficacy of the program and results in additional delays for cases then placed on the argument calendar. Improving the referral process will be difficult because the rejection rate appears to result from different standards being exercised by the judges rather than a failure by the staff attorneys to implement the criteria established by the court. The rates of rejection of cases from the screening programs varied from 3 percent on one panel to 34 percent on another, with most of the panels rejecting 15 to 20 percent of the cases they received. Because support for the program is contingent upon the right of judges to reject cases viewed as inappropriate, and because the judges demonstrate considerable variation in their individual standards for rejecting cases, a variation in rejection rates across panels appears to be unavoidable.

The Prebriefing Conference Program, the third major innovation adopted by the court, is the largest such program in the federal circuit courts. Shortly after the appeal is docketed, a conference is scheduled between counsel representing parties in the appeal and a court-designated staff attorney to discuss, among other topics, the issues and the length and structure of the briefs. The conference is intended to assist counsel in improving the presentation of issues, thereby easing the judges' burden in considering the appeal. The conference attorneys also may inquire about the possibility of settlement, but this is not a primary purpose of the program. Interviews with judges and previous interviews with attorneys conducted by the court staff indicate that the program has considerable support within the circuit. The conference attorneys are given high ratings by the attorneys who participated in the process. A secondary benefit, but one stressed by the attorneys, is the opportunity for instructing members of the bar concerning appellate practice within the circuit. The program has recently expanded to provide services throughout the circuit, concentrating on those cases in which it will most likely improve the briefing process.

In addition to these three major programs, the Ninth Circuit Court of Appeals adopted several modifications of existing practices intended to improve the functioning of the circuit. The court's administrative structure was changed, permitting greater delegation of responsibilities to the circuit executive and clerk, and an executive committee was established to act on behalf of the court. The circuit was divided into three administrative units, with separate duties delegated to an administrative chief judge in each unit. These changes have resulted in reduced administrative roles for the other judges of the court and more time for attending to adjudication. In the opinion of the judges, these administrative structures are sufficiently flexible to accommodate the additional five judges authorized for the circuit. During this period the court also expanded its use of automated systems and word processing.

Although it is difficult to know the extent to which the lessons of different courts can be shared, other growing federal circuit courts might benefit from the experiences of the Ninth Circuit. The increasing management burdens of a large circuit can be accommodated by the division of the circuit into administrative units, the delegation of greater authority to the circuit executive and the clerk, and the establishment of an executive committee to act on issues that arise between court meetings. Automated processes permit closer monitoring of cases and preparation of performance reports, ensuring that cases are not overlooked or left unattended. If the judges of the circuit must travel frequently to sit as a panel, advantages are to be found in sitting for an extended period. If the judges agree that there are cases that will not benefit from oral argument, separate standing panels can be established to consider these cases without convening, with various procedures implemented to permit the appropriate degree of conferencing among panel members. Finally, a Prebriefing Conference Program may aid in structuring the presentation of issues on appeal, resolving procedural matters, and instructing members of the bar in the standards and expectations of appellate practice, all of which should ease judges' burdens in deciding cases. The central legal staff can play an important role in conducting a preappeal conference, monitoring the caseload,

preparing the argument calendar, and identifying those cases that may be appropriate for submission without oral argument.

## III. Administrative Structure of the Ninth Circuit

The Ninth Circuit Court of Appeals made several modifications in the administrative structure of the court from January 1982 to January 1984. Although this study does not examine them directly, these changes were adopted as part of the Innovations Project and offer an alternative management plan for large appellate courts. They are intended to permit flexibility and decentralization while maintaining a unified court for adjudicative functions.

### Administrative Units

Section 6 of the Omnibus Judgeship Act of 1978 permitted large courts of appeals with more than fifteen judges to experiment with internal administrative units. The Ninth Circuit adopted a plan that divides the circuit into three units. The Northern Unit consists of the districts of Alaska, Idaho, Montana, Oregon, and Eastern and Western Washington. The Middle Unit consists of the districts of Arizona, Nevada, Hawaii, Guam, the Northern Mariana Islands, and Northern and Eastern California. The Southern Unit consists of the districts of Central and Southern California. Seattle, San Francisco, and Los Angeles/Pasadena are the centers for the Northern, Middle, and Southern administrative units, respectively. Cases arising in the units are normally calendared in these cities as well. Judges are assigned to sit in each of these administrative units an equal number of times.

The most senior active circuit judge in each unit is designated the administrative chief judge and is asked by the chief judge to coordinate court of appeals staff operations within the unit and deal with a number of other administrative matters that the chief judge would ordinarily handle. For example, administrative chief judges review the backlog of unwritten opinions of judges having cham-

bers within the unit and decide all procedural single-judge motions, such as motions to file amicus briefs.

## Modification of Judicial Committee Structure

In addition to administrative units, the circuit established a number of committees to assist in the management of the court. The most prominent of these, the Executive Committee, consists of the chief judge, the administrative chief judges of the three units, and three other active judges selected by lot from among those willing to serve. The last three members serve one-year terms, after which all other judges are polled again for interest, and new lots are drawn. The Executive Committee meets once each month and, according to a May 1982 court resolution, is authorized to act on the following:

1. Emergency matters requiring action before the next scheduled meeting of the court
2. Routine matters not requiring decision as to court policy
3. Matters that, in the unanimous opinion of the executive committee, are of insufficient importance to require action by the full court
4. Review and make recommendations on other proposals regarding the operation of the court prior to their submission to the court
5. Advise the chief judge as he may request, and perform such tasks as he may delegate to the committee.

Executive Committee meeting agendas are distributed in advance to the full court. In addition, binding action taken by the committee is listed on the agenda of the next court administrative meeting, at which time any judge may request reconsideration by the full court. One of the most important duties of the Executive Committee is to act as an advisory body to the chief judge; for example, the committee conducted an extensive review of the proposals contained in the Innovations Project prior to the submission of the project to the full court for approval. The committee has taken on many of the administrative burdens of the court, leaving for court meetings only those matters requiring consideration by the entire court. As a result, the number of administrative court meet-

ings each year has been reduced from twelve to six, leaving more time for judges to attend to their adjudicative duties.

The Executive Committee is assisted by two standing committees. The Advisory Committee on Rules of Practice and Operating Procedures conducts an ongoing review of the court's rules and procedures and includes in its membership representatives of the bar in each of the administrative units. The Senior Advisory Board is composed of nine senior members of the bar of the circuit, three from each administrative unit, and provides the court with insights on court administration from the practitioners' perspective.

## Structure of Circuit Staff

The administrative units plan proposed the expansion and gradual dispersion of court staff operations as well as decentralization of administrative authority. Decentralization will proceed in two phases. First, the court will be required to divide its staff into three groups, one for each administrative unit. Second, the circuit staff will be physically dispersed to the administrative units to provide more direct service to the members of the court and the bar in those areas.

Although divisional offices providing limited services were established in Los Angeles and Seattle, the primary staff of the clerk's office has remained in San Francisco. Until recently, and throughout the period of this study, the case-management functions of the court were handled by five docketing teams. Three teams were responsible for most of the case-processing functions for civil appeals arising from the three administrative units.[3] Criminal and agency appeals, which require expedited handling or special record preparation, were dealt with by separate case-management teams not organized by region. In January 1983, the criminal-case team was disbanded, and its duties were assumed by the three teams serving the geographical units. Specialized functions, such as management of motions and preparation of statistical reports for the

[3] A sample processing schedule can be obtained from Information Services, Federal Judicial Center.

Administrative Office of the United States Courts, are handled by deputy clerks.

Consideration of further decentralization of the clerk's office has been postponed while the court improves the services provided by the divisional offices: Divisional office staffs have been increased, local filing of documents may be permitted, and the court is developing a system that will permit electronic docketing of appeals in the divisional offices. Separate arrangements are being made to permit attorneys and the public to have access to court files within one day of the request. After these changes are implemented, the court will then determine whether further decentralization is required. The clerk's office also is extensively involved in the automation of case-management activity.

As suggested in the description of the Innovations Project programs, the staff attorneys' office is critical to their success.[4] The central legal staff consists of thirty attorneys and fifteen externs and supporting personnel. All of the staff attorneys, including the staff director, serve a limited tenure with the court. The director of staff attorneys serves a term of two years, with a possible extension of one year; staff attorneys serve one to two years. The central legal staff is divided into six groups: a prebriefing conference/civil motions division, a criminal motions division, three multiple specialty divisions that handle the preparation of cases through the inventory and screening functions, and an administrative division. The office is unique in the degree of responsibility it exercises in the management and coordination of cases filed in the circuit.

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[4] The role of the central legal staff in appellate courts has been the subject of a wide variety of publications. An early review of these issues is found in D. J. Meador, Appellate Courts: Staff and Process in the Crisis of Volume (National Center for State Courts 1975). An examination of the roles of staff attorneys in the federal circuit courts is found in D. P. Ubell, *Report on Central Staff Attorneys' Offices in the United States Courts of Appeals*, 87 F.R.D. 253 (1980). The development of the role of staff attorneys in the United States Court of Appeals for the Ninth Circuit is discussed in Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 Calif. L. Rev. 937 (1980).

Prebriefing conference attorneys become involved in the management of civil cases soon after the cases are docketed by examining the filing information and convening conferences in certain cases. The conference attorneys are available to guide the prebriefing process and to answer questions concerning court practices and expectations. With the assistance of staff law clerks, they also handle all contested civil motions filed in the circuit. Criminal motions attorneys process motions arising from criminal appeals, federal or state habeas corpus proceedings, civil rights actions brought by prisoners, and attorney fee requests. Both civil and criminal motions attorneys prepare weekly calendars for the judges assigned to the motions panels. Finally, the staff attorneys' office is responsible for calendaring cases for submission and clustering similar cases before the same panel.

All other attorneys on the central legal staff, except the staff director and the deputy directors, are assigned to one of the three multiple-specialty divisions, which are directed by experienced attorneys who review the work of the law clerks. The various areas of federal law have been divided among the three groups to allow each to develop a degree of specialization while maintaining an interesting mix of cases. Table 1 shows the allocation of areas of federal law among the divisions.

The three divisions are responsible for the inventory and assignment of weights to cases, identification of and preparation of bench memoranda for cases to be submitted without oral argument and occasionally for cases to be argued, and assistance in the drafting of proposed dispositions. The inventory process, which takes between thirty and sixty minutes, involves several steps.

Approximately forty-five cases are forwarded each week. Staff law clerks, who work for the entire court rather than for individual judges, first review the cases for jurisdictional defects. If defects are found, the case is immediately referred to the judges sitting on the motions panel for consideration of dismissal. If no defects are found, the issues raised by the appeal are classified using an elaborate system of codes to indicate the areas of law addressed in the appeal. (Copies of the jurisdictional checklist and inventory card

**TABLE 1**
**Allocation of Issues Across Divisions in the Staff Attorneys' Office**

| Division I | Division II | Division III |
|---|---|---|
| | Criminal | |
| Double jeopardy | Confrontation clause | Criminal discovery |
| Evidence* | Crimes and defenses* | Guilty pleas* |
| Search and seizure* | Cruel and unusual punishment | Judicial and prosecutorial misconduct |
| Self-incrimination* | Grand jury and indictments | Jury instructions |
| | Right to counsel* | Jury selection and deliberations |
| | | Probation and parole |
| | | Sentencing and punishment* |
| | Civil | |
| Admiralty | Antitrust | Article III |
| Banking and consumer law | Communication | Employment discrimination* |
| Bankruptcy | Copyright | (Title VII & ADEA) |
| Condemnation law | Energy | Environmental law |
| Constitutional law (except | Government licenses and employment | Failure to prosecute* |
| procedural due process) | Immigration | Habeas corpus procedure |
| Freedom of Information Act | Patents | Indian law |
| Government contracts | Procedural due process | Labor law* |
| Military law | Public lands | Section 1983 procedures* |
| Tax* | Securities | |
| Tort claims and immunities* | Social Security* | |
| | Trademarks | |
| | Transportation | |

*The issues with asterisks are high-volume issues. A division member would spend a large proportion of time working in these areas.

and a summary of the issue codes used by the staff attorneys are available from Information Services, Federal Judicial Center.) As many as ten issues may be coded. The staff law clerk then assigns a weight to each case. The court uses five categories—1, 3, 5, 7, and 10—to indicate the relative amount of judicial time and attention required to resolve the case. There is a presumption that civil and agency cases are 5-weight cases, and criminal and habeas corpus cases are 3-weight cases, with individual cases adjusted up or down to account for factors resulting in greater difficulty or simplicity. Cases likely to serve as precedents are assigned greater weights. Finally, the staff law clerk prepares a brief narrative description of the issues presented by the parties to facilitate easy recognition of the unusual characteristics of a case. The issue codes, weights, and other administrative information about the case are entered into a computer data base maintained by the staff attorneys' office to permit quick and accurate access.[5] Staff attorneys make the critical decision concerning placement of the case on the oral argument calendar or the screening calendar, where the case will be considered on the briefs.

The divisions have little further involvement with the preparation of cases destined for oral argument. Occasionally these cases are returned to the staff for further development after oral argument, but for the most part they become the responsibility of the assigned judges and their individual law clerks. Staff attorneys deal more with approximately one-fourth of the cases, which are placed in the Screening Program for consideration without oral argument. After inventory and assignment of a case to the Screening Program, the staff attorneys prepare a bench memorandum, which helps the judges make a faster ruling by providing guidance to the case materials required to resolve the appeal. The memorandum takes about three days to prepare; it informs the panel of the procedural posture of the case, contains a full discussion of the relevant facts, issues, and arguments, cites relevant legal authorities, and provides an analysis leading to the recommended result. Although the bench

[5] Responsibility for maintaining the staff attorneys' data base was recently transferred to the clerk's office.

memorandum is not a draft disposition, it often provides the basis for the eventual determination. The bench memorandum, issue classifications, and case weights are reviewed by the attorney who directs the division and may be discussed in weekly division meetings. Judges occasionally request that the staff attorney who prepared the memorandum also prepare a draft opinion.

The work of the staff law clerks varies, based on the needs of the court. In general they complete four to six bench memoranda or seven to eight substantive motions memoranda each month, depending on the difficulty of the cases assigned. They are also expected to inventory approximately ten cases each month and write any draft dispositions on cases for which they prepared the bench memorandum. When their assignments are completed, the law clerks are given the opportunity to work on more complicated cases. Upon request of a judge, the clerks are permitted to work with individual judges in need of temporary assistance. Law clerks also review unpublished decisions of the circuit and recommend publication of those with precedential value, and work with the staff attorneys on special projects, such as reviews of various areas of the law.

The circuit recently considered whether the personnel of the staff attorneys' office should be dispersed as part of the decentralization process under the administrative units plan. The Prebriefing Conference Program has been expanded throughout the circuit, with the conference attorneys visiting the larger cities of the circuit on a regular basis and holding telephone conferences in cases filed from the less populated districts. The court decided that the duties of the staff attorneys' office are better performed by a single office located in San Francisco, as the specialized knowledge of a large, centrally located staff outweighs the benefits of dispersion.

## Automation

Automation of various administrative activities is not covered in this study, but it has had a great effect on circuit productivity. The Ninth Circuit has made extensive use of automated operations, making it a leader among the federal circuit courts in developing

appellate case-management systems.[6] When asked about recent improvements in the circuit, more than one judge mentioned the introduction of word processing and other automated systems first.

The use of automation begins when an appeal is filed. Once a case is docketed, every significant activity is entered into the automated record system and is available for inspection. Automated programs are used to monitor lapses in case activity, including failure to pay filing fees, nonreceipt of the case record, and lateness of briefs. The clerk's office closely monitors case events, resulting in the dismissal of twenty to thirty appeals each month for failure to prosecute.

Automated systems also calendar cases for oral argument. The Ninth Circuit sets up to forty-five argument panels each month in three or more locations. The computer program arranges the panels so that each judge is scheduled to sit with each other judge and in each city an equal number of times. Then, based on the case weights and issue codes, the program assigns cases to "clusters," ensuring that the difficulty of the clusters is approximately equal and that all available cases presenting the same issue are included in the same cluster and are presented to the same panel. The program also lists all cases calendared in the preceding year that raised the same issue. Cases with high statutory priority receive preferential calendaring; the age of the cases awaiting calendaring in the three administrative units should remain approximately equal. The case clusters are matched with panels at random.

The court has also developed an automated system to monitor the progress of a case under submission. Once it is calendared, the case becomes the responsibility of the three judges to whom it has been assigned. The presiding judge assigns bench memoranda to the panel members, and the memoranda are circulated to the other panel members during the week prior to the argument. Unless the case is submitted on the briefs, oral argument is heard, and the judges confer and reach a decision. The presiding judge informs

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[6] A review of the use of automated systems by the Ninth Circuit Court of Appeals is found in N. Lateef, *Keeping Up with Justice: Automation and the New Activism*, 67 Judicature 213 (1983).

the clerk's office which of the three judges on the panel will prepare the opinion, and each judge informs the clerk's office as the opinion is circulated. This information is used to prepare a monthly report of each judge's backlog of uncirculated opinions, permitting the chief judge to take action to relieve overburdened judges without waiting for the problem to be brought to his attention. Upon the judges' approval or the development of dissenting or concurring opinions, the disposition is filed and the case is closed, subject only to the granting of a petition for rehearing.

The introduction of word-processing systems has greatly eased the work of the individual judges and their staffs, resulting in a noticeable increase in efficiency in drafting and editing judicial dispositions. The court may have hundreds of draft dispositions in circulation at one time, and mail delivery may take a week. The word-processing systems of the circuit, connected following this study, permit electronic mail between chambers. Orders, draft opinions, revisions, concurrences, and dissents circulate easily throughout the circuit. The court plans to install optical copy readers, which scan typewritten text, to permit rapid transmission of emergency motions and other high priority documents among Seattle, San Francisco, and Los Angeles.

Recently the Ninth Circuit Court of Appeals became one of three pilot courts used in the development of a decentralized, automated case-management system that will permit greater monitoring and control of cases. This system will replace paper dockets with an automated data base containing uniform entries; paper copies of the docket sheets will be produced only as needed. The judges of the court will have access to the system in chambers through their word-processing terminals, and staff attorneys and other court personnel will have access for case-management purposes. This system should also permit an expansion of services to the divisional offices of the clerk's office.

## IV. Increased Oral Argument Calendar

The most notable changes in the administration of the Ninth Circuit reflected the commitment of the judges to review and decide

more cases. Simple cases that were to be decided without oral argument were placed on a separate decision track and referred to one of eight permanent panels whose three members would consider the case without convening. This process, known as the Screening Program, is discussed in the next chapter. The more difficult cases were placed on the oral argument calendar, as in the past, but the court agreed to sit for more days of oral argument and to hear a calendar of greater weight.

Before the adoption of the Innovations Project, each judge usually sat for forty days of oral argument per year—four days per month for ten months. Each day of oral argument was composed of approximately five cases totalling sixteen points in difficulty, based on a weighting system that estimated the amount of judicial effort and attention required to review the materials and draft the disposition. As part of the Innovations Project, the members of the court agreed to increase the number of cases they considered by sitting for oral argument for forty-five days—five days per month for nine months each year. The daily argument calendar was increased in difficulty from sixteen to eighteen points. To accommodate these increases and to reduce the burdens and expense of travel, the members of the court agreed to sit together as a panel for the full week of oral argument rather than change panel membership at the end of each day.[7] The willingness of the Ninth Circuit judges to sit for more days of oral argument and to hear more cases each day is the most compelling evidence of their commitment to reduce the backlog of cases awaiting argument.

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[7] The increase in the number of oral argument days—12.5 percent, from forty to forty-five days—along with the increased difficulty of the daily oral argument calendar—12.5 percent, from sixteen to eighteen points—was expected to increase the number of cases disposed of after calendaring by 25 percent. However, these projections assumed that the increase in the weight of the daily calendar would be reflected in additional cases. As described later in this chapter, the introduction of the Screening Program and a reinterpretation of the case-weighting system resulted in oral argument calendars comprising fewer cases than expected, though the argument calendars were much more difficult than before.

This chapter describes in detail these changes in the argument procedure, related changes in publication practice, and the means used to ensure consistency of decisions within the circuit, with particular emphasis on the limited en banc panel.

## Calendaring

Implementation of the increased oral argument calendar was relatively easy. Within the inventory and calendaring systems described in chapter 3, in order to reflect the authorized increases in the oral argument calendar, the court restructured the computer programs that cluster the cases and assign judges to panels. The judges modified their schedules to permit spending a full five days at the designated site of the oral argument and made changes in the administration of their chambers to accommodate the increased number of cases they would be hearing.

There was considerable variation in the way individual judges handled the increased argument calendar. Although most judges sat five days a month for nine months, some judges sat for fewer months, while several judges continued to sit for ten months but heard cases under the more demanding five-day calendar. One judge continued to sit for four-day calendars, but for eleven months. There continued to be a considerable amount of panel switching by judges to accommodate scheduling difficulties that arose after the panel assignments were made.

The additional five days of oral argument each year underrepresents the increase in the judges' workload. Because the court increased the difficulty of the daily oral argument calendar from 16 to 18 points, there was a 90-point calendar for the five days of oral argument. Measured on an annual basis, the weight of the oral argument calendar was increased by 27 percent, from 640 to 810 points. Many of the judges commented that the 18-point daily calendar is much more demanding than the 16-point one because the simpler lower-weight cases are being diverted to the Screening Program. The change in the point system appears to have influenced the mix of calendared cases by making the overall

burden more difficult, rather than simply increasing the number of cases argued each day.[8]

The growing number of case dispositions increased the potential for conflicts within the circuit and in the development of circuit law. Several steps were taken to avoid such problems. First, calendaring practices were modified to place cases with the same or similar issues on an argument calendar to be decided by a single panel. Approximately eleven weeks before a scheduled argument calendar, a computer-generated list of cases that are likely to go on the calendar is prepared. Cases are selected on the bases of age and statutory priority. The computer also generates a list of cases ready for argument that were identified in the inventory process as involving issues similar to those raised in the cases tentatively placed on the oral argument calendar. Staff attorneys compare the characteristics of tentatively calendared cases with similar uncalendared cases, with all cases calendared during the previous twelve months, and with all cases still under submission that have the same primary issue code. Cases are then calendared so that (1) cases raising similar issues, that would be on the same calendar anyway, are placed before the same panel and (2) cases that would not be on the same calendar are placed before the same panel if they raise the same or a very similar issue; notice is sent to counsel informing them of the joint calendaring to allow them to improve their preparation for argument. (A copy of the notice sent to counsel in related cases is available from Information Services, Federal Judicial Center.) Criminal cases, expedited cases, and cases with a statutory priority that raise similar issues often cannot be calendared together because each case is placed on the first available calendar, before a subsequent related case has been inventoried. In such instances the rela-

[8] Although it is clear that the increased calendars are more burdensome, the increase in their weight must be interpreted with caution. The weights assigned do not reflect the cases' absolute difference in difficulty; that is, one 7-weight case may be more difficult than two 5-weight cases. In general, the weights are intended to reflect only the relative difficulty of the cases. Furthermore, the case-weighting system appears to have altered slightly after the adoption of the changes in the oral argument calendar and Screening Program, making comparison during this period especially difficult.

tionship is noted on the inventory card so that subsequent panels are aware that a case raising a similar issue is pending.

A second step taken to avoid conflicts in the development of circuit law was to rely less on dispositions by visiting judges. Before the Innovations Project, the Ninth Circuit made extensive use of visiting judges to assist in the disposition of the backlog of cases, and this reliance increased following delays in filling the additional judgeships authorized in 1978. However, heavy use of visiting judges makes it more difficult to maintain consistency of opinion than if only active and senior judges are sitting. Furthermore, because many visiting judges face heavy workloads in their home courts, presiding judges often are reluctant to give them their full share of writing assignments. The decision to rely less on visiting judges, thereby forgoing one of the traditional resources used to overcome a case backlog, indicates the priority the court placed on maintaining consistency in the development of law within the circuit during a period of increased calendaring.

## Effect of the Increases in Oral Argument Participations

Following the Innovations Project, the number of cases submitted to oral argument panels dropped slightly, from 2,246 in 1981 to 2,109 in 1982 (see table 2). This is partially due to the number of cases diverted to the Screening Program. However, the decrease disguises an increase in participations by active circuit court judges and a dramatic decrease in participations by visiting judges. The figures for 1980 and 1983 are somewhat misleading; for most of 1980 there were several vacancies on the court, while in the latter half of 1983 the backlog of cases awaiting calendaring had been eliminated, and the number of oral argument calendars was reduced accordingly.

The comparison between 1981 and 1982, before and after the increased oral argument calendar was implemented, is the most informative. During this period, the number of oral argument participations by active circuit court judges increased 10 percent while the number of participations by visiting judges was reduced by more

**TABLE 2**
**Oral Argument Participations**

| | 1980 | 1981 | 1982 | 1983 |
|---|---|---|---|---|
| Total cases | 1,883 | 2,246 | 2,109 | 1,839 |
| Total participations[a] | 5,645 | 6,731 | 6,310 | 5,502 |
| Participations by: | | | | |
| Senior judges | 568 | 401 | 428 | 377 |
| Visiting judges | 1,498 | 1,690 | 761 | 847 |
| Active judges | 3,579 | 4,640 | 5,121 | 4,278 |
| Average participations by active judges[b] | 180 | 202 | 223 | 186 |
| Lead/single cases[c] | 1,428 | 1,659 | 1,594 | 1,441 |
| Lead/single participations | 4,283 | 4,972 | 4,772 | 4,312 |
| Participations by: | | | | |
| Senior judges | 377 | 313 | 344 | 303 |
| Visiting judges | 1,123 | 1,230 | 573 | 659 |
| Active judges | 2,783 | 3,429 | 3,855 | 3,350 |
| Average participations by active judges[b] | 140 | 149 | 168 | 146 |

[a]These figures do not include participations in en banc proceedings. There were eight en banc cases terminated in 1981, twelve in 1982, and thirteen in 1983, with each case decided by a panel of eleven active judges. The number of oral argument participations adds to less than three times the number of cases due to missing data for participating judges.

[b]During 1980 six of the judgeships in the circuit remained unfilled for portions of the year. The number of active-judge participations include judges who did not serve the full year, while the number of average participations only includes judges who were in active service at the beginning of the year.

[c]During the period reported in these tables, the Ninth Circuit Court of Appeals followed practices in defining cases as "consolidated cases" or "cross-appeals" that were inconsistent with the standards specified by the Administrative Office and presumably used by the other circuits. This issue is discussed in greater detail in chapter 7. Although the figures reported here are accurate for comparisons of relative changes in the performance of the circuit across years, they underestimate the actual number of oral argument participations in lead and single cases and are not valid for comparison with similar measures of other circuits.

than half. Oral argument participations by senior judges increased 7 percent. A similar pattern emerges when only lead cases are examined: Oral argument participations by active and senior judges increased 13 and 10 percent, respectively, while participations by visiting judges were reduced by more than half.[9] Among the judges

[9] The difficulties of accurately determining the number of lead and single cases are discussed in chapter 7. Although there was some discrepancy between the definition used by the Administrative Office and the implementation of this

themselves, participations varied widely. In 1982, for example, five active judges participated in fewer than 208 cases involving oral argument while five others participated in more than 248.

As already stated, the higher number of case participations is not a complete measure of the increased difficulty of the oral argument calendar. From 1981 to 1982, the average weight of argued cases increased from 3.8 to 4.1, suggesting that the typical case required more judicial effort than in the year before the increased argument calendar. Some of the change may be due to a shift in the measurement scale during this period, but since the simpler cases submitted to the oral argument panels prior to 1982 were being diverted to the screening panels after 1982, it appears that not only were the active circuit court judges hearing more oral arguments, but the calendars themselves were composed of more difficult cases.

The judges of the Ninth Circuit were able to increase their participations in oral arguments without greatly increasing the median disposition time. Initially, there was some concern that the backlog would simply shift from cases awaiting argument to cases awaiting disposition. However, as more members of the court were able to catch up on their writing assignments during the extra time off permitted by the shift from a ten-month to a nine-month calendar, the backlog of cases awaiting disposition diminished. Median disposition increased from 76 to 79 days in 1982 and dropped to 72 days in 1983.[10]

Several criteria govern the processing of dispositions. First, criminal cases are given priority over all other cases. Second, judges are to give priority to the review of draft dispositions by other panel members and are to act on those draft dispositions

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standard by the staff of the Ninth Circuit, the standard used by the staff did not vary throughout the period examined in this report.

[10] At the time of these computations several of the cases argued in 1982 and 1983 were without disposition dates. The reported median dates include an adjustment for these missing data by assuming that the elapsed time for all of the cases awaiting disposition will exceed the reported medians, a reasonable assumption because these data were collected in April 1984, which fell after the median.

within seven days of receipt. The presiding judge of the panel is directed to contact the assigned judge when the disposition in a criminal case is not circulated within sixty days, and to contact any visiting judge who has not circulated a disposition within ninety days of assignment or not acted on another judge's proposed disposition within thirty days. If two judges have agreed on a disposition, and the third judge has not indicated a position or circulated a proposed concurring or dissenting opinion within sixty days, the majority may, after providing ten days' notice to the third judge, file the disposition with a notation that the third judge may file a separate statement at a later date.[11]

In addition to the increased argument calendar, the court adopted a series of reporting practices for monitoring the progress of cases argued and awaiting disposition. Every month the clerk's office prepares reports for the individual judges indicating the status of each assigned case. Another report, which helps presiding judges monitor the progress of their panels' cases, lists those cases awaiting disposition, the assigned judge, and the circulation date, if any. A special report on criminal cases also is prepared. Finally, a report for the chief judge summarizes the total number of cases assigned to each judge, the number that have been circulated, and the length of time they have been in circulation. A copy of this report is sent to each judge, and the administrative chief judges review the status of the cases in their districts that have been pending more than six months.

The court also adopted a policy that permits the chief judge to relieve of further calendar duties a member of the court who falls behind in preparing dispositions. (The general order expressing this policy can be obtained from Information Services, Federal Judicial Center.) At the discretion of the chief judge, a judge may be relieved of all calendar duties or assigned to fewer panels when one or more of the following criteria are met:

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[11] Copies of the general orders regarding the monitoring of dispositions and the filing of majority opinions can be obtained from Information Services, Federal Judicial Center.

1. Two or more cases not presently in circulation were assigned to the judge for preparation of a disposition over nine months earlier.
2. Five or more cases not presently in circulation were assigned to the judge for preparation of a disposition over six months earlier.
3. Twenty or more cases not presently in circulation have been assigned to the judge for preparation of a disposition.

In the two years following the Innovations Project, only one judge was taken off the calendar, and only for a brief period of time.

Almost all of the judges mentioned during the interviews that the new oral argument calendars were a heavy burden, and that sitting together as a panel for the full five days of argument made the task manageable. A five-day panel facilitates discussion and the allocation of writing assignments among the judges. However, it also limits the opportunity to sit with every other judge; under the best circumstances, it takes more than one year for each judge to sit with every other member of the court. Most of the judges believed that their greater familiarity with other panel members' decision-making processes, gained from the five-day panel, offset the diminished opportunity to sit together frequently. The extended time period results in more efficient panel deliberations, a better working rhythm, and a collegiality based on a more thorough understanding of the other panel members. Although no judge was opposed to the fixed panel system, several of the judges did not endorse the change, indicating that consistently sitting with the same panel members made very little difference and was of doubtful benefit. One judge mentioned that the slower rotation of panel membership would make it difficult for new judges to become acquainted with other members of the court.

The increased burdens of the oral argument calendar have changed the way some judges allocate their time. A number of the judges said they now have less time to read slip opinions, edit and supervise law clerk assignments, polish their own opinions, edit the draft opinions of other judges, prepare for oral argument, and

pursue independent writing and other outside professional activities. Other judges mentioned that they have less time to perform all of their duties, and they attempt to compensate by working longer hours.

Nevertheless, almost all of the judges indicated that the increased oral argument calendar could be continued as an ongoing program. Sixteen of the judges believed that the court was at the upper limit of oral argument participations, two indicated they could hear argument in more cases, and four believed that the proper limit had been exceeded and the quality of judicial consideration was suffering.[12]

## Publication of Opinions

As part of the package of innovations, the members of the court agreed to publish fewer and shorter opinions, a policy that had its greatest effect on cases submitted for argument. The court reaffirmed its practice that a full opinion, as opposed to a memorandum, should be written only if the panel specifically determines that an opinion is necessary and should be published under the standards of local rule 21. Local rule 21 contains a presumption against publication, which is overcome when a case—

1. Establishes, alters, modifies, or clarifies a rule of law, or
2. Calls attention to a rule of law which has been generally overlooked, or
3. Criticizes existing law, or
4. Involves a legal or factual issue of unique interest or substantial public importance, or
5. Relies in whole or in part upon a reported opinion in the case by a district court or an administrative agency, or

[12] At the time of the interviews, the judges of the Ninth Circuit Court of Appeals believed that the combined effect of the Innovations Project and their increased workload had resulted in a total of case participations that ranked the court among the most productive federal appellate courts in the country. The Ninth Circuit actually ranks in the middle. It is possible that this misunderstanding affected the judges' responses to questions concerning higher rates of case participations.

6. Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be reported or distributed to regular subscribers.

Typically, in the conference immediately after an oral argument, the panel determines whether the disposition of the case they have just heard should be published. In addition, the staff attorneys review unpublished opinions and recommend publication in appropriate cases, including those cases that involve apparent intercircuit conflicts. From August 1979 to April 1982, the staff reviewed approximately one hundred unpublished dispositions each month; it recommended publication of forty-two opinions, an average of slightly more than one opinion per month, and the court published twenty-two of them. The most common reason for suggesting publication was that the unpublished memorandum relied on out-of-circuit opinions as the authority for a controlling question.

Table 3 illustrates the shift in publication practice that occurred during this period. From 1981 to 1982, the proportion of cases with published opinions dropped from 40 percent to 36 percent, because of the lower proportion of signed opinions. It is not clear, however, that the decrease is due to the court's commitment to publish fewer opinions undertaken as part of the Innovations Project or simply to the continuation of a trend toward nonpublication that had already begun. Between 1980 and 1981—before the Innovations Project—the proportion of published opinions had dropped by an even greater amount.

Although there is no convenient way to determine if the lengths of the published opinions have decreased as well, most of the judges interviewed believed that they had. One judge suggested that the increased argument calendar resulted in a growing reliance on the work of law clerks, which in turn has caused an increase in the opinions' lengths. A few judges also commented on apparent inconsistencies in publication policies across panels, though all of these practices appear to be within the broad standards set by local rule 21. Publication policy and practice is a sensitive topic, and some of the judges questioned whether opinion length is an appropriate topic for the establishment of court policy. The effect of the

court's commitment to reducing the length of published opinions remains an object of speculation.

**TABLE 3**
**Publication of Dispositions in Argued Cases**

| | 1980 | | 1981 | | 1982 | | 1983[a] | |
|---|---|---|---|---|---|---|---|---|
| Published | 47% | | 40% | | 36% | | 37% | |
| Signed | 41% | (769) | 36% | (726) | 32% | (707) | 32% | (589) |
| Per curiam | 6% | (118) | 4% | (91) | 4% | (96) | 5% | (84) |
| Unpublished | 53% | | 60% | | 64% | | 63% | |
| Memoranda | 45% | (845) | 55% | (1,128) | 58% | (1,284) | 59% | (1,091) |
| Order | 8% | (152) | 5% | (94) | 6% | (121) | 4% | (82) |

[a]These figures do not include the 140 cases submitted in 1983 for which disposition information was missing at the time of the study. Since unpublished dispositions are reported more quickly, it is reasonable to assume that a greater proportion of the missing cases will be disposed of by published opinion. Even if it is assumed that all of the cases with missing information will have published opinions, the proportion of published opinions in 1983 will not exceed 40 percent.

## The Limited En Banc Procedure

The most novel innovation adopted by the Ninth Circuit Court of Appeals was the limited en banc procedure. Under section 6 of public law 95-486, the Omnibus Judgeship Act of 1978, any circuit court with fifteen or more active members is permitted to "perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals." The Ninth Circuit adopted local rule 25 . . ., which provides for hearings and rehearings en banc by special panels of eleven judges, consisting of the chief judge, or next most senior active judge, and ten judges drawn by lot from the active judges of the court. Any active judge whose name has not been drawn for any of three successive en banc cases is automatically placed on the next en banc panel. Active judges who served on the three-judge panel that heard a case subsequently taken en banc receive no priority for placement on the en banc panel.[13]

[13] Visiting judges are not eligible to sit on the limited en banc panel. Initially, senior judges also were not eligible to sit, but this policy was recently changed

The chief judge has served on all but one of the first thirty-seven limited en banc panels. The remaining twenty-one active judges who have been in service since the adoption of the procedure have served on an average of seventeen panels. The two judges with the most frequent service have appeared on twenty-one panels each, while the judge with the least frequent service has appeared on eleven. The rule that automatically places a judge on the panel if he or she has not served on the three previous panels has been invoked fifty-five times.

Apart from the selection of the members for the en banc panel, the process functions much as in the past. Any party may suggest and any active judge may request that a case be heard or reheard en banc. All active judges may vote on taking a case en banc and all members of the court, including visiting judges who participated in the three-judge panel that heard the case, are kept informed of the voting.[14]

After a case is accepted for hearing or rehearing en banc, only those members selected for the en banc panel are included in the distribution of material and in deliberations. When the members of the panel have reached their decisions, the most senior judge in the majority assigns the drafting of the opinion. The court closely monitors the preparation and circulation of the majority and separate opinions. Judges assigned to draft opinions may request to be taken off the regular argument calendar. Once the opinion is filed, any party may suggest and any active judge may request that the case by reheard by the full court. If a majority of all active judges not recused agree, the case may be reargued and submitted to the full court. . . .

From August 1980—the date the court adopted the limited en banc procedure—to July 1984, the court voted to hear thirty-seven cases en banc. Administrative Office reports reveal that in the three years following the adoption of the rule, twice as many en banc

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to permit senior judges who were on the original three-judge panel to elect to have their names placed in the en banc pool.

[14] At first, an affirmative vote of a majority of all active judges was required to take a case en banc. This policy was recently changed to require a majority of all active judges who are not recused.

appeals were disposed of as in the three years prior to its adoption, though the increase in the size of the court during this period makes it difficult to attribute this change to the procedure alone. In the twenty-six en banc cases decided at the time of this study, an average of 175 days elapsed from the date of submission to the en banc panel to the date of its decision, compared with an average of 349 days in the ten cases decided en banc in the two years preceding the adoption of the limited en banc rule. There has been no request by a judge and only one suggestion by a party for a rehearing before the full court.

All but one of the active members of the court agreed that the limited en banc panel is a satisfactory substitute for the full en banc procedure. Several of the judges mentioned the practical difficulties that the court would face in convening all of its active members and indicated that there is a greater willingness by the judges to call for an en banc hearing under the new rule. There was, however, considerable variation in the willingness of individual judges to call for a rehearing en banc. Several of the judges admitted that they had been skeptical of abandoning the traditional en banc procedure, with participation by the full membership of the court; however, the opportunity for any member of the court to call for an en banc involving all active judges was viewed as the proper safeguard to ensure that a decision represents the majority opinion of the judges of the circuit. There have been several close votes under the limited en banc procedure, but, as evidence of the court's acceptance of the procedure, the judges repeatedly stated that there has not been a single recommendation for a full en banc panel following a decision by a limited one.

Several members of the court suggested that the limited membership of the en banc panels has affected the nature of the deliberations. Those selected to serve on the limited panels appear to feel an obligation to ensure that the views of all members of the court are represented in the deliberations. In fact, two judges, including the judge who did not endorse the limited en banc procedure, mentioned that in some cases it has been difficult to restrict the deliberations to the members selected for the panels. Viewpoints held by members not selected for the en banc panel are often addressed in

the majority or accompanying opinions and can therefore be considered by the Supreme Court if the case is pursued on appeal. The likelihood that such cases will be appealed to the Supreme Court also was cited by several judges as a reason for the acceptance of limited en banc decisions by members in the minority.

Most of the judges stated that the limited en banc procedure would be appropriate for a court smaller than the Ninth Circuit Court of Appeals if it has difficulty convening its full membership. There was no agreement on the proper size of the limited en banc; the eleven-member panel was adopted as a compromise during the development of the rule, and a difference of opinion persists. When the Hruska Commission recommended the limited en banc, it suggested that the panels be composed of at least a majority of the members of the court. This restriction was not adopted by Congress when it authorized the procedure, and the size of the limited en banc panels is not expected to change as the court increases in size.

## V. Submission-Without-Argument Program

The most notable and controversial departure from past practice in the Ninth Circuit was the development of separate panels to consider cases submitted without oral argument. Although formally called the Submission-Without-Argument Program, it is commonly referred to in the circuit and elsewhere as the Screening Program. Development of the screening panels was intended to increase the number of cases disposed of without oral argument, and thereby increase the overall productivity of the court.

The benefits of this program may not be immediately apparent. Oral argument is rarely heard and in any event would only require about thirty minutes. The judges must still read the briefs, confer to the extent necessary, and draft and review the disposition. The main advantage of the Screening Program is the ease and convenience with which a case can be considered. Judges can examine the cases and dispose of them in one sitting, without having to reexamine them when the argument panel convenes. Judges are also free to consider the cases at any time that is convenient, rather than

only when the argument panel convenes. This advantage became especially important to Ninth Circuit judges when increases in the argument calendar left little time for the regular panels to consider cases not scheduled for oral argument. However, cases appropriate for the program must be identified early in the appeal process and placed on the separate screening track. If inappropriate cases are placed on the track, they must then be removed and returned to the clerk to be placed on the oral argument calendar.

The greatest concern about the Screening Program is whether the cases receive adequate judicial attention; the selection of cases by staff law clerks makes the concern even more acute. It is difficult under any circumstances to determine objectively if the degree of judicial attention is "adequate," especially in any case that receives less than the full range of appellate procedures. When this issue was raised, all members of the court agreed that cases exist in which oral argument does not aid the deliberation of the panel, and which require little consultation among the panel members. Although providing oral argument in such cases may serve several purposes, including ensuring the visibility of the appellate process, offering it in every case limits the time and attention the court can devote to cases that are more demanding. The Screening Program is intended to ensure that both simple and complex cases receive proper judicial attention and are decided in a way that is appropriate to the issues raised in the appeal.

The Screening Program was the most controversial of the major innovations. In 1975 a more limited screening program was abandoned when the court modified its calendaring practices to permit oral arguments of less than thirty minutes.[15] However, argument

[15] The Ninth Circuit Court of Appeals also adopted, then abandoned, another procedure prior to developing the new Screening Program. The Appeals-Without-Briefs Program was intended to expedite the disposition of civil appeals presenting familiar and straightforward issues. Instead of briefs, counsel filed "preargument statements," which were not to exceed five pages and which contained a list of citations to principal cases and pages of the record on which the party intended to rely during oral argument. These appeals were also given a priority in calendaring and a longer amount of time for argument. The program was not successful and was abandoned in February 1982, shortly after the

panels continued to decide approximately 20 percent of the submitted cases without argument. By 1981 the increasing caseload and greater numbers of staff attorneys caused the court to consider the reestablishment of a screening program. Some members of the court were initially opposed, citing the diminished opportunity for consultation among members of the screening panel. A screening program modeled after the Fifth Circuit serial-panel procedure was adopted on a trial basis for six months;[16] an alternative parallel-panel procedure was added to permit the individual members of a screening panel to consult with each other by telephone. Sixty cases each month were to be referred to the panels (seven to eight cases each), which would permit the Screening Program to dispose of approximately 25 percent of the cases decided after submission.

The program fell short of this goal. An average of forty cases per month were referred, approximately five cases for each panel. The Screening Program accounted for approximately 15 percent of the cases disposed of after submission in 1982 and 1983, though cases decided on the briefs by the argument panels raised the total proportion of cases decided without oral argument to 25 percent. The shortfall of cases referred to the program was due to difficulty in having sufficient numbers of eligible cases and staff law clerks available at the same time. Toward the end of 1983, when the court had overcome its backlog and there were no cases waiting to be calendared, some of the cases that customarily would have been sent to the screening panels were used to fill up available space on the oral argument calendar. This decision represents a deliberate

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adoption of the Screening Program. For an evaluation of this program, see J. E. Shapard, Appeals Without Briefs: Evaluation of an Appeals Expediting Program in the Ninth Circuit (Federal Judicial Center 1984). The state appellate court program that served as a model for the federal court program is described in J. A. Chapper & R. A. Hanson, *Expedited Procedures for Appellate Courts: Evidence from California's Third District Court of Appeal*, 42 Md. L. Rev. 696 (1983).

[16] The Screening Program in the Fifth Circuit is described in C. R. Hayworth, *Screening and Summary Procedures in the United States Court of Appeals*, 1973 Wash. U.L.Q. 257; A. B. Rubin & G. Ganucheau, *Appellate Delay and Cost—An Ancient and Common Disease: Is It Intractable?*, 42 Md. L. Rev. 752 (1983).

choice by the court to provide oral argument to as many litigants as possible.

## Procedures

The Screening Program of the Ninth Circuit relies heavily on the participation of staff law clerks to identify cases suitable for screening and to prepare bench memoranda. When the briefs and other necessary records have been filed, the case materials are sent to the staff attorneys' office for review. Staff law clerks examine the briefs and relevant portions of the record, refer cases with jurisdictional defects to the staff attorneys designated to assist with motions, and prepare the inventory cards described in chapter 3.

Then the staff law clerks, using criteria discussed below, determine if the case should be placed on the traditional oral argument track or on the screening track. The law clerks are closely supervised and are encouraged to consult with their division supervisors when questions arise. Cases assigned to the screening track are also reviewed in the divisional meetings after the law clerks have completed the initial processing.

When a case is placed on the screening track, counsel for both parties are notified that the court is considering submission without argument; they are given ten days from the receipt of the notice to present a statement setting forth the reasons why oral argument should be heard in the case. During the first two years of the Screening Program, at least one attorney objected to the submission of the case without argument in 22 percent of the cases. Any objection raised by counsel is forwarded with the case materials to the judges on the screening panel. All three judges must agree that a case can be properly decided on the screening track or the case is returned to the clerk's office for placement on the next oral argument calendar. A dissent by a panel member in a case submitted on the screening track is permitted only in cases in which counsel has not objected to the submission without oral argument. If there has been an objection by counsel in a case in which a panel member wishes to dissent, the case must be returned to the clerk's office and placed on the next oral argument calendar.

Work on the bench memorandum receives the highest priority among the duties of the staff law clerks. As in cases designated for oral argument, the purpose of the memorandum is to inform the screening panel members of the procedural circumstances, basic facts, relevant testimony and authorities, and issues and arguments raised in the case, thereby giving them the opportunity to review the materials and decide the case in a brief period of time. The bench memorandum prepared for a screening case frequently contains more information on the facts and authorities than an oral argument bench memorandum. The staff law clerks do not prepare draft dispositions in screening cases, though in a number of instances the panel has returned cases to the law clerk who prepared the bench memorandum and has requested a draft disposition consistent with the determination of the panel. Portions of the bench memorandum are frequently incorporated into the panel's decision.

A staff law clerk usually takes three or four days to review the materials, complete the inventory forms, prepare the bench memorandum, and provide whatever further support the panel requires in each screening case. Because each law clerk is responsible for developing bench memoranda for four screening cases per month, the monthly limit on the number of cases submitted on the screening track is determined by multiplying the number of available law clerks by four; there usually are fourteen law clerks available, so fifty-six cases can be accommodated in the Screening Program each month. This upper limit is rarely achieved, however, because of the difficulty in finding a sufficient number of cases that meet the screening panel criteria. Cases placed on the screening track must be the same age as those cases placed on the oral argument calendar. The court decided that the Screening Program should not become a system for expediting appeals.

In addition to the four bench memoranda, the staff law clerks usually prepare a memorandum for at least one additional case that has not been designated for the screening panels, assisting a senior judge, visiting judge, or active judge who has a particularly demanding argument schedule. These more complex cases are assigned to those clerks who have completed work on the screening cases. The lack of an opportunity to work on the more challenging

cases has been identified as a source of discontent among the staff law clerks.

## Selection Criteria

The criteria for diverting cases to the screening panels are well developed. Cases must meet the standard for submission without oral argument set forth in rule 34(a) of the Federal Rules of Appellate Procedure and repeated in local rule 3 of the circuit. . . . These standards permit submission of a case without oral argument when—

1. the appeal is frivolous, or
2. the dispositive issue or set of issues has been recently authoritatively decided, or
3. the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Cases referred to the screening panels also must be simple and straightforward enough for a judge to be able to read the briefs and bench memoranda in a relatively short time and reach a disposition with confidence. According to the handbook that instructs the staff attorneys concerning their duties, cases are placed on the screening track if they satisfy one or more of the following standards:

1. *The result is clear.* Some cases present issues that have been recently authoritatively decided by this court or the Supreme Court. Otherwise, your brief review of the materials may suggest that the issues raised are wholly frivolous or that reasonable people would not disagree on the result.
2. *The legal standard is established and undisputed.* Even where the result is not clear, the case may be suitable for submission to a screening panel if the legal standard to be applied is clear and undisputed and the result is not likely to be precedential. For example, an appeal may raise the issue whether police officers had probable cause to search a closet. Even if the outcome is close, the probable cause issue is straightforward, unlikely to be precedential, and might suitably be decided without oral argument. On the

other hand, an appeal raising the novel question whether police have probable cause to search a particular computerized memory file would be unsuitable for the Screening Program, not because the legal standard is complex, but because the disposition might well be precedential.

3. *The appellant or petitioner is proceeding pro se (and may be incarcerated).* Most appeals filed by incarcerated pro se litigants satisfy one of the first two standards for submission to a screening panel. You may encounter some appeals filed pro se, however, that raise issues of greater complexity, perhaps novel, where the result is not clear. Several factors should influence your tracking decision.

   First, you may select a case for the argument track even if it cannot be argued. A case is properly assigned to an argument calendar even if it will not in fact be argued where the case: (1) would benefit from closer scrutiny in chambers; (2) would benefit from a face-to-face conference of the three judges who will decide the case; or (3) is likely to be disposed of by a published opinion.

   Second, incarcerated pro se litigants would rarely be released from custody for the purpose of appearing for oral argument. If the appeal presents important issues, you should consider whether the court should appoint counsel to argue (and perhaps rebrief) the appeal. In appropriate cases, consult your Division Chief concerning whether you should draft a suggestion for the sua sponte appointment of counsel. Our office retains a list of counsel who have volunteered to serve pro bono.

4. *The bus trip test.* If the judges agree on one thing, it is that screening cases should be simple. Stated practically, a judge should be able to carry all the relevant materials (briefs, excerpt, and your bench memorandum) on a bus ride commute and decide both that the case is suitable for submission without oral argument and what the result should be. If your case does not satisfy the "bus trip test," it should probably be placed on the argument track.

Through discussion at weekly division meetings, the law clerks have achieved a consistent interpretation of these standards, and their work is closely monitored. During the first year of the Screening Program, the staff surveyed the judges as they participated on argument calendars and asked whether any cases submitted on the argument calendars would have been appropriate for the Screening Program. Only 18 of 557 cases on the argument calendars were identified as suitable for the Screening Program, and no case was identified by more than one judge. Furthermore, when the judges were asked if the staff and its criteria are effective in selecting cases appropriate for the Screening Program, all but one judge indicated satisfaction. Although approximately 18 percent of the cases are rejected from the program, most of the rejections result from judges' objections to the propriety of placing individual cases on the screening track, and perhaps even from differences among the panels in standards for rejection, rather than from a failure of the staff law clerks to implement the criteria of the court.

## Screening Panels

Eight three-judge panels consider cases submitted on the screening track. Membership, which is determined by random allocation, changes once every twelve months, unlike that of the argument panels, which changes every month.[17] Each of the twenty-three active circuit judges sits on one of the screening panels and two senior judges share the third position on the eighth panel. Visiting judges do not participate.

Each panel selects either the serial or the parallel procedure for considering the cases. In the serial procedure, the clerk's office sends the case materials and the bench memorandum prepared by the staff law clerk to one of the three judges on the screening panel. Each panel member serves as the initial judge on approximately one-third of the cases. The initial judge then either (1) decides the case is suitable for the Screening Program, drafts a proposed dis-

[17] The screening panels in the first year continued until February 1983, for a term of thirteen months. The panels for 1983 then served an eleven-month term.

position, and sends the draft disposition and case materials to the next judge, or (2) rejects the case from the Screening Program and returns the case to the clerk's office for placement on the next available oral argument calendar.[18] Unless the first judge rejects the case, the second judge on the panel receives the materials next and either concurs with the proposed disposition and forwards the case to the third judge or rejects the case from the Screening Program and returns it to the clerk's office. The third judge follows the same procedure and forwards the case to the clerk's office. The advantage of the serial procedure is that it saves time that would be spent coordinating discussion of those cases on which the panel members already agree. When the judges differ, however, the initial judge may waste time drafting a disposition for a case that the second or third judge will then return to the clerk's office for placement on the oral argument calendar.

In the parallel procedure, the judges receive the case materials from the clerk's office simultaneously. The members of the parallel panels generally confer once by telephone concerning the appropriateness of the case for the Screening Program and discuss any difficulties or special issues that may need to be addressed in the case. Although such issues arise infrequently, because of the simple nature of the cases, it is this opportunity for a conference that attracts panel members to the parallel system. The panel then assigns the case to one of its members, who prepares a written disposition to be circulated for approval. This process offers the added advantage of eliminating cases unsuitable for the Screening Program prior to the drafting of an initial disposition, though greater coordination of the panel members' activities is necessary.

Until recently the serial process was the more popular procedure. In 1982, six of the eight panels chose the serial method; in 1983, it was selected by five of the eight. In 1984, four of the screening panels chose each procedure, but the practices under each had been modified. Two-thirds of the judges expressed a prefer-

[18] This practice was recently modified to permit the clerk's office to send a replacement case to the screening panels upon receipt of a rejected case. Implementation of this modification is limited, however, by the availability of appropriate cases.

ence for the serial method; more than half of these judges had had experience with both processes. Supporters of the serial procedure praised its efficient disposition of a case with one viewing and its flexibility in permitting consideration of the screening cases at any convenient time, rather than structuring consideration around a conference call. Several supporters acknowledged some wasted effort occurs when a case is rejected after an initial disposition is drafted, but believed that this loss is offset by the procedure's advantages.

One-third of the judges preferred the parallel procedure, with four of these judges having had experience with both systems. All of these judges placed great value on the opportunity for conferencing. Another advantage cited was the ability to reject inappropriate cases before drafting a disposition. Procedure preference also seems to depend on the circumstances of the panel members. Two judges mentioned that the parallel system works well when all of the judges are in the same building, but that conferencing becomes awkward when the panel members are in different locations and time zones.

Some of the initial distinctions between the serial and parallel procedures became blurred as judges participated in different systems and adopted the best of each in structuring the practices of subsequent panels. For example, the serial procedure did not originally include conferences among panel members. If the second or third judge was dissatisfied with the disposition drafted by the initial judge, the case was to be rejected and sent to the oral argument calendar. However, at least half of the judges who prefer the serial procedure mentioned that panel members occasionally have conferred, usually by memoranda, on modifying an initial disposition rather than simply rejecting the case. Similarly, several judges who prefer the parallel procedure indicated that they have changed the process so that conference time is devoted only to those cases that appear to pose some difficulty. Much of the communication now takes place by memoranda, rather than by telephone. Other variations have been tried and abandoned.

In general, there appears to be a great deal of innovation under both the parallel and serial procedures, making them more similar

than originally envisioned. However, a number of the judges insisted that the individual panel members be permitted to choose either the parallel or the serial procedure, or from among those variations that have developed, rather than have the court adopt a single uniform practice.

## Operation of the Program

During the first two years of the program, 1,020 cases were referred to the screening panels. Of these, 969 cases were either single or lead cases (associated cases are submitted with lead cases). All but 13 cases had been either disposed of or rejected at the time of the study. The following analyses rely on data from these 956 cases, with separate studies of the 786 cases decided by the screening panels and the 170 cases rejected from the screening track.

Five hundred and fifteen cases were submitted in the first year of the program, compared with 441 in the second year. The drop is due in part to the Ninth Circuit's success in reducing its backlog. By the fall of 1983, the court had eliminated the pool of fully briefed cases awaiting calendaring; as briefing was completed, some of the cases that would have been sent to the screening panels were shifted to the oral argument calendars to ensure that oral argument would be available to as many cases as could be accommodated. Before the end of year, however, the increase in case filings had resulted in a growing backlog of cases awaiting calendaring for oral argument, and the Screening Program returned to its previous level of activity.

Tables 4 through 6 summarize the characteristics of the cases disposed of through the Screening Program during the first two years of its operation. As seen in table 4, the common types of cases were appeals in general civil suits (24 percent), criminal cases (21 percent), civil rights actions not involving prisoners (15 percent), petitions or applications from the Immigration and Naturalization Service (12 percent), civil suits in which the United States or an agency of the United States was a defendant (11 percent), and state and federal habeas corpus cases (6 percent). The remaining 11

percent of the cases were disbursed across the remaining case types.

In 41 percent of the cases decided by the screening panels, the appellant was proceeding without the assistance of counsel. Pro se appeals were especially common in civil rights cases not involving prisoners (86 percent) and especially rare in immigration appeals (3 percent) and appeals of criminal convictions (7 percent). Although relatively few appeals involved habeas corpus petitions, assistance of counsel occurred in only 18 percent (8 of 44) of these cases. As indicated in table 5, the court affirmed the action on appeal in 82 percent of the cases decided by the screening panels, and reversed or reversed and remanded only 8 percent of the cases.

**TABLE 4**
**Types of Cases Decided by the Screening Panels (1982–83)**

| Case Type | Percentage | | Pro Se[a] | | Objection[b] | |
|---|---|---|---|---|---|---|
| Private civil | 24% | (191) | 53% | (102) | 22% | (42) |
| Criminal appeal | 21% | (163) | 7% | (12) | 21% | (35) |
| Civil rights | 15% | (115) | 86% | (99) | 22% | (25) |
| Immigration | 12% | (95) | 3% | (3) | 14% | (13) |
| Civil vs. U.S. | 11% | (88) | 45% | (40) | 28% | (25) |
| Habeas corpus (Federal and state) | 6% | (44) | 82% | (36) | 18% | (8) |
| Other | 11% | (90) | | | | |

[a]Pro se = percentage of cases for each case type that were pro se appeals.

[b]Objection = percentage of cases for each case type in which there was an attorney objection.

**TABLE 5**
**Outcome of Cases**
**Decided by the Screening Panels**

| Nature of Disposition | Percentage | |
|---|---|---|
| Affirmed | 82% | (645) |
| Reversed | 2% | (17) |
| Reversed & remanded | 6% | (47) |
| Remanded | 3% | (23) |
| Other[a] | 7% | (54) |

[a]The "other" category includes cases dismissed for lack of jurisdiction or noncompliance with court rules, and actions on petitions for review or enforcement of agency actions.

Disposition by unpublished memorandum opinion is the almost exclusive practice, occurring in 94 percent of the cases. The opinion of the court was published in 6 percent and only 4 percent were signed. There was some initial confusion over the court's policy concerning submission to the screening panels of cases in which publication is anticipated. Such cases are submitted with a recommendation to publish the disposition: for example, on those rare occasions when no authority exists in the circuit for a particular proposition, but every other circuit has considered the issue and decided the case in an identical fashion. At first, the screening panels reacted unevenly, with some panels uniformly rejecting all screening cases in which the staff recommended publication. Although cases in which publication is anticipated are not excluded from submission to screening panels, publication of a decision by a screening panel remains a rare event.

Table 6 shows the median number of days from the submission of the case materials to the filing of the disposition. A median of forty-eight days elapsed from the time the case was submitted until the disposition was filed, with slightly less time required by the parallel panels. In the first year of the program (actually the first thirteen months during which the initial screening panels remained intact), the screening cases remained under submission for almost the same period of time under the parallel and serial panels (47 and 45 days, respectively). In the second year, however, the serial panels were notably slower in disposing of submitted cases (55

days as opposed to 40). The reason for the slowdown remains unclear.

**TABLE 6**
**Time from Submission to Disposition of Cases Referred to the Screening Panels**

| | Median Days |
|---|---|
| All screening cases (1982–1983) | 48 days (393 cases) |
| Cases referred to serial panels | 48 days (261 cases) |
| First judge to second judge | 18 days (247 cases) |
| Second judge to third judge | 9 days |
| Third judge to clerk | 13 days |
| Cases referred to parallel panels | 44 days (131 cases) |

NOTE: Data were missing for one of the cases referred to the screening panels.

## Effect of the Program

Because the Screening Program offers an alternative means of deciding cases without oral argument, the most appropriate comparison for determining the effects of the program is to examine the characteristics of cases decided without oral argument before and after the adoption of the Screening Program. This is not an exact comparison, however, of screened cases and earlier cases that would have been screened if such a program had existed. Oral argument occurred in 79 percent of the cases before the Screening Program and only 72 percent of the cases afterwards, suggesting that oral argument was originally extended to some kinds of cases that were later decided on the briefs alone. Furthermore, after the adoption of the Screening Program, approximately 10 percent of the cases submitted to the oral argument panels were still decided on the briefs. However, such a comparison is likely to include most of the earlier cases that would have been referred to the Screening Program, had such a program existed, and should indicate how such a program affects the resolution of simpler cases.

Following the Innovations Project, the number of cases submitted on briefs increased sharply, from 380 cases in 1981 to 624

cases in 1982 (see table 7).[19] The increase in participations in such cases by the active and senior judges, combined with the decrease in such participations by visiting judges, is especially noteworthy.

**TABLE 7**
**Participation in Lead and Single Cases Submitted on Briefs[a]**

| | 1980 | 1981 | 1982 | 1983 |
|---|---|---|---|---|
| Submissions on briefs | | | | |
| Total cases | 462 | 380 | 624 | 542 |
| Total participations[b] | 1,386 | 1,139 | 1,872 | 1,626 |
| Participations by: | | | | |
| Senior judges | 111 | 62 | 123 | 103 |
| Visiting judges | 264 | 266 | 71 | 73 |
| Active judges | 1,021 | 801 | 1,678 | 1,450 |
| Average participations by active judges | 51[c] | 35 | 73 | 63 |
| Subset of above cases decided through the Screening Program | | | | |
| Total cases | 0 | 0 | 434 | 365 |
| Total participations[b] | 0 | 0 | 1,302 | 1,095 |
| Participations by: | | | | |
| Senior judges | 0 | 0 | 74 | 67 |
| Visiting judges | 0 | 0 | 0 | 0 |
| Active judges | 0 | 0 | 1,228 | 1,028 |
| Average participations by active judges | 0 | 0 | 53 | 45 |

[a]During the period reported in these tables, the Ninth Circuit Court of Appeals followed practices in defining cases as "consolidated cases" or "cross-appeals" that were inconsistent with the standards specified by the Administrative Office and presumably used by the other circuits. This issue is discussed in greater detail in chapter 7. Although the figures reported here are accurate for comparison of relative changes in the performance of the circuit across the years, they underestimate the actual number of participations in lead and single cases submitted on briefs and are not valid for comparison with similar measures of other circuits.

[b]The number of oral argument participations may be less than three times the number of cases due to missing data for participating judges.

[c]During 1980 six of the judgeships in the circuit remained unfilled for portions of the year. The number of active-judge participations includes judges who did not serve the full year, while the number of average participations only includes judges who were in active service at the beginning of the year.

[19] The average number of participations per active judge in cases submitted on briefs differs somewhat from the figures reported in table 14. The figures in table 7 identify the average number of participations in cases submitted to the screening panels during the year, while the figures in table 14 identify the number of participations in cases terminated during the year.

The size of the difference between 1981 and 1982 may be somewhat misleading, however, because the number of participations in cases submitted on the briefs in 1981 was a good deal lower than in 1980. The data for 1983 should also be interpreted with caution, since the backlog of cases awaiting submission was eliminated in 1983, and some cases that would have been directed to the screening panels were used to fill out the oral argument calendars. Still, it is clear that the Innovations Project resulted in a marked increase in the number of cases submitted on the briefs.

The contribution of the Screening Program is revealed in the lower half of the table. In 1982, more than two-thirds of the participations in cases submitted on briefs involved cases submitted through the Screening Program.

Some case types in particular are now more likely to be decided on the briefs. In the two years before the Innovations Project, 36 percent of cases involving petitions and applications from the Immigration and Naturalization Service were decided on briefs (see table 8). Following the introduction of the program, this figure rose to 61 percent. Civil suits brought against the United States or a federal agency and civil rights actions not brought by prisoners also were substantially more likely to be decided on the briefs. The number of habeas corpus petitions submitted without oral argument differed by only 1 percent.

**TABLE 8**
**Types of Cases Decided on Briefs[a]**

| | 1980–1981 % (Briefs/Total) | 1982–1983 % (Briefs/Total) | Change |
|---|---|---|---|
| Immigration | 36% (53/147) | 61% (113/186) | +25% |
| U.S. civil defendant | 19% (64/342) | 33% (122/374) | +14% |
| Civil rights | 29% (98/338) | 41% (155/376) | +12% |
| Criminal | 22% (208/935) | 28% (267/942) | +6% |
| Private civil | 14% (176/1,233) | 19% (310/1,599) | +5% |
| Habeas corpus (federal and state) | 46% (134/289) | 45% (58/128) | −1% |

[a]Associated cases are excluded from this analysis.

The development of the Screening Program also affected the form of disposition in cases submitted on the briefs. In the two years prior to the Screening Program, 78 percent of these dispositions were unpublished; after the Screening Program, 89 percent were unpublished, with a sharp increase in dispositions by unpublished memorandum opinions. It is difficult to isolate the effect of the Screening Program on publication practices, however, since they were also influenced by the increase in the oral argument calendar and the commitment of the court to publish fewer cases.

During this same period, the percentage of cases submitted on briefs that were affirmed increased from 74 percent to 79 percent (see table 9), while the proportions of cases reversed, reversed and remanded, and remanded remained approximately the same. The increase in affirmances reflects a shift from other dispositions. For example, the proportion of cases affirmed in part and reversed in part dropped from 4 percent to 2 percent; the proportion of cases voluntarily dismissed after submission under rule 42 of the Federal Rules of Appellate Procedure dropped from 2 percent to 1 percent.

**TABLE 9**
**Disposition of Cases Submitted on Briefs**

| Nature of Disposition | 1980–1981 | | 1982–1983[a] | |
|---|---|---|---|---|
| Affirmed | 74% | (623) | 79% | (911) |
| Reversed | 2% | (19) | 2% | (25) |
| Reversed and remanded | 7% | (55) | 7% | (76) |
| Remanded | 4% | (35) | 3% | (38) |
| Other | 13% | (110) | 9% | (99) |

[a]These figures do not include 17 cases submitted during this period for which there is no information on the nature of the disposition.

At first glance, the Screening Program appeared to cause a slight increase in the amount of time a case decided on the briefs remained under submission. Cases submitted on briefs typically required thirty-seven days from submission to disposition in the two years prior to the Screening Program and required forty-five days in the two years following the program's inception. However,

"time under submission" has a slightly different meaning in the context of cases submitted to screening panels. When a case is submitted to an argument panel, even if it is to be decided on the briefs, the time the case is under submission is marked from the time the panel convenes to consider the case. When a case is submitted to a screening panel, the time the case is under submission is marked from the time the case materials are sent to the panel, or to the initial judge, using the serial process. Case materials are sent to the argument panel four to six weeks before the week the panel convenes. If this time is added to the time under submission for cases referred to argument panels, the development of the Screening Program appears to result in a decrease in the time a case decided on the briefs awaited disposition.

All of the judges agreed that the Screening Program is an appropriate means of increasing court productivity without reducing the quality of judicial consideration. A number of the judges who had opposed the program's adoption said that they had been won over as a result of their participation. Many of them expressed a preference for oral argument, as much for the opportunity to confer about the case as for the benefits of the oral argument itself. But these judges indicated that the need for the court to dispose promptly of cases, especially in periods of increasing appellate case filings, outweighed the value of offering oral argument in every case. Several of the judges mentioned that their support for the program was contingent on the right of each individual judge to reject cases thought to be unsuitable, a right that is recognized under rule 34(a) of the Federal Rules of Appellate Procedure.

All of the judges agreed that cases decided on the screening track receive judicial attention that is "appropriate" to the issues raised in the case. The judges were also asked if the "quality of judicial consideration in disposing of such cases has changed since the Screening Program was introduced." Unfortunately, this question was asked in such a way that the standard for comparing cases in the Screening Program was not clear. Several of the judges acknowledged that cases referred to screening panels receive less attention, but it is not clear if these judges were comparing screening cases with cases in which argument was permitted or with cases

placed on the argument calendars but decided on the briefs. Several judges mentioned that under the previous practice—when cases were placed on the oral argument calendar and decided on the briefs—the cases received relatively little judicial attention because the panel members focused their efforts on the more difficult cases. Another ambiguous interview question concerned the amount of attention such cases receive overall. Several judges mentioned that they and their law clerks now spend less time on such cases, but that the extensive review of the cases by the law clerks results in a net increase in the amount of attention devoted to them by the court as a whole. Furthermore, the preparation of a more thorough bench memorandum permits the judge to decide the case in a more efficient manner, diminishing the value of a comparison of time spent.

## Rejection of Cases

The opportunity for a single judge to reject a case from the screening panel is the greatest safeguard against insufficient judicial attention. All members of the screening panel must agree that the case is appropriate for the screening panel or the case is removed and placed on the next available oral argument calendar. Several of the judges noted that their support for the program was based on this individual right.

The rejection rate appears to be sensitive to the criteria used to select cases for screening. In the first year of the program, 15 percent of the cases placed on the screening track by staff attorneys were rejected; in the second year, 20 percent of the cases were rejected, for an average of about 18 percent. For a brief period during the first year, interpretation of the criteria was liberalized in an effort to reach the goal of sixty screening cases per month. During this period, the rejection rate increased from 16 percent to 22 percent, then dropped when the liberal interpretation was abandoned. The higher rejection rate in the second year of the program might indicate greater difficulty in finding cases appropriate for screening as the backlog of cases awaiting calendaring diminished. The sensitivity of the rejection rate suggests that the cases are closely examined by the judges to ensure that they are appropriate for the Screening Program.

As might be expected, complex cases are much more likely to be rejected from the Screening Program. In the first two years, 44 percent of the cases given a "3" case weight, and all cases with higher case weights, were rejected from screening, while less than 1 percent of the cases with a "1" case weight were rejected from screening (only four cases out of six hundred).

Rejection of almost one of every five cases from the program suggests that the judges are closely monitoring the selection of cases for submission without oral argument. However, the cases that are rejected suffer considerable delay in being heard, even though they are placed on the next available oral argument calendar. (The cases are calendared approximately eleven weeks prior to oral argument.) Such delays raise substantial concerns, especially in criminal cases rejected from screening. The court considered, but did not approve, argument by telephone in cases that would otherwise be rejected. For the time being, the added delay that results from calendaring rejected cases for oral argument must be accepted in return for the Screening Program's benefits.

Another concern is the variation in rejection rates across panels. Most judges indicated that they reject a case from the Screening Program "unless the result is clear," but this standard is not consistently interpreted. In each of the first two years, the range in rejection rates varied from 3 percent on one screening panel to 34 percent on another, with most of the panels rejecting between 15 percent and 25 percent of the cases they received. Because the cases are randomly assigned, this variation suggests that different criteria are being employed by some panels.

The judges were also asked if there are certain types of cases that cause exceptional problems in the Screening Program. Fifteen judges indicated that there are no specific types of cases that cause difficulties—cases are rejected when there is some unique or special difficulty that was unforeseen by the staff law clerks. However, eight judges said that some cases involving "personal rights" cause difficulties and should be rejected. The most frequently cited example of such cases was immigration appeals; criminal appeals, civil rights cases, habeas corpus cases, and Social Security disability appeals were also mentioned. The judges said that, in these

cases, it is especially important that the appellate process is visible and the litigants aware that the case received full consideration. Several judges noted that commercial cases are seldom placed on the screening track, and questioned whether the resources of the court should be structured so that cases involving "personal rights" receive less than the full range of appellate services while oral argument is reserved for commercial cases. Table 8 shows that the likelihood of a private civil appeal's (the case type most likely to include commercial cases) being decided on the briefs increased 5 percent after the adoption of the Screening Program, from 14 percent to 19 percent. However, this rise is much less than the increased likelihood of immigration and civil rights cases' being decided on the briefs alone.

An analysis of rejection rates reveals that diverting immigration and habeas corpus cases growing out of state court convictions to the eight screening panels is particularly controversial. Such cases are submitted on the theory that they involve the application of an undisputed standard and that the result is clear. The rejection rates for these cases were the highest in the group: 28 percent (13/46) of the state habeas corpus cases and 26 percent (33/128) of the immigration cases were rejected, compared with a rate of 16 percent for all other cases. However, the high immigration-case rate can be attributed to the actions of only a few panels. In the first year, a single panel accounted for seven of the twenty immigration cases rejected by the screening panels. In the second year a single panel was responsible for four of the thirteen cases rejected.

The choice of the serial rather than the parallel procedure also appears to result in a higher rejection rate. The average rejection rate for the eleven panels employing the serial procedure during the first two years of the program was 20 percent, while the average rejection rate across the five panels employing a parallel processing system remained steady at 13 percent each year. This higher rejection rate is a surprise—an early concern was that the serial procedure would result in more cursory attention to the screening cases and in a lower rejection rate. It appears that the members of the serial panels are at least as vigilant in monitoring the referral of indi-

vidual cases to the Screening Program as the members of the parallel panels are.

Not surprisingly, the initial judge on the screening panels employing the serial procedure rejects the greatest proportion of cases. In the nine serial panels that rejected more than 7 percent of the cases, the initial judge rejected 81 percent, while the second and third judges each rejected about 9 percent.[20]

There are several possible interpretations of these data, all of which are hindered by the absence of an objective estimate of the proper rate of rejection for a panel and how these rejections should be allocated among the serial panel members. For example, the low rates of rejection by the second or third judges relative to the rejection rate of the initial judge raise the question of whether the cases passed on by the initial judges are receiving close scrutiny by the second and third judges, who perhaps decline to reject a case in which the initial judge has already drafted a disposition. This interpretation assumes, however, that the initial judge has passed on cases that would be rejected by the other panel members if they were serving as the initial judge. If the panel members agree on the kinds of cases that are appropriate for screening, and the initial judge effectively implements this policy, the much higher rejection rate by the initial judge indicates the program is a success. If the second and third judges rejected as many cases as the initial judge, it would suggest that there is no consensus on the panel concerning which cases are appropriate for the Screening Program.

The concern that the second and third judges are passing on inappropriate cases for which the initial judge has drafted a disposition is also mitigated by evidence that the rejection rates of the serial panels are higher than the rejection rates of parallel panels, on which there is consultation among the panel members. The initial judges on the serial panels are rejecting a greater proportion of cases than the parallel panels as a whole, which implies that the initial judges are following a stringent policy of review and accep-

[20] Two of the serial panels had very low rates of rejection, making it difficult to distinguish the practices of the initial judges, and were excluded from the analysis.

tance. It is unlikely that cases that would have been rejected by the parallel panels are being decided by the serial panels.

There is also no evidence that the second and third judges on serial panels are not offering an adequate review of the disposition drafted by the initial judge. However, because the serial panels have evolved to permit subsequent judges to modify the disposition rather than reject the case, the low rejection rates by second and third judges may not offer an appropriate indication of the scrutiny these cases receive. There was no evidence from the interviews that the second and third judges are simply passing on dispositions drafted by the initial judges without reviewing them.

Without a standard for determining the proper rate of rejection, the question can be turned around: Are the initial judges in serial panels being too conservative in determining which cases are appropriate for the screening panels? The statistics might suggest that the initial-judge rejection rate is too high; perhaps initial judges tend to reject borderline cases rather than draft a disposition for a case that might be rejected by a subsequent panel member. Panels employing the parallel procedures avoid this problem by agreeing at the outset that, through a telephone conference, a case can be properly decided by the screening panel before the disposition is drafted. Recently, to ensure that the effort devoted to the draft disposition is not wasted, the court adopted a policy of forwarding to the argument panels the draft dispositions for all cases, with separate notes indicating why certain cases were rejected. Nevertheless, court personnel have suggested that judges serving on the parallel panels may be more willing to accept difficult cases because of the opportunity for consultation prior to the drafting of a disposition.

Members of the court disagree over the proper interpretation of the rejection of cases from the Screening Program. Some of the judges on panels that reject relatively few cases noted the disruptions and delay in disposing of a case that result when a case is rejected and interpreted the high rejection rates as an indication that the Screening Program is falling short of its potential. These judges urged the adoption of common standards for all the panels. Other judges, many from panels with relatively high rejection rates, said the rejection rates prove that the program is successful in ensuring

that only the cases suited for disposition by the screening panels are considered, and expressed concern that the rejection rates were so low for some of the panels.

Resolution of this conflict might be difficult. Many members of the court made clear that their support for the Screening Program was predicated on the right to reject from the screening panel any cases that seemed unsuitable, and the judges appear to employ different standards for making this determination. The right of an individual judge to determine that a case is unsuited for disposition without argument is acknowledged in rule 34(a) of the Federal Rules of Appellate Procedure. As long as the judges follow different standards for rejection of cases from screening, the court will continue to decide similar cases using dissimilar practices.

Furthermore, it appears that the standard for referral to screening employed by the court as a whole differs from the standard recommended by the attorneys representing the parties to the appeal. The attorneys are notified when the case is designated for the screening track and are given an opportunity to register an objection. Although there is agreement between the recommendations of the attorney and the actions of the court in two-thirds of the cases, this is a result of the relatively low rates of objection by the attorneys and rejection by the panels. When attorneys do object, it appears to have little impact on the actions of the court. As indicated in table 10, there is no relationship between the objection to the screening referral by one of the attorneys, almost always the attorney representing the appellant, and the decision of the panel to reject a case from the Screening Program. Attorneys raised objections in approximately 22 percent (214/956) of the cases referred to the screening panels. Of these, the panels rejected 20 percent (42/214), a rejection rate only slightly higher than the rejection rate of cases to which attorneys did not object (17 percent, or 128/742). Similarly, of the cases rejected by the screening panels, the attorneys objected to referral in only 25 percent (42/170). The lack of correspondence between attorney objections and panel rejections suggests that there may be a disagreement concerning the proper standards for submission to the Screening Program. The court is considering re-

questing more information from the attorneys to better understand the nature of this difference.

**TABLE 10**
**Relationship Between Attorney Objection to Referral of Cases and Rejection of Cases from Screening**

| | Action of Attorney | | |
|---|---|---|---|
| | Objection | No Objection | Total |
| Action of panel | | | |
| Reject | 42 | 128 | 170 |
| Not reject | 172 | 614 | 786 |
| Total | 214 | 742 | 956 |

NOTE: chi square = .4889; $p$ not less than .05.

Despite early concerns, the Screening Program has become an accepted procedure in the Ninth Circuit. All but one member of the court believes that the program should be continued, and the sole opponent suggests restructuring the selection criteria, rather than abandoning the program entirely. However, the judges did indicate that the Screening Program may have reached its limit as a means of increasing their case participations. Although some other federal circuit courts accept greater proportions of their caseloads for disposition through similar programs, most of the judges of the Ninth Circuit are opposed to expansion of the program beyond its current limits. Only five of the judges thought the program should be expanded, one suggested the program be restricted, and the rest believed the program should remain at its current level.

## VI. Prebriefing Conference Program

The Prebriefing Conference Program was the first of the major innovations adopted by the Ninth Circuit Court of Appeals. As in preappeal conference programs in other circuits,[21] under the

[21] The Ninth Circuit's Prebriefing Conference Program was patterned after similar programs in the Second and Seventh Circuits. Descriptions of the preappeal conference program in the Second Circuit can be found in J.

authority of rule 33 of the Federal Rules of Appellate Procedure, a conference is held between counsel and a court-designated conference attorney soon after the appeal is docketed to discuss the issues on appeal, the structure of the briefs, and other issues involving appellate practice. The Prebriefing Conference Program is unique, however, in that it is primarily intended to assist counsel in improving the presentation of issues, thereby easing the burden on the judges considering the appeal.

The Prebriefing Conference Program was established in November 1981 to deal with civil appeals originating in the Northern District of California. Within two years the program was expanded to include civil appeals from the districts of Oregon, Western Washington, and Central California, and conferences were held in more than three thousand cases. In February 1984, the court agreed that the program would include all civil appeals arising in the Ninth Circuit, making it the largest preappeal conference program in the federal appellate system. Although objective assessment of the effectiveness of the program is difficult, the broad support of the bar and the faith of the judges of the circuit suggest that the Prebriefing Conference Program is a valuable complement to the other innovations that have increased judicial productivity.

The opportunity for consultation between counsel and the conference attorney afforded by the Prebriefing Conference Program is intended to accomplish a wide range of purposes. It (1) permits informal resolution of procedural matters, such as briefing schedules, joinder of briefs in multiparty appeals, and requests for time extensions; (2) encourages the clarification and narrowing of issues on

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Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration (Federal Judicial Center 1978); A. Partridge & A. Lind, A Reevaluation of the Civil Appeals Management Plan (Federal Judicial Center 1983). The conference program in the Seventh Circuit is described in J. Goldman, The Seventh Circuit Preappeal Program: An Evaluation (Federal Judicial Center 1982). The Eighth Circuit recently began a limited conference program, which is described in D. P. Lay, *A Blueprint for Judicial Management*, 17 Creighton L. Rev. 1047 (1984). A description of the preappeal conference program in the Sixth Circuit is found in R. Rack, *Preargument Conference in the Sixth Circuit Court of Appeals*, 15 U. Tol. L. Rev. 921 (1984).

appeal or, when appropriate, settlement without submission to the court; and (3) encourages the parties to file shorter briefs and records. The degree to which this program focuses on the length of the briefs and other submitted material is unique among the preappeal conference programs. The conference attorneys also review the appeal for jurisdictional defects, a task that is performed by staff law clerks in cases that are not diverted to the Prebriefing Conference Program.

Unlike programs in other circuits, the Prebriefing Conference Program is not intended to accelerate the pace of litigation by setting shorter briefing schedules for appropriate classes of cases. When the circuit had a large backlog of cases waiting to be calendared, extensions in briefing schedules were common. As the backlog dwindled, however, the conference attorneys who establish the briefing schedules began to deny repetitive requests for short extensions and single requests for long extensions. For a brief period in 1983, when the court had essentially eliminated the backlog of cases waiting to be calendared, there was an effort to expedite the briefing process to fill the argument calendar, though briefing schedules were never set for a time period less than the periods specified in rule 31 of the Federal Rules of Appellate Procedure. But acceleration of the briefing schedule cannot be considered an ongoing goal of the Prebriefing Conference Program. As the number of case filings and the pool of cases awaiting calendaring began to increase, the efforts to expedite ended. In civil cases not referred to the Prebriefing Conference Program, the briefing schedule is set by the clerk's office. Appellants must file briefs forty days after the notice of filing of the record by the court; appellees file their briefs thirty days from the date of service of the appellants' briefs. Extensions of approximately four weeks are frequently allowed.

Although no goal priorities were specified when the program began, settlement of appeals appears to receive less attention by the conference attorneys than in similar programs in other circuits. When a preliminary evaluation of the program by the circuit executive's office raised questions concerning the relationship among the goals, the court indicated that efforts toward case management

rather than settlement should be emphasized. More than two-thirds of the judges interviewed identified reduction of brief and record length and narrowing of issues to be the most important aims of the program. A number of judges also mentioned the value of using the conferences to educate members of the bar concerning court procedures and expectations. Although the staff attorneys are instructed to offer encouragement when settlement is likely, most of the judges expressed considerable doubt concerning the ability of the current program to bring about settlement in cases that would otherwise continue to oral argument. A pilot program recently undertaken in the Western District of Washington permits members of the federal bar associations to serve as mediators on cases identified by the conference attorneys as candidates for settlement.

## Procedures

During the period addressed by this evaluation, the Prebriefing Conference Program was extended to all civil and agency appeals in the four districts listed above, with the exception of interlocutory appeals under 28 U.S.C. § 1292(b) (1982) and petitions for writs. After the notice of appeal is filed, the clerk of the district court, or the clerk of the court of appeals in cases involving review or enforcement of an agency action, sends a letter to the attorneys representing the parties, explaining the Prebriefing Conference Program and the procedures that will be followed in the appeal. A "docketing statement" is sent to the appellant. The docketing statement, which must be returned to the clerk of the court of appeals within fourteen days, sets forth the jurisdictional facts, nature of the proceedings, related cases, issues on appeal, and applicable standards of appellate review. The appellant must attach a copy of the judgment or order appealed from and findings of fact or conclusions of law supporting the decision. The appellee may file a single-page response if he or she disagrees with the appellant's statement of the case or the issues on appeal, but this rarely occurs.

After the clerk's office receives the docketing statement and proof of service, the case is docketed and the statement is forwarded to the conference attorneys. The docketing statement and related materials are used by the conference attorney to prepare for

the prebriefing conference. There are four senior staff attorneys who are designated as conference attorneys and have experience as civil motions attorneys. The conference attorneys have worked closely together and appear to follow similar practices in the conference process. Docketing statements are reviewed to identify jurisdictional defects. If there appears to be a problem, the conference attorney may ask for clarification of jurisdictional issues or inform the parties of a jurisdictional defect that can be cured. After a review of jurisdictional issues, pro se cases are also screened out of the conference program and referred to the clerk's office. As indicated in table 11, of the 4,024 cases referred to the program between November 1981 and January 1984, 756 pro se appeals were reviewed for jurisdictional issues and referred to the clerk's office.

**TABLE 11**
**Disposition of Cases Referred to the Prebriefing Conference Program**

| | Conference Cases | Pro Se Appeals | Total |
|---|---|---|---|
| Total dispositions | 1,640 | 344 | 1,984 |
| Cases submitted and decided | 628 | 94 | 722 |
| Cases disposed of: | | | |
| Before submission | 1,012 | 250 | 1,262 |
| Before filing docket statement | 325 | 86 | 411 |
| Before conference | 171 | — | 171 |
| Before briefing | 440 | 150 | 590 |
| Before calendaring | 76 | 14 | 90 |

NOTE: Information in this table is taken from the reports on the program compiled by the staff attorney's office and represents the period from November 1981 through December 1983. During this period there were 4,024 total cases eligible for the program. After the 756 pro se appeals were examined for jurisdictional defects and returned to the clerk's office, 3,268 cases remained and were eligible for the prebriefing conferences. Disposition information was not available for 2,040 of these cases at the time of the study. These data include disposition information for recently filed cases that settled early, but excludes disposition information on cases from the same filing cohort that continued to submission and may, therefore, slightly overestimate the rate of nonsubmission over time.

For certain cases, such as Social Security review and immigration, the conference attorneys may conclude that a conference will not be beneficial. A standard scheduling order used by the clerk's

office is then issued, and counsel is required to send a written request if the briefing schedule requires modification. For most cases, however, a conference is held within a month of filing of the docketing statement. The initial conference date is set by written notice or by telephone with written confirmation.

In-person conferences are preferred, and at least one is usually scheduled if both attorneys work within a fifty-mile radius of one of the conference sites. In other cases, or when the conference attorneys determine that an in-person conference is not necessary, an initial conference by telephone is arranged. As shown in table 12, there was an average of 113 conferences per month in 1983, 93 of which were first conferences. Subsequent conferences are usually by telephone unless their purpose is to pursue settlement negotiations. The conference attorneys estimate that approximately two-thirds of the cases involve some telephone conferencing, a figure that will increase as the program is expanded to outlying districts.

**TABLE 12**
**Level of Prebriefing Conference Activity**

| | 1983 | Monthly Average |
|---|---|---|
| Total conferences | 1,355 | 113 |
| First conference | 1,117 | 93 |
| Second conference | 182 | 15 |
| Subsequent conference | 56 | 5 |
| Total orders issued | 2,337 | 195 |
| Briefing orders | 877 | 73 |
| Stays of proceedings | 461 | 38 |
| Extensions of time | 322 | 27 |
| Releases from program | 248 | 21 |
| Settlement/show cause order | 134 | 11 |
| Miscellaneous | 295 | 25 |

NOTE: Information in this table is taken from the reports on the program compiled by the staff attorney's office. The monthly average is based on activity of the program during 1983, when the program was in effect in all four districts. During this period, there were approximately 202 appeals each month, 40 of which were pro se appeals, and 162 of which were eligible for conferencing. Approximately 35 percent of the appeals are from the Central District of California, 25 percent are from the Northern District of California, 20 percent are from Oregon or the Western District of Washington, and 20 percent are agency appeals in which the evidentiary hearing was held in one of these four districts.

The in-person conferences take place in the federal courthouses of San Francisco, Seattle, Portland, and Los Angeles. Counsel attending the conferences must have the authority to make decisions about settlement or narrowing of issues, consolidation of appeals, and other issues that are to be discussed. If attendance is not possible, lead counsel must arrange to be available by telephone and must appoint a substitute attorney with broad authority to settle or narrow the appeal and agree on case-processing matters. If any of the party attorneys are unfamiliar with the process, the conference begins with a brief explanation of its purpose. The prebriefing conference is described as the appellate equivalent of the pretrial conference, intended to organize and structure the appeal and determine simple matters with a minimum of judge involvement. The topics to be addressed and the confidentiality of the process are discussed. Counsel for the appellant is then asked what issues he or she expects to raise on appeal. Any jurisdictional problems are addressed, with the conference attorney suggesting ways to eliminate minor jurisdictional defects that would not lead to dismissal. The possibility of settlement or narrowing of the issues on appeal, and the structure and length of the brief, are also discussed. During this process the conference attorneys are likely to field a number of questions concerning appellate procedures and standards from members of the bar who have not practiced before the court of appeals. Most of the in-person conferences are thirty-five to forty minutes; simple cases may require no more than fifteen minutes, and complex cases may require as much as an hour.

Although the conference attorneys raise the possibility of settlement, the preferred practice is to rely on counsel to indicate an interest. When such a possibility exists, the conference attorneys explore settlement issues in depth and indicate that they are willing to hold subsequent conferences or to refer cases to magistrates or senior judges for additional settlement efforts. The pilot program in the Western District of Washington permits referral to a member of the federal bar association who will direct the settlement discussions. More than one conference is conducted in approximately one-sixth of the cases. Although settlement is the primary reason

for such conferences, they also may address some problem with the record that developed after the initial conference.

The usual result of the prebriefing conference is an order setting forth a briefing schedule and maximum page limits for each brief. . . . Table 12 shows that an average of seventy-three briefing orders were issued in each month of 1983. If the court reporter's transcript has not yet been ordered, a deadline is set for this as well. The matters discussed in the conference are not disclosed by the conference attorneys unless they are embodied in such an order, or unless there is a motion for reconsideration of the order resulting from the conference. A party may move for reconsideration by a judge of any order issued by a conference attorney. Within ten calendar days of the date the order is filed, the motion for reconsideration is heard by the coordinating judge of the administrative division in which the appeal is filed. After ten days any motion for reconsideration is referred to the judge serving on the single-judge motion panel.

Formal motions for reconsideration are rare. The conference attorneys are frequently able to work out disagreements with counsel through negotiation, in keeping with the program's primary purpose of avoiding formal motions for procedural relief. In fact, from the filing of the docketing statement to the completion of the briefs, the conference attorneys are authorized to grant informal requests for time extensions, usually on the basis of a telephone call, and especially if extra time might result in a reduction in brief length or in settlement of the case.

Early in the program, a lack of coordination between the conference attorneys and the clerk's office resulted in a measure of confusion. The granting of a request for an extension of time in the initial conference is considered equivalent to the first extension that is typically granted by the clerk's office in cases not diverted to the Prebriefing Conference Program. However, monitoring of compliance with briefing schedules is a duty of the clerk's office. The preliminary evaluation of the program found that the clerk's office was reluctant to dismiss conferenced cases that exceeded the briefing periods set out in rule 31 of the Federal Rules of Appellate Procedure, since the parties may have in fact been in compliance

with a schedule that had been negotiated with a conference attorney. Closer cooperation between the clerk's office and conference attorneys has diminished this problem.

Another early difficulty of the program concerned delays in ordering the court reporter's transcript. Initially, attorneys were encouraged to delay ordering the transcript until after conference discussion concerning possible limitations on record size. Soon it became apparent that the conference program was not particularly effective in reducing the record size, that transcript length was not a primary concern of the judges of the circuit, and that postponement in ordering the reporter's transcript was causing needless delay in the appellate process. Currently transcripts are ordered before the conference, pursuant to the same schedule that governs nonconferenced cases.

## Effectiveness

The costs of the Prebriefing Conference Program are clear: It requires the time of the senior staff attorneys as well as additional expenses incurred by the parties when counsel are required to participate in the conference. Although these costs may be offset by improvement in the quality of appellate practice and diminished burdens on the judges, such benefits are hard to assess in an objective manner.

The fact that the prebriefing conference occurs early in the appellate process—usually about one month after the docketing statement is filed—makes it difficult to determine what would have happened without one. Furthermore, some of the factors likely to be influenced by the program cannot be defined in measurable terms. For example, it is difficult to determine the breadth of issues on appeal in order to ascertain whether the program has been successful in narrowing these issues. Brief length is much easier to measure, but many cases must be examined in order to detect meaningful differences.

Since the primary purpose of the Prebriefing Conference Program is to ease judge burden, the judges of the Ninth Circuit are the most appropriate sources of information concerning the effectiveness of the program. The judges were surveyed twice, six months

and two years after the program was initiated. Most of them were unwilling to pass judgment on the program, noting the difficulty of assessing its effects when the appellate materials do not indicate which cases were referred to the program. However, all eight judges who offered an assessment indicated that the program seems to have a beneficial effect. Several of these judges also expressed concern about the number of staff attorneys required to maintain such a program.

A more relevant assessment can be found in the reactions of attorneys who participated in the prebriefing conferences. A preliminary evaluation, conducted by the circuit executive's office approximately one year after the program began, involved sending questionnaires to every attorney participating in a prebriefing conference. Only half were returned, so the results must be interpreted with caution. The program was modified in response to some of the survey findings, so the results may not accurately reflect the functioning of the current program. Nevertheless, the survey offers some insight into the perception of the attorneys who have participated in the initial program.

As a preliminary question, the attorneys were asked to assess the overall performance of the conference attorneys. Because they were rated as "knowledgeable" (84 percent), "reasonable" (87 percent), and "effective" (82 percent), it appears that any reservations expressed about the program cannot be attributed to shortcomings in the performance of the conference attorneys.

The survey results suggest that the program has been helpful in improving the quality of the appellate practice. In approximately 85 percent of the cases, the conference attorneys discussed narrowing the issues on appeal, and two-thirds of the attorneys in these cases believed the program to be successful in this regard.

Sixty percent of the attorneys expect that the program will be effective in reducing the number of motions. Responses to the survey suggest that this may be due to the ease with which scheduling modifications can be obtained without resorting to formal motions.

The effectiveness of the program in reducing the length of the briefs and records is more difficult to determine. Although the Federal Rules of Appellate Procedure permit briefs of up to fifty

pages, the median length of briefs prior to the program was thirty pages, including great variation. Measures collected by the conference attorneys indicate that the median length of briefs submitted after the conferences is between twenty-eight and thirty pages. Although it may appear that the program has had little or no effect on brief length, this conclusion might be unwarranted. For example, if the program is successful in encouraging settlement of simpler cases with briefs of less than average length and is effective in reducing the length of briefs in more complex cases, the median of thirty pages before and after implementation of the program may disguise the effectiveness of the program in achieving both of these goals. Of course, any measure of brief length ignores the quality of the presentation of issues in the briefs. If the conference results in narrower issues on appeal and better development of those issues that are submitted, the absence of a reduction in brief length should not be used to demonstrate that the program is a failure. Seventy percent of the attorneys expected some success in this area, while several judges had already noticed a reduction. Until a more accurate measure is developed, these impressions offer the best evidence of the effect of the program on brief length.

The attorneys found the program to be less successful in reducing record length. This issue was discussed in approximately 60 percent of the cases selected for the study, and only 19 percent of the attorneys in those cases said record lengths had been reduced. Only 23 percent of the attorneys considered it reasonable to expect the program to serve this function; less emphasis has recently been placed on reducing record length.

Settlement efforts by conference attorneys also received mixed reviews. If there is a prospect of settlement, the conference is a convenient opportunity to discuss it. Settlement was discussed by the conference attorneys in 65 percent of the cases, and the survey indicates that the attorneys found these discussions helpful about half the time. Only 27 percent of the attorneys interviewed, however, expect the program to be effective in encouraging settlement.

Some of the judges did not feel that it is the role of the Prebriefing Conference Program to bring about increased rates of settlement. Those who did suggested that the program refer cases with

settlement potential to someone with judicial authority and litigation experience. Because the judges of the circuit have little time to conduct such negotiations, reliance on senior judges, retired state court judges, or magistrates has been suggested as an option. A pilot program recently developed in the Western District of Washington will permit conference attorneys to refer cases with prospects of settling to mediators who are members of the federal district bar association. In other districts, the conference attorneys continue to encourage settlement—in subsequent conferences, if necessary—in those cases where it seems possible.[22]

The Prebriefing Conference Program is perceived as particularly helpful in instructing members of the bar in appellate practice in the circuit. Discussions with the conference attorneys suggested that this is especially important for counsel who have not practiced before the federal appellate courts, and counsel view the conference attorneys as points of contact with the court. Several of the judges mentioned that strong support for the program had been voiced by several leading members of the various federal bar associations.

The survey also revealed that the benefits of the conference program for some classes of cases have been limited. Almost one-third of the attorneys indicated that their cases did not belong in the program because they were "too simple" or "involved only a single, clearly defined issue." Conference attorneys also raised the possibility of removing the simpler single-issue cases from the program. When the program was recently expanded throughout the circuit, the conference attorneys were instructed to focus their efforts on those cases that would benefit most from conferencing. As a result, cases such as Social Security and immigration appeals are now issued standard scheduling orders, and no conference is held

[22] An effort to determine changes in settlement rates and in elapsed times to filing of the last brief was unsuccessful. Settlement rates and elapsed times in the months before and after implementation of the program in the individual districts were too unstable. Measurement of these effects is complicated by seasonal variation and differing trends within districts. Of course, the primary purposes of the Prebriefing Conference Program are not to settle cases or accelerate the briefing process.

unless the attorneys specifically indicate that such a conference will be of assistance.

The Prebriefing Conference Program is a good example of an innovative program that was implemented in a limited manner and gradually evolved into an accepted part of the circuit's appellate process. As the program expanded, it sharpened its objectives and eliminated those activities that did not appear productive. Although it is difficult to demonstrate its effectiveness in objective measures, the program has earned the support of the court and the bar. The experiences of the Ninth Circuit Court of Appeals and of other federal circuit courts indicate that this preappeal conference program can be helpful in improving the appellate process.

Two additional issues deserve to be addressed as the program expands. Because cases with settlement potential in the Western District of Washington are identified and referred to local mediators by the conference attorneys, there is an opportunity to better understand their characteristics. This pilot project also should indicate the relative effectiveness of settlement efforts conducted by the conference attorneys and by local attorneys serving as settlement mediators.

The role of in-person conferences also deserves closer examination. Although an in-person conference facilitates communication, it is difficult to determine whether this advantage outweighs the delay and expense involved in gathering the participants in a single location. Telephone conferences are becoming more common as the services of the conference attorneys are extended to outlying districts where in-person conferences are impractical. Presumably, they also will become more common than in the past in the Western District of Washington as settlement efforts are delegated to the local mediators. As they gain more experience with these procedures, the staff of the Ninth Circuit may be able to develop standards for determining the proper role of in-person conferences that can guide the actions of other federal circuit courts.

## VII. Changes in Case Activity in the Ninth Circuit

Statistics offer incomplete measures of court performance and can be misleading; objects and events are counted while quality of judicial consideration and fairness of the disposition remain unexamined. Nevertheless, concern over statistical measures of court performance was one of the factors that led the Ninth Circuit Court of Appeals to adopt the Innovations Project.

Common statistical measures of court and judicial activity reveal that the performance of the Ninth Circuit Court of Appeals has notably improved in recent years. More cases are being terminated, and the average time from filing to disposition has dropped sharply from earlier levels. These improvements are particularly impressive because they were accomplished during a period of rising case filings and diminished reliance on visiting judges. Much of the improvement certainly is due to the increase in judgeships for the court. However, the analyses suggest that an additional 27 percent increase in case participations by active judges has resulted from the innovations described in this report.

Data collected by the Administrative Office are helpful in demonstrating changes in case processing over time and in comparing the Ninth Circuit with other federal appellate courts. The published figures by the Administrative Office for all federal circuit courts are based on annual cycles that run from July to July, making awkward the assessment of changes adopted in January 1982. These data are supplemented by information from the Ninth Circuit that offers more precise measures of court performance from January to January. However, the best yearly records from the Administrative Office for examining the impact of the innovations are designated as 1983 data, containing measures of case activity from July 1, 1982, to June 30, 1983, while the most appropriate records from the clerk's office are designated as 1982 data, following the annual cycle from January 1, 1982, to December 31, 1982. To avoid confusion here, measures of annual cycles that run from July to July will have the prefix "CY," indicating the Administrative Of-

fice measure of a "court year."[23] The result is a patchwork of various measures that, when viewed cumulatively, demonstrate the improvements in the court's performance.

## Measures of Case Processing

The most common measures of appellate court activity are the number of cases filed, the number of cases terminated, and the number of cases pending at the end of the year. Figure 1 indicates the number of cases filed in the Ninth Circuit Court of Appeals in each court year since 1970.[24] The number of cases filed tripled from CY 1970 to CY 1983; increases were especially sharp after CY 1979. The broken line in figure 1 shows the rate at which the case filings would have risen had the increases in the Ninth Circuit followed the average annual rates of increase for all other federal circuit courts. It is clear that the Ninth Circuit experienced increases in case filings that exceed the overall rate for the rest of the circuits.

During this period the Ninth Circuit Court of Appeals also sharply increased the rate at which cases were terminated. Figure 2 demonstrates this increase, again sharper since CY 1979. The increase in the number of cases terminated from CY 1970 to CY 1979 occurred when the court had thirteen active appellate court judges. From October 1979 to July 1980, a period that roughly corresponds to CY 1980 on the graph, ten new judges joined the appellate court. These additional judges and a relatively heavy reliance on contributions by visiting judges contributed to the sharp increase in terminations from CY 1979 to CY 1981. The number of cases terminated in CY 1982 includes cases terminated six months before and six months after the start of the Innovations Project in January 1982. The increase in cases terminated in CY 1983 occurred after implementation of the project.

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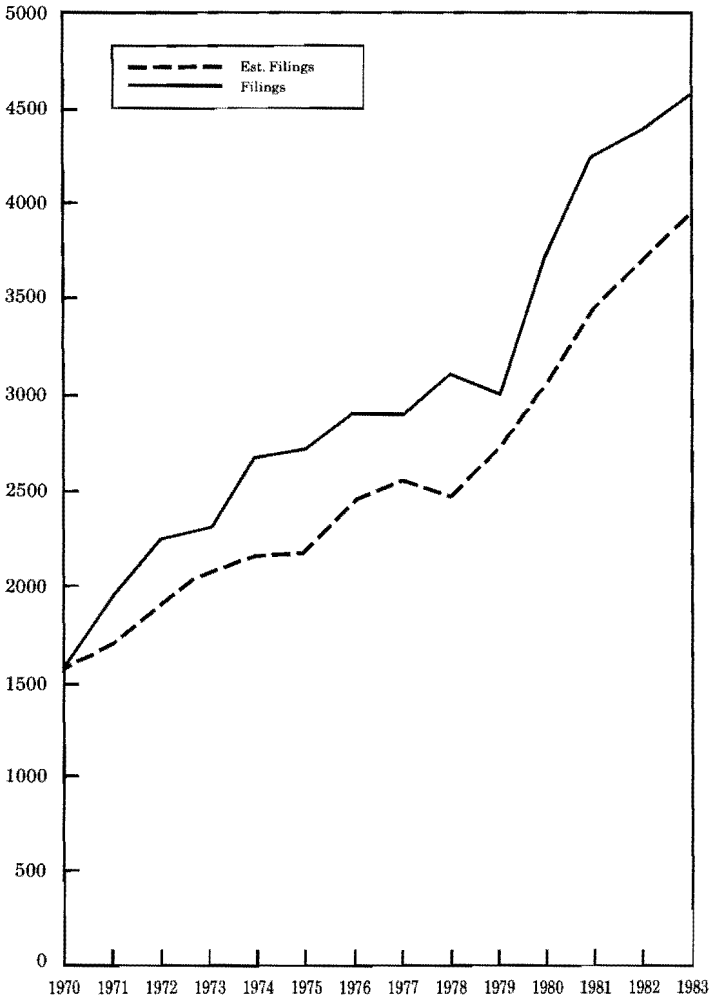
[23] The Administrative Office actually refers to this measure as a "statistical year," but because the staff of the Ninth Circuit Court of Appeals refers to it as a "court year," this convention is followed in this report.

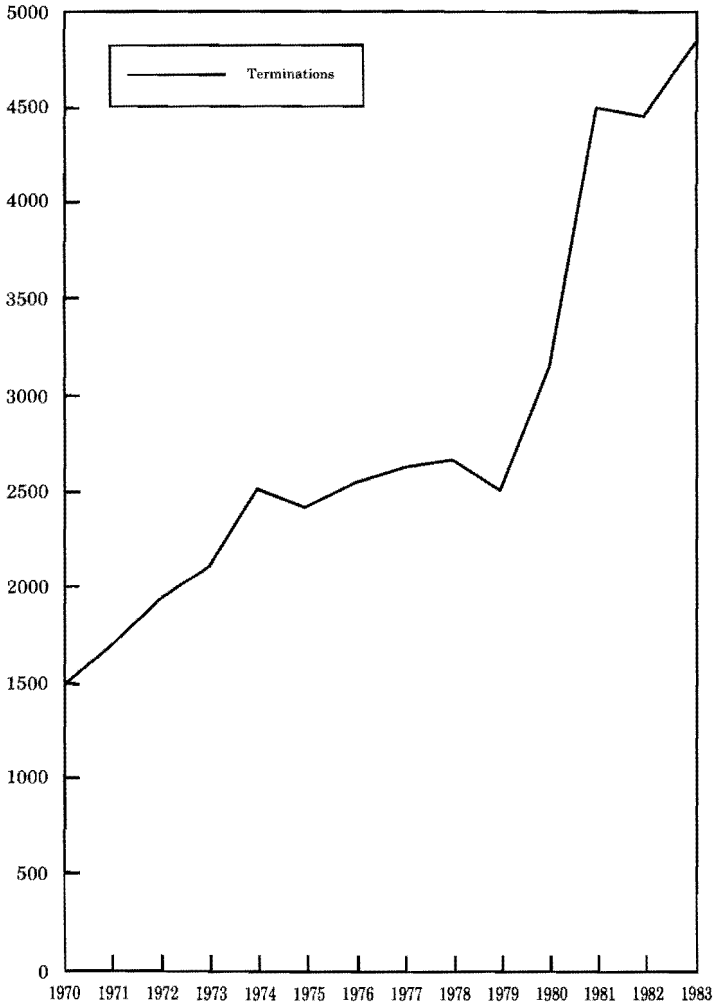
[24] Data for this figure and the three following ones are taken from Federal Court Management Statistics, an annual publication by the Administrative Office, for the years 1973 through 1983. The 1970-72 data were included in the 1973 edition.

**FIGURE 1**
**Number of Cases Filed**




NOTE: Based on Administrative Office measures of court years from July 1 to June 30.

**FIGURE 2**
**Number of Cases Terminated**




NOTE: Based on Administrative Office measures of court years from July 1 to June 30.

Despite increases in the number of cases terminated, the number of cases awaiting judicial action at the end of each year increased steadily until the additional judges entered service (see figure 3). After CY 1980, the number of pending cases began declining, but this statistic must be interpreted with caution. The pending caseload includes cases undergoing some preliminary procedure, such as preparation of the briefs by the parties, as well as cases fully prepared and awaiting argument. Increases in the number of cases pending at the end of the year reflect, in part, the increases in earlier case filings and the unavoidable passage of time that is required for briefing, submission, and drafting of a disposition. For example, during the summer of 1983 the Ninth Circuit had succeeded in calendaring all of the cases that were fully briefed and awaiting submission, and there were still almost four thousand pending cases. Presumably, these cases were undergoing court procedures in preparation for calendaring. These four thousand cases represent a "floor" in the number of pending cases, and the number of pending cases cannot be expected to go below this level without a modification of court procedures or a drop in the filing rates.

## Measures of Case Disposition Time

While the numbers of cases filed, terminated, and pending are of concern to persons involved in the administration of the federal courts, the time from filing to disposition is of greater interest to the litigants. The Ninth Circuit Court of Appeals has made considerable gains in moving cases to a speedy disposition.

Figure 4 indicates the median number of months that passed from filing of the complete record to disposition for cases terminated after hearing or submission on briefs. This median increased by 10 months, from 7.3 months in CY 1973 to 17.4 months in CY 1980, then declined to 10.5 months in CY 1983. Although these improvements are dramatic, the median disposition time for terminated cases has remained above the national average. Again, the improvement followed the arrival of additional judges, as well as increases in the productivity of the court. Furthermore, the rate of increase in the number of cases filed has been more moderate in re-

cent years, permitting the court to overcome the backlog of cases and concentrate on the more recently filed cases.

Closer inspection of the improvements in disposition time reveals that the period from the filing of the last brief in a case to submission to a three-judge panel for disposition has been reduced by more than half. In each bar graph in figure 5, individual steps identify the median number of days from notice of appeal to filing of the last brief, to submission of the case to the panel of judges, and to disposition.[25] The disposition time for all submitted cases dropped from 684 days in 1980 to 378 days in 1983. The greatest reductions were in the number of days from filing of the last brief to submission to a three-judge panel. A separate analysis, not portrayed in the graph, revealed that the median number of days that elapsed between these two events dropped from 302 days in 1980, to 224 days in 1981, to 127 days in 1982, to 87 days in 1983. The number of days from notice of appeal to filing of the last brief and from submission to a panel to disposition remained fairly stable.

The greatest improvements in disposition time occurred in non-priority civil cases. As shown in figure 6, from 1980 through 1983 the median number of days from filing to disposition in such cases dropped by more than half, from 846 days to 393 days. Again, the greatest reductions occurred in the period from filing of the last brief to submission for disposition. Figures 7 and 8 reveal that during this same period disposition times for criminal cases remained stable, and disposition times for agency cases remained stable after an initial reduction in 1981. These improvements reflect the effects of increases in the number of cases terminated, due to additional judgeships, increases in productivity, and changes in the rate at which cases were filed.

[25] Unlike the preceding figures, this graph is based on records of the Ninth Circuit clerk's office and measures the median disposition times of submitted cases that were terminated from January 1 through December 31 of each year.

**FIGURE 3**
**Number of Cases Pending at End of Court Year**

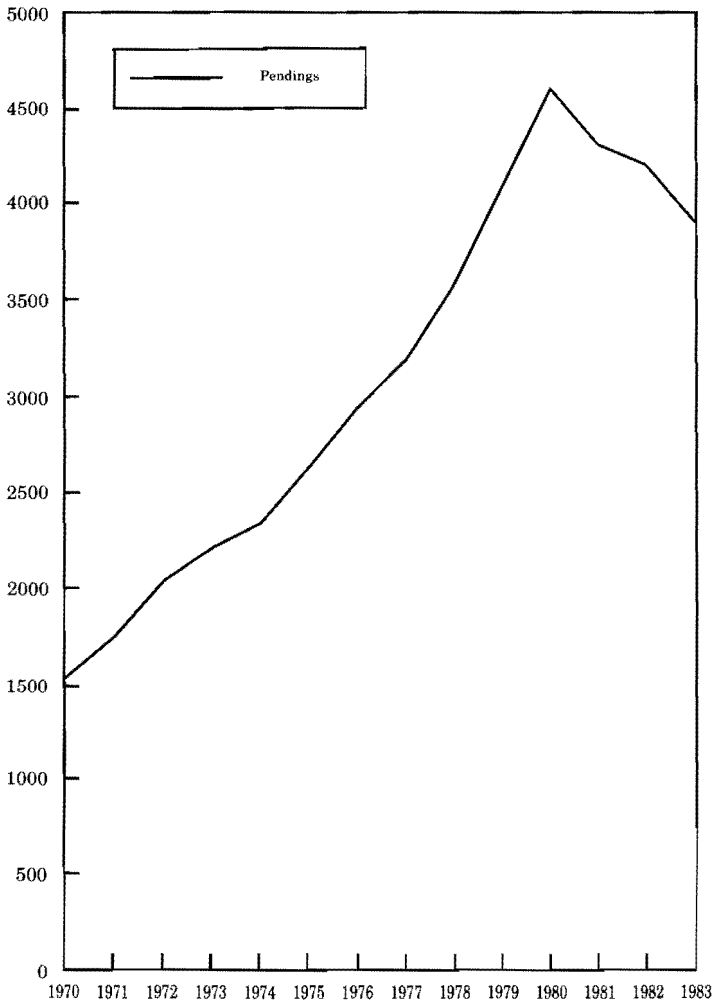
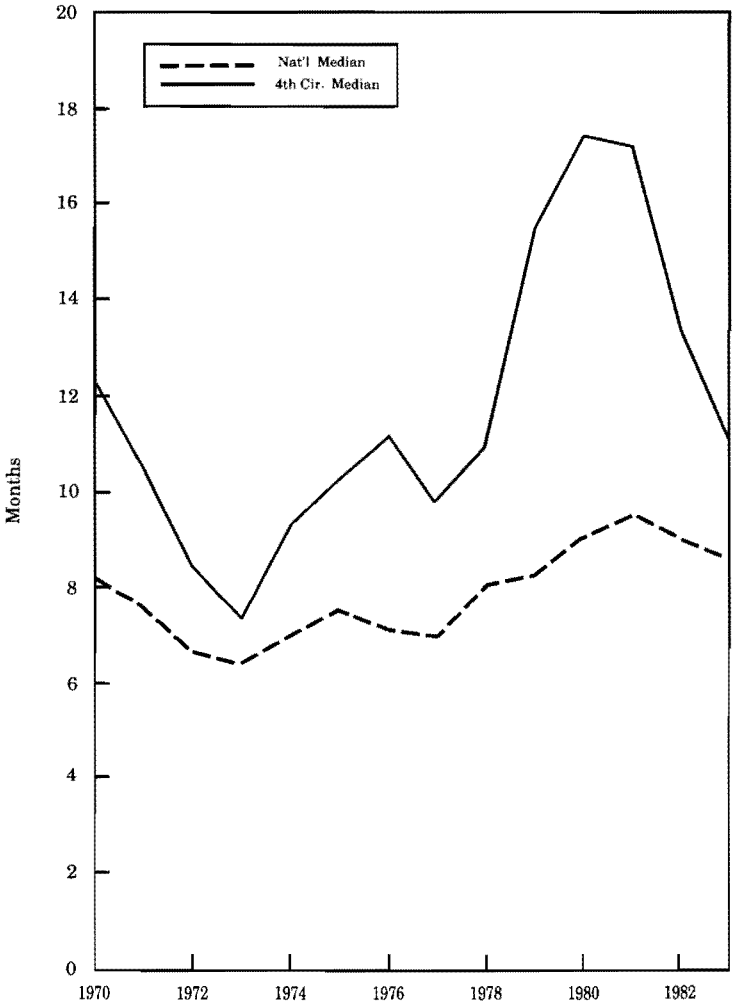


**FIGURE 4**
**Median Elapsed Time from Filing of Complete Record to Disposition**




NOTE: Based on Administrative Office measures of court years from July 1 to June 30.

