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DECISION-MAKING PROCEDURES IN U.S. COURTS
OF APPEALS FOR THE 2d AND 5th CIRCUITS

by

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DECISION-MAKING PROCEDURES IN U.S. COURTS
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Regional organization of federal Courts of Appeals, which are administratively independent of the Supreme Court and each other, has stimulated a variety of decision-making procedures among the eleven circuits. Notwithstanding uniform rules of appellate procedure, circuit courts differ in such important respects as size, methods of assigning judges to panels, and internal operations. A by-product of administrative autonomy has been widespread procedural experimentation.

There has been less effort, however, to evaluate the results of various modes of deciding appeals or to disseminate information about the lessons learned. Circuit judges are surprisingly unaware of the practices of their fellows across the country. This report will summarize how the judges of the 2d and 5th circuits assess two significant characteristics of their tribunals. These are: (1) the memorandum system of deliberation in the 2d circuit, and (2) the 15-judge size of the 5th circuit. The summaries are based on off-the-record interviews conducted with 9 active and senior judges of the 2d circuit and 15 active and senior judges of the 5th circuit during 1969-70. To protect their anonymity, no judge will be identified in the report; but the precise questions and paraphrased responses of individuals will be reported in the Appendix for maximum use by the Center.

I. Pre-Conference Memoranda in the 2d Circuit

Uniquely among Courts of Appeals, every judge on a panel of the 2d circuit prepares and circulates a memorandum of his views and vote after hearing a case but before conference. Though this procedure is avoided in simple cases, which may be decided summarily, circulating memoranda by each judge in advance of conference is a regular method of deciding appeals in this court. The method was instituted over a generation ago, in the teeth of the heaviest caseload among the circuits, to improve the quality of deliberations and to guard against "one-man decisions." In view of the recent explosion of appeals, the question naturally arises whether this extra drain of judicial resources is worthwhile. Also, because of speculation that the practice encourages dissent, by hardening views and making dissenting opinions easier to prepare, the judges were asked to evaluate the device as a catalyst to dissent.¹

There was a solid consensus among these judges regarding the value of the memorandum system and its effects on their performance. With one exception, the judges thought that preparing the memos increased their labor. But all justified the effort by the improved quality of their work. Having each judge come to grips with the issues in writing was thought to be a "salutary discipline," productive of more careful consideration. The method was defended,

¹ See Marvin Schick, Learned Hand's Court (Baltimore: The Johns Hopkins Press, 1970), pp. 96-99.

accordingly, as "the best way to squeeze out every drop of learning of individual judges in the case." For the same reason, it was considered an effective defense against "one-man decisions," of which the 5th circuit and certain state supreme courts were sometimes accused.

The judges likewise discounted speculation that voting memoranda encourage dissent. For every judge who conceded that preparing memos might stiffen positions, as Judge Charles E. Clark once wrote publicly, others thought that reading them could stifle doubts.² Indeed, one judge related how once he and a colleague had both changed their minds after reading each other's memo. In any event, the rate of nonunanimous decision in this circuit -- 8.5% in FY1965-67 -- is hardly a cause for alarm.

Certain unanticipated consequences of the practice did surface in these interviews. One judge suggested that the burden of writing memos reduced collegiality. Another thought that it had helped to sell this court on increased summary disposition. Still another complained about colleagues withholding ideas to reap personal glory. The memoranda apparently are not what they used to be. Nowadays they tend to be one-page position papers. Nevertheless, the judges of the circuit remain wedded to the memorandum system. Perhaps the acid test of their commitment is that during discussion of the alternatives that might help circuit courts cope with mushrooming appeals (e.g., specialized

² Schick, op. cit., p. 98.

tribunals, curtailed jurisdiction, circuit realignment, etc.), no one recommended that this practice be abolished. Instead, the memorandum system is a symptom of the pressure of quantity on quality, which the great majority of judges in both circuits viewed as the most serious problem facing Courts of Appeals.

