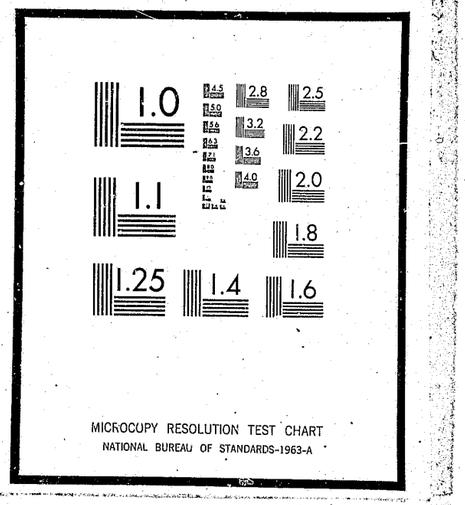

Volume II: Quantity and Quality in Appellate Justice

(to be discussed January 24)

This Conference has been planned by the Advisory Council for Appellate Justice, a 33-member group which jointly advises the National Center for State Courts and the Federal Judicial Center on the work of appellate courts. The Council is comprised of state and federal judges, practicing lawyers and law teachers in roughly equal numbers. Financial support has been provided by grants from the Law Enforcement Assistance Administration and the Council on Law-Related Studies.

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APPELLATE JUSTICE, 1975

Materials for a National Conference,

San Diego, January 23-26,

VOLUME II

QUANTITY AND QUALITY IN APPELLATE JUSTICE
(to be discussed January 24)

edited by

Professor Paul D. Carrington
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This project is supported by Grant Number 75 TA 99-0002 awarded by the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration, U. S. Department of Justice, under the Omnibus Crime Control and Safe Streets Act of 1968. Points of view reflected in this document do not necessarily represent the position of the U. S. Department of Justice. Preparation of these materials was also supported by grants from the Council for Law-Related Studies and West Publishing Company.

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CHAPTER 2 VISIBILITY OF DECISIONS: ARGUMENTS AND OPINIONS*

*Materials selected by Winslow Christian.

ORAL ARGUMENT

Delmar Karlen*

In the United States, oral arguments are secondary in importance to briefs and are rigidly limited in duration. In the United States Supreme Court, one hour is allowed to each side, but in many appellate courts less time than that is permitted, frequently no more than 15 minutes or a half hour for each side. Reading by counsel is frowned upon. The judges do not wish to hear what they can read for themselves. They expect to get all the information they need about the judgment below, the evidence, and the authorities relied upon from studying the briefs and record on appeal. They do not encourage counsel to discuss in detail the precedents claimed to govern the decision, preferring to do that job by themselves in the relative privacy of their chambers, often with the assistance of law clerks.

In England, where there are no written briefs, oral arguments are all-important. They are never arbitrarily limited in duration. While some last for only a few minutes, others go on for many days, even weeks. The average duration of a case in the Court of Appeal is a day and a quarter. Much of the time, perhaps half, is spent by counsel reading aloud to the court. It is in this way that the judges learn what transpired in the court below (by listening to a reading of the judgment and such parts of the evidence as may be relevant), what errors are complained of by counsel (by listening to a reading of the notice of appeal, which is required to specify the errors), and the authorities relied on by counsel (by listening to a reading of statutes and cases, either in their entirety or in large part). There are some departures from this pattern, notably in the Court of Criminal Appeal,[28] and attempts are now being made in other English courts to cut down the amount of time spent in reading by counsel,[29] but the general picture is as stated.

The only controls ordinarily exercised in England over the time of oral argument are informal, ad hoc suggestions from the judges. Thus when counsel wishes to cite a case as authority, the presiding judge may ask him: for what proposition? If the judges indicate that they accept the proposition as stated, there is no need to read the case. Similarly, if counsel has persuaded the judges on a certain point, they may indicate that it is unnecessary for him to pursue it further. If counsel for the appellant, by the time he finishes his argument, has failed to persuade the court

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* Professor of Law, New York University. Reproduced from APPELLATE COURTS IN THE UNITED STATES AND ENGLAND 150-152; published by the N.Y.U. Press in 1963.

that the decision below should be reversed or modified, the court informs counsel for the respondent that it does not wish to hear from him at all, and proceeds forthwith to deliver judgment. Despite such controls as these, the time spent in England in oral argument is very much greater than that spent in the United

Many observers, including a large number of American judges, believe that the quality of appellate advocacy in the United States is low, and that it is declining. If they are correct, a partial explanation may lie in the fact that rigid time limitations allow little opportunity for its development. Another partial explanation may be the fact that oral argument is regarded as relatively unimportant as compared to written argument. Indeed, in some courts oral argument is rarely heard, and in others it tends to become hardly more than ritual (especially when the judges have not read the briefs in advance).

English and American Appeals Compared

by Frederick Bernays Wiener *

COMPARISONS may be invidious, but they are inevitable, and the process of comparing closely related institutions may be helpful. That, at any rate, was the view of a group of distinguished English and American judges and lawyers who in 1961 and 1962 examined the procedures of appellate courts in both countries.

Their findings, set forth in a recent book by Delmar Karlen, Professor of Law at New York University and the Director of the Institute of Judicial Administration, under the title *Appellate Courts in the United States and England*,[1] should be examined in the light of the information and insights of an English work published independently at about the same time. This is *Lawyer and Litigant in England*,[2] a series of lectures by R. E. Megarry, Q.C., which, while it has a much wider scope, dealing also with legal education, the legal profession generally, the appointment of judges, costs and that perennially fascinating subject, lawyers' earnings, still gives us much information concerning English appellate practice that cannot be found in Professor Karlen's pages.

That there are significant differences between the appellate procedures of the two countries is, of course, widely known; that the recent comparative study has had little, if any, practical effect on either side of the Atlantic should not occasion surprise. For, just as the best advice that a friend can possibly give is to counsel a man to do precisely what he wanted to do all along, so the principal value of a comparison of varying techniques is to convince the practitioners of each that their way remains the preferable one.

Time for Oral Argument Is First Difference

Take the matter of limited versus unlimited oral argument on appeal, perhaps the most striking difference between the two systems. In the United States lawyers normally have thirty, forty-five or sixty minutes for oral argument, and are forbidden, or at least admonished not to, read long passages to the court. In England the lawyer who opens for the appellant commences by reading all the opinions (*Anglice*, judgments) below, and then continues with a reading of pertinent passages in the testimony.

This strikes an American lawyer as downright silly; he longs for even a fraction of the time that his English brethren have, convinced that he could use it to better advantage. But the English lawyer is equally convinced that the "comprehensive orality" of his system is its strongest point. As Mr. Megarry says,

> It is one thing to set out an argument or a statement of facts in a typewritten document, and be told that the judge has read it; it is another to observe the judge, and to see and hear his reactions, while that argument or those facts are orally set before him. Justice is not only done: it is seen in the doing. A judge may indeed conscientiously read a document in solitude, missing no word throughout: but has he fully appreciated the force of this argument or the significance of that fact?[3]

After the English judges and lawyers visited the United States in 1961, the Court of Appeal announced that its members would thereafter in advance of argument read the opinion below and all of the decisions cited therein.[4] But even this limited step forward was felt to be too much of an innovation, and with the advent of a new Master of the Rolls it has now been largely abandoned, and the English practice is back substantially where it was.[5]

1. New York: New York University Press. 1963. Pages x, 180. $6.00. Hereafter cited as KARLEN.
2. The Hamlyn Lectures, Fourteenth Series. London: Stevens & Sons Ltd. 1962. Pages x, 205. [Price in the United Kingdom, 22s. 6d.] Hereafter cited as MEGARRY.
3. MEGARRY, page 168.
4. [1962] 1 W.L.R. 395; MEGARRY, pages 170-171, 175-176; KARLEN, pages 95-98.
5. KARLEN, page 97; personal inquiry in England, early in 1964.

* Member, D.C. Bar, Reproduced from 50 A.B.A.J. 635 (1964).

HEARING APPEALS

Daniel J. Meador*

The hearing and decisional processes by which a three-judge panel in CACD deals with a criminal appeal are characterized by flexibility, orality, openness, and finality. In some respects the hearing is outwardly similar to the oral argument of an American appeal. But the English appellate hearing includes so much more than the American oral argument that it is really a different kind of proceeding. The terminology in the two countries suggests the difference; a "hearing" implies more than an "argument." The main features of the English proceeding are sketched here; they offer several ideas for American consideration.

If a case survives the screening procedure described in the preceding chapter--or if it is one of the few in which leave to appeal is not required--it is put on the list for hearing on a specified date in open court before three judges. Legal aid is always granted for the hearing, if the appellant is without representation and is financially unable to obtain it. The legal aid order always provides for a barrister to present the case, but sometimes a solicitor is also authorized. A solicitor is typically provided only in cases of unusual difficulty, or in which evidentiary matter needs investigating.

Flexibility is evident throughout the hearing of the appeal. Just as there are no rules which tightly control the Registrar in the process leading up to the hearing, there is no rigid format governing the hearing itself. Oral argument is as long or as short as the court may desire. Whether counsel for the prosecution argues at all is determined by the court during the hearing. New evidence and information outside the record may be received. Witnesses can be called to testify. The hearing may consume 15 to 20 minutes, or it may last several hours. The typical conviction appeal probably consumes from 45 to 90 minutes.

This unrestricted flexibility is directed to one end: a final disposition of the appeal, then and there. All are aware that a decision will be made at that sitting and that the hearing will terminate the criminal proceeding, subject only to a rare grant of a new trial because of "fresh evidence" or an even rarer appeal to the House of Lords. There is no such thing as a post-conviction proceeding, in the American sense.

Flexibility and finality are related. If the decision made at the conclusion of the hearing is to be accepted as genuinely final, it is imperative that justice be done in that proceeding. There is no later opportunity for a court to act. The court and its procedures must be sufficiently flexible to allow it to reach a result which is in fact a just decision on the merits of all issues in the case, not merely those presented by "the record."

* Professor of Law, University of Virginia. Reproduced from CRIMINAL APPEALS: ENGLISH PRACTICES AND AMERICAN REFORMS 71-80 (1973).

The hearing of a conviction appeal in the English Court of Appeal is an amalgam of what Americans know as three quite different proceedings: a hearing on a new trial motion in the trial court where the conviction was imposed, the oral argument of an appeal in an appellate court, and a post-conviction proceeding. The trial courts in England--now the Crown Courts--from which appeals lie to the Court of Appeal have no authority to tamper with a jury verdict or to disturb a sentence once it is imposed. There is nothing in those courts in any way analogous to American new trial motion practice. The Crown Court's powers evaporate with the conclusion of the trial, whether or not an appeal is sought. The powers typically possessed by American trial courts to set the defendant at liberty pending appeal or to entertain and act upon post-trial attacks on the conviction or sentence are vested, to the extent that English law recognizes them at all, in the Court of Appeal, Criminal Division, on direct review of the conviction. All authority to deal with the proceeding passes from the trial court to the appellate court upon the filing of the application for leave to appeal. Given that allocation of authority--and the absence of any collateral remedy--the appellate flexibility and willingness to receive evidence seem less odd. Indeed, those features are essential in order for the court to be able to pass on matters which in the United States could be asserted only by new trial motion or in a post-conviction proceeding. Also, the use of trial judges on the appellate court is perhaps more understandable in view of the court's blended functions.

CACD will receive new evidence on any issue, if it is in writing. Presenting the testimony of a live witness, however, requires leave of court. The application for leave is typically accompanied by an affidavit giving the substance of what the witness will say. On sentence appeals the court has an easy-going attitude and will listen to virtually anything the appellant wants to offer. But on conviction appeals, evidence is supposed to be limited to that which is admissible under the ordinary rules of evidence in the trial court. Notions about admissibility, however, leave a good deal of latitude. The court insists that it guards against retrying the case on appeal, but at times it gives the impression of doing just that. Evidence is often offered informally during the hearing, as, for example, when counsel reads an unauthenticated letter to the court. What the court does with new evidence, however, is another matter. It adheres generally to the notion that evidence must be offered during the course of the trial, and not initially on appeal, absent some exceptional reason or unless the matter arose after trial or a new trial is being sought on the grounds of "fresh evidence." Thus, while the court may listen to testimony or look at documents it may end up disregarding such matters and acting solely on the papers already before it.

The English criminal appeal, from the American standpoint, is thus something of a hybrid, with a free-wheeling character all its own. The appellant himself is almost always present at the hearing, thereby adding another feature which Americans associate with trial proceedings. The presence of the appellant is also consistent with the theory of a single review proceeding which will do justice finally, covering all the ground embraced in this country by the new trial motion, the appeal, and the post-conviction proceeding. With this atmosphere and setting in mind, a closer look can be taken at the way the hearing proceeds.

A few days before the hearing each of the three judges will have been provided by the Registrar's office with a complete set of the papers in the case. They will have familiarized themselves with the grounds of appeal and the facts bearing on these grounds. In this process, the summary prepared by the Registrar's staff is of considerable assistance, but the judges themselves also examine, to varying extents, the trial documents and the transcript. Thus the court does not come to the argument cold. It has available to it in advance of oral argument everything a well-prepared American appellate court would have, with one major exception: since there are no written briefs the judges have no insight as to the precise line of argument counsel will pursue except that which can be derived from the grounds of appeal.

When the case is called by the Registrar, counsel for the appellant opens. He exercises a large measure of control over the shape of the case at this stage, even though he may have had no previous involvement. The granting of leave is often the point at which counsel enters the case for the first time. He may omit argument on some of the grounds of appeal asserted in the original application, if he considers them without merit (the grounds in most cases having been drafted by the appellant without assistance). Counsel also may have filed additional grounds of appeal prior to the argument; this he may do even after leave to appeal is granted. Usually, though, he works with some or all of the grounds in the original application for leave to appeal. There is no reluctance by counsel to acknowledge that he can say little or nothing in support of a ground which the convicted defendant has asserted.

As indicated by the discussion of the Chilcott case in Chapter IX, once leave to appeal is granted, the whole case is before the court on its merits. The issues and the scope of the hearing are not controlled by the posture of the case at the time leave was granted.

Questioning of counsel by the judges is frequent. The tone is one of informal conversation, similar to that in some American appellate courts. If the judges have either made up their minds on a matter or have heard enough argument on it, the presiding judge will make that evident. Unless there is a significant point not yet made, counsel will take the signal to go on to something else or close. Verbosity and repetition are reasonably well controlled through self-discipline. If that is not operative, however, the judges have no difficulty or reluctance in communicating their impatience to counsel.

A healthy candor colors the whole presentation. Counsel for appellant seem quite willing to concede matters which do not directly impinge on the ground of appeal being urged. The frankness is refreshing. For example, counsel may state that the trial judge's summing up on a particular aspect is "impeccable," if such a concession does not really cut against his point. Or counsel may freely acknowledge that the appellant (his client) behaved in an "unpardonable" manner, so long as the statement does not conflict with his legal argument.

Since there are no written briefs and the grounds accompanying the application for leave to appeal will often not reveal a well-focused legal theory, the only medium for fully conveying the appellant's legal position to the court is the oral argument. If counsel intends to rely on certain reported decisions he notifies the usher prior to the hearing, and the necessary books are made available in the courtroom. As counsel refers to them he may read aloud pertinent passages or lapse into silence while the judges read what he has cited.

Such references will not be numerous. A distinctive feature of English criminal appeals is the relatively small role (by American standards) played by formal legal authority--statutes and decisions, and particularly the latter. This is evident in both the oral argument and the court's judgments. It is common for counsel not to mention a single prior decision or statute in the course of his argument. Rarely will more than two or three cases be cited. Arguments seem to proceed on an assumed basis of general principles so well understood that references to authority are unnecessary. It is unusual for an argument to center around hair-splitting distinctions as to whether the case at bar does or does not come within some prior holding.

The overall impression imparted by the proceedings is suggestive of a code system. Ironically, in the womb and cradle of the common law, the force of precedents in criminal matters seems pallid compared to practice in the United States. Advocates in American courts are prone to dredge up and press every case in point which they can find, and judges pore over them agonizingly in writing opinions. The relative unconcern with precedents in the English court, and hence a freedom from this burden in argument and decision, means that English criminal appeals are not as "law ridden" as American appeals tend to be.

The oral argument may be punctuated by lengthy silences while the judges look at papers or a reported decision or hold a whispered conference. Counsel resumes when he senses the judges are ready to hear more or when he is asked a question. The hearing, it must be remembered, serves not only as the occasion for argument of counsel but also for the court's consideration and decision of the case. The court is in fact in conference throughout the hearing, and there will be no other conference. There is an openness to the deliberation and decision-making in that they take place on the bench in full view of the lawyer, the defendant, and the spectators. Justice can thereby be seen to be done.

When the presentation for the appellant has run its course, a whispered conference is usually held on the bench. In some cases the presiding judge will then proceed to deliver orally the court's judgment (opinion and decision), and counsel for the prosecution will never speak. In other cases the presiding judge will ask counsel for the prosecution to address himself to a particular point, or counsel will be asked whether he can help the court on a certain matter. In other words, argument for the prosecution does not follow automatically. It is presented only if the court invites it, and it is limited to precisely what the court says it wants to hear.

The hearing concludes with the oral delivery of the judgment by the presiding judge. The conference on the bench which precedes this may last from a few minutes up to ten minutes or more. Because the judges will often have conferred intermittently during the course of the arguments, there may be little left to decide. The judge delivers the judgment from his notes and from the summary. The well-organized, smoothly stated opinion of the court, given extemporaneously, nearly always excites the admiration of American observers. Practice and the inescapability of this duty undoubtedly sharpen the ability of a judge to handle this assignment; in the course of a few years on CACD a presiding judge will make such presentations hundreds of times.

The English criminal appeal hearing can be summed up by saying that it compresses into one sitting of the court--lasting usually not more than an hour and a half, and often less--all of the time, energy and thought invested (a) by American lawyers in preparing and presenting new trial motions, in writing appellate briefs, and in presenting oral appellate argument, (b) by American judges in hearing and deciding new trial motions, reading briefs, listening to oral argument on appeal, participating in closed court conferences, and writing opinions, and (c) by American judges and lawyers in performing these same tasks in post-conviction proceedings at trial and appellate levels. The saving of time and effort in the English system, as compared to the American, is immense. It should not be overlooked, though, that English counsel and judges do invest time in preparation for the appellate hearing, but probably no more than American judges and lawyers invest in preparation for oral argument on appeal.

The key elements at the hearing and decision stage which differ from American procedure are: (1) absence of written briefs; (2) no written opinions; (3) immediate decision from the bench; (4) the blending with the appeal of American style new trial motion practice and post conviction proceedings; (5) allowing evidence to be offered on appeal; and (6) no fixed time limits on argument. All of these are possibilities for American experimentation, either as they are found in the English practice or with modifications.[1]

In considering possible American adaptions, thought should be given to the relationships among these elements as well as between them and other aspects of appellate procedure. For example, if the new trial motion is to be combined with the appeal, the reviewing court must be prepared to receive evidence, at least as to those matters which depend on facts not of record. The absence of written briefs, for another example, may be more feasible where the court's primary, or perhaps exclusive, concern is with the correction of error. If exclusively oral argument is to be relied on, a rigid time limitation on counsel's presentation is not desirable, and so on. The point is that one procedural feature cannot be adopted unless consideration is given to how it fits in with other features of the system and unless accommodating adjustments are made.

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[1] For an American judge's perspective on some of these differences, see the remarks of Judge Harold Leventhal in A Criminal Case in England, 10 Am.Crim.L. Rev. 263, 322-25 (1971).

In American appellate practice a major cause of delay is the time consumed by lawyers for both sides in writing briefs. Typical appellate rules of practice allow thirty days for the appellant to file a brief, after some point such as the filing of the record. Once the appellant's brief is in, the appellee typically has thirty days to submit a brief. Under some rules the appellant may then have still more time within which to prepare a reply brief. Extensions of these times can be and often are granted. Actual time consumed by the brief-writing process is often substantially in excess of the time authorized by the rules.[2] The whole purpose of those lawyers' writings is to convey to the court the parties' legal contentions and the relevant, supporting legal authorities. They are means of communication. In the English system the written grounds of appeal and the oral argument perform this function. American judicial uneasiness over dispensing with briefs might be alleviated, as suggested earlier, by requiring grounds of appeal or a docketing statement to spell out the appellant's contentions and theory at a bit greater length than is the English custom. Citations to pertinent legal authorities could also be required. Court rules might limit the length of such a document, perhaps to three double-spaced typed pages. If American judges feel too insecure without any briefs, another variation would be to have the professional staff make a decision prior to judicial action as to precisely the issues on which briefs were needed. Counsel could then submit limited briefs directed solely to these issues. Counsel's writing time and judge's reading time would both be saved. Another variation would be to have oral argument without briefs and then have the court itself, at the conclusion of the argument, indicate the precise issues on which it desired briefs. That procedure would eliminate the brief-writing delay prior to hearing but would leave it open to the court to obtain briefs--and to tailor them to specific points--if they still seemed important after the argument.

Some American appellate courts are moving in exactly the opposite direction from the no-brief orality of the English system. They are increasingly dispensing with oral argument and relying entirely on briefs. The current Fifth Circuit practice is an example. Not holding oral argument saves some time, but it does not reach the time consumed in brief writing and in opinion preparation --two of the largest segments of time in the appellate process. The recent trend stems in part from the view of many American appellate judges that oral argument is largely useless. In numerous criminal appeals this is so because those appeals are devoid of merit. Apart from that, to a large extent it is the written brief which contributes to the American attitude. The brief is a crutch. It captures the attention of all concerned. Many judges expect little from oral argument, and that is what they get. Lawyers sense those low expectations and perform accordingly. Without the crutch of a written brief, court and counsel would concentrate their intellectual energies on the oral hearing; the quality and usefulness of arguments would almost certainly improve. But again only an actual try-out can prove or disprove the desirability of the English procedure in an American court as a more expeditious means, at least in some cases, of conveying the parties' positions in a meaningful way.

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[2] Illustrative figures showing this are given in Chapter VIII.

LIMITING ORAL ARGUMENT

Charles R. Haworth*

I The Local Circuit Rules

Under Federal Rule of Appellate Procedure 47,[46] all eleven circuit courts of appeals have either instituted or authorized some method of short-circuiting the normally leisurely pace of appellate review.[47] These methods limit or dispense with oral argument and include deciding cases without rendering a written opinion. The use of these methods varies greatly within the circuits, and some analysis of the various circuit rules is helpful to understand the extent these summary procedures have been incorporated into the appellate process.

Apparently, only the Second Circuit does not have a local rule enabling it to dispose of any regularly docketed case without some oral argument.[47] Under local rule, the Fourth,[48] Sixth,[49] and Seventh[50] Circuits

47. The pertinent part of 2D CIR. R. 34 provides only that:
(d) The judge scheduled to preside over the panel will pass on requests for time for argument additional to the 30 minutes generally allowed by Rule 34(b). Upon the basis of a review of the briefs, he may also fix a time for argument less than 30 minutes if he concludes that a smaller amount of time will be adequate. The clerk will notify counsel of all such rulings.
This rule apparently does not contemplate the absolute denial of oral argument.

48. The pertinent part of 4TH CIR. R. 7(b) provides:
If all of the judges of the panel to which a pending appeal has been referred [by the chief judge under 4TH CIR. R. 7(a)] conclude that the appeal is wholly without merit, the appeal will be dismissed, or the judgment affirmed.

49. The Sixth Circuit Rules, in pertinent part, provide:
6TH CIR. R. 7(e):
Summary Calendar. Whenever the court, sua sponte or on a suggestion of a party, concludes that a case is of such character as not to justify extended oral argument, the case may be placed on the summary calendar.
In all such cases, except on special order, each side will be permitted only fifteen minutes for the argument, and only one counsel will be heard on the same side. No separate summary calendar will be maintained. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court, and such cases may or may not be heard on days set for oral

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dispense with oral argument if the appeal is frivolous or the court is without jurisdiction. The remaining circuits—District of Columbia,[51] First,[52] Third,[53] Fifth,[54] Eighth,[55] Ninth,[56] and Tenth[57]—now have

argument of cases not on the summary calendar.

6TH CIR. R. 8(b):

> [W]hen it is apparent from the record that the appeal is not within the jurisdiction of the Court or that it is manifest that the questions on which decision of the court depends are so unsubstantial as not to need further argument, the court will enter an appropriate order.

6TH CIR. R. 9:

> If upon the hearing of any interlocutory motion or as a result of a review under Rule 3(e), it shall appear to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed.
>
> Whenever a panel of this Court reviewing an appeal under procedures initiated under Rules 3, 8 or 9 concludes that clear error requires reversal or vacation of a judgment or order of the District Court or remand for additional proceedings in the District Court the panel may enter an appropriate order to accomplish this result.

50. The most recent addition to this category is the Seventh Circuit, which added its Rule 22 on June 26, 1972, effective that date. *See* 460 F.2d, No. 2, pp. XLVI-XLVIII (Aug. 14, 1972) (advance sheet). The rule is limited to cases involving unsubstantial questions, but adds an interesting twist to the decision of unsubstantial appeals, in that the rule requires that a motion to affirm be accompanied by an order, not exceeding two pages, "which fairly describes the substance of the appeal and states the reasons for affirmance." This rule apparently contemplates that the moving attorney will perform the function that staff law clerks have been performing for years—the preparation of proposed per curiam opinions in frivolous or unsubstantial pro se appeals.

51. *See* D.C. CIR. R. 11(e):

> Whenever the court, *sua sponte* or on suggestion of a party, concludes that a case is of such a character as not to justify oral argument, it may, after causing notice to be given by the Clerk to the parties of that determination, proceed to dispose of the case without such argument. Motions for restoration to the argument calendar will not ordinarily be entertained by the court.

Under D.C. CIR. R. 11(d) and 12(b), cases may also be placed on a summary calendar and fifteen minutes oral argument given to a side.

52. 1ST CIR. R. 12 (in pertinent part):

> At any time, on such notice as the court may order, on motion of appellee or *sua sponte*, the court may dismiss the appeal or other request for relief or affirm and enforce the judgment or order below if the court lacks jurisdiction, or if it shall clearly appear that no substantial question is presented. In cases of manifest error the court may, similarly, reverse. . . .
>
> If the court concludes, after adequate opportunity for briefing, that even though there may be a substantial question, oral argument would not assist it, the Clerk will so advise counsel. . . .

The First Circuit has not extensively screened out cases as not needing oral argument. In 1971 and 1972, only 149 cases of 805 cases screened were denied oral argument. The figures do not include cases dismissed on motion. Letter from Dana H. Gallup, Clerk of the First Circuit, to the author, October 18, 1972.

53. 3D CIR. R. 12(6):

> Oral Argument. Oral argument may be dispensed with, or shortened, by an unanimous order of the panel to which the case has been assigned. The clerk shall notify in writing the parties or their counsel of any such action.

rules authorizing the court to decide any case without oral argument if the judges decide that oral argument is unnecessary. At first glance, these local rules were apparently designed to save a small amount of judge-time by eliminating thirty minutes here, an hour there, that is con-

54. 5TH CIR. R. 18:

> Rule 18. Summary Calendar
>
> (a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.
>
> (b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.
>
> (c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

55. 8TH CIR. R. 6(2):

> A Screening Panel may classify a case as one requiring a full argument—30 minutes, an abbreviated argument—15 minutes, or as one requiring no argument.

56. 9TH CIR. R. 3(a):

> *Classes of cases to be submitted without oral argument, or with limited argument.* Pursuant to Rule 34(b), Federal Rules of Appellate Procedure, there is hereby established a class of cases to be submitted without oral argument except as provided below. There may be placed in this class any appeal, petition for original writ, or petition for review or enforcement of an administrative order in which (a) one party is appearing in forma pauperis and in propria persona and will not be present to participate personally in the argument, or (b) the questions raised on appeal are, in the unanimous opinion of a panel of the court, of such a nature that oral argument would not be of assistance to the court.
>
> When a case has been classified for submission without oral argument, the Clerk shall give the parties notice in writing of such action. Oral argument will be had in all other cases, as provided in the following paragraphs of this rule, except where the parties stipulate to submission without argument or where the court otherwise orders.

After about a year's experience with its original Rule 3(a), the Ninth Circuit dropped a provision allowing attorneys to obtain by request to the clerk at least fifteen minutes oral argument. Letter from The Honorable Frederick G. Hamley, Circuit Judge, to the author, October 18, 1972.

57. By order of November 13, 1972, the Tenth Circuit substantially revised its local rules. *See* 467 F.2d No. 4, pp. LII-LXIV (Dec. 18, 1972) (advance sheet). The clerk now maintains four separate calendars, labeled A, B, C, and D. The Chief Judge of the circuit, on the basis of a docketing statement filed by the appellant, *see* 10th CIR. R. 7, assigns the case to the appropriate calendar. Calendar A cases proceed in accordance with the Federal Rules of Appellate Procedure. Calendar B cases proceed on typewritten briefs on an accelerated time schedule. Calendar C cases are cases from Calendar B that were screened by a special panel after the briefs were filed and determined not to need oral argument. Calendar D cases are cases in which the court, either sua sponte or on motion of the appellee, is considering summary disposition. *See* 10TH CIR. R. 9. The docketing statement required by Rule 7 appears to be nothing more than a simplified trial memorandum containing only a statement of facts, specification of error, and a list of cases allegedly supporting appellant's position. *Cf.* H. WEIHOFEN, LEGAL WRITING STYLE 157-58 (1961).

sidered wasted by listening to argument on a case in which the outcome is certain. But the rules in courts dispensing with oral argument in any case so designated by the court are not limited to frivolous or unsubstantial questions. The broad authority granted the courts by the local rules evidences a belief by the judges that almost any case may be properly decided without oral argument. This assumption, as will be shown later, may be without merit.[59]

The manner in which cases are screened by the courts, either to eliminate frivolous and unsubstantial appeals or to identify those cases in which the court determines that oral argument would not be helpful, varies greatly. The least extensive procedure is that of the Second Circuit, where the presiding judge of a three-judge panel may make the determination prior to oral argument that a particular case does not need the full thirty minutes per side.[60] In the next category are the First,[61] Third,[62] and District of Columbia[63] Circuits, where the determination regarding oral argument is made by the panel that is to hear the case. In the final group are those courts that have established rather elaborate pre-hearing screening procedures. In the Fourth,[63] Fifth,[64] Sixth,[65] and Eighth[66] Circuits, the Chief Judges are authorized by local rule to appoint panels of judges to screen the pending appeals. In the Ninth Circuit,[67] law clerks do the initial screening but the final determination is made by a three-judge panel that rotates weekly.[68] In the Tenth Circuit the Chief Judge, on the basis of a docketing statement filed by the appellant, makes the initial determination whether the case is to be argued for fifteen or thirty minutes. A special panel then reviews his

63. 4TH CIR. R. 7(a).

64. 5TH CIR. R. 17. *See* note 100 *infra*.

65. 6TH CIR. R. 3(e). The Sixth Circuit utilizes this authorized procedure by having two standing panels that devote one day of each session to screening appeals. Special panels decide motions under 6TH CIR. R. 9. Phillips, *A Survey of the United States Court of Appeals for the Sixth Circuit*, 1970 U. TOLEDO L. REV. 63, 72.

66. 8TH CIR. R. 6(1).

67. 9TH CIR. R. 3. *See In re* Amendment of Rule 3, 440 F.2d 847 (9th Cir. 1970).

68. From September 1970 to August 1972, the law clerks in the Ninth Circuit screened 2200 appeals. Of that number, 692 were recommended for disposition without oral argument and 624 were so disposed of. Letter from The Honorable Frederick G. Hamley, to the author, *supra* note 56.

initial determination of fifteen minute cases and may conclude that some need no oral argument.[69]

The procedure in the Second Circuit appears well-suited for the limited determination that the presiding judge can make regarding the length of oral argument, since he cannot deny oral argument to any party.[70] Those circuits that allow the panel itself to make the determination do not have a substantial travel problem in convening a three-judge panel.[71] For example, the District of Columbia Circuit can easily leave the determination regarding oral argument to the panel that is assigned to the case since elaborate travel plans for the judges do not have to be rearranged if all cases for a particular week happen not to need oral argument. But in the Fifth Circuit, the time expended in assembling a three-judge panel for a week makes it imperative that once the judges are assembled, they have a full week of cases set for oral argument.[72] The Tenth Circuit procedure puts an extraordinary burden on the Chief Judge, who already has additional administrative burdens,[73] and would reduce even further the time he has available to write opinions.

* * * *

Professor Paul Carrington, in his comprehensive work on the courts of appeals, asserts that "the time of the appellate judges that is actually spent in hearing argument is too small a fraction of their total effort to make its compression an effective means of significantly increasing the rate of decision making."[145] In fact, he asserts, this judicial function extracts only about 200 hours per year in each judge's time.[146] Why, then, do the figures for the Fifth Circuit evidently show a rather remarkable increase in productivity with the institution of screening? To help reach an answer, one must consider fiscal year 1968, the last year before any screening, and 1970, the first full year of screening. This approach isolates the figures from the effects of Rule 21.[147] Between 1968 and 1970, the opinion production of the active judges increased 34.4 percent.[148] Why this substantial increase?

145. Carrington, [82 HARV. L. Rev. 542, 558.] See also Jones v. Superintendent, 465 F.2d 1091 (4th Cir. 1972).

The answer to Professor Carrington's assertion and the success of screening in moving cases involves several procedures in the Fifth Circuit and the geographical setting of the court. First, the significant expenditure of judicial time devoted to cases orally argued occurs in preparing for argument rather than listening to it. In the Fifth Circuit, all judges have read at least the briefs prior to oral argument. Additionally, each law clerk for the judges on the panel for the week has prepared pre-argument memoranda on one-third of the calendared cases for the week. These memoranda vary greatly from clerk to clerk, generally depending upon the value the clerk's judge places on them. They range from extensively researched papers to brief synopses of the contentions of the parties, the main legal authorities cited, and a recommended resolution, which are then used chiefly as a night-before-argument refresher on the case.[149] Even before screening procedures were introduced, many man-hours went into a case even before it was argued orally. Since only one issue is under consideration at the screening stage—the necessity of oral argument, not whether the case is to be reversed or affirmed—its determination, even by all three judges, takes less time than the memos.[150] Also, under the old system there was no guarantee that the clerk and judge who prepared the pre-argument memorandum on a case would eventually write the court's opinion. In fact, the origin of the memorandum and the origin of the opinion, as a result of the designation by the presiding judge of the panel, rarely coincided. This practice resulted in duplication of effort, since a judge and his clerk, although having the benefit of the memo, did not do the research on the case. This practice of not matching memo-writer with opinion-writer must have wasted some judicial time. Conversely, under the Fifth Circuit screening procedures, the initiating judge, if a case by unanimous vote of the screening panel is placed in Class II and thus on the summary calendar, writes the draft opinion that is distributed to

150. A recent Fifth Circuit law clerk has suggested that ordinarily a case may be screened by the clerk in fifteen minutes. Sweeney, *In the United States Court of Appeals*, in *Law Clerkships—Three Inside Views*, 33 ALA. LAW. 155, 171, 176 (1972). The judge then makes his independent determination. *S.J. Res. 122 Hearing* 55.

other members of the panel. Under that procedure, the judge and law clerk who have done the initial spadework on a case to determine if it is appropriate for the summary calendar are also the ones who do the initial draft opinion.[151]

Coupled with the geography of the Fifth Circuit, a more significant reason for the apparent success of summary procedures was the sharp decline, rather than the anticipated increase, in the number of actual court weeks needed to handle the cases orally argued. In 1967 the Fifth Circuit was literally at the end of its rope in holding the line at nine weeks of sittings per judge, even with the substantial use of visiting judges.[152] The court was able, after the institution of screening procedures, to reduce the number of weeks each judge sat from nine to seven.[153] On the surface, this savings appears to amount to only about forty hours of judicial time, figuring four hours of argument per day for a five day week. But the Fifth Circuit is geographically dispersed with judges residing in six southern states.[154] To compound the problem, the court is only authorized to hold sessions in six cities.[155] Furthermore, the clerk of the court and his staff reside in New Orleans, while the Chief Judge of the circuit resides in Houston. In adopting its screening procedures, the Ninth Circuit suggested, as a possible reason for the Fifth Circuit's success with screening, that the geography of the Fifth Circuit, like that of the Ninth Circuit, made it difficult for the judges to communicate with each other.[156] In these days of WATS lines and a federal communications system that enables Judge Brown in Houston to talk to Judge Dyer in Miami or Judge Bell in Atlanta to iron out the troublesome language in an opinion, it is submitted that the Ninth Circuit's explanation, although of some possible validity since it is easier to work out problems when one's fellow judges are just down the hall, does not help explain any significant increase in judicial productivity.[157]

151. From the several published descriptions of the Fifth Circuit's procedures, it is not clear whether, during the classification of an appeal, any memoranda or research is done by the intitiating judge, or, if it is, whether it is made available to the other two members of the screening panel if the initiating judge determines that the case should go on the summary calendar. Certainly it should if it is not. Similarly, any pre-argument work done on a Class III or IV case should be made available to the panel of judges that eventually hears the oral argument and writes the decision in the appeal.

156. *In re* Amendment of Rule 3, 440 F.2d 847, 848 (9th Cir. 1970).

Perhaps the real reason does, however, have something to do with the location of the judges. It is approximately 1200 air-miles from Miami to Austin, Texas, and the judges of the Fifth Circuit must literally "ride the circuit" to hold court. For a judiciary that is to the point of going anywhere to learn how to save five minutes,[160] perhaps the best advice is to stay home more. A moment's reflection will reveal that assembling a three-judge panel, law clerks, and staff, even in a metropolitan center, is time-consuming and significantly disrupts a court's normally reflective atmosphere. Add to this disruption the normal expenditures of time necessary for anyone to travel—arranging personal and court affairs for at least a week's absence, mailing original records in pauper cases to the site of the hearing, the final preparation of pre-argument memoranda, selection of work for "free" hours, and a dozen other details—and the time wasted in traveling is apparent. To these expenditures of time must be added conference time for the judges every afternoon to try to reach at least a tentative decision in the cases argued. Also, either the clerk of the court or one of his deputies is present at each court session. This use of personnel that is always in short supply reduces the work-product of that office, which is vital to the smooth operation of the court.

Taken together, these normal and necessary interruptions in the smooth functioning of the judicial process undoubtedly take time that could be used to better advantage in writing opinions and disposing of cases. The Fifth Circuit may have realized this, for it now plans to hear all cases in New Orleans for the 1972-73 term.[161] New Orleans is the residence of two judges and the clerk and it is centrally located within the circuit. Also, this analysis might suggest that the screening procedures that work well in the Fifth Circuit might not work as well in the Sixth Circuit, for example, where the court holds five regular three-week sessions each year in Cincinnati.[100] The same would be true for state courts that traditionally sit in one location. Those courts should study the possible detriments in denying or limiting oral argument and may well then conclude that the burdens outweigh the possible benefits.

160. Phillips, *A Survey of the United States Court of Appeals for the Sixth Circuit*, 1970 U. TOLEDO L. REV. 63, 68. The Sixth Circuit has, however, shown some improvement in its docket situation since instituting its screening procedures in 1967. *See* Goodpasture v. TVA, 434 F.2d 760, 765 n.1 (6th Cir. 1970) (app. A). From 1967 to 1970 that court has increased its production 46 percent and reduced its backlog from 686 cases to 499. The per-judge production increased 29.1 percent from 86 cases per year in 1967 to 111 cases per year in 1970. This increased production enabled the court in June 1970 to hear "every appeal which was ready for argument for the first time in 35 years." Edwards, *supra* note 29, at 65.

II OBJECTIONS TO LIMITING ORAL ARGUMENT

A. *Denial of Due Process*

Even before the Fifth Circuit promulgated its local rules establishing its screening procedures and summary calendar, the court met a constitutional challenge to its power to dispose of an appeal of right without oral argument.[166] In *Groendyke Transport, Inc. v. Davis*,[167] the NLRB moved that the Fifth Circuit summarily reverse an order of the district judge enjoining enforcement of the Board's order that Groendyke, the employer, furnish to a Regional Director a list of all employees in units eligible to participate in an election ordered by the Board.[168] Although it is not clearly indicated in the opinion that the employer raised the due process problem, Chief Judge Brown, probably with his eye on the screening procedures that had been adopted shortly before the opinion was released,[169] took the occasion to lay the groundwork for disposing of any due process objections to those summary procedures.[170] Judge Brown held that in at least two circumstances, both present in *Groendyke*, summary procedures in the courts of appeals are proper: cases in which time, either because of important public policy reasons or possible prejudice to the parties, is truly of the essence; and cases in which the outcome is certain or the appeal is frivolous.[171] Recognizing that parties are usually assured a "hearing,"[172] Judge Brown held that written briefs would suffice since "[o]ral argument, as such, is rarely, if ever, so essential to elemental fairness as to orbit to a constitutional apogee."[173] On the basis of this power to deny oral argument, the court summarily reversed the district court.[174]

This decision did not, of course, answer all potential objections to the Fifth Circuit's summary procedures, for, as noted earlier,[175] Class II cases (decided without oral argument) are not solely frivolous or unsubstantial appeals or appeals in which time is of the essence. Thus, in *Huth v. Southern Pacific Co.*,[176] Judge Brown, again writing for the court, suggested that the screening process and the denial of oral argument in particular cases after full consideration of the need for oral argument and the unanimous judicial determination that it was not

167. 406 F.2d 1158 (5th Cir.), *cert. denied*, 394 U.S. 1012 (1969).