**FIGURE 5**
**Disposition Times for Submitted Cases**

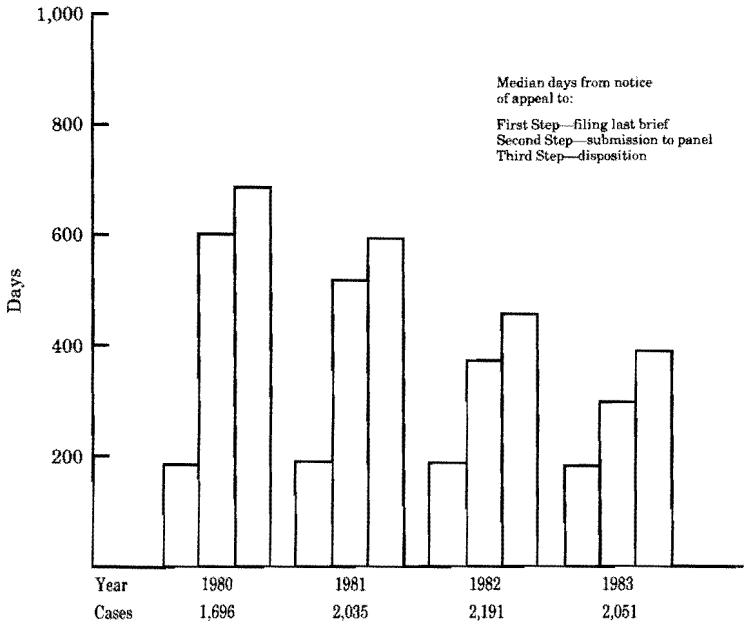


**FIGURE 6**
**Disposition Times for Nonpriority Civil Cases**

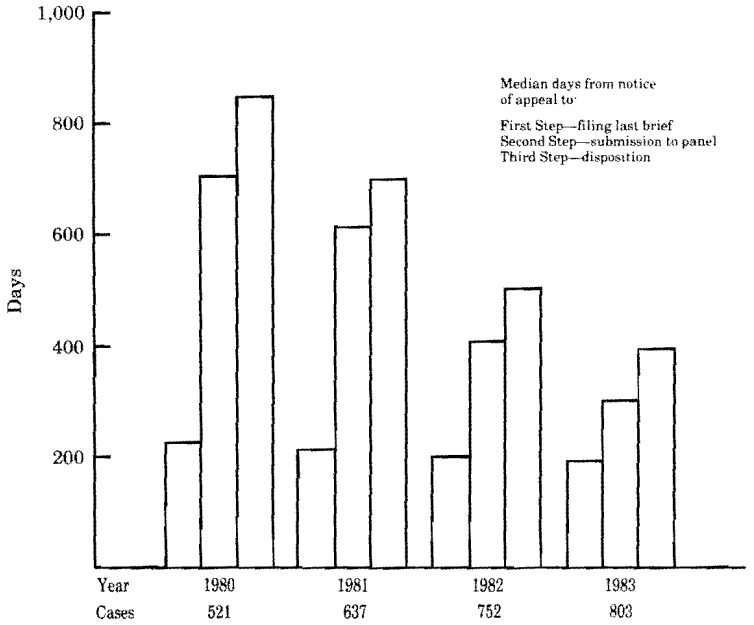


**FIGURE 7**
**Disposition Times for Criminal Cases**

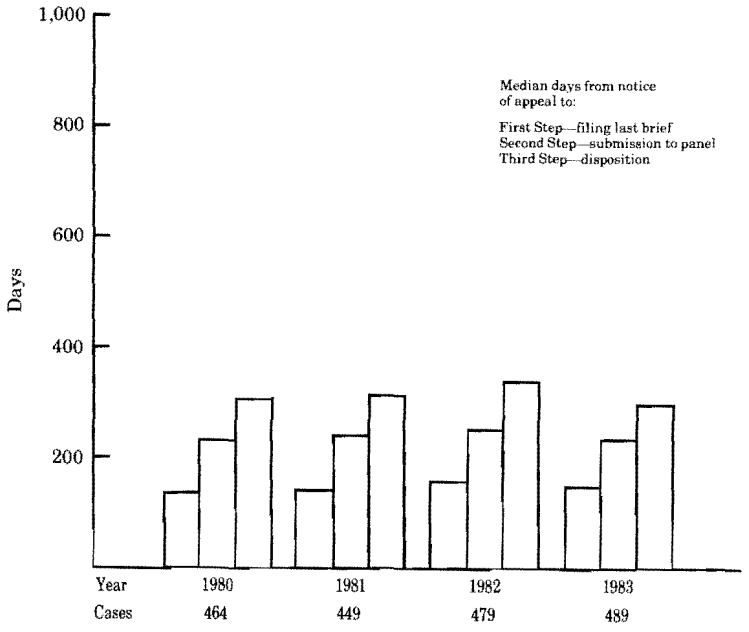
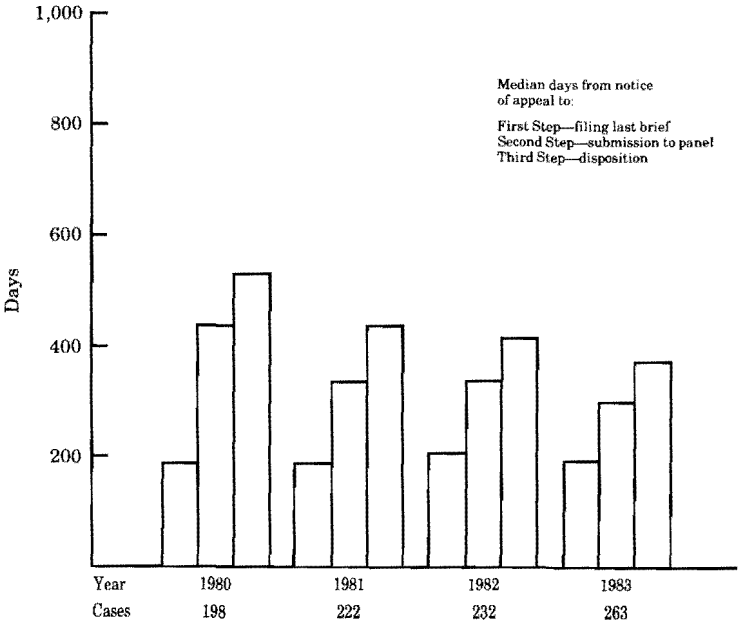


**FIGURE 8**
**Disposition Times for Agency Cases**



## Measures of Case Participation

The above figures demonstrate improvements in the overall performance of the court, but offer misleading indications of the productivity of the judges. General assessments of case activity fail to take into account changes in the number of judgeships and the contributions of visiting and senior judges. Furthermore, because a case is decided by a panel of judges, "case" is an awkward measure of the work of individuals. Participation by a judge on a panel that considers a case is a more appropriate measure. For example, when a single case is submitted to a panel of three judges, each of the judges would receive credit for one "case participation."

The number of case participations by judges increased through 1982, then dropped in 1983 (see table 13). The decline in 1983 resulted in part from the success of the court in clearing its backlog of cases awaiting calendaring. In the latter half of 1983, the court had succeeded in calendaring all cases that were ready for submission and was forced to reduce and cancel a number of argument panels. Because there were not a sufficient number of cases to fill the argument calendars of judges scheduled and willing to serve, the totals for 1983 are not an accurate measure of the productive capacity of the court.

**TABLE 13**
**Cases Disposed of by Active, Senior, and Visiting Judges[a]**

| | 1980 | 1981 | 1982 | 1983 |
|---|---|---|---|---|
| Total case participations | 6,552 | 7,774 | 8,319 | 7,556 |
| Active judges | 4,216 | 5,280 | 6,694 | 6,108 |
| Senior judges | 720 | 505 | 548 | 526 |
| Visiting judges | 1,616 | 1,989 | 1,077 | 922 |

[a]A "case participation" by an individual judge is an appeal in which the judge hears oral argument or where the appeal is submitted on the briefs. When a single case is heard before a panel of three judges, each judge serving on the panel gets credit for one case participation. These figures do not include participations in en banc proceedings. There were eight en banc cases terminated in 1981, twelve in 1982, and thirteen in 1983, with each case decided by a panel of eleven active judges of the circuit.

The total number of case participations in each year is divided into the number of participations by active judges, senior judges,

and visiting judges who were either district court judges from within the Ninth Circuit or appellate court judges from other circuits. As the table shows, the number of case participations by active judges increased sharply during this period. The increase in 1981 reflects the contributions of the ten additional active judges who entered service during this period. The increase from 1981 to 1982—a period when the number of active judges remained constant—indicates the success of the court's commitment to increasing the number of case participations by active judges. During this period, case participations by active judges increased 27 percent while case participations by visiting judges dropped by almost half.

Table 14 presents average participations in terminated cases from 1980 through 1983. The figures for average case participations for 1980 include data only from those judges who were in service for the entire year. The table reveals that in 1982 the active judges of the Ninth Circuit Court of Appeals disposed of an average of 291 cases, 62 more cases than in the year before. The additional cases are almost evenly divided between participations in oral arguments and participations in cases submitted for disposition on briefs, though this results in a notable increase in the proportion of cases submitted on briefs. These figures do not include service by the judges on en banc panels, which can be quite demanding. There were eight en banc cases terminated in 1981, twelve in 1982, and thirteen in 1983, with each case decided by a panel of eleven active circuit judges. All but one of these cases were decided after oral argument. However, the figures in table 14 do not indicate the extent of the variation among the judges in the number of case participations. Although the twenty-three active judges participated in an average of 291 cases, five of the judges participated in fewer than 261 cases and five in more than 321 cases. Some of this variation is due to participation on argument panels that were assigned a greater or a fewer number of cases consolidated or related to lead cases. However, there was also considerable variation in dispositions of lead cases among the judges.[26] An increase in overall per-

[26] The average number of oral argument participations per active judge differs somewhat from the figures reported in table 2. The figures in table 14 identify

formance can be achieved by encouraging able judges who participate in fewer than the agreed number of cases to meet a minimum standard.

**TABLE 14**
**Average Participations in Terminated Cases**

| | 1980[a] | 1981 | 1982 | 1983 |
|---|---|---|---|---|
| Average for active judges | 226 | 229 | 291 | 265 |
| Oral argument | 172 | 188 | 221 | 197 |
| Submission on briefs | 54 | 41 | 70 | 68 |

NOTE: A "case participation" by an individual judge is an appeal in which the judge hears oral argument or where the appeal is submitted on the briefs. When a single case is heard before a panel of three judges, each judge serving on the panel gets credit for one case participation. These figures include participations in all cases, not just lead and single cases, and do not include participations in en banc proceedings. There were eight en banc cases terminated in 1981, twelve cases in 1982, and thirteen cases in 1983, with each case decided by a panel of eleven active judges.

[a]During 1980, six of the judgeships in the circuit remained unfilled for portions of the year. The measure of "average" participations for active judges in 1980 includes only participations by judges who were in active service at the beginning of the year.

Another measure of judicial activity the Administrative Office uses to compare judges in the Ninth Circuit with those in other circuit courts is the number of participations in lead and single cases, excluding participations in consolidated cases, cross-appeals, and other related cases that are likely to be resolved in the same proceeding.[27] For several years the Ninth Circuit disputed the published figures. It was recently discovered that standards used by the staff of the Ninth Circuit in defining cases as "consolidated cases" or "cross-appeals" were inconsistent with the standards specified by the Administrative Office and presumably used by the other cir-

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the average number of participations in cases submitted to the argument panels during the year, while the figures in table 2 identify the number of participations in cases terminated during the year.

[27] Measures of case activity without regard to consolidation, such as those presented in table 14, offer better estimates of the changes that have resulted from the Innovations Project. One likely effect of the case inventory process combined with the Prebriefing Conference Program is more frequent consolidation of cases. If this is so, measures that count only lead or single cases will underestimate the changes that result from these programs.

cuits.[28] As a result, some Administrative Office published reports in recent years underestimate the actual number of case participations by Ninth Circuit judges.

Table 15 presents the average number of participations per judge in lead and single cases for the twelve federal circuit courts in CY 1983, including corrected numbers of participations for the Ninth Circuit Court of Appeals. The table reveals that the Ninth Circuit ranks sixth among the federal circuit courts, with an average of 259 participations per judge in lead and single cases.

Interpretation of the figures for appellate courts other than the Ninth Circuit requires caution. First, courts with relatively low rates of case participations may be quite efficient in dealing with their caseloads; most of the circuits listed in the lower half of this table would rank highly in a table displaying median times to disposition. Second, differences across circuits in the composition of the caseload are ignored in these computations. The Ninth Circuit Court of Appeals has a relatively high number of cases involving review of administrative agency actions and relatively few prisoner petitions. Other circuits, especially the District of Columbia, have caseloads with characteristics that make direct comparisons misleading. Third, data from other circuits may include classification errors similar to those found in the Ninth Circuit data. Circuit

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[28] Under the standards set by the Administrative Office, cases are defined as "consolidated" if they are joined for all aspects of case processing. This definition was recently modified to make explicit that cases are to be defined as "consolidated" only if they are consolidated for briefing by appellants as well as for subsequent proceedings in the process. Frequently, cases in the Ninth Circuit Court of Appeals have separate briefs by several appellants, then are consolidated upon motion by the appellee, who submits a single brief, followed by several separate reply briefs. The Ninth Circuit erroneously counted such cases as "consolidated," even though they were briefed separately by the appellants, resulting in an underestimate of participations in lead cases when compared with other circuits. Cross-appeals posed a separate problem. The Ninth Circuit had been coding both appeals as cross-appeals and therefore was not receiving credit for even one lead or single case. The staff of the Ninth Circuit and the Administrative Office have worked together to develop corrected figures for recent years, but the corrections have not been made for the years prior to CY 1982.

courts with judgeship vacancies during this period are especially likely to be shortchanged by the figures in the table, since the average is based on the number of judgeships and not the number of judges actually in service.

**TABLE 15**
**Comparison of Participations by Active Judges in Lead and Single Cases in CY1983**

| Rank | Circuit | Judge-ships | Total Participations | Average Participations | Percentage of Cases Receiving Oral Argument |
|---|---|---|---|---|---|
| 1 | Fifth | 14 | 4,302 | 307 | 46% |
| 2 | Eleventh | 12 | 3,453 | 288 | 50% |
| 3 | Tenth | 8 | 2,290 | 286 | 53% |
| 4 | Sixth | 11 | 3,082 | 280 | 66% |
| 5 | Third | 10 | 2,786 | 279 | 40% |
| 6 | Ninth | 23 | 5,963 | 259 | 70% |
| 7 | Seventh | 9 | 2,172 | 241 | 80% |
| 8 | Second | 11 | 2,498 | 227 | 80% |
| 9 | First | 4 | 895 | 224 | 77% |
| 10 | Eighth | 9 | 1,661 | 185 | 63% |
| 11 | Fourth | 10 | 1,481 | 148 | 89% |
| 12 | D.C. | 11 | 1,135 | 103 | 90% |
| Total | | 132 | 31,718 | 240 | 64% |

NOTE: This table presents the average number of case participations by active judges, based on data found on page 14 of the 1983 *Federal Court Management Statistics*. The number of case participations reported for the Ninth Circuit Court of Appeals has been corrected for an erroneous classification practice that resulted in an underreporting of actual participations in lead and single cases. An additional 819 misclassified participations, identified by the staff of the Ninth Circuit, were added to the 6,410 reported participations for a total of 7,229 case participations. This figure was then multiplied by 82.5 percent to yield 5,963 case participations by the twenty-three active circuit judges, or an average of 259 case participations per active judge. The figures presented in this table do not adjust for periods during which an authorized judgeship remained vacant. There were no vacancies on the Ninth Circuit Court of Appeals during this period. However, extended vacancies in the Fifth Circuit, Seventh Circuit, and Eighth Circuit are likely to have resulted in more average participations by the active judges in these circuits than these figures indicate. The estimates of the proportion of submitted cases involving oral argument are taken from table 9 on page 109 of the 1983 *Annual Report of the Director* of the Administrative Office of the United States Courts. These estimates are based on cases rather than participations and do not control for case participations by senior and visiting judges.

Furthermore, the average number of case participations does not take into account the nature of each judge's participation, such as the extent of participations in oral arguments. The last column in the table indicates the percentage of lead and single cases that were disposed of after oral argument as opposed to after submission on the briefs. As the table shows, circuits with high numbers of case participations per judge generally dispose of a lower proportion of

cases after oral argument. (The Third Circuit and the Eighth Circuit appear to be exceptions to this rule.) A table that ranks the circuits in order of participations in oral arguments would find the Ninth Circuit ranked somewhat higher than sixth.[29]

When appellate courts consider means of increasing the number of case participations, procedures for increasing the numbers of cases disposed of after submission on briefs are frequently proposed. Although table 15 would seem to support such a conclusion, the experience of the Ninth Circuit suggests that there are limits to which such procedures can be implemented. When the Ninth Circuit developed its program for increasing case participations, great emphasis was placed on the Screening Program as a means to expeditious disposition of cases submitted on briefs. After some initial skepticism, the Screening Program is now well accepted as an essential procedure in the Ninth Circuit. However, as discussed in chapter 5, the Screening Program's success was limited by a lack of cases that fit the criteria established for the program and an unexpectedly high number of cases rejected by the judges from the Screening Program and placed on the oral argument calendar. The fact that the judges of the Ninth Circuit found it inappropriate to decide as many cases through submission on briefs as originally intended, despite their commitment to increased productivity, suggests that courts seeking to implement such programs must carefully consider the characteristics of the cases referred.

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[29] The active judges of the Ninth Circuit heard oral argument in an average of 185 lead and single cases in CY 1983, based on data from the clerk's office and including a correction factor for the undercounting of lead and single cases. Comparable data for other circuits are not readily available, though a rough estimate may be obtained by multiplying the proportion of cases receiving oral argument by the average number of case participations in each circuit. Such a method does not eliminate case participations by senior and visiting judges and may result in a biased estimate for those circuits, other than the Ninth Circuit, in which screening programs permit active judges to decide a disproportionate number of cases after submission on briefs.

# PART TWO
# CASE WEIGHTING

# INTRODUCTION

*Michael Tonry*

Case management procedures are but one aspect of the Federal Judicial Center's efforts to examine the problems of growing federal court workloads. Another dimension of its research has involved "weighted caseload studies," which seek to assess how cases of different types affect the judicial workload. Additional judgeships may be created by Congress on the basis of these findings about the workload. That body of inquiry and analysis is presented in this part.

Economic and social changes, cultural attitudes, and population shifts, among other things, differentially affect the volume of business coming before the federal courts. At first impression, the simplest way to assess the comparative workloads of judges in different circuits might appear to be simply to count the number of cases filed or terminated in each circuit and divide those numbers by the respective numbers of authorized judgeships. However, the judiciary has always been aware that some types of cases demand more work than others and that these cases are not randomly distributed across the country. Consequently, since 1946 the federal judiciary has conducted a number of weighted caseload studies in an attempt to assess variations in the amount of judicial work created, on average, by cases of different types. Until the 1970s these studies all concerned case weighting in the federal district courts. The *1980 Annual Report of the Director of the Administrative Office of the United States Courts* contains a brief review of the case-weight studies through 1980.[1] Since the publication of that report, three additional major case-weighting studies have been completed

[1]Administrative Office of the United States Courts, *1980 Annual Report of the Director*, at 290-97.

concerning the bankruptcy courts,[2] the federal district courts,[3] and the District of Columbia Circuit Court of Appeals.[4]

Three major case-weighting studies concerning the work of the courts of appeals have been undertaken, all of which are included in this volume. The first, completed in 1974 and published here for the first time, involved the keeping of detailed daily time records by active Third Circuit judges and their law clerks during a full year beginning August 15, 1971.[5] The second, the Appellate Court Caseweights Project, required judges from the Sixth, Eighth, and District of Columbia Circuits to estimate the relative workloads or burdens associated with each of twenty-three different types of cases.[6] The third major study, *The Cases of the United States Court of Appeals for the District of Columbia Circuit,* involved a third method.[7] The researchers identified a representative sample of one hundred cases terminated in fiscal 1980 and attempted to isolate objective indicators of relative burdens imposed by particular types of cases. These objective indicators included such things as the number of lawyers on a case; the number of briefs; the number of case citations in briefs; the form of the record on appeal; the aggregate length of the record on appeal; the elapsed time between filing and various decision dates; and the form, number, and aggregate lengths of opinions.

These systems of case weighting have strong impact on the federal courts. They serve as the best available basis for measuring differential workloads. In the courts of appeals, these measures have two major applications: in assigning cases to panels in order to assure that each panel assumes a fair, but manageable, number

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[2]J. Shapard, The 1981 Bankruptcy Court Time Study (Federal Judicial Center 1982).

[3]S. Flanders, The 1979 Federal District Court Time Study (Federal Judicial Center 1980).

[4]G. Bermant, P. Lombard & C. Seron, The Cases of the United States Court of Appeals for the District of Columbia Circuit (Federal Judicial Center 1982).

[5]Division of Research, Federal Judicial Center, A Summary of the Third Circuit Time Study (1974) (unpublished paper on file at the Federal Judicial Center).

[6]Appellate Court Caseweights Project (Federal Judicial Center 1977).

[7]G. Bermant, P. Lombard & C. Seron, *supra* note 4.

of cases, and in determining the relative burdens of the various circuits, necessary as the judiciary calculates the number of additional judgeships to seek from Congress. Related to the latter application, case weights can be used, as they were in the last decade, by Congress to split an overburdened circuit into smaller circuits and to determine the number of judgeships that should be allocated to each.

# A SUMMARY OF THE THIRD CIRCUIT TIME STUDY[1]

**Division of Research, Federal Judicial Center**
**January 1974**
**(unpublished paper)**

The time study was undertaken at the request of the court of appeals and involved the keeping of daily time records by active circuit judges and their law clerks during the full year from August 15, 1971, through August 15, 1972. The objective of the court was to determine the real time resource available to the court and the allocation of that time among the various tasks for which the judges are responsible. Of particular concern to the court was the allocation of court resources between the two major functions of (a) review for correction of error, and (b) law declaring and policy setting. The Center suggested that additional analysis be undertaken to discover relationships, if any, between real time consumption and the elapsing of calendar time. The data-gathering effort and the subsequent analyses were structured with these objectives in mind.

## Available Time Resources

Seven judges participated in the study by keeping time records. All judges were not able to participate for the entire year for various reasons. Based on first-and-last entries of the participating judges, a total of 302 man-weeks were embraced by the timekeeping activity for a total of 5.73 man-years. [Table 1 shows the total hours of case and non-case time reported by the participating judges.] A total of 13,213 judge hours were recorded, yielding an average work

[1]In its original form, this document contains a number of tables that are not reprinted here. Notably these include breakdowns of law clerk time reports and a breakdown of judicial "case time" by case type. Ed.

year in excess of 2,300 hours for the judge years covered by the timekeeping. This figure considerably exceeds commonly accepted notions of the productive hours to be expected of professional personnel engaged in comparable or even less demanding work. The most frequently mentioned norm appears to be about 1,800 productive or "billable" hours. Discussion with the timekeeping judges would indicate that hours disclosed by the study are on the conservative side. Travel time, particularly, is probably underreported to a significant extent. Since the study design was activity-oriented rather than clock-oriented, we may expect that small bits of true productive time, e.g., time for transition from one activity to another, are not reported. Indeed, the absence of conference time reports on many cases indicated a possibility of substantial underreporting where the activity was case-related but covered a number of cases in one time portion. Thus, an hour of conference time devoted to consideration of a dozen cases probably often went unrecorded and unallocated. Though it cannot be proved with data, it seems highly certain that the average judge year exceeds 2,400 productive hours.

**TABLE 1**
**Total Judge Time Recorded**

| | Hours | Percentage of judge time |
|---|---|---|
| Case time | 8,007 | 60.6% |
| Non-case time | 5,206 | 39.4% |
| Total | 13,213 | 100.0% |

## Division of Time

. . . .

Judge time was divided on a 60 percent case-related to 40 percent non-case-related basis over the entire year. [Table 2 shows the breakdowns of time reported by judges as "case time."] There was substantial variation in this division during the three periods cov-

ered by interim reports, with non-case activities accounting for 45 percent in the first period, 35 percent for the second period, and 40 percent for the third period. It should be noted, however, that the absolute hours devoted to non-case responsibilities did not exhibit such strong cyclic tendencies. The variation in percentages results more from an *increase* in hours devoted to case activities in the second and third periods than from any *decrease* in non-case activity. This suggests that, as the pressure to clear calendars mounts during the court year, the pressure is met by devoting additional hours to case work rather than a cutback in non-case activities. This may be taken as some measure of the importance attached to the non-case activities by the participating judges.

**TABLE 2**
**Total Judge Case Time Recorded**

| | Hours | Percentage of Judge Case Time | Percentage of Judge Time |
|---|---|---|---|
| Preparation (01) | 2,589 | 32.3% | 19.6% |
| Argument (02) | 560 | 7.0% | 4.2% |
| Conference (03) | 459 | 5.7% | 3.5% |
| Opinions (04, 05, 06) | 3,857 | 48.2% | 29.2% |
| Other (07, 08) | 542 | 6.8% | 4.1% |
| Total | 8,007 | 100.0% | 60.6% |

## Non-Case Time

The largest contributor to the 40 percent non-case time is court administration activity, accounting for 17 percent of the total recorded judge time. [Table 3 sets out reported non-case time.] This activity may properly be considered the "overhead" of judge time involved in keeping the court of appeals and the circuit operating as an organization. While it is a figure that can doubtless be reduced by more effective procedures and the use of supporting personnel, the figure accords reasonably well with such other data as we have on administration responsibilities in judicial operations.

Pro bono activities accounted for 8 percent of recorded judge time. One would expect this activity to be a prime candidate for contraction during the year-end crunch, but the hours allocated to it

remained substantially the same during the last reporting period as in the first.

**TABLE 3**
**Total Judge Non-Case Time Recorded**

| | Hours | Percentage of Judge Non-Case Time | Percentage of Judge Time |
|---|---|---|---|
| Chief judge (09) | 17 | .3% | .1% |
| Court administration (10) | 2,200 | 42.3% | 16.7% |
| General preparation (11) | 512 | 9.8% | 3.9% |
| Other court (12) | 761 | 14.6% | 5.8% |
| Other judicial (13) | 653 | 12.5% | 4.9% |
| Pro bono (14) | 1,023 | 19.7% | 7.7% |
| Proofreading (15) | 42 | .8% | .3% |
| Total | 5,208 | 100.0% | 39.4% |

Other court activity—service on three-judge courts, district courts, or other circuit courts—was the third largest non-case activity, accounting for 6 percent of recorded judge time, with more than two-thirds occurring in three-judge courts.

Other judicial activity—e.g., Judicial Conference of the United States and Federal Judicial Center—accounted for 5 percent.

We were struck by the fact that general preparation, the designation embracing all those activities to maintain personal professional competence, accounted for less than 4 percent of total time. Of course, this observation implies a judgment that more such time would be desirable, but we are in no position to evaluate the priorities that result in this allocation. Further, this may be another activity that suffers from underreporting because it may very well be a diffuse activity not easily recalled and recorded.

## Case Time

The 60 percent of judge time devoted to cases was primarily spent in two activities: preparation for argument or conference and the preparation and clearance of opinions. More than 80 percent of total case time was thus consumed, with 32 percent devoted to

preparation and 48 percent devoted to opinions. Indeed, nearly *30 percent of all judge time was devoted to opinions.*

## Case Time and Case Types

The case types established by the judges at the inception of the project display a considerable variation in the relative time burden associated with each type. We have constructed weights for each of the case types following the basic formula used in weighting district court cases. This formula takes into account the proportion of the total caseload accounted for by a case type and the proportion of total time accounted for by that type. If case type "A" accounts for 10 percent of the cases and 10 percent of the time, it would have a weight of 1. If case type "B" accounts for 10 percent of the cases and 20 percent of the time, it would have a weight of 2. If case type "C" accounts for 10 percent of the cases and 5 percent of the time, it would have a weight of 0.5. The relative weights of the cases according to this formula are set forth [in table 4].

Case types A through G merit attention. The other types have obvious peculiarities that are interesting, but not indicative of significant relationships. (Note that there is a four-to-one ratio between the burden of Type G (Original) and Type A (Civil Nondiversity).) If the court decides to establish specialized panels on either temporary or permanent bases, these findings should enable a more equitable and realistic distribution of work than would have otherwise been possible. Of course, figures such as these represent averages across a collection of cases; a given case of any type could produce a burden as great as any other.

NOTE: A piece of information not revealed by any of the tabulated data suggests that some method of *early* classification of cases would save considerable judge time. In examining printouts of the total judge entries, it appeared that the three judges on a panel had substantial disagreement about the classification of a case during the early stages of preparation, particularly as to diversity and federal question classifications. As preparation continued to conference day, these differences diminished, though in some cases they persisted through opinion and clearance stages. We may assume that time devoted to consideration of the Type A characteristics of a

case ultimately resolved as a Type B might be saved by some procedure for early consideration and agreement. It is true that resolution of these classification questions is a part of the decisional process, but rearrangement of timing might have a beneficial effect. This would be particularly true if specialized panels are to be considered, since some kind of classification would be necessary to facilitate assignment.

**TABLE 4**
**Case Type Weights for Judges**
**(Weights Based on Expended Judge Time)**

| (a) Type | (b) No. Cases | (c) % Cases | (d) No. Hrs. | (e) % Hrs. | (f) Wt. e ÷ c |
|---|---|---|---|---|---|
| A | 429 | 30.9% | 3,126 | 39.0% | 1.26 |
| B | 101 | 7.3% | 670 | 8.4% | 1.15 |
| C | 323 | 23.3% | 1,912 | 23.9% | 1.03 |
| D | 210 | 15.1% | 602 | 7.5% | .50 |
| E | 19 | 1.4% | 84 | 1.0% | .71 |
| F | 72 | 5.2% | 277 | 3.5% | .67 |
| G | 18 | 1.3% | 35 | .4% | .31 |
| H | 21 | 1.5% | 193 | 2.4% | 1.60 |
| I | 13 | .9% | 92 | 1.1% | 1.22 |
| X | 15 | 1.1% | 177 | 2.2% | 2.00 |
| Y | 166 | 12.0% | 840 | 10.5% | .86 |
| Total | 1,387 | 100.0% | 8,008 | 100.0% | |

A = Civil, direct appeal from district court, nondiversity
B = Civil, direct appeal from district court, diversity
C = Criminal, direct appeal from district court
D = Collateral review of state conviction
E = Collateral review of federal conviction
F = Direct appeal from a federal administrative agency
G = Original proceedings (e.g., mandamus)
H = Virgin Islands, civil
I = Virgin Islands, criminal
X = Two or more case codes
Y = Unknown

## Case Time and Activities

While there is a variation in the time burden associated with cases as reflected in the weights above, the pattern of expenditure of time within each case is strikingly similar. [Table 5] summarizes the major activity patterns for the major case types.

**TABLE 5**
**Case Time: Major Types by Activity**

| Type | | Preparation | Argument | Conference | Opinion |
|---|---|---|---|---|---|
| A | Civil, nondiversity | 32% | 6% | 6% | 51% |
| B | Civil, diversity | 34% | 8% | 9% | 49% |
| C | Criminal, direct | 29% | 8% | 8% | 47% |
| D | Collateral review, state | 34% | 5% | 5% | 47% |
| E | Collateral review, federal | 27% | 2% | 8% | 46% |

These data demonstrate that the court does not have a differentiated processing for the various types of cases coming before it. Whether there should be a differentiated pattern is a matter for court decision. In the light of widespread comment that prisoner petition cases present repetitive, lightweight issues, it is noteworthy that they are processed in the same pattern as federal question cases presumed to be more distinctive and heavyweight. Therefore, if different types of cases present differing responsibilities and opportunities in terms of the two basic functions of error correction and law declaring, the court has not found a way to develop patterns of time usage responsive to the functions.

## Staging Analysis

As mentioned above, the effort here is to relate the expenditure of judge time to the elapsing of calendar time. Logical stages in the processing of cases were established from the progressive activity reflected in the activity codes. Correlation analysis was performed to determine the extent of correlation between the two types of time in each stage of the process. . . . Briefly summarized, the findings are:

1. Correlation analysis on the two types of time does not yield clear-cut correlations when we considered all cases. That is, a tendency of cases that consume much judge time also to require much calendar time was not clearly demonstrated. Neither did such correlation emerge when we performed it on subsets of individual case types.

   We did find, however, that there is a tendency for the various case types, taken as a whole, to produce some overall

relationships between judge time and calendar time. We applied the formula for weights described above to elapsed days to produce relative weights for each case type. Both weights are listed [in table 6].

There are substantial differences between the two weight columns, but the relative rank of weights on the two columns is very nearly the same, especially if we discount the perturbing effect of the Virgin Islands cases.

**TABLE 6**
**Case Weights:**
**Judicial Case Time and Elapsed Calendar Time**

| Type | | Hours Weight | Days Weight |
|---|---|---|---|
| A | Civil, nondiversity | 1.35 | 1.11 |
| B | Civil, diversity | 1.46 | 1.46 |
| C | Criminal, direct | .72 | 1.04 |
| D | Collateral review, state | .53 | .75 |
| E | Collateral review, federal | .94 | .82 |
| F | Direct, federal agency | .80 | .94 |
| G | Original proceeding | .59 | .12 |
| H | Virgin Islands, civil | 2.47 | 1.35 |
| I | Virgin Islands, criminal | 1.83 | 1.01 |
| X | Two or more case codes | 1.92 | 1.64 |
| Y | Unknown | .69 | .84 |

2. Case flow: Average duration of cases was about 8-1/2 months. Of this, 4-1/2 months elapsed from notice of appeal to ready date supplied by the clerk; 2-1/2 months from ready date until the first time expenditure by a judge; 1/2 month from the first judge time entry until conference; and 1 month from conference to closing.

   About 85 percent of the total elapsed time occurs before the first attention is given to a case by a judge. Therefore, very small impact on the total time to disposition could be expected from reordering the way judge time is expended, but significant impact could be achieved from reordering *when* the time is expended. Without interfering in the process by which the cases reach a ready date, and without interfering in how judges handle cases once they get them, there is an

opportunity to reduce the present 8-1/2 months to the frequently mentioned goal of 6 months simply by getting the cases into the hands of the judges immediately after they reach a ready state.

3. Interdependence of activities: We did not find observable interdependence of activities in the various stages of processing. That is, we did not find that when one stage lengthens, all stages lengthen; nor when one lengthens does another shorten to compensate for it. The chief reason for lack of interdependence is probably that 85 percent of lapsed time occurs before the first judge activity. Put another way, 100 percent of judge activity is concentrated in 15 percent of the life of a case. The opportunity for significant interdependence to develop is therefore marginal.
4. Cases ultimately terminated by opinion consumed a significantly greater portion of judge time than those terminated without opinion. This was not surprising, since opinion time is such a big consumer of judge time. It was surprising, however, to find that opinion cases received substantially more time at the *preparation stage* than cases without opinion. This suggests that relatively more difficult or important cases are recognized early and begin receiving a larger share of preparation time before conference. That might mean that the suggested early classification could be fashioned to take into account difficulty as well as case type.
5. The preceding observation on the relationship between consumed judge time and opinion cases can also be made about elapsed time; opinion cases have very long periods between appeal date and the commencement of activity by judges. This suggests that the early recognition of difficulty or importance is shared by litigants and others and perhaps finds expression in greater willingness by the appellate court to extend deadlines. If this is the case, this early recognition might be utilized to trigger special monitoring like that used in criminal cases.

6. Long opinions, whatever their vices for other reasons, do not contribute significantly to delay. Indeed, there is not any correlation between the length of opinions and the amount of time expended on them.

An added note on case-related activities: The Center will not publish a report dealing with variations on a judge-by-judge basis. Such reports have been delivered to the court at interim points in the study and final ones have been prepared. As expected, they exhibit considerable variation. In the Third Circuit, operating as it does with a high degree of collegiality, these variations may be a strength rather than an organizational weakness. So long as a judge is not seriously affecting the time standards of the court, pressure for "efficiency norms" may have more deleterious than beneficial effects. This is particularly true since such a small portion of elapsed time occurs during the period of judicial activity.

# APPELLATE COURT CASEWEIGHTS PROJECT[1]

**Division of Research, Federal Judicial Center**
**June 1977**
**(FJC-SP-77-3)**

## Summary

The Appellate Court Caseweights Project was an attempt to develop an accurate and objective measure of caseloads in the United States courts of appeals. The utility of such a measure is that it would serve as a basis for equitable allocation of judicial resources to courts, or of cases to individual judges.

To the extent that caseloads of the United States courts of appeals have been measured in the past, such measurements have been based on what may be called "gross case-processing volume." The number of cases filed per year or the number terminated per judgeship are common caseload measures based on gross case-processing volume. It is well recognized, however, that such measures may offer inaccurate comparisons of the actual workloads of judges or of courts. While ten antitrust cases typically would require far more work than would ten criminal appeals, caseload measures based on gross case-processing volume do not recognize such differences. One obvious solution to this problem is to "weight" cases according to their difficulty (by determining, for instance, that an antitrust case is the workload equivalent of four criminal appeals).

In 1974, the Federal Judicial Center initiated an Appellate Court Caseweights Project to develop a method for weighting appellate

[1] This report is reprinted here in its original form, except that footnotes have been renumbered. Ed.

court cases and thus to produce weighted caseload measurements for the courts of appeals. This paper presents an analysis of the results of that project.

The Center's previous efforts at developing case weights were conducted in district courts and required detailed timekeeping by judges. From the time records, the Center computed the total amount of judge time expended for given types of cases, and the total number of cases of each such "case type," and thus determined relative weights for each "case type." This timekeeping method imposed a substantial burden on participant judges, but the results did not seem to justify the imposition. The time-per-case spent on cases of the various case types varied substantially between districts and between circuits, suggesting that the weights were not as accurate as might have been desired.

In the project here reported, the Center used a more direct method: It simply asked judges (from three courts of appeals) for their estimates of the relative workload, or burden, associated with each of twenty-three case types.[2] Those estimates, together with the judges' estimates of the total time they spend working on cases in a year, are the data upon which this analysis is based.

Since the project obtained a set of burden estimates[3] from each of the three participating courts, the first step in the analysis was to compare, for each case type, the three burden estimates obtained. This comparison showed rough agreement among the courts, but enough disagreement to suggest that the accuracy of estimates was, at best, only slightly better than that obtained in the district court timekeeping study.

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[2] This set of case types was the product of the combined efforts of an ad hoc panel of judges, personnel of the Center, and the project contractor. It was designed to: (1) include all cases brought before the courts of appeals, (2) be not so extensive as to make the estimation process a severe burden on judicial time, (3) have category labels which clearly indicated the types of cases included in each category, (4) assure that each category contained cases of similar burden, and (5) be susceptible to unambiguous translation into the categories in which the Administrative Office labels appellate cases. The case types are listed in table 1.

[3] A set of burden estimates contains twenty-three numbers, each representing the burden, or case weight, ascribed to one of the twenty-three case types.

The second level of analysis was the comparison of the judges' estimates of their case-related work year[4] with work-year hours computed from the burden estimates. The burden estimates yield figures for the number of judge hours required to dispose of a typical case of each case type. Given the number of cases of each case type in the caseload of a particular court in a year, along with the burden estimates, it is a straightforward matter to compute the total number of hours such a caseload would require of each judge. The comparison of computed and estimated hours per judgeship per year showed only a rough level of agreement. Computed values for the typical work year were generally higher (by as much as 98 percent) than the judges' estimates, which suggests that the judges overestimated the time actually devoted to some or all of the case types. While there is a strong argument that the explanation for this discrepancy lies not so much with the judges' inability to estimate as with the particular methodology employed, the conclusion is clear that the burden estimates are not valid measures of actual judge time required by cases of the twenty-three case types.

A third, more sophisticated level of analysis was then employed. The burden estimates were taken only as relative weights, with their unit of measurement (hours), being ignored. Thus per-judge caseload measurements were computed in much the same manner as that mentioned above, but were used only for relative comparisons of workloads. For example, if a given caseload measurement computation yielded values of 3,000 "units"[5] per judgeship for court A, and 2,000 units per judgeship for court B, this was taken only as an indication that the workload in court A was 50 percent greater than that in B. By computing per-judge caseload measurements for each of the eleven courts of appeals, and then computing the average of those eleven values, standardized measurements could be obtained by expressing each value as a percentage of the average. Under this scheme, a court with a caseload measure of 100 was considered average in its per-judge workload, while a court with a measure of 150 had 50 percent more work than the "average" court. Since three sets of burden es-

[4] That is, the total time they spend on case-related work in a year.
[5] The meaning of those units (e.g., hours) being ignored.

timates were available (one set from each participating circuit), three different standardized caseload values were computed for each of the eleven courts.

The first result of this third level of analysis was that, for all but one of the eleven courts, the three standardized caseload values were in very close agreement. This meant that, despite the apparent differences among the three sets of burden estimates, they yielded very similar caseload values (hereinafter termed "weighted caseload values," since they employ the burden estimates as case weights).

The second and more important result of this analysis was that these weighted caseload values also agreed very closely with *un*-weighted standardized caseload values (based on gross case-processing data, such as terminations per judgeship per year). The conclusion was clear: Weighting had very little effect on caseload measurements.

The reason for the ineffectiveness of weighting—as evidenced by the similarity of caseload measurements based on weighted and unweighted case terminations—was not difficult to infer. If the caseload of a given court is broken down into categories based on case difficulty (i.e., by the amount of judge time required by the case), that caseload can be identified with a "case difficulty distribution," such as 5 percent hard cases, 60 percent moderate cases, 35 percent easy cases. The reason for the ineffectiveness of case weighting thus appears to be that courts of appeals have very similar "case difficulty distributions."[6] If this is indeed true, then it can be seen in retrospect that case weighting could not be expected to have any significant effect. Weighting is useful in relative caseload measurement only if the caseloads to be measured have different "case difficulty distributions." If those distributions are all the same, then weighted and unweighted caseload measures are equally valid.[7]

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[6] The D.C. Circuit is an exception.

[7] The crux of this thesis is that the concern is with relative caseload measurements. A simple analogy: If basket A contains ten apples and four oranges (cases) and basket B contains five apples and two oranges, then no matter what the prices (weights) of apples and oranges may be, basket A will cost twice as much as B.

The conclusion to be suggested is that, since the courts of appeals have such similar caseloads, caseload weighting cannot be expected to have a substantial effect on relative caseload measurements. Unfortunately, this conclusion can only be *suggested,* because the analysis has led to another, perhaps more important, conclusion: that the inconsistencies in appellate court statistical reporting are of sufficient magnitude that they render impossible any statistical analysis of the precision necessary to fully evaluate such matters as case weights.

Appellate court caseload measurements must be founded on data relating to the volume of cases handled in those courts. If, for instance, such measurements are to be based on case filings (be they weighted or unweighted), then of course it is necessary to know how many filings each court has. But the definition of "filing" must remain constant. If the same caseload would in one court be counted as 1,000 filings, but in another as 1,500, then obviously any caseload measure based on filings would be quite misleading. Unfortunately, it appears that nonuniformity of that sort may exist in much of the data reported by the appellate courts. An intimate look at the data produced in the computer analysis for this project reveals several anomalies that can most optimistically be described as "curious."[8] A less than optimistic view of the data suggests that much of the appellate court statistical data (from Form JS-34 reporting) is unreliable.

The clearest and most important conclusion of this analysis is that appellate court statistical reporting must be reviewed and probably revised to assure that each *reported* case event (e.g., a filing) represents the same *actual* event in each circuit. Any use of appellate court caseload data must rest on shaky ground until the uniformity of that reporting is assured. This conclusion does not, however, lay to waste the efforts of the judges who participated in this project. At the least, their efforts have suggested a most significant result regarding case weighting in the courts of appeals; at best, their efforts may prompt a major improvement in the data

[8] For a more thorough discussion, see *infra* text accompanying notes 15-18.

base upon which much of the analysis of developments in appellate court administration must depend.

The main text of this paper provides a somewhat more detailed description of the project itself, and a more thorough discussion of the various analyses mentioned above.

## I. Description of the Project

The purpose of this project was to test a new method for determining the judge time required by various types of cases. The utility of knowing such time requirements, or case "burdens," is that they might provide a means to evaluate more precisely the burden of a given court's or judge's caseload, and thus provide objective standards for allocation of cases to panels and for allocation of judicial resources to courts. While several previous studies have attempted to measure case burdens in terms of time, they generally have not provided results of satisfying consistency. Moreover, these studies usually have employed the rather expensive and time-consuming method of having judges keep detailed time records. The new method tested in this project avoided timekeeping in favor of simply asking judges to estimate how much of their time a given type of case typically consumes.

The particular estimation method employed was a three-stage iterative plan. In the first stage, the judges from three courts of appeals completed a questionnaire in which they evaluated a taxonomy of twenty-three case types,[9] and then estimated the relative

[9] Defining this taxonomy was in itself a substantial task. In order to be useful to the aim of this project, the taxonomy had to: (1) include all cases brought before the courts of appeals, (2) be not so extensive as to make the estimation process a severe burden on judicial time, (3) have category labels that clearly indicated the types of cases included in each category, (4) assure that each category contained cases of similar burden, and (5) be susceptible to unambiguous translation into the taxonomy by which the Administrative Office labels appellate cases (so that we could determine how many cases in each of our categories were handled by each court). Seven existing taxonomies were examined for their conformity to these criteria, but none was found suitable. The combined efforts of an ad hoc panel of judges, personnel of the

time burden of each case type. This time burden was estimated relative to a "base case," with the "typical" direct criminal appeal[10] serving as this base. Thus burden was given in base case units. The base case had by definition a weight of 1. A case estimated to require twice as much time as the base case would thus have a burden (or "weight") of 2, while a case taking only three-fourths the time of the base case would have a weight of 0.75. In order to provide a conversion factor for translating base case units to actual time burdens, the judges also estimated the time, in hours, required for the base case. In the second stage, the judges of each circuit met with project personnel to reexamine the questionnaire results. At these meetings, a Consensor (an electronic voting device) was used to facilitate presentation of the judges' patterns of "voting" on case burdens and to aid in moving them toward "consensus." The final stage of the estimation method was a follow-up questionnaire, which presented the meeting results and asked for a final reevaluation of the burden estimates. At each of the estimation stages, the judges indicated not only their estimate of case type burdens, but also a numerical indication of the confidence they had in their estimate. The group judgments of burdens (in base case units) and hours required per base case were then computed as confidence-weighted averages, with the effect that the vote of a judge expressing a confidence of 10 would count twice as much as a vote with confidence of 5.

In addition to estimating case type burdens, the judges also provided estimates for two ancillary data sets. In order to provide a basis for evaluating reasonableness of the burden estimates, the judges were asked to estimate their total time expenditures in a year. With an eye toward possible future elaboration or simplification of the case type taxonomy, the judges also were asked to evaluate the "adequacy" of certain "indicators" of case burden. The indicators are descriptors of case characteristics (e.g., number of parties before the court; procedural stage at termination of appeal);

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Federal Judicial Center, and the project contractor were necessary to devise the taxonomy that was submitted to the participating circuits.

[10] Except in the Sixth Circuit, where the judges felt that Diversity Motor Vehicle Personal Injury cases would be a more stable reference point.

and the judges used a numerical scale to evaluate the adequacy of each indicator as a correlate to case time burden.

## II. Results

The final data results of the project[11] are presented in tables 1, 2, and 3. The tables include the case type burden weights and converted burden hours, the average judge work-year time breakdown, and the indicator adequacy data. These data are presented for each of the three courts, with averages developed across the three courts presented in a fourth column.

## III. Analysis of Results

### Approach

The principal question for analysis of the burden estimates is whether these estimates appear to be useful in measuring caseload burdens. Their utility would be clear, of course, if they proved to be accurate measures of the actual time burdens imposed by the "typical" cases of the various case types. However, the problem here is that there are no standards against which to compare the estimated burdens; we do not know how much time a given type of case *does* take. The only alternative short of measuring that time is to examine both the internal consistency (the extent to which the three circuits agree on the burden hours) and external consistency (the extent to which measurements of total court caseload based on the burden estimates for individual case types agree with each other or with other caseload estimates).

[11] Note that the "final" case burden data for the D.C. Circuit is in reality the product of the meeting (second stage of estimation). Because the D.C. follow-up questionnaire asked for reestimation of burdens for *groups* of case types, and only three of these questionnaires provided thorough responses, we feel that the final D.C. results are not as reliable as the meeting results.

## TABLE 1
## Case Type Burdens

| Case Type | D.C. Circuit Burden | | Sixth Circuit Burden | | Eighth Circuit Burden | | Average Burden | |
|---|---|---|---|---|---|---|---|---|
| | Weight | Hours | Weight | Hours | Weight | Hours | Weight | Hours |
| 1. Tax Court of the U.S. Cases | 2.8 | 8.1 | 2.7 | 16.7 | 1.9 | 14.1 | 2.5 | 13.0 |
| 2. NLRB Cases | 2.8 | 8.1 | 1.4 | 8.7 | 1.0 | 7.4 | 1.7 | 8.1 |
| 3. Power, Transportation, and Communication | 10.1 | 29.3 | 3.3 | 20.5 | 3.2 | 23.7 | 5.5 | 24.5 |
| 4. Health, Safety, and Environment | 9.9 | 28.7 | 3.9 | 24.1 | 1.4 | 10.4 | 5.1 | 21.1 |
| 5. Other Regulatory Agency Cases | 9.3 | 27.0 | 3.0 | 13.7 | 2.6 | 19.2 | 5.0 | 20.0 |
| 6. Original Proceedings | 2.7 | 7.8 | .3 | 1.9 | .7 | 5.2 | 1.2 | 5.0 |
| 7. Civil Rights | 4.5 | 13.1 | 3.7 | 22.9 | 3.2 | 23.7 | 3.8 | 19.9 |
| 8. Prisoner Actions Other Than Collateral Attack | 2.8 | 8.1 | .3 | 1.9 | .7 | 5.2 | 1.3 | 5.1 |
| 9. Labor | 3.8 | 11.0 | 2.8 | 17.3 | 1.7 | 12.6 | 2.8 | 13.6 |
| 10. Antitrust | 9.6 | 27.8 | 5.1 | 31.6 | 5.8 | 42.9 | 6.8 | 34.1 |
| 11. Patents | 4.0 | 11.6 | 5.1 | 31.6 | 5.0 | 37.0 | 4.7 | 26.7 |
| 12. Copyright, Trademark, and Unfair Trade Practices | 4.0 | 11.6 | 3.0 | 18.6 | 3.2 | 23.7 | 3.4 | 18.0 |
| 13. Bankruptcy | 3.3 | 9.6 | 1.6 | 9.9 | 1.6 | 11.8 | 2.2 | 10.4 |
| 14. Tax Suits | 4.0 | 11.6 | 2.0 | 12.4 | 1.9 | 14.1 | 2.6 | 12.7 |
| 15. Securities, Commodities, Exchanges, and Stockholder Actions | 4.5 | 13.1 | 3.0 | 18.6 | 4.9 | 36.3 | 4.1 | 22.7 |

*(table continued)*

**TABLE 1** *(Continued)*

| Case Type | D.C. Circuit Burden | | Sixth Circuit Burden | | Eighth Circuit Burden | | Average Burden | |
|---|---|---|---|---|---|---|---|---|
| | Weight | Hours | Weight | Hours | Weight | Hours | Weight | Hours |
| 16. Injury Actions by Marine & Railway Employees | 3.6 | 10.4 | 2.0 | 12.4 | 1.9 | 14.1 | 2.5 | 12.3 |
| 17. Other Marine Actions | 4.0 | 11.6 | 2.2 | 13.6 | 2.2 | 16.3 | 2.8 | 13.8 |
| 18. Suits Challenging Validity of Action or Inaction of Federal Agencies or Officials | 9.6 | 27.8 | 1.4 | 8.7 | 3.1 | 22.9 | 4.7 | 19.8 |
| 19. Other Civil Actions Based on Federal Statutes | 4.0 | 11.6 | 1.4 | 8.7 | 1.7 | 12.6 | 2.4 | 11.0 |
| 20. Other Civil Actions with U.S. as Plaintiff | 3.5 | 10.2 | 1.5 | 9.3 | 1.7 | 12.6 | 2.2 | 10.7 |
| 21. Diversity Actions | 2.8 | 8.1 | 1.9 | 11.8 | 2.2 | 16.3 | 2.3 | 12.1 |
| 22. Direct Criminal Appeals | 1.0 | 2.9 | 1.0 | 6.2 | 1.0 | 7.4 | 1.0 | 5.5 |
| 23. Collateral Attacks | 1.2 | 3.5 | .4 | 2.5 | .8 | 5.9 | .7 | 4.0 |
| 19A.* Freedom of Information Act | 6.4 | 18.6 | | | | | | |
| 7A.* School Desegregation | | | 6.6 | 40.9 | | | | |
| 16A.* Social Security | | | .9 | 5.6 | | | | |
| 4A.* Environmental Protection Agency Cases | | | | | 3.6 | 39.2 | | |

*These case types represent special additions to the taxonomy made during the meetings. Each of these was recognized as a separate case type by only one court. Thus, for instance, while the Sixth Circuit assigned separate burdens to school desegregation cases (Type 7A), and civil rights cases [other than school desegregation] (Type 7), the other circuits assigned burdens only to the more general category, civil rights cases (Type 7).

**TABLE 2**
**Average Judge Work-Year Data**

| | D.C. Circuit | Sixth Circuit | Eighth Circuit | Average |
|---|---|---|---|---|
| Gross work year (hours) | 2,740 | 2,850 | 2,500 | 2,697 |
| Percentage of work year spent on non-case-related work | 22% | 26% | 24% | 24% |
| Time spent on motions not related to cases (hours) | 72 | 179 | 105 | 119 |
| Total time devoted to submitted cases (computed from above; hours) | 2,065 | 1,930 | 1,795 | 1,930 |
| Percentage of case time spent on extreme cases* | 33% | 40% | 26% | 33% |

*This figure was elicited because the judges were instructed to disregard "extreme" cases in arriving at their burden estimates. The extreme cases were defined as the 10 percent most burdensome and 10 percent least burdensome cases. The use of this figure is discussed in the section on analysis.

**TABLE 3**
**Average Adequacy Values for Indicators***

| Indicator | D.C. Circuit | Sixth Circuit | Eighth Circuit | Average | Average Rank |
|---|---|---|---|---|---|
| 1. Number of parties before appellate court | 5.2 | 2.7 | 1.8 | 3.2 | 15 |
| 2A. Federal government present as appellant | 7.7 | | | 7.7 | |
| 2B. Federal government present as a party | 5.2 | 2.4 | 1.2 | 2.9 | 19 |
| 3. Number of cross-appeals | 5.9 | 3.9 | 3.3 | 4.4 | 11 |
| 4. Number of issues presented in briefs | 6.2 | 2.7 | 3.8 | 4.2 | 10 |
| 5. Presence of an opinion from the district court | 5.3 | 4.1 | 3.8 | 4.4 | 9 |
| 6. Type of counsel for parties (e.g., retained, appointed, house counsel, pro se, etc.) | 5.4 | 2.3 | 1.2 | 3.0 | 18 |
| 7. Nature of relief sought in trial court (e.g., money damages, injunction) | 4.2 | 1.7 | 2.5 | 2.8 | 20 |
| 8. Length of appendixes from district court | 4.5 | 3.2 | 4.5 | 4.1 | 12 |
| 9. Number of amicus curiae briefs filed | 5.2 | 3.1 | 3.8 | 4.0 | 13 |
| 10. Aggregate length of all briefs filed | 6.3 | 4.3 | 5.4 | 5.3 | 7 |
| 11. Number of motions disposed of with hearing | 6.0 | 1.0 | 1.6 | 2.9 | 16 |
| 12. Time used in oral argument | 5.9 | 4.8 | 4.9 | 5.2 | 8 |
| 13. Procedural stage at termination of appeal | 8.0 | 7.8 | 4.9 | 6.9 | 4 |
| 14. Length of disposition (e.g., number of pages, with oral dispositions translated to page equivalent | 6.8 | 5.8 | 5.4 | 6.0 | 6 |
| 15. Type of disposition (e.g., signed or per curiam, etc.) | 6.9 | 6.9 | 6.3 | 6.7 | 2 |
| 16. Presence of dissenting or concurring opinions | 6.4 | 6.1 | 5.6 | 6.0 | 5 |
| 17. Aggregate length of all dissenting and/or concurring opinions | 6.6 | 6.2 | 6.2 | 6.3 | 3 |
| 18A. Petition granted for en banc review | 8.8 | 8.8 | 6.3 | 8.0 | 1 |

*(table continued)*

**TABLE 3** *(Continued)*

| Indicator | D.C. Circuit | Sixth Circuit | Eighth Circuit | Average | Average Rank |
|---|---|---|---|---|---|
| 18B. Petition for en banc review | 1.7 | | 1.0 | 1.4 | 21 |
| 19. Number of citations in all opinions (including repetitions) | 3.0 | 3.0 | 3.6 | 3.2 | 16 |
| 20. Number of citations in all opinions (excluding repetitions) | 3.6 | 3.0 | 3.6 | 3.4 | 14 |

*Adequacy was valued on a scale from 0 to 10, with 0 meaning the indicator would be of no value in indicating case burden, and 10 meaning the indicator would correlate nearly perfectly with case time burden.

## Internal Consistency

Internal consistency may be analyzed in a relatively subjective manner. By referring to table 1, and comparing the burden hours estimates across circuits, one will note instances where case types exhibit both close agreement and strong disagreement. Two examples of this phenomenon are case type 13 (Bankruptcy), where there is rather close agreement among the circuits on burden hours, and case type 5 (Other Regulatory Agency Cases), on which the circuits disagree rather strongly. Since cross-circuit disagreement on time burdens tends to detract from the potential utility of a standard set of case type burdens, it is most desirable to identify the reasons why certain case types exhibit such disagreement.

A variety of possible reasons for cross-circuit variation in case type time burdens may be suggested. One likely explanation is that there are actual variations in the burden of a case type due to variations in applicable law or other regional characteristics (e.g., the D.C. Circuit may tend to get more difficult regulatory agency cases; diversity actions may vary in difficulty according to applicable state law). Another possible reason for the disagreement is that certain case types in the taxonomy are not sufficiently narrow or unambiguous to assure that the judges of each circuit were really

considering the same sorts of cases when they made their burden estimates. A more basic and perhaps more compelling explanation is simply that, no matter how specific the case type may be, the experience of judges or of courts with that case type will usually be quite varied. In other words, it may be that even within a very narrow class of cases, the time required by individual cases will vary across a broad range without tending to cluster about a "typical" time that is susceptible to accurate estimation. Thus, even though a court has experienced the full range of difficulty of cases within a given case type, it may not be able to distill an average or "typical" case time. Moreover, a court that has experience mostly with the "easier" cases of a given case type would, of course, estimate a lower burden time than would a court that has experienced mostly "harder" cases.

The suggestion that cross-circuit variation in case type time burdens is due to inherent variation in the cases with a case type and/or variation in the experience of the circuits with that case type finds some support from the Center's 1969-1970 federal district court time study. That study obtained detailed time records from over 60 percent of all district judges, from which were derived case type time burdens for a very detailed taxonomy of trial cases. While the district court time study is not directly comparable to the present study, it is worth noting that there the variations among case type time burdens were generally similar to, but slightly larger than, the cross-circuit variations obtained in the present study.[12] This result suggests that the variations observed in the present study may stem from variations in judge experience, not from the method used.

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[12] This result was obtained by comparing normalized variations in burden time. For a given case type, the average of all burden time estimates was divided into the maximum deviation of all estimates from that average. The resulting normalized variation thus is an expression of the maximum deviation from the average as a percentage of the average (e.g., for three burden time estimates of 2, 6, and 7 hours, the average is 5 and the maximum deviation from 5 is 3 hours; 3 is 60 percent of 5, thus the normalized variation is 60). In the present study, the average normalized cross-circuit variation for all case types was 36, while in the district court study, the average "expected" variation was about 46.

While we have suggested that there is some inherent variability associated with the process of assigning time burdens to case types within a taxonomy, it is far from clear that *all* of the variability experienced in this project was unavoidable. We must still consider whether refinements in the taxonomy could reduce cross-circuit disagreement on time burdens. The possibility remains that some of this disagreement was caused by ambiguous or overbroad case type descriptions. Resolving this possibility, however, requires the considered advice of the judiciary. Only the judges can know whether a given case type description represents a true family of similar cases. In the end, of course, we must recognize that there can be no perfect taxonomy—every case is unique to some extent, hence every taxonomy of cases is imperfect. It is a matter of degree, and precise measurement of the degree is impossible.

## External Consistency—Absolute Caseload Measures

As shown in table 2, the circuit judges were asked to make estimates on various facets of their work year. These data provide one device for gauging external consistency of the burden estimates. The table 2 data provide an estimate of the total judge time devoted to relevant cases.[13] The burden estimates, along with the Administrative Office data on cases handled in each circuit in 1975, provide the means to compute the same quantity. By summing the product of burden hours and the number of relevant cases for each case type, a computed case time can be derived. Since the judges were instructed to direct their burden estimates at the middle 80 percent of each case type (i.e., nonextreme cases), the estimated and computed case times must be adjusted accordingly. The comparison of these two adjusted values, as illustrated in table 4, is a measure of external consistency.

[13] What the precise definition of "relevant cases" (i.e., those cases to which the burdens are applicable) should be is not clear. Relevant cases could mean all cases terminated, or only those terminated "with judicial action." As discussed below, the most reliable definition available, though not necessarily the most logical, confined relevant cases to those terminated after submission or oral hearing, with brief(s) filed. Unless otherwise noted, that definition will be applied hereinafter.

**TABLE 4**
**Comparison of Estimated and Computed Case Times (Adjusted Values)**

| Circuit | Estimated Time per Judgeship on Relevant Cases (Hours) | Time per Judgeship on Same Cases, Computed on Basis of Burden Estimates (Hours), FY 75 | Computed Time as a Percentage of Estimated Time |
|---|---|---|---|
| D.C. | 2,065 | 2,108 | 102% |
| Sixth | 1,930 | 3,828 | 198% |
| Eighth | 1,975 | 2,776 | 155% |

While it is clear that there is substantial difference between the estimated and computed values for the Sixth and Eighth Circuits, the result may nevertheless be seen as encouraging. The values computed on the basis of the case type time burdens are not so unrealistic as to suggest that the individual burden estimates are grossly inaccurate. Indeed, since it is the estimated time burden of the base case (direct criminal appeal) that determines the time burdens of all case types (the other case types were assigned burdens *relative* to the base case), misestimation of the the single figure "base case hours" directly affects the total computed time per judgeship. For instance, if the Sixth Circuit had estimated that the typical direct criminal appeal took four hours (instead of the 6.2 hours actually estimated) then its computed time per judgeship would have been 2,470 hours, instead of 3,828. Since wide variability in the difficulty of direct criminal appeals might make a 50 percent overestimation of average time consumption quite understandable, it might well be suggested that discrepancy between the estimated and computed time-per-judgeship figures is not so much the fault of the judges' inability to estimate as it is of the methodology that caused the computed figures to rely so heavily on a single estimate among many. While some tendency toward overestimation of burdens is suggested, it nonetheless appears fair to say that there is some promise in this method of estimating caseload burden.

In order to determine whether variations of this estimating method might have produced computed caseload estimates more consistent with the judges' work-year estimates, several methods of computing caseloads from the burden estimates were developed and tested. Each of these variations is discussed briefly below, and a comparative chart of the results is presented in table 5.

**TABLE 5**
**Comparison of Various Computations of Caseload: Hours per Judgeship per Year Spent on Submitted Cases, with Average for Three Circuits, and Caseload as a Percentage of Estimated Caseload (in Parentheses)**

| | D.C. Circuit | Sixth Circuit | Eighth Circuit | Average |
|---|---|---|---|---|
| Judges' estimated caseload | 2,065(100%) | 1,930(100%) | 1,795(100%) | 1,930(100%) |
| Computed caseload based on: | | | | |
| (a) Precise computation | 2,108(102%) | 3,828(198%) | 2,776(155%) | 2,904(152%) |
| (b) Nonadjusted computation | 1,766 (86%) | 2,871(149%) | 2,568(143%) | 2,401(126%) |
| (c) Three-case-type taxonomy | 1,911 (93%) | 2,602(135%) | 2,536(141%) | 2,350(123%) |
| (d) D.C. three type taxonomy | 1,911 (93%) | 2,703(140%) | 2,064(115%) | 2,226(116%) |

## Variations of Caseload Computation

**Precise computation.** This is the same computation as that used for table 4.

**Nonadjusted computation.** This method ignores the adjustments for the 20 percent "extreme" cases and computes caseload as the sum, over all case types, of the products of time burden and number of cases.

**Three-case-type taxonomy.** This method simplifies the taxonomy into three general case types selected in a fairly subjective manner. The three general case types are:

(1) *High burden,* consisting of case types 3, 4, 10, and 11 of the original taxonomy.

(2) *Low burden,* consisting of case types 2, 6, 22, and 23.

(3) *Medium burden,* including all other cases.

The time burden assigned to each of these three case types was the average of the burden hours of each of the original taxonomy case types included within them (e.g., the burden hours for the high burden case type is the average of the burden hours of case types 3, 4, 10, and 11). The computation of caseload was analogous to that of variation (b), above.

**District of Columbia three-type taxonomy.** This computation applied the burdens for the D.C. Circuit three-case-type taxonomy to the caseloads of the circuits.

Table 5 indicates that the two computations based on the three-case-type taxonomy (c, d) achieve greater consistency with the judges' estimated caseload time than do those based on the larger, twenty-three-case-type taxonomy. While this tends to indicate that a less extensive taxonomy may serve our purposes as well as the taxonomy used in this project, this result is one that should be taken with a substantial grain of salt. Several problems are apparent. First, the three-case-type taxonomy is merely the most consistent of several computational approaches that were tried. It is practically certain that, after significant effort, some method of manipulating the results could be found that would achieve near-perfect consistency with the judges' estimates; but that does not mean that such a manipulation would achieve success in a subsequent application. Secondly, the time burdens associated with the three case types were ones derived by the Center and are not necessarily representative of what the judges' estimates might have been had they been asked for burden estimates for this simplified taxonomy. Finally, as mentioned previously, the various caseload computation devices are judged here by their degree of *consistency* with the judges' estimates of caseload. Since there is no way of knowing how accurate those estimates are, there is no way of knowing whether consistency correlates with accuracy. It may be that the caseload computations based on the twenty-three-case-type taxonomy are in fact the more accurate ones.

## External Consistency—Relative Caseload Measures

The most revealing analysis of the case type burden estimates is that which views them as a device for relative (as opposed to ab-

solute) caseload measurement. Here the burden estimates are used merely to compare among several caseloads and not to determine the actual caseload burdens in hours. Thus, for instance, the D.C. Circuit estimates gave case type 11 (Patents) a weight of 4, and case type 22 (Direct Criminal Appeals) a weight of 1. A caseload of ten patent cases (40 units) is thus twice as burdensome as a caseload of two patent cases and twelve direct criminal appeals (20 units).

One way of testing consistency of the burden estimates in relative measurements of caseloads is to apply the three sets of estimates (from the D.C., Sixth, and Eighth Circuits) to the 1975 caseloads of each of the eleven circuits, and then compare the relative caseload burdens of each of the eleven courts across the three different sets of estimates. In order to make such comparisons, however, an adjustment must be made for the fact that a "unit" of burden under one of the three sets of estimates is not necessarily the same as a unit from another set. In other words, since the concern here is with *relative* caseload measures, it matters not that according to one set of burden estimates, circuits A and B have average caseloads measured at 3,000 and 2,000 units (respectively), but are measured at 1,500 and 1,000 units according to another set of estimates. In each instance, circuit A is 50 percent more "burdened" than circuit B. Alternatively, it may be observed that in either case, circuit A has a caseload burden equal to 120 percent of the average burden (e.g., the average of 3,000 and 2,000 is 2,500, and 3,000 is 120 percent of 2,500). Such adjustments have been employed to compare the three sets of burden estimates as estimators of *relative* caseload burdens; for each set of burden estimates, the caseload measure of each of the eleven circuits is computed, the average of those eleven values is calculated, and then each circuit's measure is expressed as a percentage of that average.

A comparison of these relative caseload values is presented in table 6. That table provides, for each circuit: per-judgeship weighted caseloads (relative to the average) as computed from each of the three sets of case type burden estimates (columns 1 through 3), and a number of relative caseload measures based on gross (unweighted) per-judgeship case-processing data (columns 4

through 8). The three most striking features of table 6 are: the surprising similarity of the three sets of weighted caseload values (similarity of columns 1, 2, and 3); the equally strong similarity between the measures based on unweighted relevant cases (column 4) and the weighted measures (columns 1-3); and the inconsistency between these four measures and any of the other caseload measures (columns 5-8). Each of these features suggests significant implications on the utility of weighting and/or of caseload measurements in general.

The consistency of the three weighted caseload measures is apparent from the fact that, except for the D.C. Circuit, the maximum difference among the three measures of a given circuit is 11 percentage points (the Second Circuit was rated 99—just below average—according to the D.C. Circuit's burden estimates, and 110—10 percent above average—by the Eighth Circuit's estimates). What makes this consistency so surprising is that the three sets of burden estimates (on which the caseload measurements are based) were so *in*consistent.

This anomaly is probably the result of several factors. First, the taxonomy of twenty-three case types was so detailed that only six of the twenty-three represented more than 5 percent of the relevant cases; about seven of the case types represented less than 1 percent of the cases. Thus, even an extreme difference in the burdens ascribed to a given case type would tend to produce a minimal difference in weighted caseload measures. Second, to the extent that inconsistencies in burden estimates vary in their "direction," their effects would tend to "wash out": If, for instance, the Sixth Circuit gave case type A twice the burden given by the Eighth Circuit, but gave case type B only half the burden given by the Eighth, then, assuming equal numbers of cases of the two types, the inconsistent burdens would nullify each other's effect on weighted caseload values. Finally, note that if two courts have identical proportions of cases of each case type, then *any* set of burden estimates will produce the same *relative* weighted caseload measures (a simple analogy: if basket A contains 10 apples and 4 oranges (cases) and basket B contains 5 apples and 2 oranges, then no matter what the

**TABLE 6**
**Fiscal 1975 Relative Caseload per Judgeship (and Rank) for the Eleven Circuits***

| | Case Type Burden Estimates | | | Unweighted Case-Processing Data | | | | |
|---|---|---|---|---|---|---|---|---|
| Circuit | D.C. Cir. | Sixth Cir. | Eighth Cir. | Relevant Cases | Filings | Terminations | Pending Cases | Signed Opinions |
| D.C. | 81% (8) | 64% (11) | 63% (11) | 60% (11) | 74% (11) | 74% (11) | 116% (4) | 57% (11) |
| First | 103% (4) | 97% (6) | 96% (6) | 93% (7) | 96% (5) | 88% (8) | 65% (10) | 130% (3) |
| Second | 99% (5) | 104% (4) | 110% (4) | 100% (5) | 116% (3) | 126% (2) | 81% (9) | 110% (5) |
| Third | 94% (7) | 96% (7) | 95% (7) | 94% (6) | 93% (7) | 91% (7) | 82% (8) | 67% (8) |
| Fourth | 74% (10) | 80% (8) | 78% (8) | 86% (8) | 113% (4) | 113% (4) | 130% (3) | 63% (10) |
| Fifth | 161% (1) | 160% (1) | 162% (1) | 173% (1) | 132% (1) | 135% (1) | 138% (2) | 147% (1) |
| Sixth | 98% (6) | 102% (5) | 98% (5) | 101% (4) | 96% (5) | 93% (6) | 87% (6) | 66% (9) |
| Seventh | 123% (2) | 130% (2) | 130% (2) | 123% (2) | 88% (8) | 98% (5) | 85% (7) | 139% (2) |
| Eighth | 75% (9) | 75% (9) | 74% (9) | 79% (9) | 76% (10) | 78% (10) | 54% (11) | 107% (6) |
| Ninth | 116% (3) | 117% (3) | 118% (3) | 121% (3) | 127% (2) | 119% (3) | 175% (1) | 92% (7) |
| Tenth | 72% (11) | 70% (10) | 71% (10) | 66% (10) | 84% (9) | 75% (11) | 88% (5) | 123% (4) |
| Column # | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |

*Each caseload value is expressed as a percentage of the average of the eleven circuits. Thus, in any column, a value of 100 percent means the circuit is of average caseload according to the measurement technique given in the column heading. A value of 150 percent would mean 50 percent more burdened than average.

prices (weights) of apples and oranges may be, basket A will cost twice as much as B; it is the *relative* cost that is important, not the absolute cost). Probably the strongest reason for the consistency of the three weighted caseload measures is simply that the eleven circuits have roughly the same proportions of cases at each level of burden.

This proposition, that the circuits have similar distributions of high, low, and medium burden cases, finds support in a number of ways. It can be seen directly by calculating for each circuit the percentage of cases falling into each case type of the three-case-type taxonomy discussed above. These percentages are displayed in table 7.[14] Additional support for this proposition is found in the close agreement between weighted and unweighted caseload measures, which was identified earlier as the second major feature of table 6.

**TABLE 7**
**Percentage of Cases in Case Types of the Three-Case-Type Taxonomy, by Circuit**

| | Circuit | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Case Type | D.C. | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | Average |
| Low burden | 48% | 41% | 48% | 47% | 61% | 55% | 50% | 52% | 54% | 53% | 41% | 50% |
| Medium burden | 35% | 56% | 49% | 49% | 37% | 41% | 47% | 43% | 44% | 44% | 53% | 45% |
| High burden | 17% | 2% | 3% | 4% | 2% | 3% | 3% | 4% | 2% | 3% | 6% | 4% |

[14] The table shows that the D.C. Circuit is clearly different from the rest in that 17 percent of its caseload is in the high burden category, while 6 percent is the largest of such proportions among the other circuits. This difference is due largely to the fact that the D.C. Circuit had sixty-six cases of type 3 (Power, Transportation, and Communication Cases), while no other circuit had more than six such cases. This disproportion, along with the substantially higher relative burden ascribed to that case type by the D.C. Circuit, accounts for much of the eighteen-point disagreement among the three circuits on the relative caseload measure of the D.C. Circuit (see table 6, first row of columns 1 through 3).

This close agreement suggests, of course, that weighted measurements of court[15] caseloads are not much different from unweighted measurements; it suggests that weighting has little effect. This in turn means that inasmuch as the present concern is with measuring the caseloads of courts, weighting by case types may be only minimally useful. Unfortunately, weighting efforts cannot yet be abandoned outright, because two confounding factors lend uncertainty to these results. The first is that differences that have been observed between weighted and unweighted caseloads are, though slight, nevertheless too large to be dismissed as trivial. The second factor is the rather disturbing suggestion that the *un*weighted caseload measures may themselves be based on quite inconsistent data (i.e., that the circuits label cases in differing fashions).

The nontriviality of the difference between weighted and unweighted measures can be seen rather simply from the fact that the average difference between these measures was more than 7 percentage points (average for ten circuits, with the D.C. Circuit omitted as an anomaly). Moreover, the difference was at least 10 points for four of those circuits. Since most circuits have nine judgeships, an increase or decrease of one judgeship would change the typical circuit's relative caseload measure by about 11 percentage points. While an average discrepancy of 7 percentage points between weighted and unweighted measures appears rather small, it is equivalent to a difference of more than half of a judgeship. Thus, if relative caseload measures were used to dictate the allocation of judgeships among circuits, different results would obtain depending on whether weighted or unweighted measures were

[15] It should be noted that this result applies only to relative measurements of *court* caseloads. The use of weights in determining the relative caseloads of individual judges probably *would* make a difference, since it is not likely that the proportions of cases of similar burden assigned to individual judges would be consistent among the judges of a given court. Indeed, assignment of cases to judges by a case type weighting scheme would probably result in a more consistently even workload distribution than would random or rotational assignment. It is not clear, however, that a very detailed weighting scheme (i.e., taxonomy) would achieve any greater consistency than would a simple, three-weight scheme: The scheme might be useful without being complicated. Such devices are in fact used in some courts, largely based on intuitive weighting.

used. Hence it cannot be said that weighting has an insignificant effect.[16]

The most disturbing and most important factor that must restrain a final judgment against caseload weighting is that existing appellate court statistical reporting may not provide consistent measures of gross unweighted caseloads (i.e., numbers of relevant cases). Without such consistent measures, comparisons of weighted and unweighted caseload measures rest on very shaky grounds. A fairly well-known inconsistency in statistical reporting may serve as a dramatic example of the problem.

Until recently, the Fourth and Tenth Circuits routinely placed prisoner petitions (which constitute case types 8 and 23) on the general docket, while in other circuits most of such cases were placed on the miscellaneous docket.[17] As a result, most prisoner petitions in the Fourth and Tenth Circuits were recorded as case filings (and, subsequently, as terminations), while in the other circuits the majority were never counted as filings (or as terminations). This was not reflective of a difference in the attention accorded such petitions, but of a mere difference in labeling: Identical cases receiving identical treatment would be labeled as filings in the Fourth and Tenth Circuits but not in any other circuits. As a result, the Fourth Circuit recorded 109 collateral attack filings per judgeship in fiscal 1973, while no other circuit recorded more than 42 per judgeship. Since the Fourth Circuit's total of all filings per judgeship was only 225 in that year, it is apparent that the "overreporting" of prisoner petitions severely distorted that circuit's relative caseload measures based on unweighted filings (that

[16] It is also important to note that weighting appears to have a directionally consistent effect. Our analysis included the computation of both weighted and unweighted caseloads based on a variety of definitions of "relevant" cases for fiscal 1973 and fiscal 1975. We noted a strong correlation to the effect that if the weighted measure of a given circuit was higher (or lower) than the unweighted measure for a given definition of "relevant" cases and a given fiscal year (e.g., terminations in fiscal 1973), then there was a strong probability that the weighted measure would be higher (or lower) for all other combinations of definition and year (e.g., filings in fiscal 1975).

[17] Matters placed on the miscellaneous docket are not considered "filings" in the appellate court statistical reporting plan, hence they are never counted as "cases."

measure being 143). Since prisoner petitions were assigned relatively low weights, the distortion was moderated somewhat by the weighted measures; the largest of the three weighted measures was 115. The difference in the weighted and unweighted measures was very large, about 30 percentage points, but was caused merely by inconsistent reporting procedures, and not by a real difference in the caseload structure of the circuit.

Among the variety of definitions of "relevant" cases that were used to produce caseload measures, it was found that these "overreported" prisoner petitions were within all but the most restrictive of the definitions. That is, they are usually counted as filings and, subsequently, as "terminations after submission or oral hearing" in the Fourth and Tenth Circuits (while not so counted in the other circuits). Yet briefs are not generally filed in these cases, and therefore they rarely are counted as "termination after submission or oral hearing, *with briefs filed.*" Thus when relative caseload measures were computed based on this restrictive definition of the cases to be counted, the unweighted measure of the Fourth Circuit became 87, while the weighted measures varied from 82 to 88. Weighting thus appears to have little effect, while the restrictive definition has vastly altered the circuit's caseload measure.[18]

It appears that the inconsistencies in labeling of prisoner petitions can be eliminated by restricting the definition of relevant cases to those in which briefs were filed. However, it is not known what similar inconsistencies may yet exist that were not thus eliminated. If other such inconsistencies do exist, then we cannot be sure how much they may have distorted the comparison of weighted and unweighted caseload measures. They might have caused the two measures to appear more or less consistent than they should.

Moreover, the data produced in the course of the analysis tend to suggest that other case "labeling" discrepancies in fact do exist. This is seen by observing the proportions of cases in each circuit

[18] It should be noted that the practices of the Fourth and Tenth Circuits are similar, but not identical. Moreover, our concern is not with variations in practice, but with variations in the meaning of the statistical term, "filings," that result.

that failed to attain a given stage of "procedural labeling." For instance, in every circuit but the Fourth and Tenth (for fiscal 1973 and 1975), briefs were filed in at least 88 percent of all cases terminated after submission or oral hearing. In the Fourth and Tenth Circuits, however, briefs were filed in no more than 67 percent of such cases. This anomaly is striking and should alert the researcher to the possibility of inconsistent labeling (in this case, the anomaly is due to those circuits' practices with respect to prisoner petitions). Similarly, when examining the proportion of terminated cases that were terminated without judicial action, an irregularity is found in the First Circuit. That circuit terminates about 30 percent of its cases without judicial action, while no other circuit so terminates more than 19 percent of its cases (seven of the others so terminate less than 13 percent). The reason for this irregularity is that the First Circuit dockets a case upon the filing of a notice of appeal, before payment of the docket fee. If the docket fee is not paid, the case is dismissed. Unfortunately, there is no way to determine what proportion of "terminations without judicial action" is attributable to this unique First Circuit practice, and what proportion is comparable to the "terminations without judicial action" of other circuits. Finally, the proportion of those cases terminated with judicial action (excluding consolidations) that do not receive an oral hearing or consideration upon submission varies broadly among the circuits from 2 percent to 37 percent. While this, too, may reflect real variation in practice, it may also reflect the situation where two cases receiving identical treatment in different circuits would in one circuit be labeled a submission, but in another be labeled as a termination without submission or oral hearing.

## Conclusions

The primary aim of court caseload measurements (be they weighted or unweighted) is to obtain an objective assessment of judicial workload. If case-processing volume (e.g., filings, terminations with judicial action) is to be the basis for such caseload measurement, then it is necessary to assure that the various courts assign procedural progress labels according to identical criteria. We cannot measure caseloads based on filings so long as a given

caseload would in one circuit be counted as 100 filings, but in another as 200 filings. We must measure by the same yardstick. Analyzing the effects of caseload weighting, or selecting a reliable basis for unweighted measurements, cannot be accomplished until that single yardstick is defined.

A clear message of the analysis in this project is that the circuit court docket report requirements (Form JS-34) must be evaluated and clarified. Only then can a reliable judgment on the utility of case weighting be made. However, the apparent inability to draw definite conclusions about the merit of appellate case weighting hardly suggests that the efforts of the participating circuits have been in vain. The burden estimates they provided have shown that the questionable reliability of appellate court statistical reporting is a severe impediment to the analysis of appellate court management innovations. Those estimates should also be helpful in testing the reliability of a revised statistical reporting plan. Moreover, they have suggested that caseload weighting may be of little utility to the appellate courts, a suggestion which, if confirmed, will undoubtedly result in substantial savings of time and money.

# THE CASES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT[1]

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**(FJC-R-82-3)**

## I. Introduction and Background

The mix of cases appearing before the United States Court of Appeals for the District of Columbia Circuit differs markedly from the case mix of the other United States courts of appeals. The D.C. Circuit's caseload includes a large number of direct appeals from administrative agencies ("agency cases") and other civil appeals in which the federal government is a party ("U.S. civil cases"), but relatively few criminal cases. Between 1976 and 1980, for example, agency cases and U.S. civil cases accounted for between 73 percent and 80 percent of annual filings in the D.C. Circuit. In the other circuits—for example, the Sixth Circuit—these types of cases constituted no more than 38 percent of the annual filings.[2]

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

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[1] This report is reprinted here in substantially its original form. The only significant deletions are the original appendix A, which lists federal statutes giving jurisdiction to the District of Columbia Circuit; appendix C, which identifies the cases on which this study was based; and appendix D, which lists the extreme cases. Some footnotes have been deleted, and the remaining ones have been renumbered. Ed.

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

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

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

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

. . . .

Table 1, an abridgment of table I in the Center's 1977 report on appellate caseweights,[3] shows the burdens assigned to twenty-four case types according to a consensus among judges in the D.C. Circuit. Types 3 (Power, Transportation, and Communication

[3] Appellate Court Caseweights Project (Federal Judicial Center 1977).

Cases), 4 (Health, Safety, and Environment Cases), 5 (Other Regulatory Agency Cases), 10 (Antitrust Cases), and 18 (Suits Challenging Validity of Action or Inaction of Federal Agencies or Officials), which include three classes of agency cases, a major category of U.S. civil cases, and antitrust cases, were all assigned a burden rating of approximately 10, relative to the typical direct criminal appeal. Note, however, that not all agency and U.S. civil cases were rated as very burdensome: National Labor Relations Board (NLRB) appeals (case type 2), for example, received a rating of 2.8, and some forms of U.S. civil cases were given a rating of 4.0 or less.

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

Tables 1 and 2 demonstrate that a very large proportion of the agency cases filed in the D.C. Circuit are from agencies whose work creates the largest judicial burdens: agencies concerned with power (energy), transportation, communication, health, safety, and the environment. NLRB cases, which are relatively less burdensome, are not major contributors to the agency caseload of the D.C. Circuit.

When the agency case filings in all eleven circuits are considered, the D.C. Circuit received 22.4 percent of all agency cases filed in the nation during fiscal 1980 (660 of 2,950). The proportion of cases filed in the D.C. Circuit by agencies with typically burdensome cases was even larger. Of course, the exact figure will vary according to the choice of agencies to be included in the count. Using one plausible list of thirteen agencies, we found that the proportion of "high-burden agency" cases filed in the D.C. Circuit was 45.3 percent.[4]

[4] A "high-burden agency" is a designation we have coined on the basis of the judges' observations of their workloads. Each of the thirteen agencies is listed here, followed by a fraction that represents the proportion of all appellate filings by that agency that were made in the D.C. Circuit: Civil Aeronautics Board (27/39), Department of Health, Education, and Welfare (0/3), Department

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

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

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

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

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of Transportation (0/4), Environmental Protection Agency (65/191), Federal Aviation Administration (5/16), Federal Communications Commission (112/127), Federal Coal Mine Safety Board (1/3), Food and Drug Administration (21/29), Federal Energy Administration (3/4), Federal Energy Regulatory Commission (122/275), Interstate Commerce Commission (113/274), Nuclear Regulatory Commission (9/16), Occupational Safety and Health Administration (13/102). Administrative Office of the United States Courts, 1980 Annual Report of the Director at 48, table 5.

mental dispute, a type of case that was rated relatively burdensome by the sampled judges in 1977, would have been nearly nonexistent had the same survey been taken fifteen years earlier. This suggests that developing measures of burden is difficult because of the shifting nature of both a court's caseload, particularly as it relates to administrative matters, and policies that are developed in areas far beyond a court's control. It was, in part, for this reason that we developed a more in-depth profile of the D.C. Circuit's agency cases and present those findings in a separate chapter (see chapter 5 *infra*).

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

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

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

ings, and criminal cases were 7 percent.[5] Each of the other pie charts in the figure, with areas in proportion to the number of cases they represent, describes the status of cases filed in fiscal 1979.

## Pending Cases

The pie chart on the far right of figure 1 shows the mix of case types still pending nineteen months after the end of the fiscal year of filing. If all case types proceeded through the appellate system at the same rate, the proportion of each case type pending after nineteen months should equal the proportion of filings by that case type. But the pending caseload clearly does not reflect the same composition as the total filings caseload. Of the pending appeals, 76 percent are agency cases, whereas only 47 percent of the total filings are agency cases.

Thus, agency cases move more slowly through the system than do other types of cases. This finding suggests that these cases take longer to dispose of, are more difficult, and therefore, are more burdensome than other types of cases. U.S. civil cases, on the other hand, constituted 33 percent of the fiscal 1979 filings but only 15 percent of the pending caseload at the end of January 1981.[6] These cases thus appear to take less time than other types of cases, suggesting that they are, by and large, less burdensome.

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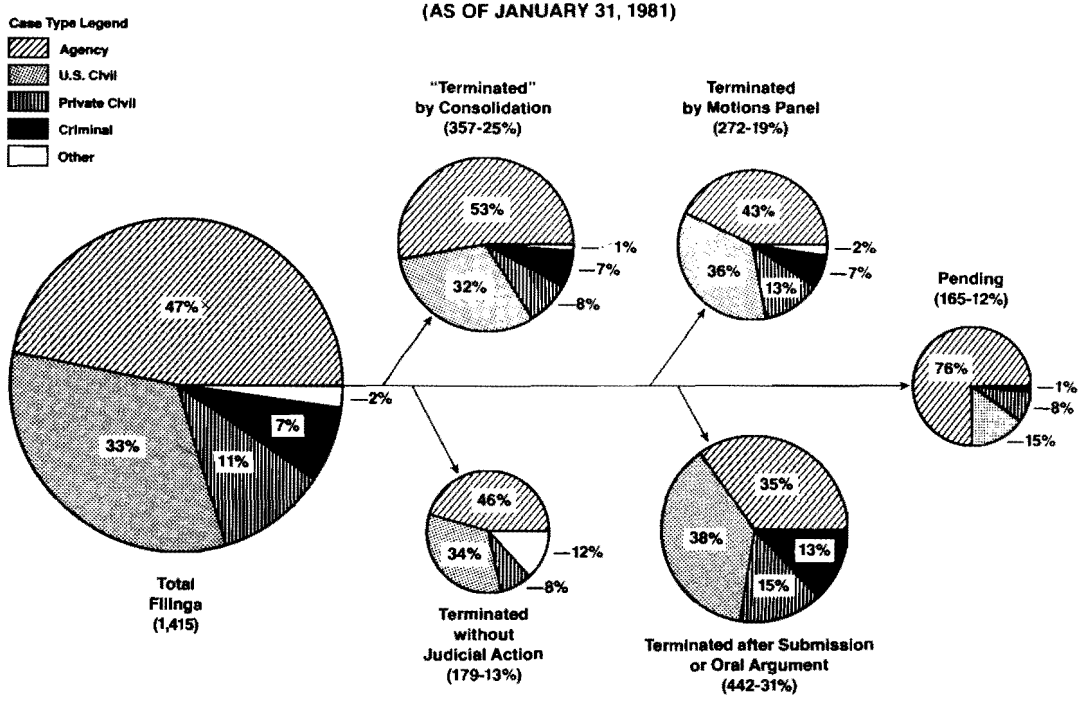
[5] These figures are based on data, corresponding to the information captured on the court of appeals docket report (Form JS-34), supplied by the Administrative Office of the United States Courts.

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

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




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

## Cases "Terminated" by Consolidation

One-fourth of all filings were "terminated" by consolidation (or cross-appeal). However, "termination" by consolidation must be understood as an administrative convenience rather than a reflection of the final disposition of a controversy. In agency cases, in particular, the chief staff counsel in the D.C. Circuit is active in promoting consolidation among parties with similar claims against an agency.[7] Of the 357 cases "terminated" by consolidation, slightly more than half were agency cases. The judicial effort saved by disposing of numerous separate cases with one decision and written opinion, especially when the issues are numerous and technical, must not be underestimated. For example, consolidation eliminates the possibility that different judicial panels will have to hear essentially identical claims against the same agency or private party. Consolidation can also reduce the burden on parties, in that the brief for the lead case may sometimes be used to argue all the issues for some of the consolidated cases as well.

## Cases Terminated Without Judicial Action

The second category of terminations, cases terminated without judicial action, comprises terminations resulting from consent decrees; dismissals by the clerk of court, acting as the court's representative pursuant to local rules; settlements out of court; and other dispositions, such as terminations for failure to pay filing fees, to prosecute the appeal, or to comply with federal or local regulations.[8] This is the smallest category of terminations, accounting for only 13 percent of all filings, none of which was a criminal case. Cases terminated without judicial action are not considered further

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

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

in this report. They may deserve study in a fuller treatment of case burden, however, because of the effort required by court staff, law clerks in particular, to bring them to termination.

### Cases Terminated by the Motions Panel

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

### Cases Terminated after Submission on Briefs or Oral Argument

Terminations after submission on briefs or oral argument to a three-judge panel accounted for 31 percent of all filings. The proportion of agency appeals in this category appears to be relatively small. This figure must be interpreted with care, however, for two reasons. First, agency cases are frequently consolidated for judicial action. The number of cases terminated after submission or argument reflects "lead cases" only,[9] and other cases whose merits are finally decided by the same action are counted as terminated by consolidation. Second, a substantial proportion of the pending agency appeals will finally be terminated after full judicial review; the proportion shown here represents the cases that were terminated between the time of filing and the time of our investigation.

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

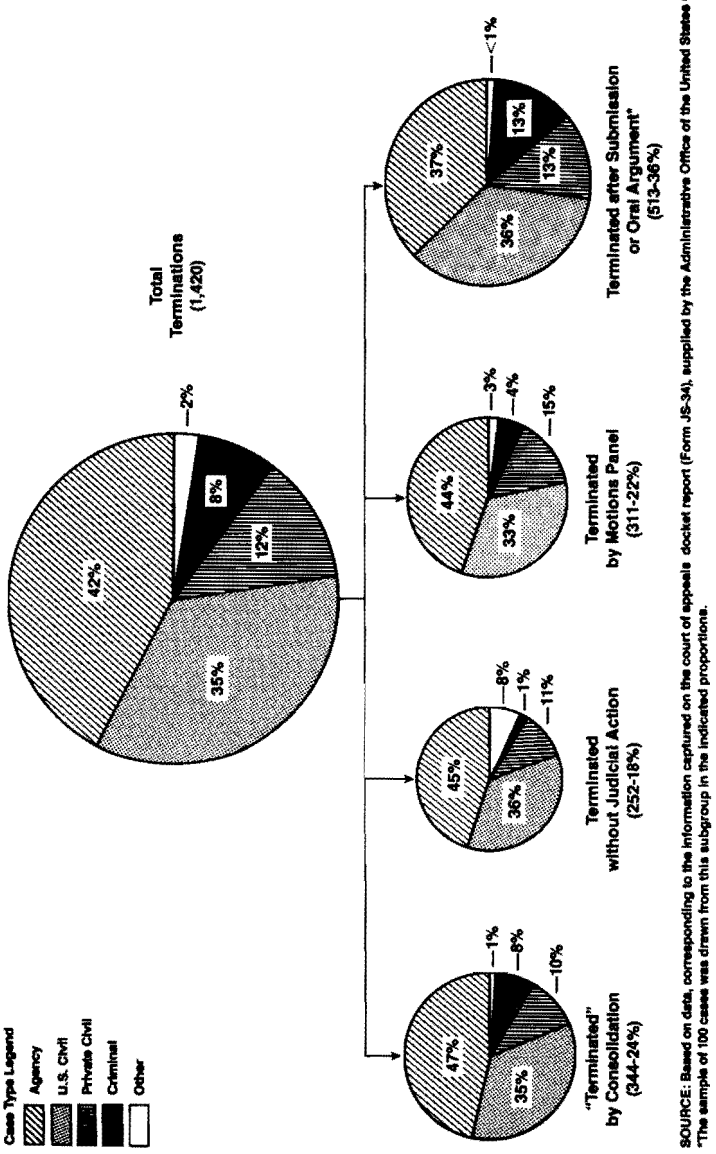
Together, these factors suggest that it would be a mistake to assume that the percentage of agency cases terminated after submission on briefs or oral argument, shown in the pie chart in figure 1, reflects the actual percentage of agency cases that are acted on by a full panel of judges in the court.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

## Terminations in Fiscal 1980

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

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

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




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

## Terminations of Consolidated Cases

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

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

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

## Terminations of All Cases (Including Effect of Consolidations)

The full implications of the effect of disposition of consolidated cases on case terminations in fiscal 1980 can be gleaned from a comparison of the findings shown in table 4 with those shown in figure 2. Figure 2 indicates that of all terminations in fiscal 1980,

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

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

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

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

cases, then some optimal number of cases for consolidation would need to be sought.

## Age of Cases

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

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

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

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

Further investigation revealed that one of the criminal cases was terminated by a hearing en banc of a matter that had been given considerable judicial attention, in various forms, since it was origi-

nally filed in 1972.[10] In addition, six of the cases were consolidated into two groups of three cases each, even though the same appellants were in each set and the cases were decided on the same day by the same panel. This suggests that the six cases could legitimately be viewed as only two and perhaps as only one. Ten more cases had been grouped into three consolidations; without further investigation of these cases, and of the fifteen other criminal cases, there is no way to determine why they were not terminated before 1980. We return to the question of elapsed time for the disposition of the various case types in chapter 3.

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

As shown in figure 2, our sample of 100 cases was taken from the total of 513 that terminated after submission on briefs or oral argument in fiscal 1980. Each of the five case types was sampled in proportion to its presence in this population: thirty-seven agency cases, thirty-six U.S. civil, thirteen private civil, thirteen criminal, and one "other."[11]

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

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

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

## II. Research Methods

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

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

### Indicators Used in the Study

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

practical value. Also, although the indicators were rated in the earlier study, they were not tested or used in an analysis of actual cases; they were the subjective estimates of experts. When put to use, some of them present measurement problems (see the appendix *infra*).

**TABLE 6**
**Average Adequacy Values for Indicators of Case Burden**

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

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

The indicators listed in table 7 provide the basis for this study. Note that we added two indicators of burden to those shown in

table 6; they are duration of postdisposition period and number of postdisposition motions. The indicators were defined as follows:

1. The *number of lawyers* in a case is the sum of different legal representatives in a case as indicated on the docket. Attorneys from each office were treated as a separate unit; therefore, two attorneys representing the Justice Department were counted as one.
2. The *number of briefs* is the sum of all possible types of briefs in a case, including appellant, appellee, cross-appellant, amicus, or intervenor.
3. The *aggregate length of briefs* is the sum of pages of all briefs filed in a case. (Page standardization is discussed in the appendix.)
4. The *number of issues in briefs* is the total number of legal questions presented in the lead brief of the appellant. (See the appendix for a discussion of the relationship between the number of appellants' and number of appellees' issues.)
5. The *number of case citations in briefs* is the number of court decisions discussed in the lead brief of the appellant. The count included citations to court cases only.
6. The *form of record on appeal* is the presence or absence of either a transcript or a joint appendix from the lower court or agency.
7. The *aggregate length of the record on appeal* is the total number of pages of all transcripts and joint appendixes filed in a case. (Page standardization is discussed in the appendix.)
8. The *duration of a case* is the number of calendar days from docketing in the court of appeals to date of final judgment.
9. The *duration of the postdisposition period* is the number of calendar days from the date of final judgment to the last date on the docket.
10. The *number of postdisposition motions* is the number of actions requested by the parties to a case after the final date of judgment as reported on the docket sheet. (Administrative or court-initiated docket items were not counted.)

**TABLE 7**
**Indicators Used in the Study**

I. Indicators of Input Burden

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

II. Indicators of Output Burden

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

11. The *presence of the United States government as a party* to a case refers to the government's presence as either appellant or appellee. (The appearance of the United States attorney representing a third party or intervenor was not considered in determining this item.)
12. The *form of opinions* is the form of the judgment (signed opinion, per curiam opinion, or memo order) as well as its publication status (published in official reporter, slip opinion, not published). In the case of published opinions, the form of opinions may also include dissenting and concurring opinions.
13. The *number of opinions* is the sum of all opinions, dissents, and concurrences in published opinions.
14. The *aggregate length of opinions* is the number of pages in all published opinions for a given case, including dissents and concurrences when they occur.

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

## A Note on Statistical Method

Much of the discussion in the following chapters centers on apparent similarities and differences between case types, based on our sample of 100 cases. The question arises, How confident can we be that the results obtained from our sample fairly represent the entire population? This section describes the rationales we have employed in answering that question.

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

Because so much of the interest in and prior discussion of the D.C. Circuit's caseload has centered on the burden of agency cases, we have focused our statistical analysis on that case type. Our primary statistical technique was to test the differences in average values of the various indicia of burden between agency cases and all other case types considered as a group.[12] What the

[12] For a description of the procedure used, see N.N. Nie, C.H. Hull, J.G. Jenkins, K. Steinbrenner, & D.H. Bent, Statistical Package for the Social Sciences 425-26 (1975). The specific statistical method employed was an a priori contrast (reported as a *t* statistic) accompanying an analysis of variance; the specific means contrasted are reported. Because our analysis was guided by specific theoretical assumptions, we have reported one-tailed probability

analysis provides is a measure of the reliability of our result; that is, the observed difference between agency cases and other types of cases is not simply due to the luck of our draw of those 100 cases from the fiscal 1980 terminations after submission on briefs or oral argument.

The small size of the sample produces a conservative effect on the statistical outcomes. In sampling only 100 cases, we run the risk of incorrectly dismissing observed differences between agency cases and the other cases.[13] Note also that we dropped our single case in the category of "other," a bankruptcy case, from all statistical analyses; however, we include information about it in the descriptive tables.

The tables in the following chapters also report the minimum and maximum values for the variables used in this study. An important goal of this study was to gain some understanding of the effect of extreme cases on the day-to-day burdens of the court; thus, special attention is given to extreme agency cases in chapter 5. Recognizing, however, that such extremes are possible in all areas of the court's docket, we report minimum and maximum figures for each case type for each variable.

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

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estimates. Also, depending on the results of tests of the homogeneity of variance, either pooled or separate variance estimates are cited.

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

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

## III. Input Burden: Results from the Sample of 100 Cases

This chapter describes measurements of the input burden of the 100-case sample generated from fiscal 1980 terminations in the D.C. Circuit after submission on briefs or oral argument.[14] . . . Overall, we found strong evidence to support the claim that the D.C. Circuit's agency cases are larger than other types of civil and criminal cases. Agency cases tend to have more lawyers, present more and longer briefs, raise more issues, incorporate longer records in the form of transcripts and appendixes, and take longer to be decided. The following discussion details these findings.

### Number of Lawyers

There are two reasons to expect that the number of lawyers in agency cases will be larger than it is in other case types. When cases are consolidated into a single action, more lawyers will be active in the case than would otherwise be true. Also, the stakes in many agency cases are very high, as for example when a group of manufacturers sues to reverse an Environmental Protection Agency ruling. With high stakes comes extensive legal representation. Table 8 shows the number of lawyers per case in each of the five

[14] See appendix C to the original report.

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

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

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

case types. Agency cases involved, on the average, approximately five lawyers, twice the average number in criminal cases. An average of approximately four lawyers participated in U.S. civil cases and an average of approximately three lawyers were involved in private civil cases. The findings shown in table 8 are statistically significant.[15]

[15] In making this statement, we are asserting that we have rejected the null hypothesis that the observed difference between agency cases and all other case types in the average number of lawyers is an artifact of the sample drawn. In the following sections we simply report whether the findings shown are or are not significant, accompanied by the appropriate statistics reported in the respective tables. The reader should recall that the comparisons reported are

## Number of Briefs

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

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

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

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

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

based on the contrast between agency cases and U.S. civil, private civil, and criminal cases taken as a group.

Intervenors' briefs were the major contributor to the larger number of briefs in agency cases. Nineteen intervenors' briefs and four amicus briefs were filed in the group of thirty-seven agency cases. Among the thirty-six U.S. civil cases, there were two intervenors' briefs and six amicus briefs. The group of thirteen criminal cases contained one brief of each sort; among the thirteen private civil cases, there were none of either type. One cross-appellant's brief was submitted in each of the four case types. The single case in the "other" category, a bankruptcy appeal, involved no briefs other than those presented by appellant and appellee.

## Aggregate Length of Briefs

Table 10 confirms our expectation that the larger number of briefs in agency cases would aggregate to more pages of brief material. In table 10, the cases are organized by case type and by total number of brief pages. One-fourth of all cases contained aggregated briefs of fewer than 58 pages, one-fourth were between 58 and 92 pages, one-fourth were between 93 and 157 pages, and the remaining fourth were longer than 157 pages up to a maximum of 750 pages. Agency cases contained 183 pages of briefs, on the average, which is approximately 45 percent greater than the average number of pages in U.S. civil briefs and more than twice as great as the values for criminal and private civil cases. The mean number of brief pages for agency cases was also significantly different from the mean value for all other cases combined.[16]

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

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

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

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

## Number of Issues in Briefs

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

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

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

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

## Number of Case Citations in Briefs

Table 12 demonstrates a reversal of the pattern that tends to characterize the other indicators. Agency cases do not contain the largest number of case citations in the appellant's lead brief. On the contrary, U.S. civil cases show the largest number of citations, approximately twenty-seven, whereas agency cases have the second largest number of citations, twenty-four, and private civil and

criminal cases both have the next largest numbers, approximately nineteen and twenty, respectively. It is our impression, however, that agency cases contain a large number of citations to administrative rulings and statutes that are not found in other case types. The differences observed for this indicator are not statistically significant.

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

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

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

## Form and Aggregate Length of Record on Appeal

Except in criminal cases, the usual method of supplying information from proceedings below is via the joint appendix. The need

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

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

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

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

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

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

## Duration of Sample Cases

In chapter 1 we suggested that agency cases took longer to work their way through the system than did other case types, although we were uncertain about the importance of the number of relatively old criminal cases terminating in 1980. The data in table 14 show that, for the sample of 100 cases, the average elapsed time from filing to termination for agency cases is longer than that for other case types. Considering all of the findings together, we feel

confident that agency cases, on the average, move more slowly through the court than do all the other major case types combined; the observed differences are statistically significant.

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

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

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

## Duration of Postdisposition Period and Number of Postdisposition Motions

Termination on the JS-34 form does not always mark the end of the court's effort in a case. Frequently, postdisposition motions will require time and attention from the clerk's office and, perhaps, a motions panel of judges. We calculated the number of days between the termination dates of the cases and the last date entered on the docket sheet. As shown in table 15, the average number of days for the U.S. civil cases was just under 190, whereas the

average numbers for the other three case types were approximately 113 (criminal), 126 (private civil), and 128 (agency).

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

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

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

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

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

differences for either duration of postdisposition period or number of postdisposition motions.[17]

## United States Government as a Party

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

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

## Conclusion

The data, based on a proportional sample of 100 cases, support the conclusion that agency cases, and U.S. civil cases to a lesser extent, present larger amounts of input material to judges and court administrators than do other types of cases. For nearly every variable selected, agency cases show the maximum size—be it the number of lawyers (26) or the number of pages in briefs (750). Although the amount of materials generated in U.S. civil cases should not be overlooked, by and large it appears that the ex-

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

tremes, at least for the D.C. Circuit, are the result of agency matters, a point we will return to in chapter 5. This conclusion is congruent with the impressions and expert opinion prevailing among the judges and staff of the D.C. Circuit.

## IV. Output Burden: Results from the Sample of 100 Cases

It may be recalled that the indicators of output burden measure the work of judges and court staff in terms of the form, type, and length of appeal dispositions. In applying these indicators in our analysis, we make the assumption that the court is able to exercise greater control over output burden than it can over the input burden discussed in chapter 3. In general, we found that administrative cases remain burdensome, as measured by indicators of output, but that the differences among the sample case types are less dramatic than those found for indicators of input.

### Form of the Court's Opinions

Table 16 shows the form of the judgment for the sample of 100 cases, grouped according to three categories: signed, published opinion; per curiam, published opinion; and unpublished opinion. Fifty-four percent of the agency cases and 53 percent of the U.S. civil cases ended with published opinions, whereas only 31 percent of the private civil and criminal cases were accorded that conclusion. Our one bankruptcy case (the "other" group) included one published opinion. In sum, published opinions were issued in 48 of 100 cases.[18]

[18] We use "opinion" generically, including memorandum opinions and orders.

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

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

In chapter 3 we reported that agency cases in the D.C. Circuit are uniquely large and, in most respects, statistically different from all other case types. These findings suggest that there is, in fact, an informal division within the court's caseload; that is, there is a de facto division between agency and nonagency cases.

From the standpoint of output, it is reasonable to assume that, by and large, a case that results in a published opinion is more demanding than one that results in an unpublished opinion. Before turning to a more detailed analysis of measures of output, it may be useful to consider the twofold relationship shown in table 17. These findings reveal that when compared with other case types as a group, agency cases are clearly a smaller proportion of the court's docket; at the same time, however, agency cases are more likely to result in published opinions. Approximately 54 percent of the agency caseload produced published opinions, whereas approximately 44 percent of nonagency cases resulted in published opinions. Although this distinction is noteworthy, it should be emphasized that the differences shown in table 17 do not approach a level of statistical significance.

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

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

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

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

In addition, the percentages of cases in each case type in the sample resulting in published opinions partially underrepresent the percentages of cases in each case type in the entire population of 513 cases terminated in fiscal 1980 after submission on briefs or oral argument. For the entire population, 55 percent of the terminated cases had at least one published opinion. By case type, the percentages were as follows: agency, 57 percent (108/190); U.S. civil, 57 percent (105/185); private civil, 49 percent (33/68); criminal, 51 percent (35/68); other, 50 percent (1/2). The large underrepresentation in percentage terms of criminal and private civil cases is due to the small number of cases sampled in these case types. We do not know whether the underrepresentation of criminal and private civil cases with published opinions biases the following analyses; they should be read with this caveat in mind.

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

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

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

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

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

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

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

## Number of Opinions

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

The presence of an extreme en banc proceeding within the criminal case type elevated the number of opinions in the criminal category considerably: The publication[20] included a signed opinion

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

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

for the court, two separate concurrences, one separate dissent, and an additional statement by three judges expanding points made in earlier portions of the publication. To substantiate the impact of the one extremely burdensome criminal case, we determined the mean number of opinions in criminal cases excluding the extreme case; it was 1.5. This is still larger than the means for the other case types, but is considerably less than the 2.4 value shown in table 18. Despite the influence of the criminal appeals, a statistical comparison employing all forty-eight cases did not reveal a significant difference between the average number of opinions in agency cases and the average number in the other case types taken as a unit.[21]

## Aggregate Length of Published Opinions

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

The difference between the average opinion length for agency cases and the average value for other cases is not statistically significant if all cases are included in the calculation. However, if the unusual criminal case is removed, the new value for this compari-

[21] We have analyzed all of the output indicators with and without *DeCoster* because this case clearly posed an unusual burden for the court. If the results of the statistical testing done on the reduced sample of cases were substantially different from those obtained for the full sample of forty-eight cases, the change is noted in text. Note that a similar procedure was used in chapter 3, in which it was necessary to remove the effect of extreme agency cases for selected variables of input burden (see note 16 *supra*).

son is significant ($p = .001$; $t = 3.57$; $df = 23.8$; separate variance estimate; means contrasted: 13.1 and 6.0).

## Number of Citations in Opinions

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

## Conclusion

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

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

court, which is to give to each case the attention it deserves, regardless of the trappings with which it is filed.

Indeed, it is possible that there is an interaction, unmeasured in this study, between input and output sizes that could, if measured, provide a significant indicator of case burden *on the judges*. Let us suppose that some group of cases (or case types) can be identified as representing "typically burdensome" cases, and we find that the size of input burdens and the size of output burdens, as measured in this report or otherwise, display a stable relationship to each other throughout the groups. It is conceivable that the "unusually burdensome" cases or case types might demonstrate relationships between the two measures that are substantially different from the postulated standard. That is, cases with small input burdens and large output burdens may call upon judges to perform substantial work with less assistance from counsel. Conversely, cases with large input burdens and small output burdens may call upon judges to distill masses of materials and inadequately focused briefs to produce a judgment that resolves the issues and limits future controversy by clear and succinct clarification of the law. Thus, either of these possibilities may create unusually large burdens for the court. Fashioning measures that would capture court experience would clearly be a difficult task, but it would be valuable if it could be achieved.

## V. Extreme Cases

The rationale behind our selection of the sample of 100 cases was to avoid any special considerations or points of view in arriving at a portrayal of the size of the cases before the court. As shown in chapters 3 and 4, this objective sampling scheme revealed that agency cases tend to be larger, in several important respects, than other case types. In this chapter we extend the analysis to examples of agency cases that, in the opinion of court officials, have provided the largest input problems for judicial management. Extreme cases burden the court out of proportion to their numbers.

Even a relatively small number of them arising during the year can, at least potentially, drain resources away from the management and disposition of the larger number of cases that may be less burdensome but not less deserving of full judicial treatment.