Thus, for judges of the 2d circuit, the real cause for concern was not whether pre-conference memoranda spawn dissent, but whether a proven method of quality control would become "a casualty of the great increase in the court's workload."

II. The Size of the 5th Circuit: A Court or a Convention?

The maximum feasible size of a federal appellate court is often said to be nine judges. This principle, though once embraced by a committee of the Judicial Conference of the United States, has recently yielded to the explosion of federal appeals.³ There are now 15 authorized judgeships in the 5th circuit and 13 in the 9th circuit, not counting senior judges who serve full-time. Similar pressures in other circuits and frightening projections of future caseloads have stimulated suggestions that, irrespective of traditional notions of optimum size, the simplest solution to overloaded circuits is adding more judges.⁴ After all, a panel

³ Reports of the Proceedings of the Judicial Conference of the United States (March 1964), p. 15.

⁴ See Quentin N. Burdick, "Federal Courts of Appeals: Radical Surgery or Conservative Care," 60 Ky. L. J. 809 (1972).

of three members is a Court of Appeals.

Given their experience as a test of this option, the judges of the 5th circuit were asked to evaluate how expansion of their court had worked. The interviews were conducted at a time when only 14 active judges were appointed, but the court had functioned several years as a tribunal of 11 and then 13 active members. To capture that experience, senior judges serving full-time were included in the interviews for a total of 15 judges.

In contrast to the consensus in the 2d circuit, the judges of the 5th circuit were sharply divided over the wisdom of enlarging their court. As summarized briefly in the table below, the judges split almost evenly among three basic viewpoints.

REACTIONS OF 5th CIRCUIT JUDGES TO
EXPANSION OF THEIR COURT

	Positive	Mixed	Negative	Total
Number of Judges	4	6	5	15

On one side were four judges who believed that the experiment had worked "admirably" or at least better than expected. "The Judicial Conference was wrong, absolutely, about nine being the maximum," one judge declared, "I believe in cross-fertilization --as much as we can get. We learn from each other."

In the middle were six judges with mixed reactions. These judges conceded that expansion had aggravated the circuit's

problems of communication, administration, and, above all, uniform interpretation of law. Yet they preferred enlargement to the alternatives of using visiting judges, an experiment tried in FY1969 with almost unanimous disapproval, or of splitting the circuit as perennially proposed. One judge summarized these reactions succinctly:

The 15-man court is workable. It creates problems, but I think the desirability of having a court large enough to be a "national" court, which will ultimately not be possible if we restrict the number to 9, makes it worth putting up with the difficulties involved.

Five unreconstructed judges believed that the enlarged court had worked poorly. Expansion, in their view, magnified already serious problems of overwork and poor communications. Despite the reduction in caseload per judge as a result of expansion, one member considered size to be "our biggest problem."

I am more and more convinced [he said] that a court of 9, possibly of 11, is the maximum. There's a geometric progression -- more than half -- in the workload. There's so much paperwork when 15 judges are on the court. Opinions have to be read for all 15. Do you know how much reading that takes? And that's just one detail. Then there's correspondence concerning other duties. It all takes time. You can reach a point of collapse from your own weight. By adding judges you could reach the point that theoretically all they could do is read their own opinions. You can't have an institution if judges don't read all of them. The only way to hold the court together as an institution is for every judge to read every opinion.

The most critical problem is maintaining consistency among panels. This difficulty, common to all but the 1st circuit, was considered by all the judges to be the "real trouble" with expansion. More judges not only increase the need for en banc

but also make them harder to come by and more cumbersome to operate.