168. The Board had issued the order pursuant to its rule announced in Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966).

176. 417 F.2d 526 (5th Cir. 1969).

needed, met the demands of due process.[177] To reach this conclusion, the judge relied almost exclusively on the Supreme Court's opinion in *FCC v. WJR, The Goodwill Station*.[178] In that case the FCC had denied without oral argument a motion by WJR for reconsideration and hearing on the granting by the FCC of a license to another radio station whose signal allegedly would interfere with WJR's present signal and with WJR's signal if clear channel broadcasting were approved by the FCC in the future. On appeal, the District of Columbia Circuit Court held that procedural due process under the fifth amendment required oral argument

> on every question of law raised before a judicial or quasi-judicial tribunal, including questions raised by demurrer or as if on demurrer, except such questions of law as may be involved in interlocutory orders such as orders for the stay of proceedings *pendente lite*, for temporary injunctions and the like.[179]

The Supreme Court unanimously reversed. In doing so, it did little to clear up the law on the question of when, if ever, oral argument is required.[180] As seen by the Court, the issue was "the extent to which due process of law, as guaranteed by the fifth amendment, requires federal administrative tribunals to accord the right of oral argument to one claiming to be adversely affected by their action, more particularly upon questions of law."[181] The Court, recognizing that it had apparently in the past held oral argument necessary to a fair hearing in some situations and not in others,[182] found the circuit court's blanket statement of the requirement "not to be the law," but in conflict with the "Court's rulings, in effect, that the 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 indeed even substantial ones*, are raised."[183] On the facts presented, the Court was unable to find any "semblance" of due process deficiency in the FCC's methods,[184] primarily because the issue was one of law.[185]

178. 337 U.S. 265 (1949), *noted in* 48 MICH. L. REV. 1186 (1950); 21 MISS. L.J. 276 (1950); 25 NOTRE DAME LAW. 353 (1950).

179. 174 F.2d 226, 233 (D.C. Cir. 1948) (en banc), *noted in* 49 COLUM. L. REV. 579 (1949); 37 GEO. L.J. 261 (1949).

180. *See* K. DAVIS, ADMINISTRATIVE LAW § 7.07, at 435 (1958).

181. 337 U.S. at 267.

Earlier Supreme Court decisions provide little guidance in resolving the question of when oral argument is required. *Londoner v. Denver*,[186] noted in *WJR* as a case holding oral argument necessary to satisfy the due process clause, concerned a Denver City Council ordinance apportioning costs of paving a street among abutting property owners. In the proceedings leading to the enactment of the ordinance, the property owners were given the opportunity to file written complaints and objections, but "were not afforded an opportunity to be heard upon them."[187] The Court first observed that in proceedings of this nature many requirements of a strictly judicial proceeding may be dispensed with, but then held that "even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."[188] Because written objections and complaints had apparently been allowed, the decision seems to support the right to oral argument. The Court may have been merely distinguishing, however, between the right to object and the right to argue the objection, and the decision may stand for no more than the proposition that due process requires an argument, either written or oral. But only seven years later in *Bi-Metallic Investment Co. v. State Board of Equalization*,[189] the Court held that in a suit to enjoin state officers from increasing the valuation of all taxable property in Denver by forty percent an individual property owner did not have the right to be heard, even in writing. These two cases may be easily reconciled, at least on the point of whether any hearing must be held, since *Londoner* involved essentially adjudicative facts that differed with each individual landowner's factual situation, but *Bi-Metallic* dealt with a legislative decision—should the valuation be raised across-the-board—that adversely affected all equally.[190]

* * * *

The Supreme Court cases discussed thus far have involved administrative agency denials of oral argument or a hearing, not the right to oral argument in the appellate courts. Although the reasons have not been clearly articulated, no case has ever held that due process requires oral argument before an appellate court. The best evidence that oral argument is not required, at least before the courts of appeals recently began to deny oral argument in selected cases and to write opinions to

186. 210 U.S. 373 (1908).

justify the practice, was the Supreme Court's practice of denying oral argument in some cases.[194] These cases do not discuss the issue, however, and dicta from several criminal cases, although supportive of the denial of oral argument, are not conclusive. For example, in *Price v. Johnston*,[195] the Court was presented with the issue whether the court of appeals had the power to order the production of a prisoner for oral argument of his habeas corpus appeal. The Court noted in passing that oral argument was "not indispensable" and "not an essential ingredient of due process."[196] Other criminal cases go no further than to support the proposition that a frivolous appeal may be summarily dismissed and that all appellate cases, paid or non paid, civil or criminal, must be handled with an even hand.[197]

Surprisingly, no historical basis exists for the contention that due process protects the right to oral argument in appellate courts, although the issue was little discussed until recently. In times when litigation proceeded at a more leisurely pace than it does even today,[198] oral argument was highly valued, extensively used, and was not denied except in rare circumstances. One of the earliest cases discussing the legal implications of a remarkably modern screening procedure was *Schmidt v. Boyle*, decided in 1898.[199] Although dealing with a state constitutional provision, the Nebraska Supreme Court found no conflict between the requirement of an appellate "hearing" and summary affirmance of a case wholly without merit and appealed solely for delay.[200] Before the decisions involving screening procedures, the issue had appeared in a civil rights action for deprivation of constitutional rights[201] and a section 2255 motion for post-conviction relief.[202] The denial of oral argument in both situations was not found to be a violation of any constitutional right. Finally, in addition to the Fifth Circuit in the opinions by Chief Judge Brown discussed earlier, other circuit courts have considered the due process problem in screening procedures and have concluded that oral argument is discretionary.[203]

* * * *

Since the federal government has granted its litigants, civil and criminal alike, an almost unlimited right to appeal, which until recently included an opportunity for oral argument for a reasonable time, may it thus be argued that before the courts of appeals can deny oral argument they must provide notice and a hearing on that issue before the final decision? Perhaps the Fifth Circuit had this problem in mind when Judge Bell noted that all litigants assigned to the summary calendar were notified of that fact and given an opportunity to object.[204]

Several considerations seem to militate against a conclusion that notice and hearing are required. First, due process protects liberty and property. Although these concepts are broad and ill-defined, it is difficult to argue that oral argument on appeal is a liberty or property interest to which a litigant may show himself to be entitled. To be sure, by oral argument a litigant is usually seeking to protect a liberty or property interest that is the subject matter of the litigation, but oral argument itself is not that interest. Secondly, the rules of the courts of appeals create for all litigants appealing to that court after the promulgation of the rules only a mere expectancy that oral argument may be granted, but no interest in it or legitimate claim to it.[205]

194. *See, e.g.*, Gianfala v. Texas Co., Holmes v. Atlanta, and DeLucia v. New Jersey, all reported at 350 U.S. 879 (1955), and all decided without oral argument. Cases of that nature, relatively common in the Court, probably involve frivolous or unsubstantial issues. *See, e.g.*, Turner v. Arkansas, 407 U.S. 366 (1972). The Court has also disposed of vital issues without oral argument. *See, e.g.*, Santa Clara City v. Southern Pac. R.R., 118 U.S. 394 (1886), in which the issue whether the fourteenth amendment applied to corporations was not argued orally before the Court. 118 U.S. at 396. *See also* Burger, *supra* note 99.

195. 334 U.S. 266 (1948).

197. United States v. Johnson, 327 U.S. 106, 113 (1946) (appeal should have been dismissed as frivolous); *cf.* Coppedge v. United States, 369 U.S. 438, 461 (1962) (dissenting opinion) (frivolous appeal may be dismissed without oral argument). *Coppedge* and Nowakowski v. Maroney, 386 U.S. 542, 543 (1967), support screening procedures if applied to both civil and criminal cases in an even-handed manner.

199. 54 Neb. 387, 74 N.W. 964 (1898).

201. Torzillo v. Goldman, 190 F. Supp. 504 (D.N.J.), *aff'd per curiam*, 293 F.2d 273 (3d Cir. 1961), *cert. denied*, 368 U.S. 991 (1962).

202. United States v. Koptik, 300 F.2d 19 (7th Cir.), *cert. denied*, 370 U.S. 957 (1962).

203. United States v. Brown, 456 F.2d 569 n.1 (3d Cir.), *cert. denied*, 408 U.S. 923 (1972); *In re* Amendment of Rule 3, 440 F.2d 847 (9th Cir. 1970); Magnesium Casting Co. v. Hoban, 401 F.2d 516 (1st Cir. 1968), *cert. denied*, 393 U.S. 1065 (1969). The courts have also uniformly held that no denial of due process occurs when oral argument is denied on a motion for rehearing or rehearing en banc. SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1309 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971); United States v. Gori, 282 F.2d 43 (2d Cir. 1960), *aff'd on other grounds*, 367 U.S. 364 (1961); Jergens v. Gallop, 40 So. 2d 775 (Fla. 1949) (en banc).

Although the Supreme Court has not yet reviewed a case challenging screening procedures in the courts of appeals, if it ever decides the issue it will probably hold that oral argument on appeal is not so essential to a just determination of the case that it should become an ingredient of procedural due process.[222] This is as it should be. The problems of the lower federal courts are of a nature that do not allow easy solution, and the first few years of experimentation is not the time for the Court to cast a requirement of oral argument in every case in a rigid constitutional mold. The constitutional right to due process of law, which involves the right to be heard, is satisfied by assuring parties the right to full and fair hearings, including oral argument in most instances, at the initial stage of the proceedings.[223] Due process only requires one hearing, not two.[224] Also, appellate hearings primarily involve only questions of law. The necessity for a party to mold his contentions and testimony as the issues develop is not present as it is in the court of first instance. Thus, until more is known of screening and summary procedures and their effects on appellate decisions, the courts should be free from constitutional restraints to make the judicial determination that oral argument may be eliminated in a particular case.[225] If in the future it is shown that screening and summary procedures produce undesirable effects not apparent or certain at this time, court rules, not the Constitution, can and should be adjusted to take those new factors into account.[226]

B. Violation of 28 U.S.C. Section 46

Two paragraphs of section 46 of the Judicial Code[227] refer to the composition of the courts of appeals as they normally decide cases. Under section 46(b): "In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs." In the next paragraph, section 46(c) directs that "[c]ases and controversies shall be heard and determined by a court or division of not more than three judges. . . ." The critical words are "hearing and determination" and "hear" in section 46(b) and "heard and determined" in section 46(c).

222. The Court has had at least one opportunity to consider the constitutionality of the Fifth Circuit's summary calendar. In Ambers v. United States, 416 F.2d 942 (5th Cir. 1969), *cert. denied*, 396 U.S. 1039 (1970), petitioner's counsel argued in his petition for a writ of certiorari that denial of oral argument limited a criminal defendant's right to appeal and was thus a violation of due process. Petitioner's Petition for Certiorari at 7-9. A petition for certiorari attacking on due process grounds the Ninth Circuit's denial of oral argument has been denied. Ho See v. United States Court of Appeals, Ninth Circuit, 41 U.S.L.W. 3472 (U.S. March 6, 1973) (No. 72-878).

The contention could be, and indeed has been, made that these provisions require the courts of appeals literally to "hear" the oral arguments of counsel.[228] The statutory history of section 46 and earlier interpretations of the meanings of these basic phrases do not support that interpretation of either section 46(b) or (c).

Section 46, as enacted in 1948 as part of the general revision of the Judicial Code, was, according to the Reviser's Notes, derived in part from section 117 of the Judicial Code of 1911.[229] An inspection of section 117 reveals that section 46 of the 1948 Code bears little resemblance to its predecessor, which does little more than establish the circuit courts of appeals with three judges to a court.[230] In neither that earlier section nor any other section of the 1911 Act was any reference made to any discretion or duty to hear or determine any appeals. But the report of Senator Wiley from the Committee on the Judiciary, in explaining the need for the 1948 codification and the reasons for certain changes, stated that "many noncontroversial improvements have been effected which, while individually small in themselves, add up to a very substantial improvement in and modernization of the law relating to the Federal judiciary. At the same time great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval."[231] Had, however, a substantial change been incorporated into the Act through the addition of the phrases quoted above? Probably not.

The Reviser's Notes to section 46 go on to explain that the revision of section 117 "preserves the interpretation established by the *Textile Mills* case. . . ."[232] *Textile Mills Securities Corp. v. Commissioner*,[233] the decision referred to by the Reviser, dealt with whether a circuit court of appeals with more than three authorized judges had the *power* to sit en banc.[234] In holding that circuit courts did have that power, Justice Douglas used the phrase "hear and decide" twice. Once it was used in merely explaining that the Third Circuit in its decision below

228. *In re* Louisiana Loan & Thrift Corp., 416 F.2d 898 (5th Cir. 1969), *cert. denied sub nom.* Holahan v. Reynolds, 397 U.S. 912 (1970). Petitioner's Petition for Certiorari 6-8.

233. 314 U.S. 326 (1941).

234. Until the Supreme Court's decision, the lower courts were divided on the issue. *Compare* Lang's Estate v. Commissioner, 97 F.2d 867 (9th Cir. 1938) (no power to sit en banc), *with* Commissioner v. Textile Mills Sec. Corp., 117 F.2d 62 (3d Cir. 1940) (power to sit en banc).

had been unanimous in its determination that all five judges (the court en banc) "were authorized to *hear and decide* the case."[236] Secondly, the Justice said that it could not be inferred from section 117 that "the provision for three judges is a limitation only on the number who may *hear and decide* a case."[237] Thus, it seems likely that Douglas's opinion was the source of the new language in the revised section 46.

That *Textile Mills* is indeed the source of the statutory language is supported by Justice Harlan's dissent in *United States v. American-Foreign Steamship Corp.*,[237] where, in tracing the history of section 46, he noted that:

> The "heard and determined" clause on which the Court relies appears in a sentence whose purposes were simply to codify the doctrine that a Court of Appeals had power to sit en banc, Textile Mills Corp. v. Commissioner, 314 U.S. 326, while making clear that the usual procedure was to be decision by a three-judge panel. It is not an unknown phenomenon in federal adjudication that a case, though heard by less than the entire tribunal, may be decided according to the majority vote of all. Cf. I.R.C. § 7460; see 2 Casey, Federal Tax Practice, 274-280. The traditional term, "heard and determined," in my view was designed to do no more than reflect the obvious inappropriateness of such a procedure to the deliberations of the Court of Appeals . . . .[238]

The genesis of Justice Douglas's phrase "hear and decide" may be traced directly to the opinion of the Third Circuit in *Textile Mills*. There the court reprinted its relevant local rules, which used the phrases "heard and decided" and "heard and determined."[239] In the text of the opinion of the court the term "hear and decide" was used in connection with a discussion of a possible construction of section 117 of the Judicial Code. But nowhere in either the Supreme Court's or Third Circuit's opinion is any indication given of the content and scope of what Justice Harlan referred to as a "traditional term."[240]

The roots of the phrase "hear and determine" are deep in English legal history. The phrase evidently derives from the English commission of Oyer and Terminer, which translated literally means "to hear and determine." The first mention of the commission in the English statutes was in a 1285 act limiting the use of the commission.[241] The phrase was also contained in the commission of Trailbaston (1304), which was a general commission to hear and determine certain crimes and trespasses.[242] It also appeared in a 1344 statute authorizing the established justices of the peace to hear and determine felonies and trespasses done against the peace.[243] Blackstone, in discussing the courts

237. 363 U.S. 685, 691 (1960).

with criminal jurisdiction,[244] mentions the local courts of Oyer and Terminer whose judges sat at the assizes by virtue of the commission of Oyer and Terminer, which directed the judges "to enquire, hear, and determine" all treasons, felonies, and misdemeanors.[245] Thus, it may be seen that the earliest uses of the phrase were in connection with trial court proceedings, where one would expect most of the proceedings to be oral.[246] But the obvious use of the phrase was to grant power to the judges of the early English courts, not to distinguish between oral and written proceedings. Probably because of continued heavy reliance on oral argument,[247] English precedents construing the exact meaning of the traditional term are not plentiful. Those authorities, however, support a narrow interpretation of "hear and determine" that requires only briefs and not an oral argument before a reviewing tribunal.[248]

The American authorities construing the term have reached a similar result. The cases recognize that the phrase is an ancient one usually connected with the requirement of a trial or trial-type proceeding in a court of first instance.[249] Instead of focusing on the meaning of the individual words, the courts, true to the historical basis of the phrase in the commission of Oyer and Terminer, have construed the phrase as an essential ingredient of the jurisdiction of the court, enabling it to decide all the issues and contentions presented by the parties, rather than a requirement that cases be heard orally by the court.[250] Although some authority to the contrary exists,[251] the weight of authority also supports the additional proposition that "hear" does not necessarily mean with the ears.[252]

These interpretations of the traditional terms used in section 46 support the Supreme Court's view of the meaning and intent of the drafters of that section. In *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*,[253] the Court dealt with an assertion that a litigant was granted the right by section 46(c) to have an application for hearing

249. Niles v. Edwards, 95 Cal. 41, 30 P. 134 (1892); Sandahl v. Des Moines, 227 Iowa 1310, 290 N.W. 697 (1940); Applegate v. Portland, 53 Ore. 552, 99 P. 890 (1909); Commonwealth v. Simpson, 2 Grant 438 (Pa. 1854). The textual discussion of the origin of "heard and determined" and its use in the King's Courts casts serious doubt on the statement in some cases, *see, e.g.*, Niles v. Edwards, *supra;* State *ex rel.* Turner v. Fassig, 5 Ohio App. 479, 26 Ohio C.C.R. (n.s.) 81, 28 Ohio C. Dec. 25 (1916), that the term had its origin in courts of equity.

253. 345 U.S. 247 (1953).

or rehearing en banc determined by all the members of the court of appeals. In rejecting this contention, the Court stated that ". . . § 46 (c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power."[254] This language is consistent with one legislative purpose in codifying the Court's earlier decision in *Textile Mills*,[255] that the circuit courts had the power to sit en banc. The other legislative purpose behind section 46 was to continue the tradition of the three-judge appellate court,[256] and section 46(b) authorizes "hearing and determination" by divisions. Arguably, this section should be read consistently with section 46(c) as only a grant of power to a three-judge panel, not as a regulation of the manner that the panels, in their discretion, exercise that power.[257]

These constructions of section 46 would undoubtedly leave the determination regarding oral argument, at least under that section, to the individual courts of appeals, in much the same manner as the Supreme Court left the determination of the meaning of the word "majority" in section 46(c) to the individual courts of appeals.[258] To have done otherwise, said the Court, would have involved the Court unnecessarily in the "internal administration of the Courts of Appeals."[259] In any further construction of the meaning of the language of section 46 the Court will probably permit each circuit to interpret whether "hear and determine" requires an oral presentation.

C. *Violation of Federal Rule of Appellate Procedure 34*

Perhaps the most persuasive legal argument that can be made against the use of screening procedures is that any denial of oral argument except in exceptional circumstances violates Rule 34 of the Federal Rules of Appellate Procedure. The pertinent part of Rule 34 provides that:

> (b) Time Allowed for Argument. Unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed 30 minutes for argument. . . . A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

258. Shenker v. Baltimore & O.R.R., 374 U.S. 1 (1963). In that case the Court deferred to the rules of the Third Circuit that required an affirmative vote of an absolute majority of active judges to set a case for decision en banc. *See also* FED. R. APP. P. 35(a).

The argument that may be made is two-pronged: the designation by the circuits of those cases to be decided without oral argument is too nebulous to constitute a "class of cases" under Rule 34; and the spirit of Rule 34 contemplates some oral argument in every case. Apparently neither of these arguments has been presented to any court for decision.[260] Under Rule 47, the courts of appeals may make only those rules governing their practice as are "not inconsistent with these rules,"[261] but the notes of the Advisory Committee made no mention of what was contemplated by the phrase "classes of cases."[262] Thus, the first issue is whether the rules of the courts of appeals limiting or denying oral argument in certain cases do so for a designated class of cases.

The criterion used by the courts of appeals, as stated in all local rules giving the circuits the power to dispose of cases without oral argument, is that oral argument would not be of assistance to the court.[263] The Ninth Circuit, in adopting its rules governing screening procedures, evidently appreciated the problem presented, and although not addressing it directly or at length, strongly suggested that a judicial determination that oral argument would not be helpful to the court and was not essential to a fair hearing was sufficient designation of a "class of cases" to pass muster under Rule 34.[264]

It is submitted that the requirement of Rule 34, that any local rule affecting oral argument apply to "classes of cases," means that the courts of appeals must apply a more objective and predetermined standard than that presently used by seven circuits.[265] The original proposed draft of Rule 34 allowed thirty minutes oral argument to the side, "unless otherwise provided by rule of court."[266] The Advisory Committee's Note recognized that the trend at that time had been to reduce the time for oral argument from forty-five to thirty minutes. The committee noted that "the proposed rule recognizes the trend toward a shorter time but specifically authorizes each circuit to determine the matter by local rule."[267] In that original form, the rule was no limitation at all on the courts of appeals to set any time limit desired on oral argument, but it contemplated arguments longer than thirty minutes, not the elimination of argument.

264. *In re* Amendment of Rule 3, 440 F.2d 847, 850 (9th Cir. 1970).

The rule, as enacted, provides a much narrower range for the individual circuit's discretion, in that any change in the thirty minute time limit must be either "for all cases or for classes of cases."[268] When the phrase "classes of cases" was introduced in Rule 34, it was also introduced into Rule 30, which deals with the appendix to the briefs. Rule 30(f) provides that "a court of appeals may by rule applicable to all cases, or to *classes of cases*, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require."[269] This provision was purportedly inserted at the insistence of the bench and bar of the Ninth Circuit, who wanted to retain the use of unprinted records.[270] Thus, the Ninth Circuit local rule now provides for appeals on the original and two copies of the record.[271] Clearly this rule is within the "all cases" provision of Rule 30. But what of rules not applicable to all cases? The Reporter for the Advisory Committee on Amendments to Rules noted in connection with Rule 30 that the courts "may adopt this practice [under Rule 30(f)] for all cases, for particular descriptions of cases (e.g., criminal cases; cases in which the record is relatively brief), or by order in any case."[272] Pursuant to this grant, several circuits have dispensed with the appendix in "classes of cases" such as appeals under the Criminal Justice Act, appeals in forma pauperis, appeals under section 2255, and social security appeals.[273] The probable intent of the Advisory Committee was that the "classes of cases" established under Rule 34 would be similar to those contemplated by Rule 30. If this is true, then the drafters of Rule 34(b) probably had in mind a "class of cases" determined by the type of case involved, not by whether the case was thought by the court not to need oral argument.[274] Thus, none of the local rules authorizing the courts to deny oral argument properly defines a class of cases and all are invalid under Rule 47.

Even if the introductory phrase in Rule 34(b) is not construed as disabling the courts of appeals from establishing classes of cases on the present nebulous basis, the only reasonable interpretation that can be given Rule 34, in light of the conditions existing in the courts of appeals at the time of the initial draft, is that the drafters thought that thirty minutes was enough time for each side, but if a particular circuit wanted to continue the former practice of allowing forty-five minutes or more to a side, then that determination should be made by the individual circuits. This interpretation accords with the Advisory Committee's Notes indicating that the "spirit of the rule [is] that a reasonable time should be allowed for argument."[275]

That seven circuit courts of appeals have evidently read Rule 34 differently from this proposed analysis is, of course, a strong argument against its validity. Also, any argument along the suggested lines would probably not be successful before the very judges that promulgated the local rules. Thus, any determination of the issue must be made by the Supreme Court under its authority to supervise the lower federal courts.[276] Certainly most counsel feel oral argument is of importance, and the uneven application that has resulted from the promulgation of the numerous local rules should not be tolerated in the basically uniform system instituted under the new appellate rules.

270. 43 F.R.D. 61, 149-50 (1968); Slade, *The Appendix to the Briefs: Rule 30 of the Federal Rules of Appellate Procedure*, 28 FED. B.J. 116, 122 (1968); Zuckman, *An Examination of the Federal Rules of Appellate Procedure*, 13 ST. LOUIS U.L.J., 564, 566 (1969).

271. 9TH CIR. R. 4.

272. Ward, *The Federal Rules of Appellate Procedure*, 28 FED. B.J. 100, 109 (1968).

273. 2D CIR. R. 30(2) (CJA and social security cases); 3D CIR. R. 10(3) (habeas corpus, § 2255, and in forma pauperis appeals); 6TH CIR. R. 10(a) (records one hundred pages or less; social security appeals); 7TH CIR. R. 9 (in forma pauperis, habeas corpus, § 2255, and social security appeals); 8TH CIR. R. 11 (CJA, § 2255, social security, and in forma pauperis appeals); 10TH CIR. R. 10(a) (records three hundred pages or less in civil cases, all criminal appeals).

274. Habeas corpus and § 2255 appeals had traditionally been decided without oral argument. Murphy v. Houma Well Serv., 409 F.2d 804, 807 n.9 (5th Cir. 1969).

275. Note of the Advisory Committee on Appellate Rules to FED. R. APP. P. 34. This conclusion is supported indirectly by Cohn, *The Proposed Federal Rules of Appellate Procedure*, 54 GEO. L.J. 431, 465-66 (1966). There, the author questioned whether a judge who was absent from oral argument should be allowed to participate in the court's decision, since the policy behind Rule 34 was supportive of oral argument. The underlying assumption in this argument, however, appears to be that 28 U.S.C. § 46(c) requires an oral "hearing." As demonstrated above in Part III B, this assumption is without foundation. Professor Bernard Ward, Reporter for the Advisory Committee, says of Rule 34 only that "[t]he matter of time is thus left ultimately to each court of appeal." Ward, *supra* note 272, at 110. It is perhaps significant that Professor Ward's comment is limited to time for argument, not whether it is to be granted at all.

276. *See, e.g.*, McNabb v. United States, 318 U.S. 332 (1943).

OPPOSITION TO CURTAILING OF ORAL ARGUMENT

American Bar Association

Action of the House of Delegates, August, 1974:

The Committee's third recommendation was approved by voice vote with an amendment presented by the Committee. As amended, it reads:

Be It Resolved, That the American Bar Association express 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 proportion of non-frivolous appeals and, *a fortiori*, to the disposition of cases prior to the filing of briefs.

B. DECISIONS WITHOUT REASONS AND ORAL OPINIONS

THE DECISION

Delmar Karlen*

In the United States, virtually all decisions are reserved and rendered in written form. Rarely is one pronounced from the bench.[1] Furthermore, an attempt is always made to have the judges agree upon an opinion for the court as a whole, or, if that cannot be done, to secure as broad a base of agreement as possible. While concurring opinions are not unusual, and even multiple separate dissents not unknown, it is not expected that each judge will express his own views. The ideal is a unanimous opinion for the court, or failing that, one majority opinion and one dissent.

In England, few decisions are either reserved or written. In the Court of Appeal, the practice is for each judge to express his individual views orally and extemporaneously immediately upon the close of argument. In the Court of Criminal Appeal, a single opinion for the court is customarily announced, but usually orally and extemporaneously. Only in the House of Lords and the Privy Council are decisions customarily reserved and written.

The American approach entails internal operating procedures different from those that are usual in England. Conferences, both formal and informal, are a prominent feature of American practice. So are exchanges of memoranda and draft opinions. On the other hand, since reading and writing are by their nature solitary operations, American judges—who are compelled to do much of both—spend many, if not most, of their working hours alone. They are frequently required to shift their attention from one case to another and then back again because, with cases being heard in batches, several are awaiting decision at any given time.

To the limited extent that the English practice conforms to the American pattern, the same internal procedures doubtless apply. In the great majority of English appeals, however, the judges follow a vastly different routine. Most of their working time is spent sitting together on the bench, listening and talking rather than reading and writing. The discussions they hold are brief and seemingly casual, although highly economical, by reason of the fact that cases are heard and decided one at a time. The judges' minds are already focused on the problems at hand and are not distracted by other cases which have been heard and are awaiting decision. They whisper between themselves on the bench, they converse as they walk to and from the courtroom, and they

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* Professor of Law, New York University. Reproduced from APPELLATE COURTS IN THE UNITED STATES AND ENGLAND 152-154; published by the N.Y.U. Press in 1963.

indirectly make comments to each other as they carry on Socratic dialogues with counsel. But they do not ordinarily exchange memoranda or draft opinions or engage in full-scale conferences.

In short, the appellate judge in England spends most of his working time in open court, relatively little in chambers, whereas his counterpart in America spends most of his working time in chambers, and relatively little in open court. This is neatly illustrated by the times of sitting for comparable courts in the two nations. In the United States Court of Appeals for the Second Circuit, each judge hears arguments one week out of four, and uses the other three for studying briefs and records on appeal, conferring with his brother judges, and writing opinions. In contrast, each judge on the English Court of Appeal hears arguments from 10:30 A.M. to 1 P.M. and from 2 P.M. to 4:15 P.M. day after day, five days a week, throughout each term.

Although English judges spend more time in the courtroom on each case, American judges probably spend more total time on each case—reading briefs, hearing arguments, doing research, conferring with their brother judges and their law clerks, and writing opinions. Many of the same intellectual labors that American judges perform episodically on and off the bench are performed by English judges in concentrated form on the bench.

English appellate procedure, however leisurely it may appear on the surface, is not dilatory. In civil cases heard by the Court of Appeal, the average time that elapses between the filing of the notice of appeal and the decision is about six months. In cases heard by the Court of Criminal Appeal, the average time is about one month. In a roughly comparable American court—the United States Court of Appeals for the Second Circuit—the average time for both civil and criminal cases is about nine months. This is not out of line with other appellate courts in the United States.

DECISIONS WITHOUT OPINIONS

Charles R. Hawôrth*

In addition to limitations on oral argument and motions to dismiss or affirm, the local rules for the District of Columbia,[85] First,[86] Fifth,[87] Eighth[88] and Tenth[89] Circuits now provide for affirmances without opinion.[90] The Fifth Circuit's Rule 21 is relatively explicit:

> When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.
>
> In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

The value of Rule 21 in expediting the disposition of cases should be obvious. A one line disposition of the entire case, as is contemplated by Fifth Circuit Rule 21, is even quicker than the traditional per curiam opinion. Furthermore, per curiam opinions, if not handled carefully, have a nasty habit of coming back to haunt a court, for enough has to

85. D.C. CIR. R. 13(c). The only guidance given in the rule regarding when decision without opinion is appropriate is that there is "no need" for an opinion.

86. 1ST CIR. R. 14. The only criterion stated in the rule for disposition without opinion is that no new points of law are believed to be involved.

87. 5TH CIR. R. 21.

88. 8TH CIR. R. 14. That rule is identical to 5TH CIR. R. 21.

89. 10TH CIR. R. 17. That rule is almost identical to 5TH CIR. R. 21.

90. Although not specifically provided for in its local rules, the Second Circuit regularly affirms a number of cases in open court without opinion. These cases are now being listed in the back pages of each volume of the Federal Reporter, 2d Series. *See, e.g.*, 458 F.2d 1406 (1972). The Ninth Circuit's Rule 21, effective March 1, 1973, *see* 471 F.2d No. 3, pp. LXII-III (March 19, 1973) (advance sheet), attempts to meet the problem of reporter systems filled with the relatively valueless opinions by designating categories of dispositions that are not to be published. Generally those categories coincide with the Fifth Circuit's description of cases for which an opinion would have no precedential value.

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be said to explain why the case is so easily decided. If that is done, then the court has revealed at least a tiny facet of its reasoning process.[91] This aperture into the court's reasoning and logic then enables commentators and lawyers either to invoke the case as authority or to criticize the court for its result or lack of explanation for the reasons behind the decision.[92] On the other hand, the notation "Affirmed. See Local Rule 21" safely protects the court (and in one way the jurisprudence) from hasty or ill-considered decisions that will have to be explained later. Its use, in appropriate cases, also alleviates to some degree the growing problem of reporter systems filled with lengthy opinions important only to the individual litigants. But the use of affirmances without opinions is certainly not to be encouraged in other than clearly deserving cases. That disposition fails to leave its track in the law and leaves litigants with the impression that no one really heard their appeal.[93] An erroneous result, although reached more quickly under the Rule, is still an intensely important matter for the litigants. That the error is safely hidden would be small consolation for them. The rule is also subject to abuse. An unexplained affirmance, reached through valid processes and indeed within one of the four criteria of Rule 21, is probably inconsequential. But any decision made under Rule 21 because the court was unwilling to expose itself to criticism for an erroneous or unjust result clearly constitutes an abuse of the court's power, subordinates justice to speed, and subverts needed improvements to illegitimate ends. In times of growing distrust of governmental authority, the courts perhaps ask too much when, by a one line disposition, they ask lawyers, litigants, and scholars to accept their uncriticizable result. More importantly, in their use of this tool a circuit court, performing its function in the federal system, should guard against the criticism that has been leveled at the Appellate Division of the Supreme Court of New York. Professor Hazard alleges that the courts of the Appellate Division "ceased long ago to write extended thoughtful opinions, except on rare occasions, and have become what they are in name, virtually a branch of the trial court rather than an intermediate tribunal for plenary review."[94]

Although not directly concerned with the Fifth Circuit's Rule 21, the recent Supreme Court decision in *Taylor v. McKeithen*[95] causes some concern about the Court's approach to lower court decisions rendered without opinion. In *Taylor* the Fifth Circuit had reversed without

91. *See* Comment, *Per Curiam Decisions of the Supreme Court: 1957 Term*, 26 U. CHI. L. REV. 279, 282 (1959). These problems are aggravated in the Supreme Court, which is watched so carefully by so many, but is not so extreme in a system of courts that rendered 3,195 signed and 2,179 per curiam opinions in 1970. 1970 ANNUAL REPORT 101.

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opinion the choice by the district judge of a legislative apportionment plan and had ordered the adoption of an alternative plan proposed by the attorney general of Louisiana. Vacating the judgment of the Fifth Circuit, the Supreme Court remanded the case to the circuit court for further proceedings. The Court was effectively ordering the circuit court to write an opinion explaining the reasons for the summary reversal. In so doing, the Court recognized the wide discretion vested in the courts of appeals to determine whether and how to write opinions. The Court felt, however, that one possible reason for the Fifth Circuit's reversal of the district judge "would present an important federal question," but that this basis should not be imputed to that court if the "actual ground of decision was of more limited importance."[96] Dissenting Justice Rehnquist characterized this action by the Court as requiring the Fifth Circuit to write an amicus curiae opinion to aid the Court.[97]

This decision should not affect the use of Rule 21 by the Fifth Circuit or the use of similar rules by other circuits, but it dramatically displays the limited utility of opinionless decisions. It must be remembered that the Fifth Circuit reversed, not affirmed, without opinion—an action not within the scope of Rule 21. The court's reasons for reversing may become clear in an opinion on remand, but the problem encountered is an unusual one. Little justification exists for the Fifth Circuit's action. Common courtesy to the district judge, if no other reason, demands an explanation of the reasons for reversal of a judgment, especially if the district judge has gone to the effort to write an opinion.[98] Secondly, a reversal without opinion of a published lower court opinion does more violence to the body of law than any affirmance could. Unless a single point of law with sharply defined contentions is involved, the reversal suggests that the law has been altered without an explanation of the reasons for that alteration. Thirdly, although the problem did not exist in *Taylor* since the district judge, after the Fifth Circuit's reversal, would not have been required to take any further action in the case, a summary reversal would usually leave the judge at sea as to his correct course of action. Fourthly, in the context of *Taylor*, the appearance is given that the court chose a summary reversal to avoid explosive legal, political, and racial issues concerning New Orleans. A summary affirmance, on the other hand, undoubtedly delights a district judge, makes no apparent change in the law, and if an opinion below is published, stamps the court's imprimatur on it. These differences, and the fact that the Supreme Court has decided without adverse comment at least one case affirmed summarily by a circuit court,[99] suggest that the Court will reject any challenge to the authority of the circuit courts to affirm without opinion.

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Pursuant to its Local Rules 17,[100] 18,[101] 20,[102] and 21,[103] the Fifth Circuit has established the most far-reaching screening and summary procedures of any circuit. Borrowing liberally from the Sixth and Tenth Circuits, the Fifth Circuit instituted its screening procedures on December 13, 1968.[104] By denying oral argument in selected appeals, the plan was designed to handle more rapidly not only the frivolous or unsubstantial case, but also the case presenting difficult issues.[105] In determining whether a case is to be argued orally, the sole criterion is whether the court would consider oral argument helpful in resolving the issues presented.[106] To facilitate this determination, the Fifth Circuit has recognized four classes of cases: Class I—frivolous appeals;[107] Class II—appeals that may or may not present substantial questions, but are judicially determined not to require oral argument; Class III—cases in which the court concludes only fifteen minutes oral argument per side would be helpful; and Class IV—cases that receive the full thirty minutes argument per side contemplated by Federal Rule of Appellate Procedure 34.[108] The screening procedure classifies each case. To arrive at this determination, the Fifth Circuit maintains five standing panels of three judges each.[109] As soon as all briefs are filed in each case or the time for filing briefs under the Federal Rules of Appellate Procedure has passed, the case is assigned randomly but by rotation to a

100. 5TH CIR. R. 17:

> In the interest of docket control, the chief judge may from time to time, in his discretion, appoint a panel or panels to review pending cases for appropriate assignment or disposition under Rules 18 or 20 or any other rule of this court.

102. 5TH CIR. R. 20:

> If upon the hearing of any interlocutory motion or as a result of a review under Rule 17, it shall appear to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed without the notice contemplated in Rule 18.

105. Bell, *supra* note 46, at 241. Nothing in the establishment or operation of screening and summary procedures in the Fifth Circuit supports the charge that it was designed to handle only frivolous criminal appeals. *See* Comment, *Screening of Criminal Cases in the Federal Courts of Appeals: Practice and Proposals*, 73 COLUM. L. REV. 77 (1973).

107. Class I cases are statistically insignificant. During 1971, only four cases were so classified, and only two in 1972. 1972 CLERK'S REPORT 37, 36, Tables S-5(a) and (b). As might be suspected, Class I cases are not used extensively, since the method of handling is the same if appropriate cases are placed in Class II. *S.J. Res. 122 Hearing* 111.

108. Murphy v. Houma Well Serv., 409 F.2d 804, 806 (5th Cir. 1969) (Brown, C.J.); Bell, *supra* note 46, at 240.

109. In Huth v. Southern Pac. Co., 417 F.2d 526, 527 (5th Cir. 1969), it was stated that four standing panels were maintained. The court, now at its full strength of fifteen judges, has increased the number of panels to five. *Cf.* 1972 CLERK'S REPORT 39, Table S-7.

judge on a standing panel.[110] The appointed judge then classifies the case. If the case is assigned to either Class III or IV, the process comes to an end and the case is returned to the clerk who sets the case on the docket for the appropriate length of oral argument.[111] If, however, the judge determines that the case should be placed into either Class I or II, he notifies the clerk, who transmits the briefs and record to the other judges on the standing screening panel. Only if the other two judges agree with the initial determination will the case be placed on the summary calendar and thereby denied oral argument.[112] Thus, the decision to deny oral argument must be unanimously determined by a three-judge panel.[113] If the case is placed on the summary calendar, counsel for the parties are then notified of the court's action.[114] It has been asserted that counsel may at that time object to the court's determination,[115] although the Fifth Circuit's local rules do not provide for an objection. Even if an objection is made, the Fifth Circuit will not remove the case from the summary calendar unless the panel determines that the case should be placed back on the regular docket.[116] Once the case is assigned to the summary calendar, the judge who first screened the case then prepares the proposed opinion. During this dispositional stage, if any judge expresses doubts about the proposed result or has unresolved differences with the proposed opinion, the case is automatically restored to the regular court calendar for full or limited oral argument.[117] Under this procedure, the judges of the Fifth Circuit assert that a three-fold safeguard exists against a party being improperly denied oral argument or having his case erroneously decided: first, every step in the process is a judicial determination, not one made by law clerks, staff attorneys, or the court clerk; secondly, the decision to transfer the case to the summary calendar must be a unanimous determination of the standing panel; and thirdly, the final decision of the court on the merits must be unanimous.[118]

111. The individual judge's classification is easily subject to change by the panel that actually hears the argument. Bell, *supra* note 46, at 241. This is not unusual in the Fifth Circuit, where time limitations on oral argument are usually not strictly enforced. For a time during calendar year 1971, cases classed III or IV had to be heard by the panel that so classifed the case. As a result, Class II cases increased to almost 70 percent since the judges could not avoid a difficult case by classifying it as a Class III or IV case and having the case referred to the clerk for calendaring. *S.J. Res. 122 Hearing* 106. *See Hearings on H.R. 7378 Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., sec. 17, at 99 (1972).