We began with a list of thirty-three extreme cases supplied by court officials. A quick survey of the cases' contents and a realistic appraisal of the time required to code them according to our procedures led to the decision to concentrate our analysis on four cases from the list. Our choice was guided by the desire to capture cases that exemplified the problems facing the court in its attention to large agency matters. Discussions with court officials suggested, for example, that we should include two cases concerning the interpretation of provisions of the Clean Air Act.[22] We therefore chose *Citizens to Save Spencer County v. EPA*[23] and *Alabama Power Co. v. EPA*.[24] The other cases were randomly drawn; they were *United Steelworkers of America v. Marshall*[25] and *United States v. FCC*.[26] . . .

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

## Input Burden

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

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[22] Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C.A. §§ 7401-7462 (1978)).
[23] 600 F.2d 844 (D.C. Cir. 1979).
[24] 606 F.2d 1068 (D.C. Cir. 1979).
[25] No. 79-1048, slip op. (D.C. Cir. Aug. 15, 1980).
[26] No. 77-1249, slip op. (D.C. Cir. Mar. 7, 1980); see 1978-2 Trade Cas. ¶ 62,205; 1980-1 Trade Cas. ¶ 63,264.

**TABLE 19**
**Burdens of Four Extreme Agency Cases**

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

**Number of lawyers.** The number of lawyers listed on the docket (see the appendix for counting conventions) ranged from eleven to forty. Five of the cases in the sample had ten or more lawyers listed, but none had more than twenty-six (see table 8). The average number of lawyers in the extreme cases was twenty-nine, almost six times the average of the agency cases in the sample (see table 8).

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

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

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

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

**Aggregate length of record on appeal.** The total number of pages of the record on appeal, including transcript as well as appendix material, ranged from 1,290 to 7,742 for the extreme cases. No sample case had a record of more than 4,405 pages (see

table 13). Indeed, the smallest extreme case presented more pages of material in the record than all but the three largest sample cases.

**Duration of cases.** On the average, the four extreme cases moved from filing to final judgment in 466 days, or approximately 15.5 months. The fastest case proceeded in 302 days and the slowest in 581 days. Sample cases proceeded at almost the same average rate, 445.5 days, but with a range of from 28 to 1,325 days (see table 14). After final judgment, however, extreme cases appear to move more slowly through the system, taking 247 days on the average, with a range of from 81 to 407 days. Among the sample cases, the U.S. civil case type had the longest average postdisposition period, approximately 190 days. The protraction in postdisposition duration appears to be related to the number of postdisposition motions, as shown in table 19. The extreme cases averaged twenty post-disposition motions, in contrast to the average of between one and two for the sample cases.

## Output Burden

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

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

## Conclusion

Taken together, these findings lend strong support to the claim of court officials that agency cases can produce a disproportionately large impact upon the operation of the court. The overwhelming difference between the size of any one of the extreme

cases and the more typical case underscores the importance of analyzing such cases as an ongoing aspect of the D.C. Circuit caseload. We note with interest, however, that the court, in moving these cases from filing to termination at the same average speed as cases of normal size, may experience an additional surcharge on its resources.

## VI. Conclusion

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

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

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

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

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

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

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

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

# Appendix: Problems of Measurement and Specification

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

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

**2. Aggregate length of briefs.** We counted the length, in pages, of all briefs associated with the docket number of the cases in our sample. In some instances briefs were contained in the files from earlier, related actions; these briefs were not included in our page counts unless the new docket numbers appeared on them, in-

dicating that the briefs were also part of the current action. Not all briefs are presented to the court in the same page format. In counting the number of pages in briefs, we used a standard of a "unit page" of one double-spaced manuscript page on standard-size paper (8-1/2 by 11 inches), and actual page counts were converted to this standard. It should be noted that the standard page size used for counting pages of briefs (and records on appeal, see number 4 below) was not the same as that used for counting pages of opinions.

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

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

**4. Aggregate length of record on appeal.** To count the number of pages of appendixes, we used a standard of a "unit page" of one double-spaced manuscript page on standard-size paper (8-1/2 by 11 inches) (approximately 300 words; this is the same unit page described in number 2 above). We converted material to this standard to account for the various forms of materials in the appendixes: scientific articles, excerpts of statutes, the *Federal Register,* congressional testimony, and so on. Our counts are only approximate; however, as shown in the body of the report, differences between case types regarding length of joint

appendixes are large enough to warrant drawing conclusions, regardless of the lack of precision in our counting methods.

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

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

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

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

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

ter 1 display relationships between case types and forms of termination.

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

# PART THREE

## ORAL ARGUMENTS, BRIEFS, AND OPINIONS

# INTRODUCTION

*Robert A. Katzmann and Michael Tonry*

The work of the Federal Judicial Center addressing the "crisis of volume" can be divided into studies examining ways to expedite the processing of appeals before they reach the judge for argument or conference and those reports assessing the processing of cases once they are in the judge's hands. The reports on "case management" are of the former type. This part focuses on the latter type by considering three methods to speed appeals: reducing use of oral argument; deciding cases without briefs; and limiting publication of opinions. Each method is presented in turn.[1]

Oral argument has long been a subject for Center research. In the early 1970s, in conjunction with its work for the Commission on Revision of the Federal Court Appellate System (the Hruska Commission), the Center sponsored two major opinion surveys concerning the attitudes of federal judges[2] and attorneys[3] practicing before the federal courts in the Second, Fifth, and Sixth Circuits toward various proposals to limit oral argument (the surveys also

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[1] Reserved for part 5 of this volume are Center reports evaluating technological efforts to increase judicial efficiency in handling opinions. J. Greenwood & L. Farmer, The Impact of Word Processing and Electronic Mail on United States Courts of Appeals (Federal Judicial Center 1979); J. Greenwood, Follow-Up Study of Word Processing and Electronic Mail in the Third Circuit Court of Appeals (Federal Judicial Center 1980).

[2] J. Goldman, Attitudes of United States Judges Toward Limitation of Oral Argument and Opinion-Writing in the United States Courts of Appeals (Federal Judicial Center 1975).

[3] T. Drury, L. Goodman & W. Stevenson, Attorney Attitudes Toward Limitation of Oral Argument and Written Opinion in Three U.S. Courts of Appeals (1974) (report to the Commission on Revision of the Federal Court Appellate System).

examined the use and nature of written opinions, a topic discussed further below).[4]

In broad outline, the survey of attorneys found that nearly all would approve severe limitations on oral argument in some circumstances, although majorities in all three circuits considered oral argument to be essential in cases involving matters of great public interest, questions of constitutionality, and matters considered en banc. Acceptance of the abbreviated procedures appeared to be related to attorneys' familiarity with them. The survey of judges found that the majority of them shared the lawyers' general views, but that the judges were relatively more inclined to accept limitations on oral argument.

More recently, the Center has undertaken an extensive examination of the varying procedures and standards adopted by the federal courts of appeals for deciding cases without oral argument. The first report, not reprinted here, provided an overview of the circuits.[5] It presented available statistical information and classified screening procedures; examined when screening occurs, who screens cases, the criteria used for screening, and the role of counsel, parties, and staff; explained the composition and responsibilities of judge panels with respect to such questions as who reviews staff recommendations and decides cases; and described the procedures used to review and decide the nonargument cases. The study also reviewed local rules and discussed responses of the clerks of the courts of appeals to a brief survey regarding court practices.

A second, in-depth inquiry by the authors of the first report, reproduced in part in this volume, examines the screening procedures of four appellate courts (the Fifth, Ninth, Sixth, and Third) with the objective of providing a clear, precise description of the procedures used by these courts to select and decide the

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[4] Neither report is reprinted here. Not only are the surveys somewhat old (they were written in 1974 and 1975), but the low response rates to written questionnaires (31 percent for judges and 60 percent for attorneys) make it difficult to gauge the representativeness of the respondents.

[5] J. Cecil & D. Stienstra, Deciding Cases Without Argument: A Description of Procedures in the Courts of Appeals (Federal Judicial Center 1985).

cases disposed of without argument.[6] The study assesses the number and kinds of cases decided without argument; the steps judges follow when reviewing cases for nonargument disposition; the written material relied on for this review; the characteristics of cases considered suitable for nonargument disposition; the ways the judges communicate with each other while reviewing and deciding the nonargument cases; the staff attorneys' and law clerks' responsibilities in selecting and preparing cases for disposition on the briefs; the special safeguards adopted to ensure that cases disposed of on the briefs receive full judicial attention; and the way the courts respond to parties' attempts to influence the method by which their case is decided.

In addition to examining procedures limiting oral argument as a means of expediting the processing of appeals once they are before the judge, the Center has evaluated a Ninth Circuit "appeals without briefs" experiment. Begun in 1980 as a way to dispose of civil appeals presenting relatively familiar and straightforward issues, the program was terminated in February 1982. Only sixty cases were handled under the program. Included in this part of the volume is a Center report evaluating the experiment, investigating the problems, and suggesting changes that could lead to more successful future efforts.[7]

Finally, the Center has studied not only oral arguments and briefs but also opinions—or more specifically, proposals for limiting publication of opinions. Those two early surveys in the 1970s, undertaken in connection with the Commission on Revision of the Federal Court Appellate System, also explored the attitudes of judges and attorneys practicing in the Second, Fifth, and Sixth Circuits about restricting the issuance of written opinions.[8] More than two-thirds of the attorneys surveyed believed that due process requires courts of appeals to write at least a brief statement of the

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[6] J. Cecil & D. Stienstra, Deciding Cases Without Argument: An Examination of Four Courts of Appeals (Federal Judicial Center 1987).

[7] J. Shapard, Appeals Without Briefs: Evaluation of an Appeals Expediting Program in the Ninth Circuit (Federal Judicial Center 1984).

[8] J. Goldman, note 2 *supra;* T. Drury, L. Goodman & W. Stevenson, note 3 *supra.*

reasons for their decision. The survey of judges found that although a majority of them held the lawyers' general views, they were more willing to accept reduced emphasis on written opinions.

The Center was involved in one of the first comprehensive efforts to come to grips with the implications of limited publication. A report published jointly in 1973 by the Center and the National Center for State Courts, not reprinted here, proposed criteria for when opinions should be published (and not published) and suggested rules for the citation of opinions not formally published. The model rule provided in part that an opinion would not be designated for publication unless it established a new rule of law or altered or modified an existing rule; involved a legal issue of continuing public interest; criticized existing law; or resolved an apparent conflict of authority. All opinions not found to satisfy a standard for publication would be marked "Not designated for publication." Opinions so marked could not be cited as precedent by any court or in any brief or other materials presented to any court.[9]

Reprinted in this part is an article by two law professors based upon a study evaluating limited publication in the courts of appeals.[10] Many of the data presented on unpublished opinions in the (then) ten federal circuits—regarding their length, quality, and similar matters—were at the time unavailable elsewhere. Besides reporting the findings of their analysis of statistical data on published and unpublished opinions during 1978–79, the investigators discuss a number of individual unpublished opinions that, they believe, are indicative of some serious problems related to non-publication. Their overall conclusion was as follows:

> Our survey of the publication habits of the circuit courts confirms that the principal benefit of limited publication is swifter justice; in addition, there may be savings in judicial efforts that in

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[9] Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice (Federal Judicial Center 1973).

[10] Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals—The Price of Reform*, 48 U. Chi. L. Rev. 573 (1981).

> turn may be translated into gains in productivity. We have also identified two major costs: suppressed precedent and, more seriously, a marked number of low-quality opinions.[11]

Finally, the Center has examined another dimension of the problem of unpublished opinions—that of fairness. A study, reprinted in this part, describes the circuits' publication policies and focuses on two questions: Who has access to the unpublished decisions? And how may these decisions be used?[12] The issues pose a classic dilemma. If access is restricted but citation is freely allowed, only those attorneys with the time and resources to search for unpublished material or those who regularly appear before the court will benefit, an outcome that is disadvantageous to the less well situated attorney and thus arguably unfair. Yet, barring citation will not prevent judges or attorneys from making use of the material found in unpublished decisions or from becoming familiar with such decisions; they can still use the information without acknowledging the source of their reasoning. Unrestricted access to unpublished decisions, however, also creates problems. The rules and procedures adopted by the circuits are responses to these concerns, and they are examined in this Center study.

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[11] *Id.* at 626.

[12] D. Stienstra, Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals (Federal Judicial Center 1985).

# DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS[1]

Joe S. Cecil and Donna Stienstra
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(FJC-R-87-5)

## I. Introduction

This report presents the findings of a study of the procedures used by four federal appellate courts to select a portion of their cases for disposition without argument. The practice of selecting cases for different kinds of decision-making procedures—often referred to as screening—is probably familiar in concept, if not detail, to most judges, attorneys, and court scholars. Generally, cases are sorted into two categories: (1) those to be disposed of using the briefs as the primary source of information for deciding the merits of a case and (2) those to be disposed of with the additional source of an oral argument from the attorneys for both parties.[2]

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[1] This report has been shortened to excerpts from chapters 1 and 7 and the entirety of chapter 8. The appendixes have been omitted and the footnotes and tables renumbered. Ed.

[2] In this report we use several terms to refer to cases disposed of on the briefs: submissions on the briefs, nonargument cases, cases disposed of without argument, and nonargument dispositions. In some courts screening may encompass a broader set of categories than only argument and nonargument dispositions. For example, some courts also select a portion of their cases for prebriefing conference programs. *See* A. Partridge & A. Lind, A Reevaluation of the Civil Appeals Management Plan (Federal Judicial Center 1983); J. Goldman, The Seventh Circuit Preappeal Program: An Evaluation (Federal Judicial Center 1982). Others have selected some cases for disposition without briefs. *See* Chapper & Hanson, *Expedited Procedures for Appellate Courts:*

In the federal appellate courts, screening was first developed and adopted in the Court of Appeals for the Fifth Circuit. Because of the early leadership of the Fifth Circuit, screening has come to be thought of in the terms set by this court. Thus, in the typical screening procedure, staff attorneys make an initial selection of cases suitable for disposition on the briefs and prepare memoranda describing the facts and issues in the cases they select. Special judicial panels that do not convene then review the briefs and the materials provided by the staff attorneys, decide whether disposition without argument is appropriate, and, if so, decide the merits of the case.[3]

Although oral argument has been the traditional method for disposing of cases in the federal appellate courts, some cases have always been decided without argument—even before the adoption of formal screening programs—if for no other reason than the inability of the parties to appear in court.[4] During the last decade, however, most federal appellate courts have formalized the practice of selecting some cases for nonargument disposition, and the proportion of cases decided without argument has increased substantially (see table 1).

There are probably several reasons for the trend toward deciding more and more cases without argument. Caseload pressure is certainly one of them, as table 1 suggests. As the number of cases filed has increased, without an equivalent increase in the number of

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*Evidence from California's Third District Court of Appeal*, 42 Md. L. Rev. 696 (1983); J. Shapard, Appeals Without Briefs: Evaluation of an Appeals Expediting Program in the Ninth Circuit (Federal Judicial Center 1984).

[3] Of course, not all courts use this procedure; some do not even use formal screening programs. For example, the Court of Appeals for the Second Circuit hears argument in all cases except those in which the attorneys have waived argument or the appellant is pro se and incarcerated. The Court of Appeals for the Third Circuit decides many cases on the briefs but without a formal screening program. *See* J. Cecil & D. Stienstra, Deciding Cases Without Argument: A Description of Procedures in the Courts of Appeals (Federal Judicial Center 1985).

[4] For example, parties may waive argument because of the cost of traveling to the court. Also, incarcerated pro se litigants are not permitted to appear in court. (Counsel are appointed if their cases require argument.)

judgeships, the courts have looked for procedures that would enable the judges to dispose of their caseloads more efficiently. At the same time, . . ., the nature of caseloads has been changing, and there has been a greater increase in the types of cases that typically are decided without argument. Faced with increasing demands on limited resources and confronted with a wide variety of cases, the courts have sought methods by which cases could be differentiated and routed through specialized decision-making processes.

**TABLE 1**
**Percentage of Cases Disposed of Without Argument in the Federal Courts of Appeals (Selected Years)**

| Statistical Year[a] | Number of Cases Terminated on Merits[b] | Percentage Decided Without Argument[c] |
|---|---|---|
| 1975 | 8,596 | 30.3 |
| 1976 | 8,660 | 29.5 |
| 1977 | 9,113 | 31.1 |
| 1978 | 8,895 | 32.5 |
| 1979 | 8,994 | 29.3 |
| 1980 | 10,598 | 28.6 |
| 1981 | 11,980 | 29.0 |
| 1982 | 12,327 | 30.2 |
| 1983 | 13,217 | 36.0 |
| 1984 | 14,327 | 36.8 |
| 1985 | 16,369 | 43.5 |
| 1986 | 18,199 | 45.6 |

SOURCE: Administrative Office of the United States Courts, 1975–1986 Annual Report[s] of the Director.

[a]The nonargument rate is reported for statistical years, which run from July 1 to June 30.

[b]Includes only lead and single cases terminated on the merits. See appendix A for definitions.

[c]Prior to statistical year (SY) 1984, there was some undercounting of the number of cases decided on the merits without argument. See appendix A for a full explanation. Also see chapter 2, section B, for a second explanation of the recent sharp increase in the percentage of cases decided without argument.

The procedures adopted by the courts have not always been enthusiastically received by practicing attorneys and court scholars—or by the members of the judicial community themselves. Many questions have been raised about the practice of deciding some cases without argument. Some critics have been concerned about the delegation of judicial decision making to staff attorneys and in-chambers law clerks. Others have worried that the cases of certain types of litigants, such as prisoners or the poor, will receive

less attention than other cases, such as large commercial cases. Some have questioned whether the legitimacy of the courts will be damaged by a procedure that denies some parties their "day in court." Others have raised concerns about procedures in which the judges do not meet face-to-face to decide the cases, such as (1) Are the issues adequately addressed when the judges do not confer? and (2) Is the decision made by three judges or, in fact, by one?

## A. Authority of the Courts of Appeals to Deny Oral Argument

The history of the development of rule 34(a) of the Federal Rules of Appellate Procedure, which provides for disposition on the briefs, reveals some of the debate that accompanied the adoption of screening programs. Rule 34(a) authorizes the courts of appeals to adopt local rules to permit an appeal to be decided on the merits without oral argument if (1) the appeal is frivolous, (2) the dispositive issue or set of issues has recently been authoritatively decided, or (3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.[5] The rule also specifies that the parties must be provided with an opportunity to file a statement setting forth reasons why argument should be heard, and that the decision to dispose of a case without argument must follow an examination of the briefs and record by a three-judge panel and must be unanimous.

Rule 34(a), adopted in 1979, is patterned after the recommendations in the Report of the Commission on Revision of the Federal Court Appellate System.[6] A review of the development of this rule suggests that the courts of appeals are expected to exercise considerable discretion in the development of procedures for deciding cases without oral argument. This review also suggests,

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[5] Fed. R. App. P. 34(a). The practices followed by the courts of appeals in implementing this rule are described in J. Cecil & D. Stienstra, *supra* note 3.

[6] Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change (Comm'n Print, 1975) [hereinafter Recommendations for Change].

however, that the proportion of appeals currently decided without argument in several of the courts of appeals is now approaching 60 percent, which caused the commission to register concern over the lack of opportunities for oral argument.

The Supreme Court determined long ago that the Constitution does not require oral argument in all cases; the need for oral argument is to be determined on a case-by-case basis after consideration of "the particular interests affected, circumstances involved, and procedures prescribed in Congress for dealing with them."[7] By the mid-1970s, most courts of appeals relied on this ruling to develop screening procedures intended to identify those cases suitable for disposition without argument.[8]

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[7] Federal Communications Comm'n v. WJR, 337 U.S. 265, 272 (1949). ("[T]he right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or even substantial ones, are raised." *Id.* at 276.) More recently, summary disposition procedures involving claims of double jeopardy were approved by the Court in Abney v. United States, 431 U.S. 651, 662 n.8 (1977) (statement of Chief Justice Warren Burger) ("It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy").

[8] *See, e.g.*, P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal at 16–17 (1976) [hereinafter Justice on Appeal]. *See also* Commission on Revision of the Federal Court Appellate System, Hearings, First Phase, Aug.–Oct. 1973 (Comm'n Print, 1973) [hereinafter Hearings, First Phase] (statement of Irving Kaufman, Chief Judge, U.S. Court of Appeals for the Second Circuit, indicating that the Second Circuit is an exception to the trend and citing J. Langner & S. Flanders, Comparative Report on Internal Operating Procedures of the United States Courts of Appeals at 36 (Federal Judicial Center 1973)).

Commentary concerning the screening programs and argument practices of the courts of appeals has been particularly spirited. *See* Bright, *The Power of the Spoken Word*, 72 Iowa L. Rev. 35 (1986); Bright & Arnold, *Oral Argument? It May Be Crucial!*, 70 A.B.A. J. 68 (1984); Engle, *Oral Advocacy at the Appellate Level*, 12 U. Tol. L. Rev. 463 (1981); Feinberg, *Unique Customs and Practice of the Second Circuit*, 14 Hofstra L. Rev. 297 (1986); Godbold, *Improvements in Appellate Procedure: Better Use of Available Facilities*, 66 A.B.A. J. 863 (1980); Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L. Rev. 1 (1986); Rubin

In 1969, following adoption of its screening program, the Fifth Circuit was the first federal appellate court to address the due process questions raised by screening procedures. In *Huth v. Southern Pacific Co.*, the court concluded that its screening program met "both the literal demands and, more important, the underlying spirit" of the standard set by the Supreme Court.[9] In 1973, the Third Circuit also found that the old rule 34 did not require oral argument in every case, noting that "[s]uch a rigid requirement would be incompatible with the need of the judiciary to husband its time by limiting argument to those cases in which the court believes it will aid in the quality of the decision-making process."[10] That same year, the Tenth Circuit Court of Appeals was even more direct in rejecting the claim of a due process right to oral argument. The court wrote, "Oral argument serves only as an aid to the court and is not premised upon a statutory or constitutional right of the parties. The court, as it does in more than fifty percent of all cases considered, did not desire oral argument."[11]

While the issue was being addressed by the courts, a series of hearings gave others an opportunity to comment on the practice of deciding cases without argument. The diminishing role of oral argument was a primary concern of the Commission on Revision of the Federal Court Appellate System, also known as the Hruska Commission. Convened in 1973, the commission was created by Congress to study the procedures of the federal courts of appeals and to recommend changes "for the expeditious and effective disposition of the caseload of the Federal courts of appeal, consistent with fundamental concepts of fairness and due process."[12] Hear-

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& Ganucheau, *Appellate Delay and Cost—An Ancient and Common Disease: Is It Intractable?*, 42 Md. L. Rev. 752 (1983).

[9] 417 F.2d 526 (5th Cir. 1969).

[10] NLRB v. Local No. 42, Int'l Ass'n of Heat & Frost Insulators, 476 F.2d 275, 276 (3d Cir. 1973).

[11] United States v. Smith, 484 F.2d 8, 11 (10th Cir. 1973). *See also* United States v. Marines, 535 F.2d 552, 556 (10th Cir. 1976) ("Dispensing with oral argument clearly does not violate due process rights") (citing *WJR*, 337 U.S. 265).

[12] Pub. L. No. 92-489, § 1(b), 86 Stat. 807 (1972), amended by Pub. L. No. 93-420, 88 Stat. 1153 (1974).

ings before the commission concerning oral argument resulted in a spirited debate between those concerned with preserving oral argument as an integral part of the judicial process (primarily attorneys) and those who wished to restrict oral argument in cases in which it was not expected to be helpful (primarily judges).

Proponents of oral argument asserted that the benefits of oral argument outweighed any saving of judicial time that might result from its elimination. Oral argument, they contended, makes the facts and contentions in dispute easier to understand and permits the parties to feel they have had their day in court.[13] The American Bar Association adopted a resolution strongly urging preservation of oral argument. The resolution stated the following:

> Be It Resolved That the American Bar Association expresses its opposition in an appropriate manner to the rules of certain United States Courts of Appeals which drastically curtail or entirely eliminate oral argument in a substantial number of non-frivolous appeals, and, a fortiori, to the disposition of cases prior to the filing of the briefs.[14]

Advocates of restricting oral argument acknowledged its value in many cases, but they insisted as well that the courts do not require oral argument in all cases to be able to render a reasoned and principled decision. They contended that many more cases could be decided if the courts were free to decide at least some cases without oral argument.[15] For adherents of this position, the critical inquiry then became one of numerical limits: What degree of nonargument was authorized by the federal rules?

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[13] *See, e.g.*, Hearings, First Phase, *supra* note 8, at 65–68 (statement of Orison S. Marsden, Esq., American College of Trial Lawyers, arguing that oral argument be preserved).

[14] Action of the House of Delegates, August 1974, *quoted in* Justice on Appeal, *supra* note 8, at 18 n.4.

[15] *See, e.g.*, Hearings, First Phase, *supra* note 8, at 17 (statement of former Solicitor General Erwin N. Griswold) ("The Fifth Circuit would be five years behind if it allowed the old-time oral argument in every case"), 36–37 (statement of Chief Judge Collins Seitz, Third Circuit Court of Appeals), 449 (statement of Judge Griffin Bell, Fifth Circuit Court of Appeals).

Although there was very little discussion of the precise percentage of an appellate court's caseload that could be decided without argument, even some advocates of restriction of oral argument expressed concern that some courts had already gone too far. These commentators felt that a tougher standard for dispensing with oral argument might be advisable.[16] Concern was expressed, in particular, about the practice of the Fifth Circuit, which at that time was deciding 57 percent of its cases without argument.[17] However, no direct discussion of the limits of appellate court discretion in structuring such procedures can be found in the record of the hearings.

The Commission ultimately recommended that the Federal Rules of Appellate Procedure be amended to establish a national standard that oral argument be allowed as a matter of right except when the appeal is frivolous, the dispositive issue or issues have been recently authoritatively decided, or "the facts are simple, the determination of the appeal rests on the application of settled rules of law, and no useful purpose could be served by oral argument."[18] The commission also supported the principle of giving the local courts of appeals discretion in determining the procedures for deciding cases without argument, stating, "The Commission recognizes that conditions vary substantially from circuit to circuit. Each court of appeals should therefore have the authority to establish its own standards, so long as the national minimum is satisfied, and to

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[16] *See* Hearings, First Phase, *supra* note 8, at 383 (statement of Judge John Godbold, Fifth Circuit Court of Appeals), 452–54 (statement of Judge Griffin Bell, Fifth Circuit Court of Appeals).

[17] *See, e.g.*, Hearings, First Phase, *supra* note 8, at 452 (statement of Judge Griffin Bell, Fifth Circuit Court of Appeals), 18 (statement of former Solicitor General Erwin N. Griswold), 65 (statement of Orison S. Marsden, Esq., American College of Trial Lawyers), 375 (statement of Roland Nachman, President, Alabama State Bar Association), 383 (statement of Judge John Godbold, Fifth Circuit Court of Appeals).

[18] Recommendations for Change, *supra* note 6, at 48. The original rule 34(a), adopted in 1968, simply stated, "The clerk shall advise all parties of the time and place at which oral argument will be heard." Fed. R. App. P. 34(a) (1979).

provide procedures for implementation which are particularly suited to local needs."[19]

With only one minor change, the report of the commission became the basis of the amended Federal Rule of Appellate Procedure 34. The phrase "no useful purpose could be served by oral argument" was changed to "would not be significantly aided by oral argument" to permit a more flexible and workable standard. Shortly thereafter, the American College of Trial Lawyers adopted a resolution condemning "the action of certain courts, both Federal and State, in curtailing or eliminating oral argument in non-frivolous matters."[20]

It is apparent that the commission and the drafters of the amendments to rule 34 intended to authorize the practices already in existence for deciding some cases without argument. Appellate judges were given considerable discretion in deciding when to deny oral argument. This discretion is reflected today in the great variation in local rules and practices across the courts of appeals. Nevertheless, although the commission and rule 34 set no specific standard, the history of the development of the rule suggests considerable concern when dispositions without argument reach 60 percent of the decisions on the merits. Moreover, the commission cautioned against routinely dispensing with oral argument:

> Oral argument is an essential part of the appellate process. It contributes to judicial accountability, it guards against undue reliance on staff work, and it promotes understanding in ways that cannot be matched by written communication. It assures the litigant that his case has been given consideration by those charged with deciding it. The hearing of argument takes a small proportion of any appellate court's time; the savings of time to be achieved by discouraging oral argument is too small to justify routinely dispensing with oral argument.[21]

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[19] Recommendations for Change, *supra* note 6, at 48.

[20] Resolution adopted by the Board of Regents of the American College of Trial Lawyers on March 9, 1979 (on file in the Information Services Office of the Federal Judicial Center).

[21] Recommendations for Change, *supra* note 6, at 48.

## B. Purpose and Design of the Study

Most of the federal appellate courts now have specialized procedures for selecting some cases for disposition without argument, and the debate about these procedures continues. The fundamental question at the center of the debate is whether cases decided without argument are receiving adequate attention from the appellate courts. There is no simple way to answer this question, but to the extent that the answer depends on a clear understanding of the procedures involved in selecting cases for nonargument disposition, this study can provide a partial answer.

We examined the screening procedures of four appellate courts with the hope of providing a clear, precise description of the procedures used by these courts to select and decide the cases disposed of without argument. We sought in particular to answer several specific questions about appellate screening:

1. How many and what kinds of cases are decided without argument?

2. What steps do judges follow when reviewing cases for nonargument disposition?

3. What written material do they rely on for this review?

4. What are the characteristics of cases they consider suitable for nonargument disposition?

5. How much and in what way do the judges communicate with each other while reviewing and deciding the nonargument cases?

6. What are the staff attorneys' and law clerks' responsibilities in selecting and preparing cases for disposition on the briefs?

7. What special safeguards have been adopted to ensure that cases disposed of on the briefs receive full judicial attention?

8. How do the courts respond to parties' attempts to influence the method by which their case is decided?

We took two approaches to answering these questions. First, we examined the data collected by the Administrative Office of the United States Courts and developed a profile of the cases decided

on the briefs. This profile highlights the differences between argued and nonargued cases on several dimensions: the nature of the cases, the elapsed time from briefing to judgment, the rate at which the cases are affirmed, the publication rate, and the types of dispositions (opinions, orders) used.

Our second approach was to interview those who participate in the process. It was beyond the scope of this study to conduct interviews in all thirteen appellate courts. However, our previous study on appellate screening practices provided a typology from which we could choose the courts for the current study. The earlier study, based on a survey of the thirteen courts' local rules and interviews with the clerks, identified three general procedures used by the courts for deciding cases on the merits without argument.[22] These procedures vary in two ways: (1) the extent to which the court staff are involved in the identification of cases for disposition without argument and (2) the structure of the judicial panels that consider such cases and the procedure the panels use to decide the cases. Eleven of the thirteen courts use one of these three procedures.[23] For the current study, we chose one court from each of the three categories. This method enabled us to highlight the courts' different approaches to screening.

The first, and most commonly used, screening procedure is one patterned after the practice first adopted by the Fifth Circuit. The court's central legal staff identifies cases suitable for disposition without argument and prepares memoranda describing the cases. Special panels of judges then review these designations, as well as the briefs and other case documents, and decide the cases

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[22] J. Cecil & D. Stienstra, *supra* note 3.

[23] The Courts of Appeals for the Second and D.C. Circuits do not. The Second Circuit has a policy of permitting argument in all cases other than those involving incarcerated pro se litigants; thus, it has no procedures for selecting cases for nonargument disposition. We were not able to interview the clerk of the D.C. Circuit, but the court's local rules suggested that it had no screening procedure. Data for SY 1984, on which the first report was based, seemed to support that conclusion: Only 6 percent of the decisions on the merits were made without argument. (The thirteenth court included in the first study was the Court of Appeals for the Federal Circuit.)

without argument; in most courts these special panels do not convene.

In the second type of screening procedure, used by the Courts of Appeals for the Sixth and Federal Circuits, court staff attorneys review cases and identify those suitable for disposition without argument, but the cases are then decided by the courts' regular hearing panels (rather than special panels) at the time they convene to hear argument in the argued cases. Thus, the nonargument cases—like the argued cases—are decided by an in-person conference of the judges.

In the third type of screening procedure, used by the Third Circuit, all cases are initially listed on the argument calendars and sent directly to the judges. Without assistance from staff attorneys or special panels, the judges then select and decide more than half the cases without oral argument. In other words, screening is carried out completely by the hearing panels.

For the present study of appellate screening practices, we selected the Fifth Circuit from the category of courts that have both staff screening and special panels. This court—the first federal court to adopt screening—has influenced the choice of procedures in many other courts. From the second category of courts, those that use staff screening but no special panels, we selected the Sixth Circuit, for the simple reason that the other court in that category is a specialized court and its experience is thus less generalizable. The single court in the third category—the Third Circuit, which has developed no special screening procedures—is of course also included in the study. Finally, we selected one additional court, the Court of Appeals for the Ninth Circuit, because it has adopted an interesting variation on the practice of the Fifth Circuit.

For each court, we followed the same basic research procedure. We made an initial trip to the court to interview the clerk and the director of staff attorneys. At that time we also tried to collect several types of data from the court files. For example, the data provided by the Administrative Office do not reveal whether a party is pro se. Because we wanted to be able to determine how large a proportion of each court's nonargument caseload was filed pro se and therefore unlikely to be argued regardless of the type of

screening procedure used (unless the case warranted appointment of counsel), we collected the docket numbers of the pro se cases.[24] We also tried to collect information about the number of cases in which the parties had requested argument or had waived argument and the number of cases in which the parties had objected to the nonargument disposition of their case. Because requests for argument or waivers of argument are usually made in the briefs, and because examination of the briefs was beyond the resources of this study, we were not able to determine for most courts how often such requests are made. Determining the number of objections filed would have been even more difficult. Therefore, for the number of attorney requests, waivers, and objections, we have for the most part relied on estimates by the court staff and the judges.

We returned to the courts for interviews with the judges in the spring of 1986. With only a few exceptions, all active judges in each of the four courts were interviewed, most in person and some by telephone. The interviews typically lasted forty-five to sixty minutes, although some were cut short because of the press of judicial business.[25]

In order to highlight the unique features of the individual courts, we tailored the interview questions to the practices of each court. For example, we asked the judges in the Ninth Circuit to discuss the differences between serial and parallel panels. We asked the Sixth Circuit appellate judges to comment on the significance of their practice of deciding all nonargument cases in a face-to-face conference. Although the interviews focused on the unique features of the courts, we also included questions that would en-

[24] The courts were very helpful in providing the docket numbers of the pro se cases. We merged the docket numbers with data from the Administrative Office so that we could identify the characteristics of the pro se cases. Because our first trips to the court were in 1985 and because we collected the data for the most recently completed statistical year, our pro se data are for SY 1984.

[25] In order to interview as many judges as possible in person, we scheduled our trips during weeks in which the greatest number of judges would be at the court for argument. The trade-off, of course, was that during argument weeks, judges have many demands on their time, and thus some of the interviews were shortened.

able us to collect, to the extent possible, similar information across the four courts.

We found during the course of our study that some courts have adopted special procedures to ensure that the cases disposed of without argument receive the full attention of the judges. In the Fifth and Ninth Circuits, for example, the decision on the merits in a nonargument case must be unanimous when the parties have requested oral argument. For nonargument cases, both the Third and Fifth Circuits have recently moved away from the use of judgment orders, in which the reasons for the decision are not stated, to the use of memorandum opinions, in which they are stated. We highlight these safeguards in our discussion of the screening procedures of these courts.

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## VII. The Role of Oral Argument

Frequently during the interviews, the judges departed from their responses to specific questions or their descriptions of their practices to speak in more general terms about the role of oral argument in the appellate process. Some offered a vigorous defense of oral argument, describing it as a "fundamental right of the litigants." One judge cautioned, "It is better to increase the disposition time than to adopt unsound procedures." Other judges took issue with this position, arguing with equal vigor that oral argument should be restricted to cases in which it is necessary to inform the deliberations of the court. Providing argument when it is unnecessary, they contended, limits the amount of time that can be devoted to the more difficult cases. These judges typically expressed concern over the increasing caseloads of the courts and the increasing time from filing to disposition. One judge, after describing oral argument as the ideal, said, "I'll be frank about it, it is not possible with this caseload to practice the ideal." Another indicated, "You can't operate a 1986 court with 1956 methods."

Although the judges tended to share the views of fellow members of their courts regarding oral argument, within each of the courts a range of views were represented. We attempted to gain a

better understanding of the judges' views of the role of oral argument by asking three questions:

1. Have your views concerning the role of oral argument changed during your time on the bench?

2. What steps should your court take if filings increase by 20 percent?

3. What means are available to assure the public that cases decided without argument are receiving full consideration?

### A. Changing Views of Oral Argument

Almost all appellate judges practiced law before being appointed to the bench and presumably can appreciate the concerns of the attorneys who object to restrictions on oral argument. We asked the judges if their views of the importance of oral argument changed during their time on the bench. The responses of the judges of the four circuits are summarized in table 2.

According to their responses, the judges are divided into two groups: those whose commitment to oral argument has remained the same or has become even stronger during their time on the bench, and those whose commitment to oral argument has diminished. As indicated by the table, the changing views of the judges generally correspond to the procedures followed by their courts. In the Third and Fifth Circuit Courts of Appeals, in which almost half of the cases are decided without oral argument, a clear majority of the judges indicated that their commitment to the role of oral argument has diminished over the years. In contrast, almost all the judges of the Sixth Circuit Court of Appeals, a court that decides a lesser proportion of cases without argument, indicated that their commitment to oral argument is as strong or stronger than when they were appointed to the bench. A number of the judges mentioned with pride the tradition in the Sixth Circuit of permitting argument in as many cases as possible. The three judges who became less committed to oral argument over time questioned the need for argument in cases in which it is not likely to aid the court's deliberation.

**TABLE 2**
**Judges' Views of Oral Argument**

| | Circuit | | | |
|---|---|---|---|---|
| | 3rd | 5th | 6th | 9th |
| Oral argument is as or more important than when they came on the bench | 3 | 4 | 12 | 10 |
| Oral argument is less important than when they came on the bench | 6 | 8 | 3 | 12 |

The judges of the Ninth Circuit Court of Appeals, another court that decides a lower proportion of cases without argument, were almost evenly divided in their responses. Although a few judges indicated that their views toward the screening program had changed since its adoption (some to favor the program and others to oppose the program), this division is approximately the same as that when the court decided to implement the screening program. Many of the judges who professed a continuing commitment to the role of oral argument indicated a tolerance for the screening program as a means of accommodating a large backlog of cases awaiting argument.

In their comments, all of the judges of all four courts appeared to acknowledge that oral argument is important in some cases; no judge favored dispensing with argument entirely. However, almost all agreed that oral argument is not desirable in some small portion of the cases, such as pro se appeals from incarcerated prisoners. Within these extremes, there are sharp differences of opinion. Generally, those judges across all of the courts who indicated that their commitment to oral argument has diminished explained that they have come to realize that argument is not helpful to the court in deciding certain kinds of cases. One judge mentioned that when he was a trial attorney, he believed that argument was essential in every case. After some time on the bench, he now believes that "there are many cases in which argument doesn't make a tinker's damn of difference." Another indicated that he arrived on the bench feeling

that the oral argument could "make or break a case," but learned that many cases can have only one outcome.

Increasing experience as a judge may also cause some judges to de-emphasize the role of oral argument. Several judges mentioned that they were more excited about participating in oral argument when they arrived on the bench, but with passing years their enthusiasm dimmed. One mentioned that as the burdens of the work increased, he became "more selective in perceiving the need for oral argument." Another indicated that "as judges become more experienced they are less likely to grant oral argument. They can quickly learn to identify those cases in which argument will be useless." Another indicated that over time, he became more confident of his judgment and "more comfortable in deciding some cases without argument." This judge also emphasized that participating in oral argument and the subsequent conference is "an important part of the orientation process of new judges."

Many of the judges who indicated less commitment to oral argument stressed the simple or frivolous nature of many of the appeals that are filed. A judge who had recently been appointed to the bench indicated that he was "amazed at the cases that make it to argument. Some of the claims are so without merit, that it is surprising that an attorney was found to write the brief." Another indicated that his experience in private practice did not prepare him for the number of cases that "have very little chance of success" and expressed surprise at the number of appeals that are filed "apparently only to gain the advantage of delay while the appeal is under consideration." This judge also expressed surprise at the frivolous nature of many pro se appeals. Another judge, who mentioned the opposition of the local bar association to restrictions on oral argument, stated, "The bar doesn't realize how many frivolous cases there are." Another judge, who said that as an attorney he "begged for argument in every case," acknowledged that as an attorney, he would be unlikely to accept the kinds of cases decided without argument in his court. Two judges, one from the Fifth Circuit and one from the Ninth Circuit, indicated that even if there were no backlog of cases, there would still be a role for the screening programs in dealing with cases of little merit. One judge,

who indicated that initially he had viewed the program as a "necessary evil," said that even if the court were current, he would urge continuation of the screening program to deal with "cases that do not benefit from argument." Another judge stated that "even if there were no caseload pressures, there would still be a place for the [screening program] to get the junk out of the system."

The judges who have retained a strong belief in the role of oral argument, including three judges who indicated that their preference for oral argument became even stronger after their years on the bench, generally admitted that there are many cases in which oral argument does not influence the disposition. However, these judges defend oral argument either as a fundamental part of the appellate system or as a superior means of learning about the issues raised on appeal. Many of these judges indicated a preference for argument as a means of learning more about the case. One judge mentioned that he "learns as much about the case after listening to the attorneys talk about the case as by reading the briefs." Others favor oral argument as a means of clarifying issues addressed inadequately by the briefs. One judge remarked that oral argument "helps in understanding the issues. Many lawyers can't write; their briefs are too unfocused. Argument gives you a chance to focus on the issues." Another judge said, "Lots of questions are not answered by the briefs. It's easier to ask questions in person than to review a long record. Argument reveals weaknesses that the briefs hide." Another would hear argument in all cases, if possible, to "make sure that no mistakes were made."

Many of these judges emphasized the importance of permitting the litigants an opportunity to have their cases heard in an open forum. One judge mentioned that oral argument "legitimates the result"; another mentioned the "therapeutic effect" of giving the litigants an open hearing. Several judges said they would prefer a procedure similar to that of the Second Circuit Court of Appeals, in which the attorneys are permitted oral argument unless they choose otherwise. Oral argument is also valued as a means of affirming the responsibility of the judges for the decision. One judge said that oral argument "increases confidence in the judiciary." Another said

that after oral argument, "the bar then knows they have looked the judge in the eye and that the clerks aren't making the decision."

Different oral argument practices in the state appellate courts may account for some of the change in judges' opinions. Prior to their appointment to the federal bench, many judges had impressions of oral argument that were based on their experiences in state appellate courts. In contrast to the practices of most federal courts of appeals, in many state appellate courts, it is not customary for the judges to read the briefs prior to the argument. A judge who acknowledged that he now feels that the role of oral argument is less important said, "There is a huge difference in my perception of the role of argument now compared to when I was a litigator. When arguing before the state courts, argument was to inform the judges because they hadn't read the briefs." Since he and the other judges in his court prepare for argument by reading the briefs, this judge now feels that oral argument can be restricted to those cases in which the judges have questions concerning the issues raised in the briefs. A different state court practice also may lead to a greater commitment to oral argument. A judge who described himself as "a strong advocate of oral argument," indicated that "as a practitioner in a state where the court seldom granted argument, I never saw the judges. It was a mystery how the court operated. Part of the court's function is to be seen and heard."

Frequently, the judges distinguished between the importance of the argument itself and the importance of the conference of the judges that usually follows oral argument. The judges of the Third and Sixth Circuits, who decide the nonargument cases when they convene to hear the argued cases, repeatedly noted the importance of convening for a conference of panel members, even in the absence of argument. Only by convening, they contended, can the parties have the benefit of the deliberations of all the panel members. One judge mentioned that he values the discussion with his colleagues far more than the argument by the attorneys. Another judge mentioned that the panel members bring different strengths to the analysis of the case, and the conference is the best way to guard against "one-judge decision making."

Some of the judges of the Fifth and Ninth Circuits, courts that decide some nonargument cases without an in-person conference of panel members, also expressed concern about the loss of the opportunity for the conference. These judges indicated that they are likely to object to the disposition without argument and place the case on an argument calendar when they feel a conference would be beneficial. In both of these courts, the staff attorneys will occasionally recommend that a case not be argued, but be placed on the argument calendar for the sole purpose of conferencing. We asked the judges of the Fifth Circuit if they thought conferencing without argument was beneficial. All but one judge endorsed the practice, although most of these judges added that the procedure should be used only for selected cases. For example, six judges said conferencing should be used when a case is complex enough to require discussion but it is also clear that questioning the attorneys will not be any help. One judge said that conferencing without argument is used "when you don't want to make the decision alone," and two judges pointed out that the procedure is beneficial because "everybody prepares the case."

The question remains whether the cases placed on the screening track and decided without argument or conference receive proper consideration. Recently, the judges of the Ninth Circuit have had an opportunity to evaluate the nature of the deliberation accorded "screening" cases when these cases are placed on the argument calendar. For a brief period, when the court had no backlog of cases awaiting argument, some of the cases that normally would have been sent to the screening panels were instead sent to the argument panels to fill out the calendars. Only the "higher weight," or the more difficult, screening cases were placed on the argument calendars. As it turned out, the panels found it necessary to request argument in few of the cases. Nevertheless, these cases received the benefit of an in-person conference of the judges concerning the issues raised in the cases. We asked fifteen judges if these cases

received more consideration by the argument panels than they would have received if decided by the screening panels.[26]

Nine of the fifteen judges indicated that these cases had received the same consideration they would have received if referred to the screening panels; the placement of these cases before the argument panels, they said, did not result in a discussion of the issues among the panel members. Little discussion was required, according to the judges, since the issues and outcome of these cases were straightforward. One judge remarked, "None of the screening cases were conferenced when placed on the argument calendar. The panel members asked, 'Does anyone have a problem with this case?'" Another judge echoed this view and mentioned that in the rare instance in which the judges did confer, the conference verified "the initial impression that there were few issues that merited the full degree of consideration." Another judge acknowledged the general benefit of conferring, but indicated that "the screening cases are a poor vehicle to achieve these purposes. In general, there is no discussion of such cases because they are so simple."

Five of the fifteen judges indicated that the cases did receive more thorough consideration when placed before the argument panels. By and large, these were the same judges who indicated a continuing commitment to the role of oral argument. In general, these judges emphasized that the opportunity for a conference among the panel members, rather than the opportunity for oral argument, was the greatest benefit of the argument designation. One judge remarked that when the judges convene, each judge gives the case "independent consideration." This judge expressed concern that the "serial procedure" tends to limit independent consideration. Another judge mentioned that he spent time reviewing such cases with his in-chambers law clerks, adding a degree of assurance that was missing when the judge relied on a bench memorandum prepared by a staff attorney.

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[26] We learned about the court's practice of diverting some screening cases to the oral argument panels after we began the interviews in the Ninth Circuit and were not able to ask this question of all of the judges.

Finally, one judge suggested that the degree of consideration given such cases depends on the nature of the panel members rather than on the procedure the panel uses in considering the cases. This judge observed, "Judges who prefer the serial procedure are unlikely to give a screening case much more attention if they encounter it on the argument calendar. Similarly, parallel procedure judges will give more consideration to such a case on an argument panel."[27] This comment articulates an impression we developed during the course of the interviews. It seemed from the comments of the judges in all of the courts that each judge finds a way to ensure that a case is given the level of consideration that he feels is appropriate in order to render a correct decision. If the briefs raise questions that require an answer, the judge will place the case on the argument calendar. If a conference of judges is needed in courts in which the panels do not convene, the judge will contact the other members of the panel, by either letter or telephone, or will reject the case from the screening program and place it on the argument calendar. In general, it was our impression that the judges do not let the specific procedures employed by their courts determine the level of consideration appropriate for a case. It is the judge's own views that determine if a case receives oral argument or a conference of panel members, and the judges appear to find a way to achieve this level of consideration within the specific procedures of their courts.

### B. Judges' Reactions to Alternatives to Restrictions on Oral Argument

Restrictions on oral argument, as well as other limitations on traditional appellate advocacy, have been adopted by the courts with great reluctance and only as an effort to accommodate the growing burdens placed on the judges by increased filings of appeals. Most judges agree that such restrictions are not desirable,

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[27] No relation could be found between preferences for a screening procedure and extent of consideration of screening cases. It is possible that such a relation once existed but now is obscured by the number of judges who express a preference for the "modified" parallel procedure. . . .

but, in the past, have preferred restrictions on oral argument to the other alternatives available to the court. As indicated in the preceding chapters, the judges in each of the courts are generally content with the current practices of their court, which made it difficult to inquire about the relation between oral argument and other alternatives that may have been considered. However, we believed that we could obtain some indication of the value of oral argument relative to that of other procedures for expedited review of appeals by asking the judges which actions should be taken in the event of a future sharp increase in the filings of appeals. Each judge in each court was asked the following question:

> Increases in case filings force courts to make difficult choices. If the number of submitted cases per judge should increase by an additional 20 percent, the court would have to decide how to handle that larger caseload.
>
> A. Which of the following options would be the most desirable response to the caseload increase?
>
> _____ Hear oral argument in fewer cases.
>
> _____ Publish fewer opinions.
>
> _____ Prepare more decisions without reasons stated.
>
> _____ Encourage settlement by preappeal conferences conducted by nonjudicial personnel.
>
> _____ Rely more heavily on visiting judges.
>
> _____ Permit the time to disposition to increase.
>
> _____ Other.
>
> B. Which option would be the least desirable response?

We attempted to include the options most likely to be considered by the court, many of which had been adopted during previous difficult times. We included only options that would be within the control of the court; we did not list such possibilities as increasing the number of judgeships and restricting appellate jurisdiction. Nevertheless, we recorded these options as "other" responses when they were mentioned by the judges.

Several of the options deserve some explanation. Preparing decisions without stating the reasons refers to the practice of issuing a very brief disposition, perhaps only a single line, that indi-

cates the decision of the court without indicating the reasoning of the court. These dispositions are sometimes referred to as judgment orders, summary affirmances, or some other term indicating that the authority for the decision is not discussed in the context of the facts of the case, although a citation to authority may be included. Publishing fewer opinions was included as an option because some judges contend that much time can be saved by not "polishing" opinions destined for publication. Permitting the time to disposition to increase was included as a "default" option, to permit judges to select this option should they find all the other alternatives to be unacceptable.

The option of encouraging settlement by preappeal conferences conducted by nonjudicial personnel was the only option presented that concerned actions taken by court staff rather than judges. Although there have been a number of suggestions for preappeal conference programs staffed by judges, the difficulty of finding judges who have the time to undertake such activities has thwarted the development of such programs. Where prebriefing conference programs have been developed, the conferences have been conducted by nonjudicial personnel, usually a senior staff attorney. This was the option described in the question. The preappeal conference programs vary greatly in their purposes and techniques.[28] In presenting this option, we did not attempt to identify which of

[28] Descriptions of the preappeal conference program in the Second Circuit Court of Appeals can be found in J. Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration (Federal Judicial Center 1977); A. Partridge & A. Lind, A Reevaluation of the Civil Appeals Management Plan (Federal Judicial Center 1983); and Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 Yale L.J. 755 (1986). The conference program in the Seventh Circuit is described in J. Goldman, The Seventh Circuit Preappeal Program: An Evaluation (Federal Judicial Center 1982). The Eighth Circuit has a limited conference program, which is described in Lay, *A Blueprint for Judicial Management*, 17 Creighton L. Rev. 1047 (1984); and Martin, *Eighth Circuit Court of Appeals Pre-argument Conference Program*, 40 J. Mo. B. 251 (1984). A description of the preappeal conference program in the Sixth Circuit is provided in Rack, *Preargument Conference in the Sixth Circuit Court of Appeals*, 15 U. Tol. L. Rev. 921 (1984).

the variations was to be considered, but inquired generally about the acceptability of such programs in dealing with sharp increases in filings.

During in-person interviews, the judges were presented with a sheet listing the options; in the telephone interviews, the list was read aloud before the judge responded. The judges were asked to comment on all of the alternatives and to indicate which was most acceptable and which was least acceptable. This question was asked toward the end of the interviews and was asked only if time permitted. It was the least popular question in the interview. A hypothetical increase of 20 percent seemed intolerable to some judges. One indicated that he would seriously consider resignation. Several others said that there are no appellate procedures available to the courts to deal with such an increase, and others said the system would collapse. However, one judge indicated that a 20 percent increase in case filings would not require a change in procedure "if the judges are doing their work," and another "questioned the premise" that a 20 percent increase in filings would be a burden. Nevertheless, they all examined the list and indicated their choices. Extensive quotations are provided to give a sense of the intensity of the judges' reactions to this question.

. . . .

**Comparisons of the four courts of appeals.** Comparing the responses of the judges across all four of the courts, it is clear that there is little agreement in any of the courts concerning the measures that should be taken in the event of a sharp increase in appellate case filings. The most common pattern is for the judges to be divided in assessing the acceptability of almost all of the options presented. For example, the judges in each of the four courts were split almost evenly concerning the acceptability of further reductions in oral argument.

To the extent that the judges in one court were able to agree, their recommendation often was in conflict with the preferences of judges in the other courts. The judges of the Third Circuit agreed only that in the event of a sharp increase in case filings, the court should prepare fewer reasoned dispositions. Yet, opposition to dispositions without stated reasons was one of the few things the

judges of the Fifth Circuit agreed upon. The judges of the Ninth Circuit expressed a strong preference for publishing fewer opinions, an option rejected by most of the judges of the Sixth Circuit. The judges of the Ninth Circuit also expressed a preference for increased efforts at settlement through preappeal conferences, an option generally disfavored by the judges of the Fifth Circuit. The responses of almost all of the judges to the option of preappeal settlement conferences, both those favoring the conferences and those opposing them, however, indicated great skepticism concerning the effectiveness of members of the court staff in bringing about settlement.

Although all four courts agreed on none of the alternatives, the Fifth and Ninth Circuits agreed that there should be no greater reliance on visiting judges, and the Sixth and Ninth Circuits agreed that the time to disposition should not increase. However, no courts agreed on an acceptable response in the event of a sharp increase in case filings. The absence of a consistent pattern of responses across the four courts indicates the difficulty the courts will face in reaching a consensus on modifications in appellate procedure in the event of a sharp increase in case filings.

### C. Visibility of the Judicial Process

At the end of the interview, if time permitted, the judges were asked what might be done to ensure that the use of abbreviated judicial procedures, such as deciding cases without argument or deciding cases without a reasoned disposition, does not undermine the confidence of the public and the bar in the decisions rendered by the judiciary. The question was asked a number of different ways, usually in reference to remarks made by the judge in responding to some of the options discussed earlier or in relation to specific procedures adopted by the judge's own court.

The overwhelming consensus across all courts is that the parties should be given either an opportunity to argue their case before the court or a written disposition of the case that addresses the issues raised on appeal and cites the authority for the court's decision. Thirty-seven of the fifty-eight judges responding to this question, including a majority of the judges in each of the four

courts, mentioned or implied that either argument or a reasoned decision should be offered as a means of maintaining confidence in the judiciary.[29]

In their comments, many of the judges appeared to accept that some cases would not be argued and stressed the importance of providing a reasoned disposition in such cases. A judge from the Third Circuit said, "Not providing oral argument results in the appearance of inadequate attention, which can be overcome by providing written decisions. The appearance, however, will always give rise to questions about the manner in which the issues were considered by the judges." A judge from the Fifth Circuit focused on the need to provide assurances to attorneys who rarely argue before the federal court, saying, "The infrequent players have no feel for the court. . . . To legitimize the court, you have to write something for the litigants to show you carefully considered the arguments." Several judges mentioned that the written disposition need not be lengthy, as long as it provides an indication of the basis of the court's decision. "The facts don't have to be rehearsed," said one judge, "as long as the disposition gives the parties an idea of the court's thinking." Another judge said that at a minimum, the disposition should cite the authority for the decision and how it relates to the issues. However, most of the judges who recommended a reasoned disposition appeared to have a more lengthy disposition in mind. One judge from the Ninth Circuit remarked, "The screening program is somewhat counterproductive in that the advantage that is gained in saving time from argument is lost in preparing such an extensive disposition."

Several judges indicated that a reasoned disposition is not an adequate substitute for oral argument in maintaining confidence in the judiciary. A judge from the Ninth Circuit indicated that only by hearing argument in a case can the court convince the attorneys that

[29] In general, the following question was asked: "With the adoption of submission on the briefs and decisions without reasons stated, the courts risk becoming less visible. What means are available to assure the bar and the public that the cases are receiving full consideration?" Some judges indicated that there are no other means. We interpreted this response as an endorsement of a practice that permits either argument or a written disposition.

the panel members have looked at the case; the judge said, "In a case in which argument has not occurred, it is very difficult to give the litigants the assurance that the court has considered the issues. Even a lengthy disposition raises questions about who authored the disposition and whether, in fact, a judge, as opposed to a staff member, considered the issues in the case." Another judge commented, "The parties can't be convinced the issues they raised were addressed by the judges when there is neither argument nor a reasoned disposition. I prefer argument. When the parties see that the judges are prepared and ask informed questions, they'll be assured that the issues are addressed." Some of the burdens of oral argument may be offset, then, by a diminished need for a lengthy decision. As another judge who favored argument said, "You can get away with a short decision if you convince [the lawyers] you're on top of the case." However, another judge took issue with this point, saying, "Attempting to convince the attorneys that the judges are considering the issues raised on appeal through argument distorts the argument and is inappropriate."

Eleven judges recommended closer relations with the bar as a means of ensuring confidence in the authority of the court. Several suggested that the judges should be more willing to speak at bar association meetings, describing the practices of the court and assuring the attorneys that the issues raised are not slighted even if there is no argument. A few judges discussed contacts with the bar in terms of improving "public relations," although their comments suggested that these efforts should be directed at the bar rather than at the public itself.

A range of other suggestions were offered. Five judges suggested that changes in publication procedures could reinforce the court's credibility. Four judges said that the courts should publish more of their dispositions, and another judge suggested that the court make available a list of or index to the unpublished cases. Another judge urged writing more opinions, saying, "If the bar wants to find me, they can look at my opinions from last year." Another held that greater attention to the quality of the opinions would guard against a lack of confidence in the courts. One judge suggested making greater use of law interns, permitting the interns

to learn about the procedures of the court and trusting them to inform other members of the bar of the integrity of the court's practices. Another judge suggested wider distribution of the internal operating procedures of the court.

Six of the judges were pessimistic that the courts could convince members of the bar of the integrity of the court's practices without offering the full range of procedures. One judge who strongly favored the opportunity for argument in all cases indicated that the cases "are not receiving full consideration. When cases do not receive full consideration, the quality of the judicial product is not as good." Other judges who were pessimistic were critical of the bar. One judge who had spoken before a number of bar associations concerning his court's practices indicated that he has "almost given up on the bar." He mentioned the beneficial role of the court's advisory committee, composed of leaders of the bar, in structuring the court's procedures, but said, "they are already convinced. It's the skeptics that need the exposure." Two judges indicated that efforts to assure the bar that cases are receiving full consideration would be misguided and would divert the court from more important tasks. One of these judges, who acknowledged that the court's visibility to the bar is a "tremendous concern," opposed the suggestion of longer reasoned opinions, saying, "We're not here to write opinions, we're here to enter judgments. We would be in more trouble with the bar if the cases took four years." Another judge said, "Visibility is not worth the price of argument where argument is not warranted and the cost to the litigant is high. Limitations on argument and publication are not done to save time, but only because they are warranted."

Finally, five judges doubted that the use of less than the complete range of appellate procedures raises a problem. In general, these judges suggested that the nature of the cases decided by such procedures are such that the issue of the court's credibility does not arise. One judge said, "The cases [submitted to the screening panels] involved such outrageous and meritless claims, that there was no issue concerning adequacy of attention." Another judge, who acknowledged that a lack of visibility is the price the courts pay for using truncated procedures, indicated, "I have no easy answers,

but I am at least confident that the cases receiving truncated procedures deserve this treatment. . . . No [reasoned disposition] is needed in the very frivolous case." Another judge, who endorsed greater use of reasoned opinions, said, "In some kinds of cases, such as tax protester cases and immigration cases, where the purpose is delay, the parties will never be satisfied with any procedure that expedites disposition of the appeal." Asked to comment on the court's credibility in using truncated procedures, one judge simply said, "This doesn't concern or bother me."

In summary, the judges of the four courts of appeals generally favored providing a reasoned disposition in cases that are not argued, as a means of demonstrating to the parties that the issues raised on appeal were addressed by the court. Some judges found this to be an inadequate alternative, and some judges felt that the members of the bar would never be satisfied with the court's attention to the issues unless the full range of appellate procedures were always used in their cases. Although a number of other approaches may be attempted, such as improving relations with local bar associations, it appears that for most judges, the court's credibility in all but the most frivolous of appeals requires oral argument or a reasoned disposition.

### D. Individual Discretion in Determining the Need for Argument

Judges generally agree that there are many cases in which oral argument will not inform the disposition of a case. However, they are not of one mind concerning the relevance of this fact in determining the need for oral argument. For many judges, a belief that argument will not aid the disposition is sufficient to justify deciding the case on the briefs alone. For these judges, offering oral argument when it is not needed to aid the deliberations of the panel diverts the court from more demanding cases, thereby limiting the court's ability to dispose of its caseload.

For other judges, the standard for determining the need for oral argument is more complex. These judges' attitudes toward the role of oral argument are not easily separated from their more fundamental concerns regarding the need for collegial interaction and the

obligation of the courts to consider cases in a public forum. These judges look beyond the information needed to prepare a disposition of the issues and would permit oral argument as a means of demonstrating to the parties and the public that the members of the panel have given due consideration to the issues raised on appeal.

Of course, a range of opinions exist between these two extremes, and judges are rarely dogmatic in their adherence to these positions. However, given the range of preferences, it was somewhat surprising that there were so few indications of general dissatisfaction by the judges for the particular practices of their own court; differences in views of the role of oral argument seemed to exist in harmony under four very different procedures. Certainly, the traditions established by the courts concerning the opportunity for oral argument encourage such harmony. However, the interviews indicated that a second important factor is the opportunity for a judge to obtain oral argument in those cases in which he feels it is required. Although we did not question the judges directly concerning the degree to which they felt free to reject a nonargument designation and place a case on an argument calendar, their comments indicated that this is a highly valued right and one that is exercised independently according to the standards of the individual judge. Furthermore, there appeared to be acceptance of the right of an individual judge to exercise this authority according to the dictates of his or her own conscience. Judges who tended to favor nonargument disposition would occasionally mention their surprise at finding certain cases placed before the argument panels on which they served. But there was never any suggestion that this reaction reflected more than a difference of opinion among colleagues who are obligated by their position to exercise their independent judgment. In short, it appears that the opportunity for a single judge, exercising individual discretion, to place a case before an argument panel is a primary reason that conflicting opinions concerning the role of oral argument continue to exist in harmony.

# VIII. Conclusions

A number of courts of appeals are now approaching the rate of nonargument dispositions that caused the Commission on Revision of the Federal Court Appellate System to register concern; several have moved beyond this rate. At the same time, a number of other courts continue to hear argument in most of the cases decided on the merits. This study has found that under the flexible standards of rule 34 of the Federal Rules of Appellate Procedure, the courts are able to fashion procedures that reflect the range of judicial opinion concerning the role of oral argument and that permit the judges to hear oral argument in those cases in which they feel it is necessary. This study also highlights the balancing of values the courts must undertake as they allocate limited resources among pressing demands. In this chapter, we address some of the issues raised by our research.

## A. Judges' Attitudes Toward Oral Argument

The judges we interviewed agreed that a considerable number of cases exist that meet the criteria for nonargument disposition under rule 34 of the Federal Rules of Appellate Procedure. In general, these appeals were described as those in which the issues are simple, the precedent is clear, and the members of the panels are likely to agree on the merits of the decision. Statistical analyses revealed that appeals decided without argument are likely to arise out of civil rights cases, prisoner petitions, Social Security appeals, and pro se appeals in general. However, although the articulated characteristics of nonargued appeals are very similar across the courts, the great variation in the rate of nonargued dispositions suggests that the extent of oral argument evolves from factors in addition to the stated criteria. In fact, our interview data reveal great variation among judges in identifying the purposes served by oral argument. Although oral argument may be thought of primarily as a method for obtaining information about a case, this is only a threshold purpose for many judges. Judges also rely on oral argument to demonstrate to the parties that the members of the panel have attended to the issues raised on appeal, to permit interaction

with members of the bar, to provide a forum for the presentation of issues of public concern, to acknowledge the court's responsibility for resolving such disputes, and to provide an opportunity for the judges to confer and hear each other's views. Each judge differs in the weights he gives to these purposes, resulting in a broad range of opinions among judges concerning the need for oral argument.

Despite the variety of opinions, however, in some courts in this study there is substantial uniformity of opinions regarding the importance of oral argument. Most of the judges of the Sixth Circuit Court of Appeals, for example, are committed to hearing argument in as many cases as they can. In the interviews, the judges of this court emphasized the importance of oral argument in meeting a wide range of needs beyond obtaining the information necessary to decide the case. When asked how their views toward oral argument have changed during their time on the bench, most of the judges in the Sixth Circuit said their experience on the bench has convinced them of the importance of oral argument. In contrast, the judges of the Third and Fifth Circuit Courts of Appeals emphasized the role of oral argument in gathering the information needed to decide the appeal, and most said the longer they are on the bench, the more convinced they are that argument is not necessary in a large number of appeals.

### B. Ensuring Independent Judicial Review

The beliefs of the judges concerning the proper role of oral argument appear to override the particular features of the screening programs. We found no direct correspondence between the procedures and the rate of argument. For example, the Courts of Appeals for the Fifth and Ninth Circuits have similar nonargument procedures, yet the Fifth Circuit decides a far greater percentage of appeals without argument. Both the Third and Sixth Circuits decide appeals without argument only after the panel members confer in person; yet the Third Circuit decides a far greater percentage of appeals without argument and does so without relying on the assistance of materials prepared by staff attorneys.

We found evidence as well that the appellate procedure under which a case is submitted does not govern the degree of attention

the case receives. Interviews with the judges indicated that they provide the degree of attention they feel is necessary to resolve the issues raised by the case; they quite freely reject cases from the nonargument calendar when they determine oral argument is appropriate. (This issue is addressed in greater detail later.) Similarly, placement of simple cases on the argument calendar offers no assurance that such cases will receive more thorough consideration. In the Ninth Circuit, many judges indicated that cases normally destined for the screening panels received no greater attention when rerouted to the oral argument calendars; argument was rarely sought, and there was little discussion among panel members concerning the merits of the disposition.

Finally, the influence of the formal procedures is diminished by the judges' willingness to adapt the established nonargument procedures on an ad hoc basis to permit a case the attention and communication they feel is appropriate. In the Ninth Circuit, for example, judges have transformed screening procedures to permit or limit communication among panel members in accord with their interpretation of the needs of the cases. It appears that two screening procedures that were once quite distinct, the serial and parallel procedures, are becoming more similar. Likewise, in the Third Circuit, some judges have initiated telephone discussions of very simple cases prior to the time the panel convenes, whereas previously they did not confer before the formal conference. These findings suggest that the formal procedures adopted by a court are not the most important factor in determining the degree of attention that is devoted to a case.

What is important in determining the degree of attention a case receives, including whether the case is argued, is the assessment of the needs of the case by individual judges. The critical feature of a nonargument process is the means by which a single judge can reject a case from the nonargument calendar and have it placed before a panel of judges for oral argument. It is the rejection process that ensures that each case receives the attention thought appropriate by the most cautious judge on the panel. It appears that each of the four courts has fashioned a procedure under the flexible standards of rule 34 that permits individual judges to exercise discretion in

determining the need for oral argument in a particular case. Despite the range of opinions about the need for oral argument, the judges of each of the courts indicated that the procedures permit them to exercise their independent judgment concerning the suitability of a case for disposition without argument. In fact, around 15 percent of all cases initially designated for disposition without argument are reclassified and sent to argument panels.

However, the interviews did reveal one way in which the procedure for nonargument disposition may hinder the opportunity for a judge to make an independent determination regarding the suitability of a case for disposition without argument. Several judges expressed concern that awareness of the preferences of other panel members for nonargument in a case may cause their colleagues to become reluctant to state a preference for argument. This potential problem may be avoided by routing the notice of objection to nonargument disposition of specific cases through the clerk's office. The clerk may then inform the panel members of the cases that remain for disposition without argument. In the Third and Sixth Circuits, this procedure would require only a slight variation in current practice. In the Fifth and Ninth Circuits, the serial procedure for circulation of materials would have to be modified. However, the adoption of the "modified" parallel procedure for disseminating and considering case materials would permit an independent assessment, as well as permit communication among the panel members when it is necessary. Although this notification practice imposes a greater burden on the clerk of the court, it also ensures that each case remaining on the nonargument calendar is a case that each judge independently found suitable for nonargument disposition.

### C. Addressing the Concerns of Parties

Despite judges' assertions that the issues in nonargued cases are carefully studied and decided, parties are often concerned that their case has not been thoroughly reviewed. To alleviate this concern, the judges agreed that some effort should be made in nonargued appeals to assure the parties that the court considered the issues. In cases that are not argued, all four of the courts attempt to

provide a written disposition that includes the reasons for the holding and a citation to the authority for the decision. Providing such a disposition will not lay to rest all concerns that arise when cases are decided without argument, but this practice appears to be a minimum requirement for nonfrivolous appeals disposed of without argument.

Parties' concerns might also be eased if a more meaningful way could be structured for them to tell the court why they think argument is necessary. Currently party expressions of preference do not play an influential role in the courts' determination of the need for oral argument.[30] Under rule 34, parties are permitted to file a statement setting forth the reasons why oral argument should be heard. Some courts require that this statement be included as part of the briefs, whereas others permit an opportunity to file the statement as an objection after the case is calendared for a nonargument disposition. The judges indicated that they give these statements little weight because they typically include nothing more than a suggestion that argument be heard. In the briefs we examined, few of the requests for oral argument or objections to nonargument designation indicated the specific reasons that oral argument would aid the court in deciding the appeal. The judges indicated that greater consideration is given to expressions of preference when they include the reasons argument would benefit the deliberations of the court. Expressions of preference that are framed within the standards expressed in rule 34 are particularly influential. Parties should be encouraged to state with specificity the manner in which oral argument will benefit the deliberations of the court.

[30] These statements are of some consequence in the Fifth and Ninth Circuits, since an appeal in which a party has expressed a preference for argument may be decided without argument only if all members of the panel join in the disposition on the merits of the appeal; dissenting and concurring opinions are not permitted in cases in which the parties have requested argument.

## D. Role of Staff Attorneys in Nonargument Dispositions

Staff attorneys participate in the nonargument process to varying degrees in the courts we examined. The role of the staff attorneys is most restricted in the Third Circuit, where they perform no screening function and prepare only an appendix to aid the judges in considering pro se appeals. In the other three courts, staff attorneys review at least some portion of the appeals to identify cases suitable for disposition without argument and prepare bench memoranda. Of these three courts, the staff attorneys of the Sixth Circuit have the most circumscribed role. As a result of recent changes in the court's screening procedures, the staff attorneys' primary screening responsibility is in pro se cases and counsel-represented prisoner cases, for which they prepare bench memoranda and draft dispositions. In the Fifth Circuit, staff attorneys review approximately half of the cases, identifying those that are appropriate for nonargument disposition and preparing bench memoranda. The role of staff attorneys is most extensive in the Ninth Circuit, where they review all cases filed, estimate the difficulty of the cases, designate a portion of the cases for disposition without argument by special screening panels, and prepare bench memoranda for each case submitted to the screening panels.

Staff attorneys appear to be effective in identifying cases that meet the courts' standards for disposition without argument. We encountered little criticism of the manner in which the staff attorneys implement the criteria established by the court for the selection of cases for disposition without argument. At first glance, the fact that approximately 15 percent of the cases staff attorneys recommended for disposition without argument were later reclassified by the judges suggests some failing on the part of the staff attorneys. However, this rate of reclassification appears to be the result of the preference of individual judges for argument in certain cases, rather than the failure of the staff attorneys to apply properly the standards established by the court. Although there is some inefficiency in a process that results in the reclassification of so many cases, the differences among judges concerning the need for argument in in-

dividual cases make it difficult to develop more precise standards. This inefficiency might be overcome if the judges, rather than the staff attorneys, undertake the initial screening, then give the cases designated for disposition without argument to the staff attorneys. However, this procedure would require judges to devote considerably more time to screening.

Generally, the materials prepared by staff attorneys are effective in assisting the judges in their consideration of nonargument cases. Judges use the materials prepared by the staff attorneys to familiarize themselves with the cases and to prepare the written dispositions. Usually, judges use the staff materials in conjunction with other case materials, but our interview data indicate that some judges may occasionally rely too heavily on the materials prepared by the staff attorneys, referring to other case materials only if the staff attorney memoranda raise questions that require additional material for resolution. The comments of the judges suggested that sole reliance on staff attorney materials tended to occur in pro se cases. Regardless of the type of case or the nature of the issues, such reliance on staff attorneys' materials is inconsistent with the standards of rule 34.

This study considered only one of many areas in which staff attorneys assist the court. During our interviews and visits to the courts, we heard many comments about the growing demands placed on staff attorneys' offices. Recently, both the number of motions and the number of cases suitable for nonargument disposition, the two areas in which staff attorneys have significant responsibilities, seem to have risen sharply. If such increases continue, courts will have to choose between increasing the number of staff attorneys and reallocating the duties of the staff attorneys to judges' chambers or other court personnel. Our own limited examination of staff attorneys' offices suggests that a more focused study of the current duties and practices of the staff attorneys would benefit the courts of appeals in responding to these common problems. Such a study might consider some of the following questions:

1. What can be done to avoid "burning out" staff attorneys with a steady stream of pro se or simple cases?

2. What is the proper term of service for staff attorneys?

3. To what extent should the staff attorneys communicate with the judges directly?

4. Should staff attorneys be paired with judicial panels?

5. To what extent should the staff attorneys become specialized in specific areas of the law?

Such a study could also consider a number of alterations in the role of staff attorneys so far not attempted in the federal courts. One possibility would be to permit parties access to the memoranda prepared by staff attorneys. Unlike in-chambers law clerks, the staff attorneys prepare these memoranda without the direct supervision of an individual judge. Therefore, the staff attorneys' memoranda may not need the same confidentiality as those of the law clerks. Access to materials prepared by staff attorneys, perhaps along with the opportunity to file a response, might alleviate some of the concerns about the delegation of authority to the staff attorneys.

### E. Judicial Productivity and Relation Among Appellate Procedures

Nonargument procedures are generally adopted when a court is in crisis and searching for a way to solve its problems. Both the Fifth and Ninth Circuits, for example, developed screening programs at a time when their caseloads and backlogs were growing rapidly. The goal was to dispose of more cases without an increase in resources. To achieve this goal, both courts recognized that less time would have to be spent on each case or on some category of cases. Thus, screening was adopted as a device for saving time.[31]

Advocates of screening have long argued that the procedure does, in fact, save time. The improvement in productivity in the Fifth and Ninth Circuits after adoption of screening seems to pro-

[31] It is important to distinguish between elapsed time and judge time. The issue under discussion here is whether the time a judge spends on a case is decreased by his deciding the case on the briefs instead of by argument. If it is, the judge has more time to spend on other cases. . . .

vide evidence to support this assertion. Critics, however, have argued that the twenty minutes not spent on the bench is too little savings to warrant the denial of counsel's opportunity to address the court. In response, those who support nonargument dispositions maintain that the procedure saves more than twenty minutes per case because judges realize substantial savings of time through the flexibility the procedure allows. For example, a judge can review a nonargument case and dictate a draft decision in one sitting, rather than having to pick up the case a second time to review it before convening and a third time to prepare the disposition. In addition, advocates of screening argue, if all cases were heard, the judges would have to convene more often, requiring substantially more travel time. Procedures for deciding cases on the briefs permit judges to stay home, disrupting their work less frequently and saving them the travel time that argument would require.

In this study, we did not attempt to measure the time saved by procedures for deciding cases without argument. We do, however, have some evidence that suggests why participants in screening programs feel that these procedures save judge time. When we asked the judges in the Fifth Circuit to describe the benefits of their screening procedure, every one said it saved time. Several judges noted the reduced travel time and the flexibility of scheduling permitted by screening, but most focused on the time savings provided by the assistance of the staff attorneys. Their memoranda guide the judges to the important parts of the record and provide material for the written decision. This assistance is similar to that provided by law clerks for argued cases; in fact, several judges specifically pointed out that the staff attorneys function as additional law clerks. Thus, the savings in time appears to derive substantially from the additional resources provided by the staff attorney's office. Were this resource not available, the judges would have to assign additional cases to their law clerks or would have to use their own time to review the cases.[32]

[32] Although the judges in the Sixth and Ninth Circuits did not comment as extensively on the savings in time resulting from their screening procedures, many of these judges also commented on the time saved by the staff attorneys'

The judges of the Third Circuit provide a contrast to those of the Fifth Circuit. Despite the absence of staff attorney assistance, the Third Circuit has fewer pending cases and a slightly faster disposition time than the Fifth Circuit. Other evidence, however, suggests that the judges' allocation of their time is in fact affected by the court's decision not to use staff attorneys for preparation of nonargument cases. The judges of the Third Circuit regard the preparation of a case for disposition as an important judicial function and do not want to delegate this duty to staff attorneys. Without staff attorney assistance, the judges in the Third Circuit do not receive any written materials summarizing the cases or providing relevant citations or arguments. Whereas the Fifth Circuit judges can turn to the statements of facts and citations provided by the staff attorneys in preparing the written disposition, the Third Circuit judges must formulate the written decision from the more voluminous briefs and records. As the judges themselves testified, the writing task is very time-consuming. Faced with both review of the case and preparation of the decision, the judges of the Third Circuit have chosen not to prepare a decision stating the reasons in nearly half the cases decided on the merits. It appears that without the assistance of staff attorneys, the judges do not have time for the longer forms of written decisions.

The evidence from these two courts suggests that the savings of time realized from screening programs derives largely from the additional resources provided by staff attorneys and not from the method (argument or no argument) used to decide a case. Given concerns about delegation of judicial functions to staff attorneys, some might ask, Why not disband these offices and give the judges more law clerks, who would be more accountable because of their presence in chambers? Our interview data suggest that few judges in courts in which staff attorneys participate in screening would welcome such a change. In the Fifth Circuit, for example, the judges said they value the expertise the staff attorney's office has

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memoranda, which provide summaries of the facts and issues in the nonargument cases.

developed in certain types of cases, particularly habeas corpus cases.

Some might also ask, Given some evidence that nonargument per se is not a critical factor in saving judge time, why not have argument in all cases? Many judges would answer that there are a significant number of cases in which the outcome is so clear that there is no need for argument; the twenty minutes on the bench, although not a great savings, simply should not be used in that way. Some would also answer that more argument would require changes in hearing schedules—changes that might, as in the Sixth Circuit, require the judges to stay at the court for two weeks at a time, handling a very large number of cases in a concentrated period of time.

This comparison of the Third and Fifth Circuits raises questions about the extent to which judges rely on staff attorney materials. Although this is an important issue, it cannot be separated from the larger issue of the courts' efforts to weigh important values in the context of limited resources and growing caseload demands. Clearly, the Fifth Circuit judges do rely on staff attorneys in preparing the written disposition, and the Third Circuit judges do not. However, most parties who file their cases in the Fifth Circuit receive an explanation of the court's decision, whereas nearly half the parties who file in the Third Circuit do not.

Other courts that are generous in providing the opportunity for oral argument are forced to trade off other values. For example, the Second Circuit Court of Appeals permits oral argument in all cases in which the attorneys request it. It is able to do this, however, because relatively few cases reach a decision on the merits and because it receives more assistance from senior judges and visiting judges than do any other federal courts of appeals.[33] The appellate

[33] In statistical year (SY) 1986, more than one-half of the appeals of the Second Circuit were disposed of on procedural grounds without the judges having to reach a decision on the merits of the case, a rate that is significantly higher than that of any other court of appeals. In SY 1986, the active judges of the Second Circuit filled only 72 percent of the panel positions in appeals decided on the merits—the lowest percentage of all the courts of appeals, but a substantial increase from the 60 percent of SY 1982. Resident senior circuit judges

procedure of the Second Circuit is exemplary in many ways; the court has developed a number of innovative procedures and has consistently decided appeals soon after they are filed. However, other courts may prefer to decide more cases on the merits, rather than on procedural grounds, and may not have available the resources of senior judges.

The judges' responses to the interview question concerning the steps to be taken in response to a sharp increase in the caseload provides an indication of the difficulty that arises in attempting to balance these competing interests. There exists no consensus across the courts, and little agreement within the four courts, concerning the steps that should be taken if there is a sharp increase in case filings. The judges of all four courts are divided concerning the advisability of deciding a greater percentage of cases without oral argument. Few of the other options were enthusiastically endorsed. If these responses are characteristic of opinions in the other federal courts of appeals, no consensus exists concerning the steps to take if the courts of appeals continue to encounter sharp increases in case filings.

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filled 20 percent of the panel positions in SY 1986, the highest proportion of all the courts of appeals; and visiting judges filled 7 percent of the panel positions, slightly less than the average proportion. Administrative Office of the United States Courts, Federal Court Management Statistics (1986).

# APPEALS WITHOUT BRIEFS: EVALUATION OF AN APPEALS EXPEDITING PROGRAM IN THE NINTH CIRCUIT[1]

**John E. Shapard**
**March 1984**
**(FJC-SP-84-2)**

Beginning in 1980, the United States Court of Appeals for the Ninth Circuit initiated an Appeals Without Briefs (AWB) Program intended to expedite disposition of civil appeals presenting relatively familiar and straightforward issues. The program was terminated in February 1982. Only about sixty cases were handled under the program during its existence, but this limited experience produced sufficient problems to persuade a majority of the court to halt the program. This report offers an evaluation of that program. Its objective is to investigate the problems encountered in the Ninth Circuit program and thus to suggest changes that might lead to more successful future incarnations of the AWB concept.

## Nature of the Program

The planned treatment of cases in the AWB program differed from normal treatment in three ways. First, counsel in program cases were to file "preargument statements" rather than briefs, with one statement from each side and no reply statement. The preargument statement was intended to differ from a brief in two important respects: It was to be no more than five pages in length (as contrasted with the fifty-page limit imposed by rule 28(g) of the Federal Rules of Appellate Procedure), and it was not to contain an ar-

[1] This report is reprinted in substantially its original form. The only material omission is the appendix. Footnotes have been renumbered. Ed.

gument, but instead a list of citations to principal cases and to the pages of the record on which the party intended to rely at oral argument. Second, AWB cases were to be given priority in calendaring, resulting in an argument date between four and fourteen months earlier than normal (depending on whether the case had statutory hearing priority). Third, there was to be no fixed maximum on the time allowed for oral argument, and each party was to be guaranteed at least half an hour to argue its case.[2]

Cases were selected for participation in the program in one of two ways. Most cases entered the program automatically, on the basis of a docketing statement filed with every civil appeal that revealed the nature of the issue and the nature of the disposition below. Thus, counsel in cases meeting specific requirements regarding nature of issue and of disposition were notified of the case's selection and were advised that either party could remove the case from the program by filing a statement of reasons within fourteen days. Ninety cases were placed in the program in this manner, and forty-three of those (47 percent) were removed by counsel. The requirements for automatic inclusion in the program were intended to identify cases most likely to present few and noncomplex issues and to involve a relatively limited record on appeal. The bulk of cases entering the program in this fashion were appeals from dispositions by summary judgment or dismissal, and the majority presented issues involving Social Security or habeas corpus. In addition, cases not selected to participate on the basis of the docketing statement could enter the program upon stipulation of counsel. About 15 percent of the program cases entered in this manner.

[2] This statement of requirements for the preargument statement, expedition of the argument date, and time allotted for argument is based on the letter sent to counsel upon a case's entry into the program. There is evidence that program cases were not argued earlier than they would have been under normal procedures (*see* note 9 *infra*), that not all participant judges understood the requirements for the preargument statement, and that not all preargument statements conformed to these requirements.

## Summary of Evaluation Results

The Federal Judicial Center conducted an evaluation of the AWB program on the basis of questionnaires completed by circuit judges and counsel participating in the program, who were asked to answer questions pertaining to the cases argued in the program. In addition, judges were asked to identify other cases they thought suitable for AWB treatment by checking a box on the form with which they regularly review the case weight assigned to cases heard under normal (briefed) procedure. Questionnaires were then sent to counsel in these other cases, asking their opinions of the desirability of AWB treatment in the identified cases. When the AWB program was abandoned by the court, a letter was sent to each active Ninth Circuit judge soliciting the judge's candid opinion of the program, the reasons for its abandonment, and the prospects for remedying the program's defects.

Because the focus of this report is on problems encountered with the AWB program, the questionnaire results are merely summarized here.

The most striking feature of the questionnaire responses is the contrast between the surprising uniformity of opinion among counsel and the rather extreme diversity of opinion among judges. Judges' experiences in specific cases varied in almost every way. There were roughly equal numbers of cases in which the judges rated the program very favorably, in which they rated the program very negatively, and in which two judges hearing a particular case rated the program in opposite ways (e.g., one judge rating the experience with the program as very positive or very negative, the other judge rating the experience in the opposite fashion or neutrally). In contrast, 70 percent of those counsel responding to the questionnaire (75 percent) rated the program favorably in regard to the case in which they participated, and more than 90 percent rated the program generally as a good or promising idea. A handful of cases fell into either of two extremes: one in which both judges and counsel participating in the case thought the program quite successful, the other in which both groups thought the program a clear failure.

## Problems with the Program

From the questionnaire results, as well as from the letters provided by circuit judges after the program was terminated, a reasonably clear picture emerges of the perceived strengths and weaknesses of the program. Before these are recounted, however, it is important to take note of an analogous program undertaken by the Third District Court of Appeal in Sacramento, one of five intermediate courts of appeal in California.[3] After a year of operation of the court's Expedited Appeal Program, and the disposition of 261 cases under the program, both judges and counsel were favorably impressed. It is particularly useful to refer to the Sacramento program as we examine the Ninth Circuit's AWB program, because the Sacramento program differs in approach in regard to many of the problems perceived in the Ninth Circuit program. The favorable perception of the Sacramento program implies that these differences in approach may be effective remedies for the problems encountered in the Ninth Circuit.

## The Preargument Statement

Foremost among the judges' complaints about AWB cases was the absence of briefs. Humorous though this result may be, it does not necessarily suggest that the concept of the program is fatally flawed, for several reasons. First, the essence of the concept is not that the appeal proceed without briefs, but that oral argument be emphasized, with a concomitant de-emphasis on written argument. Second, the absence of conventional briefs was often (but not always) cited by judges only as an indirect problem—as the cause of inadequate preparation on the part of counsel. These judges expressed dissatisfaction because counsel were either poorly prepared or off-target in their arguments, and suggested that this problem

[3] All information regarding the Sacramento program is based on a report of an evaluation of that program conducted by the American Bar Association's Action Commission to Reduce Court Costs and Delay and on discussion with Joy Chapper, Esq., of the commission's staff. Chapper & Hanson, *Expedited Procedures for Appellate Courts: Evidence from California's Third District Court of Appeal*, 42 Md. L. Rev. 696 (1983).

would have been avoided had counsel gone through the thought process necessary to present written arguments. These judges thus seemed to be saying that problems arose because counsel had not written briefs, not because the judges had no briefs to read.

Nonetheless, a number of judges found the absence of briefs to be a direct problem, which, in many instances, can probably be attributed to poor case selection—some cases in the AWB program were simply not suited for it. (Poor case selection is discussed separately below.) Yet some judges expressed dissatisfaction with the absence of briefs even in cases that were arguably suited for hearing based on something less than the traditional full brief. The most serious objection made by these judges was that the AWB program significantly increased the amount of time the cases demanded of them, requiring them to do the work that is ordinarily and more properly done by counsel in the course of brief preparation. Correspondingly, an important advantage seen by counsel was that the program reduced the time the cases demanded of counsel.

It does not necessarily follow that briefs of the traditional kind are the only remedy to the problems presented by the preargument statement. The qualitative difference between the AWB program's preargument statement and a traditional brief is the absence of a written argument, which deprives the judge of two distinguishable aids for hearing and decision making. Written argument includes both allegations of the relevant principles embodied in case and statute law and the argument proper, which suggests how those principles apply to the facts of the case in support of the result sought by the litigant. The preargument statement included only citations to relevant cases and statutes, which did not necessarily inform the judges about either the principles of the cases and statutes cited or the arguments counsel intended to advance on the basis of those principles.

Something more than a preargument statement but less than a full brief might be sufficient as a basis for judges' effective use of oral argument. Some judges suggested that the preargument statement should include an outline of counsel's arguments and brief summaries of the holdings of relevant cases. This is apparently

similar to the practice in appellate review in Australia, where briefs are often no more than four or five pages. Another alternative suggested by both judges and counsel was to employ conventional briefs limited to relatively few pages.

The Sacramento program contrasts with the AWB program in that a condition of participation is attorneys' agreement to submit briefs not exceeding ten pages (as opposed to the fifty-page limit under state rules). Sacramento judges evidently are quite satisfied with these briefs, finding them shorter and perhaps more focused and concise than those filed under conventional procedures. More than half of the attorneys interviewed in the evaluation of the Sacramento program reported spending less time in brief preparation than under ordinary procedures (very few spent more time). It seems unlikely that this was a consequence of the selection of only simple cases for the program. Cases in that program accounted for fully half of the cases disposed of on the merits, included few of the cases that the court ordinarily decides without argument (about 15 percent are ordinarily decided on the briefs), and yielded published opinions with higher frequency than normal (29 percent versus 20 percent), all of which suggests that these were not necessarily simple cases. On the other hand, it is curious that the actual reduction in brief length accomplished by the Sacramento program appeared rather modest.

The average brief length for cases in the Sacramento program was ten pages,[4] which can be contrasted with an estimated average length of fourteen pages for comparable cases not in the program and with a median length of between eleven and twenty pages for noncomplex cases in the Ninth Circuit.[5] At least two explanations

[4] This figure presumably includes the length of the statement of facts as well as that of the argument. The ten-page limit in the Sacramento program excluded the statement of facts.

[5] A survey of cases reviewed by Ninth Circuit staff attorneys during the first three weeks of January 1981 indicated a median brief length in this range (eleven to twenty pages) for the 251 cases assigned a weight of 5 or less (on the circuit's weighting scale of 1, 3, 5, 7, or 10). The remaining 30 cases, weighted 7 or 10, had a median brief length of between forty-one and fifty pages.

can be suggested for this apparent discrepancy between perception and fact in the Sacramento experience—the perception that briefs were shorter, more concise, and more focused and that counsel spent less time preparing them, and the fact that briefs were not much shorter than usual. First, it is easy to see that a brief which is concise and well focused may seem shorter than a less concise and focused brief of equal length. Perhaps the difference in page limitations—between ten pages and fifty pages—caused counsel to respond with more pointed briefs. Second, the invitation to participate in the Sacramento program was extended in the course of a settlement conference conducted by a judge. Such an invitation may constitute a convincing message that the judge regards the case as presenting few significant issues. This may have led counsel to focus their briefs on those few issues and therefore produce briefs in less time and that seemed shorter than usual.[6]

## Selection of Cases

As mentioned above, another problem that occurred with significant frequency in the AWB program was the inclusion of cases ill-suited for argument based only on a short preargument statement. There are some striking examples. One case, which the court ordered briefed after AWB argument, involved a 10,000-page transcript. In another, the issue was the constitutionality of a state death penalty statute, which the court deemed too significant to be decided without full briefing. In a number of other cases, the judges clearly stated that the cases would have been much easier to handle had they been briefed.

At the same time, a number of AWB cases were handled with complete satisfaction in the opinion of both counsel and judges. Comments of judges and counsel in these cases noted that the unlimited (but not necessarily lengthy) oral argument allowed them quickly to narrow discussion to the central issues and to explore these issues very satisfactorily. The briefs were not missed, either

[6] It is unlikely that the settlement judge's invitation to participate was unduly influential, because that judge was never a member of the panel that heard and decided the case.

because the issue had been fully briefed in the court below or because the legal issues were straightforward and the factual circumstances simple. In addition, over a period of twelve months, judges identified 125 cases argued under normal procedures that they thought would have been suited for the AWB program.

The Sacramento program is again notable in contrast. Cases were selected for that program not by reference to any specific criteria, but on a case-by-case basis. Initially the selection was made by the judge presiding at a settlement conference held after receipt of the lower court record, but before briefing. Subsequently, however, the court instituted a requirement that the appellant submit a preargument statement in every case, and began to select cases for invitation to the expedited appeals program solely on the basis of those statements (but still without reference to specific selection criteria). Counsel accepted the invitation in about 80 percent of the cases. One of the reasons the court chose to select cases on an individual basis rather than by use of specific criteria was its concern that counsel might seek to participate in the program in inappropriate cases merely to obtain the expedited hearing (a target of seventy days from start of briefing to argument) that was a key element of the program.

## Confusion about the Program

Another problem that occurred with some frequency in AWB cases is more in the nature of an administrative problem than of any systematic flaw in the program. In at least two cases, questionnaires received from counsel alleged that the judges were not aware of the existence of preargument statements until those statements were mentioned in the course of oral argument (these attorneys' statements were buttressed by the fact that no questionnaires were received from judges in those cases, although it was the duty of court personnel to supply questionnaires to the judges). If the judges were in fact not aware of the preargument statement, a serious lack of understanding on the part of at least some judges about the nature of the program is suggested. There were also a number of instances in which counsel and judges clearly did not have the same view about what a preargument statement was supposed to

be. In one case, the attorney was surprised when a judge chastised him for citing cases in the preargument statement. In another case, counsel apparently tried (without success) to compress a traditional brief into the five-page limitation. These incidents suggest that the potential success of the program was in several cases undermined by misunderstandings.

### Circumstances in Which the Program Was Tested

Although not bearing on the success of the program for specific cases, the circumstances in which the AWB program was adopted may well have limited its chances of overall success. Comments of some Ninth Circuit judges suggest that the decision to abandon the program may have been due in part to the rather difficult circumstances of the court in recent years. At the time the AWB program began, the Ninth Circuit was experiencing severe problems of delay and a rising caseload. The court had undertaken a number of innovations to try to gain control of its caseload problems, not the least of which was an agreement simply to work harder and meet higher productivity targets. Under these circumstances, it is not surprising that some judges were particularly impatient with the AWB program when some AWB cases seemed to require more work than they would have under normal circumstances. In addition, some of the judges made it clear that they had disliked the AWB idea from the outset and did not agree that it was worth testing.

The circumstances surrounding the program's adoption afford still another contrast between the AWB and the Sacramento programs. At the time the Sacramento program was adopted, the Third District's caseload statistics compared well with those of other courts, and the court was fully current with its argument calendar (oral argument was not delayed because of excessive caseload). The goal in undertaking the program was simply to reduce elapsed time for processing civil appeals, without increasing the judge time consumed by individual cases.[7] In addition, the Sacramento court

[7] The evaluation report mentions that the court was "looking for ways to enhance its ability to keep abreast of its increasing caseload" (Chapper & Hanson,

is smaller than the Ninth Circuit, with only seven judges and a compact geographic area. It does not appear that any of the Sacramento judges opposed the program, before or after its implementation. The only significant administrative challenge posed by the Sacramento program was that of ensuring that the court could prepare for argument within the target of thirty days after briefs were filed. This was accomplished in part by assigning one of the court's thirteen staff attorneys to work exclusively on program cases. The attorney read the briefs, did additional research where needed, and prepared a memorandum for the judges, delivering all materials to the panel about one week before argument. Though the judges had but one week to prepare for argument, they reported that this was sufficient.

### Benefits and Burdens of a Revised AWB Program

If the problems encountered in the AWB program can be corrected, what benefits and burdens are likely to ensue from such a program? The tentative and general answer seems to be that such a program can benefit litigants by increasing speed of case disposition and reducing costs, but that it is less likely to produce clear savings for the courts and is fairly certain to impose some administrative burdens on court personnel.

The feature of these programs that counsel most often mentioned as valuable is that they permitted cases to be decided considerably faster than would occur under normal procedures. But this increased speed was accomplished at least in part by artificial means: The cases were simply given prompter hearing dates. In the Ninth Circuit, this expedition was accomplished principally by giving program cases priority in calendaring as an incentive for participation.[8] These cases could just as well have been heard faster

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*supra* note 3, at 701). But, as discussed at note 10 *infra*, the Sacramento program served that goal by virtue of increased productivity by support staff, not by reducing the average judge time consumed per case.

[8] It is not clear from the data that these cases were in fact calendared more promptly than they would have been under normal procedures. When one looks at the time from filing of briefs to oral argument, no difference appears between program cases and either of two groups of comparison cases: those that were

than normal if they had been fully briefed. In the Sacramento program, the expedition was accomplished partly as a result of counsel's agreeing to prepare briefs in less time than normal and partly as a result of the court's scheduling these cases for earlier-than-normal argument and deciding them more promptly after argument.[9]

Another very important benefit of both the Ninth Circuit and the Sacramento programs is that counsel thought the programs caused a reduction in the time they expended on the appeal, resulting in cost savings for litigants. In the Ninth Circuit program, this benefit was characterized by a number of judges and some attorneys as a shift of work from counsel to judges, and was thus regarded on balance as the most significant failing of the program. The Sacramento program, requiring short briefs rather than preargument statements, resulted in no apparent increase in time required of judges. Although the judges in that program did not think the program resulted in reduced demands on their time,[10] they did

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selected for the program but then removed by counsel and those heard under normal procedures that the judges identified as suited for AWB treatment. But even if the program cases were not expedited, it is nonetheless important that counsel thought they were and regarded the apparent expedition as valuable. On the other hand, even though the AWB program did not reduce the time allowed for briefing, the average time between receipt of the complete record and filing of the last brief was about 50 days shorter for AWB cases than the norm of 130 days for the comparison cases.

[9] The actual time consumed by briefing was reduced by about 75 percent, from an average of 120 days to an average of 30 days. The time from filing of briefs to argument was cut in half, from 90 to 45 days. However, because it takes an average of 160 days to obtain the complete record from the court below, the average time from filing to disposition was reduced only by about 35 percent, from 410 to 260 days.

[10] The evaluation report (Chapper & Hanson, *supra* note 3) raises some doubt about this point. Although it says, "The judges' impressions suggest that the total time spent on a case was not reduced," it also says that "[j]udges see the program as enabling them to dispose of additional cases" (p. 708). The ability to dispose of additional cases appears to be attributable to an increase in the ability of support staff to prepare cases for the judges' attention. The court obtained an additional staff attorney to handle program cases, and that attorney

like the program, thinking the briefs generally shorter and more concise and focused. In light of the evidence that the briefs were not, in fact, much shorter than they would have been under normal procedures (*see* text at note 4 *supra*), it seems likely that reduced limits on brief length and on time for filing briefs may actually have led to more focused briefs, to the benefit of judges and at reduced cost to litigants.

## Recommended Elements of a Successful Appeals Expediting Program

Our evaluation suggests that it would be possible to construct a program involving reduced reliance on written argument and greater reliance on oral argument that would function well in handling some portion of the civil caseload in a U.S. court of appeals. This conclusion follows not only from the attitudes and suggestions of a number of Ninth Circuit judges but also from the fact that the Sacramento program, similar to that of the Ninth Circuit but with differences that address problems encountered in the Ninth Circuit, has been well received by both judges and counsel.

Should the Ninth Circuit or another U.S. court of appeals choose to engage in further experimentation with this kind of program, the evidence reviewed here suggests that such a program should differ from the AWB program in two fundamental ways:

1. The program should require counsel to submit either summary briefs (which outline the argument to be advanced and briefly summarize the holdings in cases relied upon) or conventional briefs, with a page-length limitation of no more than ten or fifteen pages.
2. Cases should be selected for invitation to participate in the program on a case-by-case basis, without reliance on any specific eligibility criteria, by a judge or experienced staff attorney who has a fair understanding of the case based on either a preargument conference with counsel or a docketing statement submitted by the appellant.

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was able to prepare preargument memorandums for these cases promptly enough to permit argument about one month after the briefs were completed.

It seems unlikely that such a program can succeed, however, unless certain additional requirements are met. First, the volume of cases to be handled in the program must be significant. During the life of the AWB program, the average number of such cases heard by an individual Ninth Circuit judge was fewer than four; several judges heard only one or two cases, some heard none. Infrequency of experience with a novel procedure can preclude effective adjustment to the novelty. Many Ninth Circuit judges must have felt uncomfortable approaching argument without the accustomed briefs, and the rarity of the experience may have prevented relief from that discomfort. In addition, the cost associated with the special administration of any novel procedure may not be justified when prorated over a mere handful of relatively straightforward civil appeals. Second, because there will always be some risk of including ill-suited cases in such a program, the judges of the court should be in a position and of a disposition to tolerate occasional failures. At least initially, the appropriateness of selecting certain cases for inclusion in the program will be uncertain. The circumstances must be such that the court can allow adequate time for working out the kinks that are inevitable in a selection process of this kind.

## Conclusion

The conclusions we draw, from admittedly limited evidence and necessarily tentative analysis, are these: Although the Ninth Circuit's Appeals Without Briefs project encountered significant problems in many cases, it was well received in others, and the problems appear to be remediable. Combining the results of the Ninth Circuit program with the success of a comparable program established in the Third District Court of Appeal in California, there is reason for optimism that this kind of program can function satisfactorily, affording important benefits to litigants. Additional experimentation with this type of program can therefore be recommended. If additional experiments are undertaken, however, it may be best to proceed with an objective of discovering the range of cases for which such a program is suitable rather than with an as-

sumption that the program will be applicable only to a relatively limited class of cases.

# AN EVALUATION OF LIMITED PUBLICATION IN THE UNITED STATES COURTS OF APPEALS: THE PRICE OF REFORM[1]

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## The Study: Methodology

. . . .

Our assessment of the impact of the publication plans on the decision-making process of the courts of appeals is based on a study of the published and unpublished opinions of those courts during the 1978-79 reporting year. Reviewing the material published during that period was relatively straightforward; we used all appeal-dispositive documents—"opinions"—found in the *Federal Reporter (2d)* for that year. Choosing the unpublished material involved somewhat more selectivity because the Administrative Office of the United States Courts (the administrative and record-keeping agency of the federal judiciary) distinguishes between appeals terminated "by judicial action" and those terminated "without judicial action." We studied only the former group, because we did not want to include consent decrees, affirmances or reversals by stipulation, or out-of-court settlements. Those types of dispositions present only bookkeeping problems to the judges, and do not re-

[1] The introduction and first part of this report have been omitted, as have many footnotes. Remaining footnotes have been renumbered. Ed.

quire any real exercise of judicial ability; their inclusion in the study, therefore, would obscure the nature of what judges in fact do. Accordingly, the total population for this study included all terminations that were published, and all unpublished terminations that were by "judicial action."[2] Table 1 records the population of published and unpublished opinions used in the study.

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[2] This procedure differs from the Administrative Office's typical record-keeping habits in one important respect. For many purposes (e.g., recording reversal rates and separate opinion rates), the Office uses as its relevant total disposition population the set of appeals dispositions that occurred after oral hearing or submission upon the briefs. . . . For most of the same purposes, we chose the larger population of appeals terminated "by judicial action." The difference between the two populations is that many cases docketed in the courts of appeals are terminated without argument or submission upon written briefs. Some of these nevertheless are terminations "by judicial action." Examples are motions for summary affirmance, motions for stays, and motions for bail reductions. These cases typically involve some written argument to the court; however, they are not reported as "submitted upon written briefs" unless the "brief" is the formal brief contemplated in Fed. R. App. P. 28. Telephone conversation with David Gentry, Research Analyst, Administrative Office of the United States Courts (July 24, 1980). We reasoned that the larger population of appeals terminated "by judicial action" was more appropriate for our study than the smaller set of appeals terminated "after argument or submission" because the larger group more closely reflects the total case-terminating work of the judges.

In the course of our study, it became apparent that the total number of opinions indicated as unpublished on the JS-34 forms compiled by the Administrative Office included a few opinions that actually were published. This could be the result either of errors by the circuit court clerk in filling out the JS-34 forms, or of reversals of original decisions not to publish. Because it was impractical for us to verify independently that each of the nearly 8,000 "unpublished" opinions on the list supplied by the Administrative Office was unpublished, we did not correct for these factors. We have no reason to believe that excluding these opinions would significantly decrease the population size, particularly because coding error presumably would be randomly distributed, with approximately equal numbers of unpublished opinions coded as published and published opinions coded as unpublished.

**TABLE 1**
**Published and Unpublished Opinions**

| Circuit | Published | Unpublished | Total |
|---|---|---|---|
| D.C. | 194 | 505 | 699 |
| First | 214 | 147 | 361 |
| Second | 359 | 563 | 922 |
| Third | 219 | 991 | 1,210 |
| Fourth | 346 | 890 | 1,236 |
| Fifth | 1,385 | 978 | 2,363 |
| Sixth | 340 | 908 | 1,248 |
| Seventh | 325 | 736 | 1,061 |
| Eighth | 448 | 209 | 657 |
| Ninth | 618 | 1,238 | 1,856 |
| Tenth | 251 | 555 | 806 |
| Total | 4,699 | 7,720 | 12,419 |

SOURCE: Statistical data supplied by the Administrative Office of the United States Courts.

## Results of the Study: Publication Plans and Publication Performance

The fundamental empirical question concerning the publication plans is whether they have any effect at all on the decision to publish. Do the judges actually pay attention to the plans? Fortunately for the analyst, both the contents of the publication plans and the extent to which publication is limited vary widely among the circuits. Differences occur along several lines—the specificity of publication criteria, the existence *vel non* of a presumption against publication, and the maker of the publication decision. This section examines the effect of those differences on the circuits' actual publication behavior. Table 2, which reports the percentage of published and unpublished opinions in each circuit, will facilitate that examination.

**TABLE 2**
**Percentage of Opinions Published**

| Circuit | Published | Unpublished |
|---|---|---|
| D.C. | 27.8% | 72.2% |
| First | 59.3% | 40.7% |
| Second | 38.9% | 61.1% |
| Third | 18.1% | 81.9% |
| Fourth | 28.0% | 72.0% |
| Fifth | 58.6% | 41.4% |
| Sixth | 27.2% | 72.8% |
| Seventh | 30.6% | 69.4% |
| Eighth | 68.2% | 31.8% |
| Ninth | 33.3% | 66.7% |
| Tenth | 31.1% | 68.9% |
| Average | 38.3% | 61.7% |

SOURCE: Calculated from the data in table 1 *supra*.

## A. Specificity

One aspect in which the plans vary widely is the specificity of the standards that guide the publication decision. Some plans establish criteria that can only be described as vague. The Third Circuit, for example, prescribes publication only where "the opinion has precedential or institutional value." Other circuits have specific publication criteria. The Ninth Circuit Plan (9th Cir. R. 21(b)), for example, provides for publication of an opinion that

1. establishes, alters, modifies or clarifies a rule of law, or
2. calls attention to a rule of law which appears to have been generally overlooked, or
3. criticizes existing law, or
4. involves a legal or factual issue of unique interest or substantial public importance, or
5. relies in whole or in part upon a reported opinion in the case by a district court or an administrative agency, or
6. is accompanied by a separate concurring or dissenting expression, and the author of such separate expression de-

sires that it be reported or distributed to regular subscribers.

The circuits can be roughly divided into two groups depending on the specificity of their publication criteria. Table 3 displays the circuits in that arrangement with the percentage of published and unpublished opinions produced by each circuit. The data show little correlation between the degree of specificity of a circuit's publication criteria and its actual publication behavior. The average publication percentage for circuits with detailed standards was 36.5 percent while the average for circuits with vague standards was 40.4 percent. On the other hand, the data in table 3 may give disproportionate effect to the publication habits of the Eighth Circuit. All of the other circuits with specific standards have publication percentages in the high 20s or low 30s, or less than half the Eighth Circuit's publication percentage of 68.2 percent. If the Eighth Circuit is excluded, the average percentage published for the circuits with specific standards would be 30.2 percent, and the percentage of opinions unpublished would be 69.8 percent. These percentages would indicate that a substantially greater proportion of opinions are published in circuits with vague standards. Unless and until we discover some anomalous practice in the Eighth Circuit explaining the disparity, however, we do not feel justified in excluding the circuit from our computations. At any rate, we cannot be as confident as the results of table 3 might warrant that specificity of standards has no effect on publication percentage. It may well be that vague standards enhance the likelihood of publication.

**TABLE 3**
**Publication Related to Specificity of Standards**

| Circuit | Publication in Circuits with Vague Standards: Published | Unpublished |
|---|---|---|
| First | 59.3% | 40.7% |
| Second | 38.9% | 61.1% |
| Third | 18.1% | 81.9% |
| Fifth | 58.6% | 41.4% |
| Sixth | 27.2% | 72.8% |
| Average | 40.4% | 59.6% |
| | **Publication in Circuits with Specific Standards** | |
| D.C. | 27.8% | 72.2% |
| Fourth | 28.0% | 72.0% |
| Seventh | 30.6% | 69.4% |
| Eighth | 68.2% | 31.8% |
| Ninth | 33.3% | 66.7% |
| Tenth | 31.1% | 68.9% |
| Average | 36.5% | 63.5% |

## B. Presumptions

Another provision that might affect the tendency to publish is a presumption against publication. Some circuits make such a presumption explicit. The First Circuit Plan, for instance, provides that

> While we do not presently attempt to categorize the criteria which should determine publication, we are confident that a significantly larger proportion of cases will result in unpublished decisions if the court adopts a policy of self conscious scrutiny of the publish-worthiness of each disposition coupled with a presumption, in the absence of justification, against publication. (1st Cir. R. app. B(a))

In other circuits the presumption is not explicit, but is inferable. In still other circuits there is no presumption against publication.

A plausible hypothesis is that the circuits that have a presumption against publication (explicit or implicit) would publish less than circuits without such a presumption. Table 4 shows that circuits without presumptions against publication published 44.9 per-

cent of their opinions, while circuits with such a presumption published only 32.7 percent of their opinions. The existence of a presumption against publication, then, does seem to affect actual publication practice.

**TABLE 4**
**Publication Related to Presumptions against Publication**

| Circuit | Published | Unpublished |
|---|---|---|
| | Circuits with Presumption against Publication | |
| First | 59.3% | 40.7% |
| Third | 18.1% | 81.9% |
| Fourth | 28.0% | 72.0% |
| Sixth | 27.2% | 72.8% |
| Seventh | 30.6% | 69.4% |
| Ninth | 33.3% | 66.7% |
| Average | 32.7% | 67.3% |
| | Circuits without Presumption against Publication | |
| D.C. | 27.8% | 72.2% |
| Second | 38.9% | 61.1% |
| Fifth | 58.6% | 41.4% |
| Eighth | 68.2% | 31.8% |
| Tenth | 31.1% | 68.9% |
| Average | 44.9% | 55.1% |

## C. Who Makes the Decision

Frequency of publication also might be affected by who makes the publication decision. Some circuits require a majority decision to publish, while others permit a single judge to require publication. It is plausible that circuits that permit a positive publication decision by a single judge would publish a higher percentage of their opinions than circuits that require a majority. Table 5 provides only mild support for that hypothesis. The one-vote circuits publish an average of 41.4 percent of their opinions, while majority-vote circuits publish 34.5 percent. It is difficult to assume any sort of causal connection from such a small differential.

**TABLE 5**
**Publication Related to Decision to Publish**

| Circuit | Published | Unpublished |
|---|---|---|
| | Circuits That Require a Majority for a Decision to Publish | |
| First | 59.3% | 40.7% |
| Third | 18.1% | 81.9% |
| Seventh | 30.6% | 69.4% |
| Ninth | 33.3% | 66.7% |
| Tenth | 31.1% | 68.9% |
| Average | 34.5% | 65.5% |
| | Circuits That Permit a Decision to Publish by a Single Judge | |
| D.C. | 27.8% | 72.2% |
| Second | 38.9% | 61.1% |
| Fourth | 28.0% | 72.0% |
| Fifth[a] | 58.6% | 41.4% |
| Sixth | 27.2% | 72.8% |
| Eighth | 68.2% | 31.8% |
| Average | 41.4% | 58.6% |

[a]Although 5th Cir. R. 21 does not explicitly address the issue, it has been construed as requiring a unanimous decision not to publish. *See* NLRB v. Amalgamated Clothing Workers, 430 F.2d 966, 972 (5th Cir. 1970).

# Results of the Study: An Empirical Assessment of Costs and Benefits

## A. Benefits

The major impetus for the limited publication movement has been the dramatically increasing caseload of the circuit courts. Limited publication can help the judges to deal with the glut, it is argued, because an unpublished opinion takes much less judicial time and effort to prepare than a published opinion. If nonpublication does result in significant savings, those savings should be revealed in two ways: swifter justice and increased judicial productivity.

### 1. Swifter Justice

If justice delayed is justice denied, then swifter justice obviously is an important goal. At the appellate level, the speed of justice can be measured by the number of days between the time at

which the record was complete and the date of the final judgment—turnaround time, for short. Table 6 suggests that nonpublication promotes swifter justice. As the table shows, turnaround time is considerably shorter if an opinion is not published. One out of every five unpublished opinions took no longer than three months to resolve, for example, but only one out of every thirty-three published cases was decided that quickly. Almost half of the unpublished opinions had a turnaround time of half a year or less; the comparable figure for published opinions was one-fifth.

**TABLE 6**
**Time for Decision**

| Turnaround Time (Days)[a] | Published | Unpublished |
|---|---|---|
| 0-10 | 0.3% | 3.8% |
| 11-30 | 0.4% | 3.0% |
| 31-60 | 1.0% | 6.4% |
| 61-90 | 2.2% | 7.4% |
| 91-120 | 3.8% | 7.8% |
| 121-150 | 6.0% | 10.0% |
| 151-180 | 6.9% | 9.9% |
| 181-360 | 36.7% | 31.1% |
| 360 or more | 42.6% | 20.7% |

SOURCE: Compiled from data on 11,487 cases disposed of during the 1978-1979 reporting year for which data were available.