The 5th circuit has responded both formally and informally to the en banc dilemma. Formally, it has developed a "pink slip" procedure to simplify calling an en banc, in which judges simply check-off by a certain date whether they wish to have the court polled for an en banc. Unless notified of a request by that date the panel assumes there is no en banc. Informally, non-panel members also criticize slip opinions to obviate the need of calling en bancs. This method, which falls between the statutory authorization of three-judge panels or en bancs, exists elsewhere, most notably in the 6th circuit where proposed opinions are regularly circulated among the whole court. In the 5th circuit certain judges take it upon themselves to monitor slip opinions in order to iron out inconsistencies and disagreements prior to publication as a means of avoiding time-consuming en bancs. The practice has been formalized to the extent that when a nonpanel member circulates a letter of criticism to the full court, the panel advises the clerk to hold up publication pending an exchange of views among interested members. Alterations in the opinion are then recirculated with a deadline. "The panel is in charge," a judge explained, but "nonmembers have an absolute right-- a duty-- to criticize. It is a simple system of advice, and the full court sees the proposed modifications before they go out." This practice may have had some effect on the sudden decline in the en bancs in the 5th circuit after a peak of 20

in FY1970.⁵

The opponents of expansion, nonetheless, were still dissatisfied. Over and over they repeated that an en banc in the 5th circuit was "more like a convention than a court." For them the only solution was a return to a smaller tribunal by dividing the circuit, either separately or as a part of a larger realignment scheme. Arguments that division would "parochialize" the court in oil and gas litigation or civil rights they dismissed as "no longer valid" or "specious." Recalling how division had been blocked on this ground in the 1960s, one judge remarked:

The personnel have changed twice since then. The turnover is such that you never know what the composition is going to be. In any event, that puts the issue on the wrong ground. The question is workload, not who the judge is. For myself, I think circuit alignments are the most serious defect in the federal system today. ... They are totally unrealistic.

It is common knowledge that the issues of size and division of the 5th circuit have been connected to substantive disagreements among the judges concerning civil rights and other subjects. Yet those who preferred expanding the court to splitting the circuit plainly considered the organizational difficulties of enlargement to have been exaggerated. Circuit judges are in constant communication by telephone, they argued, and the unanimous en banc in the Mississippi School Cases demonstrated the court's capacity to function collectively. Since en bancs

⁵ Annual Report of the Director of the Administrative Office of the United States Courts (1971), p. 109.

in a dispersed circuit inevitably consume considerable judge-time, several judges favored returning to the former practice of holding regular sessions in New Orleans attended by all the judges, which is also done in the 10th circuit, as a means of institutionalizing the court.

Several conclusions emerge from these disagreements.

(1) The judges of the 5th circuit differ less about the nature of the problems generated by enlarging circuit courts than about the remedies. Expansion, most agreed, intensified the difficulties of efficient management and above all uniformity in a geographically dispersed circuit with swelling dockets. En bancs are the major problem.

(2) Judging from the reactions of judges on the first Court of Appeals to grow beyond nine members, there is a point of diminishing returns to expansion divorced from other options, e.g., altering jurisdiction or realignment. What makes the question of optimum size so tricky, however, is that it is hard to separate from much deeper issues of substantive policy and federal judicial organization--as has been true throughout most American history. Judges in the 5th circuit defend expansion primarily as a less onerous alternative than division.

(3) Thus, from the standpoint of the judges themselves, the experiment with expansion has been inconclusive, neither an unqualified success nor failure. In conjunction with screening procedures, the 5th circuit has responded impressively to the challenge of mounting workload. It is fulfilling its primary

—responsibility of adjudicating appeals. The coherence of the court, on the other hand, has suffered. The problem of unity in the circuit has not been solved.

Just as the explosion of federal appeals has increased the potential of circuit courts to Balkanize federal law among the circuits, so the larger Courts of Appeals are struggling, not always successfully, with the same malady within. Adding more judges to a circuit court, without more, is likely to make that problem worse.

APPENDIX

I. Pre-Conference Memoranda in the 2d Circuit

Nine active and senior judges of the 2d circuit were asked the following questions:

Your court has a unique procedure in which each judge circulates a written memorandum in each case prior to conference. Would you please appraise the efforts of this procedure?
(Probe: on workload, quality, dissent rate, etc.)