118. Bell, *supra* note 46, at 242. The procedure in the Eighth Circuit is very similar to that of the Fifth Circuit. The Eighth Circuit maintains two permanent screening panels of three judges each. Cases are forwarded to an initiating judge on the panel, who decides whether the case needs full argument, abbreviated argument, or no argument. *See* note 55 *supra*. If the initiating judge decides that the case needs no oral argument and can be easily disposed of, he prepares a short opinion and forwards the file to the second panel member, who then makes his independent determination. If he agrees with the first judge, the file is then passed on to the final judge. If any judge decides that oral argument is necessary, the case is set for argument. Motions to dismiss or affirm are first referred to staff attorneys, who prepare memoranda recommending disposition. Interview with Robert J. Martineau, Circuit Executive of the Eighth Circuit, in Saint Louis, Missouri, March 8, 1973.

Although Chief Judge Brown admits that the last word on summary procedures is not yet in,[120] the statistics for the variety of cases that fall into Class II (no oral argument) are impressive. As seen in Table I, a

TABLE I

CLASSIFICATION OF DOCKET—CASES FULLY BRIEFED AND SUBMITTED[120]

	Fiscal Year 1969 (Dec., 1968-June, 1969)		Fiscal Year 1970		Fiscal Year 1971		Fiscal Year 1972	
	No.	Per-centage	No.	Per-centage	No.	Per-centage	No.	Per-centage
Criminal	177	26.5	270	22.7	345	24.2	435	24.5
Habeas Corpus & §2255	85	12.7	216	18.2	299	20.9	400	22.5
Civil	405	60.8	701	59.1	784	54.9	942	53.0
Total	667	100.0	1187	100.0	1428	100.0	1777	100.0

chart of Fifth Circuit cases fully briefed and submitted, the composition of the court's docket remains fairly constant although a steady decrease in civil cases is shown.

The impact of the summary procedures on the Fifth Circuit's docket can be easily demonstrated by Table II, which shows the increasingly large number of Class II cases that are decided on the briefs.

TABLE II

CLASSIFICATION BREAKDOWN[121]

	Fiscal Year 1969 (Dec., 1968-June, 1969)		Fiscal Year 1970		Fiscal Year 1971		Fiscal Year 1972	
	No.	Per-centage	No.	Per-centage	No.	Per-centage	No.	Per-centage
Class I & II	218	32.7	452	38.1	652	45.7	1050	59.1
Class III	265	39.7	506	42.7	622	43.5	560	31.3
Class IV	184	27.6	229	19.2	154	10.8	167	9.6
Total	667	100.0	1187	100.0	1428	100.0	1777	100.0

Finally, demonstrating that Class II cases run the entire range of the Fifth Circuit's docket and are not limited to the criminal area, Table III shows Class II cases by type, number and percentage of total Class II cases.

It should be noted that for criminal cases (combining direct appeals, habeas corpus, and section 2255 motions) the percentage of Class II cases differs significantly from the percentage of that type case to the total docket, making up forty-seven percent of the docket but 59.2 percent of Summary II cases in 1972. This result is not surprising considering the generally frivolous nature of post-conviction petitions and the pressures on counsel to appeal a criminal conviction, regardless of the merits of the appeal.[122] The great volume of civil litigation, both private and governmental, that falls into Class II is surprising. Some Class II cases presenting substantial questions are placed on the sum-

TABLE III

SUMMARY OF CLASS II CASES[123]

		Fiscal Year 1969 (Dec. 1968-June 1969)		Fiscal Year 1970			Fiscal Year 1971			Fiscal Year 1972		
		No.	Percentage	No.	Percentage	Percent of Class II to Total	No.	Percentage	Percent of Class II to Total	No.	Percentage	Percent of Class II to Total
CRIMINAL	Habeas & §2255	56	25.7	141	31.2	48.5	230	35.5	51.3	338	32.3	64.8
	Crim.	58	26.8	131	29.0	58.9	177	25.8	74.6	282	26.9	81.7
	Civil	104	47.5	180	39.8	82.8	341	52.7	84.0	428	40.8	93.6
	Total	218	100.0	452	100.0		648	100.0		1048	100.0	
	Further Breakdown:	1969		1970			1971			1972		
	Type	Total	Class II	Total	Class II	Percent of Class II to Total	Total	Class II	Percent of Class II to Total	Total	Class II	Percent of Class II to Total
	Crim.	177	58	270	131	48.5	345	177	51.3	435	282	64.8
	Habeas	63	39	158	93	58.9	224	167	74.6	306	250	81.7
	§2255	22	17	58	48	82.8	75	63	84.0	94	88	93.6
CIVIL	Priv. Civil	209	54	391	94	24.0	423	126	29.8	443	207	46.7
	U.S. Civil	68	20	93	23	30.1	110	40	36.3	109	40	36.7
	Tax	29	5	65	18	27.7	80	17	21.3	88	38	43.2
	Bankruptcy	10	5	24	8	33.3	22	7	31.2	27	16	59.3
	NLRB	44	10	57	13	22.8	50	20	40.0	69	34	49.3
	Other Agency	4	0	9	3	33.3	13	4	30.8	20	7	35.0
	Civil Rights	25	4	32	5	15.6	74	21	28.4	124	42	33.9
	Admiralty	16	6	30	11	36.7	12	6	50.0	45	30	66.7
	Soc. Scc.	*	*	*	—	—	*	*	—	17	14	19.7
	not available											

* not available

123. 1972 CLERK'S REPORT 35, Table S-4 (for 1972 and 1971); Isbell Enterprises, Inc. v. Citizens Cas. Co., 431 F.2d 409, 411-12 (5th Cir. 1970) (for 1969 and 1970).

mary calendar because the briefs fully and clearly discuss all the issues presented for resolution.[124] One familiar with the generally poor quality of appellate briefing must, however, doubt that excellent briefing is the reason for a significant number of Class II cases and thus conclude that many civil appeals border on frivolity. The widespread advent of deciding cases without publishing a written opinion under Rule 21 if an opinion would not have precedential value is further evidence that many frivolous appeals are brought to the circuit courts. The exploding number of cases resolved by that method, especially among civil appeals,[125] indicates that, at least so far as the court is concerned, many cases are being appealed unnecessarily.

As discussed earlier, many policy considerations militate against deciding cases without opinion, but undoubtedly it is one procedure that will increase the productivity of each judge. Acting contrary to Judge Brown's admonition that Rule 21 "must be sparingly used,"[126] the Fifth Circuit has used it extensively. The following table illustrates not only the rapid increase in the use of Rule 21, but also the decline in the number of signed opinions since it was adopted.

TABLE IV

CASES DISPOSED OF AFTER ORAL HEARING OR SUBMISSION ON BRIEFS[127]

Fiscal Year	Total Opinions	Signed	Per Curiam	Rule 21
1972	1825	622	715	488
1971	1661	676	775	210
1970	1446	741	667	38
1969	1157	616	527	14
1968	942	480	438	24

The use of Rule 21 is more extensive than anticipated, and has been widespread across the docket of the Fifth Circuit. For example, contrary to what might be expected, only 20.9 percent of the criminal cases decided in the Fifth Circuit during 1972 were decided under Rule 21.[128] Similarly, only 29.3 percent of habeas corpus cases without counsel and 20.0 percent of those cases in which the petitioner was represented by counsel were decided under Rule 21.[129] More surprisingly, 35.9 percent of the private civil diversity cases and 44.4 percent of the admiralty cases were decided under Rule 21.[130] These figures convincingly demonstrate that Rule 21, although perhaps being overused, is not confined to the criminal area or cases in which one party is not represented by counsel.

C. *The Benefits of Summary Procedures*

The stated purpose of denying oral argument in 59.1 percent of the cases on the Fifth Circuit's docket and of disposing of 26.8 percent of

submitted cases without written opinions was to increase the capacity of the judges to dispose of cases.[131] Thus, one measure of success of the procedures should be the increased productivity of the court as a whole determined by the output of cases and the productivity of the active judges. Table V shows a very remarkable increase in those important areas. In the column "Opinions Per Active Judge," the figures include only the opinions of regular active judges of the Fifth Circuit and not the opinions produced by senior circuit judges or visiting judges.

TABLE V

PRODUCTIVITY OF THE FIFTH CIRCUIT[132]

	Fiscal Year				
	1968	1969	1970	1971	1972
Output by Opinions	953	1129	1271	1661	1825
Output other than by Opinion	337	367	411	418	573
Total Closed Cases	1290	1496	1682	2070	2398
Opinions Per Active Judge	61	72	82	107	116

The Fifth Circuit has thus increased its output per active judge 90.1 percent since 1968, the last year in which no cases were screened; total closed cases have increased 85.9 percent in that same period; and the production for all judges has increased 91.5 percent.

The judges can increase production if they are writing opinions rather than listening to oral argument, unless the screening process takes more time than hearing oral argument. Table VI enumerates cases heard at oral argument by the Fifth Circuit and the number of summary panel cases in the respective years.

TABLE VI

HEARINGS IN THE FIFTH CIRCUIT[133]

Fiscal Year	Hearings	Summary II
1966	786	—
1967	943	—
1968	1039	—
1969	964	218
1970	738	452
1971	848	652

The table demonstrates that, after 1968, even though the total number of cases to be disposed of increased as the number of hearings decreased, the productivity of each judge was, as has been pointed out, increasing 90.1 percent. Taking only the increase in production from 1968 to 1970, to insulate the figures from Rule 21, the increase was 34.4 percent. This increased production would indicate that screening takes less time than oral argument.

More importantly, however, for the administrative manageability of the Fifth Circuit and its ability to function as a cohesive court, and not as a collection of visiting judges from every circuit and district court in the country, is the number 738—total hearings for 1970. That year was the first full year of operation of the screening procedures. The figure 738, if all cases had been argued orally (instead of some being assigned to the summary calendar), would have been 1190 with the addition of the 452 cases decided on the briefs. A hearing load of 1190 cases would have required almost sixty actual court weeks of sittings (one three-judge panel hearing twenty cases during one week), rather than the thirty-eight actual court weeks that were required.[134] Additionally, since 738 hearings amount to an average of 148 cases per judge, the number of weeks that each judge had to sit (hearing usually twenty cases per week) was reduced from the traditional nine weeks per year to seven weeks per year per judge.[135] Without screening, weekly sittings per judge would have increased, unless additional but unattainable outside judges were used,[136] from the nine week per year maximum that the Fifth Circuit had administratively imposed[137] to almost twelve weeks per year.[138] The figures for 1971 are even more impressive. Although the total number of hearings increased to 848, or forty-three actual court weeks,[139] the number of Summary II cases increased to 648. Thus each judge was able to participate in 299 cases, rather than 180 under the old nine-week approach, for an increase in hearing capacity of 66.1 percent.[140] To civil and especially criminal litigants, the most heartening figure is the significant decrease in appellate delays. From a high in 1967 of 12.2 months for the median time interval, in cases terminated after hearing, from the time of filing the complete record to final disposition,[141] the median time was reduced to 6.5 months in 1971.[142] Likewise, the median time interval from hearing or submission to final disposition was down from a high in 1969 of 1.7 months[143] to 1.1 months for 1971.[144]

In 1971, the productivity of the Fifth Circuit increased significantly. The per-judge disposition of cases briefed and submitted increased 30.5 percent from 1970 to 1971 and the increase from 1971 to 1972 totaled another 8.4 percent.[161] This increase can probably be partially attributed to the increased use of per curiam opinions and Rule 21 affirmances without opinion.[162] From 1970 to 1971 the percentage of cases disposed of by per curiam opinions rose only from 46.1 to 46.6 percent of total cases, but the number of cases affirmed without opinion increased from 2.6 percent to 12.6 percent. At the same time the percentage of signed opinions declined from 51.2 percent to 40.7 percent of decided cases. From 1971 to 1972, Rule 21 opinions rose to 26.8

percent of the opinions, but signed opinions declined to 34 percent and per curiam opinions declined to 39.2 percent.[163]

The further increases in production in 1971 and 1972 come as no surprise. Professor Carrington had predicted that some time would be saved by these devices, although for policy reasons he advocates the increased use of per curiam opinions, rather than an increase in "unexplained decisions."[164] In fact, the now overwhelming use of Rule 21 opinions appears to be a significant reason for the overall success of the Fifth Circuit procedures. A review of Table V will show that for 1970, the first full year of screening, the increase in production per judge was only 13.9 percent, but the increase for 1971, with the introduction of Rule 21, was 30.5 percent. Of course, at the same time the judges were gaining confidence in the workability of screening and the number of cases assigned to Classes I and II increased from 38.1 percent of the docket to 45.7 percent.[165] Regardless of whether screening or Rule 21 is the more significant cause, screening and summary procedures have apparently increased the productivity of the circuit and each judge.

* * * *

We have been warned to be "wary of reforms that are attractive in terms of saving time but have unnoticed substantive effects."[277] The results of the Chicago Jury Project, showing that the bifurcation of a trial into separate liability and damage hearings increased the chances of

163. It should be remembered that in 1971 the percentage of cases assigned to the Summary Calendar increased 7.6 percent over 1970, and 1972 showed an increase of 13.4 percent over 1971. Thus in both percentage and absolute terms the court was increasing the theorized reasons for time-saving by screening. *See* note 121 *supra* and accompanying text.

164. Carrington, *supra* note 2, at 559. Perhaps the Fifth Circuit should also add forecasts of state law in its *Erie* role to the classes of cases in Rule 21 and thus save the time expended in writing opinions that have generally been disregarded by the state courts in those states comprising the Fifth Circuit. *See generally* W.S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257, 262 (10th Cir. 1967) (Brown, J., sitting by special designation, concurring and dissenting on petition for rehearing), *rev'd*, 391 U.S. 593 (1968). The citation of *W.S. Ranch* makes this an appropriate place to note that Chief Judge Brown of the Fifth Circuit, although an aggressive and articulate advocate of almost any device that will help the Fifth Circuit meet the demands of its docket and in particular screening procedures, is also a strong advocate of abstention in diversity cases that present difficult and novel issues of state law. These apparently contradictory positions, inasmuch as that type abstention has been roundly criticized as a waste of judicial resources, *see* Agata, *Delaney, Diversity, and Delay: Abstention or Abdication?*, 4 HOUS. L. REV. 422 (1966), are reconciled in *W.S. Ranch*, *supra*.

277. Wright, *A Century After Appomattox*, *supra* note 2, at 747.

success for the defendant, might contain a warning about screening and summary procedures in the courts of appeals.[278] One might suspect that the denial of oral argument and deciding cases without a written opinion has some relation to the outcome of appeals in the Fifth Circuit. More particularly, screening and summary procedures might increase the proportion of affirmances to total caseload.

An accepted manner of determining whether a given relationship exists is the chi-square test.[279] In this test, a "null hypothesis" is established. The null hypothesis is the absence of the suspected true relationship. For example, in studies concerning tobacco smoking as a possible cause of lung cancer, the null hypothesis is that there is no relation between smoking and the incidence of lung cancer in humans. If subsequent computations show that experimental or observed results are very unlikely if the null hypothesis holds, then one rejects the null hypothesis and in doing so affirms the suspected relation.[280] Since the theory to be tested is that the screening procedures in the Fifth Circuit have a relation to the affirmance of a lower court decision, the null hypothesis is that the Fifth Circuit's screening procedures do not change the relation or proportion of the number of reversals to the total caseload decided after hearing or submission. The next step in the test is to choose a significance level—simply an upper limit on the probability that the result arose by chance—for which .05 was chosen.[281] The last two steps are determining if the experimental result belongs to a collection of results that are unusual if the null hypothesis is true, and deciding whether to reject or accept the null hypothesis.[282]

* * * *

Thus for private civil cases and for total cases the theory that a relationship exists between the condition of the screening procedure restricting the use of oral argument and the condition of having a lower court decision affirmed is supported. Although X^2 for United States civil and criminal cases was not significant enough to reject the null

278. Split trials produced a gain of 20 percent in productivity, but before the test, defendants were successful in 42 percent of the jury verdicts, compared to a 79 percent success rate during the test period. *Id.* *See also* Zeisel & Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963).

279. This test is explained in W. DIXON & F. MASSEY, INTRODUCTION TO STATISTICAL ANALYSIS 242 (3d ed. 1969). *See* E. SPITZNAGEL, JR., SELECTED TOPICS IN MATHEMATICS 217-24 (1971); *cf.* Nagel, *Testing Empirical Generalizations in Legal Research*, 15 J. LEGAL ED. 365 (1963).

hypothesis, this may be a result of the small sample size in both groups, not because the null hypothesis is true. This analysis is supported by the apparent proportional relations indicated by the contingency tables and the extremely significant value of X^2 for total cases. Also, it should be noted that the size of the sample for both United States civil and criminal cases is almost identical. Since the value of X^2 for total cases means that the chances are only 2 out of 1000 that the indicated relationship between screening procedures and affirmances arose by chance, the significance of that value becomes readily apparent.[283]

Although the relationship in the Fifth Circuit between screening and affirmances is statistically significant, it was desirable to test the validity of that relationship against a control group. Since no two cases or judges are exactly alike, no completely controlled test group existed. If one assumes, however, that all variables are held constant, the Third Circuit provides a control since that circuit did not have a docket control device of any sort during the test period.[284]

* * * *

Contrary to the trend in the Fifth Circuit, the contingency tables for the Third Circuit show a slight decrease in the proportion of affirmances. • • •

Thus the results for the Third Circuit are neutral, since none of the values of X^2 exceeds 3.84, and lend some support to the proposition that a relationship exists in the Fifth Circuit between screening and summary procedures and the decline in the rate of reversal.[285]

At the risk of being repetitious, it should be made perfectly clear that these tests should not lead one to fall into the *post hoc propter hoc* fallacy. The thesis of the statistical tests was simply to determine if a relation existed between screening and summary procedures and affirmances of the lower court decision. The test showed that the relation apparently exists, but is not proof that the screening procedures were the cause of the relation. In dealing with a subject as nebulous as the myriad cases and the diverse judges of an appellate court, the cause and effect may not be determinable.

* * * *

Some would say it is a good thing that the rate of reversals in the Fifth Circuit is dropping rapidly. Perhaps it displays a conscious effort by appellate judges to stem the tide of appeals by ignoring all but the grossest errors.[286] Or perhaps the decisions being made are indeed the proper ones, and oral argument in the past has merely contributed to results influenced by improper appellate considerations, such as sympathy or overreaction to especially persuasive oral advocacy. These imponderables may not be demonstrable, but before other appellate courts act to eliminate oral argument in all but the most serious case,

thorough consideration must be given to the possible effects of that choice and to available alternatives.

For attorneys and judges involved in the appellate process, the ramifications of this statistical study should be obvious. For the attorney in the Fifth Circuit, the chances are almost six to one that a decision of the lower court will be affirmed. Thus, any confident statement that a reversal will be obtained in the appellate court is now extremely foolhardy, as opposed to merely risky in the past. For judges, hopefully these indications that the screening and summary procedures may have "unnoticed substantive effects" will enforce the natural tendency to select carefully the cases that receive less than full-blown appellate review.

A SUMMARY OF THE THIRD CIRCUIT TIME STUDY

Federal Judicial Center*

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 objectives of the court were 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. A total of 13,213 judge hours were recorded yielding an average work 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

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* A report of the Center's Division of Research published in 1974.

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 under-reported 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 under-reporting where the activity was case-related but covering 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.

Division of time

NOTE: This description of the time study will refer only to judge time or elapsed time. Clerk time was recorded and included in the reports to the courts. It is significant that almost every observation that can be made about clerk time follows the same pattern as judge time. There appears to be no substantial differentiation in the allocation of judge time and clerk time. Put another way, the pattern of time usage by the judges appears to be reflected in the supporting activity of the clerks. Specialized tasks for clerks, if they exist, are not significant.

Judge time was divided on a 60 percent case related to 40 percent non-case related basis over the entire year. There was a substantial variation in this division during the three periods covered by interim reports with non-case 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.

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. 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.

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, with better than two-thirds of that in three-judge courts.

Other judicial activity--Judicial Conference of the United States, Federal Judicial Center, etc., 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 under-reporting 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" accounted 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 below:

CASE-TYPE WEIGHTS FOR JUDGES
(Weights based on expended judge time)

Type	Weight
A	1.26
B	1.15
C	1.03
D	0.50
E	0.71
F	0.67
G	0.31
H	1.60
I	1.22
X	2.00
Y	0.86

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 Non-Diversity.) 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.

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. The following table summarizes the major activity patterns for the major case types.

CASE TIME
MAJOR TYPES BY ACTIVITY

Type	Prep.	Arg.	Conf.	Opinion
A	32%	6%	6%	51%
B	34%	8%	9%	49%
C	29%	8%	8%	47%
D	34%	5%	5%	47%
E	27%	2%	8%	46%

This data demonstrates 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 process. The findings are set forth in one of the attachments to this memorandum. Briefly summarized, the findings are:

1. Correlation analysis on the two types of time do 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 below.

Type	Hours Weight	Days Weight
A	1.35	1.11
B	1.46	4.46
C	.72	1.04
D	.53	.75
E	.94	.82
F	.80	.94
G	.59	.12
H	2.47	1.35
I	1.83	1.01
X	1.82	1.84
Y	.69	.84

   There are substantial differences between the two weight tables, but the relative rank of weights on the two tables is very nearly the same, especially if we discount the perturbing effect of the Virgin Islands cases.

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 one 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 six 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 be the case, this early recognition might be utilized to trigger special monitoring like that used in criminal cases.

6. The favorite target of 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 Judicial 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. Particularly is this true since such a small portion of elapsed time occurs during the period of judicial activity.

FINDINGS, REASONS, AND OPINIONS

Kenneth C. Davis*

§ 16.01. The Requirement of Findings and Reasons

The law about findings and reasons is highly developed for cases involving hearings but is largely undeveloped for cases involving informal action without hearings. Yet the strange fact is that findings and reasons may often be more useful in informal action than in formal action, for findings and reasons are part of a bundle of methods for protecting against arbitrary informal action. If an agency may merely say "application denied" without explaining why, without stating the facts, and without relating the case to other similar ones, the opportunity for arbitrariness is a large one. But if the agency must say, "This is the way we summarize the facts, this is the question, and this is our answer for these reasons, in accordance with the principles developed in such and such other cases," then the opportunity for arbitrariness is a relatively small one. Furthermore, a party who thinks the agency has gone wrong is enabled to locate the infirmity. Protection lies in a bundle of mechanisms—open standards, open findings, open reasons, and open precedents.

* * *

§ 16.07. Reasons

Reasons differ from findings in that reasons relate to law, policy, and discretion rather than to facts. To some extent the courts have required agencies to state reasons as well as findings. Furthermore, the APA in § 557(c) requires that all decisions shall include a statement of "findings and conclusions, and the reasons or basis therefor." The Revised Model State APA and most of the state acts make no requirement of a statement of reasons, as distinguished from findings, but the Massachusetts statute provides: "The decision shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision, unless the General Laws provide that the agency need not prepare such statement in the absence of a timely request to do so."[1] The Supreme Court has enunciated what it called "a simple but fundamental rule of administrative law" that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."[2] Yet the courts themselves often decide cases without stating reasons; the Supreme Court sometimes reverses per curiam, without stating reasons, sometimes citing a case that seems distinguishable, and thereby causing consternation among those who try to follow the meaning of the Court's decisions.

If the Supreme Court itself disposes of cases without stating reasons, how can it consistently require administrative agencies to state reasons? The answer probably is that the judicially imposed requirement that administrative agencies state reasons is a product of the process of judicial review of administrative action. A court often feels the need for a statement of reasons in order that it may better understand what it is reviewing.

A leading case is Phelps Dodge Corp. v. NLRB.[3] The Board had power to order the company to offer employment to men against whom the company had discriminated, even though the men had secured equivalent jobs, if the Board "finds that to do so would effectuate the policies of the Act." The Board ordered such an offer of employment, stating that it was "further to effectuate the purposes and policies

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1. Ann.Laws of Mass., Ch. 30A, § 11(8).
2. SEC v. Chenery Corp., 318 U.S. 80, 94, 63 S.Ct. 454, 462, 87 L.Ed. 626 (1943).
3. 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271, 133 A.L.R. 1217 (1941).

of the Act," and that "the effectuation of the policies of the Act patently requires the restoration." The Board did not say why. Instead, it cited a case going only to the Board's power, not to the reasons for exercising the power. In holding that the Board must state reasons, the Supreme Court declared: "From the record of the present case we cannot really tell why the Board has ordered reinstatement of the strikers who obtained subsequent employment. . . . The administrative process will best be vindicated by clarity of its exercise. Since Congress has defined the authority of the Board . . . and has charged the federal courts with the duty of reviewing . . . it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis for its order."

A few weeks later the Board spelled out the missing reasons: "The purpose of the order to offer reinstatement is not only to restore the victim of discrimination to the position from which he was unlawfully excluded, but also, and more significantly, to dissipate the deeply coercive effects upon other employees who may desire self-organization, but have been discouraged therefrom by the threat to them implicit in the discrimination. . . . If reinstatement were rendered inappropriate by reason of success in that search [for other employment], the employer would be able, through elimination of union adherents, at once to impede or terminate exercise of the right of self-organization in his plant and at the same time to perpetuate his advantage by relying upon the victims' necessity of earning a livelihood elsewhere to assure their permanent riddance." [4] The remark of a commentator may have merit, that the long-run consequence of the Court's decision will be "the mechanical regurgitation of 'canned' findings [reasons] on a subject as to which nobody can entertain any reasonable doubts concerning the Board's opinion."[5]

The first Chenery case[6] establishes the proposition that when an agency gives the wrong reasons, the reviewing court will send the case back for a new determination, even though the court might have upheld the order if no reasons had been assigned. The SEC in approving a plan of reorganization refused to permit the management, who had purchased preferred shares of the company during the period of reorganization, to participate in the reorganization equally with other holders of preferred stock. The Commission held that the management's "duty of fair dealing with the persons for whom it acts is as great as that of a trustee who holds title to a res for the benefit of his beneficiaries." If the Commission had merely announced the finding and the conclusion, without writing a supporting opinion, presumably the Court would have held the findings and the reasons adequate, for the FTC for several decades customarily did no more and yet its orders were usually upheld. But the SEC discussed reasons, including judicial authorities.

The Supreme Court, five to three, set aside the order, because "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained," and "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." The Court recognized that this was a stiffer rule than that applied to the review of decisions of lower courts: "We do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.'" The justification for the difference is that a reviewing court may formulate the ground upon which a lower court should have acted but may not initially decide a question which is committed to an agency for initial determination.

4. Ford Motor Co., 31 N.L.R.B. 994, 1099–1100 (1941).

5. Timberg, Administrative Findings of Fact, 27 Wash.U.L.Q. 62, 69 (1941).

6. SEC v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943).

7. SEC v. Chenery Corp., 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947).

The Court found that the cases the Commission discussed did not support its determination and concluded: "We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

The SEC wrote a new opinion avoiding reliance on the equity decisions, and the case came to the Supreme Court again.[7] The Court then said that the first case had emphasized "a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. . . . If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action . . ."

The law thus became clear that reasons must be stated, that the basis of the action must be clear, and that even "the theory underlying the agency's action" must be stated with clarity. One might wish that not only agencies but also courts could and would live up to the Supreme Court's statement of the ideal. No one will quarrel with the ideal. But as a practical rule for practical enforcement, the statement goes beyond what may be expected either from agencies or from courts. The fact is that the Supreme Court's own opinion in the first Chenery case did not state "with such clarity as to be understandable" what the Court was holding; on the problem of interpreting the Supreme Court's opinion, the Commission took one view, the Court of Appeals unanimously took the opposite view, and the Supreme Court by a vote of four to two upheld the Commission's interpretation. The author of the opinion in the first Chenery case disagreed with the Court's interpretation of that opinion.

* * * *

A rather significant case cutting across the findings-reasons requirement and the equal-justice requirement is Melody Music, Inc. v. FCC.[14] The Commission refused a renewal of a broadcasting license to Enright and Barry because four years earlier they had produced quiz shows in which some contestants were secretly given assistance in answering questions, even though what they did violated no law. But NBC, which may have been equally guilty of quiz show frauds, was given renewals at about the same time. The court held: "We think the Commission's refusal at least to explain its different treatment of appellant and NBC was error. Both were connected with the deceptive practices and their renewal applications were considered by the Commission at virtually the same time. Yet one was held disqualified and the other was not. . . . [W]e think the differences are not so 'obvious' as to remove the need for explanation."

§ 16.08. Reasoned Opinions

The erroneous assumption is common that agencies differ from courts in the extent to

14. 120 U.S.App.D.C. 241, 345 F.2d 730 (1965).

which they prepare reasoned opinions. Dean Pound asserted: "We know exactly what courts do, on what basis they act in doing it, and at least what they say as to their reasons for doing it. We have no such means of knowing what administrative bodies or agencies have done nor how and why they did it."[1] Pound also said: "Typically judicial treatment of a controversy is a measuring of it by a rule in order to reach a universal solution for a class of causes of which the cause at hand is but an example. Typically administrative treatment of a situation is a disposition of it as a unique occurrence, an individualization whereby effect is given to its special rather than to its general features."[2]

Observations of this kind are unfortunate because they ignore the basic difference between administration and administrative adjudication. Lumping together all "administrative treatment of a situation" makes accurate generalization impossible, except to observe that practices are extremely diverse.

Such agencies as the CAB, FCC, FPC, ICC, NLRB, and SEC prepare and publish reasoned opinions which in all respects resemble ordinary judicial opinions. The chief difference is that administrative opinions usually include more specific findings of fact than those contained in judicial opinions. The administrative opinions are collected and systematically published in numbered bound volumes, and cases are cited by volume and page after the manner of judicial opinions. A typical volume of such reports contains a table of cases reported and a table of cases cited. In the back of a typical volume is an index or an index-digest.

A typical opinion of a regulatory agency contains a syllabus, findings of fact, discussion of questions of law and policy resembling a reasoned opinion of an appellate court, and the order entered. The agency's own prior decisions are customarily cited and followed or distinguished or occasionally overruled in about the same way that an appellate court deals with its own prior decisions.

Some agencies, of course, do not and should not publish reasoned opinions in all adjudications. The Social Security Administration selects some opinions as "precedent opinions," and the Railroad Retirement Board indexes and relies upon General Counsel's opinions in significant cases. Some of the less prominent administrative authorities have long published reasoned opinions —the Comptroller General, the Commissioner of Patents, the Department of the Interior, the Board of Immigration Appeals.

For adjudications of substantial magnitude, like most adjudications of the federal regulatory agencies, the desirability of systematically publishing reasoned opinions is clear. Their preparation affords a safeguard against arbitrary or careless action, and the resulting body of precedents makes for consistency and predictability. Disadvantages relate to time and expense of preparation, expense to practitioners of maintaining accessible bodies of reports, and, perhaps, the hard fact of finite shelf space in law libraries. The problem from this angle is of course a wholly practical one; much can be said for a practice of both courts and commissions of publishing opinions only in those cases which seem to have special value as precedents. A suggestion that publication of full opinions of courts in one-quarter of the cases "will come nearer to satisfying the demands of common sense and justice" may well be sound for the work of many courts and many agencies.[3]

1. Pound, Contemporary Juristic Theory 24 (1940).
2. Pound, An Introduction to the Philosophy of Law 108–109 (1922).
3. Radin, The Requirement of Written Opinions, 18 Calif.L.Rev. 486, 496 (1930).

§ 16.09. Findings and Reasons in Absence of Hearings

Although almost all judicial case law concerning findings and reasons is limited to formal proceedings, the time is sure to come —perhaps soon—when the courts will extend the requirement of findings and reasons to informal administrative action. The five practical reasons for requiring findings, stated above in § 16.03, are as clearly applicable to administrative action not involving the safeguards of formal hearings as to action based on such hearings. And we must remember that the much-ignored section 555(e) of the Administrative Procedure Act requires a statement of "grounds" for denial of a written application.

The question whether the findings-reasons requirement should be applied to informal action as well as to formal action seems to raise anew all the considerations that have gone into the construction of an admirable and remarkably uniform body of law requiring findings and reasons in support of orders after formal adjudication. Aside from the five practical reasons for the requirement, the more basic question arises as to whether a system of reasoned opinions to justify highly discretionary determinations is intrinsically weak as a protection against arbitrariness in that administrators who realize that the motivating reasons may fail to win approval will simply set forth reasons that will pass muster, whether or not they have much in common with the motivating reasons. Even the best of judges and administrators sometimes pretend that a crooked line of decisions is straight or that a precedent on all fours is distinguishable. In an agency, the opinion-writing staff may or may not be aware of the motivating reasons but they may assume that their job is to dress up a decision in verbiage that will make it look better than it is underneath. Any reader of such opinions is likely to wonder at times whether the opinion-writing staff has ready-made boiler plate that will come close to fitting decisions of every size and shape. Sometimes the tailors seem to forget to make the slight alterations that are needed.

Despite justifiable doubts about crafty administrators who can satisfy a requirement of reasoned opinions and still defeat the purpose of the requirement, the ultimate fact probably is that nearly all administrators most of the time take the requirement seriously. Most of the time they conscientiously write reasoned opinions that include most of the motivating reasons. The essence of the requirement can often be wilfully defeated, but the essence of the requirement is usually respected in whole or in part.

So the question is appropriate as to whether findings and reasons should more often be stated when discretionary determinations are made without hearings.

Seldom have either administrators or reviewing courts focused on that question. But administrators have tended to make informal decisions without findings or reasons, and affected parties have customarily acquiesced. The problem has rarely come to court.

The Supreme Court in Citizens to Preserve Overton Park v. Volpe[1] missed a good opportunity to develop the law of findings and reasons for informal action. Under a statute prohibiting highways through public parks if a "feasible and prudent" alternative route exists and allowing approval only if there has been "all possible planning to minimize harm" to the park, the Secretary of Transportation, without what the Court persistently called "formal findings," approved a highway through a park. The Court was seemingly on both sides of the question whether findings and reasons were needed.

1. 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

It said with full clarity: "We agree that formal findings were not required."[2] But in remanding to the district court for review on a full administrative record, and it said that "it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard," and it very strangely said that "it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves."[3] The support for the lack of requirement of "formal findings" was scanty: The statutes and the regulation did not require them, situations requiring such findings in absence of statutory directives "are rare," and "there is an administrative record that allows the full, prompt review" even though the record was not before the Court.

If an "explanation" may be required but not "formal findings," a good deal may hinge on the meaning of "formal findings," but the Court said nothing to clarify that meaning.

The law of the future is more likely to follow the Court's remark about an "explanation" than its conclusion that "formal findings" are not required, because the courts will gradually discover that a requirement of findings and reasons, when feasible, is one of the most effective protections against arbitrary exercise of discretionary power. What the future has in store is a combination of judicial requirement of administrative clarification of standards to guide discretion with a judicial requirement of findings and reasons that relate the standards to the facts of the particular case.

The leadership for the future is provided by the Court of Appeals for the District of Columbia in Environmental Defense Fund v. Ruckelshaus.[4] In reviewing an administrative refusal to suspend the registration of DDT, the court declared that the administrator "has an obligation to articulate the criteria that he develops in making each individual decision. We cannot assume, in the absence of adequate explanation, that proper standards are implicit in every exercise of administrative discretion. Since the Secretary has not yet provided an adequate explanation for his decision to deny interim relief in this case, it will be necessary to remand the case once more, for a fresh determination on that issue."[5] The court then made an inspiring statement: "We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. . . . Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. . . . Discretionary decisions should more often be supported with findings of fact and reasoned opinions. When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought."[6]

2. 401 U.S. at 409, 410, 91 S.Ct. at 820.

3. 401 U.S. at 418–422, 91 S.Ct. at 825–26.

4. 439 F.2d 584 (D.C.Cir. 1971).

5. 439 F.2d at 596.

6. 439 F.2d at 597–98.
The aspect of the Environmental Defense Fund case requiring rulemaking to clarify standards is fully discussed in § 2.09, along with other cases developing a similar requirement.
Other recent cases requiring findings and reasons in support of informal discretionary action include Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1100 (D.C.Cir. 1970); Medical Committee for Human Rights v. SEC, 432 F.2d 659, 682 (D.C. Cir. 1970), cert. granted; United States v. Broyles, 423 F.2d 1299, 1303 (4th Cir. 1970) (requiring draft board to state reasons concerning conscientious objector classification).

The Sixth Circuit's attitude[7] seems to be the precise opposite of that of the District of Columbia Circuit. The Comptroller of the Currency, without a hearing, issued a certificate to operate a branch bank. Two interested banks challenged. The district court held its own trial and set aside the certificate as not supported by substantial evidence, arbitrary, capricious, and an abuse of discretion. The court affirmed, taking note of the subject of findings and conclusions only in this language: "The Comptroller's decision was arrived at without an adversary hearing, consequently there is no transcript or other record which reveals the findings and conclusions of the Comptroller incident to his decision. At the trial the Comptroller successfully urged the 'executive privilege,' thus barring disclosure of much of the evidence and the findings upon which he arrived at his judgment. It is our opinion that the District Court proceeded according to law . . ."

What a large quantity of deep misunderstanding is packed into a few words! The court improperly assumed (a) that absence of a transcript justifies concealment of findings and conclusions, (b) that "executive privilege" bars disclosure of findings, and (c) that the court should take over the function of deciding whether or not the certificate should be issued, without even knowing the Comptroller's findings or reasons. The idea of judicial review by a court from which findings and reasons are withheld runs counter to thousands of decisions of federal and state courts in cases involving formal adjudications. If the Comptroller had been required to hold a hearing, the court probably would have instinctively required that he state his findings and reasons. But why are not findings and reasons all the more important when the determination is made without hearing?

7. Peoples Bank of Trenton v. Saxon, 373 F.2d 185 (6th Cir. 1967).

No opinion of any court has been found which fully and explicitly considers pros and cons as to whether the requirement of findings and reasons should be limited to administrative action based upon formal hearings. Probably a convincing opinion to that effect cannot be written. Instead of applying the requirement to formal action and not to informal action, possibly the requirement should be applied to all administrative action, formal or informal, unless the action is trivial or otherwise of such a nature that the inconvenience of preparing findings and reasons seems to outweigh the probable benefits. And the problems of discovering specifically which classes of informal administrative business call for findings and reasons and which do not are enormous and can be resolved only through extensive studies that apparently would have to go far beyond any that have been attempted.

Even though the need for findings and reasons is often stronger when discretion is exercised without hearings than when hearing safeguards provide protection (in that findings and reasons tend to protect against careless or hasty action, help assure that the main facts have been considered, make administrative supervision easier, and help parties make plans about administrative or judicial review), still the plain fact is that throughout the federal government informal action is often taken without stating findings or reasons, even in circumstances where findings and reasons seem clearly desirable.

In what follows, we shall discuss (1) the Immigration Service, (2) the United States Parole Board, (3) SEC sentencing and criminal sentencing, and (4) the Renegotiation Board.

(1) *The Immigration Service.* A good example of the reason for reasons is the informal handling of applications by the Immi-

gration and Naturalization Service. About a million applications are disposed of each year, of which some 50,000 are denied. Almost all are handled without hearings. Some of the questions involved are of great moment to particular aliens. The writer of this text suggested to the Commissioner and other top officers of the Immigration Service in 1964 that an alien should always be entitled to have a written reason for the denial of a written application, as required by § 555(e) of the Administrative Procedure Act. The initial response to this proposal was that it might require a doubling of the staff of some seven thousand and that the proposal was totally impractical. But on further study the Service found the idea feasible. For each of thirty-six types of applications it prepared printed cards, listing all the usual reasons for denials. The officer was required to check the applicable reason and to give the card to the alien. This was a great gain. The alien now knows whether he should take some action to change his circumstances and file another application, whether the denial is based on a mistaken impression of the facts, and whether he should fight the case further by going to a superior officer. Furthermore, if the facts are in the file, a superior officer has the means of checking the officer's judgment. The new system has caused no increase in the size of the staff.