[a]Measured by the interval between the day the record was complete and the date of final judgment.

Although there can be no doubt that cases culminating in unpublished opinions are resolved more quickly, it is impossible to determine how much of that saving can be attributed to limited publication. Much may be because unpublished litigation is easier to decide. By definition, it contains nothing that requires the creation of precedent. Whether published or not, it can be disposed of without the extra work needed to justify the creation and explain the application of new law.

Nevertheless, anyone who reads even a small number of unpublished opinions must conclude, given their brevity and informality, that considerable effort has been spared in their preparation. Of course, one can then ask whether too much effort was spared. That is, does the quality of decision making suffer when the judges

determine that an opinion need not be published and therefore that only a truncated opinion need be written? Before asking that question, however, the relation between publication and productivity must be examined.

## 2. Increased Productivity

If saving time and judicial effort in order to improve the courts' ability to handle a heavier caseload is the major goal of limited publication, the practice presumably should increase judicial productivity. It is easier to determine whether this is so if we limit ourselves to an investigation of the correlation between each circuit's use of limited publication and its relative judicial productivity.[3] In other words, do the circuits that publish a comparatively small portion of their opinions have a comparatively good record of productivity? Before that question can be addressed, the concept of productivity must be defined.

Typically, judicial productivity is measured in terms of dispositions per authorized judgeship. That technique is unsatisfactory for two reasons. First, measuring productivity by authorized, but unfilled, judgeships does not produce very instructive comparisons. This is particularly true given our data, because authorized judgeships were increased from 97 to 132 during the study year. Because none of the new judgeships was filled during the study year, using the traditional measure could skew the results significantly. Accordingly, we chose to evaluate productivity by using the number of active circuit judges instead of the number of authorized judgeships. A second difficulty with the standard measure of productivity is that the circuits use visiting and senior circuit judges to decide cases. That practice tends to skew productivity comparisons because the several circuits use visiting and senior judges to varying extents. Furthermore, if not compensated for, it would make total dispositions per active judgeship an inflated measure of pro-

[3] Of course, it is entirely possible that limited publication saves time but that the savings do not result in increased productivity. For example, instead of being spent in writing more decisions, the extra time could be invested in fashioning better-crafted opinions, or in more thought on the most difficult cases on the court's docket.

ductivity. We have corrected for these difficulties by subtracting from a circuit's total number of dispositions the share attributable to visiting and senior judges. Combining these two innovations, we measure productivity not by dispositions per authorized judgeship, but by dispositions per active circuit judge, corrected for the participation of senior and visiting judges: "corrected dispositions per judge," for short.

We now return to the central question: Is productivity positively correlated with nonpublication? The first column of table 7 lists the circuits in order of productivity, from most corrected dispositions per judge to least. The second lists each circuit's corrected dispositions per judge. The third column gives the percentage of each circuit's total opinion production that was not published. Columns two and three show a positive correlation of 0.097, indicating that there is scant tendency for circuits that publish less to produce more.

**TABLE 7**
**Productivity and Publication**

| Circuit | Productivity (Corrected Dispositions per Judge)[a] | Unpublished Opinions |
|---|---|---|
| Fourth | 140.9 | 72.0% |
| Fifth | 138.6 | 41.4% |
| Sixth | 113.2 | 72.8% |
| Third | 108.4 | 81.9% |
| Seventh | 106.4 | 69.4% |
| Tenth | 101.4 | 68.9% |
| First | 99.2 | 40.7% |
| Ninth | 84.7 | 66.7% |
| Second[b] | 76.0 | 61.1% |
| Eighth | 72.0 | 31.8% |
| D.C. | 61.6 | 72.2% |

[a]Calculated from dispositions per circuit in table 1 *supra*; participation by senior and visiting judges in Administrative Office of the United States Courts, 1979 Annual Report of the Director at 51; and number of active circuit judges in *id.* at 45.

[b]Because only the Second Circuit issues an appreciable number of oral opinions, its total dispositions from table 1 were increased by 195 oral opinions. Calculated by the authors from data supplied by the Administrative Office of the United States Courts.

Our data thus provide no support for the hypothesis that limited publication enhances productivity. It must be borne in mind, however, that limiting publication is only one of a host of variables that

may affect productivity. The low productivity figures for the District of Columbia Circuit and the Second Circuit, for example, might well be attributable more to the great variety and complexity of the regulatory and commercial appeals that those courts must decide than to their publication habits. Other variables include the percentage of cases that are argued orally, the extent to which central staff is used to prepare opinions, and the geographical size of the circuit. Absent the ability to control or even quantify some of those variables, it is impossible to be certain of the effect of limited publication on productivity.

## B. Costs of Limited Publication

The sections that follow examine the costs of limited publication. Two of those costs, suppression of precedent and diminished quality, accompany the benefits of swifter justice and savings of judicial effort. A third is the disparate impact of nonpublication, leading to the concern that some classes of litigants may be denied equal access to the courts. A final cost is systemic: The ultimate effect of limited publication is to transform the courts of appeals into certiorari courts in some instances.

### 1. Opinion Quality

Anyone who has read a large number of unpublished opinions must conclude that they are, as a group, far inferior in quality to the opinions found in the *Federal Reporter*. Although judgments about quality are largely subjective, some quantification of the differences between published and unpublished opinions is possible.

**a. Length.** Proponents of limited publication argue that time can be saved in the preparation of opinions that will not be published because they need not contain complete recitations of the facts or exhaustive discussions of the relevant legal principles. Hence, unpublished opinions should be considerably shorter than their published counterparts.[4] This is confirmed by tables 8 and 9.

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[4] For obvious reasons, we were unable to perform evaluations on the total of nearly 8,000 unpublished opinions produced during the reporting year . . . .

In every circuit, more than 55 percent of all unpublished opinions were shorter than 300 words. In six circuits, more than 40 percent of the unpublished opinions were shorter than 100 words. Published opinions, by contrast, are considerably longer. In nine of the eleven circuits more than 80 percent of all published opinions exceeded 500 words. In all eleven circuits, the largest group of published opinions was the group between 1,000 and 3,000 words. If we can safely assume that a relatively long opinion takes more time to prepare than a relatively short one, the claim that limited publication saves time is justified.[5]

**b. Minimum standards.** Not only are unpublished opinions shorter, they are so short that they raise serious questions concerning the exercise of judicial responsibility. Does an opinion

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Accordingly, we chose a stratified sample of about 10 percent of the unpublished opinions for that portion of the study . . . .

The sample was "stratified" in this sense: For each termination reported by the Administrative Office there is also a "Method of Disposition" reported. It can be (1) written opinion, (2) memorandum decision, (3) decided from the bench, (4) by court order without opinion, (5) by consent, or (6) other. . . . We stratified our sample by ensuring that the 10 percent of the total population included 10 percent of the cases decided by each of methods 1, 2, 4, and 6. We did so because we believed that there might be differences in quality based on method of disposition. We eliminated cases decided by methods 3 and 5 because they did not result in written case-dispositive orders resulting from judicial action, and hence could not be evaluated for quality or measured for length.

Our sample was not exactly 10 percent. It varied from circuit to circuit for three reasons. First, the selections were made from a preliminary list of terminations—really docket numbers—prepared for us by the Administrative Office. Not every docket number represents an opinion; because some cases are consolidated for argument or opinion, several docket numbers may produce only one opinion. Hence, our original selection of 10 percent of docket numbers actually produced a sample of opinions that typically was closer to 12 percent of the total opinion population. Second, some of the opinions that we requested from the circuit court clerks were never sent. Third, some opinions originally listed as unpublished were later published.

[5] If limited publication in fact saves time, but is not correlated with increased productivity, we are left with two alternate hypotheses: (1) the judges do not translate the time saved into extra dispositions, see note 2 supra; or (2) the other variables that affect productivity conceal the effect of limited publication.

shorter than fifty words, often only a sentence or two, satisfy the court's institutional obligation?

**TABLE 8**
**Length of Unpublished Opinions**

| Circuit | Below 50 Words | 50-99 Words | 100-299 Words | 300-499 Words | 500+ Words |
|---|---|---|---|---|---|
| D.C. | 45.2% | 28.6% | 16.7% | 7.2% | 2.4% |
| First | 25.0% | 12.5% | 43.8% | 16.3% | 12.6% |
| Second | 45.4% | 20.4% | 23.4% | 7.8% | 3.2% |
| Third | 70.3% | 19.4% | 5.6% | 1.1% | 3.3% |
| Fourth | 42.9% | 15.6% | 21.5% | 9.6% | 10.8% |
| Fifth | 62.5% | 7.0% | 17.2% | 9.1% | 4.0% |
| Sixth | 6.0% | 22.6% | 61.9% | 8.4% | 1.2% |
| Seventh | 7.6% | 15.1% | 37.6% | 11.3% | 29.0% |
| Eighth | 15.8% | 21.0% | 31.6% | 10.6% | 21.1% |
| Ninth | 43.2% | 9.1% | 18.0% | 14.4% | 15.4% |
| Tenth | 13.0% | 22.3% | 20.4% | 11.2% | 33.4% |

SOURCE: Stratified sample of 7,720 unpublished opinions.
NOTE: Figures for each circuit may not add up to 100 percent because of rounding.

**TABLE 9**
**Length of Published Opinions**

| Circuit | Below 500 Words | 500-999 Words | 1,000-2,999 Words | 3,000-4,999 Words | 5,000+ Words |
|---|---|---|---|---|---|
| D.C. | 3.3% | 15.0% | 50.0% | 15.0% | 16.7% |
| First | 2.7% | 26.0% | 52.1% | 15.1% | 4.2% |
| Second | 11.1% | 12.4% | 51.7% | 18.0% | 6.7% |
| Third | 4.2% | 14.9% | 50.0% | 17.6% | 13.6% |
| Fourth | 23.4% | 29.9% | 33.8% | 9.1% | 3.9% |
| Fifth | 18.8% | 24.2% | 43.6% | 7.3% | 6.0% |
| Sixth | 30.1% | 16.4% | 39.8% | 11.0% | 2.7% |
| Seventh | 4.5% | 11.4% | 73.9% | 4.5% | 5.7% |
| Eighth | 16.8% | 29.8% | 48.1% | 4.6% | 0.8% |
| Ninth | 18.5% | 24.6% | 44.7% | 10.6% | 1.8% |
| Tenth | 3.2% | 28.1% | 61.0% | 7.9% | 0.0% |

SOURCE: Calculated from all opinions reported in volumes 595-600 of *Federal Reporter (2d)*. Those six volumes contained substantial numbers of opinions from the survey year.
NOTE: Figures for each circuit may not add up to 100 percent because of rounding.

To answer that question one must first consider the essential characteristics of the judicial opinion. At rock bottom, it must announce the result to the parties and explain to them the court's reasoning. It should also explain the result to a higher court and thus facilitate review. A final purpose is to "provide the stuff of the law": rules of law, interpretations of statutes and constitutions, and declarations of public policy. Because the opinion publication plans

clearly indicate that unpublished opinions are not designed to accomplish the "lawmaking" function, the present inquiry can be limited to whether unpublished opinions perform the first two functions satisfactorily.

A substantial consensus exists concerning the minimum standards that an opinion must meet if it is to perform those two functions adequately. One formulation states that even a memorandum decision must contain at least three elements: (1) the identity of the case decided; (2) the ultimate disposition; and (3) the reasons for the result. In addition, it is often desirable that the issues be stated explicitly. How well these standards were met by our sample is shown in table 10.[6]

**TABLE 10**
**Satisfaction of Minimum Standards in Unpublished Opinions**

| Circuit | Reasoned Opinions | Decided on the Basis of the Opinion Below | No Discernible Justification |
|---|---|---|---|
| D.C. | 34.1% | 4.9% | 61.0% |
| First | 68.8% | 6.3% | 25.0% |
| Second | 45.3% | 23.4% | 31.3% |
| Third | 13.6% | 1.1% | 85.2% |
| Fourth | 46.0% | 41.0% | 13.0% |
| Fifth | 36.0% | 5.0% | 59.0% |
| Sixth | 71.5% | 7.0% | 21.5% |
| Seventh | 77.5% | 1.3% | 21.3% |
| Eighth | 57.9% | 5.3% | 36.8% |
| Ninth | 65.8% | 0.0% | 34.2% |
| Tenth | 79.6% | 13.0% | 7.4% |

SOURCE: Compiled by the authors.
NOTE: Figures for each circuit may not add up to 100 percent because of rounding.

[6] An opinion was listed as meeting minimum standards if it gave some indication of what the case was about and some statement of the reasons for the decision. Often a single citation of precedent was considered satisfactory if the precedent was narrowly directed to the problem at hand; a citation to the general standard of review of an administrative or court decision was not considered sufficient. Also considered insufficient to meet minimum standards were baldly conclusory opinions such as "appellant's contentions are frivolous and without merit," or "the conviction is supported by substantial evidence."

The reliability of the coding of opinions was established as follows: Each of the authors, using the coding method described above, applied it independently to all of the opinions in the sample. We agreed on 88 percent of the opinions for all circuits.

Three circuits recorded double-digit percentages in the second category, cases decided on the basis of the opinion below. That sort of opinion provides a satisfactory explanation of the result to the parties, at least to the extent that the opinion below gives reasons for the result. By and large, the explanation is adequate only with respect to the parties, because most district court and administrative agency decisions are not published or readily accessible. Thus, the bar and the general public rarely will be able to oversee appellate decisions that culminate in a decision by reference. Another drawback to a decision by reference is that it may leave litigants with the feeling that the appellate court never really gave the case a fresh look. A short statement of the reasons for the decision in the appellate court's own words provides more evidence that serious thought has gone into the decision than does a blanket approval of the opinion below.

It is the third category, decisions with no discernible justification, that raises the issue of judicial irresponsibility most strikingly. A decision without articulated reasons might well be a decision without reasons or one with inadequate or impermissible reasons. That is not to suggest that judges will be deliberately arbitrary or decide cases without adequate grounds. The discipline of providing written reasons, however, often will show weaknesses or inconsistencies in the intended decision that may compel a change in the rationale or even in the ultimate result. Even if judges conscientiously reach correct results, an opinion that does not disclose its reasoning is unsatisfactory. Justice must not only be done, it must appear to be done. The authority of the federal judiciary rests upon the trust of the public and the bar. Courts that articulate no reasons for their decisions undermine that trust by creating the appearance of arbitrariness.

The decision without discernible justification takes various forms in the several circuits. Perhaps the most flagrant failure to provide reasons occurs in the Fifth Circuit. A substantial number of unpublished decisions by the court read simply "Affirmed. See Local Rule 21." The District of Columbia Circuit decides some cases "substantially upon the basis of the opinion below," a practice even less satisfactory than the usual decision by reference be-

cause it does not indicate which portions of the opinion below are accepted and which are rejected. The Third Circuit produces a large number of opinions that simply list the appellant's contentions and then order that the judgment be affirmed. That practice, although perhaps more instructive than a one-word affirmance, gives no indication why each contention was rejected, nor does it give any indication that the court gave any serious thought to the appellant's brief. Several circuits employ what might best be described as form orders or judgments. These orders recite that "after due consideration" or "upon a review of the record and the briefs of the parties," the "appeal is dismissed as frivolous" or "appellant's contentions are without merit."

**c. Quality and productivity.** The percentage of below-standard unpublished opinions varies greatly among the circuits, from a high of 85 percent in the Third Circuit to a low of 7 percent in the Tenth Circuit. It might be expected that those circuits with the highest percentage of below-standard unpublished opinions are the most overworked. That is, short opinions may be necessary in order to permit those courts to keep up to date. The data in table 11, however, suggest that such is not the case.

The first column lists the circuits in order of productivity. The second displays the percentage of below-standard unpublished opinions. The data show no positive correlation.[7] In other words,

[7] In fact the correlation was negative: –.140. Another way to test the hypothesis that very short opinions are necessary to high productivity is to correlate productivity with the percentage of minimum standard opinions produced. That would remedy a possible defect in table 11. The Second Circuit and the Fourth Circuit show relatively low percentages both of below-standard opinions and of minimum standard opinions. *See* table 10 *supra*. This is the result of high percentages of decisions by reference. It may be that the lack of correlation in table 11 is caused by the fact that the most productive circuit, the Fourth, relies to a large extent on decisions by reference. This difficulty can be eliminated by correlating the percentage of minimum standard opinions with productivity. If the hypothesis that short opinions are necessary to productivity is correct, we should find a strong negative correlation. Once again the hypothesis is not proved. . . . there is a negative correlation, but it is quite weak: –.047.

the most productive circuits were not the ones that produced the most substandard opinions.[8]

**TABLE 11**
**Productivity and Below-Standard Unpublished Opinions**

| Circuit | Productivity (Corrected Dispositions per Judge) | Percentage of Unpublished Opinions That Are Below Standard |
|---|---|---|
| Fourth | 140.9 | 13.0% |
| Fifth | 138.6 | 59.0% |
| Sixth | 113.2 | 21.5% |
| Third | 108.4 | 85.2% |
| Seventh | 106.4 | 21.3% |
| Tenth | 101.4 | 7.4% |
| First | 99.2 | 25.0% |
| Ninth | 84.7 | 34.2% |
| Second | 76.0 | 31.3% |
| Eighth | 72.0 | 36.8% |
| D.C. | 61.6 | 61.0% |

SOURCE: Tables 7, 10 *supra*.

The use by the circuits of excessively brief opinions with no discernible justification cannot be supported. The cost of this practice is high; use of such opinions subverts many of the goals of appellate justice. The benefit of the practice is doubtful at best; the data reveal no correlation between productivity and the use of cryptically short opinions.

## 2. Suppressed Precedent

The lower quality of unpublished opinions may be the most important of the costs of limited publication, but it has not been the most controversial. That role has been played by the question of suppressed precedent. By suppressed precedent, we mean a case that ought to have been published but was not. Our examination

[8] Nor did the most productive circuits produce the most very short unpublished opinions . . . . Again the correlation is weak: –.151.

As might be expected, there is a high positive correlation between the percentage of below-standard opinions and the percentage of opinions shorter than 50 words: .758 . . . .

has convinced us, however, that suppressed precedent is not an insuperable problem of limited publication. The discussion that follows examines the problem of suppressed precedent generally and in the specific contexts of reversals and separate opinions.

**a. Generally.** Our sample of unpublished opinions revealed a number of instances of suppressed precedent. It is difficult to estimate how widespread the phenomenon was. An opinion that relies on no authority, for example, could be said to be breaking new ground, or it may only be that the issue is so well settled that citation would be superfluous. To determine with any certainty whether an opinion makes new law requires a familiarity with the substantive law of the circuits that is far beyond the scope of this study. The problem of identifying suppressed precedent becomes even more acute when one considers that discussions of "settled" law in novel settings may in fact shift the moorings of the "settled" principles. Detection of such nuances is difficult. Nevertheless, some conclusions can be drawn with reasonable assurance.

We discovered no widespread "hiding" of law-declaring opinions—that is, opinions that clearly broke new ground on important issues. There were, to be sure, some exceptions. One example is *Trible v. Brown.*[9] There a Congressman sought to compel the Department of Defense to file a report on two shipyard programs. The litigation raised interesting questions of standing, justiciability, and remedy. In spite of its obvious importance, the Fourth Circuit did not publish the opinion.

Cases like *Trible* were unusual. More frequent examples of suppressed precedent involved questions of state law, often in relation to federal statutory or constitutional law. Such opinions certainly should be published if they resolve novel issues. In *DeBona v. Vizas,*[10] for example, the Tenth Circuit decided that two policemen had not been denied due process when their positions were terminated. The decision turned on whether a Colorado statute created a protected property interest, and apparently it was a case of first impression. The importance of the court's resolution of the

[9] No. 79-1228 (4th Cir. May 2, 1979).
[10] No. 77-1299 (10th Cir. Dec. 18, 1978).

problem was increased because the state statute involved had not been construed since 1900. In those circumstances, the resolution of the due process claim deserved general circulation.

Suppressed precedent can also be found in cases resolving novel questions of state law. The federal courts' reluctance to publish opinions on state law questions is understandable. Still, such opinions can provide useful guidance in areas where no state precedent exists. An example is *Grant Square Bank & Trust Co. v. Magnavox Co.*,[11] a contract case where the court relied in part on promissory estoppel, but cited no state cases accepting that doctrine.

Although nonpublication of law-declaring opinions does occur, our review of the opinions in our sample has convinced us that it is not a major problem with limited publication. The handful of examples we discovered constituted less than 1 percent of the nearly 900 opinions in our sample.

Perhaps more common than unpublished law-declaring opinions were cases that were of public interest because they revealed defects in the law or its administration. Those opinions deserved wider circulation in order to reveal these flaws to a large audience, which is the best way to ensure their correction.

The Longshoremen's and Harbor Worker's Compensation Act, for example, was designed to provide employees with "swift compensation for work-related injuries, regardless of fault, and the cost of resolving disputes relating to such compensation would be kept to a minimum."[12] Unfortunately, the plan does not always work that well, as the Third Circuit noted in one unpublished opinion that described in detail one longshoreman's continuing efforts—eight years after an accident—to obtain relief.[13] The court reluctantly remanded to the agency. Publication of this story might have helped bring about change; certainly its suppression will not help achieve that goal.

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[11] No. 77-1070 (10th Cir. Sept. 6, 1978).

[12] Universal Terminal & Stevedoring Corp. v. Norat, No. 78-1029, slip op. at 2 (3d Cir. Feb. 8, 1979).

[13] *Id.*

In similar fashion, *American Bankers Association v. Connell*[14] described problems associated with fund transfers by financial institutions. The court noted that it was "convinced that the methods of transfer authorized by the agency regulations have outpaced the methods and technology of fund transfer authorized by the existing statute."[15] Such a statement from an influential court could have stimulated reform. Instead, it was not published.

Courts are uniquely situated to spot problems in the application of a statute or the workings of an agency. Their comments on the subject can enlighten those in a position to act. There is no reason not to publish those expressions.

A closely related type of case contains commentary by judges on the workings of their own courts. The judiciary has an institutional obligation to set its own house in order. Judges should not be permitted to sweep their peers' shortcomings under the rug by nonpublication. Those who have the duty to supervise the judiciary should see the whole picture, warts and all. Further, public exposure of the faults of judges may have a salutary effect on performance. Reversal in public is a far different matter than what amounts to a private reprimand in an unpublished opinion.

Several unpublished opinions in our sample involved mistakes made by district judges that led to reversal or at least admonition by the circuit court. We believe that those cases should have been made public. Elementary mistakes in routine cases deserve public attention; judicial accountability cannot exist if no one but the circuit court is aware of judicial errors. When an appellate court must remind a district judge of the necessity of subject matter jurisdiction,[16] for instance, something is seriously amiss. The same can be said when a court must reinstate a complaint because it was "dismissed pursuant to a procedure this court reviewed and found deficient [the preceding year]."[17] Pressure through publicity should be brought to bear on such trial judges.

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[14] No. 78-1337 (D.C. Cir. Apr. 20, 1979).

[15] *Id.*, slip op. at 2.

[16] *See* Bergeron v. Exxon Corp., No. 78-2318 (5th Cir. Apr. 19, 1979).

[17] McGruder v. Jeansonne, No. 78-3236 (5th Cir. Mar. 27, 1979). See also Moorer v. Griffin, No. 77-3580 (6th Cir. Oct. 12, 1978), where the District

The nonpublication of opinions that reveal problems transcending mere mistake is even more objectionable. Such cases give rise to a strong suspicion that the court does not care to wash its dirty linen in public. A prime example is *United States v. Ritter*,[18] where the full Tenth Circuit vacated an order issued by Chief Judge Willis Ritter of the District of Utah. The order in question prohibited the judge's "court reporter from carrying out the duties imposed upon him by law."[19] The decision came at a time when Congress was considering a proposal to create a procedure, short of impeachment, to hold federal judges accountable; the problems of Chief Judge Ritter figured in the debate.[20] The scope of the problems he had created clearly should have been revealed to a directly interested Congress and legal community.

Suppression of law-declaring opinions does not appear to be a major problem of limited publication. That is not surprising, given our findings concerning the quality of decision making in unpublished opinions. The concern should not be the suppression of precedent; instead, it should be whether the judges examined the cases closely enough to see if precedent should be made. The major danger we see is that the early decision not to publish an opinion means that not enough care will go into its preparation to stimulate the thought necessary to an adequate consideration of whether the precedent should be created. That basic issue of judicial responsibility should be the concern of the judiciary and of the public.

More troublesome than the suppression of law-declaring opinions was the nonpublication of decisions suggesting that statutes, agencies, or the courts themselves are not performing up to par. Appellate courts should recognize that they have a unique vantage point from which to observe the workings of our society. Observations from that point are of interest to all.

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Court dismissed the complaint for failure to prosecute. The Sixth Circuit reversed because the plaintiff was in jail and the court had not directed that his body be produced for argument.

[18] No. 77-1491 (10th Cir. Aug. 11, 1978).

[19] *Id.*, slip op. at 1.

[20] S. Rep. No. 1035, 95th Cong., 2d Sess. 4 (1978).

**b. Separate opinions.** Nonpublication presents a special problem when an unpublished opinion contains a concurring or dissenting opinion. Two major factors argue for publication in cases that generate separate opinions. First are the stated premises of limited publication, which is a treatment supposedly reserved for cases that do not implicate the lawmaking function of the court—routine, uncontroversial cases. Cases that contain dissents or concurrences are, by definition, controversial; the court disagrees either about the result to be reached or about the method used to reach it. Accordingly, few decisions with separate opinions should go unpublished.

Second is the role played by the separate opinion in our judicial system. Separate opinions serve to restrain judicial advocacy. Like all advocates, the judicial advocate can lose sight of the other side. The separate opinion restricts the judicial advocate because it assures him of a public airing of a contrary view of the same facts and law. The separate opinion also performs an important corrective function, for it criticizes the result and reasoning of the majority, appealing for correction by a higher court, a future court, or a legislature. It is "an appeal to the brooding spirit of the law, to the intelligence of a later day."[21]

In order to perform these functions adequately, the separate opinion must be published. The judicial advocate will not be restrained by a dissent that never sees the light of day. An appeal for correction is largely useless if the appeal is not disseminated to those with the power to correct the majority's errors.[22]

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[21] C. Hughes, The Supreme Court of the United States 68 (1928) (describing dissent in courts of last resort).

[22] Another reason to publish opinions with dissents is to ensure that the majority cannot suppress the views of a dissenting judge. We are not aware of any federal cases where that has occurred. The problem has arisen in some state cases, however. In People v. Para, No. CRA 15889 (Cal. Ct. App. Aug. 1979), Judge Jefferson wrote in dissent:

> Initially, it appeared that the majority felt the same as I do regarding the fact that the majority opinion merited publication in the Official Reports. When circulated to me, the majority opinion was approved by the two justices making up the majority and was marked for publication in the Official Reports. It was only after I had circulated

Thus, both the criteria for cases that should remain unpublished and the functions of the separate opinions lead to the conclusion that few cases that generate separate opinions should go unpublished. The data from the survey year, as illustrated by table 12, confirm that hypothesis. The frequency of separate opinions among the circuits' published opinions ranged between 2.8 percent and 21.1 percent; in the unpublished opinions it ranged from a low of 0 percent to a high of 1.5 percent. Taking all the circuits together, the average frequency of separate opinions in published opinions was 12.4 percent, in unpublished opinions 0.5 percent. Divided courts thus were more than 20 times more common in cases decided by published opinions than in those decided by unpublished opinions.

The important question, however, is whether any case that is sufficiently controversial to generate a separate opinion should go unpublished. Of the separate opinions in our sample, two had little to offer to the legal literature.[23] One was too short to evaluate. The other two, however, should have been published.

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> my dissenting opinion to the two justices who make up the majority that they decided to reverse their original position regarding publication in the Official Reports. I do not think this reversal of position is justified.

*Id.* at 34.

[23] In Costello Publishing Co. v. Rotelle, No. 79-1019 (D.C. Cir. May 17, 1979), the district court dismissed the counterclaim under Fed. R. Civ. P. 19(b) because the action "in equity and good conscience" should not proceed among the present parties due to the court's lack of jurisdiction over a foreign firm that possessed evidence essential to determining the merits. The court of appeals reversed on the theory that the dismissal was premature because Fed. R. Civ. P. 28(b) permits discovery in foreign countries. . . .

**TABLE 12**
**Separate Opinions**

| Circuit | Total Opinions | Dissenting | Concurring | Concurring & Dissenting | Separate Opinions |
|---|---|---|---|---|---|
| | | | Published | | |
| D.C. | 194 | 21 | 12 | 8 | 21.1% |
| First | 214 | 2 | 4 | 0 | 2.8% |
| Second | 359 | 28 | 34 | 9 | 19.8% |
| Third | 219 | 26 | 10 | 4 | 18.3% |
| Fourth | 346 | 53 | 6 | 8 | 19.4% |
| Fifth | 1,385 | 62 | 55 | 9 | 9.1% |
| Sixth | 340 | 13 | 5 | 6 | 7.1% |
| Seventh | 325 | 30 | 9 | 8 | 14.5% |
| Eighth | 448 | 21 | 10 | 2 | 7.4% |
| Ninth | 618 | 14 | 2 | 9 | 4.0% |
| Tenth | 251 | 16 | 12 | 4 | 12.7% |
| Average | | | | | 12.4% |
| | | | Unpublished | | |
| D.C. | 505 | 2 | 1 | 1 | 0.8% |
| First | 147 | 0 | 0 | 0 | 0.0% |
| Second | 563 | 1 | 0 | 0 | 0.2% |
| Third | 991 | 4 | 1 | 0 | 0.5% |
| Fourth | 890 | 1 | 1 | 0 | 0.2% |
| Fifth | 978 | 0 | 1 | 0 | 0.1% |
| Sixth | 908 | 2 | 2 | 0 | 0.4% |
| Seventh | 736 | 4 | 6 | 1 | 1.5% |
| Eighth | 209 | 1 | 0 | 0 | 0.5% |
| Ninth | 1,238 | 2 | 0 | 1 | 0.2% |
| Tenth | 555 | 3 | 2 | 1 | 1.1% |
| Average | | | | | 0.5% |

SOURCE: See table 1 *supra*.

*American Textile Manufacturers Institute, Inc. v. Bingham (ATMI)*[24] surely deserved public dissemination. It involved an issue that, although arcane, has broad implications. The Occupational Safety and Health Act provides for judicial review by the circuit courts of safety and health standards. Often petitions for review will be filed in more than one circuit; the case is then heard in the circuit in which the first petition was filed. A petition filed before the issuance of the regulation is considered premature. In *ATMI*, the challenged regulation was delivered to the *Federal Reg-*

[24] No. 78-1378 (4th Cir. Oct. 3, 1978).

*ister* at 9:00 a.m. and made available to the public at 11:53 a.m. Several labor organizations filed petitions for review in the District of Columbia Circuit at 8:45 a.m. and 11:55 a.m. ATMI filed at 8:45:01, 11:00:00 a.m., and exactly noon in the Fourth Circuit.[25] Clearly, the venue for the appeal will be determined by whether 9:00 a.m. or 11:53 a.m. was the time the regulation was issued. The dissent, relying on a provision in the statutory authorization for the *Federal Register,* thought that ATMI had filed first. The majority, relying on an interpretive regulation issued by OSHA,[26] held that the unions had filed first.

The majority and dissent, then, disagreed upon a rule of law—a rule that could be settled one way or the other without shaking the legal firmament, but a rule that should be settled. Publication would have advanced the ultimate national resolution of this issue.

Another case that should have been published is *Burrison v. New York City Transit Authority,*[27] which revealed a longstanding disagreement within a circuit. The issue was the res judicata effect of findings in a state criminal or quasi-criminal proceeding upon a subsequent federal civil rights litigation. In *Burrison* and other cases, Judge Oakes has consistently favored a much narrower scope for the doctrine of res judicata than has the majority. The issue has also caused a split between the Second Circuit and the Sixth Circuit, and it has been the subject of scholarly dispute. It seems odd that, faced with such a controversial question, the court should not treat the issues in comprehensive fashion[28] and publish

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[25] The statement of the facts is taken from Respondent Secretary's Motion to Dismiss and to Transfer, ATMI v. Bingham, No. 78-1378 (4th Cir. July 11, 1978) (on file with *The University of Chicago Law Review*).

[26] 29 C.F.R. § 1911.18(d) (1980).

[27] No. 78-7536 (2d Cir. Mar. 29, 1979).

[28] The problem here is really more serious than nonpublication; the court's opinion contains about 120 words. The facts are omitted entirely and the entire legal discussion consists of three case citations. Judge Oakes joined the majority opinion, limiting his disagreement to the statement that he adhered to his position in Turco v. Monroe County Bar Ass'n, 554 F.2d 515 (2d Cir.), *cert. denied,* 434 U.S. 834 (1977), an earlier case raising the same issue. This may well be an instance where nonpublication led to a case receiving less attention than it merited.

that treatment. Nonpublication surely is inappropriate for cases concerning such a persistently troublesome issue.

It might be argued that the controversial issues in *Burrison* had already been treated by the court in published opinions. Additional publication of dissenting views arguably is unnecessary, as well as damaging to the collegiality of the court. But frequent public airing of disagreement is the only way to settle such stubborn disputes, and it may be the only way to attract sufficient attention from the Supreme Court to provoke a grant of certiorari.

After considering the principles underlying limited publication and separate opinions, it seems clear that the circuits should adopt the rule that all cases containing separate opinions should be published. Such a rule would cost little. In the survey year, only thirty-eight separate opinions went unpublished—0.5 percent of the total unpublished product of the circuit courts. In return for the minimal cost of publishing these few decisions, the courts would be able to ensure publication of a group of opinions that should be available to guide litigants and planners, provoke critical commentary, and perhaps interest the Supreme Court in resolving a controversial question.

**c. Reversals.** About one in every seven unpublished opinions did something other than affirm the opinion below (see table 13). It should not be surprising that the rate of nonaffirmance in published cases is nearly three times that figure. With few exceptions, when one court reverses another, it means that the system has not worked properly. Almost by definition, the opinion on appeal is of sufficient interest to warrant publication.

Some reversals reflect mistakes in routine matters on the part of district judges. The inability of judges to apply commonplace law correctly should be a matter of concern to all. Including such reversals among the unpublished opinions conceals the problem. Earlier, we discussed several examples of unpublished opinions correcting plain error by the trial judge. Another is *Wesley v.*

*Green*[29] The trial court had dismissed a complaint because venue was improperly laid, without establishing in the record the parties' residences. Any such error, however embarrassing, should not be kept from public scrutiny.[30]

**TABLE 13**
**Frequency of Nonaffirmance**

| Circuit | In Published Opinions | In Unpublished Opinions | Number of Nonaffirming Unpublished Opinions |
|---|---|---|---|
| D.C. | 44% | 14% | 67 |
| First | 32% | 12% | 17 |
| Second | 37% | 9% | 51 |
| Third | 50% | 8% | 77 |
| Fourth | 43% | 14% | 121 |
| Fifth | 36% | 11% | 109 |
| Sixth | 41% | 12% | 111 |
| Seventh | 38% | 16% | 118 |
| Eighth | 28% | 17% | 35 |
| Ninth | 28% | 19% | 231 |
| Tenth | 29% | 15% | 81 |
| Total | 36% | 14% | 1,018 |

SOURCE: See table 1 *supra*.

NOTE: Dismissals for want of prosecution and cases transferred were excluded from both numerator and denominator in computing the percentages of nonaffirmance. The former figure comprised all instances in which the appellate court did anything other than affirm the opinion below or dismiss the appeal. Opinions coded "affirmed in part and reversed in part" thus were classified as nonaffirmances.

Reversal on routine matters may signify more than poor craftsmanship by the trial judge. It may, for example, point to uncertainty about the content of governing law. The court of appeals may not publish a reversal because, to it, the governing law was

[29] No. 77-2269 (4th Cir. Oct. 17, 1978). *See also* Dawn v. Wenzler, No. 76-3457 (9th Cir. Dec. 5, 1978) (failure to permit plaintiff to amend complaint once, which is a matter of right under Fed. R. Civ. P. 15(a)).

[30] A similar analysis applies to mistakes by federal law enforcement officials. Even a remand based on confession of error by the United States attorney can be interesting enough to warrant publication. United States v. Martin, No. 79-5087 (5th Cir. June 7, 1979), contained not only such a confession, but also an observation that departures from Fed. R. Crim. P. 11 were "very great." *Id.* That is a most informative comment for anyone interested in the workings of our criminal justice system.

clear; such may not be the perception of others. Put differently, the unpublished opinion may clarify precedent to such a degree that the opinion should be published. *Sanchez v. Califano*[31] was such a case. Its outcome turned on the allocation of the burden of proof in Social Security disability cases. The court of appeals thought the issue determined by its own published precedent. Although the court probably was correct, the precedent was hardly a model of clarity.[32] Publication of *Sanchez* would have helped avoid similar difficulties in the future.

Reversals in routine cases may also reflect a continuing battle over the correct legal standard to apply. That is especially likely in areas where a large number of frivolous cases arise. The finder of fact naturally will seek to dispose of these quickly; the appellate court, faced with different pressures, may not be so keen. In *Kidd v. Mathews*,[33] for example, the Sixth Circuit, in reversing a denial of black lung benefits, noted that the "Secretary [of HEW] has again used conflicting medical tests to prevent the establishment of the [statutory] presumption."[34] The secretary's evident unhappiness with the governing legal standard should be exposed, so that others will be aware of the dispute and have the opportunity to comment on its merits.[35]

Finally, for all the reasons discussed above, reversals are quite likely to create law. Many of the decisions discussed in the analysis of separate opinions and suppressed precedent also were reversals. That observation should come as no surprise; where the reversal does not turn on correction of plain error, it is likely that the court below could not possibly have known the "true" state of the law, because it had never been declared. Thus the circuit court is forced

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[31] No. 77-1900 (10th Cir. Jan. 11, 1979).

[32] *See* Keating v. Secretary of HEW, 468 F.2d 788, 790 (10th Cir. 1972).

[33] No. 76-2530 (6th Cir. Aug. 24, 1978).

[34] *Id.*, slip op. at 2.

[35] *See also* Lykins v. MacIntosh, No. 79-6228 (4th Cir. Apr. 27, 1979) (district court erred in granting summary judgment in a prisoner's civil rights action). The standard for summary judgment in civil rights cases has been a subject of dispute in the Fourth Circuit for some time now.

to make law. If it does not publish its opinion, it creates a suppressed precedent.

All of the phenomena just discussed weigh strongly in favor of publication of all reversals. They tell us interesting things about the workings of our legal system, they provide helpful discussion of legal concepts, and they sometimes create—or at least clarify—precedent. Furthermore, reversal is an easy criterion to apply. Unlike most of the criteria used to select opinions for publication, reversal requires no subjective evaluation. Publishing all reversals, however, would entail a heavy cost. If all 1,018 unpublished nonaffirmances in the survey year had been published, the number of published opinions would have increased by one-fifth.

It may be, however, that some middle ground can be found, beginning with the observation that not all nonaffirmances deserve publication. One case, for example, raised questions concerning Michigan's regulation of abortion clinics under a 1974 statute.[36] After the decision below and oral argument in the Sixth Circuit, Michigan revised the statute. The Sixth Circuit remanded for consideration of the constitutionality of the new law. Because remand was based upon an intervening event, passage of a new law, the opinion sheds no light on judicial practice. It is the paradigmatic opinion without value to anyone other than the litigants.

Similarly, a "pass-through" of a Supreme Court remand has such little value that its publication would be hard to justify. A decision not to publish a remand in light of a Supreme Court opinion in another case would be more questionable.

Finally, there is no need to publish a reversal based upon an intervening change in the law of the circuit. In that situation, the reversal tells us nothing about the quality of decision making in either court. It may not even reflect a disagreement over the content of the substantive law.[37]

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[36] Abortion Coalition v. Michigan Dep't of Pub. Health, No. 77-1223 (6th Cir. Sept. 19, 1978).

[37] *See, e.g.*, Gardner v. Zahradnick, No. 77-1870 (4th Cir. Sept. 29, 1978) (case held in abeyance pending decision in Gordon v. Leeke, 574 F.2d 1147 (4th Cir.), *cert. denied*, 439 U.S. 970 (1978); remand in *Gardner* required by rule established in *Gordon*).

It is impossible to tell from our sample the number of reversals whose publication would not be called for under almost any criteria. A rough guess, however, is that about half of the nonaffirmances center on reasons unrelated to the workings of the judiciary and the application of precedent. We believe that the remainder should be published. Although that would entail a significant public cost, the game should be worth the candle. To ensure proper handling, we recommend that all reversals be published unless the reversal is based upon a standard or fact not known to the tribunal below at the time that court or agency made its decision. We believe that rule will best square cost with benefit.

**d. Summary of apparent costs.** Far and away the major problem we have identified in connection with limited publication is that created by opinions that do not satisfy minimum standards. Such opinions do not give the appearance that justice has been done. More important, perhaps, shoddy opinions may reflect the quality of thought that went into the decision itself. Thoughtless opinions are a danger to be guarded against resolutely, especially given the lack of correlation between productivity and below-standard opinions. We believe every opinion can satisfy minimum standards.

Suppressed precedent is a much less significant problem. If the courts of appeals were to recall that opinions of public interest should be published, the problem would be lessened. In addition, the publication of all decisions with separate opinions, as well as many reversals, would help both to avoid suppressed precedent and to ensure the circulation of opinions that are independently of interest to the public.

### 3. A Hidden Cost: Disparate Impact and Certiorari Courts

A third cost, the disparate impact of limited publication, may be more pernicious, for its full effect stems from the cumulation of various devices adopted by the courts of appeals over the last decade or so to cope with their increasing caseload. An appreciation of the problem requires consideration of the interaction between limited publication and three related phenomena: (1) the dis-

proportionately low rate of publication of opinions for some types of litigation, such as prisoners' petitions, Social Security cases, and appeals in forma pauperis; (2) the decision by the courts of appeals of a substantial number of cases without oral argument; and (3) the use by the circuit courts of central staffs of attorneys to aid in research and decision making.

**TABLE 14**
**Nature of Appeal**

| Subject Matter of Appeal | Number of Published Opinions | Number of Unpublished Opinions | Opinions Not Published |
|---|---|---|---|
| United States, Plaintiff | | | |
| Civil Rights | 11 | 8 | 42.1% |
| Tax | 16 | 50 | 75.8% |
| Land Condemnation | 6 | 9 | 60.0% |
| Other | 110 | 102 | 48.1% |
| Subtotal | 143 | 169 | 54.2% |
| United States, Defendant | | | |
| Prisoner Petitions | 167 | 456 | 73.2% |
| Civil Rights | 94 | 176 | 65.2% |
| Social Security | 92 | 305 | 76.8% |
| Tort | 68 | 116 | 63.0% |
| Other | 339 | 417 | 55.2% |
| Subtotal | 760 | 1,470 | 65.9% |
| Private Cases | | | |
| Prisoner Petitions | 290 | 1,038 | 72.7% |
| Civil Rights | 398 | 708 | 64.0% |
| Securities | 68 | 75 | 52.4% |
| Labor | 91 | 116 | 56.0% |
| Tort | 272 | 357 | 56.8% |
| Other | 696 | 786 | 53.0% |
| Subtotal | 1,815 | 3,080 | 62.9% |
| Criminal | 1,320 | 1,623 | 55.1% |
| Total | 4,038 | 6,342 | 61.1% |

SOURCE: See table 1 *supra*.

Table 14 displays the subject matter of the appeals terminated during the 1978-79 reporting year. Most interesting among the items in the table is the comparatively high nonpublication percentages of prisoner civil rights cases, Social Security cases, and prisoner petitions in general. Such high nonpublication rates should come as no surprise, however, for those subject matter areas are the most likely to produce frivolous litigation because of the ab-

sence of disincentives to appeal. In addition, cases in those categories often involve emotional issues, pursued by litigants who seek personal vindication without any realistic expectation of legal remedy. Finally, such claims often turn on factual rather than legal issues; hence, there is less that an appellate court can do to review the decision below.

Another problem is the relatively high percentage of unpublished appeals that were filed in forma pauperis. Among unpublished opinions the in forma pauperis rate was 32 percent, while among published opinions the rate was only 20 percent. Once again, the discrepancy can be explained by the higher proportion of frivolous in forma pauperis appeals because of the absence of disincentives to appeal. Nevertheless, both phenomena—the disparate publication treatment of certain types of litigation and the relatively high incidence of in forma pauperis cases on the unpublished list—give rise to concern for two reasons.

First, the disparate impact of nonpublication arguably supports a claim of denial of equal treatment by the courts. The issue has been raised before the Supreme Court, but was passed over by the justices. Before this study, however, there was no hard evidence that certain classes of litigants were most likely to suffer because of limited publication. Nevertheless, even with empirical confirmation, the constitutional claim is at best colorable, because the circuit courts' practices would almost certainly pass present equal protection tests. The statistical frivolity of certain types of appeals surely provides a rational basis for the disparity, and none of the types of litigation is based on a currently recognized suspect classification justifying strict scrutiny.

Whether constitutionally justified or not, litigants in the affected classes still will believe that they have received second class justice. That is a problem, for the appearance of justice is nearly as important as the fact. The federal courts, which view themselves as the guardians of equal justice under law, should be uniquely sensitive to claims that their own house may not be in order.

Second, the danger of routine treatment is another threat to judicial responsibility. It is possible that a judge's mind subconsciously will run along these lines: "This is a prisoner civil rights

action appealed in forma pauperis; past experience tells me there is nothing to such cases. Therefore, I don't have to think about it, and if I don't publish an opinion I won't have to sift through a meaningless record to prove the frivolity of this appeal to an uncaring public." We believe that judges zealously guard against such irresponsible decision making. But there is a danger of a judge developing a conditioned response to the surface characteristics of certain classes of recurrent and annoying litigation. Requiring a judge to justify a decision to the public is one way to minimize that danger.

All of the circuits provide that oral argument need not be heard for some appeals. The idea is to expedite disposition and conserve judicial resources in cases where the issues are so plain that oral argument is most unlikely to add to the quality of decision making. Because such "clean" cases are likely to result in routine dispositions without precedential impact, we should expect a substantial coincidence of nonpublication and denial of oral argument. In the survey year, this hypothesis proved true. Only 32 percent of unpublished cases were argued orally, as compared to 81 percent of published cases.[38]

Although those figures are not surprising, they lend force to the concern that nonpublication reduces the incentive for judges to probe beyond the surface of the case. That concern is particularly acute in cases submitted for decision on the briefs, for oral argument may show a court that the case has depths not apparent from the paper record. Decision without argument, coupled with the prospect of nonpublication, removes two safeguards that might lead a court to notice that the case is not in fact "routine."

Finally, there is the role played by central staff in the formulation of opinions. Over the past decade, many courts, including the United States courts of appeals, have added large numbers of staff law clerks to assist in preparation for argument and later disposition. The Ninth Circuit, for example, employed thirty staff clerks

[38] These figures are from statistical data supplied by the Administrative Office of the United States Courts (Sept. 24, 1980) (on file with *The University of Chicago Law Review*), tables 1P, 1U, 4P, 4U.

in 1978. Although the use of staff clerks varies widely from court to court, in some the clerks are heavily involved in preparing preargument memorandums and draft opinions. Such procedures present an obvious danger of delegation of judicial responsibility either to the presiding judge of a panel or to the staff itself, leading to what one state judge styled the "one judge" or "no judge" decision.

That danger increases with the concentration of staff law clerks in areas of the law where the high volume of cases makes specialization possible—even desirable, given the possibility of economies of scale. Those high-volume areas, of course, are most likely to be the ones where frivolous appeals are the most common—criminal, prisoner, and social security cases, and appeals in forma pauperis. If, as seems likely, those cases frequently are decided on submission, it can be seen how markedly the process by which many appeals are "heard" differs from the general perception of an appellate decision as based on a collegial exchange of views, marked by multiple drafts and developing ideas.

That ideal may not often be attained. In fact, when the cumulative impact of limited publication, central staff, and the associated phenomena is assessed, it can be seen that the courts of appeals often behave much like courts with discretionary jurisdiction—like certiorari courts, in short. Suppose a petition for a writ of habeas corpus is denied by a lower court. The case is reviewed by a staff member, who makes recommendations and submits draft opinions. It is disposed of without argument by the court. That process could equally well describe a denial of certiorari by the Supreme Court or the disposition of a "routine" case by a circuit court. They certainly cannot be distinguished on the ground that denials of certiorari are unpublished and nonprecedential; so are most such "routine" circuit court decisions. A plausible distinction is that denials of certiorari typically are not accompanied by a statement of reasons, but our findings show that many of the circuit courts' unpublished opinions are similarly bereft of justification. A formal difference exists, of course, in that discretionary jurisdiction in the Supreme Court has been authorized by Congress, while the appellate jurisdiction of the circuit courts is mandatory. But when washed in the "cynical

acid," this formal difference evaporates. For the realist, the processes are the same. The conclusion is inescapable that, with regard to a large part of their caseload, the circuit courts have transformed themselves, contrary to congressional mandate, into certiorari courts.

Perhaps such a transformation is the necessary result of an overwhelming caseload. It may be that little has been lost, and that the quality of justice has not been diminished appreciably. Certainly some such steps are necessary to allow the continued operation of the system. Yet the cost of a changed appellate process must be recognized for what it is in order that the final price of judicial overload can be fully reckoned.

## Conclusion

### A. A Model Rule

Our survey of the publication habits of the circuit courts confirms that the principal benefit of limited publication is swifter justice; in addition, there may be savings in judicial efforts that in turn may be translated into gains in productivity. We have also identified two major costs: suppressed precedent and, more seriously, a marked number of low-quality opinions. Those findings challenge the critic to fashion a rule that maximizes the benefits of limited publication while avoiding as many of its costs as possible. The Model Rule that follows attempts to meet that challenge.

**Rule _____ Opinions.**

**1. Minimum Standards:**

Every decision will be accompanied by an opinion that sufficiently states the facts of the case, its procedural stance and history, and the relevant legal authority so that the basis for the disposition can be understood from the opinion and the authority cited.

If the decision is based on the opinion below, sufficient portions of that opinion should be incorporated into the opinion of this

court so that the basis for this court's disposition can be understood from a reading of this court's opinion.

**2. Publication of Opinions:**

**a. Criteria for publication:** An opinion will be published if it:

1. establishes a new rule of law, or alters or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;
2. applies an established rule of law to facts significantly different from those in previous applications of the rule;
3. explains, criticizes, or reviews the history, application, or administration of existing decisional or enacted law;
4. creates or resolves a conflict of authority either within the circuit or between this circuit and another;
5. concerns or discusses a factual or legal issue of significant public interest;
6. is accompanied by a concurring or dissenting opinion;
7. reverses the decision below, unless (a) the reversal is caused by an intervening change in law or fact, or (b) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;
8. addresses a lower court or administrative agency decision that has been published; or
9. is an opinion in a disposition that (a) has been reviewed by the United States Supreme Court, or (b) is a remand of a case from the United States Supreme Court.

**b. Publication decision:** There shall be a presumption in favor of publication. An opinion shall be published unless each member of the panel deciding the case determines that it fails to meet the criteria for publication.

**3.** The court recognizes that the decision of a case without oral argument and without publication is a substantial abbreviation of

the traditional appellate process and will employ both devices in a single case only when the appeal is patently frivolous.

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Many of the provisions of the Model Rule were suggested by existing circuit court rules. We provide textual discussion only of those provisions that were suggested primarily by the empirical study.

The most striking finding of the study is the extremely high cost of nonpublication in terms of opinion quality. Nine of the eleven circuits produced 20 percent or more below-standard opinions. In six circuits the figure was above 30 percent. Section 1 of the Model Rule should remedy that situation. The need for the provision is all the more apparent given that opinion quality is not correlated with productivity. In other words, by adopting section 1, the courts could remedy the most serious drawback of nonpublication—poor opinion quality—without reducing productivity. The case for the provision thus is very strong.

Section 2 of the Model Rule includes detailed publication criteria. Six of the eleven circuits currently use such detailed criteria. Our findings showed no positive correlation between specificity of publication criteria and the percentage of opinions published. Nevertheless, we favor specific criteria on the theory that the publication decision will be made in a more intelligent and consistent manner if the judges have detailed criteria to guide them. The result should be fewer cases of suppressed precedent. Additionally, our figures do not disprove the effect of specificity on publication percentages; they simply fail to prove it.

Three of the criteria warrant individual discussion. Section 2(a)(3) tries to ensure publication of opinions that reflect problems in the administration of justice or the working of case or statutory law. Judges are in a unique position to observe such problems. Any opinions that result from that advantage should be made generally available.

Section 2(a)(6) of the Model Rule calls for publication of all opinions that are accompanied by concurring or dissenting opinions. The results of the study provide strong evidence that such

opinions are likely to deserve public dissemination. Of the four such opinions that we evaluated, only two were correctly left unpublished. Furthermore, the cost of such a provision is negligible. In the entire survey year, only thirty-eight such opinions went unpublished—about 0.5 percent of the total of unpublished opinions. This balance of costs and benefits strongly supports section 2(a)(6).

The situation is not so clear with regard to section 2(a)(7)—publication of reversals. Our findings indicate that many unpublished reversals should have been published. Some were law-declaring opinions and others revealed important information about the performance of lower courts and administrative agencies. On the other hand, some reversals, for instance those caused simply by an intervening change in the facts or law, should not have been published. An addition to the equation is the high cost of publishing all reversals. In the survey year, such a move would have increased the total of published opinions by 20 percent. Accordingly, section 2(a)(7) is a compromise that attempts to secure the publication of only those reversals that are likely to be significant.

Section 2(b) of the Model Rule calls for a presumption in favor of publication. Our results indicate that such a presumption is likely to affect actual publication behavior, because circuits with a presumption against publication actually did publish less than circuits without such a presumption. Increased publication is likely to diminish the problems of suppressed precedent and poor opinion quality. Although there may be some loss in the area of swifter justice, our results do not suggest that productivity is likely to suffer. Section 2(b) also requires a unanimous decision of the panel in order not to publish.

The language of section 3 is entirely precatory. It simply calls for judges to recognize the dangers inherent in combining several judicial "shortcuts" in a single case. There is some temptation to call for publication in all cases in which there is no oral argument or vice versa, but the cost of such a provision is high. In the survey year, it would have more than doubled the total of published opinions. Our hope is that the precatory language of section 3 will call the judges' attention to the possibility that they may be trans-

forming their courts, without statutory authority, into certiorari courts.

## B. Summing Up

The discussion of limited publication has produced numerous claims concerning the harms and benefits of the practice. This study permits an empirical evaluation of many of these claims. It is clear that limited publication produces at least one significant benefit—swifter appellate justice. The claimed benefit of savings of judicial time and effort is less clear. It is difficult to read many unpublished opinions without concluding that relatively little time and effort was spent in their production. Yet we found no positive correlation between a circuit's tendency not to publish and its productivity. Other variables may obscure the relationship between nonpublication and productivity. Alternatively, the judges may be using the time saved to perform important but not case-related functions. Although we suspect that the time-savings hypothesis is true, we are unable to verify it empirically.

Our examination of the circuits' work has provided little to justify major concern about the problem of suppressed precedent. We did, however, find a number of cases where valuable discussions of difficulties with the law or its administration were submerged. The circuit courts could substantially remedy the problem by adhering to several of the provisions of our Model Rule.

The more significant drawback to the system is its pernicious effect on judicial responsibility. In many circuits, large percentages of the unpublished opinions failed to satisfy even minimum standards. Further, when nonpublication is combined with denial of oral argument, the result may curtail the appellate process in a way inconsistent with the mandatory appellate jurisdiction of the courts of appeals. Once again the Model Rule provides a way to reduce those costs substantially.

Perhaps the greatest danger of any procedural reform is that it will be adopted without sufficient reflection or continued without sufficient study. Although the publication plans received ample thought before their adoption and during their first several years of operation, study of the effects of the plans has almost entirely

ceased. From 1973 until 1977, the plans were the subject of annual reports by the Administrative Office of the United States Courts to the Judicial Conference of the United States. The reports are no longer being made; since 1977 the study of the plans has come largely from outside of the judicial system. Clearly the courts themselves have no facilities to conduct such inquiries. The proper agency is the Administrative Office. Data on the workings of the publication plans (and other recent appellate court reforms) should be included as a regular part of the annual report. Perhaps after several years of such reporting, more ambitious statistical studies will be possible and will provide more conclusive answers to the questions arising out of the limited publication debate.

# UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS[1]

**Donna Stienstra**
**1985**
**(FJC-SP-85-2)**

## Introduction

In the search for more efficient ways to dispose of the expanding appellate caseload, the U.S. courts of appeals have, over the past decade, adopted a variety of procedural innovations designed to reduce the time judges spend on many cases. Thus, in most circuits central staff attorneys now screen cases before they are assigned to a judicial panel; the screening duties these attorneys perform vary across the circuits, but a common practice is for them to make recommendations to the judges concerning the need for oral argument. After the recommendations have been reviewed, the judicial panel may decide that argument is unnecessary. In addition, several circuits have adopted appeals expediting procedures by which some cases may be placed on a shorter briefing schedule, while other courts have set up preargument conference programs, in which attorneys for the parties meet with staff counsel to resolve procedural problems, refine the briefs, or discuss settlement.[2]

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[1] This report is reprinted in substantially its original form. The only material omissions are some footnotes and tables 6-8 and 10-11 of the appendix. Remaining footnotes have been renumbered. Ed.

[2] For a description of the Ninth Circuit's screening program, see J. S. Cecil, Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project ch. 5 (Federal Judicial Center 1985). The Fifth Circuit's screening procedure is described in Bell, *Toward a More Efficient Federal Ap-*

Of the recent innovations, none has been more controversial than the practice of disposing of some cases without a published decision, a practice that has been adopted to some extent by all federal appellate courts. This paper describes several aspects of the circuits' publication policies and discusses some of the implications of these policies. The focus is on two questions: Who has access to the unpublished decisions? And how may these decisions be used?[3] The centrality of these two questions will become clearer in the later discussion of the history of the efforts to limit publication.[4]

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*peals System*, 54 Judicature 237 (1971). The Eighth Circuit's appeals expediting calendar is described in Lay, *A Blueprint for Judicial Management*, 17 Creighton L. Rev. 1065-67 (1984). Evaluations of several appeals expediting programs are available: L. C. Farmer, Appeals Expediting Systems: An Evaluation of Second and Eighth Circuit Procedures (Federal Judicial Center 1981); J. E. Shapard, Appeals Without Briefs: Evaluation of an Appeals Expediting Program in the Ninth Circuit (Federal Judicial Center 1984). For two discussions of preargument conference programs, see A. Partridge & A. Lind, A Reevaluation of the Civil Appeals Management Plan (Federal Judicial Center 1983); Rack, *Pre-argument Conferences in the Sixth Circuit Court of Appeals*, 15 U. Tol. L. Rev. 921 (1984). A general discussion of several appellate innovations can be found in P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal chs. 2 & 3 (1976).

[3] The words *decision* and *disposition*, which are used throughout this report, refer to all possible forms by which the court's decision in a case is made known. Thus, opinions, memoranda, and orders are subsumed under these words.

[4] Among the other issues raised by researchers and commentators have been questions about the precedential value of the unpublished decisions, the increase in productivity that may be attributed to limited publication, and the ability of judges to foresee that a decision is nonprecedential. For a discussion of the precedential value of unpublished decisions, see Foa, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. Pitt. L. Rev. 309 (1977); Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573 (1981). For an examination of the productivity question, see Reynolds & Richman, *supra*, at 604. The ability of the judges to decide which decisions are nonprecedential is evaluated in Shuchman & Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value"?*, 29 Emory L.J. 195 (1980). These issues are not discussed in this paper, nor are several other questions that frequently arise in discussions of publication policy: (1) the justifications for limiting publication; (2) the quality of the

The core issue in the debate over access and use is fairness: Is the material equally available or equally restricted to all the participants in the litigation process? And are all participants equally restricted in the use they may make of these decisions? The two questions are closely related. Because of concerns over fairness of access, use—in the form of citation—is usually prohibited.[5] The argument is as follows: If access is restricted but citation is freely allowed, only those attorneys with the time and resources to search for unpublished material or those who regularly practice in the court (e.g., the U.S. attorney) will benefit, an outcome unfair to the less well situated attorney; therefore, citation should be prohibited. This justification for prohibiting citation has, however, been countered by another problem in fairness: Barring citation will not prevent attorneys or judges from using either the information found in the unpublished decisions or their familiarity with the trend of such decisions; it will simply enable them to use the information without acknowledging the source of their reasoning.[6] Several possible conclusions follow from this argument: (1) Citation should not be prohibited; (2) access should not be restricted; or (3) publication should not be limited. Restrictions on access, then,

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unpublished decisions; (3) the guidelines for writing opinions as opposed to memoranda or orders; (4) the relationship between limited publication and limited argument.

[5] The question of fairness of access is essentially a question of distribution: To whom are the unpublished decisions routinely distributed, and where are the materials generally available? The distribution policies of the circuits are discussed in the second section. The question of use, on the other hand, is primarily a question of citation. The circuits' citation rules are discussed in the third section.

[6] *See* Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1196-99 (1978). It can be argued in response that unpublished decisions do not contain reasoning or a restatement of facts and therefore would not be helpful. While this argument might apply to unpublished orders, it is less likely to be valid for unpublished opinions or even lengthy memoranda.

seem to lead to inequalities in the use of unpublished material, whether or not citation is prohibited.[7]

Unrestricted access to the unpublished decisions, however, also creates problems. If access is unlimited and citation is prohibited, the issue of unacknowledged use again arises. On the other hand, if access is unlimited and citation is also unrestricted, use of the unpublished material will be made equitable, but the cost savings to the court, litigants, and publishers will be lost.[8]

The circuit courts have responded to these issues in a number of ways, which are reflected in the rules and procedures they have adopted. To develop a picture of current practices regarding access and citation, this report examines (1) written rules and policies contained in court documents and (2) unwritten practices as described in interviews with court staff.[9]

The paper is divided into six sections. To provide a context for the discussion of current practices, the first section reviews the history of the publication debate, with particular attention to the access and use issues. The next two sections discuss the distribution and citation policies of the courts. The fourth section takes a brief look at the circuits' criteria and procedures for deciding which de-

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[7] *Id.* at 1195. For another view on the issue of fairness—an approach emphasizing system fairness—see J. O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 40 Rec. A.B. City N.Y. 12 (1985). Summary decision and publication measures may affect the overall fairness of the litigation system by enabling greater access by more litigants through economical use of judge time.

[8] A second justification for restrictions on citation, centering on costs in time and money, has often been offered: If citation is allowed, the time saved by judges in not writing polished prose will be lost because they will feel compelled to write decisions of higher literary quality; the time saved by attorneys in not having to research this body of law will also be lost; and the costs saved in not having to publish and buy these materials will be lost because private publishers will feel compelled to print the unpublished decisions that can be cited. These concerns are not addressed in this paper. They are discussed briefly in Reynolds & Richman, *supra* note 6, at 1194.

[9] Interviews were conducted by telephone. In most of the circuits the clerk was the primary respondent; in several other circuits the chief deputy clerk answered the questions; and in a few courts other deputy clerks, such as the opinion clerk, provided some additional answers to the questions.

cisions do not warrant publication. Next is a presentation of numerical data that summarize the number and types of cases whose decisions were not published during statistical years 1981 to 1984. The final section offers a brief conclusion.

## I. History of the Publication and Citation Rules: The Debate over Access and Use

Although there have been periodic suggestions during the last fifty years that publication of decisions be limited, the debate about restricting publication intensified in the mid-1960s.[10] In 1964 the Judicial Conference of the United States called on the federal courts to limit the number and length of published opinions. Citing "the rapidly growing number of published opinions . . . and the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities," the Conference adopted a resolution asking the appellate and district court judges to "authorize the publication of only those opinions which are of general precedential value."[11]

The Conference's action was followed, several years later in 1971, by a Federal Judicial Center report, which noted that there was by this time "widespread agreement that too many opinions are being printed and published," but "not, however, any consensus about how to limit publication."[12] The following year, based on an examination of the various rules and procedures in use in the federal and state courts, the Center recommended in a report to the Judicial Conference that the Conference ask each circuit to review its publication practices and make modifications aimed at reducing the number of opinions published and restricting citation of unpub-

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[10] For the early history of the debate, see Reynolds & Richman, *supra* note 6, at 1168 n.12, 1169 n.13. That article includes an extensive review of the efforts to limit publication of opinions as well as a thorough discussion of the arguments for and against limited-publication policies.

[11] Reports of the Proceedings of the Judicial Conference of the United States 11 (1964).

[12] Federal Judicial Center, 1971 Annual Report 7-8.

lished decisions.[13] The Conference, in turn, voted to circulate the Center's report to the circuits and requested that the circuits develop and submit to the Conference plans for limiting the publication of opinions.[14]

At the same time, the Advisory Council on Appellate Justice, a group of lawyers, law professors, and judges brought together by the Center in 1971 (and subsequently supported by grants administered through the National Center for State Courts), began a study of appellate processes. In 1973 the council published its report Standards for Publication of Judicial Opinions,[15] which has been described as the "seminal document in the movement toward an official policy of limiting publication."[16] In the report the council proposed four specific standards by which to determine whether a decision should be published. It also recommended that unpublished opinions not be cited as precedent, acknowledging the difficult questions of access that arise from a policy of limited publication.

In recommending a no-citation rule, the council wrote, "It is unfair to allow counsel, or others having special knowledge of an unpublished opinion, to use it if favorable and withhold it if unfavorable."[17] At the same time, the council recognized that other types of unacknowledged use could be made of the unpublished material: "The non-citation rule does not preclude the use of reasoning and ideas taken from an unpublished opinion that may happen to be in the possession of counsel."[18] The council concluded, however,

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[13] Board of the Federal Judicial Center, Recommendation and Report to the April 1972 Session of the Judicial Conference of the United States on the Publication of Courts of Appeals Opinions (1972).

[14] Reports of the Proceedings of the Judicial Conference of the United States (October 1972).

[15] Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice (Federal Judicial Center 1973) (hereinafter cited as Standards for Publication).

[16] Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 Just. Sys. J. 406 (1981).

[17] Standards for Publication, *supra* note 15, at 19.

[18] *Id.* at 18-19.

> Nothing proposed in this report will overcome the discrepancy that exists today and will continue to exist between lawyers continually litigating specific types of matters before a court, and the lawyer who only occasionally appears on such matters. The first lawyer may have a better idea as to the way the judges think and the likelihood of success. We believe this proposal does not accentuate this problem and perhaps minimizes it by preventing the knowledgeable lawyer from citing the unpublished opinions to the court.[19]

The model rule offered by the council included a prohibition on citation of unpublished decisions.[20]

By early 1974 the circuits had submitted to the Judicial Conference their plans for restricting the publication of opinions. Although each court had to some extent followed the 1972 Federal Judicial Center recommendations, the plans indicated a substantial amount of experimentation across the circuits. The Conference, while registering its hope that the circuit plans would eventually become more uniform, decided to accept the experimentation, requiring only that the circuits submit yearly statistical reports on the operation of their plans. The Conference decided as well that the plans and yearly reports should be made widely available to members of the legal community, to "encourage them to make their contribution to the resolution of this difficult and persistent problem."[21]

The legal community was provided with a forum for its views the following year. The Commission on Revision of the Federal Court Appellate System, created by act of Congress to study several problems concerning the appellate courts, held hearings in ten

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[19] *Id.* at 19-20.

[20] Many circuits later adopted this model rule or a modification of it. The section of the rule on citation stated simply, "Opinions marked, Not Designated for Publication, shall not be cited as precedent by any court or in any brief or other material presented to any court." *Id.* at 23.

[21] Reports of the Proceedings of the Judicial Conference of the United States 12 (March 1974).

cities during 1974 and 1975.[22] In addition to the judges who testified, numerous attorneys and law professors expressed their views on limited publication and on citation of unpublished opinions. During these hearings it became clear that the rules circumscribing publication of opinions were not nearly as problematic and controversial as the rules prohibiting the citation of unpublished decisions. A majority of the legal community agreed that not every case warrants a published opinion, and it was clear to many that limiting the number of opinions published could bring substantial relief to both the judiciary and the bar. Proponents of this position noted that limited publication would reduce the pressure on judges to write polished prose and the burden of restating the facts, as well as reduce the costs attorneys incur in purchasing the reports and in researching an ever-increasing body of law.

With regard to citation of unpublished decisions, however, many noted the difficulties that arise either when citation is prohibited or when it is permitted. The discussion revolved, essentially, around issues of access.[23] It was clear from the testimony that whether or not citation were restricted, claims of unequal access and unfair advantage could be made. If citation of unpublished material were allowed, those attorneys with abundant resources to search for the material or those who appeared routinely before the appellate court (e.g., the U.S. attorney) would have an advantage

[22] The commission was created by Pub. L. No. 92-489, 86 Stat. 807 (1972), as amended by Pub. L. No. 93-420, 88 Stat. 1153 (1974). The text of the commission's hearings is in *Hearings Before the Commission on Revision of the Federal Court Appellate System, Second Phase*, vol. 1 (1974), vol. 2 (1975) (hereinafter cited as *Hearings*). (The commission is frequently referred to as the Hruska Commission, a reference to its chairman, Senator Roman L. Hruska.)

[23] Other issues were, of course, raised. Many who testified recognized, for example, that if citation were allowed, the time and money savings realized from nonpublication would be defeated: Judges would spend more time polishing their prose, an alternative press would emerge to market the "unpublished" decisions, and attorneys would feel compelled to research the material. See, e.g., the testimony of Charles R. Haworth, associate professor of law, George Washington University, in *Hearings*, vol. 2, *supra* note 22, at 931.

over other members of the bar.[24] However, if citation were not allowed, there would be a risk of the development of a "hidden body of law," known and possibly relied upon by judges and some litigators but unknown to the majority of the bar.[25] Those who argued this point favored a policy permitting citation because it would compel judges and attorneys who used unpublished material to make this material known, through citation, to those who would otherwise be unaware of the decisions.

The debate over access was sharply delineated during the testimony of Judge Robert Sprecher of the Seventh Circuit, in what has become a widely cited exchange. Out of concern about the issue of consistency in decisions, Judge Sprecher suggested that judges would soon have to develop an intracourt index of unpublished decisions "even though they [could] not be cited by the court or to the court."[26] An attorney then asked him, "Do you think that the possibility that there should be some conflict within the circuit . . . is sufficient to have you keep a file of those things and look at them when I do not have a chance to look at them?" To which Judge Sprecher replied, "I think we are zeroing in, now, on the heart of it."[27] The issue, however, was left unresolved.

The commission's final report reflected the difficulties inherent in a no-citation policy. In summarizing the testimony on nonpublication practices, it focused on the "fundamental problems" in no-citation policies, concluding,

> Whether or not unpublished opinions may be cited by litigants, judges may feel the obligation to maintain consistency between cases presenting essentially the same legal issues. For the judges to attempt consistency by examining their own prior judgments, while denying counsel the right to cite such cases[,] compounds

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[24] See, e.g., the testimony of Robert Stern, former acting solicitor general, *id.* at 1072.

[25] See, e.g., the testimony of Willard J. Lassers, on behalf of the Illinois chapter of the American Civil Liberties Union, in *Hearings*, vol. 1, *supra* note 22, at 556-57.

[26] *Id.* at 536.

[27] *Id.* at 537.

> the difficulties, whether counsel's purpose is to distinguish the cases or to urge that they be followed.[28]

Finally, the commission declined to make a recommendation "that might foreclose that further study which the problem deserves" and—describing the Judicial Conference as "the appropriate forum"—passed the problem on.[29]

The subsequent conclusions of the Judicial Conference, however, differed little from the commission's. While the commission was holding its hearings around the country the circuits continued their experimentation with the publication plans they had adopted. Between 1973 and 1977 they submitted yearly statistical reports to the Judicial Conference about the operation of their plans, and in 1978 the Conference issued its final statement on these plans. The Conference subcommittee in charge of the publication issue determined from the reports that although the number of cases filed had climbed and the number of judgeships had not increased between 1973 and 1977, the number of terminations had gone up. At the same time, the number of published opinions had declined, which led the subcommittee to conclude that limited publication had resulted in increased dispositions.[30] Despite this seemingly positive result the subcommittee, like the commission, was unable to make a definitive statement about publication and citation. It concluded,

> Initially your committee hoped that it would be possible to distill five years of experience under eleven different circuit opinion publication plans into one model that might be adaptable throughout the Federal Judiciary. That desire has not been attained and perhaps at present is unattainable. . . .
>
> At this time we are unable to say that one opinion publication plan is preferable to another, nor is there a sufficient consensus on either legal or policy matters, to enable us to recommend a

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[28] Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 51 (1975).

[29] *Id.* at 52.

[30] Opinion Publication Plans in the United States Courts of Appeals 10 (1978) (report of the Subcommittee on Federal Jurisdiction of the Committee on Court Administration of the Judicial Conference of the United States).

> model rule. We believe that continued experimentation under a variety of plans is desirable.[31]

The Conference has not spoken on these issues since the subcommittee issued its final report. The circuits continue their experimentation, and the debate persists as well.

The academic legal community, in particular, has kept the issues alive in a number of articles in law reviews and other journals. For the most part, this community has been skeptical of, if not hostile toward, restrictions on citation. In a thorough discussion, W. L. Reynolds and W. M. Richman examine the arguments for a no-citation rule and conclude that it is more unfair to restrict citation than to permit it. Their concern centers on the unacknowledged use that may be made of unpublished material, particularly by litigants who appear frequently in the appeals court and by district and appellate judges, who in many circuits routinely receive copies of unpublished decisions.[32]

At least one segment of the practicing legal community has also spoken recently on the issue of restricted citation. The Association of the Bar of the City of New York writes,

> [W]e believe that a [no-citation] procedure under which the court can place over two-thirds of its decisions outside of the normal reach of the bar, commentators, and the principles of stare decisis, is an unacceptable means of saving judicial time. . . .
> [W]e do not believe that the Second Circuit should have a rule that precludes a lawyer from calling to its attention, or to the attention of any other court, what it actually did and said in one of its prior cases.[33]

The debate has, in a way, ended where it began. Out of concern for the delay and attendant injustice caused by rising caseloads, the courts adopted limited-publication policies to increase judicial efficiency. Then, because the unpublished decisions were not uniformly available to all litigants, the courts established limitations on citation of these decisions. Now, under criticism for

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[31] *Id.* at 12-13.

[32] Reynolds & Richman, *supra* note 6, at 1195-99.

[33] Committee on Federal Courts, *Rule 0.23 of the United States Court of Appeals for the Second Circuit*, 38 Rec. A.B. City N.Y. 259 (1983).

promoting yet another kind of unfairness through these practices, the courts are being called on to reevaluate their policies. It is in the context of this continuing debate that the current distribution, citation, and publication rules and practices of the appellate courts are examined.

## II. Distribution Rules and Practices

In the following discussion of the circuits' distribution of unpublished decisions, several questions are addressed: (1) Has each circuit made a formal statement, in its rules, its plan for publication of opinions, or its internal operating procedures, about its distribution practices? (2) Who routinely receives the unpublished materials? (3) Are the unpublished decisions accessible to those who do not receive them from the court as a matter of course? Also examined are the possible effects of these rules and practices on the issues raised in the debate over publication, in particular the different access of the bench and the bar.

. . . .

The first and most obvious conclusion that can be drawn . . . is that the written policies in most circuits either do not answer or answer in only a very limited way the question about distribution, and therefore one cannot easily determine who routinely receives unpublished material or how widely available it is. Only two circuits have detailed distribution policies; seven provide a limited statement, and four have no written policy.

Of the two circuits (the Fourth and Seventh) with detailed policies, the Seventh Circuit's statement is the most comprehensive, noting the routine recipients of both published and unpublished material. Distribution is, according to the rule, quite limited: Only the appellate judges of the circuit and the district judge and parties in the case receive an unpublished decision; other district judges and litigants do not. The Fourth Circuit's rule does not specify who receives the published material, but does state unequivocally that distribution of unpublished decisions is limited to the district judge of the case and the parties. The district and appellate judges

in the circuit do not, according to the court's written policies, receive the unpublished decisions.

Seven circuits (the Third, Fifth, Ninth, Tenth, Eleventh, D.C., and Federal) make only limited statements about distribution.[34] Regarding unpublished decisions, six of these circuits indicate only that a list of unpublished decisions is sent periodically to West Publishing Company for inclusion in the *Federal Reporter*.[35] The Tenth Circuit's local rule, by comparison, states that an index of decisions unpublished between August 1972 and December 1983 is available to attorneys. The rule does not indicate, however, whether those decisions rendered and not published since December 1983 are distributed to publishers or other recipients. From the limited statements made by these seven circuits, then, one cannot determine whether publishers alone receive the unpublished decisions or, if not, who the other recipients might be.

The four remaining circuits (the First, Second, Sixth, and Eighth) make no statement at all on distribution. Their rules, publication plans, and internal operating procedures give no indication of who receives copies of either published or unpublished decisions or where these might be available to interested persons.

It is clear from this review of the circuits' written policies that few have systematically and comprehensively addressed the question of distribution. The concerns raised by some over the issue of fair access thus seem to be warranted; in most circuits an attorney cannot determine from the rules who routinely receives or has access to the circuits' unpublished decisions and therefore cannot easily determine who might be using them.

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[34] These statements are described as limited for two reasons. First, it is unlikely that the circuits send published decisions to as few recipients as are mentioned in the rules; common sense tells one, for example, that these decisions are routinely sent to the parties and publishers. Second, the interviews with court staff disclosed that both published and unpublished materials are much more widely disseminated than the rules suggest, as discussed below.

[35] While it may seem anomalous to call anything sent to West an "unpublished" decision, the adjective is commonly and appropriately used. Only the style and outcome (e.g., "affirmed") are included in the list; the text of the decision, where there is one, is not published.

In some circuits, moreover, the findings disclose that actual practices deviate substantially from written policies.[36] Policy and practice closely mirror each other only in the Seventh Circuit, while in several circuits there are notable discrepancies between the rules and the actual distribution practices. Although unstated in their rules, five circuits (the Fourth, Eighth, Ninth, D.C., and Federal) routinely send unpublished decisions to all appellate judges in the circuit. The Seventh Circuit follows this practice as well, but states the practice in its rule. In the Eleventh Circuit the practice is to send the unpublished dispositions to all the appellate judges, but only about half the judges actually receive them; the remaining judges have indicated that they do not want to receive these decisions.

Several circuits distribute the unpublished dispositions to individuals outside the appellate court. The Ninth Circuit sends these decisions to chief judges of district courts in the circuit if they request copies, while the Eighth Circuit routinely sends them to all the district judges in the circuit. The Fourth Circuit, whose distribution is the most extensive, sends the unpublished decisions to all district judges, bankruptcy judges, and magistrates in the circuit, as well as to the U.S. attorney, public defender, and district and appellate clerks.

Although the wide distribution of unpublished material in the Fourth Circuit might be cause for alarm among members of the private bar in that circuit, the court also allows subscription to the unpublished decisions, thus making the material available to the bar as well.[37] The Ninth Circuit, which distributes unpublished decisions to all the appellate judges and to the chief district judges at

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[36] The interviews revealed that all the circuits automatically send copies of the unpublished decisions to the parties and to the district judge or agency that decided the case. Although not necessarily stated in the circuits' rules, these practices are to be expected and are not discussed further here. The practice in most circuits of sending the unpublished decisions to the district or agency case file, either via the clerk or as part of the mandate, also is not discussed.

[37] The availability of a subscription service may to some extent alleviate concern about access; it does not, however, address the discrepancy between a rule that clearly states that distribution of unpublished materials is narrowly circumscribed and a practice that in fact makes these decisions widely available.

their request, also accepts subscriptions from the bar. Only one other circuit, the Sixth, provides a subscription service. The circumstances in this circuit are, however, quite different from those in the Fourth Circuit. In the Sixth Circuit neither the appellate nor the district judges routinely receive the unpublished decisions, and therefore the question of equitable access for litigants may not be as pressing. In addition, the texts of the unpublished decisions in this circuit are available on LEXIS, making the material readily accessible to both judges and attorneys. No other circuit routinely sends unpublished decisions to the bar in general, either on its own initiative or by subscription.[38]

This review of the courts' unwritten practices shows that six circuits (the Fourth, Seventh, Eighth, Ninth, D.C., and Federal) send unpublished decisions to all the appellate judges within the circuit and one (the Eleventh) sends them to some of the appellate judges. Extensive distribution of unpublished material to judges is not the norm, however. The other six circuits do not send these decisions to appellate judges, and ten do not send them to district judges (the Fourth and Eighth send them to all district judges, and the Ninth makes them available to the chief district judges). Furthermore, in the Fourth Circuit, where distribution to judicial officers and institutional litigants (e.g., the U.S. attorney and public defender) is the most extensive, a subscription service is provided for attorneys. Thus, in most of the district courts and in half the appellate courts, judges and attorneys appear to have equally limited access to unpublished decisions.[39]

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[38] From August 1972 through December 1983 the Tenth Circuit compiled an index of its unpublished decisions. This index is available for purchase and at designated libraries throughout the circuit. When the circuit suspended use of decisions marked "Not for Routine Publication," it also stopped preparing the index. The Tenth Circuit's former practice, which not only provided easy access but also allowed citation, has been hailed by critics of limited-publication plans. *See, e.g.*, Reynolds & Richman, *supra* note 6, at 1205.

[39] This conclusion does not, of course, speak to the concern that routine players in the court who frequently litigate the same types of cases—for example, the U.S. attorney—may know of and use unpublished arguments, while opposing counsel may not know that they exist.

In nine of the ten circuits that do not currently provide a subscription service, litigants who are interested in unpublished decisions have only one (official) way to find out about these dispositions: the list published in the *Federal Reporter*.[40] However, only three of these circuits (the Third, Fifth, and Eighth) include all unpublished decisions in the list that is sent to West. The remaining six (the First, Second, Seventh, Eleventh, D.C., and Federal) submit a list containing only those cases decided on the merits, leaving out those disposed of for procedural or jurisdictional defects. Thus, in these six circuits, a portion of the courts' decisions remain unavailable and unknown, but the scope of the list is probably less important in the three circuits (the Fourth, Sixth, and Ninth) that otherwise make unpublished dispositions available—by routine distribution or by subscription—to the bench and the bar.

Although a majority of the circuits limit access to unpublished decisions, the principal concern from the point of view of the bar is not the existence of limits per se, but whether these limits are imposed equally on all participants in a case, including both parties and judges. From this perspective, the few circuits that make the material available to everyone and the majority that make it available only to the parties and judges in the case have devised the most equitable practices. Those circuits, however, that send unpublished dispositions to all appellate judges or district judges, without making this material available to litigants, are vulnerable to criticism from the bar.

Finally, all but one of the circuits do not have a clear and explicit statement of their distribution policy, leaving judges and litigants guessing about who has seen the unpublished decisions.[41]

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[40] The Tenth Circuit does not provide a list to West for the *Federal Reporter*. The court publishes all decisions except judgment orders, which apparently are not made available through any mechanism to anyone but the district judge and parties of the case.

[41] The concern of those who do not have access to unpublished dispositions may be tempered somewhat if the decisions left unpublished are unimportant. This question is taken up in the fourth section.

## III. Citation Rules and Practices

This section addresses several questions about the circuits' citation policies: (1) Have the circuits adopted citation rules? (2) Under what circumstances is citation prohibited or permitted? (3) Are attorneys required to provide opposing counsel with copies of any unpublished decisions they cite? (4) Why have the circuits adopted their particular citation policies? Also discussed is the correspondence between the circuits' distribution and citation practices, which appear to contradict one another in a number of circuits. . . .

Two circuits, the Third and Eleventh, have not adopted a written statement on citation. Most of the eleven circuits that have adopted a policy have restricted citation to narrow circumstances.

Three circuits permit unrestricted citation. The Third and Eleventh Circuits, with neither written statements nor unwritten policies, leave the decision to cite unpublished material to the judges and attorneys; the Tenth Circuit, in contrast, has a rule specifically stating that citation is allowed. The rules of two additional circuits, the Fourth and Sixth, are somewhat permissive: They state that citation is "disfavored" but that an unpublished decision may be cited when no better precedent is available. The rules of the remaining eight circuits (the First, Second, Fifth, Seventh, Eighth, Ninth, D.C., and Federal) are much more restrictive, stating that citation is not permitted except in related cases, to support a claim of res judicata or collateral estoppel, or to establish the law of the case.[42]

Seven circuits (the Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C.) provide a mechanism by which attorneys who cite an unpublished decision can at the same time ensure that opposing counsel have access to it. These circuits have adopted, by either rule or convention, the practice of attaching the text of the unpublished decision to the brief in which it is cited. All but one of the circuits that are least restrictive of citation have adopted this

[42] Despite its restrictive rule, the Fifth Circuit in fact allows citation "if the attorneys can find the decision." The issue of availability is an important component of the citation question, as discussed below.

practice, thus establishing a mechanism for making the material that is cited available to all the parties in a case.[43]

Two circuits, the Fourth and the Eighth, have set up additional checks on the use of unpublished dispositions: In the former the judges closely question attorneys about their reasons for using an unpublished disposition, and in the latter attorneys must file a motion to justify citation of an unpublished decision.

Court staff report that the circuits' restrictions have successfully prevented citation of unpublished decisions. In the circuits that prohibit citation, judges and attorneys reportedly never cite the decisions. To what extent they use these decisions without citing them cannot be determined.

The courts' reasons for adopting no-citation rules can to some degree be inferred from the rules themselves. For example, the requirement in some circuits that counsel attach a copy of any unpublished decision they cite to the brief suggests these courts are concerned about fair access to the material. Other requirements, such as a motion to justify citation of an unpublished decision, imply that the courts consider such material nonprecedential. In fact, both arguments can be found in the rules of the five circuits that explicitly give a rationale for their policy. In two of these circuits, the First and Eighth, citation is restricted because the unpublished material is not uniformly available, whereas in two other circuits, the Ninth and D.C., citation is limited because the unpublished dispositions are not considered precedential. The remaining circuit, the Second, restricts citation because unpublished decisions are neither uniformly available nor precedential.[44] No circuit has, at least in its written policy, responded to the argument that no-citation rules, because they allow unacknowledged use of unpublished

[43] The Third Circuit has no ready mechanism for such a requirement because it has no rule on citation. The Eleventh Circuit, however, which also has no rule, has adopted the practice by convention.

[44] The Second Circuit rule states that a decision may be made by unpublished summary order when the judges agree that the decision serves "no jurisprudential purpose." This phrase can be interpreted to mean that the decision has no precedential value. Decisions rendered under this standard may not be cited.

decisions, are equally as unfair as policies that allow unlimited citation.[45]

An interesting question that can be asked about the citation rules is whether there is a correlation between these rules and the courts' distribution practices. Do the courts that allow citation also make sure the unpublished decisions can easily be found? Conversely, do the courts that restrict citation also restrict the circulation of the unpublished material?[46] Table 1 shows the correspondence between the circuits' distribution and citation policies.

The correspondence is clearly weak. In only four circuits do the policies reinforce each other. In the First and Second Circuits both the availability of unpublished material and the right to cite it are restricted, whereas in the Fourth and Sixth Circuits citation is permitted and unpublished decisions are widely available to both bench and bar. The citation and distribution policies in several of the remaining circuits seem to be contradictory. The Third, Fifth, and Tenth Circuits restrict the availability of unpublished decisions yet allow citation; although the judges have no more access to the unpublished decisions than does the bar, this discrepancy between distribution and citation practices is likely to increase the anxiety felt by attorneys without the resources to obtain the unpublished materials. In the Third Circuit this problem is compounded by the

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[45] One could argue that the circuits that freely allow citation have accepted the argument that restricted citation is unfair, but no circuit has made an affirmative statement to this effect. Note that only the written rationale for restricting citation—and not the unwritten reasons behind the rule—is reported here. A complete statement of reasons would require interviews with judges, a task beyond the scope of this paper.

[46] These seem to be the two most logical alternatives. The other two alternatives lead to some of the problems discussed in the first section. To make unpublished decisions easily accessible while prohibiting citation to them would invite the unacknowledged use feared by the bar; on the other hand, restricting access while allowing citation would provoke concerns about the advantage thus given to judges or to litigants with greater resources. The two most logical alternatives do not solve all the problems, however. Easy access to unpublished material and unrestricted citation may obviate the savings of time and resources promised by limited publication, whereas restrictions on both raise the question of unacknowledged use of unpublished material.

absence of a requirement that attorneys provide opposing counsel with a copy of any unpublished decision they cite. In the Seventh, Eighth, Ninth, D.C., and Federal Circuits, on the other hand, citation is restricted, but the unpublished dispositions are circulated to appellate judges. This policy may raise concerns among attorneys that the court will rely on arguments or trends gleaned from unpublished decisions that remain unavailable and unusable to litigants.

**TABLE 1**
**Circuit Policies on Distribution and Citation of Unpublished Decisions**

| Circuit | Restrictive Distribution[1] | Restrictive Citation[2] |
|---|---|---|
| First | X | X |
| Second | X | X |
| Third | X | |
| Fourth | | |
| Fifth | X | |
| Sixth | | |
| Seventh | | X |
| Eighth | | X |
| Ninth | | X |
| Tenth | X | |
| Eleventh[3] | | |
| D.C. | | X |
| Federal | | X |

1. A circuit's distribution policy is defined as restrictive if circulation is limited to only the parties, the district judge and panel that decided the case, and the *Federal Reporter*. Circuits that distribute unpublished decisions to judges or subscribers throughout the circuit are not considered to have a restrictive circulation policy, even if only appellate judges receive the material. This narrow definition was chosen because of the concern some have voiced that appellate judges may build up an index of unpublished decisions for their own use and thus develop a body of law unknown to district judges and attorneys.

2. A circuit's citation policy is defined as restrictive if citation is permitted only in related cases or to support a claim of res judicata or collateral estoppel, or the law of the case. Circuits that allow citation if the unpublished case is relevant or if no better precedent is available are not considered to have a restrictive citation policy.

3. In the Eleventh Circuit half the appellate judges receive the unpublished decisions and half have chosen not to receive them, making the circuit difficult to classify in this schema; therefore, the circuit has been omitted from the discussion.

Before concluding that the circuits should examine and possibly modify their rules, however, one must address another set of questions. Are the unpublished decisions important to the wider legal community? Is the attorney or judge who does not know

about these decisions—when others do—necessarily at a disadvantage? Reynolds and Richman argue passionately that the naive attorney is substantially handicapped by ignorance of unpublished material.[47] Others, however, argue that unpublished decisions are, or ought to be, so unimportant that knowledge of them would be of little benefit to anyone.[48] How can the practicing attorney be sure that unpublished decisions are in fact insignificant and need not be researched? Why should the bar "trust the judges"?[49]

## IV. Publication Rules and Practices

Throughout the debate over limited publication critics have raised questions about the types of decisions that are not published and about judges' ability to decide whether a case is nonprecedential.[50] It could be argued that if a court's publication policy were explicit, and if it prescribed publication in certain critical instances, judges' discretion would be narrowed and the bar might have more reason to believe that decisions on publication were being made with care and with uniformity across the court. Although the limited scope of this report precludes testing of this assertion, it is possible to examine the circuits' publication rules and practices to determine how many and what kinds of safeguards the courts have built into their decision-making processes.

A number of questions are addressed in this regard: (1) Is there a presumption against or in favor of publication? (2) Has the court adopted specific criteria by which to evaluate whether a decision should be published? (3) How is the publication decision made? (4) May attorneys request that an unpublished decision be pub-

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[47] *See* Reynolds & Richman, *supra* note 6, at 1199.

[48] *See, e.g.*, Dunn, *Unreported Decisions in the United States Courts of Appeals*, 63 Cornell L. Rev. 128, 146 n.115 (1977).

[49] See the testimony of Charles Haworth in *Hearings*, vol. 2, *supra* note 22, at 939. Professor Haworth was asked, "How do you meet the argument that . . . if you permit unpublished opinions, . . . a circuit is really building up a body of law that is not known by the trial lawyers." He answered, "I think we have to trust the judges."

[50] *See, e.g.*, Reynolds & Richman, *supra* note 4, at 606; Shuchman & Gelfand, *supra* note 4.

lished? (5) What are the publication criteria used by the courts? As in the previous two sections, both the courts' written rules and their unwritten practices are discussed.[51] The discussion is based on tables 9 through 11 . . . [Tables 10 and 11 have been omitted. Ed.].

All the appellate courts have adopted written statements on publication of dispositions. The content of these statements varies across the circuits, but several generalizations can be made. First, most circuits indicate whether the court favors or disfavors publication. Sometimes the court's position is implied rather than explicitly stated, but a presumption in one direction or the other can usually be discerned in the statement. A general presumption against publication is found in only the First and Fourth Circuits, whereas a presumption for publication is found in only the Fifth Circuit. The most common position, taken by seven circuits (the Second, Third, Sixth, Seventh, Ninth, Tenth, and Eleventh), is that certain types of dispositions (typically, signed opinions) will usually be published while other types (typically, unsigned orders) will not.[52] The rules of the remaining three circuits (the Eighth, D.C., and Federal) suggest neither a presumption for nor a presumption against publication.

The second generalization pertains to the specificity of the courts' publication criteria, which although varying substantially in

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[51] The clerks' responses to the questions regarding unwritten criteria for publication are based on the practices they have heard discussed or observed in use in their courts. It should be recognized that they may not know the unwritten criteria, if any, the judges use when deciding whether to publish an opinion. Thus, there may be discrepancies between the information presented in this report and the courts' actual practices; these discrepancies should not be attributed to the clerks.

[52] In these circuits the panel's decision about what kind of disposition to use determines whether that disposition will be published. This can be looked at another way, of course: If the judges want to issue an unpublished decision, they confine themselves to a particular type of disposition. This policy makes some categories of decisions generally available to attorneys and other categories unavailable to them. To the extent that the categories remain stable and are defined in a way the bar accepts, this type of rule may ease some of the concerns attorneys express.

wording, generally fall into three groups. Those courts in the first group (the First, Third, and Federal Circuits) make only a general statement, to the effect that the court should weigh the precedential value of a disposition before publishing it. Those in the second group (the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits) list specific criteria a decision should meet before being published.[53] The rules of the two remaining circuits (the Second and Eleventh) state that certain kinds of dispositions are accorded a particular publication status. The Second Circuit's policy, which is found in its rule on dispositions by summary order, states that summary orders are not formal opinions and therefore are unreported. The Eleventh Circuit plan for publication of opinions states that all opinions will be published.[54]

The courts that provide explicit criteria for publication have set up substantially greater controls on judicial discretion than have the circuits that make general statements about publishing only where it is warranted. The strongest safeguard a court could erect, aside from publishing all dispositions, would be to couple a general presumption for publication with a set of specific criteria by which to decide when a case should not be published. Only the Fifth Circuit has such a rule. Another rigorous test would be to favor publica-

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[53]In contrast to a rule that makes a general statement that the court should weigh the precedential value of a decision before publishing it, a rule that lists explicit criteria for publication provides detailed guidelines by which to make the decision on publication. Among the criteria stated in such rules are the following: (1) The decision establishes or explains a rule of law in the circuit; (2) the decision criticizes existing law; (3) the decision reverses a lower court decision; (4) the decision resolves or creates conflict in the law.

In addition to the specific criteria stated in its rule, the Fourth Circuit has adopted the practice of not publishing decisions in cases disposed of without oral argument unless all the active judges on the court agree that the decision should be published. Note that the criteria mentioned in the discussion that follows apply only to cases that have been orally argued to the court.

[54] Although these two circuits specify the types of dispositions that should be published, they are not classified as courts that provide explicit criteria for publication because they do not provide guidelines for deciding when a decision should be issued as an opinion and when it should be issued as a memorandum or order.

tion of dispositions defined as opinions and then to provide explicit criteria for determining when an opinion should be written. The Seventh, Ninth, and D.C. Circuits have adopted this type of rule.

In addition to the specificity of the criteria for publication, the number of judges required to issue a decision on nonpublication may be of importance to attorneys. From the attorneys' perspective, a unanimous decision by the panel deciding the case might give greater justification for nonpublication than would a majority vote. The rules in most circuits specify one or the other requirement. Three circuits (the Second, Fifth, and Federal) require that a panel be unanimous in its decision not to publish a disposition. In six circuits (the First, Third, Fourth, Sixth, Seventh, and Eighth) a majority of the judges on the panel may designate a case for nonpublication; however, in three of these circuits (the Fourth, Seventh, and Eighth), a single judge may make either his or her decision or the panel's decision available for publication, in effect overruling the panel's decision. The latter practice is permitted in the Tenth and Federal Circuits as well. The rules in the Ninth and D.C. Circuits state only that the judges must agree, specifying neither a majority nor a unanimous decision. The Eleventh Circuit does not describe the way in which the decision on publication is made.

Another type of safeguard courts can adopt is a provision that allows attorneys to request that an unpublished decision be changed to a published decision. Only five circuits (the Fourth, Fifth, Seventh, Ninth, and Federal) make this provision in their local rules; the remaining circuits, however, have made it known that they permit this practice even though it is not mentioned in their rules.

The existence of explicit criteria for publication does not by itself ensure that the unpublished dispositions will be unimportant. The nature of these criteria must also be considered.[55] . . .

The first of these seven criteria provides that the appellate decision be published if the decision below has been published. Seven

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[55] *See* Reynolds & Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 Duke L.J. 807; Reynolds & Richman, *supra* note 4, at 627. . . .

circuits (the Second, Third, Fourth, Fifth, Eleventh, D.C., and Federal) make no statement on this matter in their written policies; however, according to the clerks in the Eleventh and D.C. Circuits, the judges in practice publish a decision when the decision below was published. The remaining six circuits (the First, Sixth, Seventh, Eighth, Ninth, and Tenth) have adopted a written policy regarding publication if the lower court decision was published. The presumption in these courts seems to be in favor of publication in this instance, but several have qualified their rules; for example, the Seventh Circuit requires publication of the appellate decision when it reverses the published decision below, and the Eighth Circuit makes appellate publication contingent on rejection of the rationale of the lower court's published decision.

A second consideration is whether the decision reverses the decision below. None of the circuits unequivocally requires publication when the decision is a reversal of a lower court or agency decision. Although five circuits (the First, Fifth, Sixth, Seventh, and Eighth) state in their rules that the appellate decision will be published when it reverses the lower court's decision, each has made the rule conditional, requiring publication only if the lower court's decision has also been published (the First, Seventh, and Eighth), if the panel decides it should be (the Fifth), or if additional criteria are met (the Sixth). The remaining circuits (the Second, Third, Fourth, Ninth, Tenth, Eleventh, D.C., and Federal) make no special provision in their rules for publication of decisions that are reversals. Interviews with the clerks revealed, however, that in the Third, Fourth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits the judges do not necessarily designate these decisions for publication; the practice in the Second Circuit, in contrast, is to publish decisions that reverse the lower court.

A number of commentators have suggested that publication should be automatic when the panel decision on the merits is not unanimous. In fact, only five circuits (the Second, Fifth, Sixth, Ninth, and D.C.) require by rule that decisions accompanied by a concurrence or dissent be published. Five additional circuits (the Third, Fourth, Seventh, Eighth, and Eleventh) in practice publish

such decisions, while the remaining courts (the First, Tenth, and Federal) do not necessarily publish split decisions.

Likewise, few circuits (the Fifth, Sixth, and Seventh) require a decision to be published in a case that has been remanded from the Supreme Court. The clerks in four other circuits (the Eighth, Tenth, Eleventh, and Federal) reported that this criterion is followed in practice in their courts, whereas the clerks in the six remaining circuits (the First, Second, Third, Fourth, Ninth, and D.C.) indicated that the judges in these courts do not necessarily publish a decision on a remand from the Supreme Court. Several of the clerks qualified their answer—whether it was yes or no—stating that the publication decision would generally depend on the nature of the remand; thus, if the Supreme Court, for example, returned a case to the appeals court for simple ministerial action as directed by the Court, the appellate decision would almost certainly be left unpublished.

An issue of great concern throughout the debate on publication has been the extent to which unpublished decisions create or hide conflict in intracircuit and intercircuit law. It was Judge Robert Sprecher's concern that such conflict would develop within a court that led him to suggest that appellate judges keep an index of their decisions, a suggestion that provoked dismay among attorneys about unequal access to an important body of law.[56] Half the circuits (the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C.) speak to this issue in their rules, requiring publication when a decision may resolve or create conflict in the law. The remaining six circuits have not adopted a written policy with regard to this issue, but all are reported to have adopted such a policy in practice.

Many proponents of limited publication have argued that cases involving application of established law should not be published. These cases, they assert, are nonprecedential and contribute little to the development of the law. A number of critics, however, argue that if a case is an application of established law to new facts, precedent is being set and the decision should be published. Only four circuits (the Fifth, Sixth, Eighth, and D.C.) have specified in

[56] *Hearings*, vol. 1, *supra* note 22, at 537.

their rules that a decision should be published in this instance. Three additional circuits (the Second, Tenth, and Eleventh) reportedly have adopted the practice of publishing decisions that apply established law to new facts, whereas four others (the Fourth, Seventh, Ninth, and Federal) do not necessarily publish these decisions. The practices of the First and Third Circuits are not known.

A final possibility is a provision allowing publication of only that part of a decision that meets the criteria for publication. This practice has the virtue of making the important part of the decision public while retaining the savings that can be realized from limited publication. Three circuits (the First, Tenth, and D.C.) have adopted written rules allowing this form of publication, and two circuits (the Fifth and Ninth) have adopted it in practice.

The summary of the circuits' publication rules presented in table 9 (in the Appendix) gives a clear picture of their use of these various criteria for publication. Five of the seven recommended criteria have been adopted either by rule or in practice in a majority of the courts. Eight circuits publish a decision when the decision below was published; ten publish a decision when it is accompanied by a concurrence or dissent; seven publish a decision when the case has been remanded from the Supreme Court; all publish a decision that resolves or creates conflict in the law; and seven publish a decision that applies established law to new facts. When a decision reverses the lower court's decision, however, more than half the circuits do not necessarily publish it. Finally, fewer than half the circuits have adopted the practice of publishing only the portion of a decision that is considered precedential.

For many courts the written rules do not reflect the actual standards used by the court. From the rules, for example, one cannot determine the criteria used by the Second, Third, and Eleventh Circuits, yet in practice these courts have adopted many of the safeguards urged by critics of limited publication. The Fifth and Sixth Circuits, on the other hand, have incorporated into their rules and follow in practice most of the seven recommended criteria. Table 9 indicates that even among the courts that have adopted a publication rule listing explicit criteria, many of the suggested

safeguards may be missing from the rule. It is also clear from the table, however, that many of these safeguards are observed in practice.

## V. Rates of Nonpublication

This section presents data on the number, percentage, and types of dispositions that are not published. The purpose in presenting these data, however, is not to evaluate the impact of the circuits' publication rules and practices on publication rates; not only is that task outside the scope of this study, but a direct relationship between policy and publication rates would in any case be difficult to demonstrate.[57] Given the complexity of judicial decision making, as well as conditions unique to each circuit, the tables that follow are provided only to show the trends in the publication rates over the past several years and to support a brief discussion of the implications of the rates of nonpublication for the question of access.

Table 2 shows the overall percentage of unpublished dispositions for the statistical years (SY) 1981 through 1984; table 3 shows the number of cases in which the decision was to reverse, vacate, or deny the lower court or agency decision and the percentage of such decisions that were not published; and table 4 shows the number of cases in which either a concurring or a dissenting opinion was written and the percentage of these decisions that were not published.[58] The last two tables are included here because crit-

[57] The decision whether to publish a disposition rests on many factors, and the judges making the decision must weigh a number of potential outcomes—both positive and negative—for themselves, the attorneys and litigants in the case, and the appellate process in general. Publication rates may also be affected by local conditions and habits, such as a high proportion of cases decided without argument or a high number of prisoner petition filings.

[58] The data presented in the tables were extracted from data provided by the Administrative Office of the United States Courts (AO). A statistical year runs from July 1 through June 30. Only cases disposed of by oral argument or after submission without hearing are included in the tables. Original proceedings are not included, but the lead cases of consolidated or joined cases are.

ics of limited publication have suggested that, at the very least, the two types of decisions presented in tables 3 and 4—which indicate that the judges disagree about the outcome of a case—ought to be published.

**TABLE 2**
**Unpublished Dispositions as a Percentage of All Cases Disposed of by Oral Argument or After Submission Without Hearing**

| Circuit | 1981 | 1982 | 1983 | 1984 |
|---|---|---|---|---|
| First | 41.5 | 44.0 | 39.0 | 39.8 |
| Second | 65.2 | 64.8 | 62.7 | 58.7 |
| Third | 68.8 | 72.0 | 71.6 | 77.1 |
| Fourth | 61.7 | 55.9 | 54.7 | 62.0 |
| Fifth | 46.0 | 45.6 | 47.6 | 52.6 |
| Sixth | 71.8 | 68.8 | 70.5 | 67.9 |
| Seventh | 62.7 | 52.7 | 43.3 | 49.3 |
| Eighth | 16.6 | 25.6 | 22.2 | 17.0 |
| Ninth | 59.5 | 63.5 | 63.3 | 63.6 |
| Tenth | 46.6 | 58.3 | 56.3 | 54.0 |
| Eleventh | — | 45.6 | 54.8 | 59.1 |
| D.C. | 45.7 | 52.6 | 44.5 | 33.0 |
| Average | 48.8 | 54.1 | 52.5 | 52.8 |

NOTE: See note 58 in the text for a definition of the cases included in the table.

Table 2 shows that the nonpublication rate varies substantially across the circuits; in SY 1984, for example, the rate ranged from 17 percent in the Eighth Circuit to 77.1 percent in the Third Circuit. Only the First, Fifth, Eighth, and D.C. Circuits have generally published more than 50 percent of their decisions over the past four years. Six circuits (the Second, Third, Fourth, Sixth, Ninth, and Eleventh) have designated for nonpublication nearly 60 percent or more of their decisions. Trends from year to year within each cir-

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The Eleventh Circuit first began to report separate data on October 1, 1981 (the middle of SY 1982). The Statistical Analysis and Reports Division (SARD) of the AO reports that because of the way the Fifth and Eleventh Circuits coded their data in SY 1981-82, SARD was able to allot cases to the correct circuit and that the SY 1982 data it provided are therefore an accurate reflection of the Eleventh Circuit's caseload for the entire statistical year. Data were not available for the Federal Circuit.

cuit are not readily apparent. Only in the Second Circuit has there been a clear decrease in the percentage of dispositions that are not published, whereas in the Fourth and Seventh Circuits the trend appears to have been downward, but jumped up significantly in SY 1984. By contrast, in the Third, Fifth, and Eleventh Circuits the trend has been toward an increase in the percentage of unpublished dispositions. The Eighth, Tenth, and D.C. Circuits exhibit a third pattern in nonpublication rates: a sharp increase between SY 1981 and SY 1982 in the proportion of unpublished dispositions and then a noticeable downward trend since SY 1982.

It is clear from table 2 and the earlier discussion of the circuits' distribution practices that in some circuits a sizable proportion of appellate decisions are generally unavailable to the district bench and the bar. For example, four of the six circuits with above-average rates of nonpublication in SY 1984 (the Second, Third, Ninth, and Eleventh) do not distribute the unpublished decisions to district judges or attorneys (although the Third, Ninth, and Eleventh Circuits do provide a complete list of these dispositions to West Publishing Company for inclusion in the Federal Reporter). By contrast, both the Fourth and the Sixth Circuits, also with above-average rates of nonpublication in SY 1984, distribute unpublished decisions to all judges and provide a subscription service for the bar.

The data in table 3 show substantial diversity among the circuits in the nonpublication rate for decisions that reverse, vacate, or deny a lower court or agency decision; in SY 1984, this rate ranged from 6.3 percent in the Eighth Circuit to 41.9 percent in the Sixth Circuit. The Sixth Circuit stands out because it has consistently designated for nonpublication nearly half the decisions that reverse, vacate, or deny a lower court or agency decision. The Fourth and Ninth Circuits have also generally left an above-average proportion of these decisions unpublished. Although trends are difficult to discern, in several circuits there seems to have been an increase in the proportion of these decisions that were not published; in the First, Fourth, and Eleventh Circuits there have been recent sharp increases, whereas in the Fifth Circuit the increase has been more gradual. In contrast, the trend has been downward in the Second and Eighth Circuits; the trend appears to have been downward in

the Seventh and D.C. Circuits as well, except for recent sharp increases in these circuits in SY 1984 in the nonpublication rates for decisions that reverse, vacate, or deny a lower court or agency decision.

**TABLE 3**
**Total Number of Decisions to Reverse, Vacate, or Deny and Percentage of Total Unpublished**

| | 1981 | | 1982 | | 1983 | | 1984 | |
|---|---|---|---|---|---|---|---|---|
| Circuit | No. | % | No. | % | No. | % | No. | % |
| First | 30 | 6.7 | 7 | 0.0 | 77 | 26.0 | 101 | 25.7 |
| Second | 165 | 15.2 | 129 | 16.3 | 154 | 9.7 | 194 | 7.7 |
| Third | 170 | 23.5 | 135 | 11.9 | 162 | 22.2 | 176 | 27.3 |
| Fourth | 129 | 24.0 | 153 | 25.5 | 136 | 25.0 | 195 | 37.9 |
| Fifth | 558 | 17.4 | 284 | 20.8 | 288 | 22.2 | 322 | 25.5 |
| Sixth | 206 | 44.7 | 215 | 49.3 | 247 | 46.2 | 260 | 41.9 |
| Seventh | 175 | 38.3 | 179 | 29.1 | 154 | 14.9 | 149 | 24.2 |
| Eighth | 122 | 9.0 | 134 | 6.0 | 109 | 5.5 | 144 | 6.3 |
| Ninth | 379 | 34.6 | 343 | 38.5 | 362 | 35.6 | 337 | 38.0 |
| Tenth | 101 | 22.8 | 152 | 17.1 | 97 | 26.8 | 148 | 21.6 |
| Eleventh | — | — | 206 | 18.9 | 234 | 19.7 | 207 | 29.5 |
| D.C. | 105 | 17.1 | 89 | 13.5 | 62 | 4.8 | 84 | 10.7 |
| Average | | 21.1 | | 20.6 | | 21.6 | | 24.7 |

NOTE: See note 58 in the text for a definition of the cases included in the table.

The data in table 4 indicate that the appellate courts usually publish the disposition in cases in which the panel decision includes a concurring or dissenting decision. The percentage of these decisions left unpublished has varied greatly, however, and in SY 1984 ranged from 0 in the Second, Eighth, and Eleventh Circuits to 52.4 in the Ninth Circuit.[59] The Third, Fourth, Sixth, and Ninth Circuits have consistently designated for nonpublication an above-average proportion of these dispositions, whereas the Second, Eighth, and Eleventh Circuits have published virtually all of them.

[59] The figures for the Ninth Circuit in SY 1983 and SY 1984 are so out of line with those for the previous years for that circuit and with the figures for the other courts in SY 1983 and SY 1984 that they should be viewed with caution. Whether the figures accurately reflect the court's practice or whether they are due to a problem such as coding error is unknown.

As with tables 2 and 3, it is difficult to find a trend in the figures in table 4. The Ninth Circuit stands out because of the recent sharp increase in the number of split decisions in that court and in the proportion of those decisions the court has designated for nonpublication (again, the figures for this court should be interpreted with caution), whereas the Seventh Circuit stands out because of the substantial drop in SY 1983 in the proportion of split decisions that were not published. The proportion of unpublished decisions accompanied by a concurring or dissenting decision appears to be increasing in the Fourth and Fifth Circuits, whereas it appears to be decreasing in the Sixth and D.C. Circuits.

**TABLE 4**
**Total Number of Cases in Which Concurring and/or Dissenting Opinions Were Written and Percentage of Total Unpublished**

| | 1981 | | 1982 | | 1983 | | 1984 | |
|---|---|---|---|---|---|---|---|---|
| Circuit | No. | % | No. | % | No. | % | No. | % |
| First | 12 | 8.3 | 9 | 0.0 | 11 | 0.0 | 13 | 7.7 |
| Second | 70 | 1.4 | 65 | 0.0 | 64 | 0.0 | 76 | 0.0 |
| Third | 49 | 10.2 | 76 | 15.8 | 55 | 9.1 | 60 | 15.0 |
| Fourth | 50 | 12.0 | 73 | 15.1 | 53 | 17.0 | 43 | 16.3 |
| Fifth | 96 | 2.1 | 51 | 3.0 | 83 | 4.8 | 65 | 4.6 |
| Sixth | 42 | 21.4 | 82 | 23.2 | 91 | 22.0 | 116 | 19.0 |
| Seventh | 61 | 14.8 | 84 | 17.9 | 86 | 4.7 | 97 | 7.2 |
| Eighth | 41 | 0.0 | 53 | 1.9 | 55 | 0.0 | 68 | 0.0 |
| Ninth | 78 | 17.9 | 82 | 22.0 | 193 | 50.3 | 294 | 52.4 |
| Tenth | 63 | 1.6 | 30 | 10.0 | 46 | 8.7 | 53 | 11.3 |
| Eleventh | — | — | 46 | 2.2 | 58 | 1.7 | 60 | 0.0 |
| D.C. | 62 | 7.4 | 62 | 8.1 | 54 | 5.6 | 49 | 2.0 |
| Average | | 8.0 | | 10.0 | | 10.3 | | 11.3 |

NOTE: See note 58 in the text for a definition of the cases included in the table.