Paraphrases of their responses follow without attribution.

(1) It makes for more careful consideration of cases. Every judge thinks it is valuable. I hope we can keep it up, despite the great increase in our business. We can if we continue to get enough law clerks and timely appointments, plus the practice of summary disposition.

(Probe: how done?) Memos are prepared right after we hear a case -- it's pretty fresh. I dash off something then -- of course some cases take more than that; they take work. But it's a valuable thing to have for future reference and for the clerks, for them to look and be sure they have considered the viewpoints the judges have expressed. In some instances my remarks are off the top of the head -- inevitably. A great deal has to be left to the judge who writes the opinion -- who studies it in-depth. Not all things may be fully exposed at the earliest stages. We bypass the memorandum procedure in simple-issue cases, when it is clear what the outcome should be.

(2) It is very useful. I'm very much in favor of it. Some judges pay only lip service to it. It guarantees that cases will be decided by three judges rather than one. The 5th in practice has one-man decisions. The judge who really decides the case is the opinion writer. Clerks prepare bench memos; judges don't even read the briefs. They read only what the clerk writes and decide immediately after oral argument. We differ in 2 ways: (1) we read briefs ourselves, and (2) study the case via memos. Then we have a conference after we read each other's memos. It's very good. Hand instituted it -- an excellent idea. Most agree. One or two don't. When they are sitting we're likely to skip memo procedure. On the other hand I'm in favor of decisions from the bench. The memo system is useful for cases with substance. Lot's of criminal cases are without substance.

(3) Workload. It increases workload but to the same degree, it is a salutary discipline. The circuit judge has to come to

grips with the issue by himself, how he votes and why. It helps quality although it adds to the work. I would still vote to do it.

(Encourage Dissent?) No. Between final decision and voting memoranda comes the conference. That's where we really battle and argue things out. That's ridiculous.

(4) Workload. It's wonderful. It improves the quality immeasurably. But everybody is supposed to play the game. Some judges, I feel, try to get out memos that say nothing. The judge fears the memo might be used by another writer, so he withholds. If you studied those memos, you'd find they vary. If you get a stinker, the others sometimes don't put in any memo. It's not perfection, but pretty damn good. The vast majority of judges put out very helpful ones.

(Encourage Dissent?) I doubt any effect on the dissent rate. I have seen nothing to support that.

(5) Workload. It improves quality and, for that reason, is justified. As a visitor in the 5th circuit, I didn't like making decisions after oral argument -- too rapid. That's OK on clear cases. But I reserve the right to deliberate. The memo system is the best way to squeeze out the last drop of learning of individual judges in the case.

(Encourage Dissent?) It shouldn't if the judges are adequately prepared. Dissent so frequently expresses the personal philosophy of the writer, although I feel mine have been concerned with situations in which writers for the majority were more willing to ignore facts and write on their philosophy. If they stuck to the facts there'd be a different result. The whole trouble is inability to properly appraise facts.

(6) Workload. It adds tremendously to the workload. Whether the benefits are sufficient to justify the time is the question. I think they are. I was amazed in my first year; in conference 1 or 2 judges would say, "I've read your memorandum and think you're right." It had changed them completely. It has happened to me, too. There's a big difference between discussion like we're having and having to put on record your vote and more important, why. It makes you think about it in a different way. Earlier I spent too much time answering all contentions. That was silly. The key to the system is to put down the guts of your feeling and why, even if you don't know the authority. The best ones can be one page. It takes time to think through, however. I'm always embarrassed to record my recommendations in a memo, then change my mind and go the other way after assignment. I always tell the others. They always say go ahead and usually go along. This is another decision point and probably the most important-- the process of changing your mind.

(Encourage Dissent?) No. It might have the reverse effect, having the reasoned view of someone else before you commit yourself. The presumption is an open mind before you vote.

(7) Workload. It doesn't increase workload a great deal. You have to do the work on your own anyway. I can't compare other circuits since I have sat in only one other. Generally speaking, the quality makes the memo system worth it.