(2) *The United States Parole Board.* The main function of the United States Parole Board is to grant or deny written applications for parole. The Board never states findings or reasons in support of its decisions granting or denying parole. It has no system of reasoned opinions, no system of precedents. The Board is in the Department of Justice, where legal talent is concentrated, but it has no regard for the federal statute that ought to guide it. Section 555(e) of the Administrative Procedure Act provides: "Except in affirming a prior denial or when the denial is self-explanatory, the notice [of denial of a written application] shall be accompanied by a brief statement of the grounds for denial." All parole cases reach the Board on written application by the prisoner. The Board denies a large portion of the applications. But it never states "grounds for denial." Instead, it proudly proclaims in a 1964 printed pamphlet entitled "Functions of the United States Board of Parole" that it never states the grounds for a denial because it never knows what those grounds are: "Voting is done on an individual basis by each member and the Board does not sit as a group for this purpose. Each member studies the prisoner's file and places his name on the official order form to signify whether he wishes to grant or deny parole. The reasoning and thought which led to his vote are not made a part of the order, and it is therefore impossible to state precisely why a particular prisoner was or was not granted parole." Not only is it impossible to state "precisely why" parole is denied in any case; it is impossible to state generally why it is denied, because no one knows why. Usually no member of the Board ever knows why his colleagues have voted the way they have. Board members almost never confer with each other about their decisions. When they vote, they indicate no reasons. Not only are no reasons given to the prisoner; no reasons are stated in the files of cases.

What happens is that a prisoner who is sentenced to fifteen years and becomes eligible for parole after five years normally believes that the court has disposed of five years of his life and that the Board has power over ten years. After waiting five years, he makes application and is notified that his parole has been denied, he asks why, and he is told that the Board never gives reasons. If he presses far enough, he may learn that the Board itself does not know the reason.

Yet the Board keeps asserting to the public that its purpose is to rehabilitate prisoners. A prisoner who waits until he is eligible, makes his application, expects to be paroled, conscientiously believes that he is entitled to parole, and then is denied parole and also denied an explanation of why—such a prisoner surely is likely to feel rehabilitated!

The Board's refusal to state findings or reasons is of course only one facet of an elaborate system of procedural injustice. In granting or denying parole, the Board makes no attempt to structure its discretionary power through rules, policy statements, or guidelines; it has no system of precedents; the degree of openness of proceedings and records is about the least possible; and procedural safeguards are almost completely absent. Moreover, checking of discretion is minimal or nonexistent; board members do not check each other by deliberating together; administrative check by top officers of the Department of Justice is theoretically present but practically absent; and judicial review is almost always unavailable.

When no procedural protections are provided, even the most flagrant abuse of discretion is likely to go uncorrected. If a Board member is in such a hurry to get to his golf game that he votes in sixteen cases without looking inside the files, no one under the Board's system can ever know the difference, even though the personal liberty of sixteen men may be at stake. How could a Board member have less incentive to avoid prejudice or undue haste than by a system in which his decision can never be reviewed and in which no one, not even his colleagues, can ever know why he voted as he did? Even complete irrationality of a vote can never be discovered. Should any men, even good men, be unnecessarily trusted with such uncontrolled discretionary power?

What is especially needed is clarification of policy through announced rules, standards, and guides, and then, on that background, a system of open findings, open reasons, and open precedents, except to the extent that secrecy is necessary. After policies are stated in general terms, the key to further control of discretion, in order to minimize arbitrariness, is an attempt to evolve principles through case-to-case adjudication. This can be done only if findings and reasons are stated in each case, and only if at least some cases are used as precedent cases.

The continued violation of the Administrative Procedure Act's requirement of a statement of "grounds for denial" is not merely inadvertent. The writer has called it to the attention of two successive chairmen of the Parole Board, as well as to top officers of the Department of Justice, including one Attorney General. The violation has continued over the entire period since the Act was enacted in 1946, and it still continues.

The Board should (a) develop open standards, as specific as feasible, to guide its decisions, (b) state findings and reasons when parole is denied, and when it is granted on the basis of a policy determination that may have value as a precedent, (c) open proceedings and records to the public except to the extent that confidentiality is essential, (d) develop a system of open precedents, (e) move toward group decisions made by members who deliberate together. In addition, (f) courts should review parole denials for errors of law, unfair procedure, or abuse of discretion.[7a]

(3) *The SEC and Sentencing.* Parole decisions and sentencing decisions are part and parcel of each other, for both involve fixing the extent of penalties. Regulatory agencies

7a. Since the above was written, a state court in a persuasive opinion has required a board to state reasons for denial of parole, with some exceptions. Monks v. New Jersey State Parole Board, 58 N.J. 238, 277 A.2d 193 (1971).

also fix penalties. A licensing agency may choose between revoking and suspending a license, or it may decide that a reprimand is enough. In determining the penalty, the agency is not necessarily limited to the record on which the finding of guilt is based; in other words, the penalty may be fixed without a hearing. Should findings and reasons be required in support of choices of penalties?

The answer that seems to emerge from administrative practice is a curious one that may be wholly unjustifiable: Findings and reasons are required to be stated when a regulatory agency fixes a penalty but not when a judge or a parole board does.

A decision worthy of full consideration is Beck v. SEC.[8] The court upheld the Commission's findings that the petitioner had wilfully violated anti-fraud provisions, but the court set aside the sanction for lack of sufficient findings and reasons. Because the order revoked petitioner's employer's broker-dealer registration on the basis of petitioner's misrepresentations, the statute barred petitioner from being associated with a broker or dealer without the Commission's approval. The order provided that petitioner would not be barred "after four months if he makes an appropriate showing that he will be adequately supervised." Because of a delay of three years in the proceeding, petitioner had had what the court called "opportunity to obtain adequate training and to restore his reputation" by employment as a securities salesman after the violation. The court held that the Commission's order "fails to disclose why the public interest necessitates barring petitioner from the securities business for a period of four months at this time despite his responsible performance for six years since the violation . . . [T]he order contains no finding concerning the need for deterrence. We cannot determine whether this sanction constitutes an abuse of the discretion vested in the Commission without a disclosure of the reason for its imposition. We therefore remand . . ."[9]

If the attitude expressed by the Sixth Circuit in the Beck case were consistently applied, probably most sentences imposed in criminal cases would have to be set aside for lack of findings and reasons. Judges who impose sentences do not customarily spell out their findings or their reasons, even though the basis for the sentence may be such extra-record documents as a probation officer's report. From the standpoint of findings and reasons, probably the four-month sentence imposed by the SEC does not significantly differ from a four-month or four-year sentence in a criminal case.[10] Should findings and reasons be required?

The initial impulse is to bring tradition to bear upon the question: Judges for centuries have imposed sentences without spelling out findings and reasons, and a tradition that is good enough for judges may be good enough for the SEC. But might the tradition be in need of reexamination? If findings and reasons tend to protect against arbitrariness and pull toward even-handed justice, why should the requirement be applied to nearly all other functions but not to the crucial exercise of discretion in sentencing? Could it be that almost all judges are out of line except the majority of the Sixth Circuit in the Beck case?

Sentences are often imposed without hearings, and sentences often depend upon facts that have not been developed through the trial. One of the most dismal failures of the legal system is the disparity from one judge to another in sentencing. Much can and should be done to alleviate the disparity, and a bit of progress has been made in recent years.[11] Among the promising methods for reducing the disparity, four essential ones may be open findings, open reasons, open precedents, and review by appellate courts. But neither a system of precedents nor a system of review is feasible in absence of a system of findings and reasons. The general attitude of appellate courts has been that "Where the sentences imposed are within the limits fixed by law, we will not inquire into the court's reasons for the penalties imposed."[12] But the fact is that courts do review when they find something appropriate for review.[13] Perhaps *the* major reason our system has failed to produce meaningful guides for sentencing is the absence of a satisfactory system of required findings and reasons—of reasoned opinions and precedents. To the extent that those who determine the extent of penalties know why they do what they do, why should they not be required to spell out what they know about what they are doing?

Of course, one answer may well be that they know so little about what they are doing that they are ashamed to expose how little they know. The whole SEC, with all the staff talent available to it, probably could not convincingly explain why four months are better than two months or eight months, and it probably could not support a finding that the four months will deter the petitioner or others to a greater extent than two months, or even to a greater extent than the publicized finding that the petitioner was guilty of misrepresenting.

The proposition that open findings, open reasons, and open precedents would be beneficial to both judicial and administrative systems of sentencing and might reduce the often disgraceful disparity is probably easier to support in the abstract than in its application to the Beck case. If the Commission had before it no more facts than those recited in the court's opinion, a statement of findings and reasons might be rather empty. An explicit statement might go no further than what is already implied. The dissenting judge in the Beck case argued: "I think it is clearly implied in the Commission's order that the sanction against petitioner is being imposed as a deterrent to future violations by petitioner and others. The statute vests the Commission with broad discretion in these matters and nothing is gained by requiring the Commission to spell out that which is obvious." The view of the dissenter is sound if but only if the Commission could say no more than something like this: "We are of the opinion that one who deliberately misrepresents should be penalized by something more than a finding and the accompanying publicity. We think that a suspension of less than four months would be insufficient and that more than four months would be excessive." But the Commission almost surely could say a good deal more than that. It might line up its previous decisions and show what the penalties were and why. It might fit the Beck penalty into its precedents, stating which facts tended to increase or decrease the penalty and how much, and it might thereby demonstrate that its system of penalties is one of even-handed justice. Just as the process of com-

8. 413 F.2d 832 (6th Cir. 1969).

9. 413 F.2d at 834. See also Hanly v. SEC, 415 F.2d 589, 599 (2d Cir. 1969).
Later in the Beck case, the court set aside the four-month suspension on the ground that it was "punitive, not remedial." Beck v. SEC, 430 F.2d 673 (6th Cir. 1970).

10. In United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970), the court declared that the sentencing judge should not have confined his discretion by saying in imposing an unusually severe sentence that "anyone else that is convicted by a jury before me of armed robbery of this nature may expect a similar sentence." The court also said in a footnote that "where the sentence is substantially greater than that usually meted out for a particular offense the District Court ought to explain the basis for the sentence."

11. See Davis, Discretionary Justice 133–41 (1969).

12. Liscio v. Liscio, 203 Pa.Super. 83, 198 A.2d 645 (1964).

13. E. g., Yates v. United States, 356 U.S. 363, 78 S.Ct. 766, 2 L.Ed.2d 837 (1958); United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

paring cases contributes to the orderly development of substantive law, it might contribute to the orderly development of a system of penalties.

Experience in Norway supports what has just been said, for trial courts there have the obligation to state reasons for their choices of punishment and appellate courts write meaningful opinions in reviewing such choices.[14] Yet the opinions of Connecticut's Sentence Review Division, explaining sentences, were found to have so little value that publication was discontinued, and select sentencing opinions published in recent volumes of Connecticut Supplement seem to lack reasoning that is related to the purposes of criminal sanctions.

The SEC, with the prodding of the court in the Beck case, could lead the way.[15]

(4) *The Renegotiation Board.* Systems of informal action unsupported by findings or reasons are not limited to human problems like those of sentencing and paroling; they also extend to money problems like those of the Renegotiation Board.

The Act, first enacted in 1942 and renewed many times, provides for government recapture of "excessive profits" from those who contract with the government. The key term was first given meaning in the 1944 statute, carried into the present statute enacted in 1951:

> (e) The term "excessive profits" means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this title [sections 1211–1233 of this Appendix] to be excessive. In determining excessive profits favorable recognition must be given to the efficiency of the contractor or subcontractor, with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities, and manpower; and in addition, there shall be taken into consideration the following factors:
>
> (1) Reasonableness of costs and profits, with particular regard to volume of production, normal earnings, and comparison of war and peace time products;
>
> (2) The net worth, with particular regard to the amount and source of public and private capital employed;
>
> (3) Extent of risk assumed, including the risk incident to reasonable pricing policies;
>
> (4) Nature and extent of contribution to the defense effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;
>
> (5) Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turnover;
>
> (6) Such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted.[16]

The process is truly one of "renegotiation" only when the parties come to agreement; when they do not, the Board may issue a unilateral order. From the time the Board was created in 1951 through 1968, determinations of excessive profits were made in 3,801 cases for a total of more than $975,000,000, but only 399 unilateral orders were entered, of which 152 were appealed to the Tax Court; of the 152, 53 were dismissed, 35 were disposed of by agreement, the Tax Court redetermined 32, and 32 were still pending.

One would expect that a Board which for almost twenty years has been deciding individual cases what profits are "excessive" would thereby have developed a meaningful body of law on the subject which would constitute an authoritative guide to the determination of later cases. But that is not what has happened. A body of case law arises only when findings and reasons are stated; a body of case law usually rests on a generally available set of reasoned opinions which state the facts, resolve issues of law and policy and discretion, discuss reasons pro and con, explain the choices made, and relate each choice to the relevant precedents. No set of such opinions has evolved. The unstructured discretion that the Board had in the beginning remains unstructured. The Board's strongest movement toward clarification consists of regulations elaborating the meaning of the statutory standards.[17] The Board even refuses to make available the quantitative standards it uses in deciding cases.

The statute provides: "Whenever the Board makes a determination with respect to the amount of excessive profits, and such determination is made by order, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination."[18] One would expect that provision to furnish the basis for building a body of case law. The reason it is not is apparently the Board's regulation that "The Board will not make available for public inspection and copying any orders . . . made in the adjudication of cases. The Board has determined that all such orders are within the exemptions set forth in § 1480.9(a) (3) and (4) . . ." The Board believes that the orders and the reasons for them must be totally concealed because confidential information about particular companies is always involved.

The question is whether the Board can protect the confidentiality of particular information while at the same time openly discussing the reasoning that it uses in making its decisions. The Board advances three reasons for withholding even the quantitative standards it uses: (a) It fears that publication will emphasize a rate-of-return approach which it rejects. (b) It says publication is pointless because its determinations are not reviewed. (c) It claims that it lacks sufficient personnel to do the extra work involved in making the materials available. Let us examine each of these three reasons.

(a) The argument that the Board cannot make the truth known about what it is doing because it may be misunderstood is on its face so weak that an answer should be unnecessary. If the truth is that the Board does not use a rate-of-return approach, then the Board can emphasize that fact. By opening its reasoning processes it can demonstrate what its true approach is.

(b) That the statute provides for de novo determinations by the Tax Court is the basis for the assertion that the Board's determinations are not reviewed. The reality is, however, that the Board's determinations are reviewed. For instance, in Offner Products

14. See Johannes Andenaes, The Legal Framework, in 2 Scandinavian Studies in Criminology 9, 13 (1968).

15. In one limited circumstance, reasons for a criminal sentence must be stated—when a defendant is tried a second time for a crime and a more severe sentence imposed than the first time; the purpose is to protect against "vindictiveness against a defendant for having successfully attacked his first conviction." North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2027, 23 L.Ed.2d 656 (1969). The principle of the case is susceptible of judicial expansion.

16. 50 App.U.S.C.A. § 1213(c).

17. See 32 CFR §§ 1460.8–1460.15.

18. 50 App.U.S.C.A. § 1215(a).

Corp. v. Renegotiation Board,[10] the Tax Court said: "In this de novo proceeding the burden of proof rests upon petitioner to show errors in the determinations of the Renegotiation Board," citing Tax Court cases. The question before the Tax Court is whether the Board has committed errors. That means the Board's determinations are reviewed. But even if the Board's determinations were not reviewed, requiring open findings and open reasons would not be "pointless." Such findings and reasons are needed in order that a body of case law may be developed that will guide discretionary determinations. Parties should be entitled to know the law that affects them. Decisions that are explained through reasoned opinions are less likely to be arbitrary than decisions not so explained. Would the Board argue that reasoned opinions of the Supreme Court of the United States are "pointless" because the decisions are not reviewed by any other tribunal?

(c) If the Board really needs more personnel in order to do its job properly, it should seek additional appropriation for that purpose. But a system of open findings and open reasons may mean a reduction in personnel, although probably not in the early stages. A system of principled decisions that are guided by a body of case law should be more efficient than a system in which every question must be decided anew on an ad hoc basis. Of course, if the Board follows its precedents without letting affected parties know the precedents, the system should be condemned as unfair.

Any determination which is supported by reasons can be easily altered to delete all specific confidential information as well as any other facts that will identify the particular company, while at the same time preserving the factual basis for the Board's reasoning processes. All figures bearing upon

19. 50 T.C. 856, 859 (1968).

DECIDING APPEALS

Daniel J. Meador*

American courts should also consider possibilities for utilizing the other major English time-savers--immediate decisions from the bench, and no written opinions. Opinion preparation time accounts for a significant portion of appellate delay in the United States.[3] In discussions of this subject, different but related questions tend to be confused. With some American judges, for example, whether a decision on the bench is workable may depend on whether a statement of reasons must also be given. Attitudes toward an orally delivered opinion may also vary depending on whether the opinion is strictly for the litigants or whether it is to be published. These are three intertwined issues: (1) Can the case be decided from the bench? (2) To what extent should the reasons for the decision be explained? (3) Should that statement of reasons be published? Analysis might be furthered by separating these questions, so that each procedure can be evaluated better on its merits.

Whether a full-length statement of reasons should be given in all cases seems to be the easiest of these issues for American courts. Dispensing with the traditional, elaborate opinion in some cases is an increasingly popular idea. The movement away from full opinions reflects a view that the contentions in some appeals are too easy, clear-cut, or insubstantial to require an extended explanation of the court's reasoning. A short memorandum will suffice to inform the litigant of why the court is deciding as it is, if there is no issue of general interest to the law. But the memorandum is still an explanation of the reasons for the decision. It is not the same as the Fifth Circuit practice which goes a long step further in some cases with a summary affirmance and no reasons given other than reference to a multi-part rule.[4] The American style memorandum or per curiam might be roughly analogous to the cryptic statement of reasons in the English Court of Appeal, Criminal Division, in denials of leave to appeal; both are employed in cases where the issues are insubstantial. On the other hand, in every case given a hearing--an "appeal"--the English court spells out its reasoning at length. Thus in English criminal appeals practice reasons in one degree or another are always given by the court. That is clearly a desirable practice. Since an English "appeal" by definition presents issues of substance, this practice parallels the growing American trend of writing sculptured, full-length opinions only where there are substantial or important points involved.

There is another factor in American thinking about how fully the court should set forth its reasoning. That is whether the issues in the case are such that an opinion would have significant precedential value. Would it contribute to the law? Or are the matters involved of interest only to the parties? Inquiry of this sort does not figure in English thinking. For as pointed out, reasons are always fully stated by CACD in deciding appeals (as distinguished from applications). Precedential value, or lack of it, is relevant in England, however, but for another purpose--publication. Only those "judgments" of CACD are printed that are deemed by a committee to be of genuine significance to the law. Thus, the English separate the question of the court's spelling out reasons for decisions from the question of publishing those reasons; precedential value influences the latter but not the former. On the other hand, those American courts which have ceased giving full statements of reasons in all cases seem to let precedential value influence, if not control, the decision on the type of opinion to be utilized.

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Separating the issue of stating reasons from the issue of publication is the sounder course. Reasons should always be given, but not every opinion which is delivered needs to be printed. There are justifications for requiring the court to give explanations which have nothing to do with doctrinal development or precedential value. One is that the result may be more acceptable and satisfying to the litigants; the appearance of justice may be served better if the court explains how it reached its conclusion. Another is that the practice helps achieve just decisions; requiring the court to state openly its reasons makes the judges think more precisely and gives some protection against decision by whim or impermissible considerations.

A clearer recognition of this distinction would perhaps open the way for American courts to give reasons orally from the bench in the English style. A decision about publication can be made later. Only a small minority of opinions will meet publication criteria, and those that are selected can then be revised and polished and fleshed out with citations by the judges. If the judges realize that at the announcement of the decision they need not resolve the publication question, and if they realize that their every word will not appear in the permanent, printed reports, they should be much more willing to give an extemporaneous oral explanation. They could thereby satisfy the interests in having courts state reasons but without the lapse of time and substantial investment of effort which inevitably go with written opinions.

This still leaves the problem of the rapidity with which a decision can be reached. Even if American judges are sympathetic to the notion of giving their reasons orally in open court, the reluctance to reach a conclusion then and there may be a substantial impediment to the English style of disposition. Some American judges would not feel confident about decisions arrived at without a longer time for reading, reflection, and conference consideration. But attitudes of that sort rest in large part on the way appeals are handled at present. The familiar is confused with the necessary. Attitudes might change if the procedures were changed. If, for example, the American style oral argument were reshaped in the direction of the English model, in that there was no fixed time limit, if counsel were well prepared to discuss fully all aspects of the case, and if judges and lawyers realized that a decision would be made at that sitting, the proceeding would tend to become the kind of open conference of the court that it is in England. The judges could be engaged in the decision-making process as the hearing unfolded in a way that is not likely at present because the procedures are not framed with that in view. Under current American practice the principals know that they are not gathered in the courtroom to reach a final disposition of the appeal. This colors the meaningfulness of the exercise.

Variations for American experimentation are quite possible here. A court might distinguish between relatively easy issues which could be resolved on the bench, and the more complex issues on which greater deliberation is required. That would make immediate decisions possible in at least a sizeable percentage of criminal appeals. Another modification might be a decision after only a slight passage of time. Instead of announcement at the conclusion of argument the court might retire and then return to announce its decision in an hour, for example, or that afternoon, or the next day. This might be a more comfortable modus operandi for many American judges, and any such variation would still greatly expedite disposition of the appeal as compared to the reserved decision and written opinion system now prevailing in most American courts. The U.S. Courts of Appeals for the Second Circuit and the District of Columbia Circuit are in fact making prompt and orally announced decisions under variations of these sorts.

An adoption of the English blending of the American new trial motion practice with traditional appellate review would also contribute to expedition. In many American jurisdictions new trial motions are made in almost every criminal case as a matter of routine following conviction. In some jurisdictions the appellate process cannot go forward as long as a new trial motion is pending. Thus in large numbers of cases several weeks often pass with an appeal stalled. Since very few new trial motions are in fact granted, the major effect of the motion is simply to delay the appeal. The rare instance in which the motion is granted, thereby obviating the need to appeal, hardly justifies the substantial delays in the great mass of cases. Nothing of substance would be lost to defendants by abolishing new trial motions and giving the appellate court all authority to deal with a conviction. The Hufstedler proposal for a court of review, previously mentioned,[5] combines post-trial review in this way.

Other variations from the English arrangement could be made. One would be to provide for a proceeding where the trial judge who conducted the trial sits with the appellate tribunal, though not as a member of it. A single hearing could be held with argument covering all issues--in effect a simultaneous argument of a new trial motion and of an appeal. The trial judge as such could grant a new trial, or the appellate judges could reverse. Still another variation would be to abolish new trial motions except where the grounds require evidence outside the trial record. If the grounds could be passed upon on the basis of the record made at trial, the issues would go directly to the appellate court. But if evidence had to be taken the trial judge would hear the matter first. The virtue of this arrangement would be that the appellate court would not be drawn into hearing evidence, as the English court is. Thus it might be more satisfactory to those American judges who find too novel the English idea of receiving evidence on appeal. The same result could be reached by having the entire case go first to the appellate court, with a discretion there to refer those sorts of issues to the trial judge for resolution; the remainder of the case could be held at the appellate level to abide the trial judge's ruling on the issue dispatched to him. This would have the advantage of centralizing control over the review process in the appellate court.

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[5] See note 9, Chapter IV, supra.

AN EXPERIMENT IN APPELLATE DECISION MAKING

Daniel J. Meador*

The American Academy of Judicial Education conducted a five-day judicial writing seminar for appellate judges in June, 1974. As a novelty, one afternoon was devoted to an experiment in appellate decision making. The object was to determine whether these judges could soundly dispose of a criminal appeal on the basis of oral argument without written briefs and by a decision announced immediately following the argument.

Twenty-four of the twenty-six judges participating sat on state courts of last resort or on state intermediate appellate courts; one was a state trial judge; one was a Canadian appellate judge. Twenty-two regularly heard criminal appeals. Half had never participated in the decision of an appeal in which the court's decision had been announced immediately after conclusion of oral argument. Three-fourths had never participated in the decision of an appeal on the basis of oral argument without written briefs. No judge had more than a rare exposure to either of these variations from the conventional American appellate process. Thus, speaking generally, this was a group of state appellate judges experienced in deciding criminal appeals but unfamiliar with the process employed in the experiment.

The case was selected from an actual appeal in which a state supreme court had recently affirmed a conviction for attempted rape. Some editing of the papers was done so as to pose a single issue: the legality of the warrantless seizure in the defendant's apartment of a shirt which was introduced into evidence against the defendant. This was the principal issue in the actual appeal. Each judge was provided with the following material twenty minutes before oral argument commenced:

1. The indictment and the judgment of conviction and sentence (4 pages).

2. A transcript containing only the testimony pertinent to the seizure issue (50 pages).

3. A statement of points filed by appellant and a statement in response filed by the appellee (2 pages). [Attached on Appendix A]

4. A staff attorney's research memorandum on the seizure issue posed by the parties' statements and the transcript (8 pages).

At the close of the twenty minutes (during which each judge studied these papers) oral argument commenced. The twenty-six judges sat at a table side-by-side facing counsel, but they were designated into threesomes (one foursome) so that each judge could have the sense of being in a typical panel beside colleagues with whom he could discuss the case. One acted as presiding judge for the

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whole group. The argument for each side was presented by a member of the bar experienced in criminal appeals. The attorneys were well prepared in advance.

Before the materials were distributed the entire process was discussed with the judges so that they understood what they were expected to do, step-by-step. The proceeding went as follows, without interruption:

a. Each judge studied the materials for 20 minutes.

b. Oral argument commenced with appellant's presentation, followed by appellee's presentation. No time limit was set. Argument was to continue as long as the judges found it helpful. Each attorney in fact consumed 34 minutes.

c. At the conclusion of oral argument each judge immediately wrote a short per curiam opinion (specified to be from one to two pages in length) deciding the case for his court. He was given 20 minutes for this task. This was done instead of an oral announcement because it was not feasible to have twenty-six judges announce a decision orally; moreover, this was a way of having an additional writing exercise.

After the opinions were submitted each judge was asked to complete a questionnaire. Some of the questions, with the judges responses, were as follows:

	Yes	No
Did you feel comfortable in reaching a decision, that is, were you reasonably confident that you understood the pertinent facts and legal authorities and that you had adequate time to think about the case?	22	4
Do you think it would have been feasible to announce your decision orally from the bench immediately after the close of the argument, or within a few minutes thereafter?	24	2

If you felt reasonable comfortable in reaching a decision through this process do you think you could have coped adequately with the case under this kind of procedure if it had presented 3 or 4 issues instead of one?

Probably	6
No	4
It depends	13

In the minds of those saying "it depends" the main consideration was the complexity or the simplicity of the additional issues.

Only a small minority indicated specific concern about the process in the actual case used. Some of the concerns, with the number of judges troubled to some degree, were as follows:

Insufficient transcript of trial court proceedings	3
Lack of written briefs	3
Oral argument not long enough or fully enough developed	2
Insufficient time for preparation before argument	4
Insufficient time to study or think about the case after argument	5

The value of the staff attorney's memorandum in the process was assessed as follows:

Of little value	2
Moderately helpful but not essential	3
Quite helpful	12
Essential	9

The judges were asked some additional questions hypothetically:

	Yes	No
Do you think you could have decided this case satisfactorily without any transcript at all?	16	10
Do you think a decision could have been made more quickly and just as soundly on written briefs with no oral argument?	22	4
Do you think this case deserved a full-length signed opinion instead of a short per curiam?	5	21

Twenty-two voted to affirm the conviction, the result the state appellate court had reached in the actual appeal.

Conclusions and Observations. At least in this demonstration case, this variation from the conventional American appellate process proved workable. The large segments of time saved by such process are the time consumed sequentially by the lawyers for both sides in writing briefs and the time consumed by the judges in constructing and circulating (and perhaps holding conferences on) written opinions. The intensity of judicial scrutiny seemed adequate to the legal problem presented.

What remains untested and hence unproven is the workability of this process in appeals presenting more complicated or difficult issues. Moreover, this experiment does not provide a side-by-side comparison with other decisional processes. The judges thought, for example, that written briefs without oral argument would have worked as well and as expeditiously. But that is speculation. The cost there would be largely in lawyer time, in writing briefs. In a court not reasonably current that would have little impact on overall decisional time. But in a court current with its docket a move to an oral proceeding of this type could effect a substantial shortening of time from filing to disposition, with no apparent diminution of justice.

Possibilities for abbreviating transcripts are suggested. Almost all the judges thought that the limited transcript was adequate, and over half the judges thought that this appeal could have been decided with no transcript at all.

One of the unanswered questions about limiting transcripts and issues in direct criminal appeals is whether the short-run advantages would be outweighed in the long run by collateral litigation raising new issues outside the limited transcript utilized in the initial review.

Despite these qualifications and unanswered questions, the exercise does suggest strongly that an oral proceeding and prompt decision are feasible in American appellate courts, at least in relatively uncomplicated cases. A research memorandum by a professional assistant is probably a necessary feature of such a process, to assist the judges' understanding and to insure sound adjudication.

Appendix A

Statement of Points for Appellant

1. The purple shirt was erroneously admitted into evidence, as it was obtained through an unlawful search and seizure of appellant's residence. The search was made without a warrant. Defendant did not consent to the search; he was coerced into requesting the police to take him to his house for clothing after they had seized the clothing which he had on. Psychological coercion of this sort invalidates consent. Phelper v. Decker, 401 F.2d 232, 236 (5th Cir. 1968).

Statement of Appellee in Response

1. The consent given by the defendant to the police to enter his residence was a valid consent. Since the consent was valid the seizure of the purple shirt in defendant's residence was lawful since the shirt was in plain view. Schneckcloth v. Bustamonte, 412 U.S. 218, 234 (1973); Harris v. United States, 390 U.S. 234 (1968).

Oral argument was presented for the appellant by Ronald Goldfarb and for the appellee by Thomas Lumbard, both of the District of Columbia Bar.

The staff attorney's memorandum was prepared by Timothy Oksman, director during 1973-74 of the central staff for the Appellate Justice Project in the Supreme Court of Virginia.

STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS*

PART I

PRELIMINARY STATEMENT

Appellate judges have long been urging that many of their cases do not raise issues of types that, if discussed in depth, will contribute importantly to knowledge of the law or its development. At the same time, many of these judges bemoan the lack of time to consider and develop the solution to significant problems in other cases.

Among judges of states' highest courts 35% were of the opinion that the large number of opinions required to be written constitute a severe problem, according to a survey conducted by the American Judicature Society and summarized in Report No. 25, "Congestion and Delay in the State Appellate Courts" (June, 1969). The judges ranked opinion-writing as the second most significant cause of delay in the highest appellate courts. The results were basically the same for intermediate courts. The judges reported that writing opinions took more time than any other of their tasks: hearing arguments, conferences, research, administration, or miscellaneous duties. Doing research is the second most time-consuming task. Together these two tasks take most of the judge's time.

Many decisions do not call for opinions. A simple order or a brief memorandum may be sufficient to apprise the parties of the result and dispose of the case. Some appellate courts are developing rules to define the cases in which an opinion is necessary. However, this report deals not with that problem but with the question of whether an opinion, once written, should be published. Arguments in favor of requiring the writing of opinions have often been confused with arguments in favor of publication. The questions must be kept distinct.

One purpose of a judicial opinion is to permit the parties and their attorneys to see that the judges have considered their positions and arguments and to see the reasoning on which the court reached its conclusion. Thus, a written opinion may be required for reasons having nothing to do with whether an opinion should be published.

Still another basis for requiring a written statement of reasons in connection with the disposition of cases relates to the process of deciding cases. Most people find that their thinking is disciplined by the process of written expression. The reduction of ideas to paper, the organization of ideas on paper, significantly affects ultimate decisions; fuzzy thinking is exposed and in the collegial setting of an appellate court, errors are corrected. This likewise does not have anything to do with whether or not the reasons that support a decision are published or are filed and given only to the parties and their lawyers.

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* A Report of the Advisory Council for Appellate Justice. Published in 1973.

A wholly different purpose of judicial opinions is to provide the stuff of the law: to permit an understanding of legal doctrine, and to accommodate legal doctrine to changing conditions. Statutes and Constitutions must be interpreted and the common law developed. The reasoning of the court in significant cases must therefore be made widely available to judges, lawyers and the public. In such cases the law can be better developed if judges writing opinions have adequate time and energy thoroughly to research and reflect upon the difficult cases which will result in published opinions.

The judge's opinion also serves as a teaching device. Many people in society have special obligations to know what actions conform to law. Opinions of judges help not only the litigants; they help other citizens and public officials in similar situations to know how to act within the bounds of the law; and they also instruct lawyers besides those at bar in counseling their clients. Therefore, certain opinions should be publicly disseminated as rapidly as possible: for example, opinions involving alteration or modification of a rule of law, a critique of existing law or a resolution of a conflict of authority.

It is clear also that the judicial time and effort essential for the development of an opinion to be published for posterity and widely distributed is necessarily greater than that sufficient to enable the judge to provide a statement so that the parties can understand the reasons for the decision.

We believe that the recommendations in this report promote economy of effort while accommodating the principle that all appellate decisions should be rendered in writing.

This report recommends that opinions be published only if certain defined standards for publication are satisfied. It also sets forth procedures for determining whether an opinion should be published, and finally it considers whether or not a non-published opinion may be cited to or by a court. A proposed model court rule based on the report is attached.

PART II

RECOMMENDATIONS

I. BASIC PROPOSAL

PRINCIPLES AND PROCEDURES SHOULD BE ADOPTED THAT WILL REDUCE THE PUBLICATION OF APPELLATE OPINIONS THAT ARE WITHOUT GENERAL SIGNIFICANCE TO THE PUBLIC, TO THE LEGAL PROFESSION, OR TO ADVANCING THE FUNCTIONS OF THE LAW.

It is clear to every lawyer and judge that many written opinions do not warrant publication. It is also clear that in many cases extended opinions are not needed. These two different ideas should be kept separate. Different criteria can be suggested for deciding that an opinion

once written should be published or for deciding whether or not an extended opinion should be written. If a tentative determination can be made at a very early stage in the process of decision-making that a case is one that does not warrant a published opinion, drafting will be facilitated. Non-published opinions can be short. They do not need to cite all of the law, and can deal mainly with facts as they relate to law. They can be written especially for the parties. They need not be polished. On the other hand, opinions that are designated for publication will, under the standards, involve cases that have broader importance; therefore the written expression of the court's decision deserves more intensive craftmanship.

The limits on the capacity of judges and lawyers to produce, research and assimilate the substance of judicial opinions are dangerously near; in some systems they may already have been exceeded. Non-publication alone will not solve the problem, but non-publication combined with other procedures suggested in this report can help redress the balance between what must be produced and assimilated and the resources available for production and assimilation.

a. Unlimited proliferation of published opinions constitutes a burden and a threat to a cohesive body of law. Ten years ago it was estimated that published decisions of American courts approached two and a half million. Today the number is probably nearer three million. Common law in the United States could be crushed by its own weight if the rate of publication is not abated.

b. Publication of opinions burdens the work of writing opinions. While limitation on the publication of opinions does not reduce the number of opinions to be written, it greatly reduces the time and resources that must be devoted to opinion preparation. An opinion prepared to inform the parties of the reasons for a decision may properly be quite different from an opinion that will be published and become part of the body of precedent. The court should be able to disclose its reasoning to the parties without a judge having to acquit his legal scholarship in every opinion.

The collegial process of an appellate court requires consideration by all members of the court of all opinions of that court--whether or not they are to be published. However, the burden is substantially lighter when the responsibility is to examine a brief opinion written in order to dispose of the issues raised with reasons stated, for the benefit of the litigants and their counsel, and when the opinion is not intended for publication. The time saved can better be utilized for consideration and resolution of critical issues. This avoids erosion of collegiality and consequent impairment of a cohesive enunication of the law for the jurisdiction.

c. The burden on the lawyer is commensurate with that of the judge in terms of accountability in preparing his cases. The endless search for factual analogy requires immense expenditure of time and funds that can result in reliance upon quirks rather than upon careful rationalization and application of the developing law.

d. The logistical burden for the courts and practitioners has become dangerously heavy. Posting, maintenance, shelving and librarian services result in time and money costs disproportionate to the value of the materials.

e. The burden on the publishing industry to continue to supply a complete reporting services at prices that are tolerable appears to be beyond their capacity.

f. As the number of opinions grows, law-finding devices must proliferate and expand, and this is in itself a burden. If the finding devices do not grow, they become less effective, from loss of precision and sophistication.

II. PRINCIPLES AND PROCEDURES FOR DETERMINING PUBLICATION

1. THE STANDARDS FOR PUBLICATION SHOULD BE PROMULGATED BY RULE OF THE HIGHEST COURT TO GOVERN ITS PUBLICATION PRACTICE AND THAT OF COURTS UNDER ITS SUPERVISION.

The language of this recommendation is general and may have to be modified in certain instances. For example, if a statute requires publication of all supreme court opinions, the supreme court, although itself bound by the legislation, nevertheless could promulgate a different rule for courts under its jurisdiction. We urge repeal of any statutes mandating publication of all appellate opinions. The highest court should be given the power to adopt rules on this subject applicable to all courts. Generally, the standards set out here should apply throughout the court system.

The Committee considered the alternative of proposing that each court adopt rules governing its own operations. This method was rejected because it would probably introduce undesirable variations in publication practice within the system.

Each jurisdiction promulgating publication rules through a supervisory body not identical in composition to the high court should consider whether special treatment is required to avoid introducing problems with regard to the precedential value of non-published opinions. (See point IV below.)

2. UNLESS DIRECTED BY A HIGHER COURT, OPINIONS SHOULD BE PUBLISHED ONLY IF A MAJORITY OF THE JUDGES PARTICIPATING IN THE DECISION DETERMINE THAT PUBLICATION IS REQUIRED UNDER STANDARDS SET OUT HEREIN. CONCURRING OPINIONS SHOULD BE PUBLISHED ONLY IF THE MAJORITY OPINION IS PUBLISHED. DISSENTING OPINIONS MAY BE PUBLISHED IF THE DISSENTING JUDGE DETERMINES THAT A STANDARD FOR PUBLICATION HAS BEEN SATISFIED.

The Committee considered a variety of proposals about how and by whom the decision on publication should be made. The use of an outside agency such as the special committee in New Jersey or the reporter of decisions in New York was considered undesirable unless experience should prove that other methods will not work. Involving decision-makers in the publication decision should result in a greater commitment to the announced publication policy. Interjection of a mechanism for potential review by others entails the establishment of appeal procedures, and requires setting up a cumbersome apparatus, which is undesirable even if rarely used.

The provision that a higher court may direct publication without reference to the desires of the deciding court is probably only a restatement of an existing inherent power of the higher court. But the principle is important enough to call for explicit recognition. Direction from a higher court may be expected in some instances when publication of the opinion below will contribute to a better understanding of the high court's disposition and will avoid need for extensive repetition in the ultimate opinion of matters satisfactorily covered below.

A problem arises when the author of a dissenting opinion desires to publish and the majority has not opted for publication. A judge, of course, has the right to dissent and to make known the views that prompt the dissent. The proposal retains the right of one or more dissenters to announce disagreeing views to the bar and the public by publishing the dissent, subject to the dissenters' determining that a standard for publication has been satisfied. Undoubtedly the majority opinion will meet standards of publication in any case in which a dissent is published.

3. TO AVOID WASTED EFFORT, A TENTATIVE DECISION NOT TO PUBLISH SHOULD BE MADE BY THE PANEL AT THE EARLIEST FEASIBLE POINT. THIS WILL BE AT THE CONFERENCE OF THE CASE BEFORE THE OPINION IS ASSIGNED, OR AT THE TIME OF ASSIGNMENT.

The decision not to publish should be made as soon as possible before a judge begins to prepare the opinion so that he will know whether he is writing solely for the parties or presumptively for publication. Otherwise, the expected savings in opinion preparation time will not be realized.

On the other hand, an early decision to publish must be tentative only. The court should reserve its final decision to publish until the opinion has been fully considered and is ready for filing. During the consideration of an opinion by a court early drafts may undergo considerable change having

a direct bearing upon the utility or necessity of publication. However, early decisions not to publish can be made with considerable assurance, and such determinations will be an aid to the presiding judge in allocating the workload by assigning the writing of opinions to members of the court.

The standards suggested are not aimed at the quality of writing or the quality of the judging or the correctness of a decision. Instead, they draw distinctions on the basis of the particular type of problem before the court for decision. Is it a problem that calls for an additional published opinion?