Generally, the appellate courts are more likely to designate for nonpublication a decision that reverses, vacates, or denies a lower court or agency decision (SY 1984 average = 24.7 percent unpublished) than a decision that includes a concurrence or dissent (SY 1984 average = 11.3 percent unpublished). In either instance, however, some courts leave a substantial proportion of these decisions unpublished and generally unavailable to the bench and bar. For example, with regard to decisions that reverse, vacate, or deny

a lower court or agency decision, the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits leave a quarter or more of these decisions unpublished and also do not distribute them to district judges or attorneys. Notably, the Fourth and Sixth Circuits, which have among the highest nonpublication rates for this type of decision, routinely make all unpublished decisions available to both bench and bar. The Fourth and Sixth Circuits also have the highest nonpublication rates for split decisions (excluding the Ninth Circuit), but, again, make them generally available. By contrast, the Third, Ninth, and Tenth Circuits, which also leave a substantial proportion of these decisions unpublished, do not distribute them to district judges and attorneys.

One can ask what the impact on the courts would be if, as the critics of limited publication propose, the courts published all decisions including either a concurrence or a dissent, as well as all decisions that reverse, vacate, or deny a lower court or agency decision. In view of the trends in recent years, in most appellate courts publication of all decisions in which a panel member writes a concurring or dissenting opinion would not substantially increase the number of decisions that are published. However, publication of decisions that reverse, vacate, or deny a lower court or agency decision would significantly increase, in many circuits, the number of cases published. Nine courts designated at least 20 percent of the latter type of decision for nonpublication in SY 1984; in some circuits—for example, the Sixth and Ninth—publication of all such decisions would have meant more than one hundred additional published decisions in SY 1984.

## VI. Conclusion

Recognizing that not all appellate decisions need to be published and threatened by ever-increasing caseloads, a rising tide of paper, and mounting costs in both time and dollars, the federal courts of appeals have adopted policies limiting publication. Having accepted such policies, however, the courts have faced another problem: equitable access to unpublished material. Convinced that some members of the bar, and possibly the bench, would be able

to obtain the unpublished decisions and then use them to the disadvantage of those who could not find the material, most courts have also adopted policies prohibiting citation of unpublished dispositions. These policies have, in turn, provoked protests that no-citation rules do not restrict use, but only promote unacknowledged use.

In fact, any combination of restrictions or freedoms with regard to distribution and citation leads to problems for either the courts or the bar. If both distribution and citation are restricted, unpublished decisions may be used without acknowledgment. If distribution is restricted while citation is permitted, those who have the resources to find the unpublished decisions have an unfair advantage. Yet, if distribution is freely made while citation is restricted, the problem of unacknowledged use again arises. Finally, if both distribution and citation are unrestricted, free and fair access and use are ensured, but the savings in resources are lost. The issues in the publication debate are complex and the choices before the courts are difficult.

[Tables 5 and 9 of the appendix to the original report appear on the following pages. Ed.]

**TABLE 5**
**Summary of Distribution and Citation Rules and Practices**

| Circuit | Statement on Distribution? | Do All District Judges Receive Unpublished Decisions? | Do All Appellate Judges Receive Unpublished Decisions? | Listed in Federal Reporter? | Does List Include All Unpublished Decisions? | Statement on Citation? | Nature of Statement | Does the Statement Address Judges? | Does the Statement Address Attorneys? | Attach Disposition to Brief or Serve on Counsel? | Do Judges Cite Unpublished Decisions? | Do Attorneys Cite Unpublished Decisions? | Circuit |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1st | No | No | No | Yes | No | Yes (rule, plan) | Related cases only | No | No | No | No | No | 1st |
| 2nd[1] | No | No | No | Yes | No | Yes (rule) | Related cases only | No | No | No | No | No | 2nd |
| 3rd | Limited[2] (IOP) | No | No | Yes | Yes | No | Anything may be cited | N/A | N/A | No | No | Yes | 3rd |
| 4th | Yes (IOP) | Yes[3] | Yes[3] | Yes | No | Yes (IOP) | Res, etc.[4] No better precedent | Yes | Yes | Yes | No | Infrequently | 4th |
| 5th | Limited (IOP) | No | No | Yes | Yes | Yes (rule) | Res, etc. Related facts | No | Yes, by implication | Yes | No | Infrequently | 5th |
| 6th | No | No | No | Yes | Yes | Yes (rule) | No better precedent | No | Yes | Yes | No | Infrequently | 6th |
| 7th | Yes (rule) | No | Yes | Yes | No | Yes (rule) | Res, etc. | Yes | No | Yes | No | No | 7th |
| 8th | No | Yes | Yes | Yes | Yes | Yes (plan, rule) | Related cases | No | Yes | No | No | No | 8th |

(continued)

**TABLE 5 (Continued)**

| Circuit | Statement on Distribution? | Do All District Judges Receive Unpublished Decisions? | Do All Appellate Judges Receive Unpublished Decisions? | Listed in Federal Reporter? | Does List Include All Unpublished Decisions? | Statement on Citation? | Nature of Statement | Does the Statement Address Judges? | Does the Statement Address Attorneys? | Attach Disposition to Brief or Serve on Counsel? | Do Judges Cite Unpublished Decisions? | Do Attorneys Cite Unpublished Decisions? | Circuit |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 9th | Limited (rule, IOP) | No[5] | Yes | Yes | Yes | Yes (rule) | Res, etc. | Yes | Yes | No | No | No | 9th |
| 10th | Limited (rule) | No[6] | No[6] | No | N/A | Yes (rule) | If relevant | No | Yes | Yes | Seldom | Often | 10th |
| 11th | Limited (plan, IOP) | No | Yes[7] | Yes | No | No | No better precedent | N/A | N/A | No[8] | Rarely | Rarely | 11th |
| D.C.[9] | Limited (plan) | No | Yes | Yes | No | Yes (plan, rule) | Res, etc. | Yes | Yes | No[8] | No | No | D.C. |
| Fed. | Limited (rule) | No | Yes | Yes | No | Yes (rule) | Res, etc. | Yes | Yes | No | No | No | Fed. |

NOTE: N/A = not applicable; IOP = internal operating procedures; plan = plan for publication of opinions.

1. A committee in the Second Circuit is reviewing the court's publication policies.

2. In all instances, "limited" means the plan, rule, or internal operating procedures mention a few recipients of the disposition—mainly parties and publishers—but do not give the detail the clerks provided in interviews.

3. The circuit's internal operating procedures specify that only the trial court and the parties are to receive the text of the unpublished disposition; in fact, these dispositions are routinely sent to all judges (including bankruptcy judges and magistrates) in the circuit.

4. In all instances, "Res, etc." means the unpublished disposition may be cited to support a claim of res judicata or collateral estoppel, or the law of the case.

5. The Ninth Circuit does not routinely send unpublished material to the district judges in the circuit, but these decisions are sent to chief district judges if they request them.

6. Before the Tenth Circuit changed its policy in December 1983 and stopped using decisions marked "Not for Routine Publication," the appellate and district judges in the circuit received all unpublished decisions.

7. The Eleventh Circuit's practice is to send all appellate judges the unpublished decisions, but about half the judges have asked not to receive them.

8. The clerk reports that in practice attorneys do attach the text of the unpublished disposition they are citing, although the rules do not require this practice.

9. A committee in the D.C. Circuit is reviewing the court's publication policies.

**TABLE 9**
**Summary of Publication Rules and Practices**

| Circuit | Statement on Publication? | Presumption for or Against? | Nature of Statement | Who Makes Publication Decision? | Provision to Change Publication Status? | Publish if Published Below? | Publish if Reversal? | Publish if Split Decision? | Publish if Remand from Supreme Court? | Publish if Creates or Resolves Conflict in Law? | Publish if Established Law Is Applied to New Facts? | Partial Publication? | Circuit |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1st | Yes | Against (plan) | General | Majority | Yes* | Yes | Yes[1] | No | No | Yes* | D/K | Yes | 1st |
| 2nd[2] | Yes (rule) | Both[3] | General | Unanimous | Yes* | No | Yes* | Yes | No | Yes* | Yes* | No | 2nd |
| 3rd | Yes (IOP) | Both | General | Majority | Yes* | No | No | Yes* | No | Yes* | D/K | No | 3rd |
| 4th[4] | Yes (IOP) | Against | Explicit criteria | Author or majority[5] | Yes | No | No | Yes* | No | Yes | No | No | 4th |
| 5th | Yes (rule) | For | Explicit criteria | Unanimous | Yes | No | Yes | Yes[6] | Yes | Yes | Yes | Yes* | 5th |
| 6th | Yes (rule) | Both | Explicit criteria | Majority | Yes* | Yes[7] | Yes | Yes[6] | Yes | Yes | Yes | No | 6th |
| 7th | Yes (rule) | Both | Explicit criteria | Majority[5] | Yes | Yes[8] | Yes[1] | Yes* | Yes | Yes | No | No | 7th |
| 8th | Yes (plan) | Neither | Explicit criteria | Majority[5] | Yes* | Yes[9] | Yes[1] | Yes* | Yes* | Yes | Yes | No | 8th |
| 9th | Yes (rule, order) | Both | Explicit criteria | Judges agree | Yes | Yes[10] | No | Yes[6] | No | Yes* | No | Yes* | 9th |
| 10th | Yes (rule) | Both | Explicit criteria | Panel decides[5] | Yes* | Yes | No | No | Yes* | Yes | Yes* | Yes | 10th |

(continued)

**TABLE 9 (Continued)**

| Circuit | Statement on Publication? | Presumption for or Against? | Nature of Statement | Who Makes Publication Decision? | Provision to Change Publication Status? | Publish if Published Below? | Publish if Reversal? | Publish if Split Decision? | Publish if Remand from Supreme Court? | Publish if Creates or Resolves Conflict in Law? | Publish if Established Law Is Applied to New Facts? | Partial Publication? | Circuit |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 11th | Yes (plan) | Both | Only opinions published | Not stated | Yes* | Yes* | No | Yes* | Yes* | Yes* | Yes* | No | 11th |
| D.C.[11] | Yes (plan) | Neither | Explicit criteria | Panel decides | Yes* | Yes* | No | Yes[6] | No | Yes | Yes | Yes | D.C. |
| Fed. | Yes (rule) | Neither | General | Unanimous[5] | Yes | No | No | No | Yes* | Yes* | No | No | Fed. |

NOTE: An asterisk next to a "yes" response indicates that the criterion is used in practice even though the court's local rule does not specify the practice. A "no" response indicates that the court's rule does not specify the standard aqnd that the judges do not necessarily follow it in practice. D/K = don't know, i.e., the respondent did not know the judge's practice; IOP = internal operating procedures; plan = plan for publication of opinions.

1. The decision reversing the lower court's decision is published if the lower court's decision was published.
2. A committee in the Second Circuit is reviewing the court's publication policies.
3. In all instances, "both" means the rule, IOP, or plan states that certain kinds of dispositions (usually signed opinions) should be published, while other kinds (usually orders) should not be published.
4. The Fourth Circuit does not publish the decision in a case disposed of without argument unless all the active judges agree that it should be published. Thus, the circuit's publication rules and criteria apply in effect only to the decisions rendered in cases that are orally argued to the court.
5. In these circuits a single judge may have his or her opinion published or may ask that the opinion in a case be published.
6. The decision is published if accompanied by either a concurring or a dissenting opinion.
7. The rule does not make an affirmative requirement, but states that the publication status below should be considered.
8. The disposition should be published if it reverses the published decision below.
9. The disposition should be published when it does not accept the rationale of the published decision below.
10. The disposition should be published unless the panel decides publication is unnecessary.

# PART FOUR

# ADMINISTRATION

# INTRODUCTION

*Michael Tonry and Robert A. Katzmann*

The management of the federal courts has been professionalized in the last decade. One sign is the development of new professional positions in the courts, such as those of the circuit executives and the career staff attorneys. Another indication is the proliferation of screening and case management programs, which may be staffed by senior nonjudicial professionals with the aim of freeing judges to spend more of their time deciding appeals.

The Federal Judicial Center and such kindred organizations as the National Center for State Courts, the Institute for Court Management, the National Judicial College, and the Institute of Judicial Administration are products of the move toward professional court management and have themselves sustained and increased its momentum. Particularly during the 1970s, a major portion of the research conducted and sponsored by the Center concerned professional management of the courts. Of the twenty-five reports on the appellate courts that are included in the Federal Judicial Center's *1986 Catalog of Publications,* the oldest is a 1971 paper on the Circuit Executive Act.[1] The largest single grouping of reports concerns court administration; this work has taken two basic forms. One series of reports concerns the activities and impact of the new professionals, the early incumbents of the circuit executive and career staff attorney positions. The second series documents the functions and accomplishments of long-standing judicial actors—the clerks, the circuit judicial councils, the chief judges—and provides baseline data for consideration of new ideas and programs.

**New Professionals.** Five major documents concern circuit executives and staff attorneys; three of these are reprinted in this volume. On the subject of circuit executives, the Center produced

[1] J. Ebersole, Implementing the Circuit Executive Act (Federal Judicial Center 1971).

the 1971 paper referred to above just nine months after the act's passage.[2] That effort reviewed the statute and its legislative history and offered a series of recommendations concerning the functions of the circuit executives. Congress intended that the circuit executives would contribute to the efficient administration of the federal courts; it created a national Board of Certification and specified that only individuals certified by the board would be eligible for appointment as circuit executives. The circuit executive was, among other tasks, to exercise administrative control of nonjudicial activities of the courts of appeals; administer the personnel, budgeting, and accounting systems; maintain space management; conduct studies and compile data relating to the business of the circuit; make recommendations to the chief judge, the circuit council, and the Judicial Conference; and represent the circuit as its liaison to the courts of the various states, the news media, and other private and public groups having a reasonable interest in the administration of the circuit. Given all of these tasks, it was far from clear exactly what the circuit executives would do once in office.

Some years later, at the request of the Federal Judicial Center's Board, the Center initiated a study of the actual performance of the newly appointed officials.[3] The evaluators found that circuit executives were variously effective in the different circuits, depending on such factors as the circuit executive's own background, style, and personality; the willingness of the circuit's chief judge to delegate; and the receptivity of the judges at large to the idea of professional, nonjudicial court administrators. This report is the first of the five documents reprinted in this part. It has proved useful for circuit councils and chief judges as they think about the duties that they would have the circuit executive perform.

At the end of the first decade of experience with the circuit executive, the Center issued another evaluation, this one written by a member of the Board of Certification.[4] The study examines such

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[2] *Id.*

[3] J. McDermott & S. Flanders, The Impact of the Circuit Executive Act (Federal Judicial Center 1979).

[4] J. Macy, Jr., The First Decade of the Circuit Court Executive: An Evaluation (Federal Judicial Center 1985).

questions as whether the circuit executive has contributed to higher court productivity and efficiency, the functions that have received priority, and the extent to which the circuit executive has been incorporated into the leadership of the circuit. Included in this volume is that part of the report offering recommendations for future development of the office of the circuit executive.

The other two reports primarily concerning new court professionals focus on the permanent staff attorneys. The use by judges of personal law clerks, usually recent law school graduates serving one- or two-year appointments, has long been a familiar practice in appellate courts. Circuit judges were first formally authorized one law clerk each in 1930 and today most have three. In addition to the personal law clerks, however, there appeared in the late 1960s and early 1970s individuals who were the precursors of professional career staff attorneys. Although they were usually recent law school graduates, the early staff attorneys differed from the personal clerks in that they worked for the court, not for individual judges, and in that they often had responsibility for screening pro se and prisoners' petitions.

At the time the first relevant Center report was written on the roles of staff attorneys,[5] in 1974, staff attorneys in most circuits had narrow responsibilities, often centered on handling pro se matters. As to whether the courts should employ permanent staff attorneys, the report was ambivalent. In any case, professional staff attorneys have since been institutionalized in most circuits. The various screening programs reported on in the "case management" part of this volume, for example, depend on the roles of experienced, well-paid senior staff attorneys in making screening decisions and in managing settlement conferences and prehearing conferences.[6] The Fourth Circuit report is reprinted here. A some-

[5] S. Flanders & J. Goldman, Screening Practices and the Use of Para-Judicial Personnel in the U.S. Courts of Appeals: A Study in the Fourth Circuit (Federal Judicial Center 1974).

[6] J. Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration (Federal Judicial Center 1977); J. Goldman, The Seventh Circuit Preappeal Program: An Evaluation (Federal Judicial

what later study, *Central Legal Staffs in the United States Courts of Appeals,* is not reproduced. It consisted of a series of short, general descriptions of staff attorney responsibilities in all the federal circuits in 1977.[7] It is by and large out of date but it may be of interest to persons who wish to chronicle the evolution of the staff attorney's position in the federal judicial branch.

**Documenting Traditional Roles.** The second major group of reports on administration concerns traditional judicial roles and processes. These are generally qualitative efforts to document procedures and to establish how key institutions—notably the circuit chief judges and the judicial councils—operate.[8] In 1973, the Center staff completed the *Comparative Report on Internal Operating Procedures of United States Courts of Appeals,*[9] not reprinted here, which was the only detailed and complete "snapshot" ever taken of the administrative operations of all the federal circuit courts. It described the major processes and procedures of the courts: briefing requirements; printing requirements; time schedules; and rules and procedures governing extensions of time, docketing transcripts, assembling the record, monitoring cases, and handling pro se cases. In the first few years after the report was published, it permitted administrators and students of the courts to have ready access to knowledge about how the various courts addressed common problems and controlled common procedures. Documents of this sort, however, age quickly. Court procedures have changed radically in the United States since 1973; the report is now obsolete.

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Center 1982); A. Partridge & A. Lind, A Reevaluation of the Civil Appeals Management Plan (Federal Judicial Center 1983).

[7] Central Legal Staffs in the United States Courts of Appeals: A Survey of Internal Operating Procedures (Federal Judicial Center 1978).

[8] L. Farmer, Appeals Expediting Systems: An Evaluation of Second and Eighth Circuit Procedures (Federal Judicial Center 1981), is also partly of the genre. It describes case expedition forms, procedures, and practices in those circuits.

[9] J. Langner & S. Flanders, Comparative Report on Internal Operating Procedures of United States Courts of Appeals (Federal Judicial Center 1973).

As an offshoot of the evaluation of the impact of the Circuit Executive Act, the writers of that report assessed the operation of judicial councils in the federal circuits.[10] Their key conclusion was that the judicial councils play only a limited role in the governance of the various circuits. For a variety of reasons, the councils have not been effective at docket supervision. However, the authors were of the view that the councils have not been ineffective in dealing with allegations of improper judicial behavior, despite differences of view about the breadth of the authority of the circuit councils to respond to complaints of judicial misbehavior. Relatively few serious problems seemed to arise and those that did, the writers concluded, were dealt with informally.

The other major report on administration, and the last report reprinted in this part, is a survey of chief judges' approaches and procedures in carrying out their responsibilities.[11] A central finding was that chief judges' administrative responsibilities are substantial, to the extent that they may overwhelm judges' execution of their judicial responsibilities and certainly to the degree that they impose enormous burdens on chief judges who feel obligated to carry an aliquot portion of the courts' judicial workload. The writers observed that

> [T]he amount of time the chief judges estimated they devoted to administration ranged from 20 percent to 80 percent of their overall working time. . . . The average of their estimates is 45 percent.[12]

Taken as a whole, the materials in this part are among the more qualitative of the Federal Judicial Center's appellate court research. For the administrators of the federal judiciary, they are valuable management tools.

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[10] S. Flanders & J. McDermott, Operation of the Federal Judicial Councils (Federal Judicial Center 1978).

[11] R. Wheeler & C. Nihan, Administering the Federal Judicial Circuits: A Survey of Chief Judges' Approaches and Procedures (Federal Judicial Center 1982).

[12] *Id.* at 5.

# THE IMPACT OF THE CIRCUIT EXECUTIVE ACT[1]

**John T. McDermott and Steven Flanders**
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## I. The Need for a Circuit Executive

The Circuit Executive Act introduced a new type of manager in the federal judiciary. The act inspired enthusiastic hopes in its supporters both before passage and during its early implementation. This report, based on a field survey in each circuit, examines the act's impact in the light of hopes and expectations expressed for it. We try to take into account also the actual possibilities before the circuit executives in their first six years or so, as well as some observations drawn from other writing on court executives and professional managers generally.

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### Scope and Method

This report is based on two series of meetings with judges and support staff, as well as a review of such documents as judicial council minutes, correspondence of judges and supporting staff (especially circuit executives), and committee reports. The research was selective: Our effort was to meet with those with particular in-

[1] This report has been slightly reorganized from its original published form. In addition to several minor nonsubstantive deletions, a twenty-five-page discussion of legislative history has been omitted, as have original appendixes B (the results of a mail survey on circuit executive activities) and C (additional legislative history). Original appendix A, on scope and method, has been integrated into the text in shortened form. Most footnotes have been deleted, and the remaining footnotes have been renumbered. Ed.

terest or involvement in the work of circuit executives and judicial councils, and to read the relevant documents that were brought to our attention. In keeping with our purpose, we met with more judges than support staff, and more appellate judges than trial judges. The conferences were open-ended and discursive, and varied in content depending on the work and interests of the person interviewed. . . .

The selective character of our research imposes evident limitations. It is possible that our understanding of the work of a particular circuit executive or judicial council is distorted by unrepresentative views or experiences of certain individuals. We were aware of this possibility, however, and made a positive effort to forestall it by seeking diverse views. In particular, we used our initial interviews with circuit chief judges and circuit executives (held in December 1976 and January 1977) to identify people we should seek out in our second round of conferences later in 1977 and in early 1978. We used this method throughout our study.

The method of this study permits us to add a new perspective to what has been written by others who have evaluated court executive work. No one else has met with so many people who are familiar with executive activities, and the issues court executives deal with. On the other hand, our survey has limitations. This report deals in some fashion with almost every administrative question. Every administrative issue in every United States court is relevant to it. Our treatment of specific circuit executive initiatives is always selective and sometimes superficial. We did our best to put together an overview in a judicious fashion, but we may occasionally have been unfair.

The two authors, assisted by Professor David Neubauer, met with a number of individuals and their subordinates in the course of preparing this report. Nearly all interviews were conducted by Professor McDermott and one other interviewer (Flanders or Neubauer). Nearly all the conferences were held in the chambers or offices of the persons interviewed; a few conferences were held elsewhere, usually in Washington. About five interviews were conducted by telephone only.

## Perspectives

As might be expected, each of the supporters of the Circuit Executive Act had a somewhat different notion of the office and its expected benefits. The circuit chief judges saw the circuit executive as an administrative assistant who would handle many undefined administrative tasks, presumably minor and routine ones. Senator Tydings hoped that the judicial councils, now assisted by the circuit executive, would begin to assume the responsibilities entrusted to them thirty years before. Chief Justice Burger saw the circuit executive as an innovative manager of the court of appeals (and possibly of district courts as well) who would apply sophisticated management skills to the problems of the courts. The chairman of the ABA Section on Judicial Administration saw the circuit executive as an official who would plan and—in a purely administrative sense—direct the judges' work.

The act, then, left the job of defining the new position to the courts and to the circuit executives themselves. Even though it was not precisely defined, the new position clearly combined some disparate elements. Congress was convinced that circuit chief judges needed administrative help on matters of daily routine. Congress apparently believed also that there was a large agenda of dramatic policy initiatives that a professional manager with new skills could introduce. The questions the act left open represent our agenda in examining the circuit executives' work on each of their major functions.

**1. Administrative assistant.** There was and is a widely held belief that chief judges are too involved in administrative matters and that someone else—besides the judge's secretary and law clerks, and the clerk of the court of appeals—should handle many of them. However, except for the mistaken impression of one witness there was little precise discussion of what the circuit executive could do, or more important, what the chief judge would be willing to delegate to him. (Only Judge McGowan offered specific suggestions, relating primarily to his court alone.) Nor was consideration given to the possible need to change Administrative Office policies or statutes that involved chief judges in administrative matters.

**2. Staff to the judicial council.** The assumption seems to have been that an important, threshold impediment to more effective or aggressive council action was the lack of staff support. But most councils used the clerk of the court of appeals as staff (secretary) to the council and had other assistance available if needed (for example, the staff law clerks). The real problem, if there is a problem, may lie elsewhere.

**3. Court management.** There are several ambiguities here. First, the legislative history does not make it clear whether or in what sense the circuit executive is the manager of all the courts within the circuit or only the court of appeals. Second, it does not clarify the relationship between the court executives and the clerk (or clerks, if the district courts are included), who has traditionally been responsible, on behalf of the court, for management of its operations and its nonjudicial personnel. Third, "management" was considered by some to deal with business matters (budget, personnel, space, etc.) but by others to include case management, scheduling, and the whole litigative process generally. Finally, a larger scope for management at the circuit level would seem to necessitate some decentralization of the authority vested in the Administrative Office; neither the Circuit Executive Act nor any implementing legislation or policy has effectuated such decentralization.

Thus the actual legislation gives the circuit executive no new authority, no mandatory duties, and no staff, yet its advocates expected significant changes to result in each circuit. It is therefore not surprising that the role of each circuit executive developed in a manner reflecting the specific personalities and problems of his circuit.

## II. Administrative Assistant to the Chief Judge

This chapter focuses on the circuit executive's role as an administrative assistant to the chief judge of the court of appeals. There will be some overlap with other sections of the report, but here we will emphasize the circuit executive's function as a staff assistant to the chief judge on matters with minimal policy content,

rather than as a manager of the court of appeals or as staff to the judicial council. For want of a better word, we refer to the subject of this chapter as "administrative" duties. These include operational personnel matters not resolved elsewhere, budgets, space and facilities, arrangements for visiting judges, Criminal Justice Act vouchers, relations with outside organizations and the public, assisting the chief judge with speeches and correspondence, and other matters.

The chief judge of each court of appeals has numerous administrative responsibilities that are not shared by other appellate judges. Prior to the appointment of circuit executives, a number of chief judges found ways to delegate some of the more onerous and less important administrative duties, especially to their secretaries, some of whom functioned essentially as administrative assistants. Others assigned these duties to their personal law clerks or one of the staff law clerks. In many circuits also, the clerk of the court of appeals handled a wide range of administrative matters for the chief judge.

Even where some help was available, many chief judges were concerned about the amount of time they spent on administrative matters. Thus, much of the support for establishing the position of circuit executive came from chief judges of courts of appeals, who expected that the circuit executive would relieve them of many administrative duties and responsibilities. Chief Judge David L. Bazelon of the United States Court of Appeals for the D.C. Circuit emphasized that "[t]he administrative work in most of the circuits has become so onerous that judicial duties must be sacrificed if the court is to operate efficiently. The circuit executive would relieve the judges of administrative chores for which they are not particularly equipped and free them to do their work as judges." Strong support for the creation of an administrative assistant position for chief judges of both district and appellate courts is found in the resolution of the Judicial Conference of the Ninth Circuit, July 23, 1970. It disapproved of the legislation establishing the position of circuit executive and proposed instead that each chief judge of a circuit and the chief judge of every district having six or more judges be authorized "to employ an administrative assistant to serve

at the pleasure of the chief judge . . . to assist the chief judge in the performance of his administrative duties . . . ."

Although the Ninth Circuit resolution was not embraced by Congress there is substantial legislative history to indicate that providing administrative assistance to the chief judge was to be a primary duty of the circuit executive. As shown in chapter 1, Judge McGowan, Mr. Kirks, and several others testified that administrative burdens on chief judges were a major concern.

## Survey Findings

One of the principal functions of every circuit executive has been to serve as administrative assistant to the chief judge. Many indicated that they were spending a great deal of their time on this function, some as much as 75 percent. However, there was little evidence that the presence of the circuit executive had achieved the goal of significantly reducing the administrative burdens on the chief judge. Only in the Second Circuit did this result seem certain from our discussions with circuit judges and the chief judge himself.

One circuit presents a good example of the problem. According to one circuit judge the chief judge has assigned virtually "all delegable" administrative responsibilities to the circuit executive. In spite of this, the court has recently reduced the chief judge's caseload, as he was not able to keep up with his opinions and also handle his administrative responsibilities. The reasons the circuit executives, as a group, have not markedly reduced the administrative burdens of the chief judge appear to be: (1) a steady increase in the overall administrative responsibilities of the chief judge, and (2) the reluctance of most chief judges to delegate administrative responsibilities (except to a judge). This reluctance stems from tradition, the sensitivity of certain administrative matters, the perceived inability of a few circuit executives to effectively discharge the more sensitive and difficult duties, and statutes or Administrative Office practice that seem to require certain matters to be handled by the chief judge himself.

We received suggestions that the circuit executives need more statutory authority and greater recognition by the Administrative

Office. Specifically, it was suggested that the circuit executive should be authorized to handle all administrative problems relating to the clerks' offices (both of the court of appeals and the district courts) and that he should handle such things as Criminal Justice Act vouchers, increases in salaries for part-time bankruptcy judges and magistrates, and other nonjudicial functions including most matters of resource allocation (especially those that now require judicial council action).

Although some statutory modifications might be useful and appropriate, the main problem seems to be the inability of some chief judges to fully delegate administrative responsibilities to their circuit executives. The legislative history of the act clearly anticipated a new degree or style of delegation. The act established the circuit executive at the salary of the assistant attorney general for administration and the assistant secretaries for administration of other cabinet agencies. If he is to act as a "managing partner," then delegation must not take place within the old constraints more suitable to work with a law clerk or administrative assistant. Authority to *make* administrative decisions should be delegated, not just the responsibility to gather information in support of those decisions.

In one circuit, the chief judge estimated that he still spends between 40 and 60 percent of his time on administration. This is so because he is unwilling or unable to delegate many matters to the circuit executive. Some appear too sensitive to be handled by anyone other than the chief judge or a delegated judge—these may include most problems involving individual judges, including contacts with district judges on purely administrative matters. Others involve issues the circuit executive was thought not qualified to handle because he lacked requisite legal training and experience (Criminal Justice Act vouchers, for example).

In another circuit, the circuit executive recently moved from the "seat of the court" to the city in which the chief judge resides, feeling that closer proximity would permit him to be of greater assistance to the chief judge. The chief judge and his personal staff had been handling routine administrative matters, and it did not seem to us likely that the move would have the desired effect.

However, we have been advised that the new arrangement is proving satisfactory.

In another circuit, the circuit executive and several circuit judges commented that the chief judge handled more administrative matters than he should. According to one judge, for example, the great hope of the council in appointing a circuit executive was to relieve the chief judge of much of his administrative burden. This was not realized because of the chief judge's passion for detail and sense of personal responsibility and involvement in each matter of administrative detail. This has made it difficult for him to delegate effective administrative responsibility.

Even in circuits where the chief judge has a reputation for being an exceptional administrator, there was substantial concern that he had not delegated sufficient *important* administrative tasks to the circuit executive. In one such circuit, the circuit executive seems to have taken over administrative responsibilities previously handled by the chief judge's secretary, while the chief judge remains personally responsible for important administrative matters.

Much depends on the style and preferences of the chief judge. For example, in one circuit the situation may be improving as a result of a change in chief judges. There are strong indications that a former chief judge simply did not utilize the circuit executive, but preferred to handle all matters on a personal basis. The new chief judge also intends to be personally involved with administrative matters, as he emphasized that all of his three law clerks would have training in judicial administration. However, the present chief judge has expressed determination to fully utilize the services of the circuit executive.

While relieving the chief judge of narrowly administrative tasks was intended to be one of the principal duties of the circuit executive, it was clearly not intended to be his sole function. One of the problems this study has revealed is that a number of circuit executives are spending so large a portion of their time and energies as administrative assistants that they have inadequate time for other tasks. Only in the Second Circuit has there been a significant delegation or reassignment of administrative responsibilities by the circuit executive to members of his staff.

The circuit executive for the D.C. Circuit has made a concerted effort to avoid becoming involved in routine administrative matters. He has generally avoided any role in the routine operations of the clerk's office and has attempted to avoid spending his time and energies on minor administrative or housekeeping matters that can be handled by the clerk or others. With the help of the various staff available he seems to have succeeded in reducing burdens on the chief judge to the feasible minimum.

All of the other circuit executives seem to be significantly involved in routine matters of an "administrative assistant" character. Perhaps because there has been no one else for much of this, some circuit executives are spending too much time as administrative assistants. In the Third Circuit the construction of a new courthouse created an enormous administrative burden. In the Eighth Circuit the circuit executive spent substantial time as administrative assistant to the chief judge, handling such things as parking spaces, space allocation, telephones, and dealing with GSA. In two other circuits, several judges confirmed the impression that the circuit executive was spending too much time on administrative matters. Some circuit judges were very emphatic in commenting on the "trivial" nature of many duties assumed by the circuit executive. Yet several other circuit executives said they spent little time on routine administrative matters.

We believe the circuit executive can be of great value to the chief judge by handling the routine administrative functions. The following examples may suggest areas where an even greater contribution is possible in some circuits.

## Personnel

According to the act, one of the responsibilities that should be assigned to the circuit executive is "administering the personnel system of the court of appeals of the circuit." All have occasionally been asked to assist with special problems. At least seven of the ten circuit executives have been further involved in personnel matters and policy in varying degrees. In three circuits it appears that the circuit executive's primary role is to coordinate the search for supporting personnel other than those employed in the clerk's office.

These include library personnel and staff attorneys. In the D.C. Circuit the circuit executive has been involved in the staffing of senior level positions within the court of appeals, including the clerk, chief deputy clerk, senior staff attorney, and librarian. Also, at the request of the chief judge, the circuit executive has provided advice to the clerk of court as to hiring practices. In addition, the circuit executive was assigned the task of handling a serious personnel problem in the clerk's office.

In other circuits, for example the Third, the circuit executive has not been involved in the actual hiring of personnel, but has conducted staffing studies for the clerk's office and has assisted in obtaining additional personnel for the clerk's office. In the Tenth Circuit the circuit executive was initially given authority for the hiring, firing, and promotion of all clerk's office employees.

There have also been some efforts to improve internal operating procedures with respect to personnel. Several circuit executives have established secretarial pools serving all the judges with chambers in the main building of the court of appeals. The Fifth and Tenth Circuits prepared comprehensive personnel manuals under the circuit executive's direction. Several other circuits expect to prepare manuals in the near future.

An example of more substantial involvement in personnel matters comes from the Second Circuit, where the circuit executive made a study of hiring practices within the clerk's office and related offices, and developed an equal opportunity plan for the court of appeals. In addition, he developed a merit award program available to the entire circuit (district courts as well as the court of appeals). More than one judge noted that morale within the circuit clerk's office had improved following the circuit executive's initiatives, and the court was attracting better qualified people to fill vacancies.

The Second Circuit executive established a circuitwide grievance procedure for court employees, perhaps the first of its kind. Notably, the procedure provides a right of appeal to the circuit executive, thereby providing a reasonably independent review that remains in the court system, yet does not burden a judge or judges with the associated fact-finding or decision.

The Second Circuit executive had a major role—by invitation—in recruiting a clerk in a district court (see chapter 5). He also has conducted many special projects serving personnel of the whole circuit. These have included, for example, a detailed analysis of the alternative health plans, and extensive liaison work with Blue Cross to try to speed payments and simplify filing procedures.

## Library

Almost all circuit executives have played a role in the establishment, improvement, or operation of the court of appeals' library. Management and policy for libraries was an area of special need when circuit executives were appointed; most of them gave it special attention. In the Third Circuit the executive was responsible for all of the administrative matters relating to the establishment of a consolidated library in the Philadelphia courthouse, and satellite libraries in Wilmington, Pittsburgh, and Newark. The idea of such a system with professional librarians at each location came from the chief judge, but it was the circuit executive who carried the plan into operation. This included a good deal of work at the national level through the Judicial Conference, the Administrative Office, the Judicial Center, and—ultimately—Congress. When he began his efforts there was no provision for the needed personnel or facilities.

A number of judges in the Fourth Circuit referred to a tremendous improvement in library services, which would not have occurred without the efforts of the circuit executive. Not only have physical conditions been significantly improved, but the professionally trained librarian is providing assistance unavailable in the past.

The work of other circuit executives has also improved library services, possibly not as dramatically as in the Third or Fourth Circuit. When the circuit executive was appointed, the Fifth Circuit already had an excellent library that was a model to others in several respects. The circuit executive has helped establish three satellite libraries. In one circuit, the circuit executive was involved in enlarging the facilities of the library, and in another the circuit executive arranged for the physical relocation of the library. In addi-

tion to continuing work on the central library, the circuit executive for the Tenth Circuit is involved in consolidating the district and court of appeals libraries in Cheyenne, Wyoming. The circuit executive for the Second Circuit has been widely involved in improving the operation of the library; the chairman of the circuit's library committee mentioned that the circuit executive handled all of the problems with respect to the library and concluded that "the library is more useful to judges today because of the work of the circuit executive." The executive took a leading role in finding and hiring a librarian of exceptional qualifications and skills (especially considering the pay permitted) and is also working on establishing a district court library with a professional librarian in each of the districts.

## The Budget

According to the Circuit Executive Act, one of the responsibilities delegable to the circuit executive is "administering the budget of the court of appeals of the circuit." Although several circuit executives mentioned that they were involved in budgeting, this appeared to us to be a largely meaningless function under the existing circumstances. Budgetary allocations are not made in the circuits; most items are specifically allocated from Washington, leaving the circuit executive with the limited—though sometimes crucial—role of advocate for courts in the circuit. True, the circuit executives in most circuits have been given the authority to handle the furniture budget for the court of appeals (sometimes the whole building). However, this is a rather small element of the court of appeals' expenditures and several circuit executives commented that the task was not a significant or substantial one. Several circuit executives emphasized their role in collecting and consolidating the respective budgets of the units within the court of appeals (clerk's office, staff attorneys, libraries, etc.) and then consolidating those requests for submission to the Administrative Office. Similarly, in some circuits the circuit executive collects, combines, and consolidates the requests of the district courts and forwards them to the Administrative Office.

However, it appears that the circuit executive is largely bypassed in the budget process, though occasional successes at "advocacy" were reported. Decisions are made by the Administrative Office, the appropriate Judicial Conference committees, and Congress. Several circuit executives commented that they really had no significant input in the budget allocation process. They also do not, of course, have the authority to allocate funds either within the court of appeals or among the district courts. Several observed that the decentralization implied by the Circuit Executive Act has not been realized. Some observed also that the circuits sometimes are not kept sufficiently informed even to provide needed support at crucial times as their proposals move through Administrative Office and Judicial Conference mechanisms.

Possibilities and opportunities for decentralization remain, however. Several proposals have been developed in the Second Circuit, largely at the initiative of the circuit executive. Most interesting at present is the "incentive budget" now under development in the Financial Management Division of the Administrative Office, providing support to new projects. It should be noted, however, that at least one circuit executive opposed decentralization of the judicial budget on the grounds that there is little scope for decentralized budgeting in the judiciary. We found only limited interest among judges in decentralized budgeting, or in increased circuitwide management otherwise.

## Space and Housekeeping

Problems relating to space, building improvements, and maintenance occupy a significant portion of the time and energies of most circuit executives. The circuit executive for the Third Circuit spent a very large portion of his time on planning for the new courthouse. Several Third Circuit judges emphasized that the circuit executive had saved a great deal of their time. They mentioned that the move to the new building went very smoothly. However, the work certainly preempted a great deal of the circuit executive's time, as much as one-half to three-fourths over many months. (Probably some of this would previously have been handled by the circuit clerk.)

Judges in the Fourth, Seventh, and Tenth Circuits noted that building maintenance and repair problems in the past were handled by the chief or a resident judge (and his secretary), but were now handled by the circuit executive. In the Second Circuit the overall appearance and condition of the courthouse has substantially improved during the past few years, an improvement which several judges attributed directly to the circuit executive.

Some circuit executives kept the time they spent on housekeeping matters to a minimum. For example, the Seventh Circuit executive indicated that while he does deal with the Administrative Office and GSA with respect to furniture and other housekeeping matters, it does not take a substantial amount of his time because he can rely on the judges' secretaries. The Sixth Circuit executive also indicated that this type of work was not a great burden, although he was responsible for remodeling the courthouse. Most routine matters were handled by his secretary, and he has only become involved with them when the situation became serious. (He feels this may change, however, with the impact of some impending major projects.) The circuit executive for the Tenth Circuit minimized the burden of administrative matters, particularly with respect to GSA.

In view of the general concern for courthouse safety and security it was surprising that several judges complained that the circuit executives have not had significant impact on security programs at their facilities. However, we are inclined to discount some of these complaints, as nearly all circuit executives have played a major role in security. In the Second Circuit, the circuit executive, through a Building Operations Committee including two judges and himself, was responsible for coordinating day-to-day problems resulting from conflict of responsibility between the GSA guards and the marshals. The Fifth Circuit executive has played an important part in resolving similar problems. The Tenth Circuit executive has met with the security coordinator from the Marshal's Service concerning security in every courthouse in the circuit; numerous significant modifications have resulted. The circuit executives as a group took a leading role in changing certain GSA proposals that appeared to threaten courthouse security by reducing manpower drastically.

## Recruitment of and Accommodations for Visiting Judges

All courts of appeals use visiting judges to some degree. Although never enumerated as one of the suggested functions of the circuit executive, the responsibility for arranging for visiting judges is a task that the chief judge could be expected to delegate to the circuit executive, at least in part. However, in most circuits the actual recruitment of visiting judges, particularly those from outside the circuit, is considered too sensitive to be handled by the circuit executive. There seems to be a general feeling that a request to serve as a visiting judge should come either from a chief judge or from some other judge; it might appear demeaning or thoughtless for a judge to be invited by the circuit executive.

Thus, in some circuits the chief judge handles a significant part of the recruitment of visiting judges. In nearly all, the chief judge or a designated judge makes the initial contact. Increasingly, however, the circuit executive identifies possible judges (appraising their availability) and determines the need; the chief judge handles the formal contact only. The circuit executive handles the follow-up by arranging for chambers for visiting judges.

The Ninth Circuit makes greater use of visiting judges than any other, and the primary responsibility for recruiting judges falls to the circuit executive. He routinely submits a questionnaire to all district judges within the circuit (both active and senior) asking them to indicate if and when they will be available to sit with the court of appeals. The circuit executive then prepares the court's calendar utilizing senior judges and active district judges. He then contacts judges from outside the circuit, generally senior district and circuit judges who have sat with the Ninth Circuit in the past or who have indicated a willingness to do so.

The arrangements are a major task in the Ninth Circuit. While the circuit executive has undoubtedly saved a great deal of the chief judge's time in recruiting judges, one circuit judge mentioned that some district judges resent being contacted by the circuit executive and prefer that the request come directly from the chief judge. Visitors from outside the circuit made the same observation.

These comments suggest that the circuit executive can be fully effective only if he is treated, in administrative matters, as a professional equal by all judges. If he is viewed as a "managing partner," judges should not resent dealing with him simply because he is not a judge, any more than they resent dealing with the director of the Administrative Office or of the Federal Judicial Center. Where the circuit executive is responsible for scheduling terms of court, he is the one who knows when additional judges will be needed and is in the best position to attempt to find whatever additional help is needed. While a courtesy call or letter from the chief judge is needed and appropriate at some point, in the view of the Ninth Circuit chief judge it is sensible to delegate the responsibility for all details and for the initial contact to the circuit executive, a view we share despite its relative unpopularity among judges.

## Criminal Justice Act Vouchers

As with many aspects of this project, the magnitude of the problem associated with approval of Criminal Justice Act vouchers varied so much from circuit to circuit that the circuit executive's impact is hard to appraise. In some circuits the chief judge, other circuit judges, and the circuit executive passed off the responsibility as being a rather minor one that took very little time. In other circuits it seemed to be the principal routine administrative burden, not only on the chief judge but on other circuit judges and the circuit executive as well. The act (18 U.S.C. § 3006A) requires the chief judge of the court of appeals to approve all vouchers for excess payments, those in excess of the limits established by the act, for trial and appellate court representation. In two circuits (the Fourth and Fifth) the circuit executive is substantially involved in processing and approving vouchers for appellate representation, as well as "excess vouchers" from the district courts.

The procedure employed by the Fifth Circuit seems to function quite effectively. The judicial council first developed standards and guidelines for rates and approvable expense items, and then authorized the circuit executive to approve all claims for appellate representation within the statutory maximum. Previously in the Fifth Circuit, as is still the case in most circuits, vouchers were submit-

ted to the presiding or the authoring judge of the panel that heard the appeal. A number of Fifth Circuit judges felt that the present system saved substantial judicial resources, enhanced circuitwide uniformity, and reduced or eliminated overpayments. Requests for fees in excess of that permitted for appellate representation are referred to the chief judge with the circuit executive's recommendation. In a few cases where the request is troublesome, the circuit executive discusses the matter with the authoring judge or one or more of the panel members prior to making his decision or recommendation.

With respect to excess district court vouchers the circuit executive first examines the vouchers to insure there are no errors or improper charges. Then, using the formula approved by the judicial council, he makes a recommendation to the chief judge, who generally follows those recommendations. Again, if the request seems unusual, the circuit executive discusses the case with the district judge submitting the voucher prior to making his recommendation to the circuit chief judge.

In the Fifth Circuit there are a very large number of vouchers submitted for approval (an average of forty-five to fifty per month). If the circuit executive's involvement saves the chief judge as little as ten minutes per voucher, a total saving to him of one day per month would be realized, in addition to what is saved the panel judges on appellate vouchers within the statutory maximum.

Personal involvement of the circuit executive in approval of Criminal Justice Act vouchers seems minimal in most other circuits, though we are informed that this has changed since our visit in at least one circuit. One circuit has determined that the circuit executive cannot adequately handle CJA vouchers since he is not an attorney and apparently does not have the requisite feel for the relative complexity of legal issues presented in a particular case.

Although the Second Circuit executive has not been involved in the actual review and approval of CJA vouchers, he developed a procedure for handling them. After the procedures were adopted and implemented the responsibility for reviewing vouchers and making recommendations was delegated to a deputy in the clerk's office. The scheme requires that requests for compensation be filed

prior to the date of oral argument so that the presiding judge of the panel can determine from the nature of the argument and the briefs whether the requested amount should be approved. However, according to one judge the vouchers have not always been submitted on time and, therefore, the presiding judge is not always able to consider the request at the time of oral argument. If that happens, the presiding or authoring judge, at some later time, must review the files and briefs in order to determine whether the case merited the requested fee. This inconvenience has now been remedied by a mechanism to control submission of the voucher, assuring it is available at oral argument.

## Correspondence and Reports

Another way the circuit executive can assist the chief judge is with correspondence, reports, speeches, and congressional and other statements. In several circuits the circuit executives have handled routine correspondence for the chief judge, either directly or by preparing letters for the chief judge's signature.

Nearly all circuit executives have been actively involved in the preparation of major statements and reports. They have often helped draft "state of the circuit" messages and other policy statements of the chief judge. In the Fifth Circuit, for example, the circuit executive has assisted in preparing reports and accompanying statistics for the chief judge's use in his annual state of the circuit message, as well as presentations to the Administrative Office, circuit judicial conference, Judicial Conference of the United States, and Congress. In the Ninth Circuit, the circuit executive has been extensively involved in preparation of studies of possible methods of administratively dividing the circuit. There is now an attorney assigned to this full time.

Nearly all circuit executives were instrumental in preparing reports and statistics for use by the chief judge in justifying additional judgeships for the courts of appeals. Especially notable in the D.C. Circuit was the executive's success in defining and justifying a unique standard applicable to this circuit only. This standard, based on the unique caseload of the circuit, was accepted by the Judicial Conference of the United States and Congress.

## Public Relations and Liaison

The act contemplates that the circuit executive will act as the circuit's representative in dealing with state and local bar associations, civic groups, and the news media. In so doing, the circuit executive not only acts as an administrative assistant to the chief judge but provides an important public relations service that has generally been ignored by the federal courts. This is an example of a new function the act facilitates.

The Second Circuit has made the greatest effort to develop improved relations with the news media and the public, recently employing a program analyst on the staff of the circuit executive who also serves as press officer. The circuit executive has prepared press releases dealing with such matters as comments of the chief judge relating to the work of the circuit, approval of the Speedy Trial plans within the circuit, innovations in the courts of the circuit (sometimes in response to specific requests by district courts), the state of the courts' dockets, and the annual report of the circuit executive.

The Second Circuit also has a regular newsletter, produced and edited by one of the circuit executive's staff assistants. Several of the other circuit executives indicated that they hoped to establish a newsletter, but had not found the time or staff, or reached an agreement as to its nature and content. (Some have begun publications since our visits.)

In at least three circuits the circuit executive serves as the courts' liaison with various lawyer groups. In the Fourth Circuit he serves as secretary to the State-Federal Council of Virginia, composed of four state and four federal judges, and was apparently instrumental in the creation of the council. He has also worked with a local community college that is developing a program for court reporters and has established a law school program to assist federal prisoners. In the Ninth Circuit the circuit executive is a member of the Federal Court Committee of the California Bar Association and has worked closely with the committee in drafting its recommendations and proposed alternatives regarding circuit realignment. The Third Circuit executive staffs the Lawyers' Advisory Committee, a valuable link between bench and bar.

Several circuit executives have been extensively involved in the preparation of the circuit histories, which were part of the Bicentennial commemoration. In the Second, Sixth, Eighth, and Tenth Circuits the circuit executive served as a sort of managing editor coordinating the efforts of the contributors and arranging for printing and distribution.

## Miscellaneous Administrative Matters

Several new judges commented that the circuit executive was of particular help to them when they were appointed. He helped in arranging for their chambers, obtaining furniture and office equipment, and generally familiarizing them with the operation of the court.

In only two circuits (the Eighth and Tenth) were there indications that the circuit executive had been involved in "maintaining a modern accounting system," one of the tasks contemplated by the act. In the Tenth Circuit the circuit executive has combined a number of trust funds for improved administration. As with several of the suggested functions in 28 U.S.C. § 332(e), accounting at the circuit level is less consequential than Congress seemed to imagine, in the absence of some kind of fiscal decentralization.

Several circuit executives have been involved in the printing of court of appeals decisions. In the D.C. Circuit the circuit executive performed a cost analysis of printing costs and made recommendations to the court. In both the Fifth and Ninth Circuits the circuit executive handles the details of the contract for printing slip opinions and arrangements with the Administrative Office, and they were involved in setting up the new systems in place there. (In the Fifth Circuit the principal negotiations with the Administrative Office and the publisher were handled at the outset by a judge committee.) In the Second, Fourth, and Tenth Circuits, the circuit executive monitors the printing of slip opinions. The Tenth Circuit executive has also been involved in forms management for the court of appeals and for the district courts. Utilizing printing equipment available in the court of appeals for slip opinions, he has developed a kind of central printing service in Denver, serving the

whole circuit. He has seized this opportunity to achieve considerable circuitwide standardization of forms.

## Conclusions

The act clearly contemplates that the circuit executive was intended to serve, in part, as administrative assistant to the chief judge as well as other judges of the court, relieving them of administrative burdens to the extent possible. Unfortunately, it cannot be said that the circuit executives as a group have been entirely successful in achieving this goal. In many circuits the chief judge is unwilling or unable to delegate important administrative matters to the circuit executive. In a few, the circuit executive has not demonstrated the ability to discharge such responsibilities.

There remains a feeling among many judges that the chief judge should be the one who deals on a personal basis with judges. Perhaps this was most notable in the Fourth Circuit, where district and circuit judges alike commented on the ease of access to the chief judge. The chief judge emphasized the desirability of maintaining lines of communication with the district court judges.

Although they complain about administrative burdens, many chief judges seem to enjoy their administrative role and feel that they are particularly effective in dealing with other judges as well as with the Administrative Office. Some seem reluctant to transfer these responsibilities to the circuit executive. This may change in time, as the incumbents are replaced by new chief judges who have developed their style of management with a circuit executive available. If the circuit executive is to serve a significant function as administrative assistant to the chief judge, it seems essential that each chief judge carefully evaluate his administrative tasks in order to determine which can be turned over to the circuit executive. In some cases, particularly in dealing with district and circuit judges, it may be necessary to inform others of these changes, and to seek their assistance and cooperation with the circuit executive as the representative of the chief judge.

While there has not been the anticipated reduction in the administrative burden on the chief judges of the circuits, this is not because the circuit executives have not, in general, been exten-

sively involved in administrative matters; on the contrary, they have made many major contributions. But in several circuits it was our observation that the circuit executives were so burdened with routine responsibilities that they had little or no time for others. While it is certainly true that the chief judge should not be required to spend his time and energies on parking permits and minor facility modifications, neither should the circuit executive.

The problem may be that there is simply no one to handle the routine administrative chores. They should not fall to the circuit executive or the clerk of the court, both of whom are high-level administrators with many important duties. It may be that there continues to be a need for an administrative assistant in courts. This function probably should lie with the circuit executive and be absorbed into his office (using increased staff as necessary). The circuit executive should be in a position to assume all administrative tasks that do not specifically require the chief judge for symbolic, protocol, policy, or statutory reasons. Nearly all matters that involve routine organizational maintenance and do not clearly fall within the clerk's office or another support operation can be under the circuit executive.

Finally, as suggested by the judges of several circuits, Congress should give attention to the question of legislative changes to assign administrative chores to the circuit executive. The most obvious example is approval of Criminal Justice Act vouchers. This is clearly a ministerial task, albeit one that requires experience and judgment. While it may be that a nonlegally trained person or one without substantial experience in appellate practice would be unsuitable, it does not seem that approval of compensation vouchers should require the time and attention of Article III judges. Some have suggested also that approval of routine council matters, such as salaries of part-time magistrates and bankruptcy judges, should be given to the circuit executive. Again, while approval of such salaries clearly requires an understanding of the tasks and functions of these officials, as well as their particular workload, it should be properly assignable to a high-level administrative officer.

## III. The Circuit Executive and Management of the Court of Appeals

Prior to the Circuit Executive Act, the clerk of the court of appeals was clearly the chief administrative officer for the court. In most circuits the clerk was responsible, for example, for (1) exercising administrative control of all nonjudicial activities of the court of appeals, (2) administering the personnel system of the court of appeals, (3) administering the limited budget of the court of appeals, (4) maintaining an accounting system with respect to funds received by the clerk's office as well as the court trust funds, and (5) establishing and maintaining property control records. The clerk accounted for property associated with his office and also, in many cases, property in the chambers of the circuit judges, courtrooms, and elsewhere.

In some circuits the clerk often conducted studies related to the administration of the courts as requested by the chief judge or the judicial council. These studies involved collection, compilation and analysis of statistical data, and recommendations wherever appropriate (relating primarily to the business of the court of appeals). Most clerks arranged for meetings of the judges of the circuit (especially the annual judicial conference, and the judicial council), prepared the agenda of these meetings, and served as secretary for the council. Many clerks prepared the annual calendar for the court of appeals, establishing the number of terms when the court sat and the location. Finally, the clerk had and has had specific duties assigned to him by statute or by Administrative Office directive.

In 28 U.S.C. § 332(e), nearly all these duties are specifically mentioned for possible delegation to the circuit executive. The potential for conflict with the work of the circuit court clerk is obvious, as is the corresponding need to define the responsibilities of the two officials. This chapter will define and evaluate three general patterns that have developed in the duties of circuit clerks and circuit executives.

The need for a new circuit executive position specifically to manage the court of appeals is open to question. Among the variety of persons and groups who supported the act, the impetus unques-

tionably came from Chief Justice Burger, who seems to have held federal clerks of court in rather low esteem, at least in relation to the needs. To Chief Justice Burger and others, the needs were immense, apparently well beyond the capacities of incumbent clerks. This notion was challenged only by the spokesman for the Federal Court Clerks' Association, who stressed that clerks of court, when given appropriate staff assistance, could perform all of the functions suggested in the proposed bill. He opposed the establishment of the circuit executive position without further study of the need. Support for the act by the ABA, the Administrative Office of the United States Courts, the Judicial Conference of the United States, and most courts of appeals may be viewed in part as support for the Chief Justice's view that the incumbent clerks were inadequate to the larger responsibilities he envisioned. On the other hand, it may simply suggest a reluctance to reject additional staff assistance for undermanned courts.

There was little effort to define the respective responsibilities of clerk and circuit executive before passage of the act. . . .

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Even after the act was passed, few circuits gave much thought to the overlap and conflict between the positions. Only the Fifth Circuit indicated concern, in a comprehensive study of the circuit executive position. The recommendation of the study was not necessarily desirable, however: It was to place the two positions on an equal basis, and to prohibit the circuit executive from significant involvement in the management of the court of appeals.

The failure to adequately define and delineate the roles and responsibilities of these two administrative officers has been and remains a major impediment to effective implementation of the Circuit Executive Act. The problem is severe in about half of the circuits. The result has been conflict, grudging cooperation at best, and diminished effectiveness of one or both of the officers. Fortunately, in the other half of the circuits, the problem remains latent at most. In these circuits the clerk and circuit executive attempt to establish roles and responsibilities that minimize conflict or overlap. However, even in these circuits a number of judges, and the incumbents in both positions, feel that the problem has been avoided

only because of the efforts of the individuals involved; the potential for conflict remains.

. . . .

Three rough patterns seem to have developed in the ten circuits employing circuit executives. First, some circuit executives act as administrative director of the court of appeals, exercising limited line supervision over the clerk and other subordinate offices, including the library and staff attorneys' office. Second, some circuit executives serve as one of the "co-equal" branches or divisions of the administrative side of the court of appeals. The circuit executive is treated as equal with the clerk, as well as with the librarian and senior staff attorney. Finally, some circuit executives fill no line function, but serve as principal staff assistant to the chief judge and to the court of appeals. Their role in clerk's office operations is supervisory, but only in the sense that they act as representative of the chief judge and court.

## Administrative Director

As we see it, in the Second and Tenth Circuits, and in less degree in the Seventh, the circuit executive serves as a kind of director of administrative services over the clerk's office, library, and staff attorneys. The relationship has worked especially well in the Second Circuit. The role or involvement of the circuit executive in the operation of the clerk's office relates primarily to organization, staffing, and general policy, not to day-to-day supervision. The circuit executive does not try to "run the clerk's office" or to interfere with the clerk's control of his personnel. As a result, the clerk evidenced no resentment toward the circuit executive. In fact, he felt that the circuit executive was, in a sense, a staff assistant to him. He emphasized that he had not been trained as a "manager" so he respected the fact that the circuit executive had been selected for the position, at least in part, on the basis of his managerial ability and experience.

The managerial skills of the circuit executive in the Second Circuit have not gone unnoticed by the judges of the circuit either. A number of judges commented on the recent improvement in the operation of the clerk's office. A key change that occurred soon

after the circuit executive was appointed involved the reorganization of the clerk's office from an assembly line operation to a cluster or team structure. In the present system small groups of personnel are responsible for all aspects of a case as it proceeds through the court of appeals. Apparently all are very satisfied with this change in organization and the opportunity for case management it provides. One judge said that the reorganization "expedited administration within the court of appeals." This judge felt cases no longer simply sit on the docket waiting for attorneys to move them along. Rather, the team accepts responsibility for the cases assigned to it and insures that they progress according to schedule.

This reorganization seems important, not only because overdue improvements in the operation of the court actually took place only after the circuit executive was appointed, but because the clerk and circuit executive were able to collaborate harmoniously on the reorganization of part of the court system. The reorganization of the clerk's office was intended to lead to higher productivity as well. It has freed several people to work with the circuit executive on other projects, and to provide a higher level of service generally. The clerk indicated, however, that the reorganized structure required two to three more people within the clerk's office.

Other judges commented that the clerk's office was not only better organized, but was actually functioning more effectively because of the influence of the circuit executive in insuring that the clerk's office recruited and hired fully qualified people. One felt also that the establishment of a merit and incentive program developed by the circuit executive substantially improved job performance. He also felt that the circuit newsletter had a similar effect by providing visibility for court personnel and improving morale. Another judge indicated that the clerk's office was making better use of personnel, thus permitting the office to handle more cases more efficiently. It is especially notable, in view of the strained relations in some other circuits, that the Second Circuit clerk was willing to accept suggestions and recommendations of the circuit executive.

However, the role of the circuit executive in the Second Circuit has diminished the function and importance of the clerk to some degree. Although the clerk rejected the suggestion that the circuit

executive was a "threat" to him, he did concede that the presence of the circuit executive tended to isolate him from the chief judge and the other judges of the court. He indicated that this was not a serious problem, as he simply had less business with the judges than in the past. In his view, the circuit executive was not performing functions that had in the past been performed by the clerk. Rather, he was doing things that the clerk had not handled in the past, either because of lack of time and/or resources or because they were not part of his responsibility. For example, the clerk had never served as secretary to the judicial council, nor was he responsible for building matters. These were handled by judges of the court and are now the responsibility of the circuit executive.

Perhaps the most revealing development concerning the present role of the Second Circuit clerk involves the hiring of a "co-staff counsel" to handle essentially the duties of the senior staff attorneys elsewhere (this position was filled by the CAMP director). Since there was no position available, the office was reorganized and the vacant position of chief deputy clerk used for this purpose. In many large and well-run clerk's offices (both trial and appellate) the chief deputy clerk is responsible for the day-to-day operation of the office, and the clerk devotes his talents to improving its operation, developing new systems and techniques for handling work, justifying additional personnel when needed, and providing better equipment, new systems, and improved training. For example, in the Northern District of Georgia, where the clerk's office is roughly the size of the office in the Second Circuit, the clerk of court is physically separated from the processing area. Thus he remains uninvolved in day-to-day activities, leaving those responsibilities to the chief deputy clerk and other supervisors. In the Second Circuit the circuit executive and not the clerk is recognized as the one who has provided general supervision of the clerk's office, and innovations including improving statistical reporting, new equipment, additional personnel, and new systems and techniques for handling appellate work. Thus it appears that the clerk has been relegated to a role more like that of chief deputy clerk in charge of day-to-day operations, a position now freed for another purpose. In general, this does not seem to us desirable, though in the Sec-

ond Circuit the results have been excellent given the personnel involved.

The situation in the Tenth Circuit is perhaps even more clearly a line relationship. Except for the circuit clerks who were promoted to the position of circuit executive, the circuit executive for the Tenth Circuit is the only one who had recent experience as a clerk of a large federal court (the Central District of California); he was selected largely to tap this experience. At the time of his appointment there were serious personnel problems within the clerk's office and other supporting entities, particularly the staff attorneys' office. Thus, the circuit executive was selected to provide better management for the court of appeals, particularly with respect to personnel.

To facilitate this goal the judicial council of the Tenth Circuit ordered that the circuit executive be given the authority and responsibility for all of the items enumerated in section 332(e). Specifically, he was to exercise administrative control over the following "non-judicial activities of the court of appeals":

1. Plan, organize and administer the personnel system for all para-judicial personnel in the court of appeals with the exception of the judges' immediate staffs . . . .
2. Act as liaison officer between the court of appeals and the General Services Administration by coordinating all activities relating to the procurement, maintenance, and disposition of furniture and furnishings of the court . . . .
3. Act as liaison officer between the Administrative Office and the General Services Administration for the court of appeals for all matters relevant to special needs for the court . . . .
4. Advise the clerk of the court in the maintenance of a modern accounting system for the receipt, custody, deposit and disbursement of all monies and valuables received by the clerk in his official capacity.
5. Conduct studies relative to the business and administration of the court of appeals and the district courts within the circuit and make recommendations to the chief judge and the

council for improvements of same by revising procedures or the amendment or adoption of rules.

6. Collect, compile and analyze statistical data, and prepare reports on such data as may be directed by the chief judge or the circuit council . . . .
7. Attend all meetings of the circuit council and judicial conference of the circuit and act as secretary at such meetings.
8. Institute and maintain a forms management program . . . .
9. Assist the court in maintaining good public relations with all public and private bodies or groups having a reasonable interest in the administration of justice.

Only with respect to the "maintenance of a modern accounting system" does the council recognize the clerk's responsibility, and provide that the circuit executive shall "advise" the clerk on these matters. In others, the circuit executive is assigned responsibilities the clerk's office had handled in the past. According to the clerk, when the circuit executive was appointed, the clerk's responsibilities were divided between the clerk and the circuit executive. Particularly important was the transfer of the staff attorneys' operation and the library from the clerk to the circuit executive. Also important, the circuit executive was made responsible for personnel matters, including hiring, firing, and transferring all clerk's office personnel.

Although the circuit executive was originally involved in the actual operation of the clerk's office, he appears to have gradually withdrawn considerably, even with respect to personnel. A newly hired chief deputy clerk now serves as personnel officer for the court of appeals. Apparently the chief deputy clerk and management analyst recently have provided most of the recommendations and changes for the operation of the clerk's office, which, after preliminary approval by the clerk, must be presented to the circuit executive for final approval. Recruitment has largely been turned over to the chief deputy clerk and to the senior staff law clerk for personnel within those respective units.

One of the Tenth Circuit judges expressed concern over the line structure. He felt that the clerk has lost access to the chief judge

and to the court by having to work through the circuit executive. He emphasized that the circuit executive should provide staff and managerial support to the clerk's office but should not be in a supervisory position over the clerk.

## First Among Equals

In the Fifth Circuit, prior to the appointment of the circuit executive, a committee of the judicial council undertook a study to determine the role and responsibility of the circuit executive and define his relationship with existing court personnel, particularly the clerk of the court. The circuit executive was clearly defined as a "coordinate and equal branch" of the court of appeals. The organization chart for the Fifth Circuit Court of Appeals in the court's personnel manual shows the clerk and circuit executive each reporting directly to the chief judge, and from him to the judicial council. The librarian reports directly to the Library Committee and thus to the chief judge and circuit council. The personnel manual further defines the relationship of the various supporting units: "The head of each court support unit (staff attorneys, librarian and clerk) has the necessary degree of autonomy with respect to the operation of the unit's personnel that is essential for the proper performance of their respective duties and responsibilities. These duties and responsibilities are imposed by statute, rules or regulations, and traditional custom, practice and directives of the chief judge, court or the judicial council."

The manual seems to suggest that the circuit executive shall serve as a coordinator of problems and proposals that go beyond the function and responsibilities of the particular unit and shall present such matters to the chief judge, circuit council, or appropriate committee of the council. In practice, however, the clerk, staff attorney, librarian, and chief deputy clerk have direct access to the chief judge and the judicial council. All attend judicial council meetings on request. There seems to be little need or practice of referring suggestions or proposals through the circuit executive.

In spite of this clear division of duties, it does appear that the circuit executive has taken over certain responsibilities previously performed by the clerk, as directed by the court. As already men-

tioned, the circuit executive prepares the budget for the entire court of appeals staff. The circuit executive is also responsible for GSA liaison, security and allocation of building space, and compilation of data with respect to the work of the court of appeals. (Most data seem to be actually prepared by the chief deputy clerk.) The circuit executive also initiated and supervised preparation of a personnel manual detailing such matters as recruitment, selection, placement, promotion, working hours, compensation, employee conduct and responsibility, benefits, services, leave, and termination. He and a member of the clerk's staff jointly prepared the manual, and later referred it to the clerk for his comments and suggestions. The manual was then approved by the judicial council and distributed.

Because the organization in the Fifth Circuit assured the independence of the clerk and his staff, the high-level members of the clerk's office, although somewhat resentful of the circuit executive and the burdens he placed on their office, felt secure enough to suggest the circuit executive should be more involved in the management of the entire supporting staff. They specifically felt he should be coordinating all personnel matters and serving as "spokesman" for the clerk and clerk's office personnel in dealing with the court and the Administrative Office. However, in spite of these suggestions, there were some complaints that the clerk and his staff had to work through the circuit executive with GSA even for minor building items like changing light bulbs. Unfortunately, GSA insists there be a single person to handle all building matters. As more staff are available perhaps the executive will be able to delegate this.

The Fifth Circuit executive also participates in the grievance procedure, which requires an employee who has a problem or complaint to report the problem first to the immediate supervisor, then to the head of the court support unit involved. If the employee is not satisfied with the decision rendered, he may then seek review by the circuit executive, who, after reviewing the matter, presents it if necessary to the judicial council for its action.

The Circuit Executive Committee (Fifth Circuit) gave serious thought to the problem of the potential overlap of the roles of circuit executive and clerk of court. It requested the clerk and deputy

clerks to submit their views as to what duties should be assigned to the circuit executive, and the committee indicated that some of those recommendations were included in its report. The committee concluded "that appointment of a circuit executive had not placed the clerk in jeopardy of his autonomous role within his assigned sphere, but rather added to the total court structure a trained manager to relieve judges of time consuming, non-judicial duties which detract from their capabilities to perform judicial functions."

Other circuits also have adopted the "first among equals" approach. However, the relationship generally has resulted from unplanned development rather than intentional design. The two individuals, by mutual agreement (sometimes unspoken), have each sought out and discharged the tasks best suited to their skills and the court's needs, avoiding conflicts with each other. In the Eighth Circuit there was some support for the notion that the circuit executive should have broad supervisory authority over the other supporting staff (the clerk, librarian, and staff attorneys). However, the general understanding seems to be that the circuit executive should not supervise either the clerk or the staff attorneys for the present. One judge emphasized that the circuit executive in the Eighth Circuit "will not be superior to the clerk."

According to another judge, the circuit executive is supposed to be responsible for the clerk and senior staff attorney, but he added that the circuit executive "leaves the clerk alone" and "leaves the senior staff attorney alone." The circuit executive's recent move from St. Louis, where the clerk's office and staff attorneys are located, to Kansas City, where the chief judge resides, was appropriate in part because he had few day-to-day responsibilities in St. Louis. However, at least one judge and the circuit executive felt that the circuit executive would eventually become responsible for the overall management and operation of the clerk's office. In the view of a former judge, the circuit executive would handle the overall management and operation of the clerk's office, with the clerk in effect filling the present role of chief deputy by handling day-to-day matters, personnel, etc. He felt that the ideal relationship between the clerk and circuit executive would be a direct line of authority, but that such a scheme cannot be implemented at this

time. As we have indicated, we feel that a line relationship would be unfortunate. Thus implemented, the act would add little to the court except higher pay.

The structure in the Fourth Circuit seems to parallel that of the Fifth. The chief judge emphasized that the clerk of the court of appeals is not subordinate to the circuit executive. He emphasized also that the clerk does not have to go through the circuit executive in dealing with the chief judge, the Administrative Office, or the court, and that the circuit executive has no authority to interfere in the operation of the clerk's office. However, the circuit executive should feel free to make suggestions to the clerk for possible improvements in practices and procedure. This view was shared by several other judges.

However, one judge felt the functions of clerk and circuit executive should be clearly defined to eliminate potential as well as actual overlap. He mentioned, for example, that after the late Judge J. Braxton Craven, Jr.'s sudden death both the clerk and the circuit executive, without the knowledge of the other, sought to make arrangements for closing his office and assigning his cases.

## Comprehensive Staff Support

While a number of circuit executives have been excluded from much direct involvement in the operation of the clerk's office or other supporting entities, many nevertheless felt that their role should be that of line supervisor and expect to operate in that fashion in time. The D.C. Circuit executive is a notable exception: He emphasizes the staff or supportive nature of his position. As a result, both the clerk and the circuit executive maintain their independent responsibilities, despite the expectations of some members of the court that the circuit executive would serve as a "super clerk." Both the clerk and the circuit executive seem to work well together, and both attend judicial council meetings so that each can have direct access to the court regarding his area of responsibility. It is the clerk who serves as secretary to the council, freeing the circuit executive for fuller participation as needed.

One judge felt that the circuit executive "oversees the administration of the clerk's office" by developing personnel and other

policies for clerk's office employees. The circuit executive emphasized that he deliberately does not become involved in the day-to-day operation of the clerk's office and has avoided spending time on minor administrative and housekeeping matters that can be handled by the clerk's office or others. This reflects his understanding of good management practice and of the role the court expects of him. A written statement of activities of the circuit executive emphasizes that his relationship to the clerk is one of staff support rather than administrative direction. The circuit executive is charged with providing "guidance to the clerk of the court in property records and management, budgeting, and control of funds for furniture, etc."

Although much less formally defined, the relationship of the circuit executive and the clerk in the Sixth Circuit seems similar to that of the D.C. Circuit. As already mentioned, the circuit executive has attempted to minimize his involvement in the operation of the clerk's office. He has focused his efforts and attention on working with the district courts and general support for the chief judge and court of appeals in matters that fall between administrative "jurisdictions." He has thereby minimized the conflict with the clerk of the court of appeals. It seems probable that the court would be likely to follow the recommendations of the circuit executive, should a disagreement arise between the clerk and the circuit executive as to some particular aspect of the operation of the court of appeals (including the clerk's office in particular). However, the advice would be more in the form of staff work for the court rather than administrative directive; the circuit executive is not the clerk's administrative superior.

## Conclusions

The circuit executive can serve the court of appeals best in a strong staff capacity without line responsibilities. He should be recognized as the senior administrative official of the court. Thus he should be encouraged to take a leading role both in routine "organizational maintenance" matters not clearly assignable to one of the supporting operations, and in matters of policy (especially those that involve more than one supporting office). He should act

through the court, the council, and committees, however, not simply as supervisor.

Other arrangements have worked well. A strong argument can be made for giving the circuit executive supervisory authority over the clerk's office, as well as such other entities as the library and staff attorneys. That arrangement forestalls the diminution of the circuit executive's role we find in the "first among equals" approach. It also strengthens the circuit executive's leadership in innovation because he has continuous access and responsibility in each support operation. These alternative approaches leave us unconvinced as a matter of policy, though we admit that the "staff" role we prefer is not the only one that can be made to work.

Although items 1 through 10 of section 332(e) are merely suggestive or discretionary, they do suggest that the circuit executive has direct administrative responsibility over the clerk's office. In that degree, these provisions of the Circuit Executive Act conflict with the conclusions we have reached. In our opinion, the clerk should exercise administrative control; the circuit executive does not need to administer the personnel system, the budget, the accounting system, the property control records, the collection, compilation, and analysis of statistical data, and so on, at least with respect to the operations of the court of appeals. If the circuit executive is to have time to serve the many important functions we have drawn in chapter 1 from the legislative history, assisting the court of appeals and its entities, as well as the district courts, in improving administration of justice within the circuit, he should be freed from the responsibility of direct supervision of the clerk's office.

## IV. The Judicial Process in the Court of Appeals

Another major responsibility of the circuit executive—perhaps the most important one—is to help improve the judicial process. This is not to suggest that the circuit executive can or should be involved in the decisional process by which each judge determines the proper disposition of an appeal or motion. The circuit execu-

tive's role is not to decide cases but to facilitate and expedite the decision-making process.

By common agreement there has been a large potential role here. Court of appeals judges have neither the time nor—in general—the specific training or experience to find technical and procedural possibilities, evaluate them, and refine them into proposals that address the court's specific needs and preferences. One circuit executive feels that most judges are too busy and some too "set in their ways" to try to plan for the future and develop new approaches and techniques for handling the work of the court.

## Potential Role of the Circuit Executive

At a minimum, the circuit executive can assist the clerks and others in ensuring that the court has sufficient resources to maximize the effectiveness of each judge. Consistent with the staff role recommended in chapter 3, the circuit executive should, for example, ensure that the clerk's office has sufficient well-trained and efficient personnel so that briefs, records, transcripts, and other necessary papers are available when needed, so delays resulting from incomplete or lost records are avoided. The circuit executive may have a similar role in improving the assistance rendered by the court's library staff, ensuring not only that necessary materials are available but also that the professional staff can provide bibliographical and other supporting assistance. The circuit executive may also have a role to play in the recruitment and selection of staff law clerks for the court and he clearly is or should be responsible for ensuring that they have the necessary physical resources to perform their work effectively.

While the clerk of the court of appeals should be responsible for seeing that his office utilizes the most efficient and effective methods and equipment, it is a clear purpose of the act that the circuit executive should be able to provide advice and assistance. Furthermore, it is undoubtedly the circuit executive who should be in the best position to ensure that each judge and his staff have the most effective office equipment and techniques available. Probably he should assist in obtaining equipment as needed.

There is general agreement among judges that the circuit executive should be responsible for the judicial process to this point: providing the best possible support for judges and their support personnel. Whether the circuit executive's role extends beyond logistics is a question more in dispute. Some judges are concerned that the circuit executive might become too involved in "judicial business," apparently reflecting concern that the circuit executive might encroach on the decisional process. However, experience to date suggests that the circuit executive can assist in improving the procedures for processing cases up to the court's decision, and the procedures for disseminating those decisions, without violating the integrity of the decisional process. Circuit executives can and should suggest procedures that would increase or speed the judicial product without lowering or reducing its quality.

For example, circuit executives have studied and made recommendations for more effective use of court personnel (staff attorneys), development of screening procedures, elimination of oral argument or written opinions, consolidation of related cases or cases involving similar issues, use of different court terms or schedules, and experimentation with settlement schemes. At best, they have provided sufficient information about possible innovations that the judges have relied on staff work in determining if a proposal is suitable for adoption. The use or adoption of such innovations has been and remains a decision made only by the court.

## An Overview

Most circuit executives have helped secure personal and physical resources for the court. However, relatively few have assumed—some have been prohibited from assuming—a major role in recommending or suggesting new procedures to the court for improving the efficiency of the appellate process. A substantial number of judges interviewed indicated that this has been their greatest disappointment with the Circuit Executive Act.

The circuit executives' contribution in this area is mixed. In only two circuits do the circuit executive *and* a majority of the judges of the court of appeals generally share the view that the circuit executive should have a major role in proposing specific im-

provements in the judicial process. One of these circuit executives emphasizes that his role is not simply to carry out the policies and ideas of the chief judge, the court, and the council, but rather to be a creative force in the development of changes, improvements, and innovations within the circuit. Most of the judges agree. There was one judge from this circuit who mentioned that some judges felt the circuit executive was getting too involved in the management of the court, and several were critical of specific innovations the executive had proposed. However, most judges greatly valued the executive's achievements and indicated that he was not reaching beyond his authority. Furthermore, it was apparent that both the chief judge and the judicial council have provided the circuit executive considerable freedom in making recommendations and suggestions for improving the judicial process, in a degree not present in most other circuits.

Another circuit also supports active and effective participation of the circuit executive in the management of judicial business. For example, one judge there also emphasized that the court had modernized and improved its internal procedures during the six years he had been on the court, so that he is able to handle an increased caseload in less time. He feels that the court's improved procedures have allowed him to spend more time in deliberating and in discussing pending appeals with his colleagues. Thus, in his opinion, the judicial work product has improved both in quality and quantity.

In the other eight circuits the circuit executive has been less involved in case management improvements. This is in spite of the fact that numerous judges and, in some cases, the circuit executive himself expressed concern over his relatively modest role. In one circuit, the circuit executive is not a lawyer and the court seems to assume that he could not contribute in this area. There and in at least four other circuits, the circuit executive has had little involvement in the operation of the court of appeals, leaving those responsibilities to the clerk.

In one circuit there is a pervasive concern that a circuit executive might improperly become involved in the court's judicial business. The concern does not seem to be limited to involvement in

the decisional process (not a possibility), but seems to include most significant and sensitive areas of court operations. Although that circuit has a conscientious and diligent circuit executive, there seemed to be few policy areas of court operation in which he took the leading role the act seems to contemplate. He was, by contrast, involved in several operational matters, such as arranging for visiting judges. In this circuit, the clerk and his chief deputy are more involved in improving local rules and developing new procedures for handling cases than the circuit executive.

What seemed surprising was that virtually all circuit judges interviewed seemed well satisfied with this arrangement, while several district judges questioned the lack of involvement by the circuit executive in management of the court of appeals. One district judge commented that no one seemed to be doing any long-range planning or thinking about improving the administration of justice in the entire circuit. He indicated that this should be the responsibility of the circuit executive. Another felt that the circuit executive was being "wasted" on routine administrative matters and should be more involved in the management of the court. (Some of this concern seems misplaced, however. Pressed for examples, one of these judges listed several suggestions, nearly all of which were matters receiving the circuit executive's attention.)

The circuit executive seemed to share those concerns, indicating he would like to spend more time in long-range planning and less in "putting out brush fires." The clerk of the court of appeals felt that the circuit executive should be able to delegate his routine administrative duties to an assistant so he could spend time and thought on present and future problems facing the court.

A surprisingly large number of judges in the other circuits expressed similar concern, many suggesting that improving the judicial process was the circuit executive's biggest responsibility and his biggest failure. In one circuit a majority of the court seemed to share the view that the circuit did not need a court administrator or business manager, but needed someone who would be responsible for case management, making suggestions for changes in local rules and for improving internal operating procedures. One said that the circuit executive should be spending 75 percent of his time

on case management. Another emphasized the circuit executive should not only be an administrator, but an innovator. He pointed out that a prior circuit executive had suggested several beneficial improvements in the court's internal operations. Another judge suggested that the circuit executive should be analyzing the case flow and workload of the court of appeals in order to identify particular problems and recommend solutions. He emphasized that whatever improvements and innovations had occurred in the circuit were the product of thought and suggestions from the judges and the clerk, rather than the circuit executive. Another judge concluded that improvements in the court of appeals had come from several hardworking judges who had improved their own procedures for handling cases. According to these judges, the significant changes came about without major contribution from the circuit executive.

Similar complaints were registered in other circuits. In one circuit where the circuit executive, as supervisor of the staff attorneys, has been involved in the operation of the court's screening program, several judges felt he still should be doing more to improve the operation of the court of appeals. One indicated the circuit executive should be suggesting utilization of new equipment and recommending changes in local rules and in internal procedures for handling cases (in several instances, he has done these things). Another voiced the hope that in the future the circuit executive would become more involved in the development of methods to assist the court in reducing its backlog. Still another judge felt that the circuit executive should conduct studies designed to expedite the processing of appeals, but he noted that ideas and suggestions for such improvements were coming from staff attorneys rather than from the circuit executive. The most outspoken critic of this circuit executive felt that too little had been done by the circuit executive in developing procedures and techniques for handling the workload of the court. He felt that the backlog could have been cleared up with proper planning, by developing new systems for using visiting judges, and better docket control. Finally, a judge suggested that the circuit executive could have made the court better aware of the practices, procedures, and techniques being utilized in other circuits. He conceded that the circuit executive had made re-

ports on projects in other circuits when specifically requested to do so by the court or council but this judge suggested that the circuit executive should be better informed of developments in other circuits. Without request by the court, he should bring developments to the attention of the court.

Similar views were expressed by judges in other circuits. One indicated that several judges had been studying the possibility of creating a divisional office, but that the circuit executive should have considered the possibility, done a preliminary study, and referred the problem—with his report and recommendations—to the judicial council. This judge felt the executive was often passive or even negative concerning possible innovation, especially in matters of equipment application. Not only did the circuit executive rarely develop new proposals, he often responded to proposals of the judges only with problems or obstacles, rarely with solutions to them. Another judge also commented that the circuit executive had not been enough of an innovator and had made few suggestions for improving the operation of the court of appeals. According to another judge, although the circuit executive should not be directly involved in the routine operations of the clerk's office or the staff attorney operations, he should be making suggestions for improvements in the operation of those units as well.

Judges mentioned specific problems which would have benefited from circuit executive attention. One district judge mentioned that, in his view, the court did not have an effective way of scheduling cases, particularly emergency matters. He also mentioned the existence of substantial disparity in the caseloads and opinion production of individual judges on the court.

However, as mentioned previously, it is clear in some circuits that the circuit executive has made a substantial impact in improving the administration of justice, directly reducing delay and court congestion. In the Second Circuit one judge indicated that in spite of a 50 percent increase in the workload, the court had remained current primarily because of procedures developed and recommended by the circuit executive. In the D.C. Circuit, the circuit executive was able to predict an increase in filings and persuaded the court to increase the number of appeals it heard per day (from three

to four) and to employ additional sitting panels per year. Further, the circuit executive (not a committee of judges) studied the use of staff law clerks in other circuits and reported observations and recommendations to the court. The Seventh Circuit executive has developed and proposed many of the procedural refinements implemented there in recent years, many of them in one of his previous capacities, before he was appointed circuit executive.

## Limiting Factors

The circuit executives themselves cannot be blamed entirely for the disappointment in this area. In one case the circuit executive stands willing and able to study and recommend improved procedures for dispatching cases. The court, however, has made it clear as a matter of policy that it is not interested in most innovations, new procedures or new equipment proposed, and prefers to proceed as it has in the past. The court is aware, however, that filings and backlog continue to mount; the executive has demonstrated this precisely and projected the likely future consequences. Even where other circuit executives have been involved, there is a tendency to quickly criticize suggestions that were not adopted, or if adopted, were not successful. Some of the criticism already quoted may be unwarranted, in fact. Sometimes judges were unaware of circuit executive action on issues they mentioned. Sometimes also, judges seemed to blame the circuit executive for uncontrollable problems that beset their courts. Still, much of the criticism is supported by parallel comments of others, or by our observation.

For a circuit executive to be an effective "change agent" in judicial process matters, there must be a fortunate match of an aggressive and knowledgeable executive with a receptive court. An innovative circuit executive, trained and experienced in the judicial process and aware of the problems of an appellate court, with sufficient insight and experience to recommend workable solutions to judicial problems, can achieve little unless his court is hospitable to such suggestions and willing to experiment and implement them.

Finally, the role of the clerk is important in many of the circuits where the circuit executive has played a minimal role in improving the operation of the court. The clerk had often been providing

studies, suggestions, and recommendations for improvement. For example, in the Fourth Circuit, the circuit executive has not been significantly involved in developing new procedures for handling the court's judicial business. However, as clerk prior to his appointment as circuit executive he developed one of the early staff-supported screening procedures. A similar procedure was suggested and implemented by a former clerk of the Tenth Circuit, long before the Circuit Executive Act. And in the First Circuit, where no circuit executive has been appointed, the clerk has suggested and implemented innovative procedures for assisting the court in maintaining its calendar. Thus, in some circuits the circuit executive confronts a hostile climate for suggestions or recommendations. In others, the clerk has been the innovator.

## Specific Contributions of the Circuit Executive: Improved Staff Support

Several circuit executives have made important contributions to court of appeals staffing. This can be done in a fashion consistent with an effort to avoid interfering in the routine operation of supporting offices. On behalf of the court the executive can conduct the more burdensome aspects of recruitment for senior positions. He can also devise and propose courtwide personnel policies.

In the D.C. Circuit, the circuit executive has handled the recruitment and screening of, and participated in the selection of, the senior staff attorney, the clerk, the chief deputy clerk, and the librarian. The Second Circuit executive, in addition to recommending a clerk's office reorganization that provided for better and more efficient staff support, has suggested and implemented new recruiting, training, and incentive procedures. Several circuit executives have been responsible for greatly improving library facilities and service.

The relationship between the circuit executive and the staff attorneys is far from uniform among circuits. While all circuit executives provide some degree of "housekeeping" support for the staff attorneys and may also handle their personnel matters (appointment paperwork, vacation, leave, etc.), in only two circuits does the circuit executive supervise, direct, or oversee either

the hiring or the work of the staff attorneys. Most judges think the latter unwise. One Second Circuit judge—an ardent supporter of the work and accomplishments of the circuit executive—expressed concern about the narrow line separating judicial from administrative responsibilities. He expressed the view that staff attorneys should neither be hired by nor report to the circuit executive. He and others emphasize that the staff attorneys should be hired by and report directly to the court because supervision of their work is primarily a judicial matter. Also, under the direct supervision of the circuit executive, the staff attorneys might get too involved in his projects, thereby reducing their effectiveness for the court. Finally, the best qualified candidates can only be attracted if a meaningful personal relationship exists between the staff law clerks and the judges of the court.

Other judges emphasized that it is more appropriate for the staff attorneys to be supervised by the clerk than by the circuit executive in view of the necessary close relationship between the clerk's office and the staff attorneys, with both dealing with the processing of appeals through the court. However, in one circuit the clerk is not particularly interested in supervising the work of the staff attorneys; that responsibility naturally falls to the circuit executive. In at least one circuit, where the circuit executive had been directed to stay out of the operation of the staff attorneys, the staff attorneys had been given little direction; some sort of regular control and supervision was clearly needed. Supervision by the circuit executive may be valuable for other reasons also. A former circuit executive emphasized that the lack of direct supervisory authority over the court supporting personnel, including the clerk and staff attorneys, had reduced his effectiveness significantly.

Finally, most circuit executives have been instrumental in obtaining more personnel for their courts—both judges and supporting personnel. The circuit executive for the Third Circuit was able to obtain Administrative Office approval for the addition of several deputy clerks to the clerk's office. The Fourth Circuit executive obtained an increase in staff law clerks. Especially impressive were the efforts of the D.C. Circuit executive to justify additional judges for the court of appeals. He demonstrated to the satisfaction of the

Judicial Conference and Congress that the appeals handled by that court were, on the average, more difficult than those in other circuits. Accordingly, the court obtained judgeships for which it could not have shown justification.

## Improving Local Rules and Procedures

Several circuit executives have made significant contributions to the improvement of local rules and practices. But only in perhaps two circuits have the circuit executives been extensively involved in developing new rules and procedures governing both practice before the court of appeals and its internal operation. The Second Circuit executive has been involved in such matters. These include:

1. the preparation of a manual for judges' law clerks
2. a criminal appeals expediting plan
3. changes and improvements dealing with the filing of records and briefs
4. a new procedure with associated local rules relating to motion practice before the court of appeals.

The circuit executive also encouraged the court to establish the position of "motions clerk." This staff law clerk assists on all motions, thereby freeing the judges' personal law clerks to concentrate on submitted appeals. The system also has provided better staff support on pending motions. The circuit executive has also contributed to the procedure for appointing counsel for indigent appellants.

One of the major accomplishments of the circuit executive in this area has been his role in the reorganization of the clerk's office. According to several judges, this expedited the processing of paperwork through the clerk's office and reduced lost and misplaced files. At the same time the circuit executive also encouraged implementation of a new method for processing briefs, records, and other supporting materials. Finally, the circuit executive has provided comments and suggestions on proposed changes to the Federal Rules of Appellate Procedure.

The Second Circuit executive also proposed a new system for expediting criminal appeals within the court of appeals. The recommendation included substantial justification, beginning with a discussion of present problems, and problems which could or would be likely to exist in the future. The circuit executive's proposed solution included proposed changes or modifications to local rules that would be necessary to carry out the recommendation. Thus, the court was provided all the materials it needed to make a decision, and then to implement the decision.

Other circuit executives have made some similar contributions. Several have drafted or initiated descriptions of the court's internal operating procedures. The Tenth Circuit executive was instrumental in preparation of a Practitioner's Guide. This volume is undoubtedly of great value, especially to young practitioners or those with little or no federal trial or appellate experience. However, it apparently was prepared by the staff attorneys at some loss in their effectiveness in providing screening and other support to the judges of the court of appeals. But in another circuit, standards for internal operation were prepared, drafted, and promulgated by a committee of judges without much input from the circuit executive. He was involved only in publishing and disseminating these materials.

The circuit executive's role in screening programs usually corresponds to the circuit executive's relationship with the staff attorneys. For example, in the Eighth Circuit, where the circuit executive had little contact with the staff attorneys, the screening procedures were developed by a committee of the court and implemented by the clerk. In the Tenth Circuit they are administered by the circuit executive.

The circuit executive for the Second Circuit has been extensively involved in that court's Civil Appeals Management Plan (CAMP). Although the concept behind CAMP came from the chief judge, the circuit executive was involved in the development, refinement, and implementation of the project from the start, as well as its evaluation. The circuit executive prepared a memo recommending adoption of the chief judge's proposal to use a prehearing conference, as provided for in rule 33 of the Federal Rules of Ap-

pellate Procedure. The purpose would be to explore the possibility of bringing about a settlement and voluntary dismissal of some of the cases before the court. It was further thought, even if settlement was not achieved, that the prehearing conference could facilitate use of an abbreviated transcript and record by narrowing and focusing the issues. Perhaps also, shorter briefs and reduced oral argument would be possible. Furthermore, these conferences could identify appeals which should be expedited. Typically, the circuit executive's report and proposal are complete with draft procedures and rules, and an estimate of the cost, framed in terms of time, additional staff, and space.

While the Judicial Center report[2] and some observers from other circuits have questioned in some degree the claimed success of CAMP, these criticisms are irrelevant to the present purpose. CAMP is a valuable and significant experiment in improving the administration of justice, and in reducing costs and delay. Similarly, the Second Circuit executive's important role in this and other experimental programs is significant beyond the degree of success of the individual program; it demonstrates that the circuit executive can be a meaningful force in seeking improvement of justice within the circuit.

The Seventh Circuit executive has had a substantial role in procedural innovations and has made significant contributions also to the recent revision of the Federal Rules of Appellate Procedure (working with the senior staff attorney and the clerk). He developed the system of "docketing conferences" in all criminal and in many civil cases. The main functions of the docketing conference (which may be conducted by telephone if counsel are out of town) are to ensure that all administrative matters are in order, that the record will be ready for the appeal, and to inform the circuit executive and staff of any special problems. The conferences were held by the executive until early 1977. The senior staff attorney, appointed then, conducts the conferences now. He prepares a schedule for briefing, reviews the appeal for jurisdictional problems, and

[2] J. Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration (Federal Judicial Center 1977).

determines if there are related appeals that should be consolidated. Where there are large multidefendant cases, he attempts to obtain agreement as to the selection of lead counsel to be responsible for the principal briefing and oral argument. (Other counsel provide supplementary briefs and argument.) The circuit executive has developed and proposed many other innovations involving most aspects of the appellate process.

## Scheduling

In most United States district courts much of the scheduling of court activities is handled not by the judge himself, but by supporting staff (usually the courtroom deputy clerk). Judges have been more involved in court of appeals scheduling. Each court determines, largely on the basis of past experience, how many court days will be scheduled per year and how many cases will be heard per day. Circuit judges, especially the chief judge, have generally undertaken one calendaring function or another to assign cases or judges to the scheduled court days.

In three circuits (D.C., Second, and Third) the circuit executive has attempted, with a large measure of success, to guide this schedule by projecting the number of filings and appeals which will occur, and their effect. Several judges commented that the biggest contribution made by the circuit executive was collection and dissemination of data on the work and "production" of the court of appeals. The circuit executive collects needed data from the Administrative Office and the clerk's office and summarizes and analyzes them for the chief judge. For example, in a recent memorandum, a circuit executive noted that extraordinarily high criminal filings in the past month had been due to a large number of consolidated cases and pointed out that these large consolidated cases carry a substantially longer mean disposition time. The circuit executive concluded that the presence of these cases will prevent the court from showing a further improvement in its median time for disposition of criminal appeals.

The principal purpose in collecting data on the number and types of appeals being filed is to be able to project the number of court terms per year and hearings per day necessary to handle the

anticipated filings. For example, in the Second Circuit the court attempts to establish the optimum number of cases it should have on its docket at the end of a particular term. Thus, as the number of filings fluctuates it becomes necessary to adjust the number of sittings in order to insure that the pending caseload remains on target.

In several circuits the circuit executive also provides a monthly report to the chief judge showing the number of cases docketed, terminated, and pending at the end of the month, and the number pending at the end of the prior month and one year before. In addition, the report reflects the number of cases under submission, the number of decisions rendered, and the number of cases awaiting decision.

Collection and analysis of data on court of appeals filings, dispositions, and pending cases was one of the principal tasks assigned the circuit executive for the D.C. Circuit. He maintains tables and charts that reflect a breakdown of cases filed and disposed of per month by various categories, with comparisons to prior months and years. By maintaining these data the circuit executive is better able to predict the impact of new legislation. This is particularly important in the D.C. Circuit; new legislation frequently involves review primarily or exclusively by this court of appeals. These data allow the circuit executive to predict more accurately the impact of legislation on the court and to convert this increased workload into a justification for additional judgeships.

Scheduling of appellate work involves three separate and distinct elements that traditionally have been handled, at least in most circuits, by three different persons. The court must first determine how many days per year the court will hear oral argument, and the number of cases that will be heard or submitted per day. This decision is generally made by the court or, occasionally, by the chief judge. Next, decisions must be made as to when and where the court will sit, and which judges will compose the various panels. This function has been traditionally handled by the chief judge (or, in some circuits, by an assigned judge or committee of judges). The final step is to assign cases to particular panels. This task is almost always handled by the clerk or his deputy. In some circuits, case assignments are made on a more or less random basis. In

other circuits, an effort is made to place similar cases on the same panel, or to insure that the total burden of each day's assignments is relatively constant, or both.

It has generally been felt that the same person should not prepare the assignments of individual judges to the panels and the assignment of cases to the panels, to avoid any appearance that the court or chief judge can control decisions by placing certain cases or kinds of cases before certain judges. For this reason, in most courts the chief judge has determined which three judges will sit on a given panel and the clerk makes assignments of cases to a panel without knowing what judges will hear them.

In at least five circuits (Third, Fifth, Sixth, Seventh, and Ninth) the circuit executive is now involved in the process, usually by assuming the chief judge's former duty to assign specific judges to particular panels. While it might be thought that such a task is too routine or mechanical an operation to be properly assigned to the circuit executive, it appears appropriate to us. Since it is desirable to separate the function of assigning cases from the assignment of judges, and since the former must be handled by the clerk of the court, it seems logical to assign to the circuit executive the administrative responsibility of assigning judges to panels. Certainly this is preferable to leaving this time-consuming task to the chief judge. The procedure seems to operate effectively. In only one circuit does the clerk handle the scheduling of terms and panels; the chief judge makes panel assignments.

The assignment of cases to panels is one of the major responsibilities of the circuit executive for the Seventh Circuit. For the past five or six years the circuit executive has been responsible for calendaring cases for oral arguments. This function began long before his appointment as circuit executive, when he served as administrative assistant to the chief judge. The circuit executive keeps track of the cases as they progress through the clerk's office and reads or reviews all briefs filed in every appeal. Until recently he held all "docketing conferences" himself. A particular effort is made in the Seventh Circuit to avoid placing related cases or cases presenting similar issues before different panels. Whoever does

this must have some understanding of the nature of each pending appeal.

The Seventh Circuit executive is also responsible for screening recommendations, i.e., whether the case will be disposed of without oral argument, with limited oral argument, or after full argument. This also requires him to read the briefs in each case. He is responsible also for both assigning cases to individual panels and assigning judges to those panels. He uses a strictly random basis for assigning judges to panels.

The circuit executive is convinced that his time and effort are well spent due to the economy of having a single panel deal with a particular legal issue. Otherwise a number of panels would deal with the same issue and have to exchange proposed opinions to avoid conflicts. Perhaps the most beneficial and important aspect is the avoidance of inconsistent panel decisions.

It is anticipated that much of this responsibility will gradually be assigned to the senior staff attorney. We strongly favor this; the circuit executive's job is to design procedural innovations, but not to carry permanent operational responsibilities for them.

The clustering or consolidation of similar cases before the same panel of the court of appeals is under development in several circuits, notably the D.C. and Ninth Circuits. In the D.C. Circuit the circuit executive and senior staff attorney are developing procedures and recommendations for reviewing the cases and clustering them in an appropriate fashion. The circuit executive will not become involved in the day-to-day review and analysis of these cases. The Ninth Circuit is using staff attorneys and a Federal Judicial Center computer application to do this.[3]

A final area relating to the scheduling of terms of court is use of visiting judges. In nearly half of the circuits the circuit executive identifies the terms of court for which visiting judges will be needed. The circuit executive then, either personally or through the Judicial Conference Committee on Inter-Circuit Assignments, contacts possible visiting judges to determine their availability. In

[3] *See* M. Leavitt, CALEN9: A Calendaring and Assignment System for Courts of Appeals (Federal Judicial Center 1978).

these circuits, and in several others, the circuit executive handles the actual assignment of visiting judges to particular panels and provides for their administrative support.

## New Technology

In most circuits the circuit executive has been involved in the evaluation and implementation of equipment and devices to enhance the productivity of the court. For example, in several circuits the circuit executive directed the installation, training, testing, and evaluation of LEXIS in cooperation with the Federal Judicial Center.[4] However, in another circuit WESTLAW was evaluated, not by the circuit executive, but by the senior staff attorney (as the user, he is a logical choice). In the Ninth Circuit the circuit executive, in cooperation with the Administrative Office, initiated computerized printing of opinions. In the Tenth Circuit, the circuit executive evaluated word processing equipment and use of facsimile transmission devices, and established a system for printing opinions and forms for both the court of appeals and district courts. The Third Circuit executive has initiated the test there of computerized word processing and transmission, also in cooperation with the Federal Judicial Center. The Second Circuit executive instituted a system to microfiche court of appeals briefs and records, as well as other innovations mentioned elsewhere.

The Appellate Information Management System (AIMS), a computer software system now under development by the Federal Judicial Center, results largely from circuit executive initiative. It has also been the circuit executives who have managed the elaborate systems work necessary to develop a common "glossary," to standardize docket entries in the degree necessary and to coordinate the needs of the circuits. It is clear that this project would not be in development without circuit executive initiative.

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[4] *See* A. Sager, An Evaluation of Computer Assisted Legal Research Systems for Federal Court Applications (Federal Judicial Center 1977).

### Conclusions

We concluded in the preceding chapter that some circuit executives have been too much involved in the operation of courts of appeals. By contrast, here we indicate they have generally been too little involved. There is another, corresponding difference: The preceding chapter deals with matters that have always been staff responsibilities, while the subject here is the more novel function of improving the judicial process itself. It is easier and yet often less essential for the circuit executive to have an impact on the clerk's office. To assist the judges to improve the judicial process, however, the circuit executive must often seem to intrude on judicial prerogatives and must inquire into and act on highly sensitive matters of policy and of judges' own work patterns.

Still, improving the judicial process has been and remains a very important field for exercise of circuit executive talents and experience. Those who have had a major impact have shown that much can be done. Familiarity with the issues and setting has proved important in this area; legal training and previous experience in the judiciary have been important elements in the success of the more effective circuit executives. Important also is continuous work with all courts of appeals offices, including the clerk's office. A circuit executive who is isolated cannot make knowledgeable contributions to improving the judicial process.

It is possible that many judges overstated the failings of their circuit executive, though they may also have understated them. It may be that judges blamed circuit executives, in our meetings, for ills of the court that have been beyond anyone's control. Often the judges were unaware of the executive's efforts. However, most circuits clearly could use their executives to better advantage. Clearly also, most executives have not taken full advantage of available opportunities to help improve the judicial process.

## V. Assistance to the District Courts

Neither the statute nor its legislative history gives a clear indication of the role of the circuit executive in dealing with the district courts. The legislative history contains numerous references to trial

court problems, and expressions of hope that a new court executive would provide assistance. However, it must be remembered that much of the testimony and other support for the bill related to the original proposal to create executives for both the court of appeals and the larger metropolitan courts. The act itself heavily emphasizes the role of the circuit executive in dealing with the court of appeals. None of the suggested responsibilities involve the district courts only. The ones that refer to "courts within the circuit" only involve studies, meetings, and reports.[5]

However, there seems to be considerable expectation that the circuit executive was intended to be just that—the executive for the entire circuit. Several of the executives see their responsibility as embracing the whole circuit, as do several circuit chief judges and other judges. Yet the prevailing view is that most circuit executives have become "circuit court of appeals executives" or even "super law clerks to the chief judge of the court of appeals," as two district judges described them.

Here again the problem seems to be that there was little planning or definition of the job. Even where there was a determination that the circuit executive should provide assistance to the district courts, this fact was seldom effectively communicated to the district courts. The chief exception is the Fifth Circuit, where the Circuit Executive Committee identified several areas where it expected the circuit executive to represent the entire circuit:

1. developing work measure standards for supporting personnel
2. assisting in justifying the need for additional supporting personnel for all courts within the circuit, and in obtaining authorization for such personnel

[5] The first three suggested responsibilities (28 U.S.C. § 332(e) (1-3)) refer to the court of appeals only. Subsections (4) and (5) may have been intended that way also; in any case the responsibilities mentioned—accounting, property control, space management—are not major circuit executive matters. Subsections (6-10) involve studies, meetings, and reports. While these may be critically important, especially when conducted at council request in support of an imminent council action, they are not the primary concern of this chapter.

3. determining the training needs for supporting personnel of all courts within the circuit, and arranging with the Federal Judicial Center for appropriate programs
4. developing standards and methods for determining the need for and justifying additional equipment, supplies, furniture, and furnishings in all courts within the circuit, and coordinating these with the Administrative Office and General Services Administration
5. investigating and evaluating the use of automated data processing systems and procedures for all courts within the circuit
6. representing the circuit as its liaison to the Administrative Office, GSA, state courts in the circuit, the Marshal's Service, state and local bar associations, and private civic groups interested in the work of the courts.

The committee recognized that the administration of each court was the responsibility of the judges of that district and the chief judge, but anticipated that the circuit executive would provide "some assistance" to the district courts by conducting studies and providing standards, procedures, and systems that would be useful to the district courts. On two occasions the chief judge introduced the newly appointed circuit executive at judicial conferences and emphasized the council's commitment to this understanding of the job.

The Tenth Circuit also perceived the circuit executive from the beginning as someone who could advise and assist the district courts. The circuit executive for the Tenth Circuit is the former clerk of the Central District of California; prior to that he served in an administrative capacity with the Los Angeles County Superior Court. He was selected as circuit executive, in part, because the judicial council felt that his background and experience would allow him to be of significant assistance to the district courts. Shortly after his appointment the chief judge introduced him at a judicial conference, emphasizing his responsibilities throughout the circuit.

However, in over half of the circuits the district judges and court clerks generally said that the circuit executive has been of lit-

tle or no assistance. In general they indicated that they perceived the circuit executive as significantly involved in arrangements for the annual judicial conference and that they receive statistical reports and other information from him from time to time, but otherwise have very little contact with him. Most gave no examples of having sought assistance from the circuit executive. Generally they said they really did not need his help. Surprisingly, in two circuits both judges and clerks observed that the circuit executive never took the time to drop into their chambers or offices to see if they had any problems for which he could be of assistance, although he was frequently in their building in connection with court of appeals hearings or other business.

In most circuits there were occasional instances of help. For example, one judge in a metropolitan district mentioned that the circuit executive had assisted the court's magistrate committee in preparing statistics and supporting materials to justify additional magistrate positions and had helped the court obtain additional and more productive Xerox machines. He also mentioned that the circuit executive had helped the district court obtain authorization from the Administrative Office for additional personnel. The chief judge of the same district indicated that the circuit executive had been helpful when called upon, but that he had not sought his assistance often. He did mention that the circuit executive had been of some help in getting a swing reporter for the court. In another circuit one judge from a small rural district indicated that the circuit executive had helped resolve the question of where a new judgeship would be located and arranged for accommodations for the judge. Also mentioned was that the circuit executive had assisted in arrangements for establishing a public defender's office. However, in the same circuit the clerk, chief judge, and other judges of a metropolitan court indicated that the circuit executive had not helped them at all.

In sharp contrast, there were at least two circuits that differed markedly from the above. Most district judges and clerks interviewed in the Sixth Circuit indicated that the circuit executive had been of real assistance to them. One circuit judge considered this an "unexpected benefit," as the circuit judges perceived the position as

serving the court of appeals primarily. The circuit executive has made a specific and apparently successful effort to develop a good working relationship with clerks and judges in the circuit. (By his admission, he has been less successful in assisting the other judicial personnel such as bankruptcy judges and magistrates.) According to one circuit judge, the circuit executive has "done a fantastic job as liaison with the district judges." Another pointed out that this liaison between trial and appellate courts did not exist before. It was also pointed out, in contrast with the situation in other circuits, that the circuit executive was not viewed by the district judges or clerks as a "spy" or "arm" of either the chief judge of the court of appeals or the judicial council. Rather, he is considered someone who has the interest and ability to assist in resolving problems.

Comments from district judges were almost equally supportive. They mentioned, among other matters, that the circuit executive had worked with the clerks of the district courts in developing statistics to support requests for additional deputy clerks and in resolving problems in court reporting and jury selection.

Although their support was not as uniform, a number of judges of the Southern District of New York indicated that their circuit executive had been of significant assistance to them. One judge mentioned that the circuit executive had provided statistics supplementing those published by the Administrative Office, specifically, information regarding the number of trial days per year for each judge and the number of completed trials per judge. This judge emphasized that individual judges are isolated and frequently are not aware of the procedures and experience of their colleagues. Therefore, circuitwide data allowed a judge who was not maintaining pace to consider the possibility of using procedures employed by colleagues who keep their calendars more current. More generally, he felt that the circuit executive had significantly improved the administration of justice within the circuit and within the district, by helping relieve district judges of administrative burdens. However, this view was not universal. The circuit executive's efforts were praised by some judges and criticized by others.

## Difficulties

Several factors have limited circuit executive assistance to the district courts. Clearly a circuit executive's first priority is to serve the chief judge and other judges of the court of appeals, and the judicial council. In some of the circuits, particularly the larger ones, the business of the court of appeals and judicial council takes most or all of the circuit executive's available resources, so he has little or no time to assist the district courts. With little or no staff, the executives have had little time to spare for this.

There is also doubt in some circuits that the circuit judges or judicial councils have committed the circuit executive to assisting the district courts. We have mentioned the two clear exceptions, the Fifth and Tenth Circuits. However, even those circuit executives do not seem to have had sufficient time to visit each district court on a regular basis or provide assistance other than with respect to certain specific projects.

Other circuits gave no special emphasis to this responsibility. For this reason a number of district judges were somewhat surprised when asked whether the circuit executive had helped them or their courts. A number indicated that they had not thought of asking the circuit executive to assist, feeling that he would not have time to do so or that the judicial council would not want him to spend his time and energies on district court matters.

Another impediment is the executive's responsibility as staff to the judicial council. Since that body exercises a degree of supervisory authority over the district courts, the circuit executive is sometimes seen as a "spy" or, less pejoratively, as a "representative" of the chief judge of the court of appeals or the judicial council, or both. Thus a number of district judges in the Third Circuit expressed the feeling that greater awareness and involvement of the circuit executive in their activities and problems might carry with it greater intrusion by the judicial council in the affairs of the district court. In their view, this presented a threat to the independence of district court judges.

Initially there was almost universal suspicion and even hostility on the part of the clerks of the district courts toward the office of the circuit executive. As noted in chapter 1, the Federal Court

Clerks' Association and its officers, most of whom were clerks of district courts, raised the lone opposition to creation of the position. Some of the hostility, resentment, and suspicion remains. In most circuits the initial concern has mostly evaporated, because the district court clerks have found either that the circuit executive can be of assistance (particularly in dealing with the court of appeals, the judicial council, and the Administrative Office) or that the circuit executive neither helps nor bothers them. In several circuits a change in district court clerks has changed the climate. Also there was a prior relationship in some other instances, often where the clerk and circuit executive knew each other at the Institute for Court Management. For example, the clerk of the District of Columbia district court has found the circuit executive not a threat, but has sought, obtained, and valued his assistance on occasion.

There seems also to be an attitude in some larger districts perhaps best described as professional jealousy. These clerks resent the circuit executives' high pay and status, feeling that their own responsibilities have at least equal scope and importance. Some also fear that the existence of a circuit executive will preclude creation of the office of district court executive, which they feel is needed. (Of course, in all of these cases, the district court clerk feels he is already performing the responsibilities of the district court executive; it would appear that the concern is primarily over title and salary.) There are isolated instances where the circuit executive has been of such assistance to the chief judge of a district court as to undermine the clerk's authority and weaken his position with the district chief judge, at least in the clerk's own view.

Most disappointing in relation to the purposes of the act is the feeling expressed by the chief judge of one circuit that the circuit executive cannot deal on a personal basis with district court judges. He said—and others appear to share the view—that district court judges would resent suggestions or recommendations coming from the circuit executive or any other staff member.

Finally, the effectiveness of the circuit executive in dealing with the district courts depends on his interest and initiative, in the absence of specific encouragement by the judicial council or chief judges. It is primarily in circuits where the executive has provided

assistance without specific direction from the judicial council that a strong and useful relationship has been established. The circuit executives for the Second, Sixth, and Seventh Circuits indicated that they responded to problems arising in the district courts either on their own initiative or on the request of the district courts. On the other hand, the circuit executive for the Eighth Circuit has been specifically authorized by the chief judge and the judicial council to provide any assistance he can to districts having problems in handling their caseloads. The action was undoubtedly prompted by the fact that the prior circuit executive apparently saw his office as providing assistance to the judicial council, but "direction" to the district courts; it was generally reported that he never offered to assist the district courts and declined to work with court clerks. The present circuit executive indicated that he was spending up to 25 percent of his time as an "ombudsman" for the entire circuit, and there are other reports from the courts of assistance rendered by the circuit executive.

There is some feeling among district court clerks and judges that the circuit executive can be of greater benefit to the smaller, rural districts. A number of the chief judges and clerks of metropolitan courts said they are able to deal effectively with the support units like the Administrative Office and General Services Administration. Due to the magnitude and frequency of their contacts with those agencies it is preferable for them to deal directly. On the other hand, the smaller districts have less contact or expertise, so the circuit executive is a natural liaison for them.

## Circuit Executive Assistance

Where the circuit executive has the time, interest, ability, motivation, and authority to work with the district courts, he has provided many forms of assistance. While few, if any, circuit executives provided the entire range of assistance discussed here, the following discussion provides examples of ways the circuit executive can serve the district courts.

The circuit executive can be accessible to district court judges and clerks as well as to other judicial and supporting personnel. Particularly in the larger circuits, the circuit chief judge may be ex-

ceedingly busy and hard to reach. Furthermore, there may be matters which do not seem important enough to justify a call to the chief judge, but which require attention or action at the circuit level. A number of judges and clerks have found that they can go to the circuit executive. Some matters he can handle directly, others he can bring to the attention of the council or chief judge at an opportune moment.

Circuit executives have assisted district courts with personnel needs and problems. Perhaps most significant was the assistance of circuit executives in providing data and supporting materials justifying additional judgeships for several district courts. In the Seventh Circuit, Chief Judge William E. Steckler described a problem the Southern District of Indiana had had in obtaining additional judgeships. The circuit executive helped the court prepare data which showed, because of differences in counting prisoner petitions, that the Southern District of Indiana actually had a substantially higher caseload per judge than had been reported for other districts. These revised data convinced the judicial council and Judicial Conference to approve two additional judgeships. (However, in several districts in other circuits the judges reported that the circuit executives had been of no assistance in preparing justification for additional judgeships.) Circuit executives also assisted district court clerks in preparing justifications for additional deputies. The executive can be especially helpful in unusual situations. For example, a pro se clerk position was established in East St. Louis with the circuit executive's help in demonstrating unique need.