(Encourage Dissent?) It might tend to harden views a little bit, but I'm not sure of any appreciable effect. I see some value in an individual judge formulating his stand, his tentative determinations. Once he makes a tentative determination, he may be a little inclined to stick with it. But not appreciably. It is helpful to judges to have more detailed outlines of one another's views, especially during discussion and opinion writing.

(8) Workload. It improves quality. It rather deters collegiality. It may prove to be too great, a casualty of the great increase in our workload.

(Encourage Dissent?) I doubt it. Not really. It may in the good sense [quoting Llewellyn] that each judge has studied the case. The mere fact that these views are down on paper insures concerned colleagues.

(9) Workload. We accommodate memoranda to workload, not workload to memoranda. They're shorter. Years ago we would put in quite a bit of facts in our memos. Learned's were a delight. It took time. Now we hit for the jugular. Get rid of it in one page -- that's that. Another thing, we have more affirmances from the bench than we might if we didn't have the memo system. Decisions are from the bench rather than waste time distributing memos in cases of no merit. It saves not only the job of writing p.c.s but separate memos. Summary decision is easier to sell here than elsewhere.

Quality. I won't say the quality has gone downhill. [Improve it?] Yes. We steal language from each other. How could I help not doing it? I talk with a brother. We each write down our concept of the case. His sentence comes to mind.

(Encourage Dissent?) Well, there are a couple of judges with enough Dutch in them it has affected, but they are a very small minority. Certainly dissent is much less obvious than on the Supreme Court. Judge X and I sat the other day in a case like one last year in which he dissented. He said: "This time I'll concur and follow. I had my shot." You don't see Black or Frankfurter doing that. A couple of us dissented that way in the seamen's business. For the most part we're cooperative.

II. The Size of the 5th Circuit: A Court or a Convention?

The conclusions in the report derive from the responses of 15 active and senior judges to the following questions:

Your court has been expanded in size beyond the maximum of 9 judges once recommended by a committee of the Judicial Conference as the maximum feasible size for any appellate court. Would you please appraise the effects of this expansion? (Probe: on workload, efficiency, internal procedure, conflict, etc.)

Occasionally a simpler alternative was used: "How well has the 15 man court worked out?" Since the responses often stimulated a discussion of en bancs, paraphrases of several remarks on that subject also follow without attribution.

A. Positive Reactions

(1) All right. It has worked admirably. There is nothing to the magic number of nine. We can't be held to nine. The 2nd circuit will outgrow it. The DC circuit can't be subdivided further and will outgrow it. The 9th already has. It's difficult, but the only place with real trouble is en banc. Even there it adds a little to the prestige of the en banc court. I'm optimistic.

(2) Fine. I approve of it. The Judicial Conference was wrong, absolutely, about nine being the maximum. I believe in cross-fertilization -- as much as we can get. We learn from each other. We are geographically distributed very well. We have different backgrounds -- educationally, socially, religiously, ethnically. You name it.

I would like to sit in New Orleans for longer periods, less often, not as 15 but as panels. Say 2-week sessions with everybody there, reshuffling panels each week. We could handle 25 cases per day, 250 per week with 5 panels per day, even more if we worked Saturdays. This would have the advantage of each judge being there, less travel and time waste. Most judges wouldn't want to leave home permanently, but 2 weeks is fine. The 10th does this in Denver. We lack the facility, the mechanics, but it could be worked out.

(3) It has worked out better than I thought it would. I wouldn't say necessarily that it might be better if we were

smaller. So far none of the problems I thought we would encounter have developed.

(4) So far we've only worked with 13, recently 14. Thirteen did a reasonably good job. Fifteen shouldn't make too much difference. I prefer 13. It is not simple. But on balance it has worked well, better than one would expect. I attribute it to the real devotion to duty of all members. They have made a real push to make it work. We're in constant communication by telephone.... We all watch each as to consistency and the application of law.