Whether the opinion is strong or weak is not the decisive factor as regards publication. The proper factors and standards are set out below. They assert that decisions establishing a new rule of law or altering a rule should be published, as should a criticism of a rule. Opinions involving legal issues of continuing public interest, or resolving conflicts of authority, merit publication. In short, the character of the problem, not the quality of the opinion is the important consideration, and this can be determined early in many cases--at least, tentatively.

4. EVEN IF THE OPINION DOES NOT WARRANT PUBLISHING IN ITS ENTIRETY, EXCERPTS THAT MEET THE STANDARDS SHOULD BE PUBLISHED.

The Committee recognizes that in many cases an opinion prepared mainly for the benefit of the parties may involve several matters that do not meet the standards for publication, and at the same time may involve one or more matters meeting the standards. In such cases, partial publication should be ordered for so much of the opinion as meets the publication standards; the remainder should be left unpublished. When a tentative decision to publish is made before the opinion is prepared, as provided in the preceding section, the opinion writer can prepare the opinion with partial publication in mind. Examples of methods that could be used are: separating the part to be published from the unpublished part; including in the published portion, in the interests of assuring it will be understood, sufficient factual information; using a separate appendix to include all of the unpublished parts. Deletions should be clearly indicated in the published opinion so that anyone interested may know what is available in the records of the court. All unpublished opinions and parts of opinions are components of the public records of the court and available to anyone to examine.

There should be no problem in implementing this proposal so long as the writer of the opinion knows at the outset that the decision is to publish only partially. This will avoid filling opinions appropriate for partial publication with discussions that are extraneous to the main substance.

III. STANDARDS FOR PUBLICATION

NO OPINION IN AN APPELLATE COURT SHOULD BE PUBLISHED UNLESS IT SATISFIES ONE OR MORE OF THE FOLLOWING STANDARDS.*

1. THE OPINION LAYS DOWN A NEW RULE OF LAW, OR ALTERS OR MODIFIES AN EXISTING RULE.

This language is preferred over "case of first impression" language since it offers less room for treating the application of established rules to novel fact situations as "first impression." The recommended language is sufficiently broad to encompass first-time construction of a new statute or a new construction of an old statute.

The Committee considered whether the publication standard should require that the new rule should be "important" as well as "new." The recommended language reflects the Committee's view that the judiciary and the bar should be fully informed of the enunciation of new rules without regard to subjective judgments about their importance. The number of published opinions that would be eliminated if importance were a qualification would probably be very small.

2. THE OPINION INVOLVES A LEGAL ISSUE OF CONTINUING PUBLIC INTEREST.

There will be rare instances in which an opinion does not establish a new rule of law, but where public interest in the legal issue requires publication to disseminate information about the treatment of the legal issue.

Continuing public interest has been specified, rather than general public interest, to indicate that public interest of a fleeting nature, however widespread, is not a sufficient reason for publication of an opinion.

Publication under this standard will occur infrequently but it is better to provide this criterion than to have the other standards stretched to meet exceptional circumstances.

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* When a lower court's opinion has been published in a case that has been taken up on appeal, the complete history of the progress of that case through the courts should be preserved in published records. This does not mean that an opinion would be published by the higher court. It should be published only if a standard for publication is satisfied. But, for example, when the higher court affirms or reverses merely by citing the opinion below, or by reference to a statute or controlling precedent, it is necessary to develop a method of listing and indexing judgments by case names in a table at the end of each volume of the official reports. A record is required to complete the history of the case and to permit complete Shepardizing.

3. THE OPINION CRITICIZES EXISTING LAW.

This standard recognizes the function of an appellate court in calling attention to the shortcomings of existing common law or inadequacies in statutes, particularly where the opinion suggests action by a higher court or by the legislature.

4. THE OPINION RESOLVES AN APPARENT CONFLICT OF AUTHORITY.

The Committee recognizes that an occasional opinion, while not satisfying the preceding standards, will merit publication because it contributes to the cohesiveness of the body of law by rationalizing apparent divergencies in the ways an existing rule has been applied.

IV. CITATION

OPINIONS NOT DESIGNATED FOR PUBLICATION SHOULD NOT BE CITED AS PRECEDENT BY ANY COURT OR IN ANY BRIEF OR OTHER MATERIALS PRESENTED TO THE COURT.

One of the major objectives of efforts to curb publication is to institute a procedure whereby judges can write opinions for the benefit of the parties without having to include all the factual background and detailed rationale that is required for opinions that will enter the body of precedential law. An opinion that meets the needs of the parties to know the reasons for a decision can be written with the assumption that the parties are familiar with the background of the case. It need not take pains to identify the issues the parties chose to raise, rehearse the arguments they made, or discuss the authorities they agreed were decisive and the matters of fact or law that were stipulated. An opinion for the whole world cannot rest on such assumptions or foundations. Thus, it could be misleading if opinions prepared for the more restricted purposes appropriate for unpublished opinions were cited as precedent.

A court has power to determine what material can be cited to it as well as what material it will cite to support a proposition. 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. The rule says simply that the opinions in certain cases do not have the status of precedents to influence future determinations.

The reasons for requiring a rule of non-citation are many:

1. 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.

2. Cost will be reduced by eliminating the need to obtain and examine the mass of opinions that are not designated for publication.

3. The absence of a non-citation rule would encourage the inclusion in opinions not designated for publication of facts and details of reasoning, thus frustrating the purposes underlying non-publication.

4. Cost and delay of cases appealed only because they are apparently at odds with unpublished opinions, can be reduced.

5. Great difficulty, if not impossibility, would be involved in determining whether an unpublished opinion has been overruled.

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.

The Committee considered three alternatives related to the use of unpublished opinions:

1. Unpublished opinions have precedential value and can be cited.

2. Such opinions have no precedential value.

3. Such opinions may not be cited to support arguments or statements of law, i.e., as precedent, and nothing is said about precedential value.

The first of these positions would probably solve no problems. A whole new publication series would probably be created; more books and more citations of opinions would ensue. The time of the courts and of the lawyers would be taken up examining all of these new "unpublished opinions" to see if they have value.

The second of these positions takes us into a morass of jurisprudence and policies that can be answered only in light of the political experience of each state.

We recommend adoption of the third alternative denying citation and use by the court or litigants to support statements or ideas. It deals with use rather than philosophical effect. It relies on the correspondence of publication and precedential value on the one hand, and of non-publication and non-precedential value on the other.

The problem of precedential quality of an unpublished opinion is critical where a rule or statute or custom holds every decision of a higher court to be binding upon all lower courts within its jurisdiction. A non-citation rule effectively deals with the stare decisis problem of precedent. Jones v. Superintendent, 465 F.2d 1091, 1094 (4th Cir., 1972).

APPENDIX I

Model Rule on Publication of Judicial Opinions

Rule ____

Publication of Appellate Opinions

1. Standard for Publication

An opinion of the (highest court) or of the (intermediate court) shall not be designated for publication unless:

a. The opinion establishes a new rule or law or alters or modifies an existing rule; or

b. The opinion involves a legal issue of continuing public interest; or

c. The opinion criticizes existing law; or

d. The opinion resolves an apparent conflict of authority.

2. Opinions of the court shall be published only if the majority of the judges participating in the decision find that a standard for publication as set out in section (1) of this rule is satisfied. Concurring opinions shall be published only if the majority opinion is published. Dissenting opinions may be published if the dissenting judge determines that a standard for publication as set out in section (1) of this rule is satisfied. The (highest court) may order any unpublished opinion of the (intermediate court) or a concurring or dissenting opinion in that court published.

3. If the standard for publication as set out in section (1) of the rule is satisfied as to only a part of an opinion, only that part shall be published.

4. The judges who decide the case shall consider the question of whether or not to publish an opinion in the case at the conference on the case before or at the time the writing assignment is made, and at that time, if appropriate, they shall make a tentative decision not to publish.

5. All opinions that are not found to satisfy a standard for publication as prescribed by section (1) of this rule shall be marked, Not Designated for Publication. Opinions marked, Not Designated for Publication, shall not be cited as precedent by any court or in any brief or other materials presented to any court.

Division III

RULES FOR PUBLICATION OF APPELLATE OPINIONS

Rule

Adopted by the Supreme Court of the State of California, effective Jan. 1, 1964, pursuant to authority now contained in Const. art. 6, § 14, and Gov. C. § 68902.

Editorial Comment

Const. art. 6, § 14, provides that the Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court may deem appropriate and those opinions shall be available for publication by any person.

Gov. C. § 68902 provides that such opinions of the Supreme Court, of the courts of appeal, and of the appellate departments of the superior courts as the Supreme Court may deem expedient shall be published in the official reports under the general supervision of the Supreme Court.

Rule 976. PUBLICATION OF COURT OPINIONS

(a) [Supreme Court] All opinions of the Supreme Court shall be published in the Official Reports.

(b) [Standard for opinions of other courts] No opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports unless such opinion (1) establishes a new rule of law or alters or modifies an existing rule,[1] (2) involves a legal issue of continuing public interest,[2] or (3) criticizes existing law.[3]

As amended, effective Nov. 11, 1966; Jan. 1, 1972.

(c) [Courts of Appeal and appellate departments] Unless otherwise directed by the Supreme Court, an opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports if a majority of the court rendering the opinion certifies prior to the decision becoming final in that court that it meets the standard for publication specified in subdivision (b). An opinion not so certified shall nevertheless be published in the Official Reports upon order of the Supreme Court to that effect.

As amended Nov. 11, 1966; Jan. 1, 1972.

(d) [Superseded opinions] Regardless of the foregoing provisions of this rule, no opinion superseded by the granting of a hearing, rehearing or other judicial action shall be published in the Official Reports.

Formerly (e), renumbered (d) effective Jan. 1, 1972.

(e) [Editing] Written opinions of the Supreme Court, Courts of Appeal, and appellate departments of the superior courts shall be filed with the clerks of the respective courts. Two copies of each opinion of the Supreme Court and two copies of each opinion of a Court of Appeal or of an appellate department of a superior court which the court has certified as meeting the standard for publication specified in subdivision (b) shall be furnished by the clerk to the Reporter of Decisions. The Reporter of Decisions shall edit the opinions for publication as directed by the Supreme Court. Proof sheets of each opinion in the type to be used in printing the reports shall be submitted by the Reporter of Decisions to the court which prepared the opinion for examination, correction and final approval.

Formerly (f), added, effective Jan. 1, 1964; as amended, effective Nov. 11, 1966; renumbered (e) effective Jan. 1, 1972.

[1] This criterion calls for publication of the relatively few opinions that establish new rules of law, including a new construction of a statute, or that change existing rules. This criterion does not justify publication of a fact case of first impression, where a legal rule or principle is applied to a substantially new factual situation.

[2] This criterion requires that the legal issue, rather than the case or controversy, be of public interest and that the interest be of a continuing nature and not merely transitory. Public interest must be distinguished from public curiosity. The requirement of public interest may be satisfied if the legal issue is of continuing interest to a substantial group of the public such as public officers, agencies or entities, members of an economic class, or a business or professional group. An opinion which clarifies a controlling rule of law that is not well established or clearly stated in prior reported opinions, which reconciles conflicting lines of authority, or which tests the present validity of a settled principle in the light of modern authorities elsewhere may be published under this criterion if it satisfies the requirement that the legal issue be of continuing public interest.

[3] This criterion would justify publication of the rare intermediate appellate opinion which finds fault with existing common law or statutory principles and doctrines and which recommends changes by a higher court or by the Legislature.

Rule 977. CITATION OF UNPUBLISHED OPINIONS PROHIBITED; EXCEPTIONS

An opinion of a Court of Appeal or of an appellate department of a superior court that is not published in the Official Reports * shall not be cited by a court or by a party in any other action or proceeding except when the opinion is relevant under the doctrines of the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent.

Adopted, effective Jan. 1, 1974.

* This rule shall not apply to an opinion certified for publication prior to its actual publication.

Feinberg, Circuit Judge:

* * * *

Before we examine appellant's argument, we must consider the Government's first response to it: that two prior decisions of ours, on all fours with this one, foreclose the issue. The cases relied upon were both affirmances from the bench by different panels of this court. Appellant discounts their precedential value entirely, relying on our recently adopted local rule § 0.23, which provides as follows:

> §0.23. Dispositions in Open Court or by Summary Order:
>
> The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.
>
> Where a decision is rendered from the bench, the court may deliver a brief oral statement. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

We believe that appellant is wholly correct on this point. Although the rule refers to "statements" rather than decisions, its clear intent—contrary to the interpretation urged upon us by the Government—is that the decisions themselves shall also have no effect as stare decisis. The reasons for this new local rule are obvious. Affirmances from the bench occur only when the panel is agreed that the result is clear and that a written opinion would have no real value to the parties, or to others, as a clarification of law or as a precedent. Consequently, use of an oral

affirmance as a precedent is inconsistent with the assumption upon which the affirmance was rendered. Moreover, in many instances, it is impossible to be sure of the basis of an affirmance; *e.g.*, was a charge unobjected to below correct or was the error merely not "plain"? Even more important, any rule that accorded precedential value to the actual decisions, although not to any accompanying statements, would create severe problems of "secret law." While the Government and, to a lesser extent, Legal Aid would know of these decisions, many other attorneys and their clients would not.[7] This consideration is actually referred to in the rule, which points out that the statements on summary dispositions, whether oral or by written order, "are . . . not uniformly available to all parties." In addition, even if counsel for both sides are aware of a particular summary affirmance, they will not necessarily have equal access to the briefs and the trial record, which alone would reveal what issues were raised in the absence of a plenary opinion.[8] Because of these compelling considerations, we are not bound by our prior oral affirmances, supra note 5.

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7 The Federal Reporter merely lists these bench dispositions without giving any description of the issues raised.

8 Even if they did, as already indicated, that would not necessarily reveal the basis of the affirmance.

THE UNPUBLISHED APPELLATE OPINION: FRIEND OR FOE?

Gideon Kanner*

"The object of the constitutional requirement is . . . to put upon the record the grounds of [the courts'] decisions for the guidance of the public in their business transactions."[1]

The "constitutional requirement" with such a sensible object was Article 6, § 2 [now Article 6, § 14] of the California Constitution, providing that decisions of the Supreme Court and the Courts of Appeal which dispose of cases must be in writing with reasons stated. While a number of sound rationales have been advanced in support of this rule, two among them stand out with particular force: *first*, as noted in *Hayne*, supra, to provide guidance as to respective obligations and liabilities, to parties (and their lawyers) confronted with the consequences of litigation or transactions similar to those that have been the subject of precedent-setting adjudication in the past, and *second*, to insure compliance with the principle of fairness (and the constitutional guarantee of equal protection) that, absent a rational basis for discrimination, similarly situated parties are to receive like treatment in the courts.

But in order to accomplish either of these salutary objectives, the courts, the parties and their lawyers must first know what it is that the appellate courts have decided. Simple-minded as the foregoing statement may sound, it gives rise to a perplexing problem which became the basis for a major policy decision of the California Judicial Council — a decision whose tenth anniversary is drawing near.

Publish and Perish

The growing size of California's population and attendant complexities and frictions have resulted in a steady growth of judicial business. Additionally, the judicially-wrought revolution which has occurred in the criminal law has encouraged appeals by convicted defendants and inundated the reviewing courts with a tidal wave of appeals.

The result has been an explosive growth of appellate decisions at once filling lawyers' library shelves and straining their information retrieval capabilities. In response, action came in 1964 in the form of Rule 976, California Rules of Court. In essence, this Rule grants to the intermediate appellate courts the power to refrain from publication of their decisions in the official reports. Until 1972, this power was exercised whenever a Court of Appeal decided that a particular opinion rendered by it failed to meet the criteria for publication. In 1972, the test was obverted; *every* Court of Appeal opinion became presumptively unworthy of publication, "unless such opinion (1) establishes a new rule of law or alters or modifies an existing rule, (2) involves a legal issue of continuing public interest, or (3) criticizes existing law."

Doubts Entertained

It bears noting that the draftsmen of the 1972 revision must have entertained some doubts as to the clarity of these criteria, because they appended to each of the above-quoted criteria a lengthy footnote, longer than the respective criterion.

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[1] People v. Hayne (1890) 83 Cal. 111, 124 (concurring opinion).

* Member of the California Bar. Reproduced from 48 CAL. ST. B. J. 386 (1973).

Thus, for almost ten years now, California has had two kinds of decisional law: the published, reported opinions, and the *demi-monde* of unpublished opinions which—if the criteria expressed in Rule 976(b) are to be believed—decide nothing new or important and confine themselves to routine application of old-hat rules on which no busy lawyer in his right mind would want to waste his scarce time.

This article raises the inquiry whether the foregoing ideal has truly worked out in operation. In my opinion it has not. The past decade's experience indicates that among the unpublished opinions there lies a disquieting number of judicial endeavors which plainly do not meet the criteria of Rule 976(b), and which are either in conflict with other — sometimes published — opinions, or venture into uncharted legal territory by way of tacit or (at times) openly announced first impression holdings.

Two Lawyer Levels

One other disturbing consequence has been to produce two kinds of lawyers: the uninitiated ordinary practitioner who keeps up with the advance sheets and knows only what he reads there, and the specialist-insider who collects unpublished opinions in his field as well, and who therefore possesses a special insight into the thinking of the intermediate appellate courts. Such insight, of course, can be employed with devastating effect, particularly at the trial court level, where it can be sprung on one's unsuspecting opponent who never heard of the revealed—if unpublished—judicial wisdom which just happens to be "on all fours."[7]

Compromised Benefit

Thus, one of the benefits which non-publication under Rule 976(b) was supposed to bring us, i.e., improved retrieval of decisional law, has been compromised. At least, when all intermediate appellate opinions were published, they were entirely retrievable, if only at the cost of extra drudgery. But where some—or, as is the current practice, most — opinions are unpublished, no amount of conscientious research can unearth every precedent. Worse than that, no amount of research can unearth what may well be *the* exact precedent, because footnote 1 to Rule 976(b) states that ". . . a fact case of first impression, where a legal rule or principle is applied to a substantially new factual situation" does not constitute justification for publication.

The reasons why such precedential guidance should be made unavailable are obscure. Every experienced lawyer knows that it is often as difficult to convince a judge he should apply old law to new facts as it is to create new law. How much more smoothly (not to mention justly) could the judicial process work if such "fact case[s] of first impression" were not buried under Rule 976(b)?

Thus, the only real benefit that inures from nonpublication is the reduction in library shelf space needed to house the proliferation of Cal.App. volumes.

[7] A recent article [Seligson and Warnloff, *The Use of Unreported Cases in California*, 24 Hastings L.Jour. 37, (1972)], points out that this situation gives rise to unfairness, and so it does. Messrs. Seligson and Warnloff therefore argue that such unfairness should be cured by forbidding citation of unpublished opinions. In this they are wrong; the unfairness results not from the *citation* of such opinions, but from the fact that Courts of Appeal violate Rule 976(b) and fail to publish opinions of precedential value. To suggest that the resulting unfairness is cured by suppressing the opinion is tantamount to suggesting that a headache is cured by decapitation. The question is: does the unpublished opinion contain pertinent, otherwise unavailable precedent, or doesn't it? If it does, its suppression would be monstrous; it would open the door to creation of *ad hoc* "rules" of law, without pretense of consistency.

Worth It?

This article raises the question of whether the game is worth the candle: whether the saving in library space justifies the abuse of Rule 976(b) by intermediate appellate courts which produce a continuous trickle of unpublished opinions that are either contrary to precedent or which create precedent, but make it available, for all practical purposes, only to the parties in the particular litigation, and perhaps a handful of specially situated lawyers.

One other source of concern must be noted. Certification for non-publication has of late become a technique whereby the Supreme Court can get rid of what it apparently deems to be erroneous or otherwise improvident decisions of the Court of Appeal.[8] While this may serve the purpose of keeping the published common law free of aberrant opinions, it can hardly be justified to litigants who find themselves aggrieved by an erroneous Court of Appeal opinion,[8] but instead of receiving relief, find their cause swept under the judicial rug by an order of non-publication.

Unknown Precedents and Conflicts

The March 19, 1973, issue of the Los Angeles Metropolitan News greeted its readers with this headline:

> *"First Impression Matter:* Failure to Comply With Discovery Orders Is No Bar to Refiling Action."

The material following that headline reported and reprinted *Miller* v. *Kline*, 4th Civ. 11304, an opinion bearing the inscription: "Not to be Published in Official Reports." To make sure that the editors of Metropolitan News hadn't erred in asserting that a *first impression* matter was thus consigned to oblivion by an unpublished opinion, I telephoned the Clerk's office of the Court of Appeal for the Fourth Appellate District, Division One, and ordered a copy of the *Miller* opinion. The Deputy Clerk who answered the telephone was polite, efficient and helpful; he took my name and address, told me where to send the fee, assured me that the opinion would be mailed promptly, and *sua sponte* admonished: "Remember, it's an unpublished opinion; it's not to be cited."

Therein lies the message: What manner of legal process is it that decides first-impression matters, and yet—at least in the opinion of some—is "not to be cited"? Certainly, the notion that the considered expression of a Court of Appeal which, as we have been led to believe, constitutes guidance to the lower courts of such vigor as to render their contrary rulings jurisdictionally infirm,[9] can be somehow cast into oblivion[10] (even when it speaks to a first impression matter), deserves a closer look.

Double Difficulties

In undertaking to analyze the rule-making attributes of unpublished opinions, one runs at the outset into two serious difficulties that must be noted. *First*, it is impossible to state with any degree of assurance that the analysis is complete. For all one can tell, there may languish in court files umpteen more unpublished (and undiscovered) opinions dealing with the

continued on page 436

[8] See e.g. *Bench* v. *State* (1973) 32 Cal.App.3d 342, an opinion outspokenly criticizing existing law (Id. at 349 and 351), and thus plainly meeting the criteria for publication under Rule 976(b)(3). Nevertheless, it was ordered certified for non-publication by the Supreme Court. See Supreme Court order of June 28, 1973 (1st Civ. 31031), appearing on p. 1 of Supreme Court minutes, Advance Sheet No. 19, July 14, 1973.

Cf. Thompson, *Appellate Court Reform—The Near Term*, 6 Jour. of Bev. Hills Bar Ass'n 9, 14-15 (1972).

[9] See *Auto Equity Sales, Inc.* v. *Superior Court*, 57 Cal.2d 455 (1962).

[10] In fairness to the anonymous deputy clerk who admonished against citation of unpublished opinions, it should be noted that there exists some doubt as to those opinions' effect. See *People* v. *Gomez* (1972) 26 Cal.App.3d 928, 929-930.

same point—thus rendering what one believes to be a precedent-setting unpublished opinion not all that novel.[59] *Second,* those who read commentaries such as this one must in effect accept an author's analysis "on faith." There is no practical reference source to which one can go to ascertain what the discussed opinions say, unless one were to go to the trouble and expense of obtaining copies of the unpublished opinions which such an article discusses. With these admitted shortcomings in mind, let us take a brief look at one lawyer's experience.[59]

* * * *

An Assessment

The fond hope that non-publication under Rule 976(b) would remove from the reports only the cut-and-dried, old-hat reiterations of familiar rules, unworthy of researching or even occupying lawyers' library shelf space, has in application proved to be unjustified. Imbedded in the bulk of unpublished opinions is a not-inconsiderable body of law dealing with novel points and giving rise to conflicts among decisions.[61] Whether this is a result of judicial ineptitude, or a manifestation of momentary lapses, or a desire to hide from general view decisions whose authors — for one reason or another — do not wish bruited about, is as unimportant as it is unfathomable.

What is important is that Rule 976(b) has generated a climate in which no litigant can be certain that his case will be decided by the Court of Appeal in accordance with principles of law followed in other, similar cases. The availability of a remedy in the form of hearing by the Supreme Court is always dubious. Justice Gustafson aptly observed: "For most litigants a Court of Appeal is the court of last resort."[62] The high court's limited resources simply do not permit it to right every wrong that comes before it; its current workload forbids it.[63]

In the case of unpublished opinions, prospects for hearing become slimmer still. Diligent readers of Supreme Court minutes have noted the increasing practice whereby certain published opinions of intermediate appellate courts are ordered unpublished, including some opinions of considerable novelty.[64] That this is so is perhaps best evidenced by the fact that such orders to "unpublish" are at times the

[59] It seems reasonable to conclude that my experience has not been unique, and that other lawyers, active in other fields, can undoubtedly also point to precedential or conflict-generating unpublished opinions that they came across.

[62] Gustafson, *supra*, n. 48, 19 U.C.L.A. L.Rev. at 203.

[63] See the statistics collected in Gustafson, *supra*, n. 48, 19 U.C.L.A. L.Rev. at 203, Thompson, *supra*, n. 8, 6 Jour. of Bev. Hills Bar Assn. 9, at 13-14, and in Kanner, *It's A Busy Court: The Effect of Denial of Hearing on Court of Appeal Decisions*, 47 Cal.S.B.Jour. 188 (1972). Nevertheless, I disagree with Justice Thompson's suggestion that the Supreme Court reduce its function to strictly "institutional" changes in the law (cf. Thompson, *supra*, at 14-16). This efficiency-oriented suggestion overlooks the societal importance of the notion that litigants be periodically assured that they can apply to the Supreme Court for justice, not just for good law; with the understanding, of course, that the Court must budget its resources, and consequently cannot right every wrong. Nevertheless, that Court's *capacity* to right wrongs should continue to loom as an ever-present safeguard against the occasional aberrant Court of Appeal opinion which is just plain wrong, or even—judges being human—unconscionable.

[64] See e.g., *Garzoli* v. *Margaroli* (1972) 27 Cal.App.3d 752, advance sheets only, and *People* v. *Birnbaum* (1971) 14 Cal. App.3d 570, advance sheets only. *Birnbaum*, incidentally, provides a clear clue that the Supreme Court tends, at least on occasion, to look upon non-publication as one means of disapproving intermediate appellate opinions. In *Birnbaum*, the Court of Appeal wrote an opinion of great novelty (having to do with land valuation) and the losing party did not petition for hearing. However, after the opinion hit the advance sheets, its novel aspects caused a considerable stir among condemnation lawyers. The upshot was a letter to the Supreme Court joined in by sixteen lawyers throughout the state, imploring the Court to grant hearing on its own motion under Rule 28(a). That letter, however, reached the Court after it had lost jurisdiction to act. Nevertheless, the Court directed its Clerk to respond by letter that the Court would review the *Birnbaum* opinion and if such review warranted, might certify it for non-publication. Sure enough, the *Birnbaum* opinion was ordered not to be published shortly thereafter. See 14 Cal.App.3d 570, fn. *.

subject of significant disagreement among members of the Supreme Court. *Garzoli* provides the proverbial "Exhibit A": the Chief Justice and Mr. Justice Sullivan voted for hearing, and Mr. Justice Peters dissented from the order of non-publication.[65] One is thus hard put to conclude that such cases are of no significance, when their potential for Supreme Court review and publication-worthiness is subject to such lively dispute among members of the appellate bench.

Not Kiss of Death

On the other hand, and in fairness to the Supreme Court, it must be noted that it has on occasion granted hearing in cases disposed of by the Courts of Appeal by unpublished opinions, and has used those cases as vehicles for major changes in the law.[66] While this experience tends to provide reassurance to aggrieved litigants that non-publication by a Court of Appeal is not always a kiss of death, it simultaneously gives rise to the concern that some Courts of Appeal are not sufficiently sensitive to problems and trends in the law,[67] and regard as unworthy of public note controversies that the Supreme Court sees as vehicles for major rule-making endeavors. The wisdom of the present practice of leaving the decision of whether a particular opinion should be published to the whim of its author[68] is thus surely open to question.

Scouted Scholars?

In this context, an additional concern needs to be noted. Non-publication tends to subvert one of the more important forces in the development of the law—scholarly commentary. One of the most potent analytical tools in the hands of a legal commentator is an abundance of decisional law from which he can extract trends in the law, based on an assessment of how a rule of law is being judicially articulated, or how it may be operating in application.[69] This, in turn,

[65] See Supreme Court order of November 22, 1972, in 2d Civ. 39066, appearing on p. 2 of Supreme Court minutes in Advance Sheet No. 33 (December 7, 1972). For other examples of disagreement among Supreme Court Justices on orders of non-publication, see, *Brautner* v. *Superior Court* (1973) 29 Cal.App.3d 785 (advance sheets only), ordered unpublished by Supreme Court order of February 28, 1973, the Chief Justice and Mr. Justice Burke dissenting, and *People* v. *Bowling* (1972) 23 Cal.App.3d 1021 (advance sheets only) ordered unpublished by Supreme Court order of May 4, 1972, Mr. Justice McComb and Mr. Justice Peters dissenting.

[66] See e.g., *Beagle* v. *Vasold* (1966) 65 Cal.2d 166, *Fracasse* v. *Brent* (1972) 6 Cal.3d 784, *Brown* v. *Merlo* (1973) 8 Cal. 3d 855.

[67] Diligent readers of Supreme Court minutes have noted recently a more or less continuous trickle of cases in which hearings are granted, notwithstanding that the Court of Appeal dispositions are unpublished. *Beagle* v. *Vasold*, *supra*, n. 66, is something of a classic that way, for there the Court of Appeal *expressly* noted in its later-vacated opinion that it was dealing with an unsettled issue of tort trial procedure (i.e., whether a plaintiff could argue to the jury that it award him damages for pain and suffering on a per diem basis): "The question thus raised has not to date been settled in California" (4th Civ. 7615, slip opinion, p. 2). In spite of this recognition of the novelty of the issue, the opinion was certified for non-publication.

[68] Gustafson, *supra*, n. 48, 19 U.C.L.A. L.Rev. at 204, fn. 127.

permits the commentators (and future litigants) to make sound suggestions for changes in the law, to which the courts often respond.[70] Even if no major change in the law results from commentators' endeavors, a particularly harsh or poorly reasoned opinion may find itself the subject of public criticism, with the result that appropriate legislative action may be taken,[71] and that the concern expressed in the ancient inquiry of *quis custodiet ipsos custodes* is ameliorated.

Precedents Proliferate

As long as unpublished opinions continue to accumulate precedent-making (and precedent-breaking) judge-made law, they must remain freely citable and usable. When a court is presented with a party's reliance on any unpublished opinion, then at best, an otherwise unobtainable judicial view or insight will be brought to bear on the issue at hand; at worst, the court will be presented with reiteration of settled law. Neither possibility compares with the appalling spectacle of a litigant receiving from the appellate courts — in the name of *stare decisis*—a ruling which is directly contrary to rulings rendered earlier by the same courts on the same issue, with no one the wiser, except for a few specialists poring over privately circulated opinions.

I thus sharply disagree with Messrs. Seligson and Warnloff whose recent article—in the name of ". . . the preservation of *stare decisis* as a workable doctrine, fairness, reliability and efficiency . . ."[72] —suggests that ". . . the *citation* of unreported opinions be precluded except in those limited situations where the prior opinion involves a party to the action."[73] My position in that regard cuts across every reason thus asserted by Messrs. Seligson and Warnloff for their conclusion:

Item: ". . . preservation of *stare decisis* as a workable doctrine . . ." I submit that *stare decisis* cannot operate as a "workable doctrine" as long as courts, while adjudicating sets of identical facts, are able to reach directly contrary results on diametrically opposed legal theories, by the simple expedient of publishing one set of results but not the other.[74] Indeed, the Seligson-Warnloff proposal strikes at the heart of *stare decisis* which—lest we forget—means that we let the prior decision stand and control later, similar cases. That means that the prior *decision* stands, and not that the prior decision stands or falls depending on the medium of its publication. Certainly where

[72] See *supra*, n. 7, *The Use of Unreported Cases in California*, 24 Hast.L. Jour. 37, 53 (1972).

[74] Lest I be charged with overstating the inferences drawn from the preceding discussion, note that Justice Thompson has expressed a similar concern. In discussing the concept of finality of Court of Appeal determination in non-institutional cases (i.e., appellate cases with no potential for change in the law, which are being reviewed solely to determine if the trial court ruled correctly), Justice Thompson stated: "The principle permits the intermediate court, through the stratagem of ordering an opinion not to be published, to refuse to follow Supreme Court precedent or even a statute, if the precedent or statute is distasteful." Thompson, *supra*, n. 8, 6 Jour. of Bev. Hills Bar Assn. at 16.

a litigant can point to a prior adjudication of the very point in issue, how can the court — in the name of *stare decisis* — refuse to consider such precedent?

Item: ". . . fairness . . ." Aside from the obvious unfairness resulting from situations just alluded to, isn't it unfair to future litigants to bury a first-impression opinion in the legal *demi-monde* of non-publication? And surely it is grossly unfair to gag a litigant who wants to advise a Court of Appeal that the issue which he now presents for adjudication has already been passed on, and with what results.

Bizarre Aspects

This aspect of the Seligson-Warnloff proposal contains positively bizarre aspects. If their proposal were adopted, a situation would ensue in which one could cite to a court the law review writings of a law student, but would be precluded from citing the expressions of a justice of the Court of Appeal, writing on the very point in controversy! Moreover, opinions of trial courts (e.g. of U.S. District Courts, appearing in the Federal Supplement and out-of-state trial courts whose opinions occasionally appear in various national reporters) would continue to be citable, and so would intermediate appellate opinions from states which have no equivalent of Rule 976(b). The "fairness" of a situation in which a California litigant would be precluded from relying on a pertinent decision of one of *our* appellate courts, while being able to cite intermediate appellate opinions from Arizona or Michigan or New York, eludes me.

Unknowable and Unmentionable

Item: ". . . reliability . . ." The asserted reliability of a decisional law system whose decision-making endeavors are unknowable and unmentionable, and whose [unpublished] decisions need not follow each other on the same point of law,[75] arising out of the same facts, likewise eludes me.

Item: ". . . efficiency . . ." The speedy adjudication of controversies, without fear that the legal and scholarly community will scrutinize the resulting opinions, and without later litigants being permitted even to try to fit them into the matrix of existing decisional law, may indeed promote efficiency in the utilization of judicial time and resources. But so would the toss of a coin, as Professor Philip B. Kurland has aptly pointed out:

"Efficiency measured solely by productivity is as likely to be de-

[75] 1984 rears its head in the proposal of Messrs. Seligson and Warnloff when they also suggest that the rule of *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, be abrogated, that the Supreme Court, and the Judicial Council formulate rules forbidding the citation of unpublished opinions (20 Hast.L.Jour. at 53, n. 98), and that the Legislature enact statutes which would preclude courts from taking judicial notice of unpublished appellate opinions—which in the case of appellate courts means their own records (*id.* at 54). Cf. Evidence Code § 452(d). About the only thing missing from this doublethink proposal is the creation of a "Ministry of Truth" charged with enforcement of all this stuff. It bears noting that in *Dwan* v. *Dixon* (1963) 216 Cal.App.2d 260, 265, and *Watson* v. *Los Altos School Dist.* (1957) 149 Cal.App.2d 768, 771, the courts characterized the suggestion that they could not take judicial notice of their own records, as ". . . a ridiculous result . . ." and ". . . . a travesty on justice . . ."

Nowhere in their commentary do Messrs. Seligson and Warnloff give any thought to the inquiry of *why* lawyers persist in relying on unpublished opinions. I suggest that unpublished opinions which truly comply with Rule 976(b) are largely not cited and thus pose no problem. It is principally the novel but *unpublished* opinions that hold an attraction to counsel in need of precedent. Otherwise, why would any lawyer in his right mind go to the trouble of finding and citing unpublished opinions which merely reiterate rules and rely on precedents already larding the *published* reports?

structive of the functions of law in a democratic society as the inefficiency it replaces. . . . Inefficiency of judicial operations is certainly not a desirable objective; it may, however, be a price worth paying if it buys or helps to buy individual liberty. Certainly, the objectives of the law courts cannot be merely to resolve as many cases as quickly as possible. To do that we need only toss two-sided coins, although two-headed coins might be even more efficient."[76]

Conclusion

The practice of certifying opinions for non-publication has succeeded in reducing the required shelf space in lawyers' libraries, but at a price that no one is really in the position to calculate.[77] A persuasive case can be made for the proposition that the whole idea of non-publication is unsound.[78]

I hope that *Journal* readers will agree that, to the extent that the courts continue to accumulate novel decisions in unpublished opinions, the rationale underlying the adoption of Rule 976(b) has not worked out well enough. This is a particular source of concern when juxtaposed with the evidence that the decision to publish is made by one man: the appellate judge who wrote the opinion, likely without much input from his colleagues.[79]

If the phenomenon of unpublished appellate opinions is to remain with us, it is imperative that objective safeguards supplant the present haphazard system in which the desire of the opinion's author appears to be the ultimate (and probably exclusive) criterion of publication. In place of the present vague rule-cum-footnote format of Rule 976(b), specific directives should be promulgated. For example, the not-uncommon opinions reversing trial court judgments, containing dissenting or concurring opinions, as well as opinions in which votes were cast for rehearing, or for hearing in the Supreme Court, should invariably be published.[80] The presence of any of these points of judicial disagreement militates against the conclusion that the opinion in question is of no interest, or that the law on point is cut-and-dried.

Moreover, I take sharp issue with the notion contained in footnote 2 to Rule 976(b) which states: "Public interest must be distinguished from public curiosity." This kind of disregard for the people's right and ability to decide for themselves what aspects of their government's activities are worthy of their attention displays a regrettable lack of understanding of the essence of a free society. Unlike the executive branch of the national government with its arguable (if occasionally abused) national security concerns, or matters of police intelligence, the courts have *nothing* to hide. Particularly in juxtaposition with the unfortunate events born of secrecy and arrogant disregard of governmental candor, which even now are casting their shadow over the country, it should be recognized that the citizen's curiosity about how *his* government operates is a perfectly legitimate motivation, undeserving of official disparagement. If only *more* citizens displayed such curiosity!

These matters are of direct pragmatic concern, which is probably best illustrated by an example. On March 28, 1973, the Los Angeles *Times* prominently featured the news that the Court of Appeal affirmed the grand theft conviction of a used car dealer,[81] for "spinning back" odometers on cars sold by him.[82] The *Times* viewed this news item as important, and rightly so. Said the *Times*:

> "In effect, the court served notice on auto dealers that they can be convicted of felonies and given state prison terms for setting back odometers to indicate that vehicles have been driven fewer miles than were actually recorded.
>
> "Until this case, such offenses had been treated as misdemeanor violations of the state Vehicle Code."

The *Times* was not alone in its assessment of the impact of *Oatas*. One day after the *Oatas* decision came down, the prosecution announced further grand theft prosecutions for odometer tampering *on the strength of Oatas*.[83]

It seems to me (as it apparently seemed to the *Times*) that the novelty of *Oatas* and its profound deterrent effect on the used car business, whose sharp practices have made it proverbial in the American idiom, was worthy of considerable publicity. The Court of Appeal, however, consigned the *Oatas* opinion to oblivion by non-publication. The upshot is that future lawyers who, with the aid of the *Oatas* opinion, might have been in the position to sternly warn their car dealer clients of the potentially harsh consequences of tampering with odometers, have been deprived of ready access to that object lesson, and the applicable criminal law has been deprived of much of its deterrent effect.

Finally, and perhaps most importantly, what goes on in the courts is public business, and therefore unpublished appellate opinions —whether cut-and-dried or not— which contain any matters that arguably provide insight into the judicial process should be freely citable, and should—the same as any other acts of the government—be the subject of open public scrutiny and discussion. Viewed structurally, the courts are no more than one branch of a tri-partite government and, as in the case of the other two branches, their doings are very much public business. The other two branches must pass frequent muster with the voters; the judiciary does not, and with good reason. Yet, because the courts too are the government, they also must be accountable to the society they serve,[84] albeit the ballot box does not serve as an instrument of such accountability to the same extent it does to the other two branches of government.

In the final analysis, the courts' stock-in-trade is justice, and their strength is the citizens' faith that in spite of human imperfections the courts do dispense justice even-handedly. It is, therefore, important that all may rest secure in the knowledge that such faith is justified, and that within human limitations justice *is* administered in the courts. Few things are as conducive to such security as the knowledge that the shaping of the rules which bind the citizenry in its business is open to the scrutiny of all, and that these rules are applied with demonstrable consistency.

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[76] Quoted in Rosen and Rosen, *Evolution or Revolution in the Courts?* 78 Case & Comment 20, 26 (March-April 1973).

CHAPTER 3 RESPONSIBILITY FOR DECISIONS:

STAFF ASSISTANCE AND THE PROBLEM OF DELEGATION*

*Materials selected by Delmar Karlen.