The circuit executives have been helpful in obtaining additional or part-time reporters. In some circuits (the Third and Sixth are examples) the circuit executive has carte blanche authorization from the judicial council to approve temporary contract court reporters under 28 U.S.C. § 753(g). However, in another circuit the chief judge specifically mentioned that the authority to approve a contract reporter for $800 was something that had to be handled by the chief judge and could not be delegated to the circuit executive. In a number of circuits, including the Second, Third, and Eighth, dis-

trict judges reported that the circuit executive had helped them get a swing reporter for their court.

Among management issues in district courts, court reporter problems are almost uniquely a circuit problem as well. Late transcripts delay a trial court only with respect to motions for a new trial, or preparation of findings of fact and conclusions of law in a nonjury case. It is for the court of appeals that delay in producing transcripts may significantly delay the processing of many or most cases. This circuitwide problem that falls between the usual responsibilities of trial and appellate courts seems precisely the sort of issue best suited to circuit executive initiative.

When serious delays arose in one district, the circuit executive mounted a comprehensive attack on the problem. After meeting with the district judges he arranged with the Administrative Office to have a widely respected court reporter from outside the circuit make an on-site study of the problem and recommend ways of alleviating the backlog and delays. After the study was made and the report issued, the circuit executive again met with the judges. The result was a program that included retraining reporters the consultant had found deficient, pooling existing court reporters, and providing some contract court reporter assistance.

Noteworthy about this episode is that the circuit executive provided technical assistance to a metropolitan district court in a very sensitive matter, and the solution involved basic changes, not simply more resources. Court reporter problems present notoriously difficult management issues because trial judges often refuse to permit anyone else to direct or supervise their reporters. It is rare for any outsider to intervene successfully in court reporter matters, particularly where the actions include a program to remedy specific deficiencies.

While recognizing the circuit executive contribution, the judges of this district emphasized that the problems had been resolved by the court, and not through action of the judicial council. It is notable that the problem was resolved or substantially alleviated to the mutual satisfaction of all concerned without threatening the independence of the court, unnecessarily interfering with its responsibilities, or creating bad feelings between the court of appeals (or

judicial council) and the district court. It is precisely this kind of service the circuit executive can best perform.

The circuit executive for the Second Circuit helped resolve a similar problem. The Eastern District of New York, partly because of a great demand for daily copy, was late in producing ordinary transcripts. The circuit executive provided a person to make a management study, which reported that there was no management or coordination of court reporters. Here the circuit executive was able to persuade the Administrative Office to provide a person to collect data and to develop management procedures for the office. This procedure turned out to be so satisfactory that the court reporters themselves contributed funds to hire a person to serve as office manager and staff.

The circuit executive for the Second Circuit was also significantly involved in an attempt to provide court reporter assistance to the magistrates. The circuit executive encouraged one of the magistrates to draw up a report detailing the problem and making suitable recommendations. The report and recommendations were then circulated to all the magistrates within the circuit and were presented to the judicial council for its approval. These actions placed the recommendations before the Administrative Office and the Magistrates' Committee of the Judicial Conference.

Circuit executives have obtained temporary secretaries for district judges. They have helped retain secretaries who might have been lost to the court system by finding a temporary place for secretaries of district judges who died, or who for reasons of age or ill health no longer needed a secretary. Sometimes a secretary in this situation has served as pool secretary, helping several judges as needed; this helps the court retain outstanding employees who are then available when a new judge is appointed.

In at least half of the circuits the circuit executive is involved in the assignment of visiting judges to district courts within the circuit. In the Second, Seventh, and Ninth Circuits there were several examples and favorable comments by district judges about assistance the circuit executive had given them in locating and arranging for visiting judges to help out either with temporary emergencies or excessive backlogs. In both the Second and Ninth Circuits the cir-

cuit executives indicated that they knew the state of the docket in each of the districts and the relative backlog of the district judges individually, so they were in the best position to know when a request from a district was justified and where a visiting judge might be found. Although the Fifth and Ninth Circuits have judicial council committees, mostly composed of district court judges, to develop guidelines and arrange for the assignment of visiting judges among districts, it appears that the circuit executive is substantially responsible for recruiting and arranging for visiting district court judges.

A number of district court judges elsewhere, primarily in two circuits, indicated that they had unsuccessfully sought assistance from the circuit executive in obtaining visiting judges. In one of these circuits the chief judge indicated that the circuit executive could not deal with individual judges, district or circuit; such liaison had to be conducted by the chief judge himself.

In the Second Circuit, the circuit executive acts as liaison with the General Services Administration for the entire Foley Square courthouse, which houses both the district court for the Southern District of New York and the court of appeals. Several judges commented that the condition of the courthouse had substantially improved due to the efforts of the circuit executive. In the D.C. Circuit, the circuit executive and the administrative assistant to the chief judge of the district court coordinate space problems. There were other comments of a more individual nature. The circuit executive for the Eighth Circuit assisted a new magistrate in locating and equipping his chambers. The chief judge of the District of Colorado stressed that the circuit executive had been of great assistance in providing court facilities on the western slope.

On the negative side, a number of judges in a large circuit pointed out that the new judgeship bill, if approved, would create a crisis condition in their courthouses because there would be inadequate space for district judges and resident circuit judges alike. The circuit executive seemed oblivious to these problems. Surprisingly, some circuit executives seemed to be rather uninvolved in security measures for the buildings shared by them, the court of appeals, and a district court. In one location the resident district judge indi-

cated that there had been serious security problems and the circuit executive had been of no assistance, while in a smaller district in the same circuit the chief judge indicated that the circuit executive had assisted in working with the Marshal's Service and had provided for enhanced security protection during an important criminal trial.

In the Sixth and Eighth Circuits a number of clerks indicated that the circuit executive had helped them in their dealings with the General Services Administration and with the Administrative Office. All these comments were made by clerks of relatively small districts.

On a more sporadic basis, circuit executives have been involved in miscellaneous district court problems, from assisting and advising district judges as to how to report outside income, to the convening of three-judge district courts, to providing for a more effective method of distributing court of appeals slip opinions to the district judges, to advising the chief judge of the district as to what steps had to be taken to remove a United States magistrate who was not adequately discharging his responsibilities. The Fourth Circuit executive circulated the result of his inquiry into the application of the Hatch Act to court employees. The Seventh Circuit executive assisted a district court in resolving a sensitive problem as to where a particular district judge would hold court.

A judge of the Southern District of New York remarked very supportively that the district court judges felt they could deal directly with the circuit executive without needing to go through the chief judge of either the district court or the court of appeals with respect to a host of administrative and building problems such as parking. The judge mentioned the establishment of a better restaurant for judges, and an art exhibit in the lobby, as recent accomplishments of the circuit executive. This judge mentioned that he was nominally in charge of the "restaurant project" but had been able to delegate the entire matter to the circuit executive.

The Second Circuit executive has taken many different initiatives that have supported most aspects of trial court operation and work. He convened a series of conferences and exchanges with the district Speedy Trial reporters and supported the work of a pilot

group of judges in one district who implemented the final time limits early. He has organized a number of central services for the building, many serving all courts in the circuit. Improved systems to use support personnel resulted from his initiatives, including a better system to assign cases to magistrates and a system to assign probation officers to a single judge for presentence reports. Other areas in which specific improvements seem to have followed his initiatives are uniform local rules on bankruptcy, pro se clerks, interpreters, law clerk training, courtroom deputy staffing, standards of decorum for courtroom deputies, service of process, telephone equipment, courtroom sound equipment, data processing, librarian salaries, and outside management help. Perhaps most notable of all, he was invited by one large court to take a leading role in recruiting their clerk of court. At the court's encouragement, he provided numerous leads to promising candidates, assisted in screening, arranged for interviews, and participated actively in each step of the selection process.

It is surprising that in many circuits few instances were reported of circuit executive help in suggesting and providing modern office equipment for the district courts. One helped provide tape recorders for use in several of the districts, others helped obtain modern filing equipment. This lack of activity is particularly surprising in view of the fact that it is generally perceived that the circuit executive is knowledgeable about office equipment and computers and should be making that knowledge and expertise available to all courts within the circuit.

Circuit executives have frequently been involved in training and arranging for a variety of conferences and seminars. For example, several circuit executives have arranged for a regular conference of chief district judges, providing them an opportunity to discuss their problems and giving the circuit executive an opportunity to learn of the problems of the districts, providing what help he can. Several also have provided for training conferences for district court clerks and chief deputy clerks. The Eighth Circuit executive arranges for annual district clerk seminars, annual orientation sessions for law clerks, and joint sentencing institutes. Other circuit executives have participated in planning sentencing institutes, workshops for dis-

trict judges, and conferences for magistrates, usually under Federal Judicial Center auspices. The circuit executive for the Fourth Circuit has arranged an annual orientation conference for law clerks.

Skepticism and concern were expressed over the value of some conferences and of the executive's role. In one circuit a judge suggested that the circuit executive's responsibility was limited to arranging for "coffee and doughnuts" and other administrative matters, and that he was not involved in substantive planning or preparation. In another circuit there had been only two clerk conferences in three years, both arranged by the clerks themselves with the assistance of the Administrative Office, without any participation by the circuit executive. Some clerks in circuits where the executive planned and convened a conference complained that they had been unproductive.

Since few circuit executives have been much involved in the organization, staffing, or operation of the clerk's office for the court of appeals, or in improving case management at the court of appeals, it is not surprising that few have had much impact on the district courts in those areas. However, the circuit executive assisted in a reorganization of the clerk's office for the Southern District of New York that followed the change of that court from a master calendar to an individual calendar. More recently, he assisted the district court in implementing a pilot program designed to organize the court, both judges and supporting personnel, into clusters of four or five judges and associated supporting personnel to improve and decentralize management and support. In the Tenth Circuit, the circuit executive, according to a district chief judge, spearheaded a computer program to assist the Central Violations Bureau project. This project will automate receipt and processing of federal traffic offenses occurring in national parks and on other federal lands in all districts in the circuit.

Circuit executives have sometimes requested collection, analysis, and dissemination of data on district courts beyond what is published by the Administrative Office. While this has been some burden on the clerk's office, it has been valuable to several judges. The Second Circuit executive provides, on a monthly basis for each judge of each district, the number of cases filed and termi-

nated, both civil and criminal, and the increase or decrease in backlog. Additional data deal with trial days and other internal information. The chief judge of one metropolitan district court commented positively on the value of such data, feeling that "the more we can tell each other about what we are doing, the better off we all are." Although these data are also collected to keep the judicial council informed about the work of the district courts, they benefit the district courts directly. However, several district judges feel the data collection and dissemination is highly improper, primarily because they provide "ammunition" to the council.

In at least two circuits, the Fifth and Seventh, the circuit executives have been instrumental in establishing federal public defender and community defender offices. In both circuits, the circuit executive became aware of problems in the various districts primarily through reviewing appellate cases, either for calendaring purposes or in connection with Criminal Justice Act vouchers. They collected the necessary data to justify the new offices and forwarded the information to the chief judge of the affected district court, explaining what steps to take to establish the office, if the court chose to do so.

## An Unfinished Job

Two points can be drawn from the above sampling of circuit executive assistance to the district courts. First, it is clear that there are many areas where a circuit executive can assist the district courts. Second, it is equally clear, except in two or three circuits, that the assistance provided has been sporadic at best. Thus it is not surprising that almost all persons interviewed in connection with this study indicated that the circuit executive should be doing a great deal more to help the district courts. Even in the Sixth Circuit, a few district judges indicated that the circuit executive should be doing more to help them with their problems, especially problems relating to case management.

Elsewhere this view was more common among circuit judges than district judges. For example, in the Third Circuit the chief judge and several other circuit judges indicated that a primary task of the circuit executive should be to assist the district courts.

Clearly, providing more than episodic assistance to the district courts would require that the circuit executive visit them occasionally. Some visits should be of several days. In this way he would get to know the personnel within the district, learn of their problems, and be familiar enough with the setting to suggest workable solutions. The problem with this suggestion is obvious. The Fifth Circuit, for example, has nineteen districts; a week spent in each district would preempt nearly half a year. However, several executives have had remarkably little contact with their courts. A short visit each year, and a rotating visit of three days or so every three or four years would be a minimal burden in most circuits. As the executives fill the new position of administrative assistant, they will have more time to work with the district courts.

Unlike other roles assumed by circuit executives, the role discussed in this chapter did not generally exist before. Although the clerks of a few circuits did arrange conferences for district court clerks, and may occasionally have attempted to help district court judges and district court clerks with management and administration problems, there has been no one who could bring both the perspective of an outsider and the expertise of a court manager to bear on the problems of the district courts. Also there is no one else who, because of his dealings with the Administrative Office, GSA, and other agencies, can assist district court clerks and judges in resolving problems that may appear unique to them, but to the circuit executive may be relatively common.

## VI. Staff to the Judicial Council and Judicial Conference

### Background

The circuit executive is an officer of the judicial council. He is appointed by the council and is, by statute, authorized to "exercise such administrative power and perform such duties as may be delegated to him by the circuit council." As indicated in chapter 1, there was considerable hope when the act was passed that it would remedy some perceived failings of the councils. These include a

supposed failure to exercise their supervisory authority,[6] and failure to achieve the administrative decentralization expected when they were created. Many judges interviewed in connection with this project emphasized that one of the major reasons for the establishment of the office of circuit executive was to improve the effectiveness of the judicial council, particularly in its dealings with the district courts.

The companion report of this project describes the work of the judicial councils. This report describes how the circuit executives have served their respective judicial councils in light of the hope that the new position would add new dimensions to council work.

## Impact on the Councils

The circuit executive is limited in his opportunities to achieve basic changes in council responsibilities or operation. He cannot be expected to supply leadership for the council and certainly should not assume its responsibilities; his function is only to serve as staff to the judicial council. As a number of judges and circuit executives emphasized, the role of the circuit executive with respect to the judicial council must depend on the council's own perception of its role and responsibility. It seems fair to say that many circuit judges are not very interested in the work of the judicial council. Some emphasized that they were appointed appellate judges, not court administrators. Others see the judicial council as a relatively unimportant entity. In particular, we found very little enthusiasm for an increased council role in a more decentralized judiciary.

The circuit executive can hardly be expected to change these attitudes and perceptions. However, he can provide significant initiative and direction.

In some circuits the judicial council has been the chief judge. In one circuit there were numerous comments that the prior chief judge had handled "council matters" entirely on his own without involving either the circuit executive or the other members of the council. Since the chief judge is chairman of the judicial council, he

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[6] *See* P. Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. Chi. L. Rev. 203 (1970).

must provide leadership and direction for the council if it is to have much vitality. If he acts largely on his own, other judges may not be inclined to object. If he is uninterested in the problems of the district courts, the council is not likely to be attentive to those problems.

Some chief judges have recently taken steps to counteract the apathy of some of their colleagues. Particularly in the large circuits, they have attempted to involve all of the circuit judges in the administration of the circuit by delegating administrative responsibility to judicial council committees. The availability of the circuit executive has facilitated the expansion of the judicial council committee structure. He can provide some staff support for committees, adding to their effectiveness and reducing the burden of committee work on judges. Unfortunately, in some cases expanding the committee structure has led judicial council committees to do work that could be delegated directly to the circuit executive.

There is some doubt among the judges of several circuits, especially the Third and Tenth, as to the extent of the council's authority to supervise district courts. This uncertainty undoubtedly results from the fact that council action in dealing with a district court was repudiated by a specially constituted court of appeals in a Third Circuit case and was not supported by the Supreme Court in a Tenth Circuit case.[7]

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[7] *In re* Imperial "400" National Inc., 481 F.2d 41 (3d Cir. 1973), *cert. denied*, 414 U.S. 880 (1973); Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970). The *Imperial "400"* case illustrates one of the ambiguities associated with council action. There the entire council—all of the active circuit judges—directed the district court to remove an attorney in a bankruptcy proceeding. A three-judge panel of the court of appeals (composed of three out-of-circuit judges) later reviewed the district court's action and held the council order improper on procedural grounds. Yet, at page 46, Judge Aldrich for the court said the councils have a "broader responsibility, to oversee the district court as a whole, not just in regard to day-to-day operations and internal problems, but in the larger perspective of the court's place in the body politic . . . ."

Similarly supportive language appears in the *Chandler* case, both in Chief Justice Burger's opinion for the Court (at 85, for example) and in Justice Harlan's lengthy concurring opinion. However, the dissents of Justices Black

Even with an "active" council, there may be other obstacles to effective staff support. For example, one of the most beneficial roles that the circuit executive can play with respect to the judicial council is to serve as liaison between the council and the district courts. However, in some circuits the "resident" circuit judges have traditionally carried out this responsibility. In some cases they continue to do so.

Finally, and perhaps most important, a purpose behind the creation of the eleven judicial councils was to achieve a degree of decentralization of the administration of the federal courts. The extent of actual decentralization has been minimal, however. There is some evidence that the Administrative Office is willing to delegate certain limited responsibilities (such as the furniture budget, and possibly others) to the judicial councils. Also, some recent legislation has empowered the councils to review district court plans and obtain court reporters by contract, for example. Otherwise, little has changed, though the councils do carry out the decentralized supervision intended.

Whether the circuit executive has succeeded in "vitalizing" the judicial councils is a question that defies a single answer. The perceptions of individual judges vary. In most circuits, especially those that take a passive view of their supervisory responsibility toward the district courts, the circuit executive is not often used in any meaningful way beyond routine staff assistance. Occasionally he is asked to investigate specific problems or emergencies. Sometimes he has an important role in reviewing plans the district courts must submit.

However, the Second Circuit council has increased the scope of its activities in many areas. In some degree this can be attributed to the presence of the circuit executive. By recognizing or even anticipating problems, and suggesting council action (or the appointment of a council committee to undertake an investigation and recommendation), the circuit executive has encouraged the judicial

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and Douglas seem to have been very influential: Many judges, circuit and district, referred to the case almost as though the dissenters had spoken for the Court.

council to increase its sensitivity to the problems of the district courts and to press for a larger role in relation to the Judicial Conference of the United States. In other circuits, notably the Sixth, the circuit executive provided assistance to the district courts in a successful attempt to resolve local problems before they reach a state that requires judicial council attention or action. He has done this with the general approval of the judicial council, but usually without specific direction. Given the relatively passive role of most judicial councils, it may be that the circuit executive can best serve the council by assisting the district courts in solving their own problems so that the judicial council need not become involved.

Only the Fifth Circuit attempted to define the circuit executive's role in advance. According to the report of the Circuit Executive Committee, adopted by the Fifth Circuit judicial council, the circuit executive was to:

1. serve as secretary to the council
2. prepare the schedule of meetings as directed by the chief judge
3. coordinate and prepare the agenda for meetings
4. prepare reports containing background, evaluation, and recommendations regarding subjects on the agenda
5. based on council decisions, prepare policy statements, orders, and rules for signature by the chief judge and the council
6. take and prepare minutes of the council meetings
7. study the duties, functions, practices, and procedures in other circuits and inform the council.

This is a fairly narrow list for a "managing partner." All but the fourth and seventh items are purely ministerial; even those items are reactive only.

## Secretary to the Judicial Council

Section 332(e)(9) recommends that the circuit executive attend judicial council meetings and serve as secretary for the council. In most circuits the clerk of the court of appeals had served as secre-

tary. In three circuits, however, the junior judge had prepared and distributed the minutes to the members of the council. In nearly all circuits the circuit executive now serves as secretary to the judicial council.

In circuits where the clerk previously handled these duties, there were indications that this function was being better handled by the circuit executive. For example, the Sixth Circuit executive emphasized that as clerk he merely attended meetings and prepared the minutes. He was not responsible for preparing the agenda, providing supporting materials for the meeting, or implementing the decisions and policy of the council, as he does now. Furthermore, there were several indications that council meetings in many circuits are now more efficient because the circuit executive reviews many of the matters on the council's agenda and makes recommendations for council action that could be quickly voted upon by the council. In the Fifth Circuit, the circuit executive prepares a "book" for each judicial council meeting, which contains reports and other supporting material for each item on the agenda. This compilation helps to expedite the discussion of agenda topics and action on them.

The clerks have generally been displaced by the circuit executive; in less than half the circuits does the clerk still attend council meetings. This might not present a problem if most meetings were restricted to judicial council matters. However, a review of numerous agendas of judicial councils reveals that, in most circuits, between one-half and two-thirds of the items on the agenda dealt with court of appeals matters only. Since so much of the business transacted at most council meetings deals with the court of appeals, it is unfortunate that the clerk is sometimes not present. This further tends to isolate the clerk from the court. In other circuits both the clerk and the circuit executive attend judicial council meetings, each handling distinct matters.

The full extent of the circuit executive's staff support beyond serving as recording secretary is not always readily apparent. In the nature of staff work, his contribution is muted in varying degrees. A review of the minutes of several Second Circuit council meetings reveals that the circuit executive is highly visible at such meetings,

presenting reports and making recommendations to the council. By contrast, a review of the minutes of several Fifth Circuit judicial council meetings did not disclose extensive participation by the circuit executive. However, it is clear in both circuits that the circuit executive is providing extensive staff support to the judicial council. The difference in visibility reveals something about the structure and operation of the two councils. Although the Second Circuit has a number of standing and ad hoc committees, much of the council business, particularly that of a routine nature, is handled by the chief judge and/or the circuit executive. Thus, the circuit executive presents many matters directly to the council with recommendations for council action. In the Fifth Circuit almost all matters, even relatively routine ones, are referred to a judicial council committee for study and recommendations. Committee recommendations are then made by the committee chairman to the entire council for its approval. The circuit executive's involvement is not readily apparent, but we were advised by a number of Fifth Circuit judges that the circuit executive does most of the committee work, presenting a report to the committee which it generally adopts and presents to the council.

It is undoubtedly beneficial to make substantial use of judicial council committees, especially in larger circuits, in order to make council meetings more efficient and ensure that some judges give detailed attention to matters brought before the council. However, it seems that many more routine matters could be handled by the circuit executive and then presented directly to the entire council for approval.

There are four major areas in which the circuit executives have provided staff support to the judicial councils:

1. preparing summaries and recommendations with respect to judicial council review of such normally routine matters as salaries for part-time magistrates and bankruptcy judges
2. conducting studies and investigations on specific problems and then making reports to the council with suggestions and recommendations

3. analyzing the various plans submitted by district courts to the judicial council for its approval
4. serving as a member (or reporter) of judicial council committees.

## Approval of Routine Matters

Judicial councils are required by statute to approve the appointment and salaries of bankruptcy judges and magistrates. Many part-time magistrates and bankruptcy judges receive a very modest salary (a few receive less than $1,000 per year) and approval by the judicial council may be routine. In many circuits the circuit executive expedites the review and approval of such requests by preparing a brief summary of the request, including pertinent information such as the number of matters handled by the magistrate or bankruptcy judge in the past year.

In some circuits these matters may be handled by mail. The circuit executive prepares a summary and recommendation and circulates them and any supporting materials to each member of the judicial council. They notify the circuit executive of their approval or disapproval of his recommendation. If all approve, the circuit executive notifies the Administrative Office and handles the necessary paperwork. In these circuits such routine matters are not placed on an agenda for council meetings unless the chief judge, the circuit executive, or the resident circuit judge (or any other member of the council) indicates the matter requires full council discussion.

In two circuits there were indications that needless judicial council time was spent discussing routine matters because the circuit executive did not prepare a summary and analysis. There were no specific reasons given why these two circuit executives were not handling what is a routine task for most of their colleagues. However, in one circuit the chief judge generally prefers to deal directly with the district judges. In the other there was a widespread lack of confidence in the effectiveness of the circuit executive. In a few other circuits the staff report and recommendations are made not to the council but to the chief judge, who then

obtains the routine approval of the council—an effective use of the circuit executive.

## Conducting Inquiries and Collecting Data

Prior to the act, information about local problems was gathered either by the chief judge, a committee of the council, or frequently by the resident circuit judge. In several circuits the resident judge remains responsible for making an informal investigation and reporting to the council, but in most circuits such studies are now made by the circuit executive. One circuit judge referred to the circuit executive as the judicial council's "field man" and mentioned that the circuit executive had been involved in such things as coordinating the FBI check of a nominee for a federal public defender position and attempting to uncover the cause of delay in the processing of habeas corpus petitions in the district courts. (However, in the latter instance the chief judge suggested that the data collected and presented by the circuit executive were inadequate due to the fact that he did not have sufficient time to do a thorough job and because he was not a lawyer.) The Ninth Circuit executive made a study of the authorized places of holding court in each of the districts within the circuit and submitted a report to the council for its action.

The Sixth Circuit executive was described by the chief judge as the "investigative arm of the judicial council and its committees." In addition to formulating and implementing a plan to help court reporters in a large district to keep current with their transcripts, the circuit executive has resolved a problem in one district resulting from the court's failure to follow its jury selection plan. As do several others, he routinely follows up on the Administrative Office list of old cases and motions under advisement.

In addition to investigating the specific problems referred by the judicial council, some circuit executives have attempted to advise the council of any district court problems. The Second Circuit chief judge commented on the importance of the continuing data on the district courts compiled and prepared by the circuit executive and presented regularly to the judicial council. Not only does the information provided encourage the district courts and the individ-

ual judges to take action to remedy existing problems, it also informs the judicial council of existing or incipient problems within the circuit and allows the council to provide whatever direction and assistance is appropriate.

Most circuit judges indicated that their circuit executive effectively conducted whatever studies and investigations were specifically requested by the council. However, there was a general feeling that the circuit executive could be providing better information on the district courts either by maintaining close personal contact with the district court judges and clerks or by collecting, analyzing, and monitoring data relating to district court productivity, backlogs, and other problems.

## Review of Plans

The judicial councils are required to review and approve plans prepared by the district courts pursuant to several statutes, including the Jury Selection and Service Act,[8] the Criminal Justice Act,[9] and the Speedy Trial Act.[10] The extent of a particular circuit's need for staff assistance in discharging this responsibility depends on the council's purpose in reviewing the district court plans. If, as is the case in some circuits, the council's purpose is merely to ensure that the district court plan conforms to the enabling act or to guidelines promulgated by the Administrative Office or Judicial Conference of the United States, the required staff analysis may be limited. It must be more comprehensive if the council's purpose is to ensure that the plan will be effective, or to achieve uniformity among districts. Based on comments of many circuit judges, and our review of a number of memorandums containing circuit executives' analyses and recommendations, it appears that in all but two or three circuits the circuit executive is doing an outstanding job in making these reviews and recommendations.

In spite of this, there has been little involvement of the circuit executive in the actual preparation of the district court plans. Since

[8] 28 U.S.C. § 1863.
[9] 18 U.S.C. § 3006A.
[10] 18 U.S.C. §§ 3165 & 3166.

the circuit executive is familiar with the council's policy and its prior action on plans submitted by other districts, he can be valuable to district courts in drafting plans, or changes and amendments to existing plans. In the D.C. Circuit, the circuit executive indicated that he had offered to assist the district court in preparing its plans, but the district court never sought his advice or assistance.

## Judicial Council Committees

There is wide variation among the circuits with respect to committee structure and activities. In some circuits there are few judicial council committees and those are generally composed only of circuit judges. In other circuits there are both standing and ad hoc committees; in the Second Circuit, for example, some of these include both district judges and practicing attorneys. The Fifth and Ninth Circuits have an unusually large number of committees. In the Second, Fifth, and Ninth Circuits, the circuit executives have been extensively involved in staff support. In some other circuits, it appears that the circuit executive often serves more as a passive reporter for the committees and provides administrative staff support.

The most extensive involvement of the circuit executive in the judicial council committee structure occurs in the Second Circuit. The circuit executive often serves as a member of the committee, and acts as liaison between the committee and the chief judge, not simply as the secretary or reporter for the committee. In many cases it was the recommendation of the circuit executive that resulted in the creation of the committee in the first place. This approach is in keeping with the Second Circuit executive's perception of his role as the person who identifies problems, alerts the council to them, and conducts studies and suggests solutions without waiting for specific direction from the council.

## Delegation of Authority

In chapter 2 we suggested greater delegation of authority by many chief judges to the circuit executives. The same issue arises with respect to the judicial council, as the degree of delegation

varies among the circuits. In some circuits the judicial council has given the circuit executive the responsibility to approve requests from district court judges for employment of temporary reporters pursuant to 28 U.S.C. § 753(g). In the Third and Sixth Circuits, the delegation is virtually absolute, and the circuit executive handles all requests from the district courts. If he determines that the request is justified, he arranges with the Administrative Office for specific authorization for a contract. The extent of the circuit executive's authority in the Fifth Circuit is less clear, however. The judicial council delegated to its circuit executive the authority to act on behalf of the council on request of district judges. However, the regulation also requires the approval of the resident circuit judge.

The Second Circuit executive emphasized that routine operating problems normally are and must be his responsibility, without necessary reference to either the council or the chief judge. Of course the judicial council must resolve all policy matters, but the circuit executive indicated that he should be the one to relieve judges of handling day-to-day problems. When he receives telephone calls from district judges on matters without policy implications he is free to deal directly with the district judges and agencies involved, sometimes without prior specific approval or even knowledge of the chief judge of the court of appeals or the judicial council. The Sixth Circuit executive has similar discretion to act for the council in routine matters; he terms these matters "organizational maintenance." This discretion seems necessary if the councils are to be relieved of detail work.

One Second Circuit district judge pointed out that the circuit executive had proven his value as a "troubleshooter" for the district court as well as for the court of appeals. He also mentioned that an individual judge can deal directly with the circuit executive without having to go through either the chief judge of the court of appeals or the chief judge of the district court. He mentioned problems such as allotting parking spaces in the courthouse and arrangements for an art exhibit in the courthouse—all of which were handled by the circuit executive (by his staff, actually) without having to burden either the chief judge or the judicial council.

There can be no doubt that the circuit executive must be circumspect in his dealings with the district court, and cannot speak for the judicial council unless authorized to do so. However, it seems desirable to encourage the circuit executive to work with the district courts and other judicial agencies in an attempt to resolve problems early. Forestalling a crisis or breakdown that requires extensive judicial council involvement or action is clearly useful. We recommend that the circuit executive be given such leeway, with an understanding that he advise the members of the council regularly of his activities.

## Secretary to the Judicial Conference

The Circuit Executive Act suggests the circuit executive be responsible for arranging meetings of judges of the circuit.[11] This undoubtedly includes the annual judicial conference. All circuit executives are substantially involved in planning the annual judicial conference. In the Fifth and Ninth Circuits the circuit executive indicated that preparing and making arrangements for the annual judicial conference was an enormous task. Obviously the arrangements are more complex in these large circuits.

In several circuits there were indications that the circuit executive had relieved judges of a substantial burden, thus freeing them to devote more time to judicial activities. However, in most circuits it appeared that the circuit executive had merely replaced the clerk as the person who made the arrangements for the judicial conference, although there were some indications that the conferences were now being better managed. In all circuits the clerk was pleased to be relieved of the burden of the conference.

In one or two circuits the circuit executive seemed to be spending excessive time on administrative details and arrangements. With some notable exceptions there was little evidence that circuit executives had been meaningfully involved in planning the content and scope of the conference. Since the circuit executive should be uniquely aware of problems at both the district and ap-

[11] 28 U.S.C. § 332(e)(9).

pellate level, he should be able to contribute much to planning the substance of the conference.

## VII. Transition and Growth

Up to this point we have surveyed circuit executive activities by dividing the role into component parts. Sometimes the divisions have been artificial, separating closely related tasks from one another. In this final chapter we assemble some observations that bear on the circuit executives' experience as a whole.

The role of circuit executive is in constant change, which makes it difficult to appraise in this report. Our central difficulty lies in this paradox; we must treat as an institution something that is not institutionalized yet. There is no stable or uniform role for the circuit executive. Not only do their assignments and activities vary, but the expectations of those around them differ, change, and are sometimes mutually incompatible. The circuit executive institution today is simply the sum of the diverse assignments and activities of ten individuals, plus the experience and reactions of those they work with or serve. This is the reason we have been unable to avoid the occasional ad hominem character of this report. For the same reason, it would be pointless to be dogmatic about many of our recommendations.

The circuit executives themselves have had little guidance as they each defined the scope of their own work. What little guidance was available consists mostly of the hopes expressed when the act was passed and requests to undertake specific tasks. Taken together, the demands and requirements have been both excessive and conflicting. Probably the most useful purpose this report could serve would be to contribute some guidance based on our estimate of the relative impact and importance of the alternative commitments circuit executives have made and can make.

### An Insider

Perhaps our greatest surprise concerns the relative importance of skills a circuit executive brings to the job. The legislative history emphasizes skills new to the judiciary, especially those of indus-

trial management. Indeed, the Board of Certification was evidently intended to assure that the courts would consider outsiders with entirely new skills and perspectives. Senior-level experience in managing large organizations was especially desired. This infusion of top management was intended to transform and modernize the courts.

It has not worked that way. Least surprising is that the recruiting base turned out to be relatively narrow. Many people are very critical of the Board of Certification for certifying so large a number of retired military officers. It seems to us probable that the board had little alternative. Clearly the board correctly acted on a congressional intent in treating with skepticism the applications of circuit clerks and other court support personnel, unless they could show substantial outside training and experience. On the other hand, if Congress intended to supplement existing staff with captains of industry, the board could not help; few applied. Surely it would be unrealistic to expect the judiciary to attract successful business executives at midcareer. Executive Level V (currently $47,500 per year, it was $36,000 in 1971) is impressive within the federal bureaucracy and among courts, but not in industry.

Accordingly, at the cost of considerable conflict and lasting bitterness, the board resisted several circuit courts' efforts to appoint their clerks. It certified people who could show training in court management and also outside managerial experience. Often this experience was in the military, partly because retired officers were available and could show managerial experience. Several of those certified were not lawyers.

We see little hope that outside managerial experience can be tapped because circuit executives primarily carry out staff functions. The scope for direct management is modest at present; it is limited to what one executive calls "organizational maintenance" within the court of appeals. The circuits are very different from industrial divisions because they are not financially or administratively autonomous; in short, they are not responsible for returning assigned levels of profit, with the high degree of autonomy which that implies in modern industrial organizations. Of course the policy purpose for providing that autonomy does not exist in the fed-

eral judiciary, because there are very narrow limits on likely reallocation of circuit resources. For example, no circuit manager could determine that jury trials should be eliminated as a losing proposition, in favor of a more profitable line. Nor can any state or district be abandoned in favor of others. A manager who cannot eliminate any line of business or any geographical area in favor of others is operating within a narrow range of options.

The circuit executive's job is to make the system work better, and also to support some existing activities. To be sure, he often needs resources, but always in amounts that are small in relation to total expenditures. The skills he needs are those of an experienced insider, albeit one who can take a fresh look at old problems. He needs the experience and originality that will suggest new solutions, and complete familiarity with possible procedural alternatives. He also needs a sound intuitive sense of the practical possibilities in each court of the circuit, based on close knowledge of individuals, geography, past practice, and perhaps the law.

Thus we consider the skills of insiders to be necessary but not sufficient. Some court clerks have the needed insider skills and knowledge, and also can identify problems and propose solutions in an original and effective fashion. For this reason, clerks and other court employees should not be excluded from certification. Nor should there be any presumption against lawyers. Legal skills and experience have proven helpful, and nonlawyer circuit executives have been hampered in some degree. Because insider skills alone are not sufficient, however, we can certainly support an idea that recurs in the legislative history: It would be unfortunate if the act simply resulted in promoting most or all circuit clerks, or if the courts appointed lawyers without demonstrated administrative skills or training.

## Finding a Niche

Only gradually are the executives defining their permanent role. A large part of the confusion about their role stems from a central task each of them faced when appointed: to develop a track record quickly. Since the position was virtually undefined in all but two circuits, and they had few specific operational responsibilities,

most felt that they could not afford to turn anything down. This imperative (and the shortage of staff) may explain their commitment to some tasks that seem clearly incompatible with the purpose of Congress: drafting routine correspondence, managing all General Services Administration contacts regarding the court of appeals courthouse, routine involvement in processing individual appeals, and others we have mentioned.

Early assignments of circuit executives were governed also by specific needs at the time. Library services were generally inadequate, and most executives made a major contribution; most libraries are now better supported and better staffed, and provide much better service. The chief judges particularly needed an administrative assistant and had specifically requested one. When they got a circuit executive instead it was natural that many early assignments were those they would have assigned an administrative assistant. Staff law clerks' duties, supervision, and role also needed definition, and there was a large and important recruiting task, especially in recruiting the senior staff attorney. Circuit executives were involved in all of these "brush fires," and others peculiar to each circuit.

## A Growing Role

It is our hope that the position can now develop considerably. More staff is available, and the imperative for a quick track record has passed. With some exceptions, we feel the circuit executives have not yet created the pivotal position they could. It seems no longer necessary for the circuit executive always to "keep a low profile," as several of them put it. Wherever possible, they need to assume the responsibility to relieve judges of detail work, but avoid doing detail work themselves when their work on policy-oriented matters is threatened. They should be at the heart of all matters of administrative policy for the court and council, staffing all committees, and *acting for* the judges on routine administrative matters. As discussed in chapters 2 and 6, many judges and councils need to develop a habit of delegation generally new to the judiciary, which has made little previous use of senior staff. In administrative matters, judges need to delegate authority to make deci-

sions, not just request staff—normally law clerks—to gather information in support of their own decisions. Delegation of authority must be not only possible but routine if a position of this status is to be justified.

The circuit executives should be more widely used in other contexts as well. We see no reason a circuit executive should not serve as member of a committee of the Judicial Conference of the United States for which he has special expertise. It seems probable, for example, that executives who have worked extensively in personnel or budget matters could make important contributions as members of the corresponding committees. Also, we suggest that the Judicial Conference of the United States evaluate whether the circuit executives could make a useful contribution as staff at its regular meetings, assisting the two circuit representatives during Judicial Conference deliberations. Despite the logistical difficulties, we believe staff help could be valuable to each Conference member, as they cope with the long agenda and massive supporting material that are now routine. Finally, the circuit executives could contribute more to the conferences and seminars of the Federal Judicial Center; they rarely or never appear on the programs of judge seminars or workshops, for example.

Several circuit executives expressed the view that they are at the "cutting edge" of a new task or discipline: the management of professionals. In this respect also they have little guidance; we have found little in the management literature that addresses the executives' problems. The notion does suggest that a circuit executive must be active and aggressive, and willing to make mistakes. We believe that many circuit executives have been too passive to be effective "change agents," a role that appears in the legislative history almost as an imperative. Obviously, the task of managing professionals imposes limits, especially in the context of the judiciary. We believe that the circuit executives will justify the new position only if those limits are regularly tested.

# THE FIRST DECADE OF THE CIRCUIT COURT EXECUTIVE: AN EVALUATION[1]

John W. Macy, Jr.
1985
(FJC-R-85-4)

## VII. Recommendations for Future Development

The creation and implementation of the key position of circuit executive have filled a decided need in the circuit courts. Today the withdrawal of such a position would have a serious negative effect on the administration of justice. The multiple functions performed by the circuit executive have undeniably contributed to the efficiency of the courts. In light of the broad spectrum of responsibilities assumed by the first circuit executives, it is indeed remarkable that so much has been achieved in such a short time. This is particularly true in view of the sensitivity and confusion concerning the relationship of the new position to existing positions in the circuits. The necessity of making this new official a force for administrative change called for new patterns of administrative behavior on the part of the chief judge, the judges of the circuit, the districts, the circuit clerks, and other support personnel. The varying patterns of performance of the circuit executives are a reflection of the custom-designed nature of the relationships that have emerged in the evolution of the position. Justifiably, each circuit has been allowed to develop its own administrative personality based on the strengths and weaknesses of the circuit executive and the particular circumstances of the court.

But the indispensability of this position does not constitute a fulfillment of the original expectations for it. Some of the steps that

[1] The final chapter of the report is reprinted here. Ed.

might accelerate that progress obviously cannot be focused on the circuit executive alone. There are other actors in the drama of administrative improvement, not only in the circuits but in Washington as well. This examination has surveyed the entire scene, and from the observations have emerged a number of recommendations. Like the responsibilities of the circuit executive, these recommendations range from the relatively simple and mundane to the disturbing and revolutionary. They are offered in the interest of achieving the intended goal for the position and with the realization that they will be subjected to critical appraisal by those who have the awesome responsibility of administering the judicial system of the United States.

1. In view of the critical importance and extensive involvement of the **chief judge** in court administration, judges selected for this responsibility should be those who desire the assignment, possess the skills to perform it, and are willing to remain in the office for its entire tenure to ensure continuity and expertise.

To this end, it is recommended that the traditional selection by seniority be abandoned in favor of a process that would give consideration to the desire and capability of each judge for this assignment. The criteria for selection in 28 U.S.C. § 45 constitute a move away from strict seniority, but do not specifically call for ascertainment of interest in and qualifications for the administrative role to be played. Actual selection might be made by the Judicial Conference of the United States, or a special selection committee designated by that body.

The chief judges are the essential decision makers in the successful utilization of the circuit executives. Even though there have been efforts to reduce the magnitude of the chief judge's involvement in administrative matters, among them the creation of the circuit executive position, time commitment to those matters continues to be relatively high. These conditions would indicate that administrative interest and skill are important qualifications for consideration in the selection of the chief judge. In more and more American institutions, the selection of leadership by seniority has been

discarded in favor of more qualification-related standards. There is no reason why the judicial system should adhere to an outmoded pattern. Use of the seniority method has resulted in limited tenure in many instances, and such turnover has fostered discontinuity of leadership. It is evident that some chief judges view administrative responsibilities as an intrusion upon their basic responsibilities as jurists.

The degree of judgment brought to bear in evaluating candidates for the chief judge position should be at least as thorough and intensive as that by which circuit executives are certified.

2. The circuit executives should be given assistance in determining the **priority of functions** they perform, in order to emphasize the role of management analyst and consultant and to minimize activities of a minor or more routine nature.

The chief judge and the judicial council should expect the circuit executive to devote a significant portion of time to those functions that are directed toward improved management of the circuit. Likewise, the capacity to perform these functions should be given added weight in the evaluation of candidates for the position. There has been a tendency to view the executive's position as predominantly one of managing the nonjudicial functions in the circuit courts. This outlook has projected the appointee into a number of activities that do not demand the level of qualification expected of the candidates. Activities as assistant to the chief judge and as secretary to the judicial council are time-consuming and involve detailed administrative work. In some circuits the executives have assumed the role of line manager over nonjudicial activities to such an extent that they have become bogged down in day-to-day operations, with little time remaining for more important assignments.

The circuit executive position calls for a combination of innovator, systems analyzer, and problem solver. The incumbents of these positions should become the leaders in the identification of new technological and management methods of potential help to the courts. They should share these ideas with the clerk and the

judges, involving them in the design and installation of approved systems. To achieve this objective, the circuit executive must be encouraged to devote time to these activities through a gradual delegation of other responsibilities to subordinates in the executive's office or in other organizational elements in the circuit.

3. The circuit executives should enjoy more of a **peer relationship and partnership with judges,** a circumstance warranted by their stature in the court administration field and by the salary level and rank conferred upon the position by statute. In the administrative profession, circuit executives are at a level comparable to that of judges in their profession.

This recommendation is a sequel to the previous one. A successful peer relationship must be earned by the circuit executive through performance of truly professional tasks. By expanding the activities related to management improvement and diminishing those concerned with "administrivia," the executives will come to be viewed as an important force in enhancing the administration of justice.

4. To attract strong candidates, the **creative and influential aspects** of the circuit executive position need to be given greater prominence. Demonstration of these capabilities should be sought in the recruitment and selection process.

The original intent in creating the position was to attract highly qualified individuals from the field of management who could establish themselves as effective partners with their judicial colleagues in the campaign to overcome administrative deficiencies in the judicial system.

5. All administrative functions presently controlled or performed by the Administrative Office should be reevaluated with the objective of securing the **optimum degree of decentralization** in personnel, space, procurement, budget, and financial management. The chief

judge could delegate supervision of those functions to the circuit executive.

The growth of the judicial system has reduced the benefits of centralization. The continued centralized control of decision making in certain areas has inhibited the development of effective administration in the circuits. The circuit executive provides a capability within the circuit for a higher level of responsible judgment on such matters. The Administrative Office could ensure consistency in the application of its policies through promulgation of standards and guidelines and occasional review or evaluation of the performance of the circuits in relation to such standards.

In light of the significance of appellate decision making, it is difficult to justify claims that a circuit is not capable of determining its own staffing schedule, budgetary level, or procurement requirements and processes. Though central control might be justified on the ground of economy, the inherent delay in gaining approval from Washington adds to the cost of these functions.

The Administrative Office could retain control over certain decisions. For example, all personnel actions and candidate selections up to a specified level might be delegated to the circuits, with the Administrative Office retaining authority for the top positions in the system. Even with the rapidity of modern communications, the referral of actions for higher level approval consumes time and creates institutional tensions.

6. **More positive recruiting** efforts for circuit executive candidates should be instituted by the Board of Certification and the circuits in response to actual or prospective vacancies. Although advancement of those within the court administration profession will undoubtedly become a more common route in filling these positions, there is an obligation for outreach beyond the system. Recruitment should be directed to professional associations in law and management, regional and national media, professional publications, universities, corporate associations, federal and state agencies, state court exec-

utives, the National Center for State Courts, and other relevant institutions.

Aside from the initial circulation of information concerning the circuit executive position, there have been few attempts to attract outsiders into the competition for certification. In several instances, however, circuits with vacancies have publicized them in their own general community and have generated a significant number of candidates. Such targeted recruiting should be encouraged by the Board of Certification and the Administrative Office. But general recruiting without the prospect of vacancies is likely to be futile and fail to increase the pool of potential candidates. With the expansion of the corps of executives in the court system across the country and the increased availability of persons who have received special training in court administration, there should be a larger number of candidates with directly relevant experience. This broadening source should be cultivated, in part through encouraging a view of the circuit executive position as the pinnacle of a court management career.

7. Although the variations across circuits in the staffing of the circuit executive's office are justifiable, it would be beneficial to review that staffing in each of the circuits to determine the **adequacy of support personnel** as well as the availability of employees engaged in other court functions to assist the executive.

In interviewing the first candidates for circuit executive positions, the Board of Certification advised them that they would need to perform most functions in a solo capacity, with only a secretary and an administrative assistant as helpers. By and large, that prediction became the reality. But while limited staffing prevailed, some circuit executives were able to obtain additional assistance from staff in other units of the court, and in at least two circuits, the Second and the Ninth, additional staff have been made available, with the approval of the Administrative Office, to support the executive at both the managerial and the clerical level.

The staffing needs of the circuit executive's office are variable across circuits and over time, and there must be flexibility to adjust

to changing situations and to the particular management styles of the chief judge and the circuit executive. The original Spartan formula has become unrealistic, unduly curbing the executive's performance. At a minimum, his or her staff should include an executive assistant (not an assistant or deputy circuit executive), a management systems specialist, a secretary, and an administrative assistant. The grade levels for these positions should compare with like duties performed elsewhere in the judiciary.

Additional staffing would permit the executive to delegate certain routine responsibilities to the administrative assistant and more professional activities to the executive assistant. The management analyst would be the executive's right arm in examining problem areas in the circuit, conducting the necessary research and measurements, and preparing the preliminary recommendations for change. The analyst could also be the compiler and evaluator of the data collected by the circuit and the Administrative Office. The additional capability thus provided would help to fulfill the expectations for the circuit executive in this high-priority area.

Before adoption of such a staffing scheme, the Administrative Office would have to prepare a supporting document and circulate it to the circuits for their criticism. Variations on the adopted pattern would, of course, be permissible at the discretion of the chief judge and the circuit executive.

8. Although the **relationship between the circuit executive and the circuit clerk** has improved over the last ten years, the distinction between the two positions is still unclear. Each circuit, therefore, with assistance from the Administrative Office, should review and redefine the relationship with greater precision.

With the elevation of more and more clerks to the circuit executive position, the relationship may become smoother in one sense but more complicated in another. An elevated clerk's knowledge of internal circuit conditions may permit him or her to draw a clear line between the two offices. On the other hand, there may be a tendency on the part of such clerks to carry with them certain of the functions previously performed by the clerk's office.

This need not be a static definition, but one that is periodically reviewed to ascertain the reality of the relationship and to ensure the most effective utilization of both positions. In articulating their roles—the clerk as the administrator of the circuit's day-to-day business and the line supervisor of those associated with that business, and the circuit executive as the management consultant to the chief judge and agent of change—the points of separation and collaboration will be more clearly understood.

9. To facilitate and enhance the partnership between them, every effort should be made to **have the chief judge and circuit executive reside in the same geographical location** within the circuit; preferably, they would be located in the circuit's headquarters city.

A rigid requirement that this common residence be in the circuit's headquarters would cause a hardship for many chief judges. If the chief judge must be located outside of the circuit center, arrangements should be made for the circuit executive to spend a major portion of time at the location in which the chief judge resides.

This situation in the circuit courts is an anomaly. In most large organizations, a fragmentation of the headquarters staff would be viewed as the height of inefficiency. Even in the case of widespread decentralization, the executive leadership of an institution is most often exercised by a small staff located at a common site. The continuing tolerance of this arrangement is a major impediment to the development of effective court management. Although this recommendation has been modified to recognize the reality of the current situation, the ultimate outcome should be the common location, not only of the chief judge and the circuit executive, but of their support staff as well.

10. The **future mission of the Board of Certification** should be examined to determine its continuing usefulness.

In examining the board's future, a plan such as the following might be considered:

The board would continue to perform its statutory functions through calendar year 1986, when it would be abolished in favor of ad hoc panels in each circuit to qualify candidates in accordance with existing standards promulgated by the board, or with modified standards issued by the Judicial Conference. These panels might include the circuit's chief judge and two other active judges, plus appointees from the Administrative Office and the Federal Judicial Center. The panel would recommend no fewer than three qualified candidates to the circuit council for final selection.

With circuit executives in place in all the circuits and district executives for the six experimental positions now on board, the function of the board has changed substantially. It may currently represent an outdated piece of machinery that merely complicates the selection process and imposes a substantial delay in the appointment of candidates. Further, the growth of the court executive profession has produced a large supply of qualified candidates from throughout the federal, state, and local judicial systems, which might eventually overtake in-house candidates as the normal source from which to fill these top positions in the profession.

If the board were phased out, the existing roster of certified candidates might continue to be used for a two-year period and thereafter to the extent desired by the circuits and districts. The ad hoc panels could be authorized to conduct extensive recruiting efforts to seek a broad range of candidates, including placement of advertisements in appropriate publications. Vacancies would have to be anticipated as much as possible to avoid long periods without incumbents and the tendency to turn to those who are immediately available. The procedures followed by the board in its evaluation of applications might be continued by the panels, which would have secretarial support and assistance from the Administrative Office. To monitor this revised process, a group composed of individuals similar to those who have served on the board might be designated to review and evaluate the performance of the selection panels every five or ten years.

Central control over such a plan could be exercised by the Administrative Office. Those interested in circuit or district executive positions, without any specific preferences as to location, would be

encouraged to file their applications with the Administrative Office, which would maintain a list of applicants for use by the circuit selection panels in making initial or transfer appointments. Those entering this professional field would thus be assured that their career prospects extended beyond the jurisdiction of a particular circuit or district.

11. The circuit executive should be empowered to **study, evaluate, and propose improvements in all areas of court activity.**

Although, in the past, there may have been resistance to such extensive coverage by the circuit executive, the chief judge should negotiate removal of that resistance to ensure the executive's ready access to every phase of the circuit's operation. The circuit executive should have no hesitation about interviewing judges, clerks, or other members of the court staff.

This recommendation is in keeping with the high priority assigned to the circuit executive's management analysis and consultation functions. There is evidence of reluctance to admit this recent outsider to certain judicial processes, particularly those that tend to be dominated by judges. That reluctance needs to be overcome through the affirmative leadership of the chief judge in the circuit's support of the executive program. Ideally, there should be a growing demand for the type of professional skills the circuit executive can bring to the resolution of problems. The ultimate benefits to be derived from these functions are dependant on the capacity of the circuit executive, the leadership of the chief judge, and the access to the information necessary to design appropriate changes.

12. The circuit executive should be expected to pursue a far **more active role in relation to the districts within the circuit.**

The executive's role as an advisor to the districts should in no way be viewed as an intrusion on the independence of the trial courts. The executive's expertise should be drawn upon by the district chief judge and, where they exist, by district executives. The circuit executive's on-the-spot presence in the districts should

be increased. At the least, there should be a visit to each of the districts once a year.

There are a variety of reasons for the absence of this intended relationship with the district courts. Circuit executives have been fully occupied by assignments within the circuits, lacking time to undertake supplementary responsibilities with respect to the districts. In addition, districts have been wary of administrative intervention from the circuit level as a possible threat to their independence. The possibility that district executives might be designated has lessened the attraction of a professional visitor from the circuit. The growing capacity and better organization of the circuit executive, however, should overcome some of the districts' hesitation, permitting the circuit executive to become a more vigorous and creative contributor to the improved administration of the trial courts.

A corollary recommendation is the extension of the district executive position to other large districts. Although it is too early in the pilot districts' experience to claim success, the initial usefulness of the district executive is readily apparent, more so than in the early days of the circuit executive. Administrative functions are even more pressing in the trial courts, and high-level performance can achieve demonstrably favorable results. Expanded advisory assistance from the circuit executives should enhance the developments under the district executive program.

13. There is a need to **overcome the professional and geographical isolation** of the circuit executives.

The Administrative Office and the Federal Judicial Center have recently provided more opportunities for collective consultation among circuit executives in Washington or elsewhere. Circuit executives meet together twice a year at the time of Judicial Conference sessions and are present at the meeting of circuit chief judges following those sessions. Such participation by circuit executives in appropriate gatherings of circuit chief judges permits them to hear and present ideas for management improvement. Interchange of information and ideas should also be stimulated through publi-

cations aimed directly at court administration and the circuit executive's role in improving that administration.

Although the insulation of individual circuit executives may be lessening with the passage of time and with the broader acceptance of incumbent executives by their judicial peers within the system, even more conscious communication with and among them is required to advance the purposes the positions were created for at an accelerated rate. Although the formation of a collective body of circuit executives separate from the existing national institutions and judges is not recommended, a more collegial environment could be fostered through problem-solving workshops, joint presentation of recent findings and innovations, and briefings on judicial and administrative developments that might affect the circuits. The partnership of the circuit executive with the chief judge will be manifest in their joint presence at meetings where administrative developments are formulated or evaluated.

* * * * *

These thirteen recommendations are submitted with some temerity. They are intended to stimulate thinking and reaction on the part of those who have policy-making responsibility. The concept of the circuit executive as a potentially significant contributor to progress in court administration is basically sound, but the implementation of the concept has not lived up to the full potential in every instance. It is hoped that the changes proposed herein will increase the level of the circuit executives' contribution in the future. Their adoption, in the form proposed or with modification, would expand rather than contract the discretion of the courts, would raise the professionalism of the position to the level intended by the salary and stature designated by the Congress, would clarify areas calling for more precise definition of duties and responsibilities, and would nurture a more productive partnership between the circuit executive, the chief judge, and the judicial council.

# SCREENING PRACTICES AND THE USE OF PARA-JUDICIAL PERSONNEL IN THE U.S. COURTS OF APPEALS: A STUDY IN THE FOURTH CIRCUIT[1]

**Steven Flanders and Jerry Goldman**
**October 1974**
**(FJC No. 74-7)**

. . . .

The use of law clerks as personal assistants to judges has long been familiar in appellate courts. Circuit judges were first authorized one law clerk each in 1930. They now may employ two or, under some conditions, three. Some circuit judges employed law clerks privately before 1930. Law clerks traditionally have been assigned to individual judges. They are selected and appointed by an individual judge and are responsible only to him. Clerk duties extend to whatever the judge finds helpful and necessary, including library research, preparation of memorandums on particular issues of law (or fact), assistance in drafting and editing opinions, and verification of citations.

The staff law clerk serves the entire court, not any one judge. Both staff and personal law clerks share such generally similar functions as assistance with legal research, preparation of memorandums, and preparation of draft opinions. . . . the key distinction . . . is that the staff law clerks are centrally organized with responsibility to the court.

Only the First Circuit Court of Appeals does not employ a staff law clerk. (In that court many similar duties are performed by the

[1] Introductory materials and a section on personal law clerks have been omitted. Most footnotes have been omitted. Those that remain have been renumbered. Ed.

clerk of court and by the law clerks of the chief judge). The largest complement of staff law clerks can be found in the Fourth and Tenth Circuits, which each employ four. There is little relationship between size of circuit (as measured by number of judgeships, volume of business, area, or population) and size of staff law clerk offices. This suggests what is in fact the case: Size of central staff is related to the number and variety of assignments delegated to those staffs. The circuits vary widely in this respect, as shown in table 1.

The staff law clerk concept took hold around 1960 as a response to the rapid increase in the volume of pro se matters in the courts of appeals. Such matters include petitions for certificates of probable cause in habeas corpus appeals, appeals from a denial of a motion to vacate sentence for federal criminal offenders, petitions for leave to file in forma pauperis, and petitions for the appointment of counsel.

In the Second, Third, and Ninth Circuits, the responsibilities of staff law clerks extend only to pro se matters. In the remaining circuits (except the First, of course) pro se matters form the largest proportion of staff law clerk business.

Staff law clerks in the Fourth, Sixth, Eighth, and Tenth Circuits review nearly all cases on the regular docket, in addition to the pro se matters generally recorded on the "Miscellaneous" docket. As a result of this review procedure, a case may be routed to a special calendar providing for truncation of the court's traditional procedures. Moreover, if less than traditional procedures is recommended by the staff law clerk (e.g., to eliminate oral argument and/or full briefing), that recommendation will generally be accompanied by a proposed order to dispose of the case and by either a draft per curiam or memorandum opinion. The remaining circuits employ their staff law clerks in various ways . . . . Generally, staff law clerks in those circuits process pro se matters and, in addition, have designated responsibilities for some regular docket cases.

**TABLE 1**
**Staff Law Clerks**

| | Circuit | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | D.C. | First | Second | Third | Fourth | Fifth | Sixth | Seventh | Eighth | Ninth | Tenth |
| Number of staff attorneys | 3 | 0 | 2 | 1 | 4 | 3 | 3 | 2 | 2 | 4 | 4 |
| Number of judgeships | 9 | 3 | 9 | 9 | 7 | 15 | 9 | 8 | 8 | 13 | 7 |
| Duties | | | | | | | | | | | |
| Handle pro se matters after docketing | Rare | | Rare | | Yes | Yes | Yes | | Yes | | Yes |
| Handle prisoner correspondence | | | Yes | Yes | Yes | | | Yes | | Yes | |
| Provide legal advice to clerk's office | | | | | Yes | Yes | | Yes | | | |
| Involvement in screening | None | | None | None | Screen all cases | Infrequent | Screen all cases | Memoranda on motions for summary affirmance | Most cases | On a temporary basis | Screen all cases |
| Preparation of proposed orders or opinions | On request of a judge | | Rare; prepare bench memoranda | None | Pro se cases; no argument cases | Some summary calendar or pro se cases | None as such | None | Infrequent | None | Summary calendar cases |
| Other duties | Prepare memoranda on motions for oral argument | | Index slip opinions | | Numerous | Abstract current slip opinions | Memoranda on all substantive motions | Handle all motions | | | Some procedural motions |
| Term of appointment | One-year | | Two-year | One-year | Two-year | Permanent | Two-year | One-year | Two-year | One-year | Permanent |

NOTE: Blanks indicate that we have no information that the indicated service is performed routinely.

In the Fourth and Tenth Circuits staff law clerk assistance is greatest with respect to variety and scope of responsibilities. These responsibilities raise an intriguing question that is troubling to some observers: To what extent, if any, are staff clerk decisions tantamount to decisions by the court? We will try to answer this question in subsequent sections of this paper.

Before 1962 it was the Fourth Circuit Court's practice to hear every case fully regardless of complexity. As a result of the Supreme Court's decision in *Fay v. Noia,*[2] procedural hurdles for state prisoners seeking postconviction relief were dramatically reduced. This change in court policy put an especially heavy burden on the district courts in reviewing petitions for postconviction relief. The courts of appeals in turn shouldered heavy responsibility for supervising the increased demand for postconviction remedies.

Most postconviction prisoner cases are litigated without the assistance of legal counsel for the prisoners. The papers filed with the district court or court of appeals may be handwritten and poorly organized, with legal and factual claims awash in rambling and conclusory assertions. In order to organize these claims into some proper format, shortly after *Fay v. Noia,* the chief judge of the Fourth Circuit gave his third law clerk responsibility to establish a system of screening postconviction appeals and other pro se matters. The initial purpose was only to identify frivolous cases, which by general agreement accounted for a substantial portion of all postconviction appeals. These frivolous cases would then be reviewed by a three-judge panel and disposed of by a memorandum decision. This would be done without oral argument or appointment of counsel, unless one judge on the panel felt that the claims raised in the petition called for further assistance to the court in the forms of briefs and oral argument.

With accumulated experience in screening appeals, and with a growing need to reach the merits of the claims raised by petitioners in the light of *Coppedge v. United States,*[3] the court established a "legal section" which would be able to do more than merely elimi-

[2] 372 U.S. 391 (1963).
[3] 369 U.S. 438 (1962).

nate purely frivolous postconviction appeals. Today the legal section is composed of four attorneys and one secretary. The four staff law clerks conduct the preliminary processing of over 95 percent of all docketed cases in the Fourth Circuit.

Preliminary processing of pro se matters now extends to several steps. The staff law clerks review the petition, which comes to them on the Fourth Circuit "20-day form." The form is designed to elicit petitioner's complaint in simple, comprehensible manner. The staff law clerks correspond with the petitioners and with all appropriate authorities in order to complete a satisfactory record. When the necessary information has been gathered, they proceed to develop the petitioner's contentions in a logical and effective form. This often serves, as one staff law clerk put it, as a brief for the petitioner.

In addition to a review of all pro se appeals, petitions, and motions, the legal section reviews all cases scheduled for full briefing and oral argument. The staff law clerks recommend in each case whether it is appropriate for disposition without every element of the traditional appellate process.

The legal section performs an additional function in cases recommended for disposition without oral argument. If, after studying the record on appeal and researching the legal issues raised by the appellant, the staff law clerk is of the opinion that the case ought not be set for oral argument, then he will prepare a suggested per curiam opinion or memorandum decision. This document, the record, and the trial transcript are sent to a panel of three judges, along with a proposed order disposing of the case. Memorandum decisions (unpublished) are prepared in pro se cases, generally appeals from orders of the district court involving petitions seeking collateral relief or seeking relief from prison conditions. Per curiam opinions, now frequently unpublished, are prepared in direct appeals that would otherwise be argued but are screened off the argument calendar.

Approximately one-half of all cases filed in the Fourth Circuit involve pro se litigants and are subject to staff law clerks' review by that route. Of the remaining cases (i.e., non pro se cases), approximately one-third are screened off the oral argument calendar.

Thus the staff clerks are involved in roughly 65 percent of the cases docketed in the circuit each year to the extent of preparing proposed orders and opinions for disposition of the case.

Quantitative analysis of appellate case processing can provide useful insights into the screening of appeals. As a result of an improved information system adopted in 1971, the Administrative Office of the United States Courts collects case-related data that permit us to describe and analyze variables related to the screening process.

. . . .

Table 2 reveals that most of the cases terminated in the Fourth Circuit in fiscal 1973 received judicial action; i.e., substantial judge effort was invested in 1,504 cases. Most of these cases were disposed of by three-judge panels. Of the 1,504 cases, 1,142 (or 76 percent) were not argued orally. And, of these 1,142 cases, only 145 (or about 12 percent) were briefed as described in the Federal Rules of Appellate Procedure. Finally, of all cases receiving judicial action, only 362 (or 24 percent) were argued before three-judge panels.

**TABLE 2**
**Differentiated Case Processing in the Fourth Circuit: FY 1973**

| Case Process | Number Terminated* | |
|---|---|---|
| I. With judicial action ($N$) | 1,504 | |
| A. No oral argument ($n$) | 1,142 | 76% of $N$ |
| 1. Briefs filed | 145 | 13% of $n$ |
| 2. No briefs filed | 997 | 87% of $n$ |
| B. Oral argument (& briefs filed) | 362 | 24% of $N$ |
| II. Without judicial action | 103 | |
| Total | 1,607 | |

SOURCE: Administrative Office of the United States Courts.
*Excludes cross-appeals, consolidations, and reopened cases.

The extent to which these cases have been tracked into various procedural paths is in large measure a result of the screening procedures of the court's central staff of law clerks. In addition, the staff's recommendation to set a case down for oral argument or to

recommend a decision without argument may also entail consequences with respect to the later decision whether or not to make the court's action public in the form of a published, citable opinion.

Is the decision to grant or to limit oral argument related to the decision on publication? If oral argument is eliminated in cases that do not raise new or otherwise difficult issues, and conversely if oral argument is generally accorded to cases that raise important or novel legal questions, then we could expect that cases receiving oral argument would also be cases with published opinions. Table 3 cross-tabulates the calendaring decision (oral argument or no oral argument) with the publication decision.

**TABLE 3**
**Publication and Type of Process in the Fourth Circuit: FY 1973**

| | Process | | |
|---|---|---|---|
| Publication | Oral Argument | No Oral Argument | Total |
| Published opinion | 351 (97%) | 181 (16%) | 532 |
| Unpublished opinion | 11 (3%) | 961 (84%) | 972 |
| Total | 362 (100%) | 1,142 (100%) | 1,504 |

NOTE: phi = .73.

Since screening by staff law clerks involves the identification of difficult cases, we would expect to see orally argued cases subject to more published opinions—authored and per curiam—than cases decided without oral argument. The phi coefficient, which measures association between variables in 2 x 2 tables, in table 3 is .73. Thus, there appears to be a relatively strong association between oral argument and publication. This relationship can be expressed in another fashion. Ninety-seven percent of orally argued cases end in published opinions whereas 16 percent of cases receiving no oral argument end in published opinions. Thus it is almost certain that a case will receive a published opinion when it is

orally argued. Conversely, it is almost certain that a case will not receive a published opinion in the absence of oral argument.

Is the screening decision with respect to oral argument related to the outcome of cases (affirmance or reversal by the court)? In theory, as suggested in Local Rule 7, the "easy" cases are screened off the oral argument track and the "hard" cases stay on the track. If we assume that "easy" cases are more affirmable than "hard" cases, then our data may provide an answer to the question raised above.

In table 4, we have cross-tabulated process (oral argument/no oral argument) with case outcome (affirm/reverse). The coefficient relating process to outcome indicates a relatively weak relationship (phi = .28). To put it another way, 32 percent of the orally argued cases are reversed whereas 9 percent of the cases receiving no oral argument are reversed. Although the chances of obtaining a reversal of an antecedent district court or administrative agency decision are not great under either process, the probability of reversal is higher for cases which are argued as compared to cases not argued.

**TABLE 4**
**Outcome and Type of Process in the Fourth Circuit: FY 1973***

| | Process | | |
|---|---|---|---|
| Outcome | Oral Argument | No Oral Argument | Total |
| Reversed | 108 (32%) | 86 (9%) | 194 |
| Affirmed | 234 (68%) | 910 (91%) | 1,144 |
| Total | 342 (100%) | 996 (100%) | 1,338 |

NOTE: phi = .28.
*This table excludes 166 cases that were neither affirmed nor reversed.

The data presented here raise the intriguing question mentioned earlier. If the initial recommendation to differentiate case treatment is made by staff, is it correct to infer that, in effect, staff make out-

come decisions? Do staff also decide for or against publication? The quantitative evidence raises the possibility that the legal section, in analyzing recommendations on the process decision, in effect makes the publication decision. Much more important, they may appear, to a lesser degree, to be deciding the cases.

To evaluate these data adequately we must take a step backward at this point to consider the empirical means available to measure staff involvement in court decisions. The staff law clerks do make recommendations, using procedures already described, with respect to all three decisions: process, outcome, and publication. Ideally we would like to have complete data on the percentage of rejection of staff recommendations on each of the three, by panels of the court. We have no such data, though in the next section we report estimates of rejection percentages from both judges and staff.[4] The data we do have, in tables 2-4, can shed some light on the present operation of the system, showing the relationship of these three decisions to one another. However, a central point must be borne in mind: No possible data on case outcome or on staff advice could compel acceptance of any single evaluation of the extent of court reliance on staff. If someone were to determine, for some hypothetical court, that 100 percent of the recommendations of its legal section found their way unchanged into orders and opinions of the court, that finding would be open to either of two competing explanations. It could be argued that the court had abandoned judging to its staff. It could also be argued that communication must be so close and supervision so exact, that staff mirrored exactly the court's views. . . .

On the basis of interviews with six of the seven active circuit judges, their personal law clerks, and three of the four staff law clerks, we find that staff law clerks make decisions that generally mirror the views of the court. This finding is based upon examination from several perspectives of the nature of judicial tasks and the assistance provided by the staff and personal law clerks to the judges.

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[4] Rejection of staff law clerk recommendations are viewed as "reversals" by the staff law clerks.

Our battery of questions for judges and for clerks remained essentially unchanged through our interview schedules. The responses were open-ended, and completion of our interviews averaged about sixty minutes with each judge and about forty minutes each with members of the supporting staff. In addition, we had several extended meetings with the clerk and, more briefly, with the circuit executive. The discussions with the clerk and the circuit executive served not only to acquaint us with procedures but, possibly even more important, served to orient all of our work in the Fourth Circuit.

We questioned the judges and the law clerks (both personal and staff) about the way they do their work, the procedures they follow, and the feedback they give and receive concerning their work products and the work products of other judges and law clerks. The task patterns described in these several separate interviews lead us to conclude that the judges, and not the staff, are the decision-makers. This is so because supervision of the staff by the judges is extensive but unobtrusive. It is significant that the Fourth Circuit is thoroughly decentralized. No two judges have their chambers in the same city; they are scattered throughout five states. Despite this dispersion we received essentially similar description and evaluation of the work of the legal section from everyone involved.

All the judges found the work of the staff law clerks to be useful and necessary. In general, all of the judges were pleased with the quality of staff work, although there was one partial exception. One judge found the product of staff effort to be occasionally "very good" and occasionally "very bad," but on the whole staff preparation in his opinion was "altogether necessary." Another judge claimed that staff preparation was of "great help since it saves the spinning of wheels." This point was echoed by a colleague who said, "If we had to start from scratch with every case then we could not keep up with the work."

As to the use of staff law clerk work, the judges we interviewed were equally divided. Three of the judges use their personal law clerks to review memorandums and materials assembled by the staff law clerk before they are submitted to the judge. The personal clerk will read the staff memorandum, the

opinion of the lower court, the briefs (if present), and the record, and then note agreement or disagreement with staff recommendations. One judge estimated (with his personal clerks concurring) that 80 percent of the time staff and personal clerks are in complete agreement. Another judge noted that his personal clerks will relatively infrequently find something in the staff law clerks' work that requires significant revision.

Three of the judges review the staff materials directly. All judges indicated that they read not only the staff materials (for screened cases) but the briefs as well (if briefs were filed) and that they consulted the record in order to verify the claims of the parties and the analyses of the staff. This was supported by several references by staff law clerks to cases in which the court made modifications based on portions of the record and briefs not cited in the staff papers.

How often are staff recommendations with respect to oral argument altered? In the Fourth Circuit, under Local Rule 7, any judge on a panel can request and thereby assure full briefing and oral argument in cases screened by the staff. According to the judges, staff screening recommendations are only occasionally altered, two judges estimating that such alteration occurs in 20 percent of all the screened cases. This estimate was supported by each of the staff law clerks we interviewed. Less often, the judges may remove a case from the oral argument calendar after it had been placed there by the staff screening procedure. In short, the staff screening decision with respect to oral argument is generally in line with the views of the court. However, at least two judges would prefer that more cases be screened off the regular calendar. The staff law clerks also feel that they are forced to calendar many cases for which oral argument is not needed. They do so because they are developing a small backlog which they control, under instructions from the court, by reducing the number of cases they screen off, thereby reducing the number of proposed opinions they must prepare.

It should be noted that the staff law clerk prepares his proposed per curiam without knowing the composition of the panel that will decide the case. Thus, staff decisions are not custom-fit to the

predilections of a particular panel. The staff does know the panel in pro se cases, however, and some tailoring of the presentation of issues and style of opinion does take place in their preparation.

One feature of the appellate process takes on a different form for cases that do not receive oral argument: There is less opportunity for face-to-face discussion. After screening a case, the staff law clerk transmits his memorandum and supporting materials to each judge of the panel. The lead judge then reviews the staff clerk's memorandum either through direct examination or after perusal by his personal law clerks. Any modification in the staff law clerk's recommendation will be communicated to the other members of the panel and to the staff law clerk. After review by the lead judge, the next judge in order of seniority reviews the product of the lead judge's review. Again, all the members of the panel, and the staff law clerk, will be notified of any suggested change in the proposed opinion or case disposition. The third judge on the panel proceeds in similar fashion.

Occasionally, a judge may contact the staff law clerk by telephone in order to correct an error or clarify an issue. (As noted, the judges are widely dispersed throughout the circuit; no two live in the same city.) "Whenever I propose to make a substantial departure as to a staff recommendation," remarked one judge, "I will discuss it with the staff law clerk. In general we communicate by phone or memo." When a judge writes to another judge on a staff law clerk's case, he always sends the staff law clerk a copy. The law clerks, of course, have no way of knowing about telephone calls, but calls are reportedly made generally to judges who have already seen the papers. The result of this procedure is to assure that each judge on the panel has reviewed the case and that staff can be apprised of their correct as well as incorrect decisions as determined by the panel. Thus the communication network operates as a feedback loop to staff decision-making. Staff supervision rests on a fairly extensive communication linkage between staff and court.

A result of this screening mechanism is that it is infrequent for the panel to confer in conference on unargued cases. This absence of face-to-face confrontation may modify the traditional view of appellate courts as collegial bodies. The only collegial feature of

cases decided without oral argument can be found in the communication network linking judges to each other and linking judges and their law clerks with central staff. "We [the judges] are in touch with each other more than you suppose," remarked one judge. "While there may be no face-to-face setting for cases decided without oral argument, still we confer by phone with letter follow-ups." Oral communication, when it occurs, is often one-to-one, and judicial decisions on the merits of these cases are reached seriatim.

Three judges responded to our question on this possible difference in screened cases (which lack group deliberation) by questioning in turn whether the face-to-face aspect of panel deliberations had any great significance. These three judges emphasized directly, and the others less directly, the individual nature of their decisions whether or not the judges meet in conference. "The conference [after argument] helps us find out where the 'toes' are, so we avoid stepping on them in the opinion." It was interesting to note also that the judge quoted often used the pronoun "we" in describing aspects of his work—nearly always, "we" referred to himself and his law clerks, not to the panel.

. . . .

Criticism from the Fourth Circuit bar of screening and the use of para-judicial personnel is virtually nonexistent. At first this seems surprising, but all the judges seem to agree that the court goes to some effort in its opinions to explain what it has done in each case and why; if a case is decided without oral argument this avoids any suspicion that the judges did not consider the merits of the case. And if a case is orally argued, the judges also try to make it clear that the issues raised by the parties have been reviewed by the judges even though the case may be decided in a short per curiam. This impression is conveyed through the questioning of counsel at oral argument, which not only illuminates the issues for the court but communicates to the attorneys that the court is familiar with the dispute.

. . . [T]his paper has examined a process in which some suspect that changes in structure may affect outcomes in unexpected and undesirable ways. . . . We have concentrated on the decision-making procedures themselves, attempting to determine whether

increased use of staff has had any apparent effect on the judges' role in decisions. Although we found none, this finding surely raises questions as serious as those it answers. Why is the Fourth Circuit so successful in this respect? Given the fact that we studied procedures that are relatively new, may this success evaporate in the future? Rather than indulge in speculative discussion, we simply list in conclusion some observations based on our discussions at the Fourth Circuit that may have some bearing on future use of staff law clerks.

1. As is clear throughout the report, we feel that the procedures we observed and discussed work very well indeed by any standard. We see no reason for any basic change.

2. We feel that communication between the judges and the staff law clerks has been crucial to the success we observed. An essential element has been circulation to staff law clerks of most judge memorandums that are circulated within panels that comment on or correct staff law clerk proposals. It appears desirable that, whenever possible, any comments be made either in this form or in some other that also would advise the staff law clerk of the panel's reaction to his work. These communications permit the staff law clerks to be as responsive as possible to the thinking of the court.

3. We find it slightly anomalous that the staff law clerks know in advance the composition of panels in pro se cases but not in other screened appeals. They do appear to tailor their work somewhat to the particular panel when they know its composition in advance. This may or may not be desirable. The difference raises in our minds an intriguing question whether knowledge of the panel actually permits the staff to write a higher proportion of proposals that will be accepted by the panel.

4. We find it unfortunate that the workload has grown to the point that the legal section has a backlog. Their solution—to reduce sufficiently the number of cases they screen off to allow the section to stay current—seems proper under the circumstances but most unfortunate. We found general agreement that more cases could be screened off. When the number is reduced as at present, the legal section is forced to shift an unnecessary burden to the judges.

5. We are ambivalent about the possibility of making the staff law clerk positions permanent, as one judge suggested. The potential benefits seem clear. A great deal of expertise is now lost as staff law clerks leave each year. In particular, it was evident that the senior staff law clerk has essential training and supervisory responsibilities that might be well served by extended tenure. However, we see good reasons for caution. We feel that the system owes its present striking success to the close supervision judges give to the staff law clerks. A judge on another court recently remarked in a different context that busy judges must constantly resist temptations to delegate too much, and erode their control over their own decisions. Two Fourth Circuit judges pointed out to us that there would be greater temptation to accept staff proposals uncritically if they were prepared by permanent senior attorneys who had had several years to develop the judges' confidence. Since the continued success of the procedures described here depends on continued close supervision of staff proposals, we feel that any change that might weaken this supervision may weaken the whole process. However, there would be compensating advantages to a permanent staff. Possibly a single permanent position for the senior staff law clerk might be a satisfactory solution.

Court use of para-judicial personnel is interesting in the larger context of organization theory. Law clerks and staff law clerks enjoy a special and privileged relationship to the court they serve, which may make them the most controllable of subordinates. The positions are highly sought after; they provide privileged access to information and processes that are closed to others; and they are defined by powerful norms in a profession (meaning law generally) that itself maintains powerful norms. Staff law clerks appear to be regarded by judges as less controllable than personal law clerks, thus requiring closer supervision of their work. Possible explanations include the view that judges have less contact with staff law clerks than personal law clerks, and generally regard the position as somewhat less attractive. Also, judges know that staff are responsive to all the judges, not only to an individual judge's personal preferences and idiosyncracies.

When Bentham wrote that the law is not made by judge alone but by judge and company, surely he was not referring to the complex organization of courts that exist today. Nevertheless, Bentham's remarks reflect a state of affairs that may serve as a model for other appellate courts faced with increased demands for their services. If the emphasis in Bentham's remark is to rest on judges (and not their company), then the effective supervision of staff—such as has been achieved in the Fourth Circuit—would be a worthwhile model for other appellate courts to follow.

# OPERATION OF THE FEDERAL JUDICIAL COUNCILS[1]

**Steven Flanders and John T. McDermott**
**December 1978**
**(FJC-R-78-7)**

## I. Introduction

In 1977, the Judicial Conference of the United States, through the Subcommittee on Jurisdiction of the Committee on Court Administration, requested the Federal Judicial Center to evaluate the operation of the federal judicial councils. In particular, the subcommittee wished to determine the effectiveness of guidelines that the Conference had promulgated in 1974, which were based on the subcommittee's recommendation.

The Center had already undertaken an evaluation of the Circuit Executive Act; the results appeared in the report, *The Impact of the Circuit Executive Act.*[2]

To evaluate the impact of circuit executives, considerable inquiry into the work of the judicial councils in each circuit was necessary. A preliminary round of one-day visits had been made to each of the ten circuits with circuit executives, to meet with the circuit executive and chief judge. A more lengthy visit to each circuit had been planned to meet with most circuit judges, several district judges, the circuit executive, the circuit clerk, and selected district

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[1] Appendixes B and D through G of this report have been omitted; appendix C has become the sole appendix; and appendix A has been integrated with the text. Minor changes have been made to the text to conform it to the absence of the omitted appendixes. Many footnotes have been deleted, and remaining footnotes have been renumbered. Ed.

[2] J. McDermott & S. Flanders, The Impact of the Circuit Executive Act (Federal Judicial Center 1979).

clerks and other support personnel. Since the circuit executives, as staff to the councils, could not be evaluated without examining the work of the councils themselves, the scope of the original project was extended to include evaluation of the degree to which judicial councils were operating as specified in the guidelines.

. . . Generally, we tried to meet with all those who had direct interest or experience in matters relating to judicial councils or circuit executives, to the extent that could be done within our time limits (a visit of one week to each of the largest circuits, and two or three days to each of the others). We attempted to meet with all judges and support personnel whom we could identify as having a special interest in the relevant issues. We sought persons who had written on these subjects, who were influential members of relevant committees, or who had otherwise shown special interest. We could not avoid missing some persons with whom we would have liked to meet. In addition to the information gained from personal interviews, we also drew upon council minutes, committee reports, and other documents from each circuit.

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The selective character of our research imposes evident limitations. It is possible that our understanding of the work of a particular circuit executive or judicial council is distorted by unrepresentative views or experiences of certain individuals. We were aware of this possibility, however, and made a positive effort to forestall it by seeking diverse views. In particular, we used our initial interviews with circuit chief judges and circuit executives (held in December 1976 and January 1977) to identify people we should seek out in our second round of conferences later in 1977. We used this method throughout our study.

The method of this study permits us to add a new perspective to what has been written by others who have evaluated council operations. No one else has met with so many people in every circuit who are very familiar with council operations and the issues that have been brought to councils. On the other hand, our survey has limitations. We made no systematic effort to survey lawyers, because that job seemed clearly unmanageable. If discussions with lawyers had added complaints about judges beyond those reported

here, we would have had to conduct a separate investigation into the merits of each complaint. Our burden of "screening" would have been at least equal to that of the California Commission on Judicial Performance.

Instead, we limited our agenda to "live" issues that came before a council or that someone in the courts thought should have come before a council. We have some confidence in this approach because the judges and support staff we interviewed were frank with us in many respects we could confirm. Of course, we cannot claim to have uncovered every abuse that councils should have acted on.

The two authors, assisted by Professor David Neubauer, met with a number of individuals and their subordinates in the course of preparing this report. Nearly all interviews were conducted by Professor McDermott and one other interviewer (Flanders or Neubauer). Nearly all the conferences were held in the chambers or offices of the persons interviewed; a few conferences were held elsewhere, usually in Washington. About five interviews were conducted by telephone only.

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## The Administrative Office Act

The judicial councils were created in 1939 as a part of the Administrative Office Act.[3] Now codified as 28 U.S.C. § 332, the relevant provision states:

> (a) The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.
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> (b) The council shall be known as the Judicial Council of the circuit.
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> (c) The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United

[3] Pub. L. No. 76-299, 53 Stat. 1223-25 (1939). The act created, in addition to the judicial councils, the Administrative Office of the United States Courts to staff the Judicial Conference of the United States.

States Courts. The council shall take such action thereon as may be necessary.

(d) Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

(e) The judicial council of each circuit may appoint a circuit executive . . . .

The section of the Administrative Office Act pertaining to judicial councils (section 306) has been amended only twice: in 1948, as part of a general recodification; and in 1971, when the Circuit Executive Act was added. The 1948 recodification included several changes in the language. One of the important changes was that the controversial reference to "necessary orders" of the council (now in section 332(d)) replaced "directions" of the council. The original term might appear more inclusive than the more formal "orders." Also, the original language referred only to the district courts; the present subsection (d) seems to refer equally to the court of appeals ("courts within [the] circuit").

There are many excellent legislative histories of the Administrative Office Act, which created the judicial councils. The most comprehensive is contained in Peter Graham Fish's *The Politics of Federal Judicial Administration*.[4] The background of the statute and its legislative history are discussed in the first two sections of the 1961 "Report on the Responsibilities and Powers of the Judicial Councils" (the Johnson report).[5] Justice John M. Harlan discussed the legislative history in his concurring opinion in *Chandler v. Judicial Council of the Tenth Circuit*.[6] Without attempting to duplicate these efforts, we will provide a few observations and quotations from the legislative history that seem helpful in defining what the judicial councils were intended to be.

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[4] P. Fish, The Politics of Federal Judicial Administration (1973). See particularly ch. 4.

[5] [The Johnson report was adopted by the United States Judicial Conference at its March 13-14, 1961, meeting and is reprinted as appendix B to the original version of this report. Ed.]

[6] 398 U.S. 74, 89 (1970).

The councils' supervisory powers were intended to be comprehensive, permitting them to direct changes they found necessary in the administrative operation of district courts. Professor Fish has provided a list of "administrative functions . . . within the competence of councils" culled from various judges' testimony on the Administrative Office Act.[7] These functions include:

> assigning judges to congested districts, and to particular kinds of cases, directing them to assist infirm judges, ordering them to decide cases long held under advisement, requiring a judge to forego his summer vacation in order to clear his congested docket, compelling multi-judge courts to arrange staggered vacations, and setting standards of judicial ethics.[8]

## The Circuit Executive Act

The Circuit Executive Act of 1971 added subsections (e) and (f) to section 332, providing staff for the judicial councils for the first time.[9] Paragraph (6) of subsection (e) encourages the circuit executive to conduct studies and prepare recommendations and reports for the council. Paragraph (9) suggests specific staff duties regarding council meetings. With the exception of these provisions, the degree to which the act was directed to council functions is not clear.

One purpose of the act was to fulfill the need for an administrative assistant to the chief judge of each circuit, a function only distantly related to the need for staff for councils. The Judicial Conference of the United States had made this request in 1968. Judge William Hastie, Bernard Segal, and others provided testimony that stated or implied no conception that the purpose of the circuit executive was to staff the councils.

The legislative history of the act and its predecessors clearly shows, however, that staffing the councils was a purpose of the circuit executive. In the 1939 deliberations on the Administrative Office Act, it was clear that Chief Justice Hughes felt the councils

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[7] Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. Chi. L. Rev. 203, 207 (1970).

[8] *Id.* (footnotes omitted).

[9] Pub. L. No. 91-647, 84 Stat. 1907 (1971).

would require staff if they were to discharge their functions. Senator Joseph D. Tydings, commenting on testimony before the Senate Committee on Judicial Improvements in 1969, said circuit executives were needed because judicial councils were unable "to develop the necessary facts on which orders for improved administration of the courts could be fashioned."[10] Chief Justice Warren E. Burger frequently alluded to the comprehensive responsibilities he envisioned for the circuit executives; they were to be a major source of innovation throughout their circuits. In a 1971 paper, Joseph L. Ebersole of the Federal Judicial Center observed that "[t]he Circuit Executive Act is an amendment to 28 U.S.C. 332 and as such represents a vitalization of this section." He noted that the act's language delegating duties to the circuit executive refers entirely to the circuit council as the delegating agency.[11]

## Judicial Conference Guidelines

In 1974, the Judicial Conference approved a statement of "Powers, Functions and Duties of Circuit Councils."[12] It provides guidelines regarding council responsibility to supervise dockets and to supervise behavior of individual judges that might erode public esteem for the court system. It outlines procedures for informing district courts and judges when matters affecting them are under consideration. The statement also specifies plans and materials the councils should have before them to exercise their supervisory function. The Conference observed that "[*i*]*t is vital that the independence of individual members of the judiciary to decide*

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[10] *Hearings on S. 952 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 350 (1969).

[11] J. Ebersole, Implementing the Circuit Executive Act 4 (Oct. 18, 1971) (unpublished paper in the Federal Judicial Center library).

[12] This statement is reprinted as the appendix. We comment in this report on the degree of compliance with the guidelines. We note here that relatively few judges seemed to be aware of the document itself, whatever the degree of knowing or unknowing compliance. Judges who were aware of the guidelines had no particular reaction to them. The only exception was a group of judges in one circuit who questioned the authority of the Judicial Conference of the United States to issue guidelines that would be binding on a judicial council.

*cases before them and to articulate their views freely be not infringed by action of a judicial council.*"

## Criticism of the Councils

The judicial councils have been the subject of criticism through most of their history. In 1958, then Circuit Judge Burger noted that "[t]his statute [section 332] vests primary power, and therefore full responsibility, in the Circuit Judges for the management of the Federal judicial system," and observed that "the Judicial Councils have not fully lived up to the expectation of the sponsors."[13] . . . Then Chief Judge J. Edward Lumbard argued that the inaction of judicial councils had a damaging effect: "[T]heir many failures to act have themselves contributed to a feeling on the part of many judges that Section 332 gave the councils no real power; and some judges have thereby been encouraged to defy the councils."[14]

In 1976, the General Accounting Office determined that "[j]udicial councils, to a large extent, have not taken an active role in overseeing the administrative and financial activities of the district courts. In light of the long term inactivity of the councils and the factors contributing to it, the Congress should reexamine the role of the judicial councils."[15]

The councils have also been criticized on the relatively rare occasions when they have made "orders" affecting "courts within [the] circuit." The dissenting opinions of Justices Black and Douglas in *Chandler v. Judicial Council of the Tenth Circuit* are well-known examples of such criticism. The dissenting justices regarded the Chandler episode as another instance of a dangerous expansion of judicial supervisory power: "All power is a heady thing as evidenced by the increasing efforts of groups of federal judges to act as referees over other federal judges."[16] Both justices

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[13] Burger, *The Courts on Trial*, 22 F.R.D. 71, 75, 77 (1958).

[14] Lumbard, *The Place of the Federal Judicial Councils in the Administration of the Courts*, 47 A.B.A.J. 169, 170 (1961).

[15] General Accounting Office, Further Improvements Needed in Administrative and Financial Operations of the U.S. District Courts (1976) (the quoted passage appears on the cover of the report).

[16] 398 U.S. at 137.

considered section 332 unconstitutional; the majority seemed to suggest otherwise,[17] though they did not reach the issue. Other federal judges have attacked the councils' power as excessive and unconstitutional. Chief Judge Frank J. Battisti described it as "ill-conceived"[18] and unconstitutional.[19]

Another kind of criticism appears in proposals that would withdraw power from the councils and give it to other bodies. Two recent proposals would do this, although they are at opposite poles in other respects. The first, the Judicial Tenure Act (S. 1423, first known as the Nunn bill, now the DeConcini bill), would establish a national body to handle complaints about judges' misbehavior or nonfeasance and to provide for possible disciplinary action.[20] This proposal is modeled on disciplinary commissions now serving in many states; it most resembles the California Commission on Judicial Performance, established in 1960 (as the Commission on Judicial Qualifications). The second proposal, by the Association of the Bar of the City of New York, would establish local boards with jurisdiction over federal judges in two districts within the state

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[17]The majority opinion stated:

> Many courts—including federal courts—have informal, unpublished rules which, for example, provide that when a judge has a given number of cases under submission, he will not be assigned more cases until opinions and orders issue on his "backlog." These are reasonable, proper and necessary rules, and the need for enforcement cannot reasonably be doubted. These internal rules do not come to public notice simply because reasonable judges acknowledge their necessity and abide by their intent. But if one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse.

398 U.S. at 85 (Burger, C.J., for the Court).

[18] Battisti, *An Independent Judiciary or an Evanescent Dream*, 25 Case W. Res. L. Rev. 711, 721 (1975).

[19] *Id.* at 745 (quoting Justice Douglas's dissent in *Chandler*).

[20] The Senate passed this bill on Sept. 8, 1978. The legislation is the subject of the May 1978 issue of *Judicature*, which includes articles by Judge Lumbard, supporting the bill, and Judge J. Clifford Wallace, opposing it.

of New York; these local boards would hear complaints about judges' behavior.[21]

One proposal would supplement the councils with a new national body; the other would add to the already decentralized circuit councils a still more local structure. Both proposals contain an unavoidable implication that the judicial councils have not been adequate to the task demanded of them.

## II. An Appraisal of Council Performance

### Docket Supervision

Section 332(d), as interpreted by the Judicial Conference of the United States, requires judicial councils to examine information on the operation of the courts within their circuits, to determine when a problem exists, and to take corrective action when necessary.[22] The Judicial Conference of the United States has specifically stated:

> With respect to the district courts, the circuit council should keep itself informed on a regular basis as to the following:
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> (a) The condition of its docket in terms of the number of cases filed, cases terminated, and cases remaining on its docket; cases under decision unduly delayed.
>
> (b) List of prisoners in jail awaiting trial, showing date of imprisonment.
>
> (c) The operation of the Rule 50(b), Federal Rules of Criminal Procedure, plans for expediting the trial and disposition of criminal cases in the district courts of the circuits.
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> (d) The operation of the Criminal Justice Act plans. See 18 U.S.C. § 3006A(i).

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[21] Association of the Bar of the City of New York, A Proposed Procedure for Treating Complaints Concerning Federal District Judges (Mar. 1978) (unpublished paper).

[22] This responsibility is defined in the Administrative Office Act, 28 U.S.C. § 332(c), (d), and (e), and is further specified in the Judicial Conference statement of "Powers, Functions and Duties of Judicial Councils," items 4, 8, 9, and 10, reprinted in the appendix.

> (e) The operation of the jury selection plan in the district courts. See 28 U.S.C. § 1863(a).
>
> (f) The degree to which the district courts are undertaking to make the best utilization of jurors. See Guidelines for Improving Juror Utilization in the United States District Courts issued by the Federal Judicial Center. . . .
>
> Where it appears that the court of appeals or any district court in the circuit has a large backlog of cases, the circuit council should take such steps as may be necessary to relieve the situation. . . .[23]

However, several judges and support personnel we interviewed deny the existence of the councils' power to take corrective action. Others have claimed that judicial councils operate on "an appellate model": that they do not seek out problems, but rather, they respond when problems are brought to them. An "appellate" approach, although possibly appropriate in other areas of council responsibility, seems insufficient here (assuming as we do that section 332 as interpreted by the Judicial Conference is good law). The passage quoted in the preceding paragraph clearly indicates the need for an active and creative use of available measures to determine if a problem exists, and if so, whether it requires council action.

Docket supervision is extremely difficult and sensitive. Performance measures of judicial activities are notoriously controversial and subject to misinterpretation. More important, the application of performance measures is initially a task for each district or circuit court itself. Internal reports showing each judge's pending caseload and listing old cases not decided are standard management tools in most federal courts. They have been the basis for procedural changes, adjustments in judges' individual caseloads, assignment of magistrates and other support personnel, and many other actions. We are aware of numerous instances in which courts have solved their own docket problems, with no need of council intervention. Only when courts do not solve their own problems can

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[23] "Powers, Functions and Duties of Judicial Councils," item 8, reprinted in the appendix.

there be a role for the council. (Even then, docket problems may be beyond the control of court or council, as was true in several undermanned courts before the recent judgeship bill was passed.)

In the course of our visits to circuit councils, few council members expressed confidence that their docket supervision is valuable. We were told that statistics are not timely when the council acts on them, that they are too voluminous to be useful in pinpointing problems, and that they are difficult to interpret. Some judges doubt the accuracy of the statistical reports they receive, the relevance of statistical reports to policy problems, or the policy implications that could be drawn from the reports. Finally, many doubt that they can take any useful action. As a result of these problems, council actions based on review of statistics have been sporadic and often not timely.

The actions most frequently reported to us were those specifically mandated by Judicial Conference resolutions. For example, in 1961 the Judicial Conference determined that civil cases pending for three years or more would be considered a "judicial emergency."[24] The Administrative Office prepares a quarterly report that lists the number of these cases pending before each judge. One council determined that three-year cases were a major problem in that circuit. Following the discovery that the circuit had more three-year cases than any other circuit, the council required each district to develop a program to eliminate old civil cases.

Other circuit councils simply send a letter to each judge inquiring about the status of such cases. Unfortunately, the statistical report on which the council's action is based is often out of date. The result is that the council often inquires about matters that have already been resolved. This is often a source of embarrassment to the council or the chief judge.

An even more common cause of embarrassment is the routine letter or telephone call that frequently follows distribution of the "old motions list," which lists motions held under advisement for sixty days or more and decisions held under advisement for ninety days or more. Usually this contact is made by the chief judge,

[24] Proceedings of the Judicial Conference of the United States 62-63 (1961).

sometimes by the circuit executive. Since the list deals with matters that turn over relatively rapidly, matters or motions about which the council may inquire will often have been disposed of by the time the inquiry reaches a district judge. In our view, the quarterly inquiry is an inadequate and mechanical response in the case of judges who repeatedly have a large number of undisposed matters before them. Probably, the circuit executive should maintain a record. After only a few repetitions of this inquiry, a council should attempt to assist in a more systematic fashion, i.e., express specific concern, offer assistance as appropriate, or suggest procedural or other changes.

Most councils (or courts of appeals) have taken steps to expedite preparation of transcripts for cases on appeal, especially criminal cases. Some circuit executives have been especially valuable here; in at least one district, the reporter organization was restructured on the initiative of the circuit executive. By these means and others, most circuits now monitor the entire process closely, and have timely, accurate information on transcript preparation.

Although specific council initiatives in response to docket problems have been infrequent, there are examples of effective council actions. One circuit council has made aggressive efforts to address the problem of "caseload disparity," i.e., wide differences in the number of pending civil cases among judges of one court. Several circuits have provided courts in need of assistance with visiting judges (from within and outside the circuit). Such action usually follows a request by the chief judge of the court involved, but occasionally a council has taken the initiative. One council mobilized a comprehensive effort to attack the severe backlog problems of a district, arranging for visiting magistrates and court reporters as well as judges. Two others determined that a judge had fallen seriously behind and arranged for visiting judges to help with some of the backlog. Both councils asked the "delinquent" judge to refrain from hearing new cases and monitored the judges' progress for some time. They report that the judges involved are now quite current.

Another council obtained data showing unusual delays in the criminal cases within the circuit; each district was required to de-

velop methods to speed criminal cases. (This action took place in 1972, well before the enactment of the Speedy Trial Act of 1974.) Finally, a council that was concerned about "inexcusable delays of matters referred to magistrates" conducted inquiries in each court.

It seems evident that better mechanisms are needed to implement the requirement that each circuit keep itself informed "on a regular basis" concerning the condition of district court dockets. Improved staff work could simplify, strengthen, and refine the councils' work greatly. The charge that the Administrative Office statistics are unavoidably late seems beside the point; the instances reported to us could have been corrected. Given adequate staff work, the councils can be presented at their quarterly meetings with a manageable body of timely information that highlights significant issues.

We suggest the following:

1. The circuit executive should review each annual volume of *Management Statistics for United States Courts* and identify problem areas for the council. In this publication, the Subcommittee on Judicial Statistics has compiled a balanced, though spare, number of measures of district court and court of appeals operation. Since no single measure can adequately assess the work of a court, the subcommittee strove to provide balance by including several complementary variables. The circuit executive could bring to the council's attention any variable in which a district court in the circuit ranked among the worst 10 or 20 percent in the United States, in which its performance is markedly worse than in the previous years, or in which there has been a steady trend for the worse.
2. The circuit executive should identify quarterly any marked changes—especially changes for the worse—that have taken place since the previous quarter, or in relation to the *Management Statistics* for the previous year.
3. The circuit executive should examine the JS-1 and JS-9 reports monthly and bring any unusual problems to the council's attention. These forms, prepared each month by each district court clerk and mailed to the circuit executive and the Admin-

istrative Office, indicate the number of criminal and civil cases pending before each district judge. They provide an adequate basis for preliminary identification of a district's problems, whether these problems are caused by temporary crises or by procedures that need refinement.

4. The circuit executive should have enough contact with each district court to maintain sound, intuitive familiarity with the problems and issues in each district court.
5. Each council should obtain special information if needed, either from the Administrative Office or directly from a district when necessary. For example, one circuit council regularly obtains information on the number of trial days per year for each district judge in the circuit. (The Administrative Office can make special computer runs for this purpose on request.) This inquiry results from the concern with "caseload disparity" already mentioned. Although productivity or effectiveness is not directly associated with the number of trial days, a judge with a severely crowded docket who has fewer than average trial days may need prodding from the council. (These data have also been useful in obtaining additional judgeships.)

Once a problem has been identified, by these means and others, the council should determine the precise nature of the problem and explore innovative ways of solving it. If the problem concerns a lack of resources, the council is in a position to help; it can provide visiting judges, help a district obtain additional permanent judges, obtain court reporters on a temporary or permanent basis, or obtain supporting personnel.

Too often, however, there seems to be an automatic assumption that additional resources are the only answer. Now that the circuit executives have modest staffs, they should be in a position to define the problem and propose other solutions where appropriate.

Statistics are only a starting point, however. A council can often use statistics to identify respects in which a court's performance is not up to a reasonable standard. But if special conditions obtain, the implications drawn from statistics may be misleading. The cir-

cuit executive should be able to determine whether such special conditions apply to a specific court and propose solutions following contact with the court. As indicated in *The Impact of the Circuit Executive Act,*[25] circuit executives have pursued the task of docket supervision less actively than the act would suggest.

It is often suggested that judicial councils' monitoring of district court statistics is impermissible, because it is inconsistent with judicial independence. In response, we note that the system of judicial statistics was devised by judges for judges, specifically to help them refine their procedures. It is not, as many seem to imagine, a system that has been imposed from outside the judiciary (except those elements that have been required by Congress). Statistics constitute more than a method of external supervision; they give judges the opportunity to examine the results of procedural alternatives. A council that uses statistics wisely can meet its statutory responsibilities without any intrusion into a judge's independent decisions.

## Handling Complaints about Judge Behavior

Although the "appellate model" may not be appropriate for docket supervision, it may be the best way for a council to handle malfeasance, nonfeasance, or other problems of individual judges' behavior. As far as we know, no one has suggested that councils should do more in this difficult area than make themselves available to hear and respond to complaints.[26] The national body proposed in the Judicial Tenure Act, like the California Commission on Judicial Performance, would operate in this "appellate" fashion.[27] However, many commentators feel that councils have not taken adequate action on complaints about judge behavior. Criticism of council effectiveness has been most vigorous on this point. The

[25] McDermott & Flanders, *supra* note 2.

[26] A senior circuit judge, with a long and prominent history of supporting an active council role, argued in our meeting that the judicial council is not an investigative body. In his view, the council should take action only if a complaint is so serious that it may provoke a public scandal, and if the council determines that the court involved is unable or unwilling to act.

[27] *See supra* note 20 and accompanying text.

two proposals that would withdraw power from the councils and give it to other bodies focus on the method of handling complaints about judge behavior.

It is not surprising, given the nature of the approach Congress devised in section 332, that there is no record of stunning achievement in this area; for the most part, there is no record at all. Congress established a system that relies on informal action. Because it has been informal, there is little or no record of council action. Chief Justice Hughes believed that the councils would be the bodies best able informally to resolve issues of judicial misbehavior (short of impeachment) because of their familiarity with the individuals, the issues, and the locale.[28] Professor Fish, among others, has argued that it is precisely this familiarity that has stood in the way of effective action: Circuit judges may be unduly responsive to, or solicitous of, the other judges in the circuit.[29]

As a result of our visits with circuit and district judges, supporting personnel, and a few lawyers, we have concluded that it is in the area of handling complaints about judge behavior that the councils have been most effective. Our conclusion differs from that of Professor Fish, not in our estimate of the number or quality of reported episodes, but in the extent to which there is a discoverable problem that council efforts have failed to address. In several episodes brought to our attention, councils have taken effective action after identifying a problem with a district or circuit judge's behavior. The action taken was almost always informal. Despite considerable probing, we uncovered *no* clear instances in which councils had failed to act effectively (apart from previously known instances, such as those involving the late Judge Willis W. Ritter, and Judge Stephen S. Chandler).[30]

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[28] *See* the Johnson Report, *supra* note 5.

[29] Fish, *supra* note 7, at 224.

[30] It could be argued that the Chandler episode is not a council failure. The holding of the Supreme Court is ambiguous, and does not limit council powers. Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1969). The council did achieve its intended result, however: Judge Chandler did not take new cases. In the Ritter matter, there was little or no effective council action, although the court of appeals took numerous actions to remove Judge

On matters of individual behavior, the circuit judges are familiar with the problems in their circuits. They are cognizant of individual judges' practices that approach the boundaries of impropriety and that reflect badly on the judiciary. Circuit judges are in an excellent position to take subtle and effective action when necessary.

On the basis of our visits to the circuits, we have concluded that the councils have done an effective job, as far as we can determine. We searched for complaints that had been "swept under the rug" and found none. It is only in regard to issues that were unresolved at the time of our visits that our information seems incomplete. We were informed that three problems of individual judge behavior were pending before councils; we were given very little information on them in response to our inquiries and cannot comment further. Judges understandably felt a special need for confidentiality on pending matters.

Among the handful of problems reported to us during our visits, the most common was excessive drinking. In one case, a highly respected judge was pressured into what has been described as a very effective cure following a council threat to take action under 28 U.S.C. § 372(b).[31] In at least two other cases, judges with alcohol problems took senior status early following an informal expression of concern from the council or chief judge.

In at least three other cases, judges took senior status because of an expression of council concern regarding senility or quasi-senility. In addition, Judge Mell G. Underwood took senior status in 1966 following a threat that the council would invoke section 372(b).

We were also informed of several instances in which a council took action when a judge's docket became backlogged because of a

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Ritter from specific cases. Judge Ritter was probably fortunate in that he served in Judge Chandler's circuit. The council, its members indicated to us, was hesitant to take another forceful action after a perceived failure in the Chandler case. A petition was pending before the council when Judge Ritter died.

[31] This section empowers a majority of the council to submit a "certificate of disability" to the president, depriving the judge of his seniority and permitting an additional judge to be appointed.

particular case. One circuit issued a formal order under section 332 that removed a district judge from the assignment list until the case causing the delay had been disposed of. Two other circuit councils achieved the same results informally. In one of these cases, the circuit executive served as the council's emissary in a series of conferences and discussions with the judge involved. In both cases, the councils independently provided judicial assistance as well.

Another council took informal action to moderate the approach of a judge who was severely criticized by the bar for his alleged excessive aggressiveness in moving cases on his docket. Reportedly, no further action was required after the circuit chief judge conveyed to the judge in question the seriousness of the bar complaints, and the concern these caused the circuit council.

A bankruptcy scandal was averted in one district through the intervention of the judicial council. No formal action was taken.

There were cases in which a council did not take needed action. The ones that came to our attention primarily concerned docket management and related matters. One small court, for example, had a long list of pending sixty-day motions—longer than the total for all but two other circuits. No action was taken on this beyond a routine, perfunctory letter advising the judges that these motions were pending; the council did not advise the judges that the situation was in any way exceptional.

It would appear that awareness of council powers should be increased. Too many district and circuit judges deny their existence or assume they are unconstitutional or unenforceable. The scope and use of council powers would be a useful topic for discussion at meetings of the Judicial Conference and other bodies. We assume that the subject has been avoided in the past because of its inflammatory character. The topic should probably be avoided when a specific council action is being considered. It seems clear that the council powers will be better exercised, and their existence better understood, if they are discussed—preferably in a thorough yet low-keyed manner.

Another step to increase awareness of council powers would be the creation of committees in each circuit to consider complaints

from lawyers and the public. Most lawyers do not know of the existence of section 332 powers, or how to invoke them. Establishing a formal body to consider complaints, among other purposes, could correct the situation. It would be desirable for each circuit to have a committee to handle complaints. To be effective, a committee must be well known by the bar. Perhaps it is best for the committee to have broad responsibilities as a conduit between bench and bar and to receive occasional, specific support from the chief judge. The Third Circuit, for example, has a Lawyers' Advisory Committee that considers complaints, among other functions.[32] If the supervisory powers of the councils have fallen into disuse, a likely reason is that they are little known and poorly understood.

## Matters for Council Review

A large number of matters, ranging from important to routine, must be submitted to the judicial council for approval. The judicial council is the actual appointing authority for each federal public defender, on the district court's recommendation. Council approval is required for most district court requests for more judges, magistrates, bankruptcy judges, and other supporting personnel. The council must review the adequacy of statutory plans, as well as changes in the salary and assignments of certain personnel. In nearly all of these matters, council review precedes review by the Judicial Conference or the Administrative Office, or both.

During our visits to the circuits, we received little indication that circuit judges resist assuming these responsibilities. We frequently heard the complaint that judicial council meetings are one of a circuit judge's least interesting responsibilities; but few judges were willing to support the idea of curtailing council approval. Most felt that the time consumed was not unreasonable in relation to the importance of the matter under consideration, i.e., important matters took more time, less important matters took less time.

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[32] See Rule XVI of the Judicial Council of the Third Circuit. Under a new procedure, the Ninth Circuit will establish an ad hoc committee to conduct an inquiry in serious cases, including notice to the judge involved and hearings as appropriate. Initial screening of complaints is done by the circuit's chief judge.

Some councils have taken their approval responsibilities very seriously. The Tenth Circuit council, handling a recent public defender appointment, obtained three recommendations from the district court, interviewed all three candidates, and only then made an appointment. The Third Circuit council made a recent appointment in similar fashion. Although not all councils follow this procedure, several have independently examined applicants' qualifications and have interviewed candidates. Some judges outside the Tenth Circuit have argued strenuously that the opportunity to choose among several candidates is essential.

Several councils are very active in reviewing statutory plans, sometimes establishing and publicizing distinct requirements as circuit policy.[33] Often the circuit executive conducts a preliminary review to determine whether the proposed plan is consistent with circuit policy and with the statute involved. The Fifth Circuit, for example, would not accept automatic mileage excuses in jury plans. Several circuits have used a model speedy trial plan—more stringent than statutory requirements—as the basis for detailed scrutiny of proposed plans.

By resolution of the Judicial Conference, the councils must decide whether senior judges are entitled to supporting staff. These decisions, made annually, are based on the standard of "substantial judicial work" rendered by the senior judge. Several councils have taken a hard look at the service of each judge to determine whether supporting staff was justified. One sent an inquiry to the council in another circuit where a judge did most of his work. However, council approval of supporting personnel for senior judges is an area of recurring criticism. Several judges said that councils had certified "substantial service" with little justification.

We are not inclined to be particularly critical of councils that prefer to err on the permissive side of this difficult issue. Many se-

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[33] There appears to be considerable potential here for a collision between a council's policy responsibility and the court of appeals' reviewing power. Judge Jack B. Weinstein has pointed out that courts of appeals often, in effect, find themselves reviewing their own plans when litigation reaches them questioning a district plan that, in turn, was based on a judicial council model. *See* J. Weinstein, Reform of Court Rule-Making Procedures 126 (1977).

nior judges clearly render "substantial service." Many of those who do not are ill. For a council to hastily withdraw the staff of a stricken judge would surely suggest that it had determined the judge's illness to be either terminal or permanently debilitating. Wishing to avoid that implication, some councils may certify staff even though the judge did little judicial work the previous year.

During our circuit visits, we observed that the various methods councils use to grant or withhold approval of plans and resource requests could be improved in many instances. The councils often have no information that would provide an objective basis for comparing resources requested with any larger standard. District court requests are sometimes taken at face value and approved without discussion. (It should be noted, however, that many observers think council review forestalls unreasonable requests, an argument that has considerable force.) Several circuits assign a particular resident circuit judge to evaluate requests from certain districts. That judge is expected to know the districts in his "jurisdiction" well, and to be able to make a personal appraisal of the merits.

It appears that there is occasional need for a comprehensive statistical workup that presents a national picture by which local requests could be judged. Often, no national standard exists in any formal sense; one must be inferred from a survey of practice elsewhere. In some instances, a brief cover memo summarizing a request and prior council actions could be sufficient. In important or novel situations, a more comprehensive workup would be necessary, accompanied by appropriate statistical comparisons. The circuit executive or other council staff could perform this function; effective use of staff minimizes the time that judges must spend on administrative matters.

## Other Council Functions

During our circuit visits, we found that the councils are more aware of their continuing responsibilities than we had expected, particularly in light of the criticism that their powers are so little used. Judicial councils have such a volume of routine business that

a circuit judge is regularly reminded of his role as both judge and council member.

We examined council operations in terms of the items specified in the 1974 Judicial Conference statement of "Powers, Functions and Duties of Circuit Councils." We discuss below only those items not previously addressed in this report.

Item 5 specifies that the chief judge of a district court should be "informed when matters concerning his district are under consideration and shall pass the information promptly to the judges of the district." In the very few episodes in which formal council action under section 332 has been considered since 1974, we know of no instance in which this was not done. The Third Circuit has adopted useful rules for council operation; rules XIII and XIV address this matter.

Item 6 requests councils to invite persons subject to council action to present their views. We know of no instance since 1974 in which this was not done.

Item 7 requests the chief judge of the circuit to hold periodic meetings with the chief judges of the district courts within the circuit, as a matter of council business. Leaving aside the District of Columbia Circuit, to which this item is not applicable, we know of four circuits that do not meet regularly. Several judges expressed the view that these meetings have been useful; they would probably be useful in the four remaining circuits.

Item 12 requires that circuit council meetings be held at least four times a year and suggests use of standing and ad hoc committees. Several councils do not meet as such four times a year. However, in most circuits, council business is taken up at regular meetings of the courts of appeals, whose members constitute the councils. Therefore, in every circuit, there are at least four meetings each year at which council business may be discussed. Also, many routine matters are handled between meetings, by mail or telephone.