En Banc. The big problem is keeping consistency and uniformity. Unfortunately, it's not solved. It may not be possible of solution.

[Informal en banc?] Oh, yes. I think nothing for a judge to call to straighten a conflict out. There is a lot of give and take. The telephone is the answer why the 5th can get by without more en bancs. When I call a judge, it isn't for three minutes, but 30. And when we meet, we stay together the entire time. Talking shop is all we do. There is a constant barrage of exchanging information. Our poor wives, how they hate us to get together!

B. Mixed Reactions

(5) I have mixed views. It's really not a great innovation for us for we had more visiting judges. We had no alternative to keep up with the load. Visiting judges is a very disadvantageous thing to do for many reasons. They are here only one week, they have their own work to do, it's harder to get to know them, and to communicate. The use of district judges is very unfortunate -- you get their opinions and have to reverse. I'm delighted to have 15 judges of our own without having to call in outsiders or district judges. From that point of view, it's a great advantage. But it's too big a court to operate efficiently. Brown wouldn't like to hear this, but if you lop off Texas to the 10th, it would take 3 or 4 judges and cut us back to 10 or 11 and we would operate more efficiently. With the 15 we have I think we're doing extraordinarily well. When we sat en banc last month there were 14 in a unanimous decision. Anytime you can do that you're a long way.

(6) It has worked out alright. Even with 15 men, we still have an enormous caseload. It is alright to have a court that size, but I hope eventually we won't have to sit in 7 cities in 6 states. It is hard to institutionalize a court when we move around as much as we do. We'll have a renovated building in New Orleans in 18 months. There is no reason why 3 sittings couldn't go on at once. More judges could move around and talk with each other. It is very difficult to communicate. That existed when

there were 7 judges. It's a little more exaggerated now, but not much more. [Hence implication: the real problem is not numbers but physical dispersal.]

En Banc. There is a disposition on our court not to hold en bancs if they can be avoided, but the make-up is such that there is a greater need for them.

[Informal en bancs?] Judge X's effort to avoid en bancs by strongly urging the original panel to reconsider a matter where there is serious objection to it is a means of getting away from en bancs. There is also a disposition on our court to have en bancs without oral argument. I have mixed feelings. If the case is important enough for en banc, it is important enough for oral argument. But we still have conferences. Judge Y suggested we do away with conferences. I opposed that successfully.

(7) The 15-man court is workable. It creates problems, but I think the desirability of having a court large enough to be a "national" court, which will ultimately not be possible if we restrict the number to nine, makes it worth putting up with the difficulties involved.

En Banc. All are reluctant about en bancs because of the time they consume. All adhere to one principle: one panel doesn't overrule another; they must adhere to another. Conflict happens more frequently because there are more panels and they haven't had the chance to talk out their conflicts. When they disagree, it's a great problem. All are conservative in suggesting conflicts be resolved by en bancs because of the loss of judicial time.

Some circuits have more en bancs more freely. We will have to have more because we have more panels. But let me stress: if I'm not a member of a panel and I see a slip opinion dealing with a subject, I'll write the author and express my doubts to him and send a copy to the chief judge. He'll ask them not to issue judgment until the other panel has an opportunity to get their opinion out. We don't circulate opinions among non-sitting judges, but we are supposed to read all decisions and to notify other judges if we have a parallel subject in order to avoid conflict. [INFORMAL EN BANC.]

(8) There are many management problems which the court has dealt with in an innovating approach and effectively. That's the only shortcoming in it -- the pure administrative difficulty. We haven't lost any sense of being a cohesive institution.

[In describing the hardest part of the job, however, this judge stressed the problem of intracourt consistency in rapidly developing areas of law. He said:] We have not developed a truly

effective way to disseminate in most usable forms our decisions in these areas. We get slip opinions and read them as a must until they come out in West six or eight months later. Each judge has to devise his own annotation system. None is truly effective with the volume of cases and the number of judges. I feel we're scrambling in the dark on searches and seizures. No one has the capacity to remember the search and seizure decisions of this circuit in the last 6 months. No judge can carry them in his head. We need something in this circuit to apprise us in meaningful form of what the circuit is doing.