Observations of an Appellate Judge: The Use of Law Clerks

*Eugene A. Wright**

I. Skills and Limitations of New Law Clerks—An Introduction

Appellate judges, indeed all judges, have one overriding responsibility: to decide cases. Chief Justice Burger has reminded the bench and bar:

> We must constantly keep in mind that the duty of lawyers and the function of judges is to deliver the best quality of justice at the least cost in the shortest time.[2]

Time—judicial time—is our most valuable commodity. We must employ it effectively and efficiently if we are to keep abreast of new developments in the law, new areas of litigation, and modern procedural improvements and to dispose of increasing backlogs of appealed cases.[3] Circuit judges, each authorized two law clerks,[4] have become increasingly dependent upon the help of their staffs to meet the demands of their expanding workload.

The role of the law clerk is to aid the experienced judge in his ultimate task, decision-making. An appellate judge will have a varied background of skills and experience. Often he brings to his task the skills of an advocate, having used discovery procedures before trial, sought witnesses, examined and cross-examined, summed up, received favorable and unfavorable results and as a lawyer gone through the appellate process for himself. His background may include service as prosecutor, defense counsel, corporate executive, legislator, governor, community leader, military commander, law teacher, or trial judge.[5]

With such a background of knowledge and experience, the judge often can read the cold record with shrewd analysis. The judge questions, doubts, and searches for the truth. Between the lines he sees inferences that are missed by the novice and reaches conclusions that only an expert can find. It is not unusual for a judge in the common law tradition to have visceral reactions for which he can find no immediate reasons—what Karl Llewellyn liked to call a judge's "situation-sense."[6] A judge's conclusions may be valid but the bases therefore obscure even to him.

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* Judge, United States Court of Appeals for the Ninth Circuit. Reproduced from 26 VAND. L. REV. 1179 (1973).

2. Burger, "Report on Problems of the Judiciary" 1. Address to the Annual Meeting of the American Bar Association, San Francisco, Aug. 14, 1972, in 93 S. Ct. supp. page 3.

6. K. Llewellyn, The Common Law Tradition: Deciding Appeals 121 (1960).

Conversely, a judge's impressions of a case are not immune from error. There are times when an initial conviction, the "judgment intuitive"[7] of a case, is erroneous, the error surfacing as such only upon later discussion, research and reflection—or upon writing.[8] Occasionally a judge will experience the agony that comes when his draftsmanship fails and he must face his inability to set his original view into words. As his initial conviction begins to bend, a judge is often thankful that judgments are required to be articulated in a written opinion.[9]

The law clerk is intended to work with and complement this complex decision-making organism that is an appellate judge. Indeed, Learned Hand characterized law clerks as "puisne judges,"[10] and correctly so, for they are not just secretaries or mere assistants.[11] They are the extra hands and legs, which, when coupled with an inquiring mind, are indispensable to a judge in the performance of his most difficult obligation.

The knowledge that a young graduate brings with him often surpasses that of his judge in some areas of the law, usually as a result of his having recently completed an in-depth seminar paper or *Review* article on a subject. In the appellate context, such a background is an immense aid to a clerk in enabling him to understand the broader picture in which his judge's decisions are being made. Unfortunately, the depth of knowledge that many clerks possess on substantive matters is rarely matched with a solid grasp of trial processes.

A recent experiment conducted in a law school classroom illustrates this point. The professor gave an unemotional reading of the trial record quoted by Mr. Justice Douglas in *Mayberry v. Pennsylvania*.[12] The quoted portions included egregious examples of criminal contempt, such as the following interchange between the petitioner, acting as his own counsel, and the judge:

> Mr. Mayberry: You're a judge first. What are you working for? the prison authorities, you bum?
>
> . . . .
>
> The Court: I would suggest —
> Mr. Mayberry: Go to hell. I don't give a good God damn what you suggest, you stumbling dog.[13]

The class proved their lack of understanding of the trial process by

7. *See* J. HUTCHESON, THE JUDGMENT INTUITIVE (1938).

8. "Nevertheless, as a writer, a judge is under a pressure to produce and publish more severe than that felt by any college professor or journalist. The requisite research and study, the technical accuracy required, and the tremendous emotional strain and responsibility involved make this certainly among the most difficult types of writing." Johnson, *What Do Law Clerks Do?* 22 TEXAS B.J. 229, 230 (1959).

9. "In sixteen years I have not found a better test for the solution of a case than its articulation in writing, which is thinking at its hardest. A judge, inevitably preoccupied with the far-reaching effect of an immediate solution as a precedent, often discovers that his tentative views will not jell in the writing. He wrestles with the devil more than once to set forth a sound opinion that will be sufficient unto more than the day." Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957).

12. 400 U.S. 455 (1971).

laughing at the reading. The professor told me that he doubted whether his students read Justice Douglas's commentary as anything more than words.[14] Trial proceedings come to the law clerk cold. The words are muted in the transcript; the trial environment is left far behind. Young law graduates, often having spent their last three years dealing only with hypotheticals, are ill-prepared to understand and appreciate what has gone on during the trials below.

Some attributes of the decision-making process that the new clerk finds difficult are institutional in nature. The scope of appellate review is an example. A clerk may see an issue lurking somewhere in the record but not raised by counsel. Yet a judge may choose to ignore it for reasons wholly unrelated to the merits; the integrity of the adversary system may be at stake, or the judge may simply decide not to allocate his limited judicial time to errors outside the purview of the "plain error" doctrine.[15] And what of the clerk who for the first time confronts the riddle of harmless error? As an institutional matter that issue has troubled even the brightest of our judges.[16]

The law clerk is also hampered by his introduction to the appellate process in the procedure casebooks used in law schools. A check on such casebooks indicates that most leave the materials on appeals until the end, with the treatment given the subject coming almost as an afterthought.[17] As a result, incoming law clerks must spend valuable time learning rudimentary aspects of appellate procedure.

Finally, young clerks are in the main untried cubs.[18] Ripening takes time and exposure to the task at hand. "Disinterestedness and deep humility,"[19] qualities so necessary for the wise exercise of the judicial function, cannot be memorized. Also, a young clerk may have an inadequate sense of the long-range effect of his judge's decisions at either the trial or appellate level. And sometimes a new clerk may not see ". . . that other major duty of the court, unimplemented by much doctrinal or other verbal machinery, but there, live, throbbing like a heart: the felt duty to justice which twins with the duty to law."[20]

As a result of these factors, it is often not until a clerk reaches midstream in his year with the court that he begins to have even a tentative feel for the nature of the appellate process and its institutional characteristics.[21] Unfortunately, all too often an understanding of the trial process never comes during his tenure as a clerk, and

20. K. LLEWELLYN, *supra* note 6, at 121.

21. The hardest discovery is the realization that most appeals are routine.

> Most appellate judges would agree that the result in about seventy-five percent of appeals is clearly foreseeable after argument, regardless of which judges sit on those cases. . . . The courts of appeals thus spend the great bulk of their time on only twenty-five percent of the appeals they hear.

Lumbard, *Current Problems of the Federal Courts of Appeals*, 54 CORNELL L. REV. 29, 36 (1968).

his ability to participate in decision-making is thereby hampered. Perhaps as law intern programs[32] become more popular, clerks will come to the court with some trial experience under their belts. Judges must accept the responsibility for searching out those students who combine a background in legal research and writing with on-the-job experience.

All too often participation on the *Review* is the *sine qua non* for clerkship selection.[34] *Review* experience is certainly valuable training for a clerkship, and generally does insure that a clerk is qualified to do the kind of analysis of trial records, research and writing—either memoranda or draft opinions—that will be required of him. But *Review* participation can leave a student suffering from the "classroom syndrome"—a tremendous knowledge of substantive law with little appreciation of how it is to be applied. Judges must begin to select as their clerks those who have actually participated in the legal process, whether as interns, legal aid assistants, or whatever. This is not to denigrate the importance of the scholarship and research skills usually instilled by the *Review* experience. Indeed, participation on the *Review* remains the most reliable indicator of scholarship, writing ability and good work habits;[34] but, if clerks are to contribute meaningfully to the appellate decision-making process, a broader background is essential.

Having selected his clerk, a judge must be conscious of the need for training; but he cannot allow the training effort to divert him from his main task—deciding cases.[35] While experience has established that a good law clerk so increases the judge's working capacity as to far outweigh the loss in judicial time that must be given to training a new clerk each year,[35] perhaps there are more efficient ways to train our clerks than are presently being utilized. Rather than training by an individual judge or by an outgoing clerk, a number of clerks can be trained at one time in a central location. The Court of Appeals for the Ninth Circuit has had such a program of clerkship instruction for four years and the circuit judges favor its continuation as an annual event.[36] At the national level, Louisiana State University's Law Clerk Institute is also fulfilling the need for adequate preparation of the law clerk at the start of the job, before he reaches his judge.[36]

With this presentation of some of the skills and limitations that newly arriving clerks bring to their jobs, it should be apparent that while clerks can exert, and should exert,[37] a significant influence in the decision-making process, that influence is tempered by the clerks' unfamiliarity with trial processes, appellate procedure, and institutional needs. This suggests that law clerks should be utilized mainly to do what their background has prepared them for: legal research,[38] analysis of specific issues, and rough drafting.

II. Use of Law Clerks in the Appellate Process

The intra-office institutional structure of the judge-clerk relationship is probably the most important factor in efficiently using the law clerk's talents. Since all appellate courts perform roughly the same tasks, it would be instructive to analyze in general the various steps in the appellate process and the use of clerks in each.

A. *Screening of Briefs, Files and Transcripts of Cases Scheduled for Argument*

Most appellate courts schedule oral argument[32] several weeks in advance and each judge will have the printed briefs at least two weeks early. If he customarily reads the briefs before oral argument,[39] the judge can use his law clerk's assistance in a number of ways: (1) to check the accuracy of cases cited in support of each argument; (2) to look for later cases in point (appellate briefs are sometimes as much as two years old!); (3) to pinpoint those issues which are likely to be dispositive; (4) to suggest areas where the need for questioning at oral argument is apparent; (5) to recommend alternative approaches to the decision on each issue, with reasons for each; and (6) to raise with the judge any issues not mentioned by the parties, including broader policy considerations.

Armed with this pre-argument preparation by his clerk, a judge can delve into the briefs with a good deal of the necessary legwork already completed. In some cases, the clerk will have substantially shortened the amount of judicial time necessary for a decision,[33] especially if he has looked for later cases in point, or has recognized accurately the issue that is likely to be dispositive of the appeal.

During this initial contact with the case, it may appear to the clerk that the issues are complicated, or that there is little precedent in the area and the outcome is in considerable doubt. He may be of the opinion that some research in depth is required, and at this point he should confer with the judge, spelling out the problem as he sees it. Often a clerk will be surprised to see an appeal that seemed to him to be of considerable moment dismissed out of hand as frivolous by the judge. There is no substitute for judicial experience, so in such cases the judge should instruct the clerk that no further research is necessary.

In other situations, the judge and clerk may determine that some research in depth must be done and that a comprehensive bench memorandum is required. If this is the judge's decision, the clerk should follow some prescribed format. The memorandum should probably include some brief reference to the facts, the way in which the case comes to the court, the jurisdiction of the appellate court, the issues and arguments presented, the holdings of significant cases, and any areas of uncertainty that remain. Some judges will want a conclusion or recommendation, others will not. In any event, the clerk must be objective, not an advocate for one side, and must present both sides of the appealed case with equal fairness.

In those cases where the clerk has prepared only a brief pre-argument summary, study by the judge may have convinced him that some further in-depth research is necessary. A precise and brief memorandum to the clerk specifying what is required of him may be all that is necessary, or the judge may prefer to instruct his clerk orally. The office structure should be styled to accommodate interaction initiated by either the judge or the clerk. The judge's chambers should always be open to his clerk, but the clerk must be encouraged to utilize his entrance rights sparingly to minimize time consuming interruptions. Some judges prefer an intra-office com-

munications system based almost entirely on memoranda, supplemented by only occasional personal contact. Others deal almost always in the spoken word. Whatever arrangement is considered desirable, the clerk should early be made aware of its contours. Once a communications pattern is established, the judge and clerk can efficiently get down to the task at hand—judicial decision-making.

B. Pre-argument Conference with the Judge

After the judge has studied the briefs and the pre-argument preparation of his clerk, and has had the benefit of his own research and any that he may have required of his clerk, he will often have arrived at fairly definite conclusions about many of the cases before him. Many others, however, will pose difficult questions and the judge's preferred disposition will remain tentative. Before these cases are argued, the judge will often find it profitable to confer at length with his clerk. In order to test his tentative conclusions, the judge may require the clerk to defend the opposing position, or the judge himself may reverse roles, attacking his own opinions. The interchange is often quite beneficial to the judge, enabling him to look at an issue from an entirely different angle. At times the clerk will have arrived at a conclusion quite contrary to that of his judge and will defend his position passionately. Such advocacy is often helpful and should be encouraged.[37] While these conferences will only occasionally shed new light on a subject, they will often help the judge to understand better his own position, and at the very least they should enable him to listen more attentively and with better comprehension to the oral arguments of counsel soon to follow.[37a]

C. Clerk's Attendance at Oral Argument

Judges agree that many arguments are unnecessary and not helpful,[37b] but in some an effective argument by counsel will aid the judges in their decision-making. If possible, the judge should determine in advance of a day's calendar those cases in which oral argument is likely to be influential, and he should relieve the clerk of sitting through all others. When the clerk does attend orals,[37c] he should be responsible for noting any new citations of authority not referred to in the briefs, the substance of any new argument not well articulated in the briefs, and any concessions made by counsel.

D. Post-argument Conference with the Judge

The judges on an appellate court or panel usually confer among themselves soon after the conclusion of oral argument. Tentative views may be expressed, and the result may be clearly indicated and unanimous or it may be uncertain. The writing of an opinion, memorandum or order may be assigned at that time or deferred until a later time.

Whichever happens, the judge and his clerk will want to have

a subsequent conference to discuss in confidence[38] the disparate views of the judges, if any, the opinion which is likely to be produced, and the nature of additional research required. This process would occur both when opinions are assigned to the judge and when they are assigned to his colleagues. Although a particular draft in a case may not be prepared and circulated for several weeks by the judge assigned to write the case, the other judges will want to reach their decisions and perform any further research while the points are fresh.

Judges and clerks may hold some of their pre-argument and post-argument discussions in the course of travel. A well-disciplined clerk will be ready to travel with his judge on short notice, always equipped with pad and pencil for note taking and opinion drafting. Many an opinion has been cast in rough form as the two return from court sessions in other cities.

Judge Henry Friendly's description of his use of law clerks represents a typical pattern and it summarizes what has been said so far about the role of the law clerk in the appellate process:

> Each afternoon, I will sit down with my law clerk and discuss rather briefly the cases that were argued that morning. These fall into three groups: The first is a group where I have practically arrived at a decision, subject, possibly, to verifying one or two small matters of fact or looking up a reference which can be expeditiously done; the second group involves cases where I have not yet made up my mind but where it is apparent that the field requiring investigation is fairly limited; and the third group consists of the cases where it is apparent that a fair amount of added research will be needed before I can come to any conclusion. I reserve my law clerk almost entirely for this third group. I endeavor to get rid of the first group currently and then use whatever time remains during the week of argument to make as much progress as I can on the second. The result is that out of a clutch of, say, 18 appeals, I will probably produce memoranda on 6 or 8 before the week is out.
>
> By the end of the week or the beginning of the next, I should be getting memos or oral reports from my law clerk on the more difficult cases which have been assigned to him for study. Working in this manner, I can just about manage to get out all my memos in time for a conference toward the end of the second week.[39]

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38. Confidentiality of the work of a judge is an honored tradition among law clerks as well as a strict rule of court. Any breach would seriously undermine the institution of law clerking as a respected adjunct of the appellate process. A judge must be able to discuss matters pending before the court freely with his clerk, without fear of disclosure. It is imperative that a clerk not discuss any aspect of any case under consideration by the court with outsiders. One former clerk for a United States Circuit Judge has written:

> As a trusted subordinate of the court, it would be improper for a law clerk to disclose particular information as to how or why judicial decisions are made. For to reveal information beyond that of the public record would violate both the trust and tradition of the court.

Sweeney, *Law Clerkships—Three Inside Views: In the United States Court of Appeals*, 33 ALA. LAW. 171, 172 (1972). What matters is that the judge's work product must be kept exclusively within the court's family; it should not be shared even with the family of the clerk. Inquiries which may appear innocent should go unanswered if they pertain to any court business, the judge's whereabouts, or an opinion that might be forthcoming.

Research discloses only one alleged breach of confidence, the "1919 leak case." *See* Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 ORE. L. REV. 299, 310 (1961).

39. Friendly, "How a Judge of the United States Court of Appeals Works," mimeographed (New York: Institute of Judicial Administration, 1962), p. 1, *quoted in* M. SCHICK, LEARNED HAND'S COURT 99 (1970).

E. Drafting of Opinions and Memoranda

Most law clerks will spend more than half their office time preparing memoranda that will assist the judge in drafting his opinions. At the least, these memoranda are expected to communicate a clerk's research findings to his judge. Speaking generally, the time saved by this research is probably the greatest contribution of the clerk toward the end of the best quality of justice at the least cost in the shortest time.[39]

The writing assignment varies from judge to judge. Sometimes a judge will instruct his clerk very broadly: "See what you can do with this one." The clerk is expected to work the case out for himself and submit a memorandum for the judge's use in drafting an opinion. Often a judge is quite loose with his instructions to his clerk at the start of the term. After a few weeks, a judge is in a better position to evaluate the capacity of his new clerk, and the breadth of later writing assignments will turn on his evaluation of the clerk's skills. If a judge chooses, he may rely on talented clerks for even more writing.[41] Indeed, he may have to because of the press of time;[42] the case load of the eleven federal courts of appeals has increased massively from 4,200 appeals in 1962 to 14,500 in 1972.[43]

Some judges prefer narrower instructions. The clerk is told, perhaps, to prepare a memorandum on the "consent" aspect of airport passenger searches. Or the demand can be the narrowest of all: "Give me a synopsis of all significant cases defining 'dangerous weapon.'" Here the clerk is expected to sift through every reporting service in the library.[44] Sometime soon computerized research will put the cases responsive to this type of question at the clerk's fingertips.[45]

There are judges who want their clerks to play devil's advocate: "Write the strongest possible argument you can against the result I intend to reach in this case." Judge Jerome Frank even pitched his law clerks against Hand: "[T]he law clerk, barely out of law school, was encouraged by Frank to say why and where Judge Learned Hand, the dean of the federal judiciary, had erred."[46] Occasionally, a clerk's memo will cause the judge to consider a change of position. However rare the occasion, the law clerk is obliged to "fail in the attempt."[47]

Clerks with prior experience in legal writing who measure up to their judges' expectations will, at this stage, have the opportunity to produce material which can be used verbatim in an opinion.[48] If the memorandum is to serve its purpose, it must be thorough, accurate, and must follow a logical course; it should also be grammatical, professional, and timely. These six essential characteristics are discussed below.

48. There are judges on record, however, who are wholly against the incorporation of any of the clerk's memorandum in their final opinions. *See, e.g.*, Edwards, *The Avoidance of Appellate Delay*, Panel Discussion before the Section of Judicial Administration, Appellate Judges Conference, Proceedings of the American Bar Association Annual Meeting, St. Louis, Aug. 8, 1970, *printed in* 52 F.R.D. 61, 68. The reasons given for rejecting the clerk's draftsmanship generally involve a judge's pride of authorship or stem from the view that delegation of any of the writing function would be inconsistent with judicial duty.

1. *Thoroughness:* One circuit judge has written that he has a standing rule for his clerks: run the citator on every case that he cites.[49] A memorandum which misses a recent case, or fails to distinguish a prior opinion of the same court or a higher court is not worthy of a lawyer of competence.

2. *Accuracy:* The spelling of case names and citations to case reports, treatises, or other authorities must be perfect before the memorandum goes to the judge.[50] A clerk should not assume that he will have another opportunity to check for accuracy before the opinion is in final form. The judge may have other ideas; he may want to dictate a note to his judicial colleagues, based on the clerk's memorandum, and he must be able to rely on its accuracy.

The worst error of all is misstatement of the facts. A clerk must see that each factual assertion in his memorandum has support in the record. References to the trial transcript should accompany any statement of the case contained in a clerk's memorandum. Inevitably, some factual inaccuracy appears.[51] Although understandable because of the press of time, inaccuracy is still inexcusable. The law clerk is—to use Justice Brandeis's apt description—supposed "to correct [his judge's] errors and not introduce errors of [his] own."[52]

3. *Logical Course:* A memorandum must flow smoothly, read easily, and pass from one point to another without difficulty. It need not follow a set pattern or be stereotyped so long as it is logical and makes sense to the reader. In more difficult cases or in memoranda which are quite long, the direction will be more apparent if the clerk uses paragraph headings, subheadings, and varied typography.

The clerk must test each of the judge's opinions for clarity and readability. The two of them together may understand well enough what is meant by the opinion, but will other readers who are unfamiliar with the intricacies of patent law, for instance, or building construction, or the rules of the road at sea? While the opinion is, in the first instance, addressed to parties familiar with the case, its publication in the reports enables countless lawyers, law students, and legal scholars to read it.[53] They, too, must be able to understand what the court meant.

Both a judge and his clerk might well sleep on a draft, scanning it again another day, if there is any doubt about its readability and meaning.

4. *Grammar*: A common complaint of judges and older lawyers is that many recent law graduates cannot spell or use proper grammar. Perhaps we are too impatient with those who do not have abundant training in grammar, syntax, rhetoric, punctuation, and good spelling. But a judicial opinion is no place for poor English. There may be many ways to say it properly, but the simple, straightforward sentence is likely to be the best.

49. *Id.* at 69.

Discussion of rough drafts between a judge and his clerk can be enlightening for both. As they debate the use of words and phrases, the clerk realizes how important grammatical precision is to the bench and bar. Good opinions have no loose language, no awkward phrases, no dictum capable of misapplication, no quotations out of context. Some judges even encourage their clerks to review the style of their drafts. This is part of the clerk's responsibility, too, for opinions should not become stereotyped or be written to fit a single pattern.

Drafting memoranda requires a precision that comes only through frequent use of the dictionary, a thesaurus, and handbooks. In the Ninth Circuit the law clerks are advised that they can find help in this regard in the various texts especially prepared to aid legal writing.[54]

5. *Professionalism*: Law clerks, whether or not admitted to the bar, are expected to meet professional standards. Appellate court opinions should reflect that professionalism. They should set the standard of fidelity to law. If our opinions are meticulously prepared, and if they read well, the public and the bar who study them will have increased respect for the court that produced them and the administration of justice in general. How well we all can recall reading some older opinions in law school that did not meet that standard.

Our law will always remain only as good as we make it, and the first measure of its worth will continue to lie in its expression, our opinions. Perhaps it is the process of reasoned articulation itself which comes closer to Law in its grand sense than does whatever substance we are fortunate enough to pen.

6. *Timeliness*: Every day that an appellate court opinion is delayed causes another day of injustice to some litigant. A well-disciplined judge will have set a time schedule for himself to meet. In turn, he should pass this practice along to the clerks who work for him. This is one of the hardest self-disciplines for the young graduate to acquire. Yet it is essential for the clerk to realize that in the business of the appellate courts, time *is* of the essence. Almost always research proves interminable; still—and this is inexorable—there always comes a time to cut it short and begin to write. Sometimes this is much earlier than the law graduate would expect. He must learn to live that way, though. A clerk must know when his work product[55] is to reach his judge in order to meet the court's deadline. If he fails, the clerk has wasted his time and embarrassed the judge and his court.

There is no excuse for wasting time. There can be little excuse for not meeting a deadline when the court is dealing with public business or a litigant's rights. Perhaps Gladstone said it best: "Justice delayed is justice denied."[56]

54. *See, e.g.*, R. Flesch, The Art of Readable Writing (1949); M. Lambuth, The Golden Book on Writing (1963); and H. Weihofen, Legal Writing Style (1961).

F. Non-case Time

Not all of a clerk's time is taken up by his participation in the decision-making process, but all of his time must be directed toward that end. An appellate judge assumes that his clerk keeps current on the law, that he reads all recent decisions of the judge's court and of higher courts, and that he follows legal periodicals and most of the important decisions of other courts. In this way, the clerk often can perform a screening function for the judge, pointing out to the judge those opinions and articles of special interest. Often a brief written summary will suffice for the judge—again, minimization of the loss of judicial time is one of the primary functions of the appellate clerk.

III. Some Final Observations

The law clerk has an enviable job.[57] He has the opportunity to absorb the philosophy of a senior lawyer with extensive experience, to draw upon the judge's background, his successes, even his failings and shortcomings, and to arrive at conclusions that can make him a better lawyer. The profound effect that an outstanding judge can have on a clerk is perhaps best put by one of Learned Hand's former clerks, now Professor Gerald Gunther of Stanford:

> Hand and I established an extraordinary man-to-man relationship, and in comparison to him any other experience would have paled.
>
> He was 81 that year, but he was still remarkably self-questioning and open minded. It was just an extraordinary personal experience for me to talk over the tough issues with him, especially realizing that he had been dealing with these questions for 50 years. And yet he was always teaching and probing, trying to reexamine the issues, never assuming he knew the answer.
>
> In my entire year with Hand, I never wrote one word for him. Instead, on a difficult issue he would ask me to read up and then call me in to talk about it. If he was writing the opinion, we would intensively go through every paragraph with an extremely close analysis. His openness of mind toward his work product was just amazing.[58]

Law clerking on an appellate court can be the culmination of a great period of schooling for the young graduate. The experience is excellent preparation for a professional career ahead as a lawyer, professor, or judge. Having seen the judicial process firsthand, the clerk will be a better lawyer for it.[59] Even more important, he will have a sense of how fragile some judgments really are. But he will realize that they are, nonetheless, our only promise. In this discovery lies the beginning of his wisdom.

As a clerk, the young lawyer has a tremendous opportunity to observe at first hand the actual operation of the judicial process.

58. Rutzick, *Gerald Gunther: A Man Who Enjoys a Brief Constitutional*, 56 Harv. L. Record 8 (1973).

Although not yet an expert in any field of law, the clerk is expected to bring to the court his own visceral reaction, his own view of justice and how it is achieved, and his feelings about the correctness or long range effect of the decision below.[60] Where he has done special research or participated in discussions with law teachers and fellow students, he may have collected thoughts on new developments of the law. This exposure is especially useful in the areas of social change, civil rights, consumer protection, poverty problems, and space law, on which courses have been added to law school curricula in the past decade.

We in the appellate judiciary look forward with genuine enthusiasm to having new clerks on duty each year. We need the imaginative inclinations that they bring from the nation's law schools and their questions, doubts, and disagreements. Most of all, the fresh perspectives of these "puisne judges" keep and develop our contacts with the changing currents of newer generations. This we need if we are to find and stay on the path which leads to "equal and exact justice to all men, of whatever state or persuasion, religious or political."[61]

61. Thomas Jefferson, from his first Inaugural Address, Mar. 4, 1801.

Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity

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I. Introduction

The business of American appellate courts has been escalating, and never at a pace greater than in the past half dozen years.[1] The problems presented by swelling caseloads require that court systems reexamine their operation. As Hart and Sachs recognized,

> [t]he courts in any legal system . . . can handle only so many contested cases at any given time, without major reorganization. In hosts of respects the pressures of work in the courts affect or even determine the ways in which the work is done. How the courts work cannot be understood without understanding this.[2]

The traditional response to increasing appellate caseloads has been the creation of additional courts, principally intermediate appellate courts,[3] and the proliferation of additional judgeships.[4] Adding judges, however, is expensive and may adversely affect a court's cohesiveness and doctrinal consistency.[5] Furthermore, the palliative effect of additional judges may inhibit efforts to seek lasting solutions and may result only in the recurring necessity for even more judges as caseloads continue to increase.[6]

Another response to increasing caseloads has been the use of judicial law clerks. Law clerks are so generally accepted and universally utilized by appellate courts today that they have become an institution. The position is, however, a relatively recent innovation. Law clerks did not come into general use by the Justices of the United States Supreme Court until the 1920's, and it was not until 1930 that judges of the United States Courts of Appeals were authorized to employ clerks. At the state level, a survey conducted in the early 1930's revealed that law clerks were in general use in the appellate courts of only seven states.[7] Ten years later, almost one-half of all state supreme courts employed law clerks, although not always in sufficient number for each judge to have his own.[8]

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Reproduced from 26 VAND. L. REV. 1211 (1973).

7. Curran & Sunderland, *The Organization and Operation of Courts of Review*, in Third Annual Report of the Judicial Council of Michigan 147-52 (1933).
8. ABA Section of Judicial Administration, Methods of Reaching and Preparing Appellate Court Decisions 37-38 (1942).

A 1968 survey reported that 90 percent of all state supreme courts and twelve of the eighteen state intermediate appellate courts then in existence employed law clerks, generally at a ratio of one clerk per judge.[9] The figures are undoubtedly higher today. Indeed a widely suggested remedy for appellate court congestion is the use of multiple law clerks.[10] The practice of employing two clerks for each judge has been followed by the United States Supreme Court since 1947 and is becoming commonplace at the state supreme court level. Today United States Supreme Court Justices are alloted three law clerks each,[11] and the seven justices of the California Supreme Court have a total of 28 clerks.[12]

There are indications, however, that multiple law clerks may not be altogether beneficial. One observer, commenting upon the increase in United States Supreme Court law clerks, expressed the fear that "[t]he traditional image of the several justices bringing the dispassioned reason of law to bear on problems may be blurred by the noise of typewriters and the scurry of subordinates."[13] Moreover, the addition of law clerks is not necessarily the most efficient approach. The use of multiple law clerks compounds the problems of selection, training, and supervision. A study undertaken by the Judicial Council of California reports that "the productivity of each justice is only slightly increased by augmentation of his own research staff."[14] After reviewing several new approaches to productivity adopted by various appellate courts, Justice Winslow Christian of the California Court of Appeal recommends:

> [W]hen staff is to be added, any staff beyond the necessary personal staff of the judges should work in a centrally supervised unit, rather than be scattered among the judges. Some excellent judges can never be trained to use staff effectively.[15]

The Michigan Court of Appeals reached this same general conclusion in 1968, after having experimented with two clerks per judge. The court soon found that simply attaching more law clerks to the individual judges did little to increase judicial productivity. Accordingly, the court decided to organize the extra clerks into a central division, responsible for researching and screening appeals prior to hearing.[16] Now, five years later, due principally to prehearing research and screening, the court remains current with its caseload despite a 50 percent increase in the number of appeals.

An overview of the organization and duties of the Michigan

9. AMERICAN JUDICATURE SOCIETY, LAW CLERKS IN STATE APPELLATE COURTS 1 (Report No. 16, 1968). Other comparatively recent surveys may be found in INSTITUTE OF JUDICIAL ADMINISTRATION, APPELLATE COURTS, INTERNAL OPERATING PROCEDURES 162-67 (1957) and ABA SECTION OF JUDICIAL ADMINISTRATION, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 43-46 (1961).

10. *See, e.g.*, Shafroth, *Survey of the United States Courts of Appeals*, 42 F.R.D. 243, 290 (1968), wherein 2 clerks per judge is recommended, and AMERICAN BAR FOUNDATION, ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS—REPORT OF RECOMMENDATIONS 2 (1968), recommending that "[e]very Circuit judge should have two, and perhaps three, law clerks to assist him."

13. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 ORE. L. REV. 299, 304-05 (1961). *See also* FEDERAL JUDICIAL CENTER, *supra* note 11, 57 F.R.D. at 582-83, 609-10. Reference to the "noise of typewriters" in this context is apt in light of the revelation that, due to lack of secretarial assistance, Supreme Court law clerks must personally type their memoranda. *Id.* at 611.

15. Christian, *Using Prehearing Procedures to Increase Productivity*, 52 F.R.D. 55, 61 (1971).

16. In doing so, the court drew upon some of the experience of the Appellate Division of the New York Supreme Court, First Department, in its use of "law assistants," described in D. KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND 15, 18-19 (1963).

Court of Appeals may aid in understanding the function and operation of its prehearing system. The Michigan Court of Appeals is an intermediate appellate court of statewide jurisdiction.[17] It hears appeals taken as a matter of right from both civil and criminal judgments of inferior courts,[18] and has original jurisdiction in specified habeas corpus, superintending control, apportionment, quo warranto, and mandamus proceedings.[19] The court also hears appeals by leave, including applications for delayed appeal not timely filed as of right, appeals from state administrative agencies (principally workmen's compensation awards), and appeals from probate and district courts.[20] The court's opinions are final, subject only to review by the Michigan Supreme Court on grant of leave to appeal.[21]

Since 1969 the court has consisted of twelve elected judges, frequently augmented by three retired judges or circuit judges assigned to the court as the caseload requires. Appeals are heard by three-judge panels assigned to hearing divisions whose membership rotates monthly to ensure that the judges sit with each other with equal frequency. In the tradition of the circuit riders of the past, the judges travel to the hearing site located in one of the three divisional offices.

The court's hearing year runs from October through June, during which each panel hears 21 full issue-joined appeals per month. Generally a second hearing session is scheduled during the month of June so that cases ready for hearing need not be held over to the following October. During the year 1972 three retired judges were assigned to the court on a continuous basis. The fifteen judges heard a total of 1,025 calendared appeals on the merits, and they decided an additional 200 appeals on the merits without the traditional trappings of a formal hearing. Thus in 1972 the court handled in excess of 80 appeals per judge. Sitting in panels of three, each member of the court participated in the decision of approximately 240 appeals. This activity represents the most significant part of the court's function, but certainly not all of it. The court also processes about 6,000 motions, running the gamut of those normally considered by appellate courts. These include applications for leave to appeal and motions for extension of time to perfect an appeal. Applications for leave are significant matters because, in many instances, denial of leave effectively disposes of the case on the merits.

In large measure, the court's ability to manage a caseload of this magnitude can be attributed to the innovative use of supporting research personnel. In describing the court's initial success in this direction, a previous article concluded:

> The day of the single, unassisted legal practitioner is over and so is the day of the unassisted judge. With appeals fast becoming the routine "next step" in the litigation process, it is incumbent upon our appellate courts to modernize procedures and develop new techniques for coping with the steadily increasing volume of appeals. Our experience to date indicates that the use of

supporting research personnel, functionally organized, can effect a significant increase in judicial output without derogation of the essential judicial function.[22]

Five years of experience with centralized staff and prehearing procedures have fulfilled the above predictions. This article seeks to describe in detail the prehearing research and screening procedures used in the Michigan Court of Appeals, to evaluate the system's performance, and to compare similar prehearing practices employed by other court systems. In conclusion, the shifting role of supporting research personnel—traditionally embodied in the position of personal law clerks—is explored.

II. Description of the Prehearing Research and Screening System

A. Prehearing Research

The nucleus of prehearing research as practiced by the Michigan Court of Appeals is the preparation by the central staff of legal research memoranda after appellate issue has been fully joined. These memoranda resemble those traditionally prepared by judicial law clerks prior to oral argument or submission. They are distinguished, however, by more extensive fact analysis and independent research. The "prehearing report" includes a fact resume with reference to the actual record, a statement of the parties' contentions, and a documented analysis of the existing law applicable to each issue. The prehearing report, the briefs of counsel, and the record provide the judges with the information necessary to decide the outcome and prepare an opinion.

Cases presenting questions totally devoid of jurisprudential significance or merit (elsewhere designated as "frivolous") are often decided by a short per curiam or memorandum opinion. In such cases, a proposed draft opinion is generally included in the prehearing report for the court's consideration. At the other extreme, where complex and unprecedented issues are present, the prehearing report serves as a guide to judicial deliberation and further research. Thus the prehearing system transfers preliminary research and record review from judicial law clerks to a prehearing staff. Moreover, the shift of these functions from after to before oral argument enables the early identification of appeals appropriate for per curiam or memorandum treatment.

1. The Prehearing Report[23]

Prehearing research and record review by a central research staff rather than by individual law clerks results in the standardization of the format and content of prehearing reports. In the Michigan Court of Appeals, a prehearing report includes the following elements:

(1) a caption giving the full and correct title of the appeal and the court's docket number, the identity of the trial judge and trial counsel, the name of the prehearing attorney preparing the report, and the date upon which the report was drafted;

(2) a full statement of facts in a style generally suitable for use in a draft opinion, verified by page citations to the lower court record;

(3) an objective statement, or restatement where necessary, of the issues on appeal;

(4) a detailed discussion of each issue, starting with a brief summary of the arguments of the parties and followed by an analysis of the applicable law;

(5) a conclusory recommendation suggesting the result or alternatives available to the court and the type of opinion most appropriate for the particular case (if the prehearing attorney recommends a per curiam or memorandum opinion, he drafts a proposed opinion and attaches it to his report);

(6) an appendix including photocopies of the opinion—if any—of the trial court or tribunal below, relevant portions of the pleadings or testimony which the court should examine, and any previous research memos prepared on the case, such as a commissioner's report if the appeal came by way of application for leave to appeal.

If it will aid in their discussion of resolution, prehearing attorneys are free to consolidate issues or change their order of presentation in the briefs. They may also bring to the court's attention any unraised issues that may dispose of the appeal[24] or that may affect the quality of justice in the case, emphasizing that such issues were not briefed by the parties. Generally, however, their research is confined to the issues raised rather than to de novo examination.

The prehearing report's most important function is to provide an analysis of the law applicable to the issues. Virtually every case involves a considerable degree of independent legal research, even when both sides of the appeal are well briefed. All appellate judges are well aware that because of its adversary nature, the brief can rarely be relied upon to present a sufficient exposition of the law. Furthermore, the quality of written appellate advocacy often is lacking, in which case the issues must be researched almost afresh. While the prehearing report serves to call the court's attention to briefs grossly violative of applicable court rules or standards of professional conduct, the prehearing attorney is still obliged to research the issues fully.

22. Lesinksi, *Judicial Research Assistants: The Michigan Experience*, 10 Judges J. 54, 55 (1971).

23. For a typical, hypothetical example of a prehearing research report prepared by a Michigan prehearing attorney see D. Meador, Criminal Appeals: English Practices and American Reforms, Appendix K, 266 *et seq.* (1973).

24. One function that is not a primary source of concern to the prehearing staff is the policing of appeals for jurisdictional and procedural defects. The clerk's office of the court is staffed with legally trained and in-house trained personnel who screen all appeals for such defects before the appeal reaches the prehearing staff.

Prehearing attorneys do not ordinarily extend their treatment of existing law beyond Michigan authorities, except in cases clearly warranting such an extension. If an exhaustive multi-jurisdiction survey must be undertaken, the task normally falls to the judicial law clerk. If a prehearing attorney discovers a problem that might be resolved by an appropriate inquiry at oral argument, he lists the question in his report. Additionally, since the presentation of the facts often influences the disposition of a case, the report also includes a thorough and objective review and verification of the facts stressed by the parties.

Although there is a degree of inter-office discussion in their preparation, prehearing reports are primarily an individual undertaking. Originally sent to the court anonymously, the reports now bear the author's name in order to promote pride of authorship and to assist the judges in evaluating each prehearing attorney's performance.

2. Prehearing Screening

The comprehensive research reports prepared for all cases in advance of oral argument provide the foundation for the prehearing screening of appeals. Because legal analysis is performed prior to calendaring, appeals may be screened more accurately than if screening were based solely on a docketing statement or a reading of the briefs. As practiced by the Michigan Court of Appeals, the basic screening function is the categorization of appeals according to the type of opinion each will require for disposition. At the conclusion of a prehearing report, the prehearing attorney suggests whether an authored opinion, a per curiam opinion, or a memorandum opinion is most appropriate for the resolution of the particular appeal. While no appeal is given summary treatment, and every case is fully examined, the ultimate treatment each case receives is affected by knowledge of what it involves, and the category attached to a case determines how it is processed.

An authored or, in the jargon of appellate judges, "full blown" opinion needs no extended explanation—it is the thorough exposition traditionally rendered by appellate courts. In the Michigan system a per curiam opinion, typically two or three typed pages in length, is employed when the issues are not jurisprudentially significant and may be adequately resolved with a brief discussion of controlling precedent. The memorandum opinion is simply an order of the court affirming the judgment below. It is employed where the issues border on frivolity or where they have been resolved by the court on several occasions and are so well settled that they require no discussion.

If the prehearing attorney recommends per curiam or memorandum treatment, he attaches to his report a draft that the court may adopt, modify, or reject. In full opinion cases, the prehearing report may occasionally be sufficient to constitute a rough outline of the eventual opinion. In the past two years approximately 50 percent of the court's opinions have been per curiam or memorandum opinions. To save the bar from having to purchase reporters containing a large percentage of nonprecedential opinions, memorandum opinions are not published, and per curiams are published only upon request by a member of the three-judge panel. Judges

have shown significant self-restraint in ordering publication of per curiam opinions.