Council committee work is a major burden in some circuits. Sometimes, the circuit executive can handle committee work, leaving only supervisory responsibilities for the judges. For example, in the Second Circuit, the circuit executive collects data and

prepares summaries for each committee that uses case flow information. A cover memorandum highlights the significant points. The same executive provided continuous support during the Clare Committee's[34] study on the quality of advocacy, conducting substantial data collection and analysis. He is active on nearly every council committee; several committees, to some degree, owe their existence to his initiatives.

In some other circuits, the burden on judges seems greater than necessary—even if the circuit executive contributes substantially to committee work. Some circuit executives—especially in the larger circuits—are simply spread too thin. Councils themselves sometimes fail to request needed assistance. Only in a few instances is the circuit executive a participating member of council committees. In most cases, the executive's role is limited to that of secretary, or even to simply arranging meetings.

In one circuit, many judges told us they cannot use the circuit executive for "judicial business"; they define this term so broadly that judges do what elsewhere would be delegated to staff. Although the executive in this circuit serves on the committees and is available to provide help, judges more than once have drafted reports and traveled to other circuits to appraise procedures being considered for adoption.

A few councils have actively served as sources of ideas and innovations for the operation of courts throughout the circuits. The General Accounting Office (GAO) has recently reemphasized the responsibility of judicial councils to press for innovations and improvements in court operations.

We discussed the recommendations in the 1976 GAO report with each circuit judge and many district judges. These recommendations included improved jury utilization, a reduction in places of holding court, greater use of interest-bearing accounts for registry funds, and other matters.[35] Some judges said those minor matters were of no consequence to the councils. The issues GAO men-

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[34] The Advisory Committee to the Judicial Council on Qualifications to Practice before the United States Courts in the Second Circuit.

[35] General Accounting Office, *supra* note 15.

tioned had been of continuing concern to the councils, although they were never accorded high priority. We know of several councils that took specific actions in response to the report. Several circuit executives have been involved in an Administrative Office program to close little-used courthouses. This has been a major effort in at least one circuit, involving considerable correspondence with the affected bar and judges, as well as with the General Services Administration and (sometimes) Congress. Several councils have encouraged improved juror utilization, and have sponsored or supported workshops on the subject in conjunction with the Federal Judicial Center.

## III. Proposals for Change in Council Powers

The supervisory powers of judicial councils make many judges uncomfortable, whether they serve on a district court or a court of appeals. Many judges feel that section 332 lacks effective enforcement power, or that it is unconstitutional, or both. Many circuit judges also feel that, whatever their powers under section 332 might be, the unpleasant duties associated with council responsibilities are "not really part of the job" or are not truly part of the judicial system.

Many judges told us that "clarification" of section 332 is needed. One circuit judge said that council power amounts to no more than a power to make speeches. Another asked rhetorically what the judicial council can do about judges who take long vacations or refuse to file required financial statements, or those whose best work is normally inadequate. Another expressed the view that "a little inefficiency is a small price to pay for judicial independence"; he opposed aggressive council action in the districts except in certain extreme situations where there was no alternative. Like many judges, he sought precise statutory definition of the situations that require council action.

A vocal minority of judges denied the existence of council powers. This minority tends to be concentrated in three circuits. Some of these judges insist that section 332 is unconstitutional; others argue that its powers are limited to those defined statutory

powers that are specifically enumerated. Several judges made vigorous policy arguments against the statute. One young district judge argued that the councils may drive out independent judges and do long-term damage to the judiciary. He cited a particular trial judge as the sort of distinguished jurist who would be driven out of a system in which judicial council intervention was common. The judges expressing these views would repeal section 332 or permit it to die quietly from disuse.

Unfortunately, the suggestions that section 332 be clarified were always phrased in general terms. We know of no specific proposal that would clarify the statute while leaving intact the broad supervisory power that Congress intentionally granted. The real problem may be the fact that both major cases that address the matter are ambiguous: Neither the Third Circuit in *Nolan* nor the Supreme Court in *Chandler* reached the issue of the constitutionality of section 332 in their decisions.[36]

A council's exercise of its supervisory power can only be sporadic and infrequent; each instance is likely to be unique. Drafting legislation to define such a power seems to us impossible: The existing statute and its legislative history confer comprehensive powers that are unlikely to be strengthened by any attempt at statutory redefinition. The more likely effect (intended or not) would be to limit, rather than strengthen, the councils' supervisory powers. We suspect that the discomfort expressed to us by both circuit and district judges is unavoidable. The only prospect for "clarification" is that some future case would specifically address the supervisory powers granted by section 332(d).

No useful clarification concerning enforcement powers seems possible either. Few statutes that confer a substantive power are self-executing. It would be odd if section 332(d), directed to

[36] Nolan v. Judicial Council of the Third Circuit, 481 F.2d 41 (1973); Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1969). It seems to us that both *Nolan* and *Chandler* are often misread or incorrectly remembered. Both cases were cited to us repeatedly as indicating that councils have no constitutional authority over judges. Actually, only the dissents of Justices Black and Douglas take that view. The majority language in both decisions consistently supports council powers.

judges sworn to uphold the Constitution and the law, had some exceptional provision to define powers if the statute were ignored. It seems reasonable to assume that virtually all judges will either follow council orders, or litigate council authority on constitutional or other grounds—and obey if they lose. If a judge failed to obey a lawful order, presumably he could be subject to mandamus proceedings or even impeachment.

There is a wide range of supervisory powers available to judicial councils. The legislative history of the Administrative Office Act clearly suggests that section 332(d) was intended to confer a vigorous power. When the statute was passed, no doubt was expressed concerning either its scope or its constitutionality. In addition to the formal power under section 332, section 372(b) is also available to the councils. Under that section, a majority of the council can authorize the president to appoint an additional judge to assist a "permanently disabled" judge who does not voluntarily retire. The majority must find "that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability . . . ." The informal power of persuasion—supported by the threat of either formal action—is an important council power. Whatever attitudes judges may have toward these formal and informal powers, we found no specific instance outside the public record in which existing powers were inadequate.

Since our visits to the courts, there has been some renewed interest in an amendment to provide for district judge representation on the councils. We cannot comment on this at length because we did not raise the question systematically in our meetings; the issue was discussed only if someone else introduced it. This did not happen often; we uncovered no extensive interest in district judge representation. Some district judges proposed representation; others opposed it. One appellate judge mentioned that if district judges were to sit in on many council meetings, they would soon conclude that they had more important things to do.

There is widespread concern, however, about the secrecy of council sessions at which important decisions about a judge may be made. Some circuits invite representatives of the district judges'

association to attend council meetings and participate informally; this practice was commended to us during our circuit visits.

A few judges mentioned to us that they felt that councils should have subpoena power. We cannot comment on this proposal, except to observe that some circuit judges see the absence of this power as an obstacle if a serious problem should arise. We know of no such instances to date, but this could conceivably be a problem in the future.

Finally, one circuit judge said that the councils need more power to mobilize resources when a district needs major assistance. At present, a council can do no more than request judges to help another court. In order to bring in supporting personnel, a council must make numerous specific requests of the Administrative Office, and gain approval for each. The judge feels that the council's responsibility in this area should be matched by adequate authority. Procedures, or a statute, that would provide emergency powers might be useful. When one council attempted to mount a comprehensive effort to rid a district of its backlog, so much time was needed to smooth the administrative path in order to move people around that the effort may not have been worth the trouble.

Apart from this last item, we see no particular promise in any of the proposed changes we heard. Rather, we feel the councils have worked fairly well. An agenda for improving the operation of judicial councils should focus on the recommendations we have summarized, which emphasize improving the methods of the councils' operation.

## Appendix: Powers, Functions and Duties of Circuit Councils[37]

1. Section 332(d) of Title 28, United States Code, reads:

> Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

[37] Judicial Conference of the United States, March 1974.

2. The purpose of 28 U.S.C. § 332 is to create a "system of decentralization" by recognizing in each circuit the judicial council as "the operating unit in bringing about the proper administration of justice." Hearings before a Subcommittee of the Senate Judiciary Committee, 76th Congress, 1st Sess., on S. 188, April 4-5, 1939, at p. 20.

3. The judicial council "shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." 28 U.S.C. § 332. *It is vital that the independence of individual members of the judiciary to decide cases before them and to articulate their views freely be not infringed by action of a judicial council.*

4. "The responsibility of the councils 'for the effective and expeditious administration of the business of the courts within its circuit' extends not merely to the business of the courts in its technical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts." Report of the Judicial Conference of the United States on the Powers and Responsibilities of the Judicial Councils (June 1961).

5. The chief judge of a district court should be informed when matters concerning his district are under consideration and shall pass the information promptly to the judges of the district.

6. Before any action is taken with respect to a particular judge or other person attached to the courts in the circuit, that judge or other person should be invited to present his views to the council after being advised of the nature of the action which may be taken together with the reasons. Monitoring the substance of judicial decisions is not a function of the judicial council.

7. The chief judge of the circuit, as a representative of the council, should periodically call a meeting of all the chief judges of the district courts to discuss with them matters of mutual concern. It is suggested that copies of the minutes of these meetings be furnished all active court of appeals and district court judges in the

circuit. The judges of the district courts should be encouraged to recommend matters for consideration by the circuit council and, where appropriate, they should be advised what action, if any, is taken on the recommendations.

8. With respect to the district courts, the circuit council should keep itself informed on a regular basis as to the following:

(a) The condition of its docket in terms of the number of cases filed, cases terminated, and cases remaining on its docket; cases under decision unduly delayed.

(b) List of prisoners in jail awaiting trial, showing date of imprisonment.

(c) The operation of the Rule 50(b), Federal Rules of Criminal Procedure, plans for expediting the trial and disposition of criminal cases in the district courts of the circuits.

(d) The operation of Criminal Justice Act plans. See 18 U.S.C. § 3006A(i).

(e) The operation of the jury selection plan in the district courts. See 28 U.S.C. § 1863(a).

(f) The degree to which the district courts are undertaking to make the best utilization of jurors. See Guidelines for Improving Juror Utilization in the United States District Courts issued by the Federal Judicial Center.

Although the circuit council should rely when possible on statistics available from the Administrative Office, it may require the district courts to supply this information by filing reports with the council.

9. Where it appears that the court of appeals or any district court in the circuit has a large backlog of cases, the circuit council should take such steps as may be necessary to relieve the situation, including working with the court in question in procuring the assignment of judges from other districts and circuits to that court.

10. Where it appears that a circuit or district judge has a large backlog of cases or decisions to be made, the circuit council should take such steps as may be necessary to relieve the situation after first giving an opportunity to the circuit judge or the district court to take appropriate action in the case of a district judge.

11. When the district judges are encountering difficulty in agreeing upon the adoption of rules and orders dividing the business of the court, the circuit council should lend its assistance in resolving the problem. When the district judges are unable to agree upon the adoption of rules or orders dividing the business of the court, the circuit council shall make the necessary orders. 28 U.S.C. § 137.

12. Circuit council meetings should be held at least four times a year. Standing and ad hoc committees may be utilized to reduce the burden on the council as a whole and persons not members of the council, including district judges, members of the bar, law professors and laymen, may be appointed to such committees.

13. Before the circuit council adopts any general order affecting the operation of the courts within its circuit, the judges of the district courts should be afforded an opportunity to comment. In appropriate cases it will also be desirable to afford an opportunity for comment to the bar and public groups known to be concerned.

14. A circuit council may delegate limited power to the chief judge of the court of appeals to act on its behalf, but such power shall not extend to the adoption of general rules or to the taking of final action with respect to a particular judge or other person.

15. All duties delegated to the circuit executive by the circuit council shall be subject to the general supervision of the chief judge of the circuit. When authorized by the circuit council, the chief judge may also delegate specified portions of his powers to the circuit executive.

16. Where any formal order of the circuit council is not complied with, the matter may be referred to the Judicial Conference of the United States, or the circuit council may take other appropriate action.

## Duties Which May Be Delegated to the Circuit Executive

The circuit executive shall act as secretary of the circuit council. The circuit council may delegate power to the circuit executive. The duties delegated to the circuit executive of each circuit may include but need not be limited to:

(a) Exercising administrative control of all nonjudicial activities of the court of appeals of the circuit in which he is appointed.

(b) Administering the personnel system of the court of appeals of the circuit.

(c) Administering the budget of the court of appeals of the circuit.

(d) Maintaining a modern accounting system.

(e) Establishing and maintaining property control records and undertaking a space management program.

(f) Conducting studies relating to the business and administration of the courts within the circuit and preparing appropriate recommendations and reports to the chief judge, the circuit council and the Judicial Conference.

(g) Collecting, compiling and analyzing statistical data with a view toward preparation and presentation of reports based on such data as may be directed by the chief judge, the circuit council and the Administrative Office of the United States Courts.

(h) Representing the circuit as its liaison to the courts of the various states in which the circuit is located, the marshal's office, state and local bar associations, civic groups, news media, and other private and public groups having a reasonable interest in the administration of the circuit.

(i) Arranging and attending meetings of the judges of the circuit and of the circuit council, including preparing the agenda and serving as secretary in all such meetings.

(j) Preparing an annual report to the circuit and to the Administrative Office of the United States Courts for the preceding calendar year, including recommendations for more expeditious disposition of the business of the circuit.

## Legislative Responsibilities of the Circuit Councils

The responsibilities of the circuit councils under 28 U.S.C. § 332 and other legislation are:

(a) The circuit council must meet at least twice each year to provide for the effective and expeditious administration of the business of the courts within its circuit. 28 U.S.C. § 332 (a)(d).

(b) The United States district courts are required to devise plans for random jury selection, for the appointment of counsel under the Criminal Justice Act, and for achieving prompt disposition of criminal cases under Rule 50(b), Federal Rules of Criminal Procedure. The circuit councils are required to approve these plans and to direct appropriate modifications. 28 U.S.C. § 1863; 18 U.S.C. § 3006A.

(c) Where the need arises for a circuit judge to be temporarily assigned to another circuit, the Chief Justice of the United States may make the assignment with the consent of the chief judge or the circuit council of the circuit furnishing the assigned judge. 28 U.S.C. §§ 291(a), 295.

(d) A retired circuit or district judge may be designated and assigned by the chief judge or the circuit council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. 28 U.S.C. § 294(c).

(e) The circuit council may designate the place for keeping the records of the district courts and the court of appeals within the circuit. 28 U.S.C. § 457.

(f) The circuit council may find that court quarters and accommodations are necessary and, upon that determination, the Administrator of General Services, at the request of the Director of the Administrative Office, may establish such accommodations. 28 U.S.C. §§ 142, 635(a).

(g) Upon a certificate of physical or mental disability signed by a majority of the members of the circuit council of the circuit, the President, with the advice and consent of the

Senate, may appoint an additional judge for any judge of a circuit who is eligible to, but who does not, retire. 28 U.S.C. § 372(b).

(h) The circuit council may by order designate the residence of a district judge at or near a particular place within a district if the public interest and the nature of the business of a district so require. 28 U.S.C. § 134(c).

(i) When the district judges are unable to agree upon the adoption of rules or orders dividing the business of the court, the circuit council shall make the necessary orders. 28 U.S.C. § 137.

(j) Any district court may, with the consent of the circuit council, pretermit any regular session of court for insufficient business or other good cause. 28 U.S.C. § 140(a).

(k) A district court may, by the concurrence of a majority of the judges, remove a referee in bankruptcy for cause. Where there is no concurrence, the referee may be removed by the circuit council. 11 U.S.C. § 62(b).

(l) The circuit council shall advise the Judicial Conference of the United States of their recommendations and reasons concerning the number of referees and their respective territories, salaries and schedules of fees. 11 U.S.C. § 65(b); see also 11 U.S.C. §§ 68, 71(b)(c).

(m) A district court may, by the concurrence of a majority of the district judges, remove a magistrate for cause. Where there is no concurrence, the magistrate may be removed by the circuit council. 28 U.S.C. § 631(h).

(n) The circuit councils shall advise the Judicial Conference of the United States of their recommendations and reasons concerning the number of magistrates and their respective locations and salaries. 28 U.S.C. § 633(b).

(o) The circuit councils may appoint a circuit executive. 28 U.S.C. § 332(e).

(p) The circuit council approves or disapproves the supporting personnel of the senior circuit and district judges each year. Resolution of the Judicial Conference of the United States.

(q) The circuit councils develop plans for limiting publication of judicial opinions. Resolution of the Judicial Conference of the United States.

(r) The circuit councils may delegate authority to the circuit executive to approve for payment appointment vouchers and vouchers for expenses or other services (CJA Forms 20 and 21). Resolution of Circuit Council, 4th Circuit, October 4, 1972.

(s) Where the chief judge of any district court advises that the number of court reporters in the district is insufficient to meet temporary demands and that services of additional court reporters should be provided, the circuit council may notify the Director of the Administrative Office, who shall arrange for additional reporters on a contract basis. 28 U.S.C. § 753(g).

# ADMINISTERING THE FEDERAL JUDICIAL CIRCUITS: A SURVEY OF CHIEF JUDGES' APPROACHES AND PROCEDURES[1]

Russell R. Wheeler and Charles W. Nihan
August 1982
(FJC-R-82-5)

## I. Introduction

### Origin and Purpose of the Study

This report, which describes how the chief judges of the federal appellate courts discharge their administrative responsibilities, was written at the request of the Conference of Chief Judges.[2] The conference had decided at its October 1980 meeting to distribute a questionnaire on this subject to each of its members to enable them to learn more about how their colleagues approach administrative tasks. Subsequently, however, the then-chairman of the conference, Chief Judge James R. Browning of the Ninth Circuit Court of Appeals, . . . asked the Center if it would be willing to undertake what he characterized as a "field study of the manner in which administrative responsibility is discharged by the chief judge in

[1] This report is substantially similar to the original report, with some minor deletions of material. Some footnotes have been deleted, and the remaining footnotes have been renumbered. Appendix A of the original, which is a description sent to potential interviewees, has been deleted; appendix B of the original has become the only appendix. Ed.

[2] At the time the report was requested by the Conference of Chief Judges, the conference was composed of the chief judges of the federal circuit courts, the Court of Claims, and the Court of Customs and Patent Appeals. The research was substantially completed prior to October 1, 1981, when the Eleventh Circuit was formed pursuant to the Fifth Circuit Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994.

each of the circuits and national courts." He thought "an analysis based on direct interviews . . . will be more valuable than personal responses to a questionnaire by thirteen chief judges which they may interpret differently and answer on widely varying levels of specificity."[3]

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## Method

In preparing this report, we initially compiled a list of all the duties assigned by statute to chief judges and supplemented it with other administrative duties that one might reasonably expect to find performed in an appellate court. In this report, administrative activity refers to all aspects of the work of the court (except actual case deciding) and the judicial council. It includes, for example, maintaining relations with the bar and the public, dealing with the sensitive problems of alleged judicial unfitness, and planning improvements in, as well as monitoring the status of, case-flow management in the circuit and district courts. It also includes the array of more conventional administrative duties involving a court's personnel, budget, equipment acquisition, and other such matters.

Most of the data for the report came from interviews with chief judges and others aimed at discovering how administrative responsibilities were met in a particular court. Prior to each interview, we sent a description of the project, including a list of possible administrative duties, to the potential interviewees. . . . The main part of each interview was spent reviewing the administrative duties listed in the project description.[4] We also sought such information as estimates of the amount of time the chief judges devoted to adminis-

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[3] Memorandum from Chief Judge James R. Browning to chief judges of the circuit courts (Dec. 8, 1980) (on file at the Federal Judicial Center).

[4] A slightly abbreviated document was provided to interviewees in the two national courts, omitting such inapplicable duties as those associated with the bankruptcy act transition. We have not included the chief judges of the two national appellate courts in the quantified comparisons in this report because, as both were quick to point out, their responsibilities differ significantly from those of chief circuit judges. However, we have drawn on both interviews in our narrative.

tration, and we tried to get a sense of the chief judges' basic approaches to administration. We pursued these questions with each chief judge as well as with those who worked with him in order to gain a variety of perspectives on the particular chief judge's method of operation. The interviews were loosely structured and open-ended to allow treatment of other questions that arose in the course of the discussions. We also sought various documents from the courts, such as sample judicial council agendas, standard internal operating procedures, specific directives, and lists of committees. Once this information was amassed, we used follow-up telephone calls to verify information and to obtain additional information as required.

We interviewed every chief judge and every circuit executive. In some circuits we interviewed other judges, including four former chief judges, usually at the suggestion of the chief judge. In all but two circuits, we interviewed the clerk of court; in some circuits, we spoke to the senior staff attorney and to others such as the librarian and members of the chief judge's staff. Precisely whom we interviewed beyond the chief judge and the circuit executive was determined in part by the constraints of geography and time. The shortest interview with a chief judge lasted forty-five minutes and the longest interview lasted more than three hours; the average interview was slightly less than two hours. Interviews with the circuit executives and clerks of court averaged approximately one hour and twenty minutes, as did interviews with other judges. In September 1981, we sent a draft of this report to all the chief judges (current and former) we interviewed as well as to all circuit executives. We also presented the report orally to the Conference of Chief Judges, attended by the circuit executives, at their September 1981 meeting, which resulted in several emendations to the report.

Several characteristics of our interview data should be mentioned. We interviewed several chief judges who had held office for a comparatively brief period of time.[5] The practices and per-

[5] At the time we interviewed them, three of the eleven chief judges had served for less than a year and two others had served for less than a year and a half.

spectives—collective and individual—reported in this survey may change as these chief judges serve longer. There are other ways in which our information reflects the current state of transition of the circuits and their leadership. First, between the time of our research and the publication of this report, the Fifth Circuit was split, creating two large circuits where there had been one enormous circuit. Second, in the late 1970s, most circuit councils adopted rules providing for district judge participation and specifying procedures for handling complaints of judicial misconduct. At the time of our interviews, the circuits were preparing to implement the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,[6] which took effect October 1, 1981, mandating procedures for district judges' council membership and for handling judicial misconduct complaints. The procedures required by statute were similar to those that most councils had already adopted. Third, several circuits are or were reorganizing the membership and activities of their annual circuit judicial conferences.

Finally, this report hardly has the precision that would be provided by data resulting from a desk audit, but it enjoys the advantage of not having subjected individuals to that obtrusive and time-consuming process. Those we interviewed—chief judges and others—sometimes found it difficult to describe the full scope and detail of their administrative tasks and to quantify the amount of time and energy that they give to various administrative tasks. The quantifications they provided, therefore, were not always consistent with their more general descriptions.

## II. Five Overall Impressions of Administration by Chief Judges in the Appellate Courts

### Administration Is a Significant Burden on Chief Judges

Administrative duties impose a very significant burden in time and energy upon appellate chief judges. The amount of time the chief judges estimated they devoted to administration ranged from

[6] Pub. L. No. 96-458, 94 Stat. 2035.

20 percent to 80 percent of their overall working time. They pointed out that these estimated percentages could well fluctuate on a daily basis. As one might expect, chief judges in the larger circuits gave the highest estimates and those in the smaller circuits gave the lowest estimates. The average of their estimates is 45 percent.

. . . .

Despite the press of their administrative duties, almost half the chief judges take no caseload reduction, and most of the others take only a slight reduction. Table 1 shows the caseload reductions of chief circuit judges as of February 1982.

**TABLE 1**
**Chief Judges' Caseload Reductions as of February 1982**

| Circuit | Filings in Stat. Year 1981[1] | Number of Circuit Judgeships[2] | Number of District Courts[3] | Number of District Judgeships | Caseload Reduction |
|---|---|---|---|---|---|
| D.C. | 1,604 | 11 | 1 | 15 | None |
| First | 902 | 4 | 5 | 23 | None |
| Second | 3,061 | 11 | 6 | 50 | 20% reduction in sittings |
| Third | 2,013 | 10 | 6 | 48 | 1 or 2 fewer sittings per term (normal for judges is 8) |
| Fourth | 2,247 | 10 | 9 | 44 | Reduced screening |
| Fifth[1] | 1,852 | 14 | 9 | 57 | Reduction in screening when possible; depends on number of active judges |
| Sixth | 2,376 | 11 | 9 | 51 | No motions panels |
| Seventh | 2,038 | 9 | 7 | 36 | None |
| Eighth | 1,368 | 9 | 10 | 35 | Reduced participation in administrative panels[4] |
| Ninth | 4,262 | 23 | 15 | 73 | 33% reduction in sittings |
| Tenth | 1,577 | 8 | 8 | 27 | None |
| Eleventh[1] | 1,711 | 12 | 9 | 52 | Fewer sittings per term |

NOTE: This table is modeled after a table prepared in 1980 for the Conference of Chief Judges by Center Research Director William B. Eldridge.

1. Administrative Office of the United States Courts, 1981 Annual Report of the Director (preliminary ed.) at table B3.
2. 28 U.S.C. § 44 (1980).
3. 28 U.S.C. § 133 (1980).
4. Administrative panels dispose of presubmission matters requiring judicial action.

Whether a chief judge takes a caseload reduction and how much of a reduction he takes seem to be based primarily on personal preference rather than on work pressure or established court policy. In reviewing the information in table 1, we noticed only a slight association at best between the chief judges' caseload reductions and their estimates of the percentage of time they devote to administration. . . .

Chief judges who take no reduction do not appear to oppose the principle of the idea; they are just reluctant to apply the principle to themselves. Indeed, one hoped he could leave the standard of a reduced caseload "as a legacy to his successor." Others noted, without apparent disapproval, that the court had voted a procedure to allow them a reduction, or had urged them to take one, although they had not availed themselves of this opportunity. Those chief judges who take no reduced caseload seem to think that to do so would constitute a failure to fulfill their main responsibilities as judges. One chief judge with a heavy administrative burden said, for example, that although he might take a reduced caseload in the future, he did not think it appropriate to do so while the court was involved in a "manful effort" to eliminate its backlog. In another circuit, the chief judge takes no significant caseload reduction, but reported that he had reached a fairly explicit agreement to forgo his slight reduction if the other judges of the court would agree to assume some administrative tasks on delegation.

## Chief Judges Tend to Understate the Importance of Their Administrative Responsibilities

Chief judges are generally reluctant to acknowledge the importance of their administrative responsibilities. They apparently are reluctant because such responsibilities are not an exercise of the law-declaring function for which they were appointed to the court of appeals. What a former chief judge said of his circuit has general applicability: "[I]n [this] circuit, the feeling is that judges were appointed to be judges first and not administrators, and this influences the work of the chief judge." An incumbent chief judge said he "wanted to be a judge rather than an administrator." Both of these chief judges, it should be noted, approached their

administrative responsibilities with diligence, and their tenures are marked by significant administrative accomplishment.

## Chief Judges Differ Less in Their Specific Administrative Procedures Than in Their Overall Approach to Administration

We have not uncovered a thick catalog of alternative administrative procedures from which chief judges might pick and choose new ways to meet the duties of their office. Many of the chief judges perform their specific administrative duties in a highly similar fashion. There are, to be sure, variations in procedures—most of them modest—and we have highlighted these throughout the report.

The greater variation in how chief judges confront their administrative duties is in their general approach to the job. The "chief judge as administrator" can be described on the two distinct and obvious dimensions—activism and delegation—displayed in table 2. We use the term activist to describe chief judges who find that their administrative responsibilities are best carried out when they try to anticipate problems and take steps to control them before they arise. Other chief judges are nonactivist; they find it best to let situations develop and to deal with problems only once they take definite form. Similarly, some chief judges rely on what we call "heavy delegation," referring as much administrative work as possible to other judges, committees of judges, or court officers. Others think that the personal attention of the chief judge will, in the long run, result in the most effective administration. (Of course, there are other dimensions of administration, but these two seem most apt for the present discussion.)

Table 2 reveals our best judgment of how the chief judges are aligned on the two dimensions. The actual administrative patterns of each chief judge are more complex than is suggested by these discrete categorizations; the patterns in the table, however, offer an insight into administrative styles that is consistent with intuition. There is a relatively even split, six to five, on both major dimensions. Moreover, as might be expected, there is an association between the tendency to be activist and the tendency to delegate and

between the tendency to be nonactivist and the tendency to attend to detail. . . .

**TABLE 2**
**Chief Judges' Approaches to Administration**

| Dimension | Heavy Delegation | Little Delegation | Total |
|---|---|---|---|
| Activist | 5 | 1 | 6 |
| Nonactivist | 1 | 4 | 5 |
| Total | 6 | 5 | 11 |

## Circuits Are in Transition to a New Administrative Era

Courts of appeals are in transition from one era to another. The number of circuits has increased, one circuit is experimenting (and one had experimented) with administrative divisions,[7] and both the circuit and the district courts have grown larger. Interest in case management innovations is growing. Many circuits are reevaluating the purpose of the circuit conferences, and there have been judicial and legislative efforts to invigorate the judicial councils. Furthermore, there is new leadership. As of October 1, 1981, seven of the twelve chief circuit judges had served for less than two years. Of these seven, one—in the new Fifth Circuit—had formally become chief judge that day, four had served for less than one year, and two had served for less than two.

One senses a contrast between the administrative approach of some of the current chief judges and that of their predecessors, some of whom served much longer than average[8] and may have

[7] The Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1632, authorizes any court of appeals with more than fifteen active judges to constitute itself into smaller administrative units.

[8] Since 1959, when circuit judges over the age of 70 years were barred from serving as chief judges (Pub. L. No. 85-593, 72 Stat. 497 (1958)), the average tenure for chief judges has been 64 months, or 5.3 years, slightly less than the maximum of 7 years (plus whatever additional period is necessary for a successor to qualify) to be allowed under statute starting October 1, 1982 (Pub. L. No. 97-164, §§ 201–202; also forbids judges 65 years or older to become chief

imbued their circuits with expectations of personalized administration by the chief judge. Several chief judges reported that predecessors had sought to "have a hand in everything" and had delegated relatively little—their approach could be characterized as circuit administration from the hip pocket. The chief judge's personal attention to detail took root when the circuits were smaller and the responsibility for overall supervision was less onerous. Increasingly, chief judges wish to avoid detailed personal involvement in all aspects of circuit business and thus are seeking to delegate much of this responsibility to the circuit executive and to committees of judges.

## Current Conditions May Require a Change in Administrative Approach

The transition in administrative approaches described above appears to be directed in part by changing circumstances. Perhaps the most important impression we have gained from this inquiry is that chief circuit judges are facing a double bind created by the growth in the size of the judiciary, on the one hand, and the desire to maintain traditions of close personal relations with their colleagues, on the other. In more than one interview, we heard the chief judge referred to as a "father figure" (chapter 3 describes some specific manifestations of this attitude). There is every reason to believe that as the number of district and appellate judges in a circuit grows, the time and energy required of the chief judge to minister to individual problems will grow commensurately. Chief judges may find it necessary to restrict the amount of time and attention they devote to solving others' individual problems, to further restrict their judicial case work, or to delegate more administrative duties. In fact, they will likely be forced to do all three things.

This shift in administrative approach is not simply a result of details grown too numerous for the chief circuit judge to attend to personally. Rather, it reflects an affirmation of the view that all

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judges). The appendix lists the chief judges in each circuit who have served since 1959 and allows comparison of their tenures.

judges should share in the circuit's administration, with that sharing orchestrated by the chief judge. This view is consistent with the current effort, catalyzed in part by recent legislation,[9] to reinvigorate the judicial councils. As the number of judges in each circuit grows larger, more coordination and managerial guidance will be required to accomplish the goal of administration based on collegiality and shared responsibility. In other words, if it is true that federal judges will not accept autocratic rule from chief judges—even if they once did—the chief judges' responsibility must all the more become one of creating conditions and arrangements by which judges can share effectively in the administration of the circuit. As one timely example, chief judges might spend less time supervising the preparation of the agenda for the circuit judicial conference and more time facilitating administrative channels by which all judges could participate in setting the agendas for various segments of the circuit conference.

. . . Strong executive (as opposed to personal) leadership by chief judges is not a tradition in the federal courts. Indeed, the 1974 Judicial Conference policy statement on chief judges' authority describes a very weak office: "A circuit council may delegate limited power to the chief judge of the court of appeals to act on its behalf, but such power shall not extend to the adoption of general rules or to the taking of final action with respect to a particular judge or other person."[10] Thus, the goal in the circuit courts is not to maximize strong executive leadership as far as collegiality will allow. Rather, it is to use executive leadership to maximize efficient administration that is at the same time collegial administration.

## III. How Chief Judges Fulfill Their Administrative Responsibilities in the Appellate Courts

What follows is a description of how the chief judges fulfill administrative duties within their circuit and court.

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[9] Pub. L. No. 96-458, 94 Stat. 2035 (1980).

[10] *Powers, Functions and Duties of Circuit Councils*, Report of the Proceedings of the Judicial Conference of the United States 8, 9 (Mar. 1974).

## Judicial Organizations

The chief circuit judge is the designated administrative head of the court of appeals and has numerous statutory and unofficial duties. In addition, Congress has established several federal judicial administration organizations and has provided chief circuit judges with the opportunity for close involvement in all of them. Every circuit and national appellate court chief judge is a member of the Judicial Conference of the United States.[11] Furthermore, the chief judge is directed to convene, and to preside over, meetings of both the circuit judicial council[12] and the circuit judicial conference.[13] Congress has also provided for periodic sentencing institutes in the circuits, to be convened at the request of either the attorney general or, as is more common, the chief circuit judge.[14] Moreover, the Federal Judicial Center conducts other educational programs on a circuit basis, and under a Center policy requested by chief judges, the chief circuit judge is the initial point of contact.

Our interviews focused on the chief judge's highly intertwined roles in administrative leadership of the court, in determining the business of and conducting the various circuit-based meetings and Center programs, and in tasks connected with participation in the Judicial Conference of the United States.

## Judicial Councils and Courts of Appeals

At the time of our interviews the circuit judicial councils were in a state of transition, in anticipation of the statutory change, effective October 1, 1981, providing for district judges to assume council membership.[15] Most councils planned to meet less frequently than they did when the council membership was the same as the active membership of the court of appeals. The councils may nevertheless become the instrument for more activist circuitwide management by the chief judge and council. . . .

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[11] 28 U.S.C. § 331 (1980).
[12] 28 U.S.C. § 332(a) (1980).
[13] 28 U.S.C. § 333 (1980).
[14] 28 U.S.C. § 334 (1980).
[15] Pub. L. No. 96-458, 94 Stat. 2035 (1980).

Prior to the change in membership, most circuit council meetings were subsumed within regular and relatively frequent court meetings, at which the appellate judges discussed the judicial business of the court of appeals. With the inclusion of district judges, it has become necessary for the councils to maintain a specific agenda of council-only business. We found great variation in the number of council meetings per year, which ranged from two to twelve, and in the length of council meetings, which ranged from less than an hour to more than a day and a half. It appears that in many of the circuits, councils, which had been meeting on a monthly or bimonthly basis, are reverting to the statutory minimum of meeting twice a year, although the appellate judges meet more frequently than that to consider court of appeals business.

There are some similarities in the manner in which chief judges deal with their judicial council responsibilities. Much routine judicial council business is statutorily assigned, such as approval of district court plans on such matters as jury selection,[16] speedy trial,[17] indigent representation,[18] and various actions concerning magistrates.[19] Councils are also directed by statute to resolve controversies over where district judges must maintain their residences,[20] to decide how the district courts should allocate cases,[21] to approve court quarters and accommodations,[22] to consent to district court decisions to pretermit a regular court session,[23] and to certify to the Administrative Office that retired judges are performing "substantial judicial service" and are thus eligible to retain chambers and staff.[24] In addition to all this and more, a council, accord-

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[16] 28 U.S.C. § 1863 (1980).
[17] 18 U.S.C. § 3165(c) (1980).
[18] 18 U.S.C. § 3006A(a) (1980).
[19] 28 U.S.C. §§ 633(b) and 636(c)(1) (1980).
[20] 28 U.S.C. § 134(c) (1980).
[21] 28 U.S.C. § 137 (1980).
[22] 28 U.S.C. § 142 (1980).
[23] 28 U.S.C. § 140(a) (1980).
[24] *See* Report of the Judicial Conference of the United States 21-22 (Sept. 1950); Report of the Proceedings of a Special Session of the Judicial Conference of the United States 245-46 (Mar. 1958); *Powers, Functions and Duties of Circuit Councils, supra* note 10, at 11.

ing to a widely quoted if less understood phrase, is to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit."[25] (This list hardly exhausts the duties that the judicial councils may perform, however.[26])

Although any of these duties is potentially controversial, the majority are routine. In all but a few circuits, the bulk of routine business is done by mail, sometimes on an "absent objection" or "If I don't hear from you in ten days" basis, and this business is normally validated at the next judicial council meeting. One circuit that does little business by mail has a "noncontroversial" and "potentially controversial" list of council agenda items. Where committee systems are active, the committees take the initial responsibility for reviewing items prior to the agenda's distribution, and in at least two circuits, committees are empowered either to take final action for the council or to refer the matter back to the council. The executive committee of the council in one circuit, and the substantive committees in the others, are also so empowered.

The chief judges reported little variation in how they prepare for council meetings and in how they coordinate follow-up action. In almost all the circuits, both the chief judges and the circuit executives maintain a "running file" of agenda items, trading items between one another's files. Usually, the circuit executive is sufficiently familiar with both the business of the council and the chief judge's wishes that agenda preparation does not become a time-consuming or rigidly structured process. In only one circuit were we told that council members are canvassed prior to a meeting to learn of items they wish to add to the agenda. In another circuit, a draft agenda is circulated to the whole council to let them add items if they wish.

More typically, agenda preparation is passive; judges who want to put items on the agenda may, although they are not specifically asked to do so. In only a few circuits is there an established mech-

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[25] 28 U.S.C. § 332(d).

[26] Other legislative duties and Judicial Conference policies regarding the councils can be found in a statement adopted by the Judicial Conference in March 1974.

anism for obtaining the recommendations of staff in the court offices concerning items that should go on the agenda. In courts with committees that, among other things, are responsible for supervising the various offices of the court, items are added to the agenda through these committees. Otherwise, the circuit executive is the channel.

In several interviews, chief judges said that without monitoring, agendas could become unwieldy, burdened with relatively unimportant items not requiring council consideration. At least one chief judge has decided to be more than a funnel for items suggested by judges that could "just as easily be discussed in the hall." In another circuit, a new chief judge deliberately shortened what had been a massive agenda—a legacy of a prior chief judge who had sought to illuminate every detail possible for the council—to a much briefer document. If councils become less passive concerning their management responsibilities, such changes may appear in more circuits and thus help to focus council activity on the matters most deserving of their attention.

Follow-up on those judicial council actions requiring additional work is almost uniformly left to the circuit executive. "Delicate" matters, such as a judge delinquent in his caseload, are usually handled by the chief judge or other judges, but even this is not a rigid rule. If the chief judge sends a letter or memorandum to the circuit executive stating the routine follow-up actions necessary, it is typically as a formality or a reminder for the chief judge because in all but one of the circuits with a circuit executive, the circuit executive keeps the minutes of the council. In the remaining circuit, the clerk keeps the minutes; the circuit executive thought the clerk would continue to do so even after October 1 so that the circuit executive could participate more fully in the discussion of the various management problems that come before the council.

There appears to be greater variation among the circuits in how the chief judges actually conduct the council meetings. But the important point is that regardless of how the meetings are conducted, they can serve as a catalyst for action. In one circuit, the chief judge reported that monthly council meetings were quite amiable because he undertook to resolve potential controversies informally

and to arrive at consensus before the meeting. When consensus could not be achieved, the matter was held over. Another circuit, whose chief judge stressed its high level of collegiality, prides itself on a tradition of considerable written exchange of views among the judges. The written messages can evidently be quite pointed, but because of them the disposition of even controversial matters at the council meeting itself is obvious and is handled quickly. The council meeting, in all these cases, is the instrument for reaching consensus.

There is some use of committees in all but two circuits; however, the distinction between court and council committees, impelled by the recent judicial council legislation, was but dimly defined in most circuits at the time of our interviews. The number of committees on a given court as of mid-1981 ranged from four to more than thirty; these included both standing and ad hoc committees. The specific activities of these committees are best discussed within the context of our treatment of the chief judges' administrative duties. Several summary comments about committees are in order, however. Among the uses of the committees, which vary tremendously, are the following:

**Long-range planning.** Four circuits have used committees to study possible reorganization of the circuit judicial conference. One circuit appointed an advisory committee on planning for the district courts, which included four subcommittees chaired by prominent members of the legal or academic communities.

**Monitoring court officers and offices.** At least two circuits, both relatively large, use committees or "committees of one" (i.e., monitoring judges) to superintend the work of all the court offices, and five other circuits use committees to supervise one or more offices (e.g., library, clerk's office, or staff attorney's office). Several court officers praised this arrangement, which protects them from judges' conflicting, ad hoc requests for services and provides ready access to the court-council decision-making process (the committees, for example, present the offices' items to the council).

**Selecting officers.** The committees just described are responsible for selecting the various court officers. If such commit-

tees are not in place, ad hoc committees usually are appointed for this purpose.

**Special problems or projects.** A review of the total list of circuit committees presents a vast array of subject matters thought to be appropriate for committee attention, ranging from interlocutory appeals, the Bankruptcy Reform Act, and orientation of new circuit judges to housekeeping and space. Most circuit chiefs appear to regard committee work as a responsibility to be distributed evenly among at least the active circuit judges. In only one circuit did we encounter a chief judge who would not ask judges to perform committee work if they did not wish to do so. All the chief judges, however, asserted that they take special care to select willing members for important committees.

The actual level of activity of these committees is difficult to assess. In several circuits, there were intimations that the committees are more form than substance. Interviews with several judges in one circuit revealed their unawareness of the overall committee structure and, in the case of one judge, even of the committees to which that judge was assigned. It may be that courts are burdened with a committee structure that is more extensive than necessary. Committees appointed to deal with a new and specific problem often continue indefinitely. Moreover, without some provision for staff, committees tend to "wither on the vine."

## Circuit Judicial Conferences

Like the operations of the circuit judicial councils, the operations of many circuit judicial conferences are in transition. Planning and holding a circuit judicial conference involves numerous logistical details, and the conferences are increasingly addressing broad policy questions:

- What should the general and specific nature of the agenda be?
- Who should participate in shaping the agenda?
- To what degree should conference membership represent the various segments of the bar of the circuit?
- To what degree should there be opportunity for meetings of specific groups—for example, all chief district judges, or

bench and bar from specific districts, or bankruptcy judges—at the conference? Should the annual conference be the forum and vehicle for networks of committees—bench-bar committees, for example—in the circuit's districts?

Current chief judges' involvement with preparation for circuit judicial conferences reflects a diminution of activity from that of their predecessors, when chief judges personally prepared the agenda and sometimes even inspected the hotel. Most of the chief judges are little involved in logistics for the conference, which are left, in all but one circuit, to the circuit executive or clerk, who appears to have relatively wide latitude in handling the details, working perhaps with local judges. In the one exception, the committee of lawyers that plans the conference program also attends to these logistical details. Most chief judges still send the letters of invitation to guest speakers and to dignitaries such as the circuit justice, but this is not a great burden.

In three circuits, the program agenda is prepared mostly by lawyers in the circuit—by the bar of the host district, by the bar association of the circuit, or by members of a particular law firm. More typically, the chief judge appoints a planning committee of judges of the circuit to prepare the conference agenda. In several circuits, the planning committee rotates among the states. At least two circuits use a standing committee to give continuity to conference planning. The chief judges' involvement with these planning committees varies somewhat; most of the judges restrict themselves to review and approval of proposed agendas and invited speakers.

Most chief judges still exercise their prerogative to adjust details of the circuit conference and influence its program agenda—whether prepared by lawyers or planning committees—but they are increasingly shifting their attention to the more basic matters of conference composition and the nature of conference activities. Their object is to change the circuit conference from what one chief judge described as an "old boy" social gathering to an instrument for effective bench-bar and intracircuit communication and for consideration of administrative policy matters. The institution of the circuit conference has, in the last several years, gone unchanged or unexamined in only a few circuits. Four of the eleven

circuits examined in this study have made major changes in the conference program or agenda, including, for example, the establishment of sessions for judges within a district or state to facilitate discussion of administrative or procedural problems. Three other circuits have considered major changes but have adopted less consequential ones. Another circuit has adopted minor changes, and one has only recently begun a basic review of its conference.

## Periodic Meetings with Chief District Judges

Chief circuit judges meet with individual district judges on a host of occasions—at circuit conferences, swearing-in ceremonies, Federal Judicial Center educational workshops, and periodic meetings held by judges in a particular district. In five of the circuits the chief judge also meets regularly with the circuit's chief district judges. Such meetings were specifically urged by the Judicial Conference in 1974. (In one circuit, a former chief judge abandoned his predecessor's practice of meeting with the chief district judges, and the current chief judge is disinclined to reactivate the meetings, since the district judge representatives to the newly constituted circuit councils will include several chief district judges.) The meetings with chief district judges occur from one to four times a year, and three circuits hold a meeting at the time of the circuit judicial conference. Their major purpose is to provide the chief circuit judge with the views, concerns, and interests of the chief district judges and an opportunity to develop rapport and discuss general matters of circuitwide policy with them. In only one circuit is the meeting used to review the state of the district courts' calendars.

## Educational Programs

Judges also convene at the educational programs sponsored by the Federal Judicial Center. The programs include sentencing institutes held pursuant to 28 U.S.C. § 334, continuing education workshops for district judges (to which circuit judges are invited), and other programs sponsored by the Center within a particular circuit. Chief judges' involvement in the preparation and conduct of these programs is uniformly minimal. In most cases, chief

judges appoint planning committees to develop agendas for the programs; a good deal of work—logistical and otherwise—is done by the circuit executive. All chief judges reserve the prerogative to review the agenda and perhaps suggest modifications. The chief circuit judge typically addresses any educational meeting of judges within the circuit and sometimes other meetings as well.

Few chief judges take an activist approach to curriculum development. One said that "he wants to be sure, if the judges are taken away for a week [e.g., to a sentencing institute], that the program is good." He also suggested to the planning committees that certain workshop topics were repetitive of an earlier workshop. Another chief judge indicated that he had clear curricular goals for these meetings and that he wished to play an active role to ensure that they were met. This chief judge expressed disapproval of the content of a recent sentencing institute and indicated that had he had more time to give to the creation of the agenda, the institute curriculum would have been different.

Chief judges who want to be involved in curriculum development said that their overall understanding of the curricular needs of the judges in the circuit is better than that of any other individual and that they are thus in a good position to help prepare the program agendas. Others pointed out, however, that chief circuit judges have no institutional position that necessarily gives them more knowledge than their colleagues about the nature of the cases and the specific problems facing district judges; they noted that chief judges with reduced caseloads are in fact more sheltered than their colleagues from a full view of the flow of cases through the circuit court.

## Judicial Conference of the United States

Chief judges' administrative duties also extend to the Judicial Conference of the United States. By statute the chief judge of each circuit and national appellate court is a member of the Conference[27] and may thus devote his energies to preparation for the Conference, dissemination of information on Conference proceedings,

[27] 28 U.S.C. § 331 (1980).

and certain other Conference-related activities. (The brief tenure of some of the chief judges we interviewed meant that they had a limited sense of how they would commit time and energy to the Conference in the future.)

There is significant variation in the degree of time and energy the chief judges devote to preparation for the Conference. Some said they skim the reports of the Conference committees and glance at the appendixes. They might also use a digest prepared for them by the circuit executive; almost all circuit executives reported that they read the reports on their own initiative and provide the chief judge with information about items they regard as important. Some chief judges reported spending up to two days reviewing the material, although this may have been because they were new to the job and did not want to be unprepared at the Conference. One experienced chief judge, however, still reads the reports closely. One or two chief judges said that although they prepare for each Conference, they find it much more helpful to seek their objectives through year-round contact with the various committees of the Judicial Conference.

The few judges who give more than cursory attention to the committee reports do so for the numerous subtleties in them that would be recognized, they say, only by those who participate in the Conference. Detailed perusal of the committee reports and appendixes gives these chief judges a sense of Conference activity that they cannot get from a summary. One chief judge reported that review of the Intercircuit Assignment Committee reports provides good clues regarding potential visiting judges.

Chief circuit judges do not normally undertake formal canvasses or surveys of judges in the circuit as part of their preparation for the Conference. Two survey the council, at least on matters of special interest, and one routes selected items to judges known to be interested in them or refers the reports to court officers. The majority do nothing, confident that they already know the positions the judges in their circuit would take on a particular issue. On matters of significant controversy, such as judicial conduct canons governing membership in private clubs, the relevant Judicial Con-

ference committee may itself survey all judges and then disseminate this information.

Judges of the circuit learn of actions taken by the Judicial Conference in various ways, but almost every chief judge said that it was necessary to provide some notification, simply because the official reports of the proceedings of the Conference appear several months after the Conference is held and press accounts of Conference activity are skimpy at best. The level of reporting activity varies considerably, however. None of the chief circuit judges said that they regularly send written reports to the judges of the court of appeals or the district courts. But almost all said that they advised the circuit judges at the subsequent judicial council meeting of nationally significant or circuit-related Conference activity, and one chief judge stated that he also informs chief district judges of significant Conference action at his next meeting with them. In five circuits, the district judge member of the Conference prepares a written report for the district judges in the circuit; in three of these circuits, copies go to the circuit judges as well. This written report describes the deliberations at and results of the Judicial Conference; the chief judge praised this arrangement in every circuit that had it. The circuit executive may provide logistical support in the dissemination of this document.

## Relationships with Judges

Chief circuit judges, only in part because of statutory provisions, traditionally bear responsibility for dealing with a wide range of situations involving the appellate and district judges in the circuit.

### General Problem Solving

The chief circuit judge inevitably is viewed, to use terms drawn from the interviews, as a "father figure," "father confessor," or even "house psychiatrist." These phrases reflect the general attitude that the chief judge should serve as the ultimate point of reference for judges in the circuit. It is difficult to describe this phenomenon with precision. Most chief judges, however, reported that they receive numerous letter and phone inquiries, from district as well as

circuit judges, as a result of their position. They are asked to provide advice, to help resolve problems, and to acquire services. The inquiring judges call the chief judge either because they think he is the person most likely to be able to resolve the problem or because they think it important to know the chief judge's view of a situation before proceeding.

Some of these inquiries are statutorily rooted; for example, 28 U.S.C. §§ 332(a) and 333 require judges who wish to be excused from meetings of the judicial council or the annual circuit conference to obtain permission from the chief judge. Other inquiries vary with the circuit and include such matters as whether recusal is advisable in a certain case, the propriety of a certain extrajudicial civic assignment, or general advice for dealing with the media. Circuit executives reported that they receive calls from judges seeking clues about the chief judge's disposition or likely reaction to a particular situation.

Chief judges who gain reputations as problem solvers or skilled counselors will increase the resulting burden because success will only breed more requests. Although we did not attempt to quantify the burden of these inquiries on the chief judges, references to "constant interruptions," "a lot of telephone traffic," and callers' failure to "realize the time the calls take" occurred frequently in the interviews. Geography may affect this phenomenon, according to a chief judge whose circuit includes large rural areas. In his view, judges who are isolated from colleagues may turn more frequently than other judges to the chief circuit judge.

Chief judges offered three distinct ways to mitigate this burden: diverting inquiries, allocating set times for dealing with inquiries, and establishing "standard operating procedures." Some requests for help in problem solving can be diverted by asking the caller to deal with another judge, perhaps a circuit judge who has specific responsibility for the area in question or the caller's chief district judge. Or the caller might be asked to deal with the circuit executive on specific matters within his domain. The point of mentioning these diverting techniques is not because they are novel, but to illumine the fact that they will help the chief judge only if there is an established presumption that such calls should be directed to oth-

ers. For example, one chief judge who encourages district judges to deal with their chief district judge said that he rarely gets direct inquiries from district judges; he maintains ample contact with them at workshops and conferences in his geographically compact circuit.

In addition to diverting inquiries, some chief judges are reassessing the costs and benefits of taking any phone call from a judge at any time or of returning such a call immediately. One chief judge related that although he does not wish to be discourteous, he has begun to restrict when he will receive calls, setting aside certain times of the day during which he will handle problems directed to him by telephone.

A final way to reduce the burden of personal problem solving is to make would-be callers aware of what the chief judge would likely say, by disseminating the procedures or point of view that the chief judge would apply to a problem. As noted later in this chapter, several chief judges have advised the judges of their circuit of the standards they will apply when reviewing Criminal Justice Act payment requests that are over the statutory maximum. One court has published a set of cumulative "standard operating procedures," detailing steps to be followed in such routine matters as acquiring equipment or securing the assistance of temporary employees; the chief judge attributed a "sharp decrease" in his administrative time to the publication of these procedures. Some courts have included internal administrative policies—for example, "that all judges and other units of the court would obtain word processing equipment that is compatible"—in their written internal operating procedures, but the latter are generally something other than comprehensive standard operating procedures for the circuit's administration. Other courts have promulgated procedures in particular areas such as hiring. No such set of procedures can cover all potential problems, and some of the most difficult, involving delicate personal relations, will continue to come to the chief judge. Nevertheless, establishment—and full dissemination—of succinct standards or procedures whenever feasible can serve to lighten the burden on chief judges.

## Dealing with Allegations of Judicial Unfitness and Misconduct

How to deal with judicial unfitness—broadly defined to include misconduct, job-impairing health, or even extreme caseload tardiness—has been the subject of legislative action and intense internal debate within the judiciary. At the time of our interviews, this situation was in transition, as circuit courts examined the operation of the complaint procedures they used then in anticipation of possible modifications pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.[28]

The statute notwithstanding, there are two specific types of allegations of judicial unfitness. One type can be called "external complaints." Filed from outside the federal judiciary, these are presumably the complaints that will most often engage the mechanisms created by the statute. The other type are "internal complaints," brought to the chief judge by other judges. There is apparently nothing in the statute to preclude a judge from filing a complaint against another judge. Nevertheless, it is reasonable to expect judges to continue to communicate informally and confidentially about problems with their colleagues that may not be publicly visible or, if visible, are not the type that lawyers would be likely to report. One chief judge observed, however, that after public complaint procedures are fully established, judges might not continue to call attention to problems informally and privately, lest they interfere with a statutorily prescribed procedure.

Either on their own initiative or in response to a Judicial Conference recommendation in March 1979,[29] most of the circuits had procedures in place prior to October 1, 1981, for receiving complaints against judges from attorneys and other members of the public. Chief judges in almost all courts characterized the bulk of such complaints as minor in number and negligible in substance, usually involving the merits of a judge's decision or procedural ruling. (This characterization seems accurate regarding the circuits'

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[28] *See* Pub. L. No. 96-458, § 3, 94 Stat. 2035, 2039-40.

[29] Report of the Proceedings of the Judicial Conference of the United States 4-5 (Mar. 1979).

experience since October 1, 1981.) Consequently, the chief judges reported spending relatively little time investigating these external complaints, although one chief judge subjects every complaint to a thorough staff investigation and has the staff prepare a proposed response, on the view that "someone has to go through it." Another chief judge circulated a proposed order disposing of a complaint to the other members of the council and incorporated their comments into the final order; he did this in part to strengthen "the recourse to collegiality" on the court. By contrast, another chief judge used (at least prior to October 1, 1981) a set of fairly standard letters and, when a complaint was received, directed his secretary to prepare the appropriate letter for the complainant and for the judge complained of, inviting comment at that judge's option.

In addition, other judges may be asked to conduct investigations. One circuit established a judicial misconduct and disability screening committee. Occasionally, chief judges ask the resident circuit judge to investigate a complaint against a district judge. Generally, however, the major concern about external complaints was that the statute would encourage frivolous complaints, leading to a problem of numbers if not of substance.

A different type of demand on the chief judge's time and energy is created when internal judicial branch sources call attention to evidence of possible judicial unfitness—typically involving judges with mental or physical health problems sufficient to impair seriously their ability to conduct their office or judges who behave questionably on or off the bench. These problems do not usually achieve public notoriety unless they fester for some time. Generally, the chief judges reported that internal complaints were less frequent than external complaints but that when they occurred they took a good deal of time to resolve. Unlike the more routinized procedure used to handle most external complaints, an internal report of a problem means that the chief judge is "likely to go and see" the object of the report, regardless of that judge's court or location. As one chief judge put it, he personally investigates such internal complaints because "morale is important," collegiality cannot be "sacrificed," and both would be threatened if a judge's sensitive problems were illuminated for all his colleagues to see. Some

chief judges reported using resident circuit judges to make initial investigations of allegations involving district judges in the circuit.

Dealing with judicial unfitness is an aspect of the chief judge's duty that is difficult to quantify or even to describe because of the sensitive nature of the relationships and the varying nature of the problems involved.

## Case-Flow Management in the Court of Appeals

Managing the court of appeals case flow presents chief judges with various tasks in recruiting judges from the district courts of the circuit or from other circuit courts to sit temporarily on the court of appeals; in taking specific action to clear backlogs in opinion production; and to a much lesser degree, in designating appellate calendars and panels and assigning opinions. More generally, some chief judges have been active in designing and implementing innovations to speed the flow of cases.

### Designation of Calendars and Panels and Opinion Assignment

Few chief judges are greatly involved in the actual designation of judges of their court to its appellate panels, in the preparation of the calendars of cases to be assigned to those panels, or in the matching of panels to calendars. Chief judges' involvement in the delicate process of assigning cases to specific panels is extremely limited, lest there be any appearance that the chief judge is trying to influence a case's outcome. Indeed, most courts have developed one form or another of random assignment for this reason.

The circuits' established procedures for these tasks are highly similar from court to court. After the cases are weighted or screened—if the particular circuit provides for either process—the clerk's office usually prepares the calendars of cases. Typically, either the circuit executive or the clerk arranges the panels; the chief judge is available to resolve problems in panel assignment, including those that may require visiting judges. In only three circuits are judges more heavily involved. In one circuit, the chief judge spends a day or two reviewing the panels as prepared initially by clerical personnel (to be certain that all judges' preferences for sit-

ting days have been accommodated) and identifying vacancies to be filled by visiting judges. In another circuit, a "calendaring judge" is used, and in a third a "scheduling committee" (with substantial assistance from the circuit executive) is responsible for this task. In a few circuits, the chief judge might review the schedule of hearings simply to catch irregularities. In four circuits the judges of the court are surveyed to determine their preferences regarding when they would like to sit, and of course these judges have an opportunity to review the schedule and request adjustments.

We also sought to learn whether chief judges had any involvement in opinion assignment and discovered a specific role in only two circuits. The two chief judges asserted that they have the "whole picture of the court's workload" and referred to the need to ensure that a disproportionate number of opinions were not assigned to one judge; the recommendation of the presiding judge on the panel is still given great weight, however. In other circuits, our interviewees doubted that the judges would tolerate opinion assignment by any but the presiding judge. These circuits rely on informal negotiations or the publication of lists showing judges' outstanding opinions to ensure that any one judge does not receive either a disproportionate share of opinions or more than he can handle at the particular time.

## Recruiting Visiting Judges

In all circuits, after the panels have been prepared, the number of active or even senior appellate judges available to fill the panels inevitably is inadequate, and it is thus necessary to secure the services of visiting judges—either district judges or judges from other circuits. Although some do so reluctantly, all the circuits use visitors. Some circuits ask district judges to serve on panels because of the learning experience the panels provide them (in two circuits, there is an informal expectation that district judges give at least one week a year to the circuit). Others are reluctant to use visitors because of the tardiness in producing appellate opinions of district judges pressed by their own trial calendars when they return home. In any event, arranging for visiting judges may prove less onerous now than it has in the past. The Federal Courts Improvement Act

of 1982, for instance, requires that a majority of the judges on any circuit panel be judges of that court, unless recusal, disqualification, or an emergency certified by a chief judge precludes it.[30] Moreover, the Judicial Conference Committee on Intercircuit Assignment announced new guidelines to curtail the use of visiting judges at the Conference's September 1981 meeting.[31]

The role of the chief judge in identifying potential visiting judges and in asking them to serve varied considerably at the time of our interviews. In most circuits, the chief judge, other circuit judges, and the circuit executive maintain an informal awareness of judges—circuit and district—who might be willing or even eager to serve on the court. There is in some circuits a strong feeling that invitations must be extended personally by the chief judge. In four circuits, the chief judges issue all invitations, fearing that any judge would be offended if an invitation to serve came from anyone but the chief judge. In three circuits, invitations are the circuit executive's responsibility. In the other courts, there are mixed arrangements: The chief judge or a scheduling committee might invite visiting circuit judges; invitations to the district judges might come from the circuit executive, calendaring judge, or clerk.

The circuit executive generally has the responsibility of arranging for the conveniences of the visiting judges, especially those who visit from outside the circuit. In at least one circuit, however, plans have been developed whereby a circuit judge in the host city writes to the visiting judge with a formal offer of assistance in getting established.

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[30] Pub. L. No. 97-164, § 3.

[31] The guidelines provide that a circuit which lends (or borrows) active judges on intercircuit assignments shall not be permitted to borrow active judges for assignment to its circuit (or lend active judges to another circuit). There are exceptions to the rule, which does not apply to senior judges or in circumstances in which active judges are needed for a particular case, for example, because of disqualification of judges in the borrowing circuit. *Guidelines for Intercircuit Assignment*, Report of the Proceedings of the Judicial Conference of the United States 99-100 (Sept. 1981).

### Clearing Backlogs

The level of the chief judge's involvement in, and the amount of energy he devotes to, urging colleagues on the court of appeals to dispose of pending cases or outstanding opinions depend on the degree to which the court has established procedures and reporting requirements whereby all judges are routinely made aware of delinquent cases and peer pressure is allowed to work its will. One circuit court distributes internally a list of all opinions outstanding for sixty days or more, and this list is a standard agenda item at regular court meetings; the chief judge reported that he finds relatively little need to prod the judges in his circuit.

### Planning Innovations in Case-Flow Management

The line between a chief judge's regular monitoring of the court's case flow and his efforts, sporadic or continuous, to plan and monitor the progress of innovations in case-flow management is not precise. We identified six circuits in which the chief judges appeared to take an active role in the investigation, design, or monitoring of such innovations (e.g., an appeals expediting program or a preargument conference) and five in which their role was passive. Moreover, the activist chief judges were likely to be those in the circuits with the largest caseloads. When chief judges reported that they did not become involved in case-flow management planning, they referred to the adequacies of current procedures and stated that additional work was not necessary. Other chief judges, however, reported examining innovations in other circuits, and one judge said he took himself off the calendar to devote time to such investigation.

## Supervising District Court Business

### Dealing with Backlogs

By statute, each judicial council is to "make all necessary and appropriate orders for the effective and expeditious administration

of justice within its circuit."[32] In only a few circuits are there specific procedures or steps by which the chief judge, perhaps aided by the circuit executive, undertakes to identify district judges or district courts that are not processing cases expeditiously, to determine why, and to take necessary action. This situation, like others, appears to be changing, however, and the passive council activity of past years is giving way to active supervision.

A necessary ingredient for effective supervision of district court case flow is adequate data. One source of such data is the periodic Administrative Office reports "as to the business of the courts."[33] By statute, the chief judge is to submit the reports to the council, which in turn is to "take such action thereon as may be necessary."[34] These reports are compiled from information, submitted by the district judges to the Administrative Office, that indicates (a) cases and motions held under advisement over sixty days and (b) cases awaiting disposition for more than three years. Until 1981, the statute required quarterly submission of the reports to the council; the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 seems to require only semiannual submission of these reports,[35] although the act, presumably by oversight, did not change the requirement that the Administrative Office produce quarterly reports.

A recurring complaint in our interviews was that the quarterly reports arrive too late from the Administrative Office to be of effective use because the information they contain might be up to three months old by the time of their receipt. Thus, some chief judges and circuit executives have made arrangements to receive other data, a practice specifically authorized by the Judicial Conference.[36] In one circuit, district judges were asked to send

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[32] 28 U.S.C. § 332(d)(1), as amended by Pub. L. No. 96-458, 94 Stat. 2035 (1980), effective October 1, 1981.

[33] 28 U.S.C. § 604(a)(2).

[34] 28 U.S.C. § 6332(c).

[35] *See* Pub. L. No. 96-458, § 2(b).

[36] "Although the circuit council should rely when possible on statistics available from the Administrative Office, it may require the district courts to supply

copies of the material submitted to the Administrative Office to the circuit executive at the time of the submission. In another circuit, the chief judge and the circuit executive use past Administrative Office reports to identify district judges who appear to have difficulty in keeping their caseloads current. Shortly after the start of the next quarter, these judges are asked about the condition of their dockets and, where needed, are offered temporary help from law clerks or perhaps a visiting judge.

The action chief judges take to secure a timely disposition of cases in the district courts is generally ad hoc and in the form of letters or telephone inquiries to the judge in question. One chief judge uses standard letters to chief district judges that ask about problems suggested by information in the Administrative Office reports. Another wrote "with trepidation" to a chief district judge to ask for an investigation of a judge with cases listed as delinquent in the Administrative Office report, but found that the chief district judge appreciated the "leverage" that his letter provided.

### Interdistrict Assignments

According to 28 U.S.C. § 292(b), the chief judge of the circuit must approve all temporary assignments of a district judge from one district in the circuit to another district in the circuit. Most chief judges give personal supervision to such assignments, concerned that they have potential for abuse or at least for the appearance of such.

Only one chief judge reported that he would routinely sign any interdistrict assignment requested by the sending and receiving chief district judges. In another circuit, a committee of the judicial council, working with the circuit executive, manages these requests and also surveys the courts on a quarterly basis to determine their needs for visiting judges. In emergency situations, the circuit executive is authorized to handle the request without recourse to the committee; the chief judge, however, wants to establish a "point

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this information by filing reports with the council." *Powers, Functions and Duties of Circuit Councils, supra* note 10, at 9.

system" to determine which judges should be called to provide emergency interdistrict assistance.

Most chief circuit judges reported taking steps to ensure that district judges do not receive interdistrict assignments for any reason other than the host court's need for assistance and thus made it clear that they would not routinely sign orders submitted to them. Their practices range from requiring the chief judge's approval of any preliminary contact between the potential host district and the would-be visiting judge to asserting their authority to veto a proposed invitation by refusing to sign the order. In at least three circuits, the current level of scrutiny was represented as more rigorous than the level adopted by the previous chief judge. At least one circuit chief has formally advised all the district judges that proposed transfers must include a written statement certifying that both chief district judges agree to the transfer. Furthermore, the statement must aver that the visiting judge is "absolutely current with his docket" and that his temporary absence "will not impair the disposition of pending business in his home district."

Chief judges who have sought to strengthen control over interdistrict assignments cited two major reasons: The first is to avoid the use of assignments for personal reasons. The second is that in a particularly sensitive case, when a transfer may be required because all the judges in the district have recused themselves, the chief judge assumes a special obligation to review the qualifications of the would-be visiting judge in light of the particular circumstances of the case.

In contrast to most of the circuits, two circuits use routine standing orders authorizing interdistrict assignment for all the district judges in particular districts. The chief judge in one of these circuits described annual standing designations that allow every district judge to serve temporarily in the other districts in his state. In this circuit, circuit judges are also asked if they would like to be included in a standing designation for assignment to all the district courts in their state. Such annual standing orders are used in more limited fashion in the other circuit, which allows transfer between specified districts to assist courts that have suffered a serious backlog for some time. One of this circuit's standing designations

was in fact the result of an intercircuit agreement allowing district judges in a metropolitan area divided by a circuit boundary to transfer within that area.

## Approval of Criminal Justice Act Vouchers

The Criminal Justice Act sets out hourly rates and overall maximums for attorneys who provide representation (before magistrates or district or appellate courts) under the act, but provides that payment in excess of the overall maximums "may be made for extended or complex representation whenever the court . . . or magistrate . . . certifies that the amount of the excess is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit."[37] Statutory payment rates were last adjusted in 1970.[38]

The burden imposed on chief judges by the review of vouchers for excess payment varies considerably among the circuits, depending largely on the degree to which the chief judges have routinized the process. In no case did we find that they rubberstamped the other judges' approval of the payments. Nevertheless, chief judges are finding that they cannot give the vouchers the same amount of review and analysis that might have been possible shortly after the statute was passed, when the number of claims was fewer and the rates prescribed by the statute bore a greater resemblance to the money that the attorneys might earn in other situations. Increasingly, chief judges find they must rely on the discretion of the judge who approves the request for excess payment. Chief judges in four circuits have used speeches or memorandums to announce the criteria they will apply in reviewing the vouchers, to help the other judges in making their decisions. Chief judges are also aided in this task by reviews of the requests conducted by the circuit executive or law clerks, as well as by personnel in the clerk's office. Moreover, once approved for payment, the vouchers are analyzed by the Administrative Office for conformity with the statute.

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[37] 18 U.S.C. § 3006A(d) (1980).

[38] Pub. L. No. 91-447, 84 Stat. 916, 917 (1970).

Six chief judges characterized the time spent on review of vouchers as minimal, perhaps amounting to fifteen to thirty minutes a week, although an occasional voucher that clearly seemed unreasonable would demand more attention. The judges who have time for only a brief review of the vouchers said that out of a batch of ten or twenty presented in one week by the clerk's office, at least one might be returned to the transmitting judge for further information or action. At least one chief judge reported that he had personnel in the clerk's office contact the district judge in such cases, specifically because he feared that if he did so personally, it would elevate the importance of the matter too greatly. At least four chief judges said that they always prepare a written explanation for any voucher they modify so that those affected are provided with some reason for the action (one chief judge pointed out the analogy, in this regard, to the need for an appellate court to offer some reason, however brief, for its decisions).

## Bankruptcy Reappointments

The Bankruptcy Reform Act of 1978[39] provides a mechanism for the reappointment of bankruptcy judges during the transition period lasting until 1984, when the act's presidential appointment provisions become effective. Those whose appointments expire during the transition period are to continue in office unless found not qualified by the chief judge of the circuit. The chief judge, however, is to decide on their qualifications to continue serving after considering a merit screening committee's recommendations.[40] The committees in each state are to be composed of the president of the state bar association, the dean of a law school in the state, and the president of a local bar association in the area in which the bankruptcy judge is located; in each case, the principal may designate someone to serve on the committee in his place. The statute directs the circuit executive to organize the committee and serve as its secretary.[41]

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[39] Pub. L. No. 95-598, 92 Stat. 2549.
[40] *Id.* at § 404(b), 92 Stat. at 2683.
[41] *Id.* at § 404(c).

Chief judges do not generally take an active hand in organizing the screening committees. Indeed, one chief judge especially concerned with securing qualified bankruptcy judges said that he doubted his authority to become involved in the appointment process. Because the statute assigns screening committee administration to the circuit executive, the chief judges largely leave this task to the circuit executives. Several chief judges said they occasionally intervened to review prospective committee members; one met with the panel; another intervened informally to ask a committee to talk to the local district judges once he learned that it had not. Several judges reported writing letters of invitation to serve or of appreciation for having served; in one circuit, as the chief judge put it, the circuit executive "writes them over my signature."

The chief judges are required under the statute to use the reports of the screening committees to evaluate the bankruptcy judges' qualifications, and thus, at a minimum, they verify that the reports indeed assert that the reappointment criteria specified in the statute were met. It appears that because the circuit executive is intimately involved in this process, including serving as secretary to the panels and writing the reports, chief judges do not feel obliged to review bankruptcy reappointments in great detail.

## General Planning

We raised the subject of general, or long-range, planning in our interviews because it is typically included in inventories of management functions. Planning is even hinted at in the Circuit Executive Act, which gives the circuit executive, if the council so directs, the authority for "conducting . . . studies relating to the business and administration of the courts within the circuit and preparing appropriate recommendations and reports to the chief judge, the circuit council, and the judicial conference."[42] We found little inclination among the circuits to engage in formal long-range planning as it is generally defined, that is, setting organizational goals, anticipating developments, and devising means to ensure accomplishment of the goals. Only one circuit has engaged in this task; it

[42] 28 U.S.C. § 332(e)(6) (1980).

has several committees with responsibilities for long-range planning, most particularly the Advisory Committee on Planning for the District Courts, which works with four subcommittees and last year submitted a 209-page final report. Most chief judges dismissed formal long-range planning as an empty exercise that produces reports destined to gather the proverbial "dust on the shelf."

The circuits' disinclination to engage in formal long-range planning may understate the degree to which they engage in ad hoc and incremental planning. Standing committees may undertake such planning in their areas of responsibility. Furthermore, several circuits have used ad hoc committees to assess how particular aspects of circuit administration might be changed, notably the circuit conferences. In the other circuits, the chief judges referred to regular committees and other mechanisms for coordination among chief circuit and district judges. Finally, almost all chief judges indicated that some amount of their time is devoted to space and facilities planning for future courthouse needs, which entails extensive dealings with the General Services Administration.

## General Administration

We sought to learn the degree to which chief judges' time and energy are devoted to the range of relatively routine administrative functions necessary for the day-to-day management of a court but not necessarily requiring the active involvement of the chief judge. Five areas stand out: budgeting, personnel management, acquisition of equipment and supplies, courthouse space and security, and external relations. Chief judges devote little time to these activities on a regular basis. All review, at least briefly, important management decisions represented in the budget or a proposed hiring. The details of routine budget preparation, personnel management, and security arrangement are left to court staff, perhaps with committee involvement. Of course, that these matters do not require a great measure of the chief judge's time does not necessarily mean that they do not consume a great deal of energy on the part of the circuit executive or other officers.

There may be a lack of clearly defined expectations about the nature of the chief judge's routine administrative functions. In this

part of our interviews, support staff we talked to tended to focus on the specifics of a query, when the specifics were offered merely as an example. For instance, to learn the extent of the chief judge's involvement in hiring supporting personnel, we might have asked, "For example, would the chief judge have a formal role in the hiring of a deputy librarian?" The answer provided might well have been that the current deputy librarian was just hired and thus there was no need to hire another. Interviewees would rarely say, for example, "The chief judge is involved in hiring at the deputy librarian level but not below." The responses we obtained may have been due to inartful questioning, but they may also suggest a general lack of formal policy defining responsibilities in routine administration.

## Budgeting

The statement of a circuit court's budget needs is not typically a preoccupation of the chief judge aside from his final review of the document with the circuit executive prior to its submission to the Administrative Office. In some circuits, there is early discussion between the chief judge and the circuit executive to agree on general parameters of the budget document. This low level of involvement by the chief judge, however, does not necessarily reflect his abdication of supervisory responsibility, but instead indicates that most circuit executives are able to prepare these materials without intensive supervision because they understand the chief judge's general administrative point of view and are, as one chief said, "trusted to know where the needs are." Because centralized budgeting allows the courts relatively restricted discretion in budgetary matters, a heavy burden falls on support staff to find available funds as special needs arise.

## Personnel

At the time of our interviews, the courts of appeals were statutorily authorized to appoint a clerk (who could appoint additional personnel with the court's approval), librarians and library assistants, and a crier and messengers. Staff attorneys were serving in each court although there was no explicit statutory authorization to

hire them.[43] The actual point of decision for the hiring of these officials varies among the circuits. The chief judges, either through personal involvement or through review of committee work, usually wished to approve the hiring of the heads of major court offices and perhaps their chief deputies.

Staff attorneys present a case different from that of other mid-level employees because of the important relationship of their work to the court's judicial decisions. In four of the circuits, the chief judge personally interviews each candidate for a staff attorney position, and in four others, court committees interview these candidates. In three circuits, the senior staff attorney (or equivalent) may hire without any substantive review by the chief judge or any other judge. The degree of judicial involvement in hiring mid-level employees, including staff attorneys and others, does not appear to be a function of the size of the court.

In the area of equal employment opportunity, chief judges reported heightened levels of involvement, in part because of pertinent Judicial Conference policies[44] and in part because of personal commitment to the concept. Several mentioned giving special attention to promotion of equal employment opportunity within the court, especially in the clerk's office, the largest employer. This involvement extends beyond the grievance reviews that may be required of the chief judge under the court's equal employment opportunity plan. Almost all chief judges acknowledged that, at a minimum, they remind officers of the need to be aware of and responsive to equal employment opportunity requirements. When asked to sign hiring documents, for example, they seek to assure themselves that the selecting officer has complied with equal employment opportunity requirements.

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[43] Pub. L. No. 97-164, § 120(b)–(c), establishes this authority, specifically authorizing the chief judge, with the court's approval, to appoint a senior staff attorney, who may in turn appoint staff attorneys with the chief judge's approval.

[44] *See* Report of the Proceedings of the Judicial Conference of the United States 58 (Sept. 1979); *id.* Mar. 1980 at 5.

## Equipment and Supplies Acquisition

Eight chief judges reported that they willingly defer to the court officers in the acquisition of even major equipment for the court, although most endorsed the view of a chief judge who said "I would expect to hear about it." Only one chief judge—of a smaller circuit—plays a continuing role in review and approval of equipment for the court, although the chief judge of a larger circuit stated that he reviews all requests for equipment as part of his effort to ensure that the court is taking full advantage of all available technological innovations. A number of chief judges are sporadically involved in acquisition when, for example, a major piece of equipment is to be secured through a sharing arrangement with the district judges in the same courthouse.

## Space and Security

Courthouse space and security problems involve no chief judge on a systematic basis, but such problems, when they develop, can be highly time-consuming given the frequent need for drawn-out negotiations with other government agencies, most obviously the General Services Administration (GSA). These negotiations become all the more complex when problems of space acquisition intermingle with problems of security.

Most chief judges minimized the contribution they could make to resolving security problems involving district courts in their circuit and said that district judges tend to regard courthouse security problems as more pressing than they do. This does not mean that a district court security problem cannot become serious enough to receive the chief circuit judge's attention. In one instance, a chief judge found it necessary to write to both the Chief Justice and the director of the Office of Management and Budget to try to resolve a particular district court security problem.

Courthouse space problems, at both the circuit and the district level, more frequently receive the attention of the chief judge. The range of problems with which chief judges have dealt is considerable: securing the repair of a broken lavatory in an isolated district court; resisting efforts to close courthouses; and coordinating a major reallocation of space—with its attendant security problems—

in a circuit's main courthouse, for which the chief judge testified before Congress, met with GSA several times, and negotiated with the other judicial agencies involved. Chief judges take this personal role in space negotiations because of the presumed weight of the authority of their office. As one chief judge put it, "I've not been very successful [in dealing with GSA concerning heating and cooling problems within the courthouse], but presumably the title of chief judge counts for something." Another holds "peacemaking and brokering meetings" with the district courts, the bankruptcy courts, and GSA.

## External Relations

A final administrative function is the maintenance and promotion of relations with relevant groups in the court's environment, namely, the bar, the media, the community, and other courts. It is difficult to define the burden this responsibility places on chief judges qua chief judges, simply because every chief circuit judge was a prominent jurist and member of the legal and political community before becoming chief judge. It is not always an easy matter to determine whether a particular chief judge was invited to address the state bar association because he is the circuit's chief judge or because he has long been a prominent member of the local legal community.

This external relations function has at least two components: relations with bar and citizens' groups and relations with the media. The bar and its numerous organizations present the chief judge with an opportunity—through speeches, for example—to articulate goals for the circuit or to express particular needs to wider audiences. At least two chief judges consider bar association speeches to be a responsibility of a chief circuit judge, and one reported using these occasions to press Congress on the need for additional judgeships. Beyond these observations, it is difficult to categorize the chief judges' attitudes; one said, for example, that he tries to be "vigorously responsive" to such invitations—not seeking them, but acknowledging an obligation to use them to maintain good relations with the bar.

Regarding the press, no chief judge said he refused to talk to journalists about administrative matters, and at least three judges were favorably disposed to issue press releases explaining important administrative developments. No circuit court currently has a press information office to issue releases concerning the court's judicial opinions, but three chief judges expressed some interest in establishing such an office. One chief judge expressed the "feeling that the press have to be better advised than they are now."

Relations with the state courts in the circuit present another area of potential leadership. Four chief judges expressed varying levels of enthusiasm for the promotion of state-federal judicial councils, and two took pride in having rejuvenated such councils in their circuits. The chief judges' perceptions of the need for such forums vary. In two rural circuits, the chief judges said that state-federal liaison could best be achieved informally. In another circuit, the chief judge said he would not push to reactivate dormant councils; they were dormant precisely because "they had run out of things to do."

## IV. Chief Judges' Assessment of Their Administrative Roles

The information provided in this report may suggest to chief judges procedures worthy of emulation or at least testing. The data do not allow one to say, however, which of the several ways in which chief judges meet their many administrative responsibilities are preferable, nor even which of the general models described in chapter 2 are better. Nevertheless, the data do provide a composite picture of the importance that chief judges collectively attach to the various tasks that they are or may be called upon to perform. They see some of these tasks as essential, some as important, and some as peripheral. Table 3 arrays the various duties that fall to chief judges, categorized in these terms.

**TABLE 3**
**Chief Judges' Collective Perception of the Relative Importance of Their Administrative Duties**

| |
|---|
| **Essential** |
| Circuit council agenda preparation |
| Chairing judicial council |
| Internal judicial misconduct complaints |
| Reviewing bankruptcy screening committee reports |
| Personnel management (court officers) |
| General problem solving for other judges |
| Appointing circuit conference planning committee |
| External judicial misconduct complaints |
| Reporting Judicial Conference (U.S.) actions to circuit judges |
| **Important** |
| Supervising interdistrict assignments |
| Developing and promoting use of circuit council committees |
| Circuit conference reform |
| Chairing circuit judicial conference |
| Recruiting visiting judges for circuit court |
| Clearing circuit backlogs |
| Invitations for circuit conference |
| Regular meetings with chief district judges |
| Close review of Criminal Justice Act vouchers |
| Personnel management (mid-level officers) |
| Space and security problems |
| Press relations |
| State court relations |
| Bar–community relations |
| Preparation (detailed) for Judicial Conference (U.S.) |
| Circuit conference program agenda review |
| Planning appellate case-flow innovations |
| Dealing with district court backlogs |
| **Peripheral** |
| Designation of calendars and panels and opinion assignment (regular) |
| General planning |
| Circuit council follow-up |
| Reporting on Judicial Conference (U.S.) to district judges |
| Significant budget preparation and review |
| Reviewing educational program agendas |
| Bankruptcy screening committee appointments |
| Acquisition of equipment and supplies |

NOTE: The information in this table is based on interviews conducted between April and August 1981.

We developed the list presented in table 3 using the following method. To begin, we drew from the documentation in chapter 3 a list of the various tasks that chief judges perform or might perform.

We phrased all statutory tasks in such a way as to de-emphasize their ministerial aspects. Thus, instead of listing the task of "signing a Criminal Justice Act payment voucher in excess of the statutory maximum," we listed "close review of Criminal Justice Act vouchers." Then we assigned a ranking to each task on the basis of our review of the interview data. A rating of 1 signified that no, or perhaps only one, chief judge thought the task demanded his personal involvement. A rating of 10 signified that all or almost all chief judges thought the task demanded their personal attention. We labeled ratings 1 to 3 *peripheral,* 4 to 7 *important,* and 8 to 10 *essential.* Although the rankings and therefore the assignments they produced are subjective, they represent our best judgments after a careful review of the interview data.

These terms do not describe how we see those tasks but, rather, how the chief judges collectively regard them. For example, all chief judges would regard it as incumbent upon them, that is, as essential, to investigate and attempt to resolve a problem of judicial unfitness reported by another judge in the circuit. The interviews make clear, however, that the chief judges collectively regard regular meetings with chief district judges as important but not essential; some regard the meetings as a vital part of the responsibilities of the office, others regard them as less important.

Two aspects of this discussion deserve emphasis. First, these terms describe the chief judges' collective estimation of the importance of giving their personal attention to these tasks. There are individual differences. One chief judge, for example, takes an active hand in panel preparation, but since the majority of chief judges do no more than iron out special problems, if that, we have categorized this task as peripheral in the collective estimation of the chief judges. Second, that the chief judges collectively regard their attending to a particular task as peripheral, for example, does not necessarily mean that they regard the task as unimportant—only that they do not regard it as a task to which they should devote any substantial amount of energy. They may regard a task as unimportant, or they may regard it as quite important but delegable, such as the preparation of the court's calendars and panels.

The list in table 3 serves two purposes. First, it presents a composite picture of how the chief judges weigh the importance of their personal involvement in various administrative duties. Second, by reviewing this list the chief judges can compare how their estimates of essential, important, and peripheral tasks compare with the collective estimates of their colleagues.

## V. How the Administrative Component of the Chief Judge's Role Might Be Strengthened

In the course of the interviews, chief judges and other interviewees made observations about how chief judges might better equip themselves to serve as chief judges and gain the best possible support of their staffs.

### Preparation and Orientation in Chief Judges' Responsibilities

Several interviewees suggested, or agreed when asked, that new or prospective chief circuit judges might benefit from a structured orientation program providing them the opportunity to become familiar with their duties as chief judge. Currently, the orientation within each court is informal: The new chief judge observes the work of his predecessor, accepting some ideas, rejecting others, and developing new ones. At least one newly elevated chief judge, moreover, went off calendar for a month of self-orientation shortly after his elevation. Several chief judges suggested other, more structured forms of orientation.

As it is doing for chief district judges, the Federal Judicial Center could construct specific orientation programs for chief circuit judges. The Center would invite new or prospective judges, and if they wished, the circuit executive, to visit the Center and the Administrative Office, not only to discuss administrative procedures of the two agencies but perhaps also to meet with other chief judges or others knowledgeable in the field for one-on-one orientation sessions.

Several chief judges commented on the benefit they gained from visiting other chief circuit and appellate judges while on

intercircuit assignment or while attending circuit judicial conferences as guests. Those chief judges who had not attended other circuit conferences said they thought it would have been helpful to have done so. Consequently, new chief judges might be urged, or at least offered the opportunity, to attend the judicial conferences of other circuits to discuss the administration of a circuit court in a relaxed setting with experienced chief judges and others.

Another comment offered by the interviewees is appropriate to mention, especially in regard to new chief judges. In several circuits, supporting staff worried that the chief circuit judge had little sense of the full range of their duties and activities—actual and potential. Likewise, the support staff were unaware of the full range of activities of the chief circuit judge. We heard these complaints most frequently from circuit executives. In one court, the several officers of the court expressed frustration because the chief judge was not always aware of which tasks he had assigned the respective officers or for which regular tasks each was responsible. These statements echo somewhat similar observations reported in an earlier Center study of circuit executives. The circuit executives, wrote McDermott and Flanders, "have had little guidance as they each defined the scope of their own work. What little guidance was available consists mostly of hopes expressed when the Act was passed, and requests to undertake specific tasks."[45] That study focused on the ambiguity in the circuit executive's role vis-a-vis the clerk of court and described the major barrier to an effective relationship between the chief judge and the circuit executive as the chief judge's reluctance to delegate authority.

When we looked at the relationship between the chief judge and the circuit executive for the present study, we were struck less by the chief judge's reluctance to delegate than by the low degree of familiarity in some circuits with what the chief judge expected of the circuit executive or other officers. A partial solution might be to develop an explicit memorandum of understanding between the chief circuit judge and the circuit executive (and/or other officers)

[45] J.T. McDermott & S. Flanders, The Impact of the Circuit Executive Act 218 (Federal Judicial Center 1979).

detailing what is expected of the circuit executive and also indicating how the chief judge plans to exercise administrative authority. One new chief judge said he found it very helpful that the circuit executive had prepared for him a notebook listing the various duties he must perform as a chief judge and how the circuit executive might help.

This level of formalism might seem unwarranted in light of the relatively small size of the federal courts and the existing expectation of a close and confidential relationship between chief judge and circuit executive. The potential for ineffectiveness due to misunderstanding, however, appears to be sufficiently great that chief circuit judges might wish at least to consider this option. In a sense, the memorandums suggested here are but a variation of the "standard operating procedures" that some circuits have already adopted. In this light, it is important that such memorandums also be published, both to advise judges and staff about whom they should bring problems to and to give the arrangements the force of policy.

## Recognition of the Importance of Administration

As noted earlier, chief judges generally indicated a reluctance to acknowledge the importance of their administrative activities and downplayed the amount of time and energy they devote to administration. Effective administration, if not as essential *as* effective judging, is nevertheless essential *to* effective judging. Two questions emerge in this regard.

First, is it possible—and if so, is it desirable—to increase recognition that assuming the office of chief judge is optional, not mandatory?

Although the statute that designates the selection of chief judges speaks in relatively mandatory terms about the assumption of the office,[46] it in fact clearly allows those eligible to serve as chief

[46] Both 28 U.S.C. § 45 (1980) and the revised section to take effect October 1, 1982, pursuant to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 201, use the word *shall* in describing who shall be chief judge.

judge to decline to accept the position.[47] We encountered great variation among the chief judges we interviewed regarding whether they actually wanted to be chief judges. Some said they enjoyed administration and enjoyed the position; others said they did not relish the position but thought they were good at administration and welcomed the opportunity; and some said frankly they wished they were not the chief judge, regarding the duty as a burden for which they deserved condolences, not congratulations. Yet none of the chief judges declined the office. This is due in part, we presume, to their strong sense of obligation and responsibility. Furthermore, at least to some degree, the prestige of serving as chief judge, membership on the Judicial Conference, and other such external attributes presumably play a role. Nevertheless, as the office of chief judge grows in importance, it might be useful to mitigate the presumption that a refusal to accept the office would somehow be a badge of dishonor, especially if another colleague also eligible to serve has strong administrative skills and inclinations.

Congress has taken a partial step toward greater selectivity in choosing chief judges by limiting their tenure to seven years and by providing that judges who could not serve the full term should not, under normal circumstances, assume the position.[48] Limitation on the term of the chief judge was recommended several years ago by the Commission on Revision of the Federal Court Appellate System "to minimize the impact of a chief judge who lacks administrative abilities, while allowing the chief judges who are good administrators sufficient time to have a beneficent effect on the functioning of their circuits."[49]

The second question that emerges is whether it is possible—and if so, whether it is desirable—to establish a presumption, perhaps through a Judicial Conference suggestion, of reduced caseload for chief circuit judges. Some chief judges regard such a

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[47] *See* 28 U.S.C. § 45(c) (1980). Furthermore, common sense dictates that it would be difficult to justify the view that one is obligated to accept the office even if one does not want to serve.

[48] *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 201.

[49] Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 68 (1975).

presumption as unnecessary because their colleagues would abide by whatever decision they made. Others, however, said that the weight of a Judicial Conference resolution, even if unnecessary to convince other judges of the propriety of such a reduction, might help persuade wavering chief judges to accept a reduction.

## Review of Chief Judges' Statutory Duties

One general impression that emerges is that chief judges are to a degree captives of statutory duties assigned by Congress, perhaps on the recommendation or agreement of the Judicial Conference. Some of these statutory duties obviously must be performed by chief judges. Other duties, however, would appear to be open to the discretion of others in the circuit, for example, the task of excusing judges from circuit conference attendance.

The chief judges' limited responsibility in bankruptcy reappointments offers an instructive comment on the role of Congress in shaping the judges' administrative activity. The position of bankruptcy judge is one of great sensitivity. Given that sensitivity, one might have expected the Congress to direct the chief circuit judge to select the screening committees personally or in some other way have a greater role in choosing them. Congress has not hesitated to impose on chief circuit judges the duty to approve personally requests for payment over the Criminal Justice Act statutory maximums. And they, not the chief district judges, must excuse district judges' attendance at circuit judicial conferences, as well as approve all temporary interdistrict assignments.

Our point is not to argue about whether these duties are necessary to ensure efficient judicial administration. Rather, the point we offer is that Congress has assigned duties to the chief circuit judge that could perhaps be handled by others. Congress looks for some orderly process for granting discretion as each need arises. The most visible figure in the courts is the chief judge, and this office is thus gradually burdened with "one-thing-at-a-time" duties imposed without full regard to their cumulative effect. It would seem more desirable for the Congress to indicate to the Judicial Conference what discretion is to be allowed in the exercise of any particular

task and leave it to the Conference to provide for its exercise within the boundaries set by Congress.

## Appendix: Tenure of Chief Circuit Judges Serving Since 1959

| Name | Start of Term | End of Term |
|---|---|---|
| **District of Columbia Circuit** | | |
| Prettyman, E. Barrett (24) | October 1958 | October 1960 |
| Miller, Wilbur (24) | October 1960 | October 1962 |
| Bazelon, David (185) | October 1962 | March 1978 |
| Wright, J. Skelly (34) | March 1978 | January 1981 |
| McGowan, Carl (4) | January 1981 | May 1981 |
| Robinson, Spottswood (62) | May 1981 | July 1986 |
| **First Circuit** | | |
| Woodbury, Peter (66) | June 1959 | December 1964 |
| Aldrich, Bailey (91) | January 1965 | August 1972 |
| Coffin, Frank (203) | August 1972 | July 1989 |
| **Second Circuit** | | |
| Lumbard, J. Edward (137) | December 1959 | May 1971 |
| Friendly, Henry (24) | May 1971 | May 1973 |
| Kaufman, Irving (85) | May 1973 | June 1980 |
| Feinberg, Wilfred (120) | June 1980 | June 1984 |
| **Third Circuit** | | |
| Kalodner, Harry (5) | October 1965 | March 1966 |
| Staley, Austin (21) | March 1966 | December 1967 |
| Hastie, William (40) | January 1968 | May 1971 |
| Seitz, Collin (157) | May 1971 | June 1984 |

| Name | Start of Term | End of Term |
|---|---|---|
| **Fourth Circuit** | | |
| Sobeloff, Simon (81) | March 1958 | December 1964 |
| Haynsworth, Clement (196) | December 1964 | April 1981 |
| Winter, Harrison (120) | April 1981 | April 1991 |
| **Fifth Circuit** | | |
| Rives, Richard (16) | August 1959 | December 1960 |
| Tuttle, Elbert (79) | December 1960 | July 1967 |
| Brown, John (149) | July 1967 | December 1979 |
| Coleman, James (14) | December 1979 | Febrary 1981 |
| Godbold, John* | February 1981 | September 1981 |
| Clark, Charles (167) | October 1981 | September 1995 |
| **Sixth Circuit** | | |
| Allen, Florence (5) | September 1958 | February 1959 |
| Martin, John (6) | February 1959 | August 1959 |
| McAllister, Thomas (18) | August 1959 | February 1961 |
| Miller, Shackelford (19) | February 1961 | September 1962 |
| Cecil, Lester (14) | September 1962 | November 1963 |
| Weick, Paul (69) | November 1963 | August 1969 |
| Phillips, Harry (113) | August 1969 | January 1979 |
| Edwards, George (67) | January 1979 | August 1984 |
| **Seventh Circuit** | | |
| Hastings, John S. (106) | August 1959 | June 1968 |
| Castle, Latham (20) | June 1968 | February 1970 |
| Swygert, Luther (60) | February 1970 | February 1975 |
| Fairchild, Thomas (77) | February 1975 | July 1981 |
| Cummings, Walter (62) | July 1981 | September 1986 |
| **Eighth Circuit** | | |
| Johnsen, Harvey (71) | August 1959 | July 1965 |
| Vogel, Charles (31) | July 1965 | February 1968 |
| Van Osterhout, Martin (28) | February 1968 | June 1970 |
| Matthes, Marion (36) | July 1970 | July 1973 |
| Mehaffy, Pat (13) | July 1973 | August 1974 |
| Gibson, Floyd (64) | August 1974 | December 1979 |
| Lay, Donald (200) | December 1979 | August 1996 |

| Name | Start of Term | End of Term |
|---|---|---|
| **Ninth Circuit** | | |
| Pope, Walter (6) | February 1959 | August 1959 |
| Chambers, Richard (202) | August 1959 | June 1976 |
| Browning, James (148) | June 1976 | October 1988 |
| **Tenth Circuit** | | |
| Murrah, Alfred (129) | August 1959 | May 1970 |
| Lewis, David (91) | May 1970 | December 1977 |
| Seth, Oliver (89) | December 1977 | May 1985 |
| **Eleventh Circuit** | | |
| Godbold, John (109)** | October 1981 | March 1990 |

NOTE: Numbers in parentheses indicate months in the position of chief judge. For current judges, the figures are projections that assume service until age seventy. Although the Federal Courts Improvement Act of 1982 limits the tenure of chief judges to seven years, these provisions do not apply to chief judges in office when the act takes effect. See Pub. L. No. 97-164, § 203.

* Chief Judge Godbold served for eight months as chief judge of the old Fifth Circuit, assuming office as chief judge of the Eleventh Circuit in October 1981.

** The projected figure of 109 months is calculated from February 1981, the month Chief Judge Godbold assumed office in the old Fifth Circuit.

# PART FIVE

# TECHNOLOGY

# INTRODUCTION

*Michael Tonry*

This part contains substantially complete reprints of two studies conducted by the Federal Judicial Center for the Third Circuit concerning the use of word processing equipment and an electronic mail system.

"Technology," the title of this part, could encompass a wider range of subjects than simply word processing and electronic mail. For example, the Center conducted an evaluation of federal court use of computer-assisted legal research (CALR) systems and a computerized citation verification system. The CALR evaluators concluded that both systems they evaluated improved the quality of research and were faster than manual research. No unequivocal conclusion was reached concerning overall cost-effectiveness, but the report recommended that the federal courts adopt one of the two systems.[1] The evaluation of the computerized citation verification system concluded that it was faster, more accurate, and more comprehensive than manual citation verification, but probably not cost-effective.[2] Other major studies concerned with new technologies include evaluation of computer-assisted transcription[3] and the evidentiary use of videotapes.[4]

The major focus of the Center's work on new technologies has centered on the research and development to create Courtran, a diversified computer-based information system for federal case and

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[1] A. Sager, An Evaluation of Computer Assisted Legal Research Systems for Federal Court Applications (Federal Judicial Center 1977).

[2] A. Sager, An Evaluation of the Application of a Computerized Citation-Checking System in the Federal Courts (Federal Judicial Center 1977).

[3] J. Greenwood, Computer-Aided Transcription: A Survey of Federal Court Reporters' Perceptions (Federal Judicial Center 1981).

[4] G. Coleman, The Impact of Video Use on Court Function: A Summary of Current Research and Practice (Federal Judicial Center 1977).

court management. Except insofar as Courtran is an integral part of the electronic mail system tested in the Third Circuit, and later expanded to include other circuits, research on Courtran is not included in this volume. Most of the published reports on Courtran are either on systemwide applications or on district court applications. Few primarily concern the appellate courts. Several publications describe Courtran's development and its major applications.[5]

The Center also developed a data base programming facility used for the Courtran Criminal Docketing Automated Case Management System. That system was utilized in the development of the criminal docketing system of federal district courts. Similar data base systems are being constructed for appellate application, among others.[6]

Courtran has been the primary responsibility of the Center's Division of Innovations and Systems Development, for some years the largest of the Center's divisions. As various Courtran applications have become fully operational, they have been removed from the Center's development agenda.[7]

Specialized programs within Courtran created for the appellate courts include the Appellate Record Management System (ARMS), which was developed on a priority basis for the Ninth Circuit to help that court deal with its pressing caseload; ARMS has since been replaced by the Appellate Information Management System (AIMS), a nationwide system. A second major Courtran application developed for the appellate courts, again originally for the Ninth Circuit, is CALEN9, a program designed to group cases into panel calendars based primarily on the cases' difficulty and to assign judges to panels. The calendaring function of CALEN9 is

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[5] Nihan & Wheeler, *Using Technology to Improve the Administration of Justice in the Federal Courts,* 1981 B.Y.U. L. Rev. 656; J. Buchanan, A Framework for Managing Computer Resources in the United States Courts (Federal Judicial Center 1980).

[6] Buchanan, Fennell & Samet, 9 ACM Transactions on Database Systems 72 (1984).

[7] Readers who are interested in further information concerning Courtran and its applications may wish to contact the director of the Center's Innovations and Systems Development Division.

fully operational and has been used as the basis for similar systems in other circuits. Although the judicial assignment function was not used in the Ninth Circuit, it has been used in the Fifth Circuit. The Center has not published formal evaluations of the operations of the appellate Courtran system. However, a description of the initial CALEN9 system may be obtained from the Center.[8]

Apart from its work in developing technologies, the Federal Judicial Center has played a key role in assisting federal courts as they enter a new phase in the process of automation—the decentralization of the automated systems used for case management and court administration.[9]

Reprinted in this part are edited versions of two Center reports that deal exclusively with appellate courts, specifically their initial experimental use of word processing and electronic mail. The first concluded that word processing is cost-effective, that it decreased the cost of preparing court opinions, that it reduced the time required to prepare and issue per curiam opinions by 52 percent and the time to prepare signed opinions by 25 percent, that secretarial productivity increased by 200 to 300 percent, and that judges were not required to significantly alter their work styles or procedures.[10]

This same study found that an electronic mail system used throughout the Third Circuit achieved dramatic time savings and, while more expensive than regular postal service, was less expensive than overnight delivery systems and was much less expensive than courier services. The second study, a follow-up to the first, is the second document contained in this part.[11]

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[8] M. Leavitt, CALEN9: A Calendaring and Assignment System for Courts of Appeals (Federal Judicial Center 1978).

[9] G. Bermant, Preparing a United States Court for Automation (Federal Judicial Center 1985).

[10] J. Greenwood & L. Farmer, The Impact of Word Processing and Electronic Mail on United States Courts of Appeals (Federal Judicial Center 1979).

[11] J. Greenwood, Follow-Up Study of Word Processing and Electronic Mail in the Third Circuit Court of Appeals (Federal Judicial Center 1980).

# THE IMPACT OF WORD PROCESSING AND ELECTRONIC MAIL ON UNITED STATES COURTS OF APPEALS[1]

J. Michael Greenwood and Larry Farmer
March 1979
(FJC-R-79-2)

## I. Introduction

The press, popular magazines, and technical journals frequently inform us about the anticipated "paperless society," "electronic age of information exchange and storage," "demise of the U.S. postal system," "birth of electronic mail service," and "installation of a computer terminal or word processor in every office and home." Although many of these above predictions may come true, they do not offer insight into the potential impact of electronic technology on the appellate court process.

. . . .

In the recent past, the potential benefits of word processing and electronic mail to help expedite the opinion preparation process were often overlooked or underestimated. For example, the 1975 National Conference on Appellate Justice prepared more than a thousand pages of briefing materials and conference conclusions, but there is no suggestion or comment on using technologies for the preparation and dissemination of opinions.

Various appellate courts are beginning to examine and introduce modern management tools. Both federal and state appellate

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[1] This report has been somewhat shortened. Several tables from the original chapter 4 have been omitted, as have several appendixes and discussions of cost estimates and technology that are now obsolete. Many footnotes have also been omitted. Remaining footnotes and tables have been renumbered. Ed.

courts are developing computer-based information systems to monitor the appellate case flow better, provide more accurate statistical information, and offer improved court services. Several detailed studies on the development and utilization of computer-aided legal research in the appellate courts have been published recently.[2]

Among businesses and government agencies, word processing is widely acknowledged as a technology whose time has come, and electronic mail, as a technology whose time is coming. A few appellate courts have already begun using word processing equipment. To date, no comprehensive study has reported on the effects of either technological innovation on the appellate process. Only one published report has assessed the actual implementation of these technologies in an appellate court.[3] This pilot project, completed six years ago by the U.S. Emergency Court of Appeals, in conjunction with the Federal Judicial Center, provided inconclusive findings. It assessed equipment that is now considered obsolete, and both technologies were used only sporadically.

. . . .

The Court of Appeals for the Third Circuit asked the Federal Judicial Center to help implement and evaluate modern office equipment, specifically word processing and electronic mail. The Third Circuit wanted to determine whether these technologies might increase judicial productivity and expedite the preparation and dissemination of appellate court opinions.

Word processing and electronic mail equipment were installed in the chambers of each circuit judge and several administrative offices (clerk of court, circuit executive, secretarial pool) and a special software computer program was written for the Federal Judicial Center's Courtran II computers to help provide an electronic mail service. To aid in a comprehensive study of the impact of

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[2]For example, A. Sager, An Evaluation of Computer Assisted Legal Research Systems for Federal Court Applications (Federal Judicial Center 1977); Search Group, Inc., Automated Legal Research: A Study of Criminal Justice Agencies (1978); R. Caldwell, Issues in Automated Legal Research (National Center for State Courts Research Essay Series No. 3, 1977).

[3]S. Flanders, Pilot Project on Communicating Automatic Equipment (Federal Judicial Center 1973).

these technologies, the court permitted the Center to collect sensitive and confidential information about case processing techniques such as office practices, work styles, and opinion drafting techniques.

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## II. Research Objectives and Methodology

### Objectives

One of the primary objectives of the Third Circuit—and all other appellate courts—is "to insure that appeals are processed as expeditiously as possible consistent with a careful discharge of proper appellate responsibilities."[4]

The general purpose of this evaluation was to assess the impact of word processing and electronic mail technology on appellate court efficiency. We considered two types of efficiency:

1. court efficiency in expediting the production and productivity in each judge's office (the amount and speed at which court documents, particularly written opinions, could be prepared, edited, retyped, and disseminated). Research techniques such as typing and communications surveys helped measure such criteria.
2. court efficiency in expediting the average time to process a case (the number of days gained or lost by introducing and implementing technological innovations). A case-tracking survey that measured time intervals between crucial appellate stages helped measure this criterion.

From a judge's perspective, the first criterion might be more important, but an administrator might place greater weight on the second. From the public's perspective, improvements in both types of efficiency are very desirable.

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[4]United States Court of Appeals for the Third Circuit, Internal Operating Procedures (1974) at v.

This study examined the impact these technologies might have on the processing of appeals, especially during the court's deliberation process; and judicial and secretarial productivity within chambers, especially for the preparation of written opinions.

The study attempted to address the following questions:

1. What impact might word processing equipment have on
   - secretarial productivity
   - internal office procedures within a judge's chambers
   - the production and preparation of opinions
   - the appellate decision-making process—in particular, the drafting of opinions?
2. What impact might electronic mail capability in each office have on
   - internal office procedures
   - the delay in distributing and delivering opinions among offices
   - the appellate decision-making process—in particular, the dissemination and review of draft opinions?

## Description of Equipment

Each appellate judge's office and a few administrative offices (clerk of court, circuit executive, and central pool secretaries) were provided with a modern word processing system, a Digital Equipment Corporation (DEC) word processing model WP100 or WP102. Each system contains:

1. a video display (cathode ray tube) station: a device resembling a television screen used to display typed text, and a keyboard console that allows text to be entered and edited. In two offices, circuit executive and secretarial pool, a dual video terminal display system was installed
2. a printer: a device that prints forty-five characters per second in high-quality typescript
3. dual "floppy" diskette drives: a device that permits text to be stored and retrieved from flexible discs, each of which

can store up to 120 pages of text (two dual drives were installed in the circuit executive and secretarial pool offices)

4. a communications package: a software program and hardware adapters that permit the word processing machine to transfer information to and from other word processors or computers.

This word processing equipment contains most text-editing features found in the more advanced word processor models. It can be used to telecommunicate over regular government telephone lines with the Federal Judicial Center's Courtran II computers in Washington, D.C.

Word processors . . . allow each user to

- store on magnetic medium (floppy disc) and recall for editing any typed text in any format
- change rapidly both the content and format of text with or without printing text on paper
- make corrections easily, quickly, and with assurance that the text is accurately printed
- print high-quality, clean copies
- more rapidly type original text (15 to 50 percent faster), and print text (500 to 1,000 percent faster) than on a standard typewriter
- reproduce text on paper and/or transmit electronically to other machines for printing and/or visual review
- rapidly prepare and print standard documents or forms.

The Third Circuit judges, like judges in many other federal appeals courts, are not all permanently located in the same city. Although the court does sit in Philadelphia to hold conferences and oral arguments, the judges' permanent chambers are spread among six cities within three states (Camden and Newark, New Jersey; Philadelphia, Pittsburgh, and Wilkes-Barre, Pennsylvania; and Wilmington, Delaware). Communication capability was provided in each word processing machine to permit judges to circulate documents among each other through telecommunications.

## Research Instruments

To comprehensively assess the impact and value of these technologies on the workload within each judge's chambers and on the appellate case process itself, five distinct research techniques were used. A typing survey allowed evaluation of each office's typing workload and capacity to prepare opinions and other court documents. An opinion circulation survey measured the delivery times for U.S. postal service among judges' offices—in particular, the delivery schedules between each pair of the six cities within the circuit. An electronic mail transmission report allowed us to calculate the precise delivery times among judges' offices and tabulate electronic mail usage rates. Interviews and questionnaires for each judge and secretary revealed personal attitudes and preferences towards the adoption of the technology, and individual practices and informal administrative policies within each judge's office. An appellate case survey allowed us to compare changes in appellate processing time before and after the introduction of word processing and electronic mail technologies.

## Typing Survey

The typing survey examined the typing production in each judge's office and the circuit executive's office during a three-week period from May 15 to June 5, 1978, several months after the word processing equipment was installed. A secretary, after typing any document, completed a detailed log form showing the author, purpose, priority requirements and length of each document typed, the typing machine used, and the amount of daily time spent at typing and at work. All eighteen secretaries working for ten circuit judges and a circuit executive located in the six cities submitted completed logs.

The typing survey followed word processing industry practices of sampling typing production over several weeks to estimate typing volumes, requirements, and characteristics. Since the content of the draft opinions is confidential and the survey could not be disruptive or obstructive, the amount of information solicited and the number of days surveyed were somewhat limited. Rather than attempt a more comprehensive sampling effort—by sampling in-

formation at different times during the entire project and by collecting carbon copies of each document prepared—data were collected during a period the court believed represented the normal work pace of the Third Circuit.

No unique events occurred during the survey period to disrupt the circuit's normal work flow. Although some judges and secretaries were absent for part of the survey there were no more absences than would normally be anticipated.

Some data collection problems did arise. In this survey, a few secretaries did not diligently record all typing information requested. One secretary frequently reported only the amount of time spent typing and the total number of documents typed; not listed were the number of lines typed or the identity of some documents. Her typing data are necessarily underrepresented in the survey. In another instance, the secretary sometimes did not separate other secretarial duties from her typing activities, thereby overestimating typing time. Overall, methodological errors in reporting tended to balance each other and did not significantly affect the overall results of the Third Circuit typing survey. The survey limitations, however, prevent assurance that we have accurate statistics of the work in each office.

## Opinion Circulation Survey

During the typing survey in May and June 1978, each secretary also completed a detailed log listing all opinions exchanged. For each opinion sent or received, the secretary identified the document by author, case number, length, and recipient. The log also listed the manner in which the document was sent and the date it was actually sent or received. This survey was designed primarily to estimate the U.S. postal service delivery time for exchanging opinions.

Some secretaries were not diligent in recording the number, names of recipients, and date for every opinion sent from their offices. However, the number of opinions recorded was sufficient to proceed with the analysis of postal delivery times.

## Electronic Mail Transmission Report

A complete software program was prepared to monitor unobtrusively and to track continuously each electronic mail transmission in the Third Circuit. The comprehensive data from the electronic mail transmission reports provided an extremely reliable log of the telecommunication exchanges among the circuit offices. Each time a judge or administrator contacted the Courtran II computer facility to send a document, inquire if any documents were awaiting transmission, or receive a document, the computer automatically registered the identity of the user, the date and time for each activity, the type of activity (send, receive, or inquiry), and the success or failure for each transmission.

This report permitted detailed tabulation and analysis of the entire electronic mail service. Although the computer program contained some diagnostic information when a particular transmission failed, the monitoring system could not identify the precise cause of the problem: computer hardware, computer software, telephone lines, or word processor failure.

## Interviews and Questionnaire

Each participating judge and secretary was interviewed in person or by telephone sometime during the project to elicit information about perceptions and attitudes. The interviewees were asked to comment on

- work styles and habits concerning the preparation and drafting of opinions, bench memorandums, and other court papers
- formal and informal office procedures, especially those affecting typing workload and the preparation of opinions
- flow of work and documents within the office and among colleagues in the circuit
- judgments on typing and opinion review priorities, policies, and requirements
- impact and influence of word processing and electronic mail technologies on office practices and procedures
- role of law clerks and their needs for typing support

- personal knowledge of and facility with the equipment.

Interviews and questionnaires were structured and standardized to tabulate group judgments and attitudes and to enable direct comparisons between offices.

## Appellate Case-Tracking Survey

Not every appeal requires an opinion. According to the 1977 statistics of the Administrative Office of the United States Courts (AO), opinions are written in 50 percent of terminated cases among the United States courts of appeals, and in only 25 percent of cases in the Third Circuit. Because this study examined the impact of two technologies on the opinion preparation process, it was considered desirable to assess only cases resulting in written opinions.

Although the AO annually reports some median interval times for cases terminated in each court of appeals, those AO statistics are insufficient for detailed analysis of a comparison between preproject and project cases.

Both technologies were fully implemented in early March 1978. Beginning April 1, 1978, all opinions filed were classified as cases potentially influenced by one of the technological innovations—"project cases." A control group consisting of all cases with opinions filed between July 1, 1976, and December 31, 1977, was labeled "preproject cases."

The following case information was obtained, for both project and preproject cases, from court records listed in the clerk of the court's docket book entries of the Third Circuit and the Confidential Case Monitoring Report: the case name and docket number, category of case, names of judges assigned to the panel and judge assigned to prepare the draft opinion, type of appellate proceeding (oral argument or submission of briefs only), type of opinion (per curiam or signed), and vote. In addition, data were obtained for each of the four crucial events in the appellate process: filing of notice of appeal, listing for disposition on the merits (oral argument or submission of briefs), distribution of draft opinion to the panel, and filing of the opinion. This information permitted the tabulation on each appeal of the appeal time for various phases of both the litigants' preparation of the appeal and the court's review and de-

liberation. With this information, detailed statistical comparisons could be made between cases preceding and following the introduction of both technologies, and other contributing variables or procedures normally associated with the appellate process could be assessed.

The only opinions excluded from this survey were from those cases the Third Circuit classifies as "CAV." CAV cases are atypical in that they do not reflect procedures normally followed by this court. These cases are delayed after submission or oral argument because of extenuating circumstances or legal precedent or policies. These exempt cases fall into three categories: cases that need additional substantive information from contesting parties, including additional information in the briefs; cases that need additional portions of the record (transcript of trial proceedings or court documents) from the trial court or government agency; or cases delayed pending a Supreme Court decision or another circuit court decision. CAV cases eliminated only 2 to 3 percent from each sample.