The problem that is difficult for me is not inconsistency on the same day but inconsistency with the decision of two weeks and thirty days ago. This is one of the purely management problems we haven't solved. Size aggravates it. Each one of the judges has his own jackleg annotation system, and none is effective.

(Probe:) Yes, we have an informal process of working out panel disagreements. Judge Z encourages this, though some are unhappy. There is no written rule, but if I read an opinion contrary to what I did in another case, I take it up with the panel. We hammer it out between ourselves without bothering the rest of the court unless we can't agree. We do a great deal of this. Some judges don't like this informal en banc procedure. To me this isn't right. To me it makes good sense for the courts to work out a consistent front without bothering 15 people.

(9) It's too early to tell. You can't avoid having the same question posed to different panels who sit at the same time. This creates conflicts, even though there is no conflict. The next case may differ a little factually. One side relied on one, the other side relied on the other.

(10) I don't think splitting the circuit is any answer. True, if you get 15 judges you impose a terrific administrative burden on the chief judge. It's not impossible.... Now first there is no sacrosanctness to the figure 9. Where to hell did the figure come from? For 10 years we had demonstrated a court can function with more than 9. We had as many as 50 visiting judges; 12, 13, and 14 circuit judges; then 4 temporary judges. That worked. Now we have 15. Ingraham was confirmed today. For 8 years running we had 11, 12, 13 men courts with visiting judges. It worked beautifully. Of course there were some problems, which the sleepy First Circuit doesn't have, of institutional stability. How to maintain uniformity? En bancs are acute with us.

En banc. We cooked up a "pinkie" system with the clerk. Observe how the biggest guinea pig with the biggest problems responds without any help. We cooked up forms; we had no time to

write letters. We cut corners everywhere....The "pinkie" alerts the judge, act now or lose your voice. It works beautifully. We have more en banc applications than anybody else and are having more en bancs. We are handling them by a well-organized procedure.

The pinkie slip gives the name of the case and the man who wrote it, the senior active judge and the one judge who raises the question right on it, plus the notify date. Unless notified by such and such a date the panel assumes no en banc. It gives every judge the opportunity to say en banc. If a single judge asks for a poll, we have to poll. Parties cannot make you take a vote. Some member of the court has to. It's alright for cases where parties ask it.

What about cases where nonpanel members object? Judges X and Y do the most. They are offended by sloppy work. Some judges got to resent this; they had the feeling of interference with panels. The panel is the court. Always remember this. We deprecate the three-judge panel the moment we think it is something less than the court.

So we came up with another procedure to handle criticism of nonpanel members. [INFORMAL EN BANC] It has been formalized. The panel is in charge, but the moment a nonmember writes a letter expressing concern, with a copy to all, the panel advises the clerk to hold up. We hold it in the bosom of the court. Then we can have an exchange of views with the panel only and don't have to have the whole court unless they want to cut in. So when the criticized judge meets the objections, he sends around to the others with a deadline. After all, they might object to his objections. Nonmembers have an absolute right -- a duty -- to criticize. It's a simple system of advice, and the full court sees the proposed modifications before they go out. It obviates the need of en bancs.

...The system is a recognition by our court that we -- 15 judges -- have absolute responsibility for everything that goes out. While the statute forbids any intrusion -- there are 3-man or en banc courts only -- it is a way of giving us: (1) a sense of common responsibility, and (2) a sure way of [internal criticism] without any resentment at all.... En bancs are no longer the big problem though they are a big problem.

C. Negative Reactions

(11) No court with present precedents can function with reasonable efficiency above nine. Nine is the outer limit. There's a real good lesson. When we sit in panels of three, we act with dispatch -- and I doubt with less knowledge of law between the

three of us.