Appeals are not screened for the purpose of limiting oral argument. Arguments impose no burden on the court because they are limited to 30 minutes per side and are confined to a three or four day period each month for each panel. A sufficiently large number of cases are submitted on briefs alone to allow the court to reach promptly cases ready for disposition. To the extent that screening is practiced in Michigan, the convening of special screening panels is unnecessary. The prehearing attorney's opinion recommendation is weighed with the merits of the appeal by the panel of judges who decide the case.

As an adjunct to the screening practiced by the prehearing staff, Michigan permits the extensive use of motions to affirm and dismiss. The motion to affirm, which is filed after the appellant has filed his brief, places the case at issue and allows the court to reach frivolous or simple-issue controversies quickly. A motion to dismiss can be filed any time the appellee feels he can affirmatively demonstrate a basis for such action. Preparation of a prehearing report often precedes consideration of these motions, which are placed on the court's weekly motion calendar for early disposition.

In addition to the benefits derived from the categorization of appeals by type of opinion each will require, the prehearing screening provides several secondary benefits. These include the early identification of latent jurisdictional problems, the facilitation of calendaring and assigning cases to writers to provide a balanced work load for the court, and the compilation of an "in-house" digest of pending issues.

B. The Prehearing Staff

The prehearing staff varies in size according to the court's caseload. During the period from 1970 to 1972, from fifteen to eighteen prehearing attorneys were employed. In January 1973, the number of appeals heard each month increased from 105 to 120, necessitating a staff increase from eighteen to twenty.[25] Responsibility for administrative supervision of the prehearing staff is vested in a Research Director, and staff performance is closely monitored by the court's Chief Judge.

1. Selection, Orientation, and Tenure

Because of the size of the staff, the degree of turnover, and the responsibilities of the position, recruitment of law school graduates to serve as prehearing attorneys is an important undertaking. To attract candidates of the highest caliber, interview teams visit the four Michigan law schools and a half-dozen other major schools each fall for on-campus interviews. The interviews are conducted by a team consisting usually of a judge of the court and either the Research Director or another senior member of the court's staff. In-

25. Recent increased activity calls for increasing the staff to 24 or 25.

volving judges in the recruiting process helps demonstrate to the applicants the importance the court places on the quality of its staff and enables the judges to recruit their personal law clerks at the same time.[26]

Each applicant is requested to submit a completed employment application, a personal resume, a copy of his law school grade transcript, and one or more examples of his legal writing. Based on these materials and on the law school interview, the interview team determines which candidates have the best potential for law clerk or prehearing service. The applicant's materials are then reproduced and, together with an interview summary and appraisal, are sent to the judges. Once the judges have made their clerkship selections, the best of the remaining applicants are invited to the prehearing offices for a further personal interview, following which offers of employment are tendered.

As an intermediate state appellate court, the Court of Appeals is at a disadvantage when competing with more prestigious federal and state supreme courts for the top students. An effort is made to overcome this by offering a higher than average salary ($14,900), an excellent fringe benefit package, and attractive offices. Less tangible, but perhaps more effective, is the attitude of the judges toward the staff; a spirit of openness and receptivity is shared by all members of the court.

If prehearing attorneys are recruited and selected with care, they do not require a great deal of orientation upon commencing employment. New prehearing attorneys are supplied with a comprehensive staff manual, which is revised annually with the assistance of the prehearing attorneys themselves and which describes in detail the responsibilities and procedures attending their position.[27] As part of the orientation process, prehearing attorneys are offered legal research and writing tips found valuable by members of the staff, are invited to review books on legal research methodology and legal writing style, and are instructed in the use of dictaphones.

In the tradition of law clerkships, the tenure of a prehearing research attorney is generally one to two years. Coupled with the circumstance that Michigan law schools graduate students in January, June, and August, staff level flexibility is easily achieved.

26. Joint recruiting offers several advantages. The judges are insulated from a constant stream of inquiries and unsolicited applications each fall, and students who might not otherwise apply are attracted to prehearing work. In the past most students have indicated a decided preference for law clerkships. As the nature and function of the position of prehearing research attorney has become more widely recognized, however, this attitude is diminishing. The starting salary and fringe benefits are identical.

27. The manual begins with an introduction to the Court of Appeals and its jurisdiction and procedures, and includes a summary of the function of other divisions of the court, such as the clerk's office and the court commissioners. The main body of the manual details the format and content of prehearing reports as well as office procedures and productivity expectations. Other topics covered include confidentiality, restrictions on extracurricular activities, and the conditions of employment. An appendix to the manual contains a sample prehearing report, a citation style guide, and copies of various inter-office forms.

It was initially envisioned that the prehearing staff eventually would consist largely of career employees; however, this has not occurred. Indeed, the court is satisfied that the same considerations that have led the overwhelming majority of appellate courts to opt for short-term law clerks who have recently graduated from law school apply equally to the prehearing staff. Turnover can intensify administrative problems, but avoids the more subtle adverse effects of institutionalism. Recent law school graduates seem to make up in freshness of thought and purpose what they may lack in practical experience. After a year or two, some prehearing attorneys develop what we call the "second-year syndrome," a malaise manifested by delusions of infallibility. Once a prehearing attorney starts taking more interest in defending his conclusion than in objectively discussing the alternatives, it is time for him to seek other employment.

2. Office Procedures

The prehearing staff is centralized in a one-floor suite of offices situated in the building housing the court's main office at Lansing, the state capital. The location facilitates access to the court's central records and research materials and provides liaison with the personnel of the Clerk's office. On a weekly basis a list of cases ready for prehearing is furnished by the Clerk's office. A case is ready for prehearing when it has been noticed for hearing (both briefs having been filed or the time for filing the appellee's brief having expired) and the lower court record and transcript have been filed with the court. From that list cases are assigned to individual prehearing attorneys, as needed, on a blind-draw basis, although an effort is made to equalize the assignment of civil and criminal cases. A carbon copy of the assignment memorandum goes to a Deputy Clerk who then delivers a set of briefs and the lower court record and transcript to the prehearing attorney. Upon completion of the prehearing report, the author deposits the briefs, record, and transcript in a bin from which frequent pickups are made by the Deputy Clerk or a member of his staff.

Once the prehearing report is dictated, typed, edited, and corrected, it is reproduced; one copy is sent to the author and another copy is delivered to the Clerk's office for use in drawing up the next monthly calendar. Three copies are routed to the Deputy Clerk; he in turn sends them, together with the briefs, to the members of the hearing panel after the case is calendared. Prehearing reports are considered confidential working papers and are not made available to counsel or the public.

3. Caseload and Quality

The production goal for each prehearing attorney is an average of two reports per week over the course of a month. Because cases vary widely in complexity and in sheer bulk of the transcript that must be read, it is frequently impossible to complete eight reports a month. For this reason, six reports a month is considered a minimum level of satisfactory performance.

The caliber of the staff's work is evaluated in several ways. Before each prehearing report leaves the floor, it is reviewed by the Research Director or, in his absence, by a senior prehearing attorney. For new employees, this review generally includes a paragraph critique using the report to illustrate facets of case analysis and writing style. More seasoned staff members' work is reviewed in more cursory fashion. The review may include reading the briefs, but usually does not. Spot research to confirm that the report has not overlooked leading cases on a particular issue is more common. The purpose of this review is not to ensure that the reports are totally free of errors or omissions—an impossible task given the rate of twenty to 30 reports a week—but to guarantee that they "ring true."

When sent to the judges, each report is accompanied by a judicial evaluation card. The judges rate reports as to quality, without regard to the ultimate result recommended. Each judge may make any specific comments he sees fit. The cards are returned to the Research Director who analyzes them on a monthly basis and reports the results to the Chief Judge. Reports rated less than good are frequently discussed with the author in an attempt to identify and correct the source of dissatisfaction. Perhaps the best test of the caliber of a prehearing report is its comparison with the ultimate opinion issued by the court. Accordingly, opinions are sent to the author of each prehearing report so that he may determine whether the court decided the case the way he recommended, relied upon the authorities he found controlling, or made use of his proposed opinion, if one was furnished.

III. Evaluation of the System's Performance

In evaluating screening procedures used by the federal circuit courts of appeals, one commentator suggested:

> It is not at all clear what, if any, conclusions can be drawn from the experience of experimental judicial administration. Programs tried thus far may have been helpful in facilitating some particular task in the court's workload; nothing, however, can claim substantial success.[29]

The prehearing research and screening system used by the Michigan Court of Appeals has now been operating for five years and has passed the stage of "experimental" judicial administration. Furthermore, the operational results of the system's five-year performance lay a strong claim to substantial success not only in reducing appellate delay and eliminating the necessity of adding large numbers of judges to meet the burgeoning caseload, but also in satisfying the essential functions of intermediate appellate review.

A. *Benefits Derived from the System's Basic Features*

Both increase in judicial productivity and reduction of appel-

29. Note, *Screening of Criminal Cases in the Federal Courts of Appeals: Practices and Proposals*, 73 Colum. L. Rev. 77, 88 (1973) [hereinafter cited as *Federal Screening*].

late delay result from the smoother case flow attributable to the prehearing system. The underlying reasons for these effects can be best understood by examining the benefits—both anticipated and unanticipated—springing from the system's two basic features: the transfer of the preliminary research from judicial law clerks to a central staff; and the shift of a substantial portion of the research from after to before oral argument.

The transfer of the preliminary research to the central staff results in greater economy of effort as well as a better work product. Even where panels consist of only three judges, the economy is obvious: instead of three clerks researching the same case for each of their judges, one prehearing attorney prepares a report that is sent to all members of the panel. Working in an atmosphere tailored to research and uninterrupted by other duties, the prehearing attorneys are able to devote their entire energy and attention to the preparation of research reports. A central research department also permits a catalogued collection of research on issues litigated in this state, which collection contributes to a superior work product with a minimum of effort.

The shift of factual and legal research from after to before oral argument and the resulting categorization of appeals according to appropriate mode of disposition further contribute to the time saved. Knowing that an appeal will probably be treated in a memorandum, per curiam, or full opinion allows calendaring tailored to the amount of time necessary to resolve the case. In a multi-panel court, the opinion recommendations also help to equalize dockets so that each panel receives an equivalent measure of full opinion, per curiam, and memorandum cases at each session. Identification of related cases is facilitated, allowing separate appeals by codefendants or appeals presenting similar issues to be heard together. Serving as an inventory of all issues pending before the court, the prehearing reports aid in the retrieval of staff research being done on similar or identical issues. This inventory function is enhanced by the preparation of subject-index cards used to prepare a "pending issue digest," supplemented monthly, which is distributed to all judges, law clerks, and prehearing attorneys. The digest serves not only to prevent separate panels hearing similar issues from inadvertently issuing inconsistent opinions, but also to alert judges on the same panel of the positions their fellow judges may previously have taken on a similar issue.

The transfer of the focus of research to before oral argument also yields benefits during the oral argument, judicial conference, and opinion writing stages. Supplied with the briefs and a prehearing report in each case, well in advance of oral argument, the judges are—despite the heavy caseload—much better prepared for the argument. Similarly, this procedure expedites the afternoon conferences held to discuss the cases heard that morning. If a full opinion is warranted, the advance preparation often enables the judges to delineate their positions at the initial conference and permits the prospective writer to proceed without the duplication of further conferences.

Moreover, the prospective writer may find in the prehearing report an outline for his opinion. The statement of facts in the prehearing report is arranged so that it would be suitable for use in an opinion. If the judges agree at conference that some or all of the statement of facts in the prehearing report may be directly adopted, this alone can be a great time saver. During the conference the judges may decide to use the report's legal analysis as the underlying framework of the opinion. Since the basic structure may be easily modified or augmented as necessary, the prehearing report can save significant time for an opinion writer at the preliminary organization phase. This is even more true in unusual or complex cases. In sufficiency of evidence cases, for example, the entire record can be more readily examined with the prehearing report serving as a roadmap, and the amount of judicial time expended in the search of a voluminous record may accordingly be minimized.

Even judges who disagree with conclusions drawn in a prehearing report find it a useful tool. Sometimes the reasoning of the report can be adjusted and used to support the opposite result. The report can also aid a dissenting judge in recording those areas that he has read, weighed, and dismissed.

If a per curiam or memorandum opinion seems appropriate, the time savings become still more apparent. Apprised of the applicable law and facts at the initial conference, the judges are ready to act immediately, and such opinions are often filed within days of argument. Advance review of the prehearing report additionally assures that the record is complete before the case is considere`, allows time for the production of missing exhibits, and provides a double check of proper jurisdiction. In short, no one document serves as many useful functions in an appellate court system as the prehearing report does in Michigan.

While aiming at an increase in judicial productivity, the Michigan prehearing system has also succeeded in expediting the appellate process. By conserving and concentrating judicial energy, by tailoring dockets to maximum judicial capacity, and by identifying cases not ready for decision, it assists the court in handling a larger volume of cases, avoiding the delay inherent in a backlogged docket. By pinpointing routine cases for immediate disposition and by focusing on problems presented by more complex cases, the prehearing system enables the court to prepare opinions in the minimum possible time. Therefore, although an extra month is required to pass a case through the prehearing system, the overall process is speeded by the smoother flow of the cases.

While other benefits of the prehearing system can be theoretically isolated, perhaps the best measure of its contributon is the statistically verifiable increase in judicial productivity. Various figures can be cited, depending upon which years are chosen for comparison, but the increase in opinions per judge per year is at least 46 percent.[30] It is difficult to translate this figure into an exact amount of money and time saved, but, to say the least, it is substantial.

B. Meeting of Proper Screening Criteria

Various commentators have expressed uneasiness over the propriety of screening and research pooling procedures. Such expressions have taken the form of concern over the delegation of judicial authority,[31] the "de-humanization" of the judicial process,[32] the constitutionality of such procedures,[33] and the correlation of screening procedures with the basic functions of judicial appellate review.[34]

It is clear that a viable screening and pooling system must meet a variety of tests; the nature and purpose of the court system, State and Federal Constitutions, and practical considerations all impose their own demands. During its five years of operation, the system used by the Michigan Court of Appeals has satisfactorily met these demands.

1. The Dangers of Delegation

The prehearing system endeavors to avoid delegation of authority to nonjudicial staff personnel. The basic element of the system, the prehearing report, is only a preliminary research tool to aid a panel of judges in arriving at its decision. Suggestion by a prehearing attorney that a case be decided via a per curiam or memorandum opinion is simply a *recommendation* having no judicial force. The decision-making responsibility rests with, and is carried out by, a three-member panel of judges. None of the research staff has any power of decision.

30. For the derivation of this 46% figure see Michigan Court of Appeals Annual Report, reprinted at 39 Mich. App. xxii, xxviii (1972). The figure was based on the first 3 years of prehearing operation. Five years have now elapsed since the inception of the prehearing system. Since the major features of the process have remained unchanged, this time period establishes a firm foundation for comparisons with the prior history of the court's judicial productivity. Meaningful statistics are best obtained by deletion of figures for 1965, the first year of the court's operation, and for 1968, the first year of the prehearing system, thus eliminating the possible peculiarities associated with the launching of new systems. The figures for the 2 years 1966-68 can be effectively compared with those from the 4 years 1969-72, with the addition of the prehearing system as the primary variable affecting the statistical outcome. From 1966-68, 846 opinions were written, an average of 45 per judge per year. From 1969-72, 4,555 opinions were written, an average of 84 per judge per year. Stated as a percentage of the prior opinion production per judge, this increase represents an 87% gain in judicial productivity. If the figures from 1965 and 1968 are included, the percentage gain increases to 132%.

31. *See* Huth v. Southern Pac. Co., 417 F.2d 526, 529-30 (5th Cir. 1969); Carrington, *The Dangers of Judicial Delegation*, 52 F.R.D. 76 (1971); Christian, *supra* note 15, at 58.

32. *See* Carrington, *supra* note 31, at 77-78.

33. *See* Huth v. Southern Pac. Co., 417 F.2d 526, 529-30 (5th Cir. 1969); Christian, *supra* note 15, at 58; *Federal Screening*, *supra* note 29, at 82-85.

34. *See Federal Screening*, *supra* note 29, at 80-82.

Concern that prehearing research procedures dehumanize the judicial process[35] or result in production line justice[36] is unwarranted. A case backlog hanging over the head of a judge and his law clerk is not an incentive to a detached, unhurried examination of an individual party's rights. The prehearing system not only produces a detailed research report examining in depth both parties' contentions, but also serves to avoid the inconvenience and agony caused by case backlogs that suspend parties' rights for disturbingly long intervals.[37] Proper concern for the humaneness of appellate review dictates prompt intermediate appellate court determinations of the rights of people with meritorious claims. Moreover, the early and swift disposition of unmeritorious appeals that is aided by staff research and recommendations results in more available judicial time for considering extensively those cases of particular significance to the state's jurisprudence.[38] The prehearing system is not a production line. Prehearing attorneys have the same concern for the rights of an individual that a law clerk researching for his particular judge would have. In addition, the preparation of a report by a neutral prehearing staff attorney, uninfluenced by the real or imagined prejudices of a law clerk's particular judge, may well result in a fairer, more objective examination of the issues presented.

2. Purposes of Appellate Review

Each stage of the judicial process must have certain functions if the overall system is to accomplish its proper goals. A high-volume intermediate court inundated with appeals as of right must handle its docket differently from a discretion-exercising supreme court. The functions of such an intermediate court include: to do justice to the parties; to maintain standards in the trial courts; to develop the law of the jurisdiction; and to contribute to the prompt termination of litigation.[39] The Michigan prehearing system significantly improves the performance of each of these roles.

Common sense dictates that an overworked court will have difficulty doing justice or giving the parties a fair examination of respective contentions on appeal. Screening facilitates the application of extensive decision-making criteria to those cases which merit it. At the same time, the prehearing report provides even in unmeritorious appeals a detailed analysis of parties' contentions and permits a fairer examination of all positions on appeal.

35. *See* Carrington, *supra* note 31.

36. *See generally* Edwards, *The Avoidance of Appellate Delay*, 52 F.R.D. 61 (1971).

37. Appellate delay, as pointed out by Judge Griffin B. Bell, causes "concomitant effects. The recidivist criminal may continue on bail, the hapless plaintiff is without his damages, interest accrues against the defendant, and controversies remain unsettled. Witnesses are lost for retrial in the event of reversal." Bell, *Toward a More Efficient Federal Appeals System*, 54 JUDICATURE 237, 238 (1971).

38. It is equally important that judges do not waste their valuable time with extended research on unmeritorious appeals. *See* Presiding Justice Gordon L. Files's remarks, *reprinted in* JUDICIAL COUNCIL OF CALIFORNIA, 1970 ANNUAL REPORT, Appendix B, at 36.

By interjecting a reasonably objective third party between the disputing parties and the judge who has to live with the decision he ultimately makes, the prehearing report helps to maintain consistent trial court standards. Identifying those cases suitable for per curiam or memorandum disposition not only eases the uncertainty inherent in prolonged pending appeals, but it also focuses prompt judicial attention on those remaining cases that do have jurisprudential significance affecting trial court standards.

Another aid to the maintenance of consistent trial-court standards is the compilation of pending issues. Incident to each prehearing report, the prehearing attorney prepares index cards stating the issues. Compiled in a central digest, these cards help synchronize the court's consideration of related cases before they are decided and permit retrieval of completed research for later reference. In both instances, decisional consistency is enhanced.

This same consistency develops the law of the jurisdiction by presenting a firm stance on the interpretation of laws and by framing precise vehicles for higher review.

Finally, the contribution of an intermediate court of appeals to the prompt termination of litigation is obviously facilitated by a prehearing system that not only significantly expedites the appellate process, but also prevents unnecessary rehearings and further appeals by applying swift and consistent interpretations of the law. Temporal economy is most evident in those cases decided by per curiam or memorandum opinions.

3. Constitutional Considerations

Several possible constitutional objections to prehearing procedures have been suggested, including whether significant parts of what is considered judicial work can properly be delegated to nonjudicial personnel,[40] and whether the system meets the requirements of constitutional due process and equal protection.[41] The Michigan system satisfactorily answers these constitutional challenges.

The provisions of the Michigan constitution mandate that judicial power be vested in "one court of justice," including the court of appeals. Because Michigan's prehearing system does not involve the delegation of judicial duties to others, the impartial presentation of the facts and law of a case embodied in the prehearing report aids rather than usurps the judicial function. If a prehearing attorney's recommendation as to form of opinion is followed, or if a proposed opinion is adopted, it is only after the judges themselves have examined the record and briefs and come to their own decision. Accordingly, the proper judicial role as required by the constitution is preserved.

The keystone of the due process safeguard is that a hearing must be fair—arbitrary, capricious, or unreasonable procedures cannot be tolerated. The Michigan prehearing system results in a fairer hearing for all parties. Even those parties who file unmeritorious appeals of no jurisprudential significance have their case carefully and unhurriedly scrutinized in the prehearing report. Prompt treatment of unmeritorious appeals allows more time for extensive consideration of those cases of significant importance and avoids unnecessary delay of meritorious appeals. Since the system's uni-

form procedures assure that each appeal receives extensive background consideration through the prehearing report and then receives individual attention by the judges who retain sole responsibility for decision, the requirements of due process are satisfied. The uniform procedures and the vesting of all decision-making authority only in the judges also assure that the system meets the requirements of equal protection. Although appeals are treated differently according to the type of opinion used in deciding them, the distinctions are squarely justified by the overwhelming state interest in the numerous benefits the system offers to the judicial process as a whole. Thus, although constitutional questions are properly raised, they present no problems for the Michigan prehearing system as presently constituted.

* * * *

V. Conclusion: The Trend Toward Central Research Staffing

As recognition now spreads that the proliferation of personal law clerks, like the perpetual creation of additional judgeships, is subject to the law of diminishing returns, a new trend is emerging. The concept of differential case management, or screening, requires for its implementation a pool of legally-trained staff assistants. Consequently, several appellate courts have established centralized research staff units as an alternative to multiple law clerks. Their initial successes have led national advisory commissions to recommend that central staffing and screening procedures be incorporated within appellate court systems in general.[67]

While it is doubtful that central research staffs will ever eliminate the need for law clerks, who serve also as personal assistants to individual judges, it is interesting to note that at least two appellate courts, the Third District Court of Appeal of California and the English Court of Appeal, function effectively without using any "traditional" law clerks. A more likely development is a shift in the function served by law clerks from preparation of legal research memoranda toward greater assistance in opinion preparation. Research, basically an objective task, is easily centralized, while assistance in opinion drafting, a more subjective undertaking, benefits from a close working relationship between author and aide.

67. ABA Comm'n on Standards of Judicial Administration, Standards Relating to Court Organization (Tent. Draft, 1973), Standard § 1.10 and commentary to Standard § 1.13, at 31; National Advisory Comm'n on Criminal Justice Standards and Goals, Working Papers for the National Conference in Criminal Justice, Courts Standard 6.2 and commentary (1973); *cf.* ABA Project on Standards for Criminal Justice, Standards Relating to Criminal Appeals (Approved Draft, 1970), Standard § 2.4 and commentary, critical of procedural devices for preappeal screening. It is clear from Standard § 3.1 and the commentary accompanying it, expressing approval of staff participation in prehearing preparation of appeals, that Standard § 2.4 relates solely to preappeal or "threshold" screening rather than to the screening procedures discussed in this article.

The judges of the Michigan Court of Appeals are united in the belief that prehearing procedures are a sound and effective weapon in the perennial battle of the backlog. Were it not for the resulting 46 percent increase in opinion productivity per judge, a comparable increase in the number of judges would have been required to keep pace with increased filings. Substantial productivity increases have also been reported by federal courts of appeals that have adopted screening procedures. In the Fifth Circuit, each panel of judges heard 233 appeals in 1970, compared with 180 prior to screening, a productivity increase of nearly 30 percent.[68] Implementation of screening procedures in the Sixth Circuit has increased the number of cases scheduled for argument by a like amount.[69]

Productivity increases of this magnitude do not result merely from screening cases solely for the purpose of eliminating or restricting oral argument. In both circuits memoranda prepared by staff law clerks are used in the screening process and undoubtedly contribute substantially to the identification of appeals that are appropriate for summary disposition.[70] When prehearing research is integrated more fully into the appellate process, further increases in productivity could well be achieved.

Contrary to the fears expressed by some,[71] experience also indicates that prehearing procedures do not result in abdication of the judicial function. Rather, prehearing research reports result in better pre-argument preparation and serve to achieve maximum judicial participation in the decisional process. This has been not only Michigan's experience, but also that of other appellate courts as well.[72] As appellate caseloads continue to increase, a proliferation of additional judges can be avoided and a more efficient organization of work can be achieved by employing staff personnel to research and screen pending appeals.

USE OF COMMISSIONERS

E.M. Curran & Edson R. Sunderland*

In practically every State in which the commission system has been employed, or its use advocated, it has been frankly admitted that the device is no more than a makeshift to alleviate a temporary emergency. One of its chief merits is the flexibility with which it enables the court to dispose of peak loads without an increase of the permanent personnel beyond the number needed during normal periods.

The commission system has been used in nineteen States. New York first employed it in 1870. By an amendment to the Constitution in 1869 a Commission of Appeals, of five members, was to be appointed by the governor to relieve the congestion in the Court of Appeals. The commissioners entered upon their duties on July 1, 1870 and sat for five years. In many ways this New York Commission of Appeals was a unique organization. The members of the commission were the four elected judges of the Court of Appeals who were voted out of office under the new judiciary article, and a fifth judge specially appointed by the governor. The commission sat as a separate body for the hearing and determination of the causes pending and undetermined in the Court of Appeals on January 1, 1869. The decisions of the commission were entered as the judgments of the Court of Appeals, without being passed upon by the regular members of that court. The commission had a separate clerk and separate attendants, but the reporter for the Court of Appeals served also in that capacity for the commission, the decisions of court and commission being reported in separate volumes of the same series of New York reports. In practical operation therefore, the Commission of Appeals was a separate court, even though its decisions were entered as those of the Court of Appeals and served as precedents in that tribunal.

Texas was the next State to experiment with commissioners. A Commission of Appeals was established in 1879, to which cases pending before the Supreme Court, and civil cases pending in the Court of Appeals as then established, could be transferred upon agreement of the parties. This tribunal also had unique characteristics. It was called a Commission of Arbitration and Award, and heard only such civil cases as, by consent of the parties, were transferred to it by the Supreme Court or Court of Appeals. In such cases, however, its decision was final, without approval or examination by the courts from which the cases were transferred. This commission was sustained as constitutional in Henderson v. Beaton, 52 Tex. 29 (1879). It continued in that form only two years.

Ohio was the first State to employ a commission system of a modern type. Article V, Sec. 22 of the Constitution, as amended in 1875, created a commission, composed of five members, to be appointed by the governor for a term of three years. It continued until 1879.

In the eighties several States resorted to the expedient of a commission,—Indiana and Texas in 1881; Ohio (for a second time) and Missouri in 1883; California in 1885; Colorado and Kansas in 1887.

The reports in 1885 and 1886 of the Special Committee of the American Bar Association on Delay in Judicial Administration recommended that "temporary commissions should not be resorted to in courts of last resort." The eminence of the signers of these reports — David Dudley Field, John F. Dillon, George G. Wright, and Seymour D. Thompson —may have led some of the States to look with disfavor upon commissions, for they were soon abandoned in Indiana, California, Colorado, Ohio, and Kansas by failure to provide for their continuation. California went so far as to prohibit in its constitution any future use of commissions.

*Reproduced from The Organization and Operation of Courts of Review in THIRD MICH. JUD. COUNCIL REPORT 65-67 (1933).

The commission system, as it has developed in recent times, has few of the characteristics of the early New York Commission of Appeals or the Texas Commission of Arbitration and Award. Two general types of the commission plan have been used. The more common type is a commission whose members sit with the judges, listen to oral arguments, and discuss the cases, but cast no votes. Cases are then assigned to the commissioners individually for the writing of opinions in conformity with the views of the court. The opinions, when written, are submitted to the court for approval or rejection. When and as approved, the opinions are handed down as the opinions of the court. This plan, or some variation of it, has been used in Florida, Idaho, Indiana, Kentucky, Minnesota, Mississippi, Missouri, Montana, Oregon, South Dakota, and Texas.

The second type is a commission of three or more members sitting as a separate body, hearing cases assigned to it by the court, and formulating opinions which are submitted to the court for approval or rejection. This system has been utilized by California, Colorado, Idaho, Kansas, Nebraska, Ohio, Oklahoma, and Texas. In Missouri the appellate courts are authorized to refer cases to the commission as a separate body.

Illinois does not adhere strictly to either type. The court itself hears the case, and after the oral argument the case is assigned to a commissioner for the writing of an opinion. The opinion so prepared is presented to the whole court in the presence of the commissioner who wrote the same, and the opinion is then approved, modified or rejected.

Today the commission system is being used in only four States—Illinois, Kentucky, Missouri, and Texas. In one of these States its use is of very recent origin, Illinois having instituted the plan in 1927. In the other three States it seems to have become a quasi-permanent feature of the judicial system. Commissioners have been used continuously in Kentucky since 1906; in Missouri, since 1911; and in Texas after several earlier experiments, since 1918. Within the past two years five States—Florida, Minnesota, Nebraska, Oklahoma, and South Dakota—have abandoned the use of commissions. These facts seem to indicate that the trend today is away from the commission system. When we realize that of the nineteen States which have tried it only seven were sufficiently interested to take any affirmative steps to continue it in operation after an initial period of experiment, it becomes apparent that the system has not been particularly successful in the United States.

B. EXPERIMENTAL USES OF STAFF

HOW THE SECOND CIRCUIT IS SPEEDING UP CRIMINAL APPEALS

Marianne Stecich*

Since 1973, the United States Court of Appeals for the Second Circuit has sharply reduced the amount of time needed to dispose of criminal appeals without eliminating any such appeals or curtailing oral argument or reducing the time for briefing by counsel. This has been accomplished in part by increased staff assistance in assuring that the necessary paper work is done on time.

The Court recognized that official time tables are not self-enforcing and that if the filing of briefs and records is left to counsel without supervision, unconscionable delays result. Accordingly, it instituted a program somewhat resembling that followed in the Court of Appeal in England.

> "It created the position in the Court of Appeals of scheduling clerk, who draws up an order fixing the dates for docketing the records, filing the briefs, and designating the week for argument of the appeal. This order provides that if the appellant fails to meet any of the scheduled dates, the appeal must be dismissed forthwith. The scheduling clerk also draws up orders appointing counsel and any other orders necessary for expeditious handling of the appeal. The scheduling order, which controls the course of the appeal, allows the court to forego rigid rules and handle each case according to its needs."

His duties also include monitoring.

> "A critical factor in the success of the Second Circuit's Criminal Plan has been the careful monitoring of the entire appeal process and all parties involved in it by the specially created Court of Appeals scheduling clerk. Records are kept on each case to make certain the scheduled dates are met. Motions for extensions of time are reviewed carefully to determine the reason for the request (was the transcript not prepared by the estimated completed date; was the attorney less than diligent; was the schedule unrealistic). Records are maintained on attorneys who are delinquent in handling the appeal; and letters are sent, initially from the Circuit Executive and subsequently from the Chief Judge, to attorneys who regularly fail to observe the Court's rules, to remind them of their responsibilities. Weekly reports are sent to United States Attorneys listing briefs filed late and motions for extensions of time made by their assistants. Monthly reports on court reporters who fail to meet the 30-day limit for preparation of the transcript are prepared for the Chief Judge of the District Court and the Chief Judge of the Court of Appeals. Finally, the scheduling clerk maintains regular contact with the courtroom deputies, appeals clerks, and court reporters to advise them of any slippage. He also meets with them periodically to discuss the progress of the Criminal Plan and to impress upon them its importance.

Assisting the scheduling clerk is an appeals clerk in each of the districts within the circuit. His functions are described as follows:

> "To insure that all the steps necessary to commence the appeal in the district court are taken, an appeals clerk was appointed by the Clerk of each District Court. The appeals clerk supervises the work of the courtroom deputies and makes certain that the attorney orders the transcript. He serves as the contact person in all matters concerning appeals while they are being prepared at the district level. In addition, he provides all information and records to the Court of Appeals and provides attorneys with printed instructions on how to proceed with the appeal."

Finally in each courtroom there is a courtroom deputy clerk who

> "distributes to counsel instruction sheets on how to proceed with the first steps of the appeal: i.e., that he should order the transcript by the time of sentencing; that he should complete a financial affidavit if the defendant wishes to have the court appoint counsel on appeal; that he should complete the appropriate form for government payment of the trial transcript. The courtroom deputy also provides attorneys with all the necessary forms. The sentencing hearing is the most important stage in commencing the appeal. At this time all parties to the appeal are present and the courtroom deputy is charged with the responsibility for seeing that all the necessary steps are taken.
>
> At the time of sentencing the courtroom deputy collects the basic case information and records it on the appropriate form. This form also includes questions regarding the defendant's eligibility for appointment of counsel on appeal and the appropriateness of continuing the trial attorney as counsel on appeal.
>
> After the judge advises the defendant of his right to appeal, he reviews the defendant's financial affidavit; answers his questions on the case information form; signs the order authorizing government payment of the transcript, when appropriate; and advises all parties to the case of any other arrangements which must be made to expedite handling of the appeal. At this time the attorney is encouraged to order the transcript and make arrangements for payment with the court reporter."

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THE PRE-ARGUMENT CONFERENCE: AN APPELLATE PROCEDURAL REFORM

Irvin R. Kaufman*

In response to a rapidly increasing number of appellate filings, the Second Circuit has recently employed a long dormant rule to remove from its calendar at an early stage appeals which otherwise would run the entire gamut from record transcription and briefing to argument and opinion. The Civil Appeals Management Plan (CAMP), an experimental program of appellate pre-argument conferences, is the first implementation of Rule 33 of the Federal Rules of Appellate Procedure. Its objectives are to encourage parties in civil cases to reach voluntary settlement early in the appellate process and to simplify the issues and otherwise streamline unsettled cases for adjudication. Since its inauguration on April 15, 1974, CAMP has proven highly successful in both respects. The encouraging preliminary reports indicate that principles and techniques derived from the Second Circuit's experience can be successfully applied to the caseload crisis affecting other federal appellate courts.

Although Rule 33 explicitly provides for a pre-argument conference procedure, all circuits except the Second have largely relied upon the mechanism of denying or abbreviating oral argument to mitigate the caseload crisis. That procedure, however, often denies parties a full opportunity to be heard. Moreover, although the elimination of oral argument may affect some economies, it does not reduce the time and effort required for briefing, decision and opinion.

The pre-argument conference plan, on the other hand, preserves the right of parties to obtain oral argument, and relies upon their voluntary termination of the appeal to achieve judicial economy. The Second Circuit has jealously guarded the opportunity for oral argument not only because it assists judges by clarifying issues raised in the briefs, but also because it gives parties their day in court, assuring them that their case has received careful and complete judicial scrutiny. It was largely the need to preserve the possibility of oral argument that stimulated the implementation of this reform. In addition, CAMP improves on alternative procedures by encouraging settlement or narrowing the issues at an early stage, before most of the energy, resources and time ordinarily required for an appeal have been expended by counsel, parties and the court.

The analogue to the pre-argument conference at the district court level is the pre-trial conference, authorized by Rule 16 of the Federal Rules of Civil Procedure. Rule 16 was adopted in 1938 because of the success similar procedures had enjoyed in the state courts "in relieving the congested condition of trial calendars..." The experience with pre-trial conferences since their introduction in the federal system suggests that parties are more willing to discuss settlement in the presence of a judge than they are when left alone, where a mutual reluctance to show signs of weakness impedes pre-trial resolution. In addition to furthering the goal of judicial economy through an early resolution of cases, pre-trial conferences have increased the likelihood of fair, expeditious trials of unsettled cases by limiting and clarifying disputed issues and facts.

To test the effectiveness of analogous procedures at the appellate level, the present Chief Judge of the Second Circuit in November 1973 selected five appeals at random from a group of cases which seemed to lend themselves to private dispute resolution, and which were in the early stages of the appellate process. In fact, briefs had not yet been filed in any of these cases. With the Chief Judge serving as a mediator, all five cases were successfully settled. Indeed, all counsel were enthusiastic over the procedure and urged its use on a regular basis. Subsequently, with the support of Chief Justice Burger and the Commission on Revision of the Federal Court Appellate System, the Federal Judicial Center sponsored a one-year pilot study of the Civil Appeals Management Plan adopted by the Judicial Council of the Second Circuit.

7. It is generally accepted that pre-trial conferences improve the chances for settlement of a case. See, e.g., J. Moore, 3 FEDERAL PRACTICE ¶ 16.17 at 1127-28 (1974); BRENNAN, Remarks on Pre-Trial, 17 F.R.D. 479 485 (1955). Some recent research, however, has cast doubt upon this assumption. M. Rosenberg, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE 45-50 (1964). But even if Professor Rosenberg's thesis were to be validated by more extensive study, there are persuasive reasons for believing that appellate pre-argument conferences should be pursued. A litigant's assessment of the strength of his case will be significantly affected by the experience of having had a trial at which all his arguments were presented to a judge and jury. Nor should one underestimate the additional impulse toward settlement provided by the prospect of continuing a lawsuit already long in the works of the judicial machinery and whose outcome remains uncertain.

* Chief Judge, United States Court of Appeals for the Second Circuit; reproduced from a forthcoming issue of the COLUMBIA LAW REVIEW.

A. The Operation of CAMP

CAMP is designed to encourage early discussion of settlement and simplification of issues, for parties are more willing to compromise when an appeal is in its embryonic state than they are after investment of considerable time, effort and funds in the preparation of records and briefs.

The Plan requires appellants to file a pre-argument statement within ten days after filing notice of appeal setting forth, among other matters, the issues to be presented. The appellant must also file on forms provided by the court, notice that the necessary portions of the transcript have been ordered. Upon receipt of these forms, the court's Staff Counsel--who functions similarly to a magistrate and who, with the Circuit Executive, coordinates all CAMP activities--issues a scheduling order listing the dates on which the record is to be docketed, the briefs are to be filed, and argument is to be heard on the case.

Accordingly, in all civil cases, counsel are promptly notified of the timetable pursuant to which the Court expects the appeal to proceed and it is the Second Circuit's expectation that they will be inhibited from stipulating or moving from extensions of time which unnecessarily retard progress of the appeal.[12] This scheduling procedure is similar to that used in the Second Circuit's Plan to Expedite the Processing of Criminal Appeals--a plan that has provided the Circuit with the best record in the nation for expediting the disposition of criminal appeals.

Staff counsel determines, on the basis of the pre-argument statement, which cases will be amenable to pre-argument proceedings and communicates with counsel for the parties to fix the date for conference. Consel are informed of the proposed agenda for the meeting and are asked to secure in advance authorization from their clients to pursue settlement negotiations. Conferences have been held an average of 195 days after filing the notice of appeal.

All pre-argument conferences are conducted by the Staff Counsel,[14] whose important function is to provide a forum for counsel to pursue settlement negotiations. The parties and counsel are made fully aware that all agreements must be the product of mutual consent. The ultimate authority to settle resides with the parties and their counsel, and no effort is made to impose "voluntary" termination of an appeal on an unwilling party. The alternative of proceeding to oral argument remains open in every case.

B. Early Results of CAMP

While some civil appeals are terminated by the parties before argument or submission even without the mediating influence of court services, the restrained and judicious encouragement envisioned by CAMP has so far proven successful at precipitating settlement and simplifying the issues in those cases that proceed to argument.

As the accompanying chart shows, during the first five and one-half months of the Plan's operation, the Staff Counsel conducted pre-argument conferences in 181 cases (follow-up conferences were held in
settlements and five withdrawals of appeals. In addition, 27 settlements and seven withdrawals resulted after pre-argument conferences were scheduled but before they were actually held. Thus, 66 successful dispositions have resulted from a total of 181 cases submitted to CAMP's pre-argument procedures.

12. CAMP ¶ 7 (b) provides that noncompliance by an appellant with the terms of a scheduling order shall result in dismissal of the appeal by the clerk, unless the court grants an extension. An appellee failing to file his brief within the time set by a scheduling order will be subjected to such sanctions as the court deems appropriate, including those provided in FRAP 31 (c) (denial of oral argument) and 39(c) (assignment of costs). As of August 1, 1974, two cases have been dismissed for non-compliance with scheduling orders. This number will undoubtedly increase as more scheduling order deadlines mature.

14. To further both practical objectives and the interests of justice, the Judicial Council provided for the use of Staff Counsel rather than judges to conduct pre-argument conferences.

> (T)he pretrial judge who actively encourages settlements runs the danger of disqualifying himself from conducting the trial, if there is one, since he may be suspected of bias against the party who has resisted settlement.

J. Moore, 3 FEDERAL PRACTICE ¶ 16.17, at 1128 (1974). This admonition would apply with equal force to an appellate judge conducting a pre-argument conference. Moreover, CAMP is intended to minimize the caseload burdens resting on judges. For these reasons, CAMP has insulated the judges from pre-argument conferences. The panel which may ultimately hear an argument is never informed about the conduct of counsel at the conference.

As is evident, cases have been selectively chosen for conferences. It was felt at the outset that appeals involving personal injuries, property damage, employment or other contract disputes--cases appealing the award of monetary as opposed to injunctive relief--would be most amenable to settlement procedures. A negotiated settlement at an early stage in an appeal from a money judgment is often advantageous to all parties. The costs of monetary awards and continued litigation are readily calculable. The relationship between the cost of settlement and the expense of continued disagreement is immediate and highly visible. Thus, even a party who might ultimately succeed on an appeal may prefer an early settlement to the increasingly expensive, time-consuming process of waiting for his case to be briefed, argued, and decided. The appellant from a money judgment with poorer prospects of prevailing on appeal will already have witnessed the sparsity of his proof in the district court. He may frequently be willing to negotiate a reasonable settlement in pre-argument conference, a neutral forum where he may make exploratory moves at conciliation without conceding the weakness of his case. It was anticipated, on the other hand, that appeals from the grant or denial of injunctive relief would be harder to resolve. The relative costs of continued disagreement and settlement in such cases are not as apparent or readily calculable, since money is not an adequate substitute for the injunctive remedy sought. It was also suspected that appeals raising substantial questions of constitutional law or public policy, because of the number of parties or the significance of the outcome, would be difficult, and often undesirable, to submit to settlement procedures.

These preliminary conclusions have been borne out by the 181 cases processed under the Plan since its inception. Forty-nine of the 66 settlements and withdrawals resulting from pre-argument procedures have involved four categories of cases: personal injury, property damage, employment and other contract disputes. All but five have concerned the grant or denial of money damages in private actions involving relatively few parties. It is significant, however, that 48 cases not falling within those categories have been entertained, and 17 have been resolved before argument under the Plan. This result is remarkable since it was anticipated that CAMP might not prove useful in solving cases requesting such equitable relief as injunctions or recissions, or involving criminal appeals or matters of general public concern. It deserves mention that the participation of administrative agencies as parties has not adversely affected the potential for pre-argument resolution. Of the 11 agency cases submitted to CAMP procedures, five were resolved in some fashion before a conference could be conducted. Of the four in which conferences were held, settlement resulted in one case and is likely in two others.[17]

To be sure, many factors which were not obvious on the face of the information forms filed by appellants crystallized at the pre-argument conference to deflate expectations of settlement. The Staff Counsel found, for example, that pro se appellants were in many instances unwilling to terminate their claims by private dispute resolution and demanded adjudication by the court. In several cases which appeared susceptible to pre-argument resolution, parties such as banks or administrative agencies rejected settlement because the district court decision entailed substantial adverse institutional ramifications, raising the cost of agreement well above the cost of pursuing the appeal.

17. Although CAMP has not been in operation long enough to predict what real effect the use of pre-argument conferences will have on the rate of settlement of appeals, some preliminary conclusions may be hazarded. Out of a total of 1,709 filings in fiscal year 1973, 686 cases (40%) might be classified as amenable to settlement. These include all private civil appeals with the exception of prisoner, civil rights, administrative and bankruptcy matters. From this group of settlement-prone cases, fewer than 136, cf. note 16 supra, were dismissed by consent--a maximum settlement rate (dismissals by consent divided by cases amenable to settlement) of 19.8%. Of the 181 civil cases which have thus far been submitted to CAMP procedures, 66 have been settled or otherwise terminated, and there remains a possibility of settlement in 32 or more (an additional 17.7%). It is difficult to tell how many of the appeals settled or withdrawn after submission to pre-argument procedures, had they otherwise been allowed to take their course, would have been dismissed ultimately upon motion or by the clerk of the court for failure to prosecute. (Such dismissals were not included in calculation of the settlement rate for fiscal 1973.)

Even where pre-argument conferences did not lead to settlement or withdrawal of the appeal, significant benefits accrued. In 18 cases the conference resulted in substantial simplification of the appeal. Numerous substantial motions were eliminated by stipulation, issues were clarified or dropped, and projected appendices were reduced in size. Agreements reached at the conferences concerning such matters were memorialized in pre-argument orders which control the future course of the appeals.[19] The aggregate saving of judicial resources occasioned by fewer motions and sharply defined appeals, although not easily quantified, is substantial. Moreover, the Staff Counsel's extensive familiarity with those cases that remain unsettled after submission to conference procedures assists him in drawing up the court's argument calendar. Since he is apprised early of the relative difficulty of such appeals, he is better able to assign equal loads to the weekly panels.

The response from members of the bar who have participated in pre-argument conferences has been uniformly favorable. This response engenders some hope for potential overflow effects of the Plan: counsel, after a successful experience with CAMP, may on future appeals pursue avenues of settlement without the court serving as catalyst. Moreover, the widespread acceptance of CAMP in its initial period and its successful use in other than simple private civil appeals indicate that it may have value in bringing about the settlement of complex litigation, for example, cases seeking review of agency action or charging invasion of prisoners' rights.

When one considers that every appeal disposed of by settlement conserves the time of three judges who would otherwise be required for adjudication, the already obvious value of CAMP is multiplied threefold. At the same time, CAMP permits the judges to devote more time to those appeals raising issues of constitutional and statutory interpretation and general public import. Since courts are increasingly called upon to decide questions of profound social importance, this additional time for reflective decision-making is essential to the maintenance of judicial excellence.

CONCLUSION

Since CAMP is authorized by Federal Rule of Appellate Procedure 33, pre-argument conferences could be undertaken by other circuits without the tedious and lengthy process of seeking statutory modification of the Federal Rules. Indeed, the Plan adopted by the Judicial Council of the Second Circuit fits neatly within the traditional appellate process, requiring but a few simple administrative changes for counsel practicing before the Second Circuit.

It is hoped that the institution of settlement conferences will eventually prove as much a boon to the circuit courts of appeals as Rule 16 procedures have to the district courts. At a time when courts and judges are straining to satisfy ever-increasing demands on their resources, the potential for voluntary dispute resolution embodied in the Civil Appeals Management Plan holds great promise. CAMP has the significant advantage over alternative schemes of assuring that the parties, not the court, will exercise the option of deciding whether a case warrants oral argument. Moreover, it conserves the energy, time and resources of court and counsel through early disposition of appeals which are settled, and by simplifying the issues in appeals which proceed to argument.

19. CAMP ¶ 7 (c) provides that an appellant's failure to comply with the terms of a pre-argument order shall result in dismissal of the appeal unless, within ten days after default, the appellant files an affidavit showing good cause for his noncompliance and indicating when the required action will be taken.

CAMP ¶ 7 (c) follows closely the interpretation which has been given FED. R. CIV. P. 16. That rule provides, as does FRAP 33, for issuance of a pre-trial conference order following all conferences, which shall control "the subsequent course of the action." In extreme cases, noncompliance can result in dismissal, or preclude the defendant from introducing evidence relevant to his case. See J. Moore, 3 FEDERAL PRACTICE ¶ 16.19, at 1135 (1974). See also Link v. Wabash Railroad Co., 370 U.S. 626 (1962); Von Poppenheim v. Portland Boxing & Wrestling Comm'n, 442 F.2d 1047 (9th Cir. 1971), cert. denied, 404 U.S. 1039 (1972).

TPO, INCORPORATED v. McMILLEN

460 F.2d 348 (7 Cir., 1972)

Before SWYGERT, Chief Judge, and KILEY and SPRECHER, Circuit Judges.

SPRECHER, Circuit Judge.

Petitioner seeks a writ of mandamus to nullify the assignment of its case in the district court to a magistrate for ruling on petitioner's motion to dismiss.

Petitioner is a defendant in the case of Zeitman v. Walston & Co., No. 71 C 2074 in the U. S. District Court for the Northern District of Illinois. Petitioner filed a motion to dismiss for failure to state a claim upon which relief can be granted. Because affidavits were attached, the motion was to be treated as a motion for summary judgment. Fed. R.Civ.P. 12(b) (6) and 56. All briefs connected with the motion were filed by November 29, 1971.

At a status-report hearing on January 24, 1972, plaintiffs' counsel expressed his concern over the slow pace of pretrial proceedings because of plaintiffs' advanced age (both were 78), ill health and poor economic status, he pressed for a trial date during the spring. He even offered to dismiss the complaint against petitioner and two other defendants if it would expedite the case.

The district judge observed, "We are pretty far behind on motions," and decided to refer the case to a magistrate "to conclude everything up to the date of trial." Petitioner's motion to vacate the order of reference, which argued that a magistrate was without power to rule on a motion to dismiss, was denied. No other motion or contested matter was pending when the reference order was entered.

U. S. Magistrate James T. Balog on February 9, 1972, entered an order denying petitioner's motion to dismiss. On February 15, petitioner filed its mandamus petition; two days later this court stayed all proceedings before the magistrate until further order. Plaintiffs and the district judge filed responses to the petition and the case was argued April 5.

The statute under which the district judge made the reference is the 1968 United States Magistrates Act, 28 U.S. C. §§ 631–639. A majority of judges of a district court may appoint a full-time magistrate for a term of eight years. The magistrate must be a member of the bar of the state where he is to serve, must be determined to be competent to perform the duties of the office, must not be related to a judge of the appointing court and must be under 70 years of age. He may be removed by a majority of the judges only for incompetency, misconduct, neglect of duty, or physical or mental disability. (28 U.S.C. § 631.) He may receive an annual salary of up to $22,500; the salary may not be reduced during his term below that fixed at the beginning of the term. (28 U.S. C. § 634.)

Section 636(b) of the statute provides in part:

> "Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate . . . may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—
>
> * * * * * *
>
> "(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions. . . ."

Pursuant to this statute, the District Court for the Northern District of Illinois has adopted these "Magistrate Rules":

> "1(C) The Magistrates shall perform the following additional duties upon direction of a Judge approved by order of the Executive Committee:
>
> * * * * * *
>
> "(b) assist Judges in conducting pre-trial proceedings in civil cases. . . .
>
> * * * * * *
>
> "2(2) (b) An appeal from a final order entered by a Magistrate shall be filed within twenty (20) days with the Judge who referred the matter to a Magistrate."

The issues raised by this petition are whether the district court may delegate to a magistrate, and whether a magistrate has the power to rule upon, motions to dismiss or motions for summary judgment. These issues are important to the administration of justice through the instrumentality of magistrates and require a close analysis of the legislative history of the magistrates act.

* * *

The federal magistrates act was enacted on October 17, 1968,[20] to become generally effective within any federal judicial district on the date the first magistrate assumed office within that district or on October 17, 1971, whichever date was earlier.

Magistrates' Status and Jurisdiction

The 1965 exploratory hearings held by the Senate subcommittee established that the U. S. commissioner system was little understood, even by the commissioners; that almost one-third of them were not lawyers;[21] that the fee system under which they were compensated probably resulted in deprivation of due process of law since the commissioners had a pecuniary interest in reaching a conclusion detrimental to the defendant.[22] Although they constituted the "front line of Federal justice" [23] and "were being called upon to apply some of the most sophisticated rules of constitutional law," [24] particularly under the Criminal Justice Act of 1964,[25] the commissioners operated with great disparity from district to district and had become the "forgotten men" of the federal judicial system.[26] The hearings raised a threshold question of whether the system should be eliminated entirely, or "downgraded" in importance, or revised substantially and "upgraded."

The consensus ran heavily in favor of upgrading the system with the result that the federal magistrates act as ultimately passed provided that[27] (1) the title of the office be changed from U. S. commissioner to U. S. magistrate; (2) all magistrates be attorneys unless it is impossible to find a qualified attorney; (3) other minimum qualifications be established to insure independence and disinterest; (4) the anachronistic fee system be replaced with salaries; (5) full-time magistrates be given a secure eight-year term of office subject to removal only for cause and (6) full-time magistrates be supplied with office space, clerical assistants and supplies.

In addition to the "upgrading" provisions, the act as ultimately passed revised substantially the two important jurisdictional areas where the former commissioner devoted most of his time and efforts and where it was anticipated that the magistrate would devote most of his—preliminary examinations and the trial of petty and minor offenses.

* * *

Constitutional Concern

From the outset of the preliminary hearings[28] and throughout the period until the act was passed, there was an abiding concern by interested witnesses before the committees considering the various proposed bills,[29] and by senators and representatives[30] that expanding the jurisdiction of commissioners or magistrates might violate the dual constitutional concepts (1) that Article III of the Constitution vests the judicial power of the United States in judges possessing life tenure and undiminishable salaries[25] and (2) that due process of law encompasses the right of litigants to have "cases" or "controversies" determined by Article III judges.[31]

25. Among the grievances against George III detailed in the Declaration of Independence was that "He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." Hamilton urged that "complete independence of the courts of justice is particularly essential" and that independence be assured by life tenure (The Federalist No. 78) and by fixed provision for support which shall not be diminished during continuance in office (The Federalist No. 79). Article III, section 1 of the Constitution provides, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The constitutional doubts were brought to a head when former assistant attorney general Fred M. Vinson, Jr. testified in 1966 to express the view of the Department of Justice that the section of the bill "which authorizes Magistrates to try minor offenses, appears to establish 'judges' who do not meet the standards for Federal judges set forth in Article 3 of the Constitution."[28] This view resulted in the Senate subcommittee staff's preparation of a lengthy memorandum of law entitled "The Constitutionality of Trial of Minor Offenses by U. S. Magistrates," which concluded:[28]

> "Three features of the minor offense provision of S. 3475 bring it within three separate lines of authority which indicate that trial of such offenses by United States Magistrates does not conflict with the Constitution. . . .
>
> "*First*, the magistrate is an officer of the United States District Court, appointed by that court and subject at all times to the court's direction and control. When a case is tried before a magistrate, jurisdiction remains in the district court and is simply exercised through the medium of the magistrate. The magistrate's position is analogous to the position of the referee in bankruptcy, of the special master, and of the present United States Commissioner.
>
> "*Second*, both the Government and the defendant must consent to trial before the magistrate rather than before the district judge. . . .
>
> "*Third*, the defendant if convicted may appeal to the district court. . . ."

29. Mr. Justice Douglas summarized his concern over the performance of judicial power by non-Article III judges in his dissent in Glidden Co. v. Zdanok, 370 U.S. 530 at 606, 82 S.Ct. 1459 at 1502, 8 L.Ed.2d 671 (1962):

> "In sum, Judges who do not perform Article III functions, who do not enjoy *constitutional* tenure and whose salaries are not *constitutionally* protected against diminution during their term of office cannot be Article III judges.
>
> "Judges who perform 'judicial' functions on Article I courts do not adjudicate 'cases' or 'controversies' in the sense of Article III. They are not bound by the requirements of the Seventh Amendment concerning trial by jury.

As a result of the doubts of the Department of Justice over the constitutionality of permitting magistrates to try cases committed to "the judicial Power of the United States"[29] and the staff memorandum in response, the language of the proposed legislation was revised to make it completely clear that both the government and the defendant must consent to a trial before a magistrate of a minor offense[30] and that an appeal lies from the judgment of the magistrate to a district court judge.[31]

The constitutional problems were not solved to everyone's satisfaction by the carefully revised provisions. The Department of Justice, although generally supporting the passage of the act, concluded that the constitutional problem is "an issue over which a genuine difference of opinion can exist."[32] A lively debate over the constitutional soundness of the bill occurred during the hearings before the subcommittee of the House Committee on the Judiciary.[33] Representative Cahill of New Jersey expressed strong dissenting views to the favorable report on the bill by the House Judiciary Committee[34] and on the floor of Congress.[35] When the implementing rules were adopted by the Supreme Court, Mr. Justice Black, joined by Mr. Justice Douglas, filed a dissenting opinion raising constitutional doubts.[36]

Magistrates' Civil Jurisdiction

Although a great portion of the considerable effort expended on the development of the magistrates act was directed to the trial of minor criminal offenses and the preliminary examination required in criminal cases, all the constitutional issues debated in regard thereto are equally applicable to the magistrates' jurisdiction over civil matters[37] inasmuch as Article III provides that the judicial power of the United States "shall extend to all Cases, in Law and Equity."

The legislative history of the magistrates' civil jurisdiction must therefore be viewed in the context of the constitutional problems of which Congress had been made acutely aware.

37. The constitutional argument that due process requires a determination by an Article III judge is, to a certain extent, tied to the constitutional guarantee to a trial by jury. . . .

When the hearings commenced in 1965, the civil jurisdiction of U. S. commissioners was limited to administering oaths and taking acknowledgments, affidavits and depositions,[38] a power also accorded to any officer authorized to administer oaths, such as notary publics and court clerks.[39] Analogously, masters were utilized to conduct investigations, perform ministerial acts, examine witnesses located throughout the country pursuant to a supplementary proceeding, and to assist in pretrial discovery,[40] such as taking depositions,[41] overseeing the production of documents under Rule 34,[42] reporting on the materiality of certain exhibits[43] and reporting on the validity of objections to interrogatories.[44]

The first witness at the investigative hearings in 1965, after reviewing the role of the commissioner and suggesting improvements in the system, limited his civil case suggestions to the question, "Why couldn't U. S. commissioners be utilized to handle settlement conferences. . . .?"[45] Virtually nothing else was said about civil jurisdiction at those hearings. When the subcommittee adjourned in February, 1966, the subcommittee staff prepared a preliminary draft of a bill

[accompanied by a comment] on "new functions" as follows:[46]

> "The bill authorizes the district courts to assign full-time magistrates such additional duties *as are consistent with their non-Article III status.* The provision lists by way of suggestion rather than requirement, the following: supervision of pretrial discovery proceedings in both civil and criminal cases; the holding of pretrial hearings; preliminary review of petitions for post-conviction relief; assignments to act as special masters in appropriate civil cases."

* * *

In September, 1966, the Judicial Conference of the United States approved a report by its Committee on the Administration of the Criminal Law, which included the following:[51]

> "The Committee is of the opinion that the enumeration of duties in Section 636(b) as now worded presents a delegation which is so broad in scope and so general as to make this subsection vulnerable to possible constitutional attack. . . .

* * *

After the July-August, 1966, hearings and the above action by the Judicial Conference, a revised bill, S. 945, was introduced on February 8, 1967. Section 636(b) was revised[52] to the same language in which it was ultimately enacted . . .

The changes in the three categories of "additional duties" were drastic:

(1) "service as a special master" was expressly made subject to the Federal Rules of Civil Procedure which include the highly restrictive Rule 53;[53]

(2) "supervision of the conduct" of pretrial or discovery proceedings was reduced to "assistance to a district judge"; and

(3) "preliminary consideration of applications for posttrial relief" was reduced to "preliminary review" leading to "submission of a report and recommendations to facilitate the decision of the district judge" as to "whether there should be a hearing."

The Senate Committee on the Judiciary was extremely cautious in describing the civil duties of magistrates in its favorable report on S. 945 of June 28, 1967:[54]

> ". . . [P]roviding that assignments are to be governed by rule of court protects against potential abuses of the assignment power by individual judges who, in misguided attempts to expedite the business before them, might unwittingly delegate to magistrates responsibilities that are more properly discharged by the judge.
>
> "Second, the subsection clearly prohibits assignments or delegations to magistrates that are inconsistent with the Constitution and laws of the United States. This prohibition reflects in particular your committee's recognition that any additional duty assigned to magistrate must be within the bounds of what may be constitutionally performed by a nonarticle III judicial officer.

* * * * * *

... Congressional intent is clear that magistrates' civil jurisdiction includes only "such additional duties as are not inconsistent with the Constitution and laws of the United States," [56] that there is to be "no abdication of the decisionmaking responsibility" of district courts, that "the district judge is to retain the ultimate responsibility for the conduct of pretrial or discovery proceedings," and that § 636(b) "cannot be read in derogation of the fundamental responsibility of judges to decide the cases before them." [57]

In the only area where magistrates' jurisdiction was expanded beyond that of commissioners—the trial of minor criminal offenses—Congress painstakingly provided for the prior consent of both defendant and government [58] and for an appeal to the district court.[59]

~~55. House Hearings, 73.~~

~~56. 28 U.S.C. § 636(b).~~

57. S.Rep. 371, 25–26. Judge William E. Doyle, then a district judge but now a circuit judge on the Court of Appeals for the Tenth Circuit, is chairman of the Committee to Implement the Federal Magistrates Act of the Judicial Conference of the United States. In "Implementing The Federal Magistrates Act," 39 J.B.A.Kan. 25, 29 (1970), Judge Doyle observed: "A magistrate is limited to the performance of interlocutory activities assigned or authorized by the judges of the district. Final adjudicating is not authorized. The cases make it clear that within the framework of Article III, only the so-called good behavior judges can exercise the ultimate adjudicating responsibilities."

58. *Cf.* Fed.R.Crim. 23(a): "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

59. The appeal provided in the act (18 U.S.C. § 3402) and in the rule (Rule 8(d) of the Rules of Procedure for the Trial of Minor Offenses, 51 F.R.D. 205) is not a trial *de novo* but an appeal on the record before the magistrate. Some of the witnesses at the Congressional hearings suggested that constitutionality would be on a firmer basis if a trial *de novo* were required before the district court. Preliminary Hearings, 234; Senate Hearings, 126. *See also* Doub & Kestenbaum, "Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality," 107 U.Pa.L.Rev. 443 (1959).

Even then no one was willing confidently to predict the ultimate constitutionality of the enlarged field of magistrate decision making.

We need not speculate in regard to what civil functions the magistrate can constitutionally perform, however, since Congress carefully intended that in regard to civil cases the magistrate was not empowered to exercise ultimate adjudicating or decision making.[60]

We conclude that magistrates have no power to decide motions to dismiss or motions for summary judgment, both of which involve ultimate decision making, and the district courts have no power to delegate such duties to magistrates. We find that the order of reference here was lacking in power and "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." La Buy v. Howes Leather Co.

60. For example, during the House hearings, the following occurred (House Hearings, 83–84, 127):

"Mr. Poff: . . . Section 636(b) treats the possibility of assigning additional duties. . . . We will undoubtedly be asked, is it possible under that authority to give the magistrate himself the power to decide a postconviction case?

"Senator Tydings: I don't see how it is possible to give him permission to decide the case; no.

* * * *

"Mr. Rogers: The answer to the question then would be . . . the only duty that can be performed by the magistrate is to make certain studies and hand them to the judge for his final order in the matter.

* * * * *

"Mr. Poff: Would it be broad enough to permit hereafter a magistrate to decide postconviction cases?

"Mr. Finley: I do not believe it would, sir; no."

HOLIDAY v. JOHNSON
313 U.S. 342 (1941)

The District Court determined that a petition for a writ of habeas corpus alleged facts which, if proved, would entitle the respondent to relief. A hearing was ordered before a designated United States Commissioner. The Commissioner held an evidentiary hearing at which the petitioner testified and the respondent submitted the depositions of two witnesses. The Commissioner made findings adverse to the petitioner and recommended that the petition be denied. The District Judge heard oral argument on the Commissioner's report and then entered an order in accordance with the recommendation.

The Supreme Court held that the fact-finding procedure failed to comply with the Habeas Corpus Act:

> "One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts.
>
> * * * * *
>
> "The District Judge should himself have heard the prisoner's testimony and, in the light of it and the other testimony, himself have found the facts and based his disposition of the cause upon his findings."

WINGO v. WEDDING
_____ U.S. ___ (1974)

Local Rule 16 of the United States District Court for the Western District of Kentucky provides:

> "In addition to submitting such other reports and recommendations as may be required concerning petitions for writ of habeas corpus from state prisoners, the full-time Magistrate is directed to schedule and hear evidentiary matters deemed by the Magistrate to be necessary and proper in the determination of each such petition, and to report thereon with an appropriate recommendation for the disposition thereof to the District Judge having jurisdiction of the case. The Magistrate shall cause the testimony of such hearing to be recorded on suitable electronic sound recording equipment. He shall submit his proposed findings of fact and conclusions of law to the proper Judge for his consideration, copies of which shall be provided at that time to the petitioner and respondent, and the Magistrate shall expeditiously transmit the proceedings, including the recording of the testimony, to the proper District Judge. Upon written request of either party, filed within ten days from the date such is so transmitted to the District Judge having jurisdiction thereof, the District Judge shall proceed to hear the recording of the testimony given at the evidentiary hearing and give it de novo consideration."

The Supreme Court of the United States held that the Federal Magistrates Act of 1968 did not overrule Holiday v. Johnson, and did not authorize such a local rule:

> We conclude that, since § 2243 requires that the District Judge personally hold evidentiary hearings in federal habeas corpus cases, Local Rule 16, insofar as it authorizes the full-time Magistrate to hold such hearings, is invalid because it is "inconsistent with the . . . laws of the United States" under § 636 (b). We conclude further that the Rule is to that extent invalid because, as we construe § 636 (b), that section itself precludes District Judges from assigning Magistrates the duty of conducting evidentiary hearings.[18] Review by Magistrates of applications for post-trial relief is thus limited to review for the purpose of proposing, not holding, evidentiary hearings.[19] In connection with the preliminary

> review whether or not to propose that the District Judge hold an evidentiary hearing, we agree that Magistrates may receive the state court record and all affidavits, stipulations and other documents submitted by the parties.[19] Magistrates are prohibited only from conducting the actual evidentiary hearings.[20]

Chief Justice Burger and Justice White dissented in an opinion by the Chief Justice:

> On the one hand, Congress sought to enable district courts to authorize magistrates to conduct evidentiary hearings. On the other hand, there was apprehension that the power of authorization granted to district courts might lead to a rule permitting magistrates to exercise ultimate decision-making power reserved exclusively to Art. III judges. To avoid the latter but accomplish the former, Congress persisted in retaining the broad language of subsection 636 (b), and in retaining subdivision (3). Not only, as set forth earlier, does the subdivision *not* limit the subsection, it was drafted in language to insure that it could not be read to preclude authorizing magistrates to conduct hearing in federal habeas corpus cases.[21]

* * * *

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[18] To the extent that *O'Shea* v. *United States*, 491 F. 2d 774 (CA1 1974), and *Noorlander* v. *Ciccone*, 489 F. 2d 624 (CA8 1973), suggest that magistrates may also accept oral testimony, provided that each party has the right to a *de novo* hearing before the District Judge, we disagree. Such a procedure is precluded by both § 2243 and § 636 (b).

[19] Since under § 636 (b) District Judges may call upon Magistrates to relieve them of most other details of the processing of habeas corpus applications, it does not appear that judges will be significantly overburdened by the requirement that they personally conduct evidentiary hearings. Indeed, data from the Administrative Office of the United States Courts indicates that very few habeas corpus cases ever reach the evidentiary hearing stage. In 1973, of the 10,800 prisoner petitions filed for habeas corpus or as § 2255 motions to vacate sentence, less than 5%, or approximately 530, necessitated evidentiary hearings. See Report of the Director of the Administrative Office of the United States Courts A–13, A–36 (1973). When hearings were required, 88% were completed in one day or less. *Id.*, at A–36. Thus, among the 400 District Judges, the burden of evidentiary hearings averages less than 1.5 hearing days per judge per year. To the extent that the 80 active Senior District Judges also participate in habeas corpus cases, the hearing burden upon each District Judge is further reduced.

The final limitation of the Act, that additional duties assigned to magistrates must not be "inconsistent with the Constitution," needs little discussion here. The Court does not suggest that the conduct of an evidentiary hearing, where the district judge retains the power to make the final decision on an application for a writ of habeas corpus, would be unconstitutional either under Art. III or as a matter of due process of law. Where this situation obtains, the magistrate's conduct of the hearing would be clearly constitutional.[11]

Not only would his report and recommendation to the district judge be subject to amendment or outright rejection, the district judge could, at the behest of the habeas corpus petitioner or on his own motion, conduct his own evidentiary hearing to judge for himself, for example, the credibility of witnesses if he deems their testimony essential to disposition of the application. To the extent a problem of constitutional magnitude may be foreseen in the particulars of the rules established by a district court, those rules can be construed to comport with constitutional requirements. In any event, now that the Court has construed the Magistrates Act contrary to a clear legislative intent, it is for the Congress to act to restate is intentions if its declared objectives are to be carried out,

. . .

[11] The commentators have generally agreed with this conclusion. Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321, 365 (1973); Peterson, The Federal Magistrate's Act: A New Dimension in the Implementation of Justice, 56 Ia. L. Rev. 62, 98 (1970); Doyle (District Judge and Chairman of the Judicial Conference Committee charged with implementing the Act), Implementing the Federal Magistrate's Act, 39 Kan. St. B. A. J. 22, 69 (1970); Note, Proposed Reformation of Federal Habeas Corpus Procedure: Use of Federal Magistrates, 54 Ia. L. Rev. 1147 (1969). So too would the Judicial Conference appear to be in agreement. Proposed Amendments to the Proposed Rule Governing Habeas Corpus Proceedings for the United States District Courts, Committee on Rules of Practice and Procedure, Rule 11 (Preliminary Draft, Jan. 1973). Congress has given the magistrates power to conduct trials of a limited nature, 28 U. S. C. § 636 (a)(3), which grant of power, carefully limited, appears not to contravene any constitutional prohibition. Cf. *Palmore* v. *United States*, 411 U. S. 389 (1973). *A fortiori* granting magistrates the power to conduct hearings where the district judge retains ultimate decision-making authority comports with constitutional requirements. Cf. *Campbell* v. *U. S. District Court*, *supra*, n. 1 (hearings on motion to suppress); *Harlem River Consumers Coop., Inc.* v. *Associated Grocers of Harlem, Inc.*, 54 F. R. D. 551 (SDNY 1972) (hearings on discovery motion).

CHAPTER 4 UNIFORMITY OF DECISIONS: THE APPELLATE STRUCTURE AND PROBLEMS OF GROWTH

A. APPELLATE PROCESS AND THE RULE OF LAW

(1) Individualism of Appellate Judges

THE COMMON LAW TRADITION - DECIDING APPEALS

Karl N. Llewellyn*

When the psychologists began to look into how people go about reaching decisions, the question they were concerned with was: how do people get to a decision at all, to any decision, when faced with a problem-situation out of life? Roughly, they arrived at the conclusion that if it was a true problem-situation, i.e., if it was really a puzzler, then it was seldom that the actual deciding was done by way of formal and accurate deduction in the manner of formal logic. The common process was rather one either of sudden intuition — a leap to some result that eased the tension; or else it was one of successive mental experiments as imagination developed and passed in review various possibilities until one or more turned up which had appeal. In any ordinary case a reasoned justification for the result represented a subsequent job, testing the decision against experience and against acceptability, buttressing it and making it persuasive to self and others.

* * *

Today all of this is so familiar and obvious as to bore, but there were reasons why, four or five decades ago, it shocked our legal world. The ingrained practice of that time was to write an appellate opinion as if the conclusion had followed of necessity from the authorities at hand and as if it had been the only possible correct conclusion. Accept those premises, and a "well-reasoned" opinion not only shows why the decision is wise and right, but would also show the *process* by which the decision was arrived at. Men liked that. A "well-reasoned decision" had meant a reasoned and rational deciding. Now these psychologists were insisting that that was not so at all — except of course by accident or on very occasional occasion. It is not hard to see why they, along with those men of law who adopted and adapted their insight, looked challenging, seemed like attackers and destroyers.

Then the logicians moved in to the support of these iconoclasts. The logicians pointed out that to deduce anything you needed a major premise, single and solid; but they or their legal pupils pointed out that in our legal system we have large numbers of mutually inconsistent major premises available for choice: "competing" rules, "competing" principles, "competing" analogies; and they pointed out that cases which raise true problems are likely to lie in those open areas which are the very arenas of such competition. Not content with this, they went on to insist that before a rule or principle can be used for deduction about any case in the border zone, it must be given a clean-staked outside edge; and that insofar as the rule has not taken on a frozen verbal form, the way the court happens to catch it into words may make all the difference in the case in hand; whereas even when the verbal form is already frozen, there still remains the problem of classifying the facts of the case, and wherever the problem is a real life-problem, that classification is in turn a job of fresh creation which has to be done before a true deduction becomes possible. Thus in any ordinary case worth both appealing and defending — i.e., in any case presenting an honest arguable issue — the opinion, however well reasoned, must either express the doubt, the choice, and the creation, or else fail to show the actual process of deciding. Worse and more terrifying, all of this seemed to force to the fore the fact that a certain cherished principle did not, does not, and cannot hold true in life: "This is a government of laws *and not* of men"; "It is the law, not the court, the judge, that decides the case."

No longer does the Supreme Court sit in a holy of holies which no respectable lawyer may profane by criticism or even honest inquiry. No longer is the established bar convinced that laws *"and not"* judges are doing the deciding of cases. No longer is "certainty" in the outcome of appellate cases an idol too sacred for binoculars. The danger lies now in altogether different quarters. "You never can tell on what peg an appellate court will hang its hat." "The Supreme Court is going to hell." "What has become of the doctrine of precedent?" "What we need is to get back to *stare decisis.*" The danger today is that an older generation of the bar may be losing all confidence in the steadiness of the courts in their work. That is bad. The danger today is that the middle and younger generation of the bar may have already lost all confidence in the steadiness of both the courts in their work and in the law in its. That is worse. The danger today is indeed that the courts themselves may by tomorrow have lost their own feeling for and responsibility to continuity. That would be worst.

* * *

Meantime, the logicians have helped us further almost exactly not at all. What they gave us in the first quarter of the century has been mildly supplemented by semantics — which has in the main been of small aid in this area. For the rest, they have left us on our own. The psychologists, during this last decade, have made advances in learning and communication theory and in motivation research which seem to me to have real promise for our problem, but the applications to our work do not seem to me, as yet, to carry beyond what can be reached out of our own materials and experience by way of skilled horse sense.

Neither is this to be wondered at. For the inquiry across the border is still primarily into how men find *some* answer to a problem-situation, followed then by inquiry into what are lines of wise procedure in approaching a problem-situation (especially one involving policy); and more recently moving into questions of how *groups* arrive at some decision ("small-group behavior" studies). Whereas our problem is vastly harder, so much harder as to belong almost to a different universe of thought. The lawyer does not ask: How does an appellate tribunal arrive at *a* decision, *some* decision, *any* decision — in general, as an approximative pattern, in perhaps three, even four or seven, cases out of

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Reproduced from a book of the same name published by Little, Brown & Co. in 1960, pages 11-12, 15-16, 19-21, 23-24, 26, 28-36, 45-46, 51.

ten? The lawyer asks, instead: How does *this* appellate tribunal arrive at *the particular and concrete answer* which it reaches *in the particular and concrete* case?

I know of no man in the social disciplines who would dare to ask such a question. But the lawyer wants to know in order that he *may apply the knowledge in advance to a particular concrete tribunal in the next* SPECIFIC *appeal* with which he will be concerned. In the present state of the other social disciplines or of behavioral science at large — so far as published work goes — this would be a dream-inquiry. It would be fantastic.

The astounding thing is that in our own discipline, all unnoticed, very real progress has been made toward not only intuiting, but documenting, some very useful leads indeed.

* * *

One begins by observation of the really extraordinary body of institutions and techniques we have built and which we use daily to focus the deciding and then to guide it. It pays to set out some of these with a bit more care than is customary, and it pays to set out beside them some of the deficiencies or counterdrives which we are not always mindful to consider when we do get to talk or to serious thought about the situation. I shall run through fourteen factors, or better, clusters of factors, which bear with much regularity on the way in which appellate cases get decided, and which combine to produce a significant steadiness in the work of a court; a steadiness amounting, I shall argue, to a significant *and most neglected* degree of predictability of outcome *case by case.*

1. *Law-conditioned Officials*

The personnel are all trained and in the main rather experienced lawyers. Few judges "make" the American appellate bench without twenty and more years of active work in some aspect of the law, in addition to their schooling. The judges are therefore not mere Americans. They have been law-conditioned. They *see* things, they see *significances,* both through law-spectacles, in terms of torts and trusts and corporations and due process and motions to dismiss; and this is the way they sort and size up any welter of facts. Moreover, they *think* like lawyers, not like laymen; and more particularly like *American* lawyers, not like German lawyers or Brazilian lawyers. Cases have authority, dictum can be and is to be marked off from holding, strict "system" is unfamiliar and uncomfortable, "freedom" is an underlying drumbeat and slogan that informs not merely life but law.

2. *Legal Doctrine*

It is understood and accepted that the context for seeing and discussing the question to be decided is to be set by and in a body of legal doctrine; and that where there is no real room for doubt, that body is to control the deciding; that where there is real room for doubt, that body of doctrine is nonetheless to guide the deciding; and that even when there is deep trouble, the deciding should strive to remain moderately consonant with the language and also with the spirit of some part of that body of doctrine.

That body, of course, includes not merely the very elaborate body of recorded directions which we know as rules of law, whether gathered and phrased in unchanging rigor (e.g., statutes) or scattered and loosely phrased in case law style. The body includes also the accepted lines of organizing and seeing these materials: concepts, "fields" of law with their differential importance, pervading principles, living ideals, tendencies, constellations, tone.

3. *Known Doctrinal Techniques*

(a) It is understood and accepted that the doctrinal materials are properly to be worked with only by way of a limited number of recognized correct techniques. Among these techniques many are phrased, taught, and conscious; many are rarely phrased or *taught,* but are still to be viewed as known and conscious and *learned;* many are felt and are used in standard fashion, but are learned and indeed used almost without consciousness of the users as they use them.

4. *Responsibility for Justice*

There exists, and guides and shapes the deciding, an ingrained deep-felt need, duty, and responsibility for bringing out a result which is just. It is not to the point that this is only semi-articulate in the "legal" phase of the tradition. One sees it unmistakably in the net behavior of the men.

5. *One Single Right Answer*

The deciding is done under an ideology which in older days amounted to a faith that there is and can be only one single right answer. This underlies such ideas as "finding the law" and "the true" rule, and "the" just decision. I refer not merely to a manner of writing the opinion but to a frame of thought and to an emotional attitude in the labor of bringing forth a decision. Even judges who know with their minds that varying answers would be legally permissible will be found with a strong urge to feel that one alone among them must be *the* right one.

6. *An Opinion of the Court*

The deciding is, in the main, done under felt pressure or even compulsion to follow up with a published "opinion" which tells any interested person what the cause is and why the decision — under the authorities — is right, and perhaps why it is wise.

This opinion is addressed also to the losing party and counsel in an effort to make them feel at least that they have had a fair break — a matter of importance to the polity and the law, and often enough (as is suggested by long Per Curiams in some touchy cases) of political importance also re a judge's re-election. The "single *right* answer" idea still has some tendency to dominate the form of the opinion, and the need for an opinion, often enough the opinion itself, often casts its shadow before, into the process of the actual deciding.

In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause in hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steadying factor which aids reckonability. Its preparation affords not only back-check and cross-check on any contemplated decision by way of continuity with the law to date but provides also a due measure of caution by way of contemplation of effects ahead.

More: the effort is to make this opinion an opinion of the court, a group expression, at the worst one which will command adherence of the group. This, like the process of consultation and vote, goes some distance to smooth the unevenness of individual temper and training into a moving average more predictable than the decisions of diverse single judges.

In another fashion the dissent and its possibility press toward reckonability of result. Mention has been made of "the law of leeways"; but it is a law without immediate sanction for breach. In real measure, if breach threatens, the dissent, by forcing or suggesting full publicity, rides herd on the majority, and helps to keep constant the due observance of that law.

7. *A Frozen Record from Below*

The fact material which the appellate judicial tribunal has official liberty to consider in making its decision is largely walled in. It includes the transcript of what happened at the trial, and it includes common knowledge about things in general. It includes also (as if it were common knowledge) a sometimes startling selection from what the court sees in the kaleidoscope of life outside. But no new facts about the particular case are supposed to disturb, distract, or change the picture. Moreover, if the jury or the judge at trial has decided on conflicting evidence, the court on appeal is supposed to abdicate its own judgment on the matter if any man could in reason reach the result the trial tribunal did reach.

8. *Issues Limited, Sharpened, and Phrased in Advance*

The ultimate matter (Do we affirm? Do we reverse? Do we modify?) and the mediate matters (What do we do about Assignments of Error Numbers 1, 2, 3, etc.?) which come before the appellate judicial court to be decided are each an issue already drawn, drawn by lawyers, drawn against the background of legal doctrine and procedure, and drawn largely in frozen, printed words. This tends powerfully both to focus and to limit discussion