## III. Typing Workload and the Need for Word Processing

### Secretarial Support

At the time of the typing survey, there were eighteen full-time secretaries working in the Third Circuit judges' chambers or circuit executive offices. Each judge was supported by at least one full-time secretary and most judges had additional half-time or pool secretarial support.

There are at least three principals in each judge's office (the judge and two law clerks) who may require typing support from the secretary. The ratio of secretary per principal in judge's office (table 1) varies from .33 to .67, with an overall ratio of .5 secretary per principal (two principals per secretary). This support ratio is quite low, considering the additional administrative and secretarial support duties assigned most secretaries in the circuit, and compared to support services in efficient law firms. Law firms typically

employ one secretary or administrative support for each attorney (.75 to 1.0 secretary per principal).

The Ninety-fifth Congress approved an increase in the authorized secretarial support for each Third Circuit judge to two full-time secretaries in each judge's office (an increase to .67 secretary per principal).

**TABLE 1**
**Distribution of Secretarial Support within the Third Circuit**

| Chambers/ Office | Number of Principals | | Number of Secretaries | | Secretaries per Principal | Principals per Secretary |
|---|---|---|---|---|---|---|
| | Judges | Admin. Personnel or Law Clerks | Full-time | Pool (Full-time Equiv.) | | |
| Judge A | 1 | 2 | 1 | 1.0 | .67 | 1.5 |
| Judge B | 1 | 2 | 1 | .5 | .50 | 2.0 |
| Judge C | 1 | 2 | 1 | .5 | .50 | 2.0 |
| Judge D | 1 | 2 | 1 | .5 | .50 | 2.0 |
| Judge E | 1 | 2 | 1 | | .33 | 3.0 |
| Judge F | 1 | 2 | 1 | | .33 | 3.0 |
| Judge G | 1 | 2 | 2 | | .33 | 3.0 |
| Judge H | 1 | 2 | 1 | | .33 | 3.0 |
| Judge I | 1 | 2 | 1 | .5 | .50 | 2.0 |
| Judge J | 1 | 2 | 2 | .5 | .67 | 1.5 |
| Total | 10 | 20 | 12 | 3.5 | .50 | 2.0 |

## Types of Documents

Documents typed in judges' chambers can be conveniently classified in six categories: opinions (signed or per curiam), bench memorandums (prepared before oral arguments), judgment orders (prepared by the senior ranking judge on a panel, for issuance after oral argument or conference panel decision), speeches, general correspondence, and miscellaneous typing.

Each document category has its unique typing characteristics:

**Opinions.** Lengthy documents, typically ten to fifteen legal-size pages—although some per curiam opinions are short (four to five pages) and some signed opinions are lengthy (forty to sixty pages). Each opinion consists of a standard title page fully identifying the case, participating parties (litigants, counsel, and judges),

and dates, followed by text with appropriate footnotes on each page and virtually no repetitive text. Each opinion normally requires moderate to heavy revisions, several typed drafts, and expeditious production of each revision.

**Bench memorandums.** These documents vary in length depending on the nature of the legal issue and the author's (usually a law clerk) writing style. Memorandums have a lower typing priority than opinions. They usually contain no repetitive text and seldom require revision or retyping.

**Judgment orders.** Short documents (one or two pages) consisting of a standard format and standard text (also known as "boilerplate form," i.e., nearly all text is similar except identification of case and parties, and possibly a small portion of the narrative). Judgment orders are seldom revised; they are frequently produced by the senior members of the court.

**Correspondence.** Short documents (one or two pages) or letters, such as acknowledgment letters to law clerk applicants and law professors. Correspondence is seldom revised and it may or may not contain repetitive or standard text with variable information.

**Speeches.** Longer documents (five to ten pages). Speeches generally undergo moderate revision. This category is a small proportion of typing demand.

**Miscellaneous.** Usually very short internal memos, letters, and correspondence (under one page). These documents are seldom revised.

## Typing Time

A Third Circuit judge's secretary averages eight and one-quarter hours per working day in the office (table 2); however, the average number of hours spent typing varies tremendously according to the judge initiating the work and by work day within the same office. On any particular day the proportion of the work day spent in typing ranges from 0 to 90 percent, and the average time a secretary spent in typing during the survey period ranged from 15 to 78 percent of a normal eight-hour day.

**TABLE 2**
**Third Circuit Typing Survey: Secretarial Time Spent Typing**

| Chambers/ Office | Days Worked during Survey Period | Avg. No. Hours at Work per Day | Avg. No. Hours Typing per Day | Percentage Work Time Typing | Range of Typing Time | |
|---|---|---|---|---|---|---|
| | | | | | Low | High |
| Judge A | | | | | | |
| A1 | 14 | 8.8 | 3.3 | 37% | 11% | 61% |
| Judge B | | | | | | |
| B1 | 16 | 8.9 | 4.7 | 52% | 15% | 89% |
| Judge C | | | | | | |
| C1 | 15 | 9.4 | 7.3 | 78% | 63% | 89% |
| Judge D | | | | | | |
| D1 | 15 | 9.0 | 1.7 | 19% | 6% | 39% |
| Judge E | | | | | | |
| E1 | 5 | 8.1 | 1.2 | 15% | 0% | 29% |
| Judge F | | | | | | |
| F1 | 15 | 8.4 | 2.3 | 27% | 9% | 47% |
| Judge G | | | | | | |
| G1 | 11 | 8.2 | 1.5 | 18% | 10% | 30% |
| G2 | 5 | 8.0 | 1.0 | 13% | 0% | 25% |
| Judge H | | | | | | |
| H1 | 9 | 8.6 | 2.7 | 31% | 14% | 53% |
| Judge I | | | | | | |
| I1 | 14 | 9.2 | 1.8 | 19% | 3% | 45% |
| Judge J | | | | | | |
| J1 | 15 | 7.3 | 3.1 | 42% | 0% | 76% |
| J2 | 13 | 8.0 | 5.5 | 69% | 50% | 88% |
| Pool secretaries | | | | | | |
| (Judges A & J) | 14 | 7.0 | 4.7 | 67% | 27% | 91% |
| (Judges A & J) | 14 | 8.5 | 4.6 | 54% | 35% | 73% |
| (Judges B & I) | 14 | 7.4 | 1.7 | 26% | 0% | 40% |
| (Judges C & D) | 13 | 7.7 | 1.6 | 20% | 0% | 56% |
| Circuit executive | | | | | | |
| CE1 | 14 | 8.0 | .3 | 4% | 0% | 31% |
| CE2 | 11 | 8.0 | 2.2 | 29% | 6% | 48% |
| Avg. for all circuit secretaries | 12.6 | 8.3 | 2.1 | 25% | | |
| Avg. for judge and pool secretaries | 12.6 | 8.3 | 2.2 | 25% | | |

This rapidly fluctuating demand for typing services is common in nearly all offices and is characteristic of small businesses, legal offices, and companies in which one or two secretaries serve only

a few executives and professionals. Apparently, the flow of typing work in the Third Circuit is uneven, often unpredictable, and difficult to control considering the nature of the work, the size of the staff, and diverse localities of the offices.

A typical secretary in a Third Circuit judge's office spends approximately 25 percent of the time typing. This percentage is high when compared to industry and business offices, where secretaries' typing time averages 15 to 25 percent (without word processing equipment), or to corporate legal departments, where secretarial personnel spend 23 percent of their time typing.[5] Thus, Third Circuit secretaries spend slightly more time typing than their counterparts in private practice or corporate legal departments.

## Typing Volume

The workload trends identified in the typing time statistics are consistent with volume statistics. Typical typing volume varies greatly among offices and secretaries (table 3). Typing volume data (table 4) reveal the diversity of the typing load within the circuit—volumes ranged from 0 to 2,600 lines per day, and the total during the three-week survey period ranged from approximately 2,000 to 19,000 lines. In a few instances, typing volume was reduced because of judges' vacations. Typing volume, like typing time, is considerably heavier in circuit chambers (414 lines per day per secretary) than in corporate legal departments (159 lines per day per secretary) or Smith and Traux industry standards (138 lines per day per secretary).[6]

Typing production appears to be more related to work demands than to available secretarial support. Some secretaries are required to provide substantially more typing production than other secretaries at the same location or at other offices. Again, the data strongly suggest that typing is unevenly distributed, and demands are moderate to heavy in nearly all Third Circuit offices.

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[5]According to Traux, Smith, & Associates, Inc., Word Processing and Office Systems Consultants, Wilmington, Delaware (unpublished word processing industry surveys, 1977).

[6]The Smith and Traux statistics were based on 369 typing surveys of 5,900 secretarial positions within a variety of companies and government agencies.

**TABLE 3**
**Third Circuit Typing Survey:**
**Average Number of Lines Typed per Eight-Hour Day per Secretary**

| Secretary | Total Lines Typed during the Survey Period | Eight-Hour Day Equivalents Worked during the Survey Period | Average Number of Lines Typed per Eight-Hour Day |
|---|---|---|---|
| A1 | 5,559 | 15.4 | 361 |
| B1 | 7,174 | 17.8 | 403 |
| C1 | 5,323 | 17.6 | 302 |
| D1 | 5,105 | 16.9 | 302 |
| E1 | 397 | 5.0 | 79 |
| F1 | 9,275 | 15.8 | 587 |
| G1 | 4,150 | 11.3 | 367 |
| G2 | 472 | 5.0 | 94 |
| H1 | 3,063 | 9.7 | 316 |
| I1 | 3,426 | 16.1 | 213 |
| J1 | 9,785 | 13.7 | 714 |
| J2 | 8,960 | 13.0 | 689 |
| CE1 | 469 | 14.0 | 34 |
| CE2 | 2,531 | 11.0 | 230 |
| Pool secretaries | | | |
| A & J | 12,540 | 14.9 | 842 |
| A & J | 8,512 | 12.2 | 698 |
| B & I | 1,851 | 13.0 | 142 |
| C & D | 1,875 | 12.5 | 150 |
| Avg. for all secretaries | 5,026 | 13.1 | 384 |
| Avg. for judge and pool secretaries | 5,467 | 13.2 | 414 |

**TABLE 4**
**Third Circuit Typing Survey: Typing Volume Information**

| Chambers/ Office | Total Lines Typed | Average Lines Typed/Day | Documents Produced or Edited |
|---|---|---|---|
| Judge A | 13,953 | 930 | 73 |
| Judge B | 8,659 | 577 | 110 |
| Judge C | 5,865 | 391 | 40 |
| Judge D | 5,300 | 353 | 43 |
| Judge E | 10,201 | 680 | 63 |
| Judge F | 9,303 | 602 | 159 |
| Judge G | 4,501 | 300 | 37 |
| Judge H | 2,368 | 158 | 19 |
| Judge I | 3,942 | 263 | 65 |
| Judge J | 18,820 | 1,233 | 208 |
| Circuit exec. | 3,000 | 200 | 55 |
| Other judges | 4,585 | 306 | 14 |
| Totals for all offices | 90,497 | 6,031 | 886 |
| Totals for judges and pool secretaries | 87,497 | 5,831 | 833 |

## Opinion Preparation Process

Opinions are the longest documents prepared by circuit judges. Within the Third Circuit they average twelve pages each and constitute the largest single document category of typing work (37 percent of all typing) (table 5). Several procedures are used for initial drafting and revision of opinions in the circuit. Some judges usually prepare the initial draft of an opinion, then assign law clerks to undertake additional research and make further revisions. In other chambers, the law clerk prepares the initial draft, working from bench memorandums or discussion notes. Typically, a law clerk submits a draft opinion in longhand or personally types several drafts on a standard typewriter. In a few courts, the law clerk has learned to use the word processing machine or the secretary types the law clerk's initial draft into the word processing machine. In too many cases, opinions initially prepared by a law clerk are not typed on a word processing machine until after the judge reviews and edits the initial draft.

Per curiam or signed opinions go through numerous revisions in most offices. A per curiam opinion normally requires two to three revisions, and a signed opinion frequently needs five to six drafts—nine or ten revisions are not unusual. As might be anticipated, earlier drafts involve more substantive changes while final revisions normally entail correcting typographical errors or making minor refinements in writing style or wording.

**TABLE 5**
**Third Circuit Typing Survey:**
**Volume Information by Document Category**

| | Lines Typed | | Documents Typed | | |
|---|---|---|---|---|---|
| Document Category | Number | % of All Lines | Number | Avg. No. Pages | % of All Documents Typed |
| Opinions | 33,792 | 37% | 156 | 11.8 | 18% |
| Bench memos | 14,778 | 16% | 95 | 5.3 | 11% |
| Judgment orders | 2,082 | 2% | 41 | 3.9 | 5% |
| Correspondence | 20,196 | 22% | 393 | 2.9 | 44% |
| Speeches | 2,451 | 3% | 13 | 7.9 | 1% |
| Miscellaneous | 16,911 | 19% | 188 | 4.0 | 21% |
| Total | 90,210 | 100% | 886 | 5.1 | 100% |

## Revision Typing

Revisions are a very productive application for word processing technology. Opinion preparation requires substantial rewriting and typing revisions (table 6). Although the preparation of speeches often requires retyping, speeches constitute only 3 percent of the typing workload.

Typing opinions accounted for 37 percent of all lines typed (table 5) but an enormous 76 percent of all revision work (lines retyped) and 48 percent of all documents retyped (calculated from tables 5 and 6).

Similarly, revision typing accounted for 70 percent of all opinions typed and a substantial 57 percent of all lines typed for opinions. The difference in these two percentages should be anticipated. More lines are typed in the initial drafts, since the entire

opinion must be keyboarded into the word processor. Consequently, 29 percent of first-draft opinions accounted for 43 percent of all lines typed for opinions.

**TABLE 6**
**Third Circuit Typing Survey: Revision Typing by Document Category**

| | Revision Typing as % of All Lines Typed | | | Revision Typing as % of All Documents Typed | | |
|---|---|---|---|---|---|---|
| Document Category | None | Light | Heavy | None | Light | Heavy |
| Opinions | 43% | 13% | 44% | 29% | 35% | 35% |
| Bench memos | 88% | 12% | 0% | 93% | 7% | 0% |
| Judgment orders | 83% | 6% | 1% | 71% | 27% | 2% |
| Correspondence | 89% | 10% | 1% | 84% | 14% | 2% |
| Speeches | 33% | 51% | 17% | 46% | 31% | 23% |
| Miscellaneous | 88% | 6% | 7% | 84% | 13% | 3% |
| Weighted average | 70% | 12% | 18% | 74% | 17% | 9% |

Revision typing in the Third Circuit accounted for 30 percent of all lines typed and 26 percent of all documents typed. Compared to an all-industry average of 16 percent reported by the Smith and Traux surveys, the circuit court has moderate amounts of revision typing. Law firms and corporate legal offices, however, report considerably higher revision typing figures of 57 percent and 49 percent respectively. Differences in work styles and revision practices again demonstrate the considerable variations among the judges (table 7).

Word processing equipment permits efficient revisions and avoids retyping the entire original text when only portions of the text need correction. All the figures substantiate that heavy revision typing is associated with opinions and to some extent with other documents, and that opinion typing turnaround can be significantly reduced by using word processing equipment rather than standard electric typewriters.

**TABLE 7**
**Third Circuit Typing Survey: Revision Typing by Author**

| Office Location | Revision Typing as % of All Lines Typed | | | Revision Typing as % of All Documents Typed | | |
|---|---|---|---|---|---|---|
| | None | Light | Heavy | None | Light | Heavy |
| Judge A | 30% | 26% | 44% | 61% | 22% | 17% |
| Judge B | 65% | 13% | 21% | 81% | 13% | 6% |
| Judge C | 52% | 27% | 22% | 58% | 22% | 19% |
| Judge D | 61% | 36% | 2% | 80% | 15% | 5% |
| Judge E | 82% | 16% | 1% | 77% | 19% | 4% |
| Judge F | 65% | 17% | 18% | 90% | 7% | 3% |
| Judge G | 58% | 4% | 38% | 65% | 6% | 29% |
| Judge H | 100% | 0% | 0% | 100% | 0% | 0% |
| Judge I | 59% | 24% | 16% | 85% | 11% | 4% |
| Judge J | 83% | 15% | 2% | 73% | 22% | 5% |
| Circuit exec. | 34% | 36% | 30% | 55% | 31% | 14% |
| Other judges | 82% | 18% | 0% | 82% | 18% | 0% |
| Law clerks (all) | 30% | 41% | 29% | 43% | 37% | 20% |
| Weighted average | 70% | 12% | 18% | 74% | 17% | 9% |

## Typing Priorities

There are no formal typing priorities in the Third Circuit. However, most judges have prescribed guidelines that establish the preparation of opinions as the highest priority, followed by judgment orders and the judge's correspondence. Bench memorandums and speeches have the lowest priority.

Judges' materials normally have priority over law clerk requests. In many offices, secretaries provide only a modest amount of typing support to the law clerks; frequently, clerks are required to type their own documents as a condition of employment.

Opinion typing is often designated "rush" priority. Although defining rush work is subjective, most court personnel understand "rush" as referring to a document that must be prepared as soon and as rapidly as possible. Word processing technology permits faster keyboarding, editing, and printing of documents than standard electric typewriters.

In the Third Circuit, rush typing represents 31 percent of all lines typed and 22 percent of all documents prepared (tables 8 and 9). The Smith and Traux typing surveys report 20 percent rush

typing for all industries and only 3 percent rush typing in corporate legal departments. Once again, comparing Third Circuit workload to general industry and legal practices shows that the Third Circuit secretaries are under greater time pressures to produce documents than are secretaries in most organizations.

**TABLE 8**
**Third Circuit Typing Survey: Rush Typing by Document**

| Document Type | Rush Typing as % of All Lines Typed | Rush Typing as % of All Documents Typed |
|---|---|---|
| Opinions | 44% | 52% |
| Bench memos | 18% | 13% |
| Judgment orders | 16% | 27% |
| Correspondence | 28% | 14% |
| Speeches | 11% | 23% |
| Miscellaneous | 25% | 18% |
| Average for the circuit | 31% | 22% |

Opinion typing constitutes the largest proportion of all rush demands with 44 percent of all lines typed. Since fewer changes are made in the last few drafts of an opinion, the finding that the percentage of rush lines for opinions was less than the percentage of rush documents indicates that final draft opinions are more likely to be completed quickly than initial drafts of an opinion.

**TABLE 9**
**Third Circuit Typing Survey: Rush Typing by Author**

| Author | Rush Typing as % of All Lines Typed | Rush Typing as % of All Documents Typed |
|---|---|---|
| Judge A | 14% | 4% |
| Judge B | 36% | 39% |
| Judge C | 48% | 53% |
| Judge D | 11% | 3% |
| Judge E | 46% | 31% |
| Judge F | 6% | 3% |
| Judge G | 0% | 0% |
| Judge H | 19% | 33% |
| Judge I | 62% | 21% |
| Judge J | 34% | 27% |
| Circuit exec. | 33% | 15% |
| Other judges | 42% | 29% |
| Law clerks | 56% | 61% |
| Average | 30% | 22% |

## Improvements in Typing Productivity

A Third Circuit secretary typically produces at least twice the typing output of corporate legal secretaries. The legal and industry productivity figures cited in this report were usually based on typing done on standard electric typewriters. Since 60 percent of Third Circuit typing during the survey period was prepared on word processors, the high productivity is attributable to word processing technology.

Manufacturers make various claims that word processing equipment can increase productivity four- to tenfold compared to standard typewriters. Improvements in productivity depend on the type of documents prepared. A recent court study classifies court documents according to four groups: manuscripts (opinions and speeches), standard forms and letters (judgment orders), standardized complaints and jury instructions, and correspondence and memos.[7] The two largest typing requirements in circuit courts are for opinions and correspondence. The report estimated it is more

[7]National Center for State Courts, Business Equipment and the Courts: Guide for Court Managers 14-16 (1977).

realistic to expect word processing to increase productivity by 200 to 300 percent for documents typically produced by an appellate court.[8]

## Time Savings

It is evident that without word processing, Third Circuit secretaries would spend substantially more time retyping documents, in addition to their present burdensome typing load. No typing surveys had been previously completed in any appellate court, so there is no precise data on production times without word processing equipment. However, a projected time savings can be estimated from the available productivity and workload information. Since approximately 60 percent of all Third Circuit typing is handled on word processors, about 60 percent of typing time is spent on these machines. Secretaries average 2.1 hours per day typing; therefore, 1.25 hours (2.1 x .6) per day are needed on the word processors. Given the high proportion of revision and rush typing—about one-third of all typing—and the productivity gains (300 percent), circuit secretaries would require an estimated 3.75 hours per day using electric typewriters instead of word processors. Adding the .84 hours per day for typing presently completed on standard typewriters, a total of 4.6 hours per day (56 percent of the work day) would be required without word processing. Word processing equipment has permitted secretaries to handle their typing work in about half the time—2.1 hours with word processing compared to 4.6 hours without word processing.

Opinion typing on the word processor is associated with a high proportion of revisions (59 percent of typed lines and 76 percent of documents). Obviously, a substantial amount of the time saved (estimated at 50 to 80 percent) is associated with opinion preparation.

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[8] *Id.* at 15-16.

# IV. Mail Service and the Need for Electronic Mail

## Description of Electronic Mail

There is no simple way to describe the field of electronic mail services or equipment. Services can comprise the electronic transmission of typed text only, graphics only, pictorial reproductions of original documents, computer information, or single- or multipage documents. Equipment can include facsimile devices, word processing machines, telephones, or large-scale computers.

In this study, electronic mail service was limited to the transmission of typed single- or multipage text. Each Third Circuit judge and administrative office was given a word processing machine containing communication features capable of storing, transmitting, and receiving typed text over regular telephone lines and receivers. The communications feature permits a judge to conveniently send any document already prepared and stored on the word processing machine.

The Third Circuit electronic mail system is unique. Besides being the first court to implement an electronic mail exchange system, the court is among the few word processor users anywhere in the United States to transmit electronically lengthy narrative documents on a regular basis by means of a centralized "electronic post office" system.

Each user's word processor was connected to a standard dial telephone and communications modem. A modem is an electronic box that converts digital coded information in a word processor or computer to standard audio frequencies for transmission over regular voice-grade telephone lines to another computer or word processor. In the earlier stages of the project, a device with a slower transmission speed (300 baud rate acoustic couplers) was installed, but all users have now received higher speed (1,200 baud rate AT&T Model 212A Dataphone modems) devices. These devices transmit information four times faster than the original equipment.

When judges or administrators want to use the centralized electronic mail system, they dial a Washington, D.C., telephone number that connects them to the Federal Judicial Center's Courtran II

computer. After providing appropriate passwords and codes to satisfy security procedures, the user has access to the electronic mail system. Each Third Circuit court office can use the electronic mail service anytime during the week (8:00 a.m. to 6:30 p.m.); hours can be extended by request.

**TABLE 10**
**Third Circuit Electronic Mail Survey:**
**Transmissions Sent and Received**

| Week of | Transmissions Sent | Transmissions Received | Total | Transmission Reliability |
|---|---|---|---|---|
| 6/5–9 | 6 | 9 | 15 | 55% |
| 6/12–16 | 25 | 91 | 116 | 78% |
| 6/19–23 | 19 | 64 | 83 | 78% |
| 6/25–30 | 21 | 92 | 113 | 76% |
| 7/3–7 | 26 | 95 | 121 | 89% |
| 7/10–14 | 45 | 211 | 256 | 90% |
| 7/17–21 | 42 | 157 | 199 | 88% |
| 7/24–28 | 22 | 70 | 92 | 83% |
| 7/31–8/4 | 36 | 170 | 206 | 84% |
| 8/7–11 | 35 | 140 | 175 | 94% |
| 8/14–18 | 25 | 88 | 113 | 78% |
| 8/21–25 | 22 | 93 | 115 | 91% |
| 8/28–9/1 | 33 | 147 | 180 | 89% |
| 9/4–8 | 30 | 167 | 197 | 91% |
| 9/11–15 | 34 | 146 | 180 | 90% |
| 9/18–22 | 20 | 96 | 116 | 88% |
| 9/25–29 | 26 | 109 | 135 | 85% |
| 10/2–6 | 15 | 98 | 113 | 81% |
| 10/9–13 | 23 | 92 | 115 | 90% |
| 10/16–20[a] | 40 | 163 | 203 | 91% |
| 10/23–27 | 13 | 22 | 35 | 93% |
| 10/30–11/3 | 28 | 95 | 123 | 86% |
| 11/5–10 | 31 | 123 | 154 | 87% |
| 11/13–17 | 37 | 112 | 149 | 91% |
| 11/20–24 | 29 | 132 | 161 | 91% |
| Total | 683(20%) | 2,782(80%) | 3,465(100%) | |

[a]Telecommunications (electronic mail) speed was increased from 300 to 1,200 baud rate.

One communications approach—heavily promoted by word processing and facsimile vendors—is to permit each user to transmit directly to another word processing machine, circumventing a central computer. The normal distribution of documents among Third Circuit offices makes such a direct transmission approach impractical. A document is sent simultaneously to several offices

whether by U.S. postal or electronic mail service. If a direct transmission approach were adopted, the sender would have to separately contact each recipient, carefully coordinate activities with each recipient—to avoid disrupting work in progress on some recipient's word processor—and substantially increase transmission time. It takes the same amount of time to send the document to a centralized Courtran II computer as to send to just one word processor using the same approach.

The Third Circuit judges can, if they want to, adopt a direct transmission approach with their existing word processors. Presently, an average of four judges or administrators receive each document distributed (table 10), a fact that strongly supports the establishment of the centralized electronic mail system adopted by the Third Circuit.

The electronic mail system stored on the Courtran II computer permits easy performance of several functions according to any priority chosen. The computer system allows each judge or administrator to

- send document(s): transmit one or more documents of any length to the computer for distribution to one or more designated recipients. Third Circuit users who are not designated recipients do not have access to the document.
- receive document(s): transmit one or more documents of any length from the computer to recipient's word processing machine.
- cancel document(s): cancel sending of any document or a particular receipt of a document that has not yet been picked up by the recipient(s).
- verify status of document(s) sent: at any time verify which documents sent have or have not been received by each recipient.
- verify status of pending document(s) to be received: determine which documents are awaiting electronic transmission pick-up to user's word processor. Inquiry log lists the name of document, name of sender, date sent, approximate document size, and amount of time to transmit the document.

- record history of document(s): retain an archival listing of all documents sent and received, including the name of the document, date sent and received, and the names of parties sending or receiving each document.

## Transmission Reliability

Electronic mail technology in general, and particularly the unique computer configuration and procedures developed for the Third Circuit court, is still in the embryonic stage of development.

An electronic mail transmission failure, called an abort, is comparable to losing a connection during a telephone conversation. Unfortunately, when such a failure occurs, the entire document must be transmitted again. Failures cause irritating interruptions, require tasks to be performed again, and result in lost personnel time. During peak typing production and under severe time pressures, electronic mail failures become unacceptably time-consuming and disconcerting—especially when a twenty-five-minute (fifty-page) transmission aborts after twenty minutes.

The reliability of electronic mail service has been assessed continuously. Although transmission reliability has improved, it has not achieved an acceptable (95 percent reliability) or desirable (99 percent) reliability level. (See table 10.) The present rate of transmission failures is a primary reason for the court's mixed feelings towards electronic mail. If high reliability could be assured, there would be nearly unanimous agreement to retain and expand the use of this technology. When additional communications features are provided with the new word processing equipment (see chapter 6), these failures will be less disconcerting and less disruptive of other word processing activities.

The chances for transmission failures increase as transmission time increases. Transmission time—rather than transmission speed, size of document, or user—is associated with transmission reliability. For example, the chance of an abort is seven times greater if transmission time is approximately twenty minutes than if it is three minutes. Adopting higher transmission speeds did not appreciably change the overall abort rate. Since the volume of information transmitted per minute increased fourfold by changing

from 300 to 1,200 baud, the chances for a complete transmission without an abort of short- or moderate-size documents improve.

## Comparison of Electronic Mail to U.S. Postal Service

Despite the intermittent transmission failures, electronic mail has been used extensively and has made dramatic improvements in the distribution of opinions and memorandums within the court.

Over a six-month period, several thousand documents and more than ten thousand pages of draft opinions, related memorandums, and correspondence were exchanged electronically (table 10), usage rates varied, and an extensive number of short and longer documents were transmitted.

Although many documents consisted of two- or three-page memos, or excerpts from draft opinions, a substantial number of documents (20 percent) exceeded ten pages, and some draft opinions contained more than sixty pages.

Each judge uses the electronic mail service several times a day (a few use it twice a day; most offices use it four or five times daily) to send, receive, and make status inquiries through his electronic mail box. During a typical week, a judge sends three or four documents, receives twelve to fifteen documents, and requires two hours of electronic mail time, including inquiries.

The opinion circulation survey (table 11) shows varying patterns of U.S. postal service delivery schedules among Third Circuit users. Ideal conditions exist for postal service in several Third Circuit cities: Judges' chambers in Camden, Newark, and Pittsburgh are located at each city's main post office. The average delivery time for mailed opinions is slightly under two days (38.6 hours), but delivery times vary depending upon distance and destination. Same-day delivery is nonexistent; one-day delivery is provided less than half the time (45 percent). Delivery within two days is normally anticipated, but almost 10 percent of mailings take more than two working days (table 11).

Using electronic mail sharply reduces the delivery time between all Third Circuit offices. Compared to an average two days for postal delivery, electronic mail averages less than half a day (table 12). The speed of electronic mail is not related to distance or desti-

nation (the average delivery time between any of the cities is either .3 or .4 days), but to the frequency and timeliness that a recipient inquires through his electronic mail box. Each recipient decides when to take the mail from his electronic mail box. If a recipient were to check his electronic mail box each hour rather than every three hours—the present inquiry rate for the Third Circuit—the delivery time would decrease further.

Electronic mail provides the most benefit in delivery service to more distant (Pittsburgh) or remote (Wilkes-Barre) localities, but all localities show major time savings from 60 percent to 85 percent.

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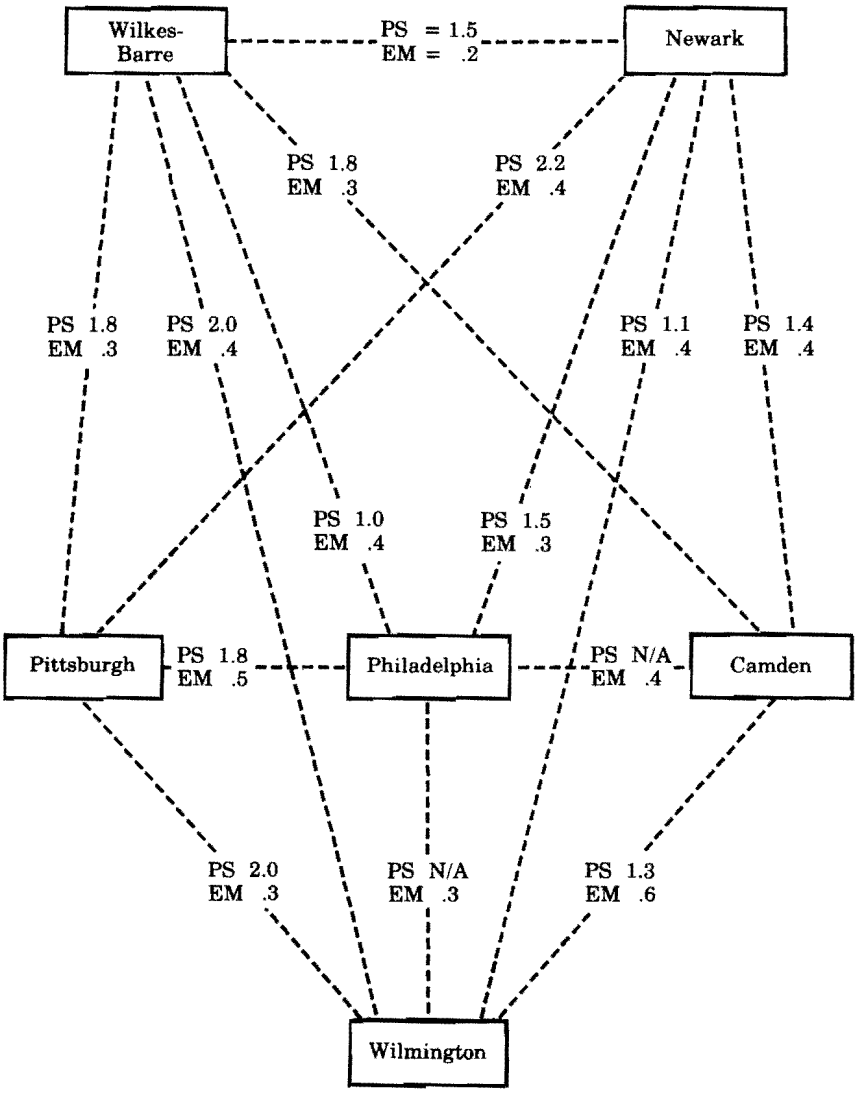
**TABLE 11**
**Opinion Circulation and Electronic Mail Surveys: Comparative Delivery Times for Postal Service and Electronic Mail (EM)**

| | Postal Service May 1978 | | EM May 1978 | | EM Sept. 1978 | |
|---|---|---|---|---|---|---|
| Delivery[a] | No. | % | No. | % | No. | % |
| 1 hour | — | — | — | — | 204 | 41% |
| 3 hours | — | — | — | — | 110 | 22% |
| 6 hours | 1 | 1% | 10 | 45% | 39 | 8% |
| 24 hours | 35 | 45% | 8 | 36% | 146 | 29% |
| 48 hours | 35 | 45% | 3 | 14% | 3 | 0.5% |
| 72 hours | 5 | 7% | 1 | 5% | 0 | 0% |
| 96 + hours | 1 | 1% | 0 | 0% | 0 | 0% |
| Same-day (within same working day) | | 1% | | 45% | | 71% |
| One-day (by next working day) | | 46% | | 81% | | 99% |
| Two-day (within two working days) | | 91% | | 95% | | 100% |
| Three-day | | 99% | | 100% | | 100% |
| Avg. no. of hours | 38.6 | | 19.9 | | 8.9 | |

[a]Opinion circulation survey in May 1978 did not tabulate electronic mail deliveries under six hours.

**TABLE 12**
**Schematic Representation of Average Delivery Time between Postal Service and Electronic Mail among Third Circuit Locations**




*Key*
PS: Average delivery time in days using postal service.
EM: Average delivery time in days using electronic mail.
N/A: No documents reported during the typing survey between locations.

Using the average delivery rates for U.S. postal and electronic mail services, adoption of the electronic mail system would save an estimated four and one-quarter days on each opinion. This calculation assumes that the author of an opinion sends one or two drafts to two panel members; the panel-approved opinion is distributed once to the entire court for review; and on average each electronic mailing is at least one day faster. The actual time saved on a specific opinion depends on the number of times a draft is distributed, whether a concurring or dissenting opinion is also prepared, and the time each judge takes to respond to the draft.

### Costs of Electronic Mail

Compared to U.S. postal service, electronic mail requires additional equipment and technical resources, and correspondingly, additional expenditures. Whether electronic mail is presently competitively priced when compared with U.S. postal service was not a crucial concern for this study. But how expensive would electronic mail be if regularly and more heavily used?

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. . . [A]t present usage rates,[9] a typical seven-page document sent by electronic mail to a specific recipient would cost approximately $4.44 ($32,000 total cost per year divided by 7,200 documents per year). The same seven-page document would cost $0.28 by first class mail. Private express delivery services charge $5.00 or more for one-day delivery, and standard facsimile devices (presently used in several federal courts, including the Third Circuit) would cost $10.10 per document, assuming that 50,000 pages are transmitted yearly (however, at the Third Circuit's present usage rate of facsimile transmissions, the cost is $25.00 to $30.00 per page).

If electronic mail were permanently installed with word processing equipment, costs would decrease as volume increased. Since the court has generally restricted electronic mail distribution

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[9][The original published version of this report sets out pricing and usage pattern assumptions on which these estimates are based. Inflation, technological advances, and changes in usage patterns have made those assumptions obsolete. Ed.]

primarily to draft opinions and related correspondence, the court's usage rate could substantially increase.

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## V. Appellate Case Processing

An important measure of appellate court efficiency is the speed with which a typical appeal is processed. The extent to which word processing and electronic mail expedite the processing of an appeal is a crucial measure of the potential value of these technologies for an appellate court. An appeal has two principal stages: the perfection of the appeal (controlled by the parties involved) and the court's deliberation process.

Nearly all appellate courts have established rules and procedures governing the litigants' perfection of the appeal. The Court of Appeals for the Third Circuit, which is recognized as an open, innovative appellate court, was the first appellate court to publish its internal rules.[10] The publication covers the essential processes and procedures followed by this court from the distribution of the litigants' briefs to the final termination of the appeal.

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### Stages Analyzed in Appellate Case Processing

The Administrative Office of the United States Courts (AO) publishes various statistics on each circuit's workload and median case processing time. These statistics are inadequate for this study because the AO does not provide data on separate appeals requiring per curiam or signed opinions only, the amount of time opinion writers take to prepare opinions, or the amount of time the court takes to review opinions.

A separate survey needed to be completed in order to compare case processing time before and after installing the word processing and electronic mail equipment. The methods used for case selection and sampling are discussed in chapter 2 of this report. The

[10]United States Court of Appeals for the Third Circuit, Internal Operating Procedures (1974).

four dates of key appellate events in each case (filing of appeal, formal submission on the merits, distribution of draft opinion to panel, and rendering of decision) permitted the tabulation of several crucial time intervals:

1. Filing of appeal to filing of opinion by court (column A in tables 13 through 18): the total number of days for both the perfection of the appeal and deliberation by the court. This time interval measures how long it takes to process an appeal (column A equals columns B plus C).
2. Filing of appeal to formal submission on the merits (column B): the number of days for the perfection of the appeal. Neither of the two technological innovations has any impact on this appellate stage, and there should not be any major differences between the preproject versus project cases.
3. Formal submission on the merits to rendering the court's written opinion (column C): the number of days for the court to prepare and release a reasoned opinion. This time interval measures the deliberation stage, and both technologies can affect this stage (column C equals columns D plus E).
4. Formal submission on the merits to opinion draft distribution to the panel (column D): the number of days the opinion writer takes to prepare his draft opinion. Word processing technology has its greatest impact during the opinion preparation stage, but electronic mail has no effect at this stage.
5. Opinion draft distribution to the panel to rendering the court's written opinion (column E): the number of days for circulation to the panel and for the entire court to review and comment on the decision (unnecessary for per curiam opinions) and send the opinion to the clerk of the court. Electronic mail has its impact on this stage.

## Description of Opinions

In the years surveyed (1976 to 1978), criminal appeals constituted approximately 20 percent of written opinions (table 13). Although a substantial number of written opinions were per curiam (25 percent), the court has increased its preference for signing opinions from 67 percent to 83 percent. Within the Third Circuit, nearly all written opinions are prepared by panels; and there was

**TABLE 13**
**Word Processing and Electronic Mail Project: Distribution of Written Opinions**

| | Preproject Cases | Project (WP–EM) Cases |
|---|---|---|
| Type of case | | |
| Civil | 208 (80%) | 132 (84%) |
| Criminal | 52 (20%) | 25 (16%) |
| Type of opinion* | | |
| Signed | 174 (67%) | 131 (83%) |
| Per curiam | 86 (33%) | 26 (17%) |
| Case presentation | | |
| Oral argument | 224 (86%) | 136 (87%) |
| Submitted (no orals) | 36 (12%) | 26 (17%) |
| Composition of court* | | |
| Only circuit judges | 160 (62%) | 122 (78%) |
| District judge sitting | 100 (38%) | 35 (22%) |
| Vote | | |
| Unanimous | 207 (80%) | 127 (81%) |
| Concurring | 13 (5%) | 10 (6%) |
| Dissenting | 35 (14%) | 20 (13%) |
| Both (concurring and dissenting) | 5 (2%) | 0 (0%) |
| Judge | | |
| A | 31 (12%) | 16 (11%) |
| B | 37 (14%) | 20 (14%) |
| C | 22 (9%) | 13 (9%) |
| D | 36 (14%) | 16 (11%) |
| E | 30 (12%) | 22 (15%) |
| F | 27 (11%) | 17 (11%) |
| G | 21 (8%) | 17 (12%) |
| H | 22 (9%) | 8 (6%) |
| I | 34 (13%) | 17 (12%) |

NOTE: Judge J joined the circuit in late 1977, and prepared eleven written opinions during 1978 that were included in this study.

*Statistically significant change at the .01 level.

less reliance upon the temporary reassignment of district judges into appellate panels in 1978 (22 percent) than in the 1976-1977 period (38 percent). The preparation of written opinions is reasonably distributed over the entire court. Each active appellate judge prepares from 9 to 15 percent of the written opinions. The voting pattern on decisions has remained stable in recent years; the court has voted unanimously in 80 percent of written opinions, and dissenting opinions have been filed in 13 percent of the cases.

## Preproject Case Processing Time

The time it took for the Third Circuit to deliberate and prepare a written opinion before the introduction of word processing was approximately one-fourth (84 days out of 331 days) the total appellate processing time. This ratio is consistent with previous findings in state courts where the perfection of the appeal consumes more than one-half to three-quarters of the entire appellate process.[11] The preproject time taken by the Third Circuit to process appeals is about average among United States courts of appeals, but substantially less than in most state appellate courts.

The opinion writer's preparation of the draft opinion took two-thirds (59 out of 84 days) of the court's deliberation time, while panel review and circulation encompassed slightly less than a month.

Although the federal speedy trial provisions enacted by Congress do not directly impose time constraints on the appellate courts, criminal appeals were completed two months sooner than civil appeals; however, most of the time saved was in the perfection of the appeal (table 14).

The adoption of per curiam (memorandum) opinions has been extolled by advocates as a method to expedite the opinion writing process.[12] The Third Circuit drafting and review procedures regarding the issuance of per curiams work well. Per curiam opinions were produced twice as fast as signed opinions during the preproject survey period.

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[11]D. Meador, Appellate Courts: Staff and Process in the Crisis of Volume (1974).

[12]P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal (1977).

**TABLE 14**
**Case Processing Time for Preproject Cases**
**(July 1976 to December 1977)**

| | Number of Cases | Number of Days: Filing to Decision [A] | Filing to List [B] | List to Decision [C] | List to Draft [D] | Draft to Decision [E] |
|---|---|---|---|---|---|---|
| Total | 260 | 331 | 247 | 84 | 59 | 24 |
| Type of case | | ** | ** | | ** | |
| Civil | 208 | 342 | 257 | 85 | 61 | 24 |
| Criminal | 52 | 284 | 206 | 78 | 53 | 25 |
| Type of opinion | | * | | ** | ** | ** |
| Signed | 174 | 343 | 244 | 99 | 71 | 28 |
| Per curiam | 86 | 306 | 252 | 53 | 35 | 18 |
| Vote | | ** | | ** | ** | ** |
| Unanimous | 207 | 313 | 239 | 74 | 55 | 20 |
| Concurring | 13 | 396 | 283 | 113 | 78 | 35 |
| Dissenting | 35 | 379 | 262 | 117 | 75 | 43 |
| Both (concurring and dissenting) | 5 | 548 | 390 | 158 | 100 | 58 |
| Judge | | | | ** | ** | ** |
| A | 31 | 339 | 268 | 71 | 50 | 21 |
| B | 37 | 284 | 239 | 45 | 27 | 18 |
| C | 22 | 346 | 234 | 112 | 79 | 33 |
| D | 36 | 345 | 265 | 80 | 61 | 20 |
| E | 30 | 310 | 227 | 84 | 56 | 28 |
| F | 27 | 315 | 207 | 108 | 83 | 25 |
| G | 21 | 373 | 269 | 104 | 76 | 28 |
| H | 22 | 349 | 237 | 111 | 78 | 33 |
| I | 34 | 343 | 271 | 73 | 52 | 21 |

*Key*
Filing: Filing of notice of appeal.
List: Listing for disposition on the merits (oral argument or submission).
Draft: Draft opinion distributed to court panel for review.
Decision: Opinion filed with the clerk of the circuit.
*Statistically significant difference at the .05 level.
**Statistically significant difference within category at the .01 level.

The efficacy of eliminating oral arguments is another appellate policy hotly debated among lawyers, jurists, and researchers. In the preproject period, the Third Circuit reviewed approximately 15 percent of appeals submitted on the merits without oral arguments. The court prepared and released written opinions almost three weeks faster if only briefs and appropriate court documents were submitted to the panel.

It was expected that the panel's vote might significantly affect the time the court took to deliberate and render an opinion. A con-

curring or dissenting opinion added approximately forty days to the preparation process.

The largest preproject time variation in the court's opinion preparation process was related to judge assignments. The most efficient opinion-writing judge prepared opinions two-and-a-half times faster than the slowest judge. The more efficient judges are also among the most productive judges in the circuit (table 13).

The opinion writer's preparation of the draft opinion—not the time for the panel and the entire court to review the draft—accounted for the time differences among judges. Apparently, a judge's work style, work priorities, opinion preparation procedures within chambers, and utilization of law clerks and secretaries have a strong impact on processing time.

### Impact of Technology on Case Processing Time

The implementation of word processing technology had a consistent and substantial influence on decreasing the amount of time the Third Circuit took to prepare and render written opinions. The total processing time for an appeal requiring a written opinion was reduced substantially by approximately three weeks—a 6 percent reduction in total appeal time (table 15, column A). The Third Circuit's deliberation time was reduced by approximately eighteen days—a 21 percent reduction in the time to draft opinions (table 15, column C). These time savings occurred almost exclusively in the time opinion writers took to prepare drafts (table 15, column D). Only a minuscule savings in time was found for opinion dissemination and review by the entire bench (table 15, column E). As anticipated, there was no change in the average time litigants took to perfect appeals.

These findings strongly support a program to provide permanent word processing technology for the Third Circuit, but the findings pertaining to electronic mail were less encouraging. Merely tabulating and examining total case statistics without any more refined analysis can be misleading. Moderate changes in the appeals (percentage of criminal appeals), appellate process (percentage of appeals without oral argument), or appellate procedures (percentage of signed opinions or panel voting patterns)

might have totally or partially caused the time changes. To insure that these findings were valid, further statistical analysis was conducted.

With a few exceptions, all major trends noted between the two sample groups (preproject and project cases) are supported by analysis of various subcategories. Every major classification breakdown (by type of case, type of opinion, voting pattern, etc.) shows substantial reduction of the time to draft opinions after instituting word processing technology. For the bulk of the opinions normally prepared, improvements averaged two to three weeks, especially if the opinion was a civil appeal, a signed opinion, a unanimous opinion, or an appeal decided with oral arguments. The court's total deliberation time was reduced dramatically—20 to 30 percent. A detailed analysis of these subcategories follows.

## Type of Case

Although only civil cases showed a statistically significant improvement in the time required to process opinions, there were substantial decreases in the preparation time for both civil and criminal appeals, civil cases averaging eighteen days and criminal cases eight days. Since criminal appeals might have received higher typing priorities in some chambers before word processing was introduced, there was less potential for word processing to effect time reductions in preparing criminal opinions. As a result of the technology, civil and criminal opinions are prepared by the court in about the same amount of time (table 16), although the time litigants take to perfect the appeal still differs substantially. Apparently, the improved production and productivity provided by word processing eliminates the need for establishing typing priorities, at least for written opinions. Electronic mail may have some impact on the processing of criminal cases which show a four-day decline in opinion review time (table 15).

One might conjecture that criminal appeals were processed faster because per curiam opinions were prepared more frequently; however, a statistical analysis did not verify this hypothesis—a per curiam opinion is about as likely in a civil as in a criminal appeal.

## TABLE 15
## Case Processing Time for Preproject and Word Processing–Electronic Mail Cases

| | Number of Cases | Number of Days: Filing to Decision [A] | Filing to List [B] | List to Decision [C] | List to Draft [D] | Draft to Decision [E] |
|---|---|---|---|---|---|---|
| Total | | * | | ** | ** | |
| Pre | 260 | 331 | 247 | 84 | 59 | 24 |
| WP–EM | 157 | 312 | 246 | 66 | 44 | 23 |
| Type of case | | | | | | |
| Civil | | * | | ** | ** | |
| Pre | 208 | 342 | 257 | 85 | 61 | 24 |
| WP–EM | 132 | 319 | 252 | 67 | 43 | 23 |
| Criminal | | | | | | |
| Pre | 52 | 284 | 206 | 78 | 53 | 25 |
| WP–EM | 25 | 275 | 209 | 66 | 45 | 21 |
| Type of opinion | | | | | | |
| Signed | | * | | ** | ** | |
| Pre | 174 | 343 | 244 | 99 | 71 | 28 |
| WP–EM | 132 | 317 | 242 | 74 | 50 | 25 |
| Per curiam | | | | ** | ** | * |
| Pre | 86 | 306 | 252 | 53 | 35 | 18 |
| WP–EM | 25 | 287 | 262 | 25 | 12 | 14 |
| Vote | | | | | | |
| Unanimous | | | | ** | ** | |
| Pre | 207 | 313 | 239 | 74 | 55 | 20 |
| WP–EM | 127 | 311 | 250 | 61 | 43 | 18 |
| Dissenting or concurring | | ** | | ** | ** | |
| Pre | 40 | 384 | 267 | 116 | 75 | 41 |
| WP–EM | 38 | 317 | 229 | 88 | 47 | 41 |
| Oral argument | | | | ** | ** | |
| Pre | 224 | 331 | 242 | 87 | 62 | 25 |
| WP–EM | 136 | 315 | 246 | 69 | 46 | 22 |
| Submission | | | | | * | |
| Pre | 36 | 333 | 268 | 65 | 44 | 21 |
| WP–EM | 21 | 295 | 244 | 51 | 26 | 25 |
| Panel | | | | ** | ** | |
| Pre | 247 | 325 | 242 | 81 | 58 | 23 |
| WP–EM | 152 | 311 | 244 | 66 | 44 | 23 |

*Key*
Filing: Filing of the notice of appeal.
List: Listing for disposition on the merits (oral argument or submission).
Draft: Draft opinion distributed to court panel for review.
Decision: Opinion filed with the clerk of the court.
*Statistically significant difference at the .05 level.
**Statistically significant difference at the .01 level.

**TABLE 16**
**Case Processing Time for**
**Project Cases (April 1978 to November 1978)**

| | Number of Cases | Number of Days | | | | |
|---|---|---|---|---|---|---|
| | | Filing to Decision [A] | Filing to List [B] | List to Decision [C] | List to Draft [D] | Draft to Decision [E] |
| Total | 157 | 312 | 246 | 66 | 44 | 23 |
| Type of case | | | | | | |
| Civil | 132 | 319 | 252 | 67 | 43 | 23 |
| Criminal | 25 | 275 | 209 | 66 | 45 | 21 |
| Type of opinion | | | | * | * | * |
| Signed | 132 | 317 | 242 | 74 | 50 | 25 |
| Per curiam | 25 | 287 | 262 | 25 | 12 | 14 |
| Vote | | | | | | * |
| Unanimous | 127 | 311 | 250 | 61 | 43 | 18 |
| Concurring | 10 | 322 | 250 | 72 | 43 | 30 |
| Dissenting | 20 | 315 | 219 | 96 | 49 | 48 |
| Judge | | | | * | * | |
| A | 16 | 334 | 270 | 64 | 38 | 26 |
| B | 20 | 271 | 226 | 45 | 23 | 22 |
| C | 13 | 308 | 247 | 61 | 38 | 23 |
| D | 16 | 290 | 228 | 62 | 34 | 29 |
| E | 22 | 316 | 235 | 80 | 58 | 23 |
| F | 17 | 344 | 255 | 89 | 67 | 22 |
| G | 17 | 307 | 233 | 74 | 54 | 20 |
| H | 8 | 337 | 269 | 69 | 50 | 19 |
| I | 17 | 308 | 271 | 38 | 18 | 19 |
| J | 11 | 327 | 240 | 87 | 62 | 25 |

*Key*
Filing: Filing of the notice of appeal.
List: Listing for disposition on the merits.
Draft: Draft opinion distributed to court panel for review.
Decision: Opinion filed with the clerk of the court.
*Statistically significant difference at the .01 level.

### Type of Opinion

Word processing technology is a valuable tool for preparing either lengthy, detailed signed opinions or the shorter, concise per curiam opinions. In either case, opinion preparation time was reduced by over three weeks (table 15).

The electronic mail capability appears to significantly improve—by four days—the processing of per curiam opinions. Panel members give high priority to responding to all draft opinions, but per curiam opinions do not normally require circulation among the entire court. The Third Circuit's Internal Operating Procedures (IOP) may act as disincentives, particularly regarding signed opinions, thereby reducing the potential impact of electronic mail. The present rules permit a reviewing judge to wait eight days without responding to the opinion writer, rather than using electronic mail to send faster "no comment" responses.

If electronic mail is retained permanently, it is anticipated that the Third Circuit will reduce its time limit for review of signed opinions by four to five days.

Even with the introduction of both technologies, per curiam opinions are still produced much faster than signed opinions (table 16). The case processing time between a per curiam and signed opinion remained stable (fifty-day difference) across the preproject and project cases.

### Voting Pattern

Again, word processing significantly reduces the opinion preparation time for either unanimous opinions or dissenting or concurring opinions. The time savings are more dramatic for dissenting and concurring opinions (table 15).

### Use of Oral Argument

Word processing technology helped lower the preparation time for both orally argued and submitted appeals, but the improvements were more substantial for argued appeals.

## Opinion Writer

Word processing technology consistently reduces draft processing time for nearly all judges. The time savings varied by judge (tables 17 and 18), with six judges showing statistically significant improvements and two other judges showing substantial improvements. For several judges the time savings were almost one month; for others, a few weeks. These figures indicate that word processing technology substantially contributed to the time savings for nearly every judge in the Third Circuit.

Electronic mail seemed to have a modest effect for most judges. There was a small but consistent decrease in the review and circulation time for signed opinions for seven of the nine judges (table 18).

Word processing and electronic mail helped judges—whether they were originally high or low in efficiency (number of days to complete opinions) or productivity (number of written opinions produced). However, there is still a wide divergence between the fastest opinion writers, whose signed opinions are completed in approximately 45 to 50 days, and the slowest opinion writers, whose opinions take 100 days (table 16).

**TABLE 17**
**Case Processing Time for Preproject and Project Cases by Judge (All Opinions)**

| | Number of Cases | Number of Days | | | | |
|---|---|---|---|---|---|---|
| | | Filing to Decision | Filing to List | List to Decision | List to Draft | Draft to Decision |
| Total | | * | | ** | ** | |
| Pre | 260 | 331 | 247 | 84 | 59 | 24 |
| WP–EM | 157 | 312 | 246 | 66 | 44 | 23 |
| Judge | | | | | | |
| A Pre | 31 | 339 | 268 | 71 | 50 | 21 |
| WP–EM | 16 | 334 | 270 | 64 | 39 | 26 |
| B Pre | 37 | 284 | 239 | 45 | 27 | 18 |
| WP–EM | 20 | 271 | 226 | 45 | 23 | 22 |
| | | | | ** | ** | |
| C Pre | 22 | 346 | 234 | 112 | 79 | 33 |
| WP–EM | 13 | 308 | 247 | 61 | 38 | 23 |
| | | | | | ** | |
| D Pre | 36 | 345 | 265 | 80 | 61 | 20 |
| WP–EM | 16 | 290 | 228 | 62 | 34 | 29 |
| E Pre | 30 | 310 | 227 | 84 | 56 | 28 |
| WP–EM | 22 | 316 | 235 | 80 | 58 | 23 |
| | | | * | * | * | |
| F Pre | 27 | 315 | 207 | 108 | 83 | 25 |
| WP–EM | 17 | 344 | 255 | 89 | 67 | 22 |
| G Pre | 21 | 373 | 269 | 104 | 76 | 28 |
| WP–EM | 17 | 307 | 233 | 74 | 54 | 20 |
| | | | | ** | * | ** |
| H Pre | 22 | 349 | 237 | 111 | 78 | 33 |
| WP–EM | 8 | 337 | 269 | 69 | 50 | 19 |
| | | | | ** | ** | |
| I Pre | 34 | 343 | 271 | 73 | 52 | 21 |
| WP–EM | 17 | 308 | 271 | 37 | 18 | 19 |

*Key*
Filing: Filing of notice of appeal.
List: Listing for disposition on the merits.
Draft: Draft opinion distributed to court panel for review.
Decision: Opinion filed with the clerk of the court.
*Statistically significant difference at the .05 level.
**Statistically significant difference at the .01 level.

**TABLE 18**
**Case Processing Time for Preproject and Project Cases by Judge (Only Signed Opinions)**

| | | Number of Cases | Number of Days | | | | |
|---|---|---|---|---|---|---|---|
| | | | Filing to Decision | Filing to List | List to Decision | List to Draft | Draft to Decision |
| Signed | | | * | | ** | ** | |
| Pre | | 172 | 343 | 244 | 99 | 71 | 28 |
| WP–EM | | 132 | 317 | 242 | 74 | 50 | 25 |
| Judge | | | | | ** | ** | |
| A | Pre | 11 | 382 | 280 | 103 | 70 | 32 |
| | WP–EM | 16 | 324 | 270 | 64 | 39 | 26 |
| B | Pre | 17 | 295 | 232 | 63 | 40 | 24 |
| | WP–EM | 17 | 269 | 218 | 51 | 27 | 24 |
| | | | | | ** | ** | |
| C | Pre | 17 | 380 | 252 | 128 | 90 | 38 |
| | WP–EM | 12 | 306 | 242 | 64 | 41 | 23 |
| | | | | | | ** | |
| D | Pre | 31 | 335 | 250 | 85 | 65 | 21 |
| | WP–EM | 15 | 296 | 231 | 65 | 36 | 30 |
| E | Pre | 24 | 307 | 221 | 86 | 58 | 28 |
| | WP–EM | 16 | 321 | 222 | 99 | 74 | 25 |
| | | | | ** | ** | ** | |
| F | Pre | 22 | 317 | 199 | 118 | 91 | 27 |
| | WP–EM | 16 | 343 | 250 | 93 | 69 | 24 |
| G | Pre | 13 | 414 | 293 | 121 | 93 | 28 |
| | WP–EM | 11 | 313 | 206 | 107 | 81 | 26 |
| | | | | | ** | ** | ** |
| H | Pre | 17 | 358 | 234 | 122 | 86 | 36 |
| | WP–EM | 8 | 337 | 269 | 69 | 50 | 19 |
| | | | | | ** | ** | |
| I | Pre | 22 | 360 | 273 | 87 | 62 | 24 |
| | WP–EM | 10 | 330 | 283 | 46 | 25 | 22 |

*Key*
Filing: Filing of notice of appeal.
List: Listing for disposition on the merits.
Draft: Draft opinion distributed to court panel for review.
Decision: Opinion filed with the clerk of the court.
*Statistically significant difference at the .05 level.
**Statistically significant difference at the .01 level.

# VI. Implementing a Permanent Word Processing and Electronic Mail System

## Word Processing and Electronic Mail Use in the Third Circuit

### Third Circuit Attitudes and Perceptions

Each judge and the senior secretary in each judge's chambers responded to a short questionnaire checking their attitudes toward word processing and electronic mail technologies (table 19).

Almost all the Third Circuit respondents want to permanently retain the word processing equipment and believe this technology has greatly benefited the court. They were pleased with the capabilities of word processing equipment.

Electronic mail capability did not receive such a strong endorsement. Although a majority of the court would retain the existing electronic mail system (among active judges the vote was six in favor, three opposed), several judges and secretaries expressed some reservations. Most judges and secretaries want better transmission reliability—90 percent reliability is too low—and greater flexibility than is now available on the system. The respondents agreed that if reliability could be improved (to the 98-99 percent range) and if both typing and electronic mail communications could be provided simultaneously (new word processor models contain this feature), electronic mail should be retained.

Most judges' personal comments about the technologies were positive. They believe that word processing technology

- decreases the time needed to retype opinions, but does not require a judge to modify work habits or office policies
- might not affect the opinion preparation process because it does not change their work procedures
- reduces the likelihood that new errors will appear in revised versions

- keeps the drafting process moving (e.g., makes it easier to keep a particular opinion in mind and to change and sharpen the opinion even at the last minute).

**TABLE 19**
**Judge and Secretary Attitudes Toward Word Processing and Electronic Mail**

| Question | Response | Judges | Secretaries |
|---|---|---|---|
| What value, if any, has the word processing equipment, exclusive of the communications capability, had for you? | Substantial | 9 | 9 |
| | Moderate | 1 | 1 |
| | Small | 0 | 0 |
| | None | 0 | 0 |
| What value, if any, has the communications capability (electronic mail) had for you? | Substantial | 3 | 2 |
| | Moderate | 4 | 6 |
| | Small | 2 | 2 |
| | None | 1 | 0 |
| What is your overall feeling about the word processing (exclude the communications—electronic mail—feature) system? | Favorable | 9 | 10 |
| | Unsure | 1 | 0 |
| | Unfavorable | 0 | 0 |
| What is your overall feeling about the electronic mail capability? | Favorable | 7 | 6 |
| | Unsure | 2 | 4 |
| | Unfavorable | 1 | 0 |
| If it were only your decision, would you permanently retain the: | | | |
| Word processing machine, exclusive of the electronic mail—communications feature—capability, in the Third Circuit? | Yes | 9 | 10 |
| | No | 1 | 0 |
| Electronic mail capability in the Third Circuit? | Yes | 6 | 5 |
| | No | 4 | 5 |
| Electronic mail capability, if it had better reliability (fewer transmission failures) and the capacity to both type one document and telecommunicate (send or receive by electronic mail) simultaneously? | Yes | 10 | 10 |
| | No | 0 | 0 |

Most secretaries expressed similar viewpoints, but were generally even more favorable than the judges. They understood better the advantages and limitations of the technologies, and they stated that the technologies would effect substantial time savings not only in chambers, but also in overall appellate case processing time.

## Use by Clerk of Court

Traditionally, the opinion writer prepared the original typescript and a dozen duplicate copies which were released by the clerk of court. The introduction of word processors and electronic mail allowed the official opinion to be forwarded, received, and reproduced at the clerk's office within an hour instead of two days. This process has permitted the circuit to officially release opinions to litigants two days earlier.

In addition, this technological process would permit the circuit to expedite the printing of slip opinions by either offset printing (camera-ready copy)—preparing high-quality printed copy using the word processor system[13]—or phototypeset printing—providing a printing company with the text in machine-readable form that would eliminate the need for rekeyboarding the text (however, special typesetting and format codes would have to be entered by the printer). Several printing companies in the Philadelphia metropolitan area are beginning to offer electronic transmission services between the printer's office and a user's word processing system. The Third Circuit may test this service during 1979.

The word processor installed in the clerk's office has been used only to receive completed opinions via electronic mail. The clerk's word processing machine can be used to provide office support for visiting judges, prepare emergency orders and motions for dissemination to the court, and speed up transmission and production of slip opinions. The clerk's office has not, to date, attempted to use the word processor for preparation of reports, court orders, and the like. Given the clerk's office parsimonious use of the word processor, the word processor should be removed from the clerk's office if electronic mail service is discontinued, or if typing support activities described above are undesirable.

## Use by Law Clerks

There are many more law clerks than judges in the Third Circuit. In most offices, law clerks prepare bench memorandums and

[13]This approach has already been instituted by the Eighth and Tenth Circuit courts of appeals.

initial drafts of opinions. Their work requires a higher proportion of revisions and rush typing than that of judges. Yet law clerks authored only 14 percent of the lines typed and 9 percent of all documents typed by the circuit secretaries during the project survey period (table 20).

**TABLE 20**
**Third Circuit Typing Survey:**
**A Comparison of Judge Originated and Law Clerk Originated Typing**

| Category | Judge Originated | Law Clerk Originated |
|---|---|---|
| Total lines typed | 69,355 | 12,354 |
| % of all lines typed | 77% | 14% |
| Total documents typed | 730 | 79 |
| % of all documents typed | 82% | 9% |
| Percentage rush typing | | |
| Lines | 25% | 56% |
| Documents | 18% | 61% |
| Percentage revision typing | | |
| Lines | 29% | 48% |
| Documents | 21% | 57% |

The apparent disparity between amount of typing demand and actual typing support stems from the inadequate secretarial and typing support provided in most chambers, where the available secretarial support could not adequately meet all demands, and judges' work was given priority. In several chambers, law clerks were employed with the understanding that they would have to do their own typing.

The lack of sufficient typing support for most law clerks causes delays in opinion preparation—usually several days. The problem is exacerbated when a law clerk prepares several preliminary drafts before submitting a draft of the opinion for judicial review. Law clerk productivity could increase if additional typing support was provided. The additional secretarial support provided each judge will help particularly in the preparation of bench memorandums, which do not require retyping.

Two strategies are suggested: When the typing workload is manageable, the circuit secretary should type the law clerk's draft

on the word processor; or when the workload is too heavy (as is often the case), each law clerk should be trained to use the word processor. Law clerks can easily learn the rudimentary skills needed to operate a word processor by using a self-paced training manual provided by the vendor, with additional assistance provided by the secretaries. In some chambers, law clerks were easily taught to use the word processors for drafting opinions. They often had access to the equipment during regular office hours and in the evenings and on weekends.

### Use for Judgment Orders

The ranking appellate judge on each panel drafts a judgment order before each appeal is reviewed. Each year, nearly a thousand proposed judgment orders are drafted, and approximately six hundred are issued. Judgment orders contain mostly standard text produced according to a prescribed format, with some variations in text to identify cases and parties. Because of this, judgment orders are ideally suited for quick, accurate production on the word processing equipment.

. . . .

### Utilization of Word Processing

Not all typing can be more efficiently handled on a word processor. A short one- or two-page document typed without any revisions and not containing any standard text can be as efficiently prepared, at less cost, on a standard typewriter.

Most Third Circuit secretaries report their primary function is typing, and they are continuously pressed to stay ahead of the work flow. They were concerned with the best use of their typing equipment. Recognizing the production efficiencies that a word processor can provide, Third Circuit secretaries shifted preparation of 40 percent of the documents and 60 percent of the typed lines from the typewriter to the word processor (table 21). In most cases, word processing equipment was used appropriately. An additional 10 percent of the Third Circuit's documents should be prepared on the word processors.

**TABLE 21**
**Third Circuit Typing Survey: Comparison of Typing Volume on the Word Processor and Other Typing Equipment**

| Item | Word Processing | | Office Equipment (Electric, Mag Card, & Memory Typewriters) | |
|---|---|---|---|---|
| | Lines Typed | % Typed within Each Document Category | Lines Typed | % Typed within Each Document Category |
| Opinions | | | | |
| Lines | 32,599 | 96% | 1,193 | 4% |
| Document | 143 | 91% | 13 | 8% |
| Bench memos | | | | |
| Lines | 4,375 | 29% | 10,421 | 71% |
| Document | 17 | 18% | 78 | 82% |
| Judgment orders | | | | |
| Lines | 1,951 | 94% | 131 | 6% |
| Document | 53 | 80% | 8 | 20% |
| Correspondence | | | | |
| Lines | 8,682 | 43% | 11,520 | 57% |
| Document | 80 | 20% | 313 | 80% |
| Speeches | | | | |
| Lines | 1,193 | 49% | 1,258[a] | 51% |
| Document | 7 | 54% | 6 | 46% |
| Miscellaneous | | | | |
| Lines | 5,466 | 32% | 11,445 | 68% |
| Document | 60 | 32% | 128 | 68% |
| Revision | | | | |
| Lines | 23,726 | 86% | 3,816 | 14% |
| Document | 173 | 76% | 55 | 24% |
| Rush | | | | |
| Lines | 20,032 | 76% | 6,401 | 24% |
| Document | 122 | 66% | 64 | 34% |
| Total typing | | | | |
| Lines | 54,248 | 60% | 36,219 | 40% |
| Document | 340 | 38% | 548 | 62% |

[a]Nearly all of this typing was done by one secretary on a memory typewriter.

## Training on Word Processing Equipment

The years of experience, age, and skills (typing skills and previous exposure to word processing equipment) varied widely among Third Circuit secretaries. Nevertheless, all these secretaries are competently using the basic editing capabilities of the word processor. As a group, however, they do not fully understand or take advantage of some of the more advanced features and capabil-

ities of their machines. These advanced features could save them considerable typing time. For example, standard-form reports or documents such as judgment orders lend themselves to efficient preparation on a word processor, but at the time of the survey few secretaries understood the technique for setting up this application, and none were using it. This situation exists, in part, because training took place only once: when the equipment was installed, but before the secretaries had an opportunity to become familiar with the equipment and discover where they needed further instruction in the more sophisticated uses of the machine. Many secretaries did not have the time or inclination to further review the word processing reference manuals provided for such advanced training.

. . . .

## Electronic Mail for the Third Circuit

Electronic mail has provided faster delivery of court documents among all Third Circuit offices. Yet the average time for the court to review and file an opinion has not been reduced.

Any technology might provide faster and improved service, but it cannot guarantee how the consumer will utilize the derived benefits. In this situation, electronic document transmission provides faster document exchanges among offices, but it cannot ensure how quickly a judge will review and respond to a draft opinion or memorandum. In an appellate court, the slowest member of the court determines the norm, particularly when the draft opinion is circulated. The Third Circuit's present eight-day review time limit needs to be altered to achieve time savings. The present time limit was established, in part, to compensate for the uncertain and lengthy postal delivery (one judge proposed to extend the time to ten days because of further deterioration in postal service). The present rule does not require a judge to respond; therefore, more than one week can elapse without any action being taken. If the court would lower this time limit to three or four days, and suggest a response be sent to the opinion writer, the court's review time could be reduced.

Whether electronic mail service should be permanently retained is a difficult decision. The choice—like the selection of any advanced technology—is related to economic and administrative constraints. The costs can be reasonably estimated, although projected usage in the Third Circuit or other United States courts of appeals is uncertain.

Electronic mail costs more than using the U.S. postal service. However, electronic mail using word processing equipment costs less than facsimile equipment or commercial air express delivery services. Such comparisons assume no cost is associated with the speed of delivery or the certainty of receipt; it is not possible to estimate cost including these factors. Delay is often expensive, sometimes it is costly to litigants awaiting decisions, sometimes to the court itself. The proverbial adage "justice delayed is justice denied" is as important in the appellate process as in the trial process.

Telecommunications experts predict rapid growth in electronic mail, diminishing transmission costs, and a greater variety of services. Are the additional services worth the additional expenses? A final recommendation should probably be made by the court.

## Word Processing and Electronic Mail Use in Other United States Courts of Appeals

How typical is the Third Circuit case flow and typing workload, compared to other courts of appeals? A typing survey and a case monitoring survey would be needed in each circuit to derive precise figures, but the 1977 AO statistics on courts of appeals provide us with a reasonable basis for comparison.

Several indices suggest that the Third Circuit workload and case processing time are representative of the courts of appeals. The median time for Third Circuit cases terminated after oral argument or submission ranked fifth of eleven circuits; the Third Circuit average was 9.1 months, compared to 9.4 months for all circuits.[14] The number of cases per authorized Third Circuit judge was 177 cases (sixth highest in ranking) compared to 184 cases for all cir-

[14]Administrative Office of the United States Courts, 1977 Annual Report of the Director, table B4.

cuits;[15] and the active circuit judges sat in 79 percent of case participations in the Third Circuit—ranking the circuit sixth highest of all circuit courts, which averaged 75 percent.[16]

Among the United States courts of appeals, 66 percent of cases reviewed on the merits are disposed by written opinion, but only 30 percent were disposed by written opinion in the Third Circuit.[17] This finding suggests that word processing technology might be even more beneficial in other circuits where opinion preparation work constitutes a higher proportion of the workload.

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[15] *Id.* at table 3.
[16] *Id.* at table 7.
[17] *Id.* at table 8.

# FOLLOW-UP STUDY OF WORD PROCESSING AND ELECTRONIC MAIL IN THE THIRD CIRCUIT COURT OF APPEALS[1]

J. Michael Greenwood
June 1980
(FJC-R-80-4)

## I. Background

### Findings of the First Study

In 1978, as part of the Federal Judicial Center's Courtran II project, the United States Court of Appeals for the Third Circuit instituted an extensive word processing and electronic mail system for all active circuit judges and administrators (clerk of court and circuit executive) in six cities within the circuit. A video-display word processor containing telecommunications capability was installed in each appellate judge's chamber and administrative office. The technology permitted each user to prepare and send typed documents electronically to other Third Circuit offices and chambers, via the Courtran II centralized computer facility.

The first project report, *The Impact of Word Processing and Electronic Mail on United States Courts of Appeals,* assessed the efficacy of those two technologies to expedite the processing of appeals.[2] The study evaluated the impact of word processing on the drafting and production of opinions, on judicial and secretarial productivity, and on office procedures and judicial work styles.

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[1]This report is reprinted substantially in its original form. Some footnotes have been deleted, and the remaining ones have been renumbered. Ed.

[2]J. Greenwood & L. Farmer, The Impact of Word Processing and Electronic Mail on United States Courts of Appeals (Federal Judicial Center 1979).

The study also assessed the impact of electronic mail on the time required to distribute and review working papers and draft opinions, on the processing of court opinions, and on court productivity.

Word processing technology had a striking impact on the opinion preparation process. The court saved substantial time and money and improved both secretarial and judicial productivity without altering judicial work styles or procedures. Specifically, secretarial production increased by 250 percent. The court's deliberation process time (the number of days for the court to prepare, review, and issue opinions) dropped by 52 percent for per curiam opinions (from 53 days to 25 days) and 25 percent for signed opinions (from 99 days to 74 days). The total appellate processing time for appeals requiring written opinions (the time from the filing of the appeal to the disposition of the appeal) decreased by 6 percent (from 331 days to 312 days).

In the initial Center report, inconclusive evidence was presented to support the permanent installation of electronic mail service. Although electronic mail service improved the delivery time among chambers and administrative offices compared to regular postal service, the overall efficacy of this newly developed technology was lessened somewhat by various technical and procedural problems. The electronic mail service was occasionally unreliable during document transmissions. Court personnel had reservations about the flexibility and ease of transmitting documents electronically. Therefore, the court and the Center decided to extend the development and evaluation of the electronic mail system to determine whether the court would prefer to use electronic mail service or rely on alternative methods such as postal service, facsimile transmission, or private express delivery services.

## Objectives of the Follow-Up Study

At the request of the Third Circuit, the Center agreed

- to refine and upgrade the capabilities of the word processing and electronic mail systems during the spring of 1979
- to continue a comprehensive evaluation of the electronic mail service through 1979

- to review and comment briefly on the court's utilization of the word processing system since the initial evaluation study was completed
- to assess the effect of integrating electronic mail and an automated photocomposition system for the publication of the court's slip opinions.

## Word Processing and Electronic Mail System Enhancements

For its major impact on speeding the appeals process and the unique integration of word processing and electronic mail communications, the Third Circuit received a major national achievement award from the information processing industry. The Third Circuit is the first court to implement an electronic mail exchange system in the country. It is also among the first word processor users in government or industry to transmit lengthy documents on a regular basis through a centralized "electronic post office" and a network of word processing systems located in various cities.[3]

In the early spring of 1979, after the Third Circuit system had been used for more than a year, various equipment enhancements and technical modifications were made to reduce electronic mail transmission disruptions and operator mistakes. Those changes included installation of new word processing equipment, modifications to the Courtran II electronic mail computer software programs, and upgrading FTS telephone lines. The original word processing machine in each judge's and administrator's office was upgraded.[4] The new equipment contains more sophisticated and reliable telecommunications capabilities—including simultaneous text-editing and electronic mail transmission—doubles typing and storage capacity, and provides additional automatic text-editing functions.

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[3]For a full description of the system's capabilities and functions, see *id.*

[4]The original Digital Equipment Corporation (DEC) model WP 100, single terminal, was upgraded to a DEC model 82 (a two-terminal, shared-logic system).

Computer personnel at the Center modified the computer programs controlling the electronic mail capabilities on the Courtran II system to increase the service's reliability, security, and ease of use. Those modifications helped reduce transmission disruptions caused by computer program failures and faulty operating procedures.

Simpler transmission procedures reduced the incidence of operator errors. Improved encryption techniques were introduced, eliminating unauthorized access to court documents.[5]

During the initial study, a few offices experienced frequent transmission failures. The General Services Administration and the local telephone company were asked to modify telephone circuits and electrical lines that could cause interference and disruption to either the word processing or the electronic mail system.

While the systems were being modified, all Third Circuit secretaries attended an advanced training program to review and upgrade their skills in using the word processing and electronic mail systems. At the judges' discretion, secretaries taught law clerks the rudimentary techniques needed to operate the word processing equipment.

## II. Findings

### Electronic Mail Transmission Reliability

*The reliability of the electronic mail service has improved substantially. The system now provides reliable, convenient document transmission for all court users.*

In the initial Center report, transmission reliability was described as inadequate; . . . one out of every eight documents sent or received was disrupted and needed to be retransmitted. Those reliability statistics were substantially below telecommunication industry standards and were unacceptable to both Center technical personnel and the court. Transmission failures wasted staff time

[5]Encryption limits access to specified documents to designated Third Circuit personnel.

and required repeating tasks already performed. During busy work periods and under severe time pressures, failures became too time-consuming and disconcerting. Without reasonable transmission reliability (95 percent reliability is reasonable; 98 to 99 percent is desirable) many users were hesitant about fully utilizing the system, and they were tentative about its long-term value.

**TABLE 1**
**Transmissions Sent and Received in 1979**

| Week of | Transmissions Sent | Transmissions Received | Total | Transmission Reliability |
|---|---|---|---|---|
| 4/30-5/4 | 79 | 306 | 385 | 97% |
| 5/7-5/11 | 91 | 340 | 431 | 88% |
| 5/14-5/18 | 77 | 314 | 391 | 93% |
| 5/21-5/25 | 76 | 352 | 428 | 95% |
| 5/28-6/1 | 82 | 328 | 410 | 96% |
| 6/4-6/8 | 31 | 122 | 153 | 97% |
| 6/11-6/15 | 76 | 295 | 371 | 94% |
| 6/18-6/22 | 83 | 378 | 461 | 95% |
| 6/25-6/29 | 119 | 496 | 615 | 95% |
| 7/2-7/6 | 132 | 469 | 601 | 96% |
| 7/9-7/13 | 122 | 519 | 641 | 93% |
| 7/16-7/20 | 130 | 651 | 781 | 97% |
| 7/23-7/27 | 113 | 406 | 519 | 95% |
| 7/30-8/3 | 112 | 464 | 576 | 94% |
| 8/6-8/10 | 84 | 333 | 417 | 95% |
| 8/13-8/17 | 101 | 448 | 549 | 95% |
| 8/20-8/24 | 117 | 503 | 618 | 98% |
| 8/27-8/31 | 70 | 233 | 303 | 98% |
| 9/4-9/7 | 22 | 101 | 123 | 98% |
| 9/10-9/14 | 72 | 297 | 369 | 98% |
| 9/17-9/21 | 95 | 391 | 486 | 98% |
| 9/24-9/28 | 164 | 564 | 728 | 97% |
| 10/1-10/5 | 127 | 631 | 758 | 97% |
| 10/8-10/12 | 107 | 508 | 615 | 98% |
| 10/15-10/19 | 132 | 639 | 771 | 98% |
| 10/22-10/26 | 128 | 608 | 736 | 97% |
| 10/29-11/2 | 104 | 397 | 501 | 96% |
| 11/5-11/9 | 115 | 544 | 659 | 97% |
| 11/12-11/16 | 113 | 529 | 642 | 97% |
| 11/19-11/23 | 149 | 646 | 795 | 98% |
| 11/26-11/30 | 175 | 832 | 1,007 | 98% |
| 12/3-12/7 | 101 | 377 | 478 | 97% |
| 12/10-12/14 | 155 | 732 | 887 | 98% |
| 12/17-12/21 | 214 | 761 | 975 | 98% |
| 12/24-12/28 | 122 | 436 | 558 | 98% |
| Total | 3,790 | 15,950 | 19,741 | |

Since the technical modifications were completed in early 1979, electronic mail communications reliability has improved steadily and substantially (table 1). From a weekly average of 87 percent in 1978, electronic mail reliability has consistently reached 97 to 98 percent reliability (only one out of every fifty documents is disrupted during transmission). Considering the length of documents, telecommunication protocols, and technical capabilities used, the transmission reliability has probably reached its optimum level.

## Court User Attitudes

*User attitudes have improved since the technical enhancements and additional training were completed. The court now unanimously wants to retain both the word processing and electronic mail services.*

Several Third Circuit judges and secretaries did not endorse electronic mail when the original evaluation was completed in 1978. They expressed strong reservations about the service's consistency (particularly poor transmission reliability) and flexibility (the complexity and constraints in simultaneously sending documents and text-editing on the word processor).

After the technical modifications were completed in 1979, not only did transmission reliability increase, but user confidence and acceptance of the system also dramatically improved. Although the court's assessment of the electronic mail system was divided in 1978, the court now unanimously favors permanent retention of the electronic mail system (table 2). The question whether the electronic mail services are worth the additional expenditures is ultimately the court's decision. The court has expressed itself not only in words but in action—it has substantially increased its use of electronic mail.

**TABLE 2**
**Judicial and Secretarial Attitudes Toward Electronic Mail**

| Question | Responses | 1978 Judge | 1979 Judge | 1978 Secy. | 1979 Secy. |
|---|---|---|---|---|---|
| What value, if any, has the electronic mail service had for you? | Substantial | 3 | 10 | 2 | 10 |
| | Moderate | 4 | 0 | 6 | 0 |
| | Small | 2 | 0 | 2 | 0 |
| | None | 1 | 0 | 0 | 0 |
| What is your overall reaction to the electronic mail service? | Favorable | 7 | 10 | 6 | 10 |
| | Unsure | 2 | 0 | 4 | 0 |
| | Unfavorable | 1 | 0 | 0 | 0 |
| If it were your decision, would you permanently retain electronic mail in the Third Circuit? | Yes | 6 | 10 | 5 | 10 |
| | No | 4 | 0 | 5 | 0 |

## Number of Electronic Mail Transmissions

*The number of electronic mail transmissions has increased dramatically, far more than projected in 1978.*

Electronic mail usage steadily increased during 1978 and averaged 125 document transmissions each week by late 1978. In a typical week, a judge sent four documents, received twelve to fifteen documents, and spent two hours using the electronic mail service.

In the initial report, the Center projected a 50 to 75 percent increase (an additional 3,000 to 4,000 documents) in electronic mail usage for 1979. Instead, the actual use of electronic mail escalated even more dramatically throughout 1979 (table 3). In 1979, the Third Circuit used the electronic mail system to transmit approximately 20,000 documents containing more than 60,000 pages of typed text. According to several measures (table 4), electronic mail has increased almost fourfold, averaging more than 450 documents a week during 1979. In a typical week, a judge now sends more than a dozen documents, receives more than 50 documents, and uses the electronic mail system for about three hours. The volume

of documents transmitted has increased because, in addition to draft opinions and responses, court personnel are now sending nearly all court memorandums and correspondence by electronic mail. While volume increased, the average length of a document decreased (table 4).

**TABLE 3**
**Number of Documents Exchanged by Electronic Mail**

| Number of Pages | April 1979 | May 1979 | June 1979 | July 1979 | Aug. 1979 |
|---|---|---|---|---|---|
| 1-5 | 735 | 1,232 | 1,147 | 1,826 | 1,664 |
| 6-10 | 62 | 73 | 89 | 167 | 49 |
| 11-15 | 64 | 74 | 89 | 100 | 47 |
| 16-20 | 15 | 20 | 59 | 43 | 9 |
| 21+ | 35 | 82 | 52 | 68 | 50 |
| Total | 911 | 1,481 | 1,398 | 2,204 | 1,819 |

| | Sept. 1979 | Oct. 1979 | Nov. 1979 | Dec. 1979 |
|---|---|---|---|---|
| 1-5 | 1,073 | 2,270 | 2,390 | 1,850 |
| 6-10 | 97 | 117 | 132 | 160 |
| 11-15 | 88 | 90 | 124 | 142 |
| 16-20 | 53 | 64 | 71 | 87 |
| 21+ | 42 | 51 | 25 | 67 |
| Total | 1,353 | 2,592 | 2,742 | 2,306 |

NOTE: January to March 1979 data are not included because the electronic mail and word processing capabilities were being upgraded during that period. The new capabilities were fully available beginning in April 1979.

The court's utilization rate during 1979 greatly exceeded any earlier projections. The substantial increase reflects the Third Circuit's full acceptance of electronic mail as the primary method (in some instances, almost the sole method) of document transmission. Increased reliability has made electronic mail easy and convenient to use. Because most typed documents distributed within the Third Circuit are now sent by electronic mail, the annual volume of electronic transmissions will plateau within another year. The clerk's office may increase its use of the service. Thereafter, changes in the volume of electronic mail transmissions will be more closely related to changes in the caseload. Based on anticipated projections and recent utilization rates, the court's an-

nual transmission rate via electronic mail should reach 100,000 pages by 1982.

**TABLE 4**
**Electronic Mail Usage Rates**

| Measures | 1978 | 1979 |
|---|---|---|
| Total documents | | |
| Sent (annual rate) | 1,366 | 5,054 |
| Received (annual rate) | 5,564 | 21,266 |
| Distribution list ratio (no. of recipients per document) | 4.1 to 1 | 4.2 to 1 |
| Weekly average (no. of documents) | | |
| Sent | 27 | 108 |
| Received | 111 | 456 |
| Transmission reliability (weekly rate) | | |
| Range | 55%-91% | 88%-98% |
| Average | 87% | 97% |
| Document size (pages) | | |
| 1-5 | 72% | 84% |
| 6-10 | 9% | 6% |
| 11-15 | 5% | 5% |
| 16-20 | 4% | 2% |
| 21+ | 10% | 3% |

## Method of Exchanging Documents

*Court users have shown a strong preference for the electronic mail system as the principal method of sending correspondence and opinions among themselves.*

Four methods are available to each judge and administrator in the Third Circuit for sending documents to other chambers or administrative offices: (1) regular postal service, (2) word processor/electronic mail service, (3) facsimile service,[6] and (4) hand delivery (particularly between offices in the same building).

[6]Each judge's chamber or administrative office contains a facsimile machine. The machine is a quasi-photographic copier that can electronically transmit a document over telephone lines to another device that produces a "facsimile" of

The frequency with which a particular transmission method is used is a good indicator of user preferences. A survey of actual document transmission methods (table 5) shows an overwhelming preference for using the word processing and electronic mail service. Electronic mail is now used to transmit approximately 90 percent of all intracircuit correspondence (opinions, memorandums, reports, orders, etc.); 6 percent is sent by regular postal service, 3 percent by facsimile machines, and 1 percent is hand-delivered.

**TABLE 5**
**Method of Document Distribution**

| Office (Sender) | WP–EM[a] | Postal | Facsimile | Hand Delivery |
|---|---|---|---|---|
| Judge A | 95% | 3% | 1% | 1% |
| Judge B | 84% | 5% | 10% | 1% |
| Judge C | 98% | 1% | 1% | 0% |
| Judge D | 90% | 8% | 1% | 1% |
| Judge E | 90% | 5% | 5% | 0% |
| Judge F | 90% | 5% | 4% | 1% |
| Judge G | 85% | 10% | 5% | 0% |
| Judge H | 94% | 4% | 1% | 1% |
| Judge I | 97% | 2% | 1% | 0% |
| Judge J | 90% | 5% | 2% | 3% |
| Circuit executive | 81% | 10% | 6% | 3% |
| Clerk's office | 5% | 80% | 10% | 5% |

[a]Word processing–electronic mail.

There are two alternate methods of sending documents using word processing and electronic mail: (a) transmitting documents through the centralized Courtran II computer system, and (b) sending documents directly (point-to-point) to other users.

The point-to-point method permits each user to send a document directly to another word processing machine, circumventing the central Courtran II computer. That approach is practical if the document is sent to only one recipient. If there is more than one recipient, however, the sender must repeat all transmission proce-

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the original document. The machine is particularly desirable when documents containing signatures, graphics, or pictures must be transmitted rapidly to another location.

dures for each additional recipient. Therefore, a two-page letter that takes two minutes to transmit electronically will require the sender to spend at least eight to ten minutes if the letter is sent to four recipients.

Using the Courtran II system, the same document sent to four recipients will require only two minutes of the sender's time. In either situation, each recipient will take two minutes to receive the document. The sender and recipient must carefully coordinate their activities if the direct method is employed; using the Courtran II system, the recipient can choose the time at which he receives the document.

Because most documents transmitted in the Third Circuit are sent to three or more recipients, the central Courtran II mail system is favored, as usage figures strongly indicate. In fact, only 2 percent of electronic mail transmissions are sent by the point-to-point method. For the Third Circuit, the direct method is less practical, more time-consuming, and more expensive than the centralized approach. However, in courts where the dissemination of correspondence and opinions is limited to one or two recipients, the direct method might be as efficient as the Third Circuit's centralized approach.

## Delivery Time

*The implementation of electronic mail service in the Third Circuit has reduced the delivery times of court documents by almost 85 percent compared to regular postal service.*

Since its implementation in the Third Circuit in 1978, electronic mail has consistently proved a faster delivery method than the United States postal service.

The average delivery time for postal service within the circuit is usually two days, but it varies depending on distance and destination. As noted in the initial report, same-day postal delivery service is nonexistent, about half the court's documents are delivered in one day, and about 10 percent of the mail takes three or four days for delivery.

**TABLE 6**
**Postal Service and Electronic Mail**
**Delivery Times (Hours)**

| Hours for Delivery | Postal Service May 1978[a] | EM[a] May 1978 | EM Sept. 1978 |
|---|---|---|---|
| 1 (or less) | — | — | 41% |
| 3 (1–3) | — | — | 22% |
| 6 (3–6) | 1% | 45% | 8% |
| 24 (7–24) | 45% | 36% | 29% |
| 48 (25–48) | 45% | 14% | 0.5% |
| 72 (49–72) | 7% | 5% | 0% |
| 73 + | 1% | 0% | 0% |

| | EM May 1979 | EM Sept. 1979 |
|---|---|---|
| 1 (or less) | 62% | 57% |
| 3 (1–3) | 18% | 25% |
| 6 (4–6) | 3% | 5% |
| 24 (7–24) | 17% | 13% |
| 48 (25–48) | 0.5% | 0% |
| 72 (49–72) | 0% | 0% |
| 73 + | 0% | 0% |

[a]Survey in May 1978 did not include electronic mail deliveries under six hours.

**TABLE 7**
**Postal Service and Electronic Mail**
**Delivery Times (Days)**

| Days for Delivery | Postal Service May 1978 | EM May 1978 | EM Sept. 1978 |
|---|---|---|---|
| Same work day | 1% | 45% | 71% |
| One | 45% | 36% | 28% |
| Two | 45% | 14% | 1% |
| Three | 8% | 5% | 0% |
| Four or more | 1% | 0% | 0% |

| | EM May 1979 | EM Sept. 1979 |
|---|---|---|
| Same work day | 82% | 87% |
| One | 18% | 13% |
| Two | 0% | 0% |
| Three | 0% | 0% |
| Four or more | 0% | 0% |

More than 85 percent of all documents sent by electronic mail are now received on the day they are sent, and all documents are received by the next work day (tables 6 and 7). A more detailed analysis shows that more than half the electronic mail documents are received within one hour, and more than 80 percent in less than three hours. Electronic mail has reduced delivery time by 85 percent, from an average of thirty-nine hours using the postal service to less than five hours (under two regular working hours) for an electronic mail transmission. In addition, unlike regular mail service, the time needed to deliver electronic mail is unrelated to the distance between the correspondents or the recipient's location.

Because office practices and internal court administrative procedures tailored to the use of electronic mail have now been established, the normal delivery times using electronic mail may be close to an optimum level. Typically, users check their electronic mail boxes and "pick up" their mail three to four times a day, although some chambers check almost hourly. Correspondence sent in the late afternoon or after normal working hours (usually 5 to 10 percent of transmissions) is received and reviewed by recipients the following work day (fifteen to twenty-four hours later). Judges could establish office procedures to ensure receipt of all electronic mail within one hour; however, in practice, one-hour receipt is unnecessary.

Most judges commented that the electronic mail service has substantially improved their "continuity of thought"—particularly during panel reviews of draft opinions—and that this has both improved the quality of opinions and facilitated the opinion review process. Before the advent of electronic mail, written comments frequently took several days or a week to be exchanged. That delay often required judges to reacquaint themselves with case materials. Now, detailed commentaries can be transmitted, reviewed, and responded to in a few minutes instead of days.

## Electronic Mail Costs

*The cost per page of the electronic mail system has been substantially reduced. The cost reduction is due primarily to the increase in electronic mail usage. The Third Circuit electronic mail*

*system is cheaper than alternate electronic transmission techniques or other express delivery services.*

As discussed in the initial report, electronic mail is competitive with other priority delivery services. The cost of the system is lower than that of either facsimile transmission services or commercial express delivery services. Although electronic mail costs more than regular postal service, which averages two to three days for delivery, it is cheaper than guaranteed overnight United States postal express service.

Electronic mail is substantially cheaper and more flexible than facsimile systems; it also requires less personnel time and produces a document of higher quality. Although each Third Circuit office now contains both a word processing/electronic mail machine and a facsimile machine, the former is heavily used in most offices, and facsimile is rarely employed (table 5).

**TABLE 8**
**Cost Elements of Electronic Mail Service**

| Basic Costs per Office or Chamber | |
|---|---|
| Word processing communication software features (one-time charge) | $1,500 |
| Telephone | $10/month |
| Modem (1200 baud) | $40/month |
| Telephone transmission time (GSA rate) | $12/hour |
| Courtran II computer connect time | $3/hour |
| **Cost Projections for Third Circuit** | |
| Fixed Costs | |
| Word processing communication features (capital expenditure: $1,500 x 13 machines prorated over 7 years) | $2,800/year |
| Telephone and modems (13 offices) | $7,800/year |
| Variable costs | |
| Transmission and connect time | |
| 7,200 documents/year, 1,250 hours/year | |
| 21,000 documents/year, 1,625 hours/year | |
| 30,000 documents/year, 2,080 hours/year | |
| 36,000 documents/year, 2,210 hours/year | |

**TABLE 9**
**Estimated Electronic Mail Costs for the Third Circuit**

| Year | Number of Documents | Avg. Size per Document | Annual Costs | | | Cost per Page | | |
|---|---|---|---|---|---|---|---|---|
| | | | Fixed | Variable | Total[a] | Fixed | Variable | Total |
| 1978 | 5,000 | 6 pages | $10,600 | $15,950 | $26,550 | $.35 | $.53 | $.89 |
| 1978 | 7,200 | 6 pages | 10,600 | 18,750 | 29,350 | .24 | .43 | .67 |
| 1979 | 21,000 | 3 pages | 10,600 | 24,375 | 34,975 | .17 | .39 | .56 |
| 1979-80 | 30,000 | 3 pages | 10,600 | 31,200 | 41,800 | .12 | .35 | .47 |
| 1980 | 36,000 | 2.75 pages | 10,600 | 33,150 | 43,750 | .11 | .33 | .44 |
| Long-term | 45,000 | 2.50 pages | 10,600 | 36,200 | 46,800 | .09 | .32 | .41 |

[a]Approximately $10,000 of total costs are one-time capitalization costs. In 1981, the annual budget allocation for the Third Circuit electronic mail system will be approximately $35,000.

With the unanticipated surge in electronic mail usage, the initially projected cost figures needed to be recalculated (tables 8 and 9). Compared to 1978, electronic mail cost per page decreased in 1979 by more than 30 percent, and the cost is projected to decrease by more than 50 percent in 1980. It now costs 45 cents to send a legal-size page of information on the electronic mail system; the long-term cost per page will be between 40 and 45 cents per page.

The fixed equipment costs of electronic mail software, telephones, and ancillary equipment constitute about 25 percent of the total costs. The largest cost component remains the telephone line, at 20 cents per minute. The total cost of electronic mail should increase only slightly in the next few years ($35,000 annually), and the cost per page will be relatively constant (about 40 cents per page). Those figures do not include the potential savings involved in the automated composition of slip opinions (see table 13).

Transmission costs could be further reduced by 20 to 25 cents per minute if (a) electronic mail were limited to off-hour transmission periods (5:00 p.m. to 8:00 a.m.)—currently only 5 to 10 percent of electronic mail is received the day after it is sent—or (b) higher transmission speeds were utilized;[7] however, transmission reliability might sharply decrease.

All Third Circuit users realize that electronic mail will remain somewhat more expensive than regular mail service; but they believe that the incremental expenditures for this technology are easily offset by the expedited delivery of documents, improvements in the quality of opinions, and substantial improvements in judicial productivity and expedited case processing.

## Case Processing Time

*Word processing reduces the time spent in drafting opinions by four to five weeks, and electronic mail reduces the time spent for distribution and review of draft opinions by approximately one week.*

The extent to which word processing and electronic mail expedites the processing of appeals is a strong measure of the potential

[7]Increasing the baud rate from 1,200 to 2,400 or 4,800.

value of these technologies. Word processing makes its greatest impact during the initial drafting of an opinion (the time between the date of formal submission on the merits or oral argument of the appeal until the date the draft opinion is distributed to the panel members). The greatest impact of electronic mail is during the court's panel and en banc review of the draft opinion (the time between the circulation of a draft opinion and the rendering of the opinion). Neither technology affects the amount of time during which the litigants perfect their appeals.

We have completed an appellate case-tracking survey that analyzes cases in which the Third Circuit issued written opinions during 1979.[8] The results from this and previous case-tracking surveys permitted us to compare appellate case processing times for opinions prepared during three time periods:

1. Opinions prepared prior to the introduction of either word processing or electronic mail into the Third Circuit (survey of opinions prepared and filed between July 1976 and December 1977).
2. Opinions prepared after the initial introduction of those technologies in 1978 (survey of opinions between April and November 1978).
3. Opinions prepared after major equipment alterations and technical modifications were made in early 1979 (survey of opinions between March and December 1979).

The surveys show that the two technologies saved substantial time in the court's deliberation process beginning after the submission of appeals on the merits. Not surprisingly, the average time for a litigant to perfect an appeal (from filing the notice of appeal to formal submission on the merits or oral arguments) has remained constant at about 245 days over the past four years. The 1978 study showed that word processing technology saved substantial case processing time, but that the time savings related to electronic mail were insubstantial; that is, no significant reduction was made

[8]For details of the research objectives, methodology, and data analysis procedures of this survey, see J. Greenwood & L. Farmer, *supra* note 2, at ch. 2.

in the number of days taken for opinion review. The 1979 survey showed that both electronic mail and word processing had substantial influence on decreasing case processing time. The use of both technologies contributed to reducing the total case processing time by an average of more than 33 days in each case requiring a written opinion (from 330 days in 1977 to 297 days in 1979).

In 1978, the Third Circuit's total deliberation time to complete a written opinion (table 10, column A) was reduced by an average of eighteen days or 21 percent; and in 1979, that time decreased by another seventeen days—a total of 40 percent time savings since the two technologies were introduced into the court. Although the time savings reported in 1978 were associated exclusively with the process of initial drafting of the opinion (table 10, columns B and C, WP-EM 1978), the 1979 data showed a substantial time savings for both the drafting process (column B)—when word processing is crucial—and the dissemination and review of the opinion (column C) when electronic mail is important. Word processing has consistently saved several weeks of case processing time, and electronic mail has saved one week. These findings strongly justify both technologies.

Merely assessing total case statistics without further analysis might be misleading. Moderate changes in the type of appeals (proportion of civil appeals), the appellate process (proportion of cases submitted without oral argument), or appellate court procedures (proportion of per curiam opinions) over the past four years could have caused the time savings. To further ensure that the time savings were caused primarily by the use of word processing and electronic mail, additional analysis of various subgroupings was completed (table 11).

Irrespective of any case classifications or categories such as the type of case, type of written opinion, or the court's voting pattern, appellate processing time has been reduced consistently and significantly (table 10). It appears that word processing helped save from three to five weeks during the opinion drafting stage, and electronic mail, an additional one week during the court's review process.

**TABLE 10**
**Third Circuit Case Processing Time**

| | Number of Cases | Number of Days: List to Decision [A] | List to Draft [B] | Draft to Decision [C] |
|---|---|---|---|---|
| Total | | | | |
| Pre WP–EM | 260 | 84 | 59 | 24 |
| WP–EM 1978 | 157 | 66 ** | 44 ** | 23 (NS) |
| WP–EM 1979 | 262 | 49 ** | 30 ** | 19 ** |
| Type of case | | | | |
| Civil | | | | |
| Pre WP–EM | 208 | 85 | 61 | 24 |
| WP–EM 1978 | 132 | 67 ** | 43 ** | 23 (NS) |
| WP–EM 1979 | 193 | 50 ** | 21 ** | 19 ** |
| Criminal | | | | |
| Pre WP–EM | 52 | 78 | 53 | 25 |
| WP–EM 1978 | 25 | 66 (NS) | 45 (NS) | 21 (NS) |
| WP–EM 1979 | 69 | 46 ** | 27 ** | 19 * |
| Type of opinion | | | | |
| Signed | | | | |
| Pre WP–EM | 174 | 99 | 71 | 28 |
| WP–EM 1978 | 132 | 74 ** | 50 ** | 25 (NS) |
| WP–EM 1979 | 175 | 59 ** | 38 ** | 21 ** |
| Per curiam | | | | |
| Pre WP–EM | 86 | 53 | 35 | 18 |
| WP–EM 1978 | 25 | 25 ** | 12 ** | 14 * |
| WP–EM 1979 | 87 | 29 ** | 15 ** | 14 * |
| Vote | | | | |
| Unanimous | | | | |
| Pre WP–EM | 207 | 74 | 55 | 20 |
| WP–EM 1978 | 127 | 61 ** | 43 ** | 18 (NS) |
| WP–EM 1979 | 217 | 44 ** | 28 ** | 16 ** |
| Dissenting or concurring | | | | |
| Pre WP–EM | 40 | 116 | 75 | 41 |
| WP–EM 1978 | 38 | 88 ** | 47 ** | 41 (NS) |
| WP–EM 1979 | 45 | 75 ** | 41 ** | 34 * |
| Oral argument | | | | |
| Pre WP–EM | 224 | 87 | 62 | 25 |
| WP–EM 1978 | 136 | 69 ** | 46 ** | 22 (NS) |
| WP–EM 1979 | 208 | 54 ** | 34 ** | 20 ** |
| Submission | | | | |
| Pre WP–EM | 36 | 65 | 44 | 21 |
| WP–EM 1978 | 21 | 51 (NS) | 26 * | 25 (NS) |
| WP–EM 1979 | 54 | 27 ** | 13 ** | 14 ** |
| Panel | | | | |
| Pre WP–EM | 247 | 81 | 58 | 23 |
| WP–EM 1978 | 152 | 66 ** | 44 ** | 23 (NS) |
| WP–EM 1979 | 255 | 49 ** | 30 ** | 19 ** |

*Key*
List: Listing for disposition on the merits (oral argument or submission). Draft: Draft opinion distributed to court panel for review. Decision: Opinion filed with the clerk of the court.

*Statistical Test*
*T*-tests: Comparison between preproject cases and WP–EM cases for a particular year. *Statistically significant difference at the .05 level. **Statistically significant difference at the .01 level. NS: No statistically significant difference.

**TABLE 11**
**Distribution of Written Opinions**

| | Preproject Cases | WP–EM 1978 Cases | WP–EM 1979 Cases |
|---|---|---|---|
| Type of case | | | |
| Civil | 208 (80%) | 132 (84%) | 193 (74%) |
| Criminal | 52 (20%) | 25 (16%) | 69 (26%) |
| Type of opinion | | | |
| Signed | 174 (67%) | 131 (83%) | 175 (67%) |
| Per curiam | 86 (33%) | 26 (17%) | 87 (23%) |
| Case presentation | | | |
| Oral argument | 224 (86%) | 136 (87%) | 208 (79%) |
| Submitted (no orals) | 36 (12%) | 26 (17%) | 54 (21%) |
| Composition of court | | | |
| Only circuit judges | 160 (62%) | 122 (78%) | 192 (73%) |
| District judge sitting | 100 (38%) | 35 (22%) | 70 (27%) |
| Vote | | | |
| Unanimous | 207 (80%) | 127 (81%) | 217 (83%) |
| Concurring | 13 (5%) | 10 (6%) | 14 (5%) |
| Dissenting | 35 (14%) | 20 (13%) | 30 (11%) |
| Both (concurring and dissenting) | 5 (2%) | 0 (0%) | 1 (1%) |
| Judge | | | |
| A | 31 (12%) | 16 (11%) | 56 (21%) |
| B | 37 (14%) | 20 (14%) | 25 (10%) |
| C | 22 (9%) | 13 (9%) | 21 (9%) |
| D | 36 (14%) | 16 (11%) | 30 (11%) |
| E | 30 (12%) | 22 (15%) | 22 (9%) |
| F | 27 (11%) | 17 (11%) | 25 (10%) |
| G | 21 (8%) | 17 (12%) | 25 (10%) |
| H | 22 (9%) | 8 (6%) | 10 (4%) |
| I | 34 (13%) | 17 (12%) | 26 (10%) |

NOTE: Judge J joined the circuit in late 1977 and prepared eleven and eighteen written opinions, respectively, during 1978 and 1979. Judge K joined the circuit in late 1979 and prepared four written opinions.

The two technologies substantially decreased the time required to prepare both principal types of written opinions. The analysis showed a 40 percent and 45 percent time reduction, respectively, for signed and per curiam opinions.

Compared to the 1978 analysis by various case categories, the 1979 analysis showed word processing technology helped to further improve previous productivity gains, and electronic mail provided, for the first time, significant time savings (table 10). In addition, both technologies consistently helped speed the deliberation process for nearly all judges (table 12). Although the time savings

varied by judge, eight out of nine judges realized substantial time savings.

**TABLE 12**
**Case Processing Time**
**(Signed Opinions)**

| Judge | | Number of Cases | Number of Days: List to Decision | List to Draft | Draft to Decision |
|---|---|---|---|---|---|
| A | Pre WP–EM | 11 | 103 | 70 | 32 |
| | WP–EM 1978 | 16 | 64 | 39 | 26 |
| | WP–EM 1979 | 20 | 43 | 23 | 20 |
| B | Pre WP–EM | 17 | 63 | 40 | 24 |
| | WP–EM 1978 | 17 | 51 | 27 | 24 |
| | WP–EM 1979 | 16 | 44 | 26 | 18 |
| C | Pre WP–EM | 17 | 128 | 90 | 38 |
| | WP–EM 1978 | 12 | 64 | 41 | 23 |
| | WP–EM 1979 | 15 | 42 | 27 | 15 |
| D | Pre WP–EM | 31 | 85 | 65 | 21 |
| | WP–EM 1978 | 15 | 65 | 36 | 30 |
| | WP–EM 1979 | 25 | 56 | 34 | 22 |
| E | Pre WP–EM | 24 | 86 | 58 | 28 |
| | WP–EM 1978 | 16 | 99 | 74 | 25 |
| | WP–EM 1979 | 21 | 81 | 56 | 25 |
| F | Pre WP–EM | 22 | 118 | 91 | 27 |
| | WP–EM 1978 | 16 | 93 | 69 | 24 |
| | WP–EM 1979 | 21 | 76 | 50 | 26 |
| G | Pre WP–EM | 13 | 121 | 93 | 28 |
| | WP–EM 1978 | 11 | 107 | 81 | 26 |
| | WP–EM 1979 | 15 | 53 | 37 | 16 |
| H | Pre WP–EM | 17 | 122 | 86 | 36 |
| | WP–EM 1978 | 8 | 69 | 50 | 19 |
| | WP–EM 1979 | 10 | 61 | 37 | 24 |
| I | Pre WP–EM | 22 | 87 | 62 | 24 |
| | WP–EM 1978 | 10 | 46 | 25 | 22 |
| | WP–EM 1979 | 16 | 52 | 34 | 18 |

## Printing of Slip Opinions

*In addition to expediting the preparation and transmission of opinions, word processing and electronic mail permit the circuit both to expedite and reduce printing costs and to expedite the publication and distribution of slip opinions.*

According to a recent report,[9] federal courts of appeals annually prepare more than 4,500 opinions totaling 22 million printed pages. The annual cost of printing slip opinions exceeds $750,000, and printing an opinion requires an average of six days. Although the Administrative Office report does not endorse or recommend any particular printing approach, it does offer several proposals to reduce costs substantially and improve printing production times.

The Third Circuit's existing capabilities now include word processing, electronic mail, and the recently instituted electronic transmission and automatic photocomposition of slip opinions through a printing contractor. Those technologies permit the Third Circuit to adopt any printing alternative ultimately recommended by the Administrative Office or the Judicial Conference of the United States.

One publication approach strongly suggested by the Administrative Office is the linking of word processing to photocomposition equipment, either by telephone (electronic transmission), by word processing disk, or by computer tape. If an opinion prepared and stored on a word processor can be automatically entered into a typesetting machine, the labor-intensive, time-consuming, and costly process of retyping the text can be eliminated.

The Center undertook an informal technical assessment of one procedure to implement that approach by sending a word processing "floppy disk" (a standard storage medium) to two national publication and legal information companies. Although it was technically feasible to convert the floppy disks to a printer's computer system, the costs were prohibitive, and elaborate administrative and technical procedures were necessary according to these companies.[10]

A more practical procedure is the electronic transmission of the opinion to a printer via regular telephone lines. That procedure, which has recently been adopted in the Third Circuit, is less time-

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[9]Management Services Branch, Administrative Office of the United States Courts, Study of Printing Opinions, United States Courts of Appeal (1979).

[10]The Administrative Services Division of the Administrative Office reports that several printers claim they can accept any floppy disk containing text and automatically produce photocomposed copy at competitive prices.

consuming, and it is competitively priced while providing good print quality. Electronic transmission eliminates the technical problem of hardware and software compatibility between different word processing and printing systems, which previously prohibited rapid and inexpensive transfer of text from word processing to photocomposition equipment.

Beginning October 1, 1979, the Third Circuit contracted with a local printing company to transmit electronically, over regular telephone lines, final draft opinions for automatic typesetting and photocomposition of slip opinions.

Since the Third Circuit adopted the automatic typesetting procedure, all opinions have been printed within one day, compared to the average eight-day printing time in previous years (table 13).

**TABLE 13**
**Production Costs and Time of Printing**
**Third Circuit Slip Opinions**

| Fiscal Year | Cost per Printer's Camera-Ready Page | No. Copies of Each Opinion | Cost per Printed Page[a] |
|---|---|---|---|
| 1980 (EM) | $17.75 | 425 | $0.0417 |
| 1980 (traditional method) | $20.75 | 425 | $0.0488 |
| 1979 (traditional method) | $19.75 | 375 | $0.0527 |

| | Filing Procedure | Printing Time | Printing Method |
|---|---|---|---|
| 1980 (EM) | Printing/ filing | 1 day | Computer & cold type |
| 1980 (traditional method) | Filing/ printing | 7 days[b] | Hot type |
| 1979 (traditional method) | Filing/ printing | 7 days | Hot type |

NOTE: The terms and variables listed are used by the Administrative Office of the United States Courts. (See Management Services Branch, Administrative Office of the United States Courts, Study of Printing of Opinions, U.S. Courts of Appeals (1979).)

[a]The Administrative Office suggests that the cost per copy of a printed opinion page is the most realistic and valid measure of slip opinion costs. This measure is calculated by dividing the cost per printer's camera-ready page by the number of copies of each opinion printed.

[b]Estimated.

The printer submitted a bid for printing the Third Circuit's slip opinions in fiscal 1980 that was 15 percent below the lowest submitted bid for using traditional typesetting equipment, and more than 20 percent below the fiscal 1979 printing contract (table 13). The potential cost savings are from 30 to 60 percent as more printing companies convert to this new typesetting technology and as administrative procedures are further streamlined.

The following narrative describes how the new publication system operates in the Third Circuit and illustrates the processing of a typical slip opinion, including typical production times.

On Tuesday at 2:15 p.m., Judge X, in Pittsburgh, receives approval from the court to release a ten-page signed opinion. At 2:20, his secretary sends the opinion from his word processor to the clerk of court in Philadelphia, via the Courtran II computer. By 2:45, a deputy clerk in the clerk's office receives the entire opinion on a word processor and prints a temporary copy of the opinion. After the clerk makes a few minor notations, such as listing the official filing date, the document is sent at 3:15 to the printer, using point-to-point electronic transmission.

The printer receives the entire opinion by 3:25. As the opinion is electronically transmitted to the printing company, it enters a device that automatically converts all the text from the word processor into the appropriate computer codes acceptable to the printer's computer. The device permits the printer to accept transmission of any documents sent by almost any word processing machine following prescribed printing formats.

The printer's computer, a minicomputer containing sophisticated text-editing capabilities, is used to rapidly (within minutes) add typesetting codes and reformat the opinion in accordance with the Third Circuit's format and printing requirements. By 4:00, the opinion has been transmitted from the minicomputer into a high-speed cathode-ray-tube (CRT) automatic typesetter, which produces a camera-ready copy of the entire opinion. The film is processed by 4:30 and is ready for normal offset printing procedures (page make-up, imposition, shooting, and preparation of printing plates). (In the near future, the minicomputer will eliminate several of these offset printing procedures.) The printing plates are ready

by 6:00. Printing and binding are completed during the night, and the published slip opinion is delivered to the clerk's office Wednesday morning and mailed Wednesday to the regular subscribers.

If such a procedure were desired, the printer, on behalf of the Third Circuit, could electronically transmit the published slip opinion to national publishers or legal computer information organizations in minutes. That approach would give the court excellent local service and would permit rapid dissemination and national publication of the court's opinions.

## THE FEDERAL JUDICIAL CENTER

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