En Banc. Oddly enough, when I got on the court there was no way of getting an en banc. You could apply, but they would deny it. I asked how did that satisfy due process on a court that regarded itself as the champion of due process. We hit upon the rule that (1) a request for en banc is circulated to the whole court, not just the panel, or (2) if any one judge asks for a poll. Otherwise, if no judge thinks enough of it, the petition is denied. You'd be surprised at the number of en bancs judges ask for polls on. But few are granted by the majority. They're scarcer and scarcer. [Sic] With 15 men it's impossible to get an en banc, and if you get one, it's impossible to function as an en banc. It's more like a convention.

(12) We're becoming so overloaded, I'm fearful of the effect on the quality of our work. Fifteen judges is too many. We had a conference call the other day simply to avoid an en banc. Fifteen men spoke for an hour and forty-five minutes. Just to hold the phone that long my arm ached all day.

(13) I am more and more convinced that a court of 9, possibly 11, is the maximum. There's a geometric progression -- more than one half -- in the workload. There's so much paperwork when 15 judges are on the court. Opinions have to be read for all 15. Do you know how much reading that takes? And that's just one detail. Then there's correspondence concerning other duties. It all takes time. You can reach a point of collapse from your own weight. By adding judges you could reach the point that theoretically all they could do is read their own opinions. You can't have an institution if judges don't read all of them. The only way to hold the court together as an institution is for every judge to read every opinion.

[Later] Size is our biggest problem. It's very difficult to function with a court of 15.

En Banc. We exercise great restraint on en bancs. I think we do have enough. You can't overlook that we are a panel court. Courts of Appeals were designed as panel courts. Lots of us read slip opinions and straighten out disagreements informally. We have a system of policing. It's sort of an irritant. Recently I was accused in half-fun of being a monitor. But people monitor me. We all monitor each other. Otherwise we must go to en banc and that would lead to breakdown on a court of this size.

(14) It's too large. You can't sit as a court with 15. The ideal court is not over 7. Of course the Supreme Court is 9.

En Banc. The ideal court is 5 men, with all 5 hearing the cases argued and sitting en banc. I see cases go across that

(10)

probably should be en banc, but if everybody did that we would be en banc all the time. The court is too large....We need re-alignment of the circuits. Fifteen judges is a convention. Of course, there's always a vacancy (laughter).

(15) Fifteen is more like a convention than a court. It's very difficult to organize. Everyone lives in a different city except for two in Houston and Atlanta. It's a huge area. To get the 5th on a par with the other circuits would require a court of 18. I mean by weighted caseloads. Of course, we have no satisfactory statistics on weighted loads. We need a factor such as the weighted caseload which Spaniol worked out for district judges. We don't really know what goes on in the Courts of Appeals.

We've got to realign the circuits. It's a responsibility Congress will have to face up to. I definitely support it. There's never even been a comparative study to this extent. In this computer age, somebody should try to see how every conceivable geographic combination works out. I suppose you would want contiguous states. That means you start with Maine and New Hampshire; then work out every combination to see what would happen to the workload. It would be a highly sensitive political decision. Every time you mention one new district judge, every Senator gets upset. Mention a circuit and ten Senators get upset. Mention a Supreme Court appointment and 100 get upset. They have as many ideas, depending on the ideas of their favorite judge, who more than likely they appointed. I don't want to be cynical, but that's the process. Out of that must come an improved system.

[Probe: a parochial court?] I regard it as a specious argument. They [liberals] won't compose the court anyhow. The personnel have changed twice since then. The turnover is such that you never know what the composition is going to be. In any event, that puts the issue on the wrong ground. The question is workload, not who the judge is. For myself, I think circuit alignments are the most serious defect in the federal system today. ...They are totally unrealistic.

En Banc. Oh, yes. If one judge asks for a pink slip, the whole court must be circulated. After one, some judges will say, "Never again will I vote for an en banc."

We've had telephone conferences....They are an absurdity. Everything has already been said by the time it gets to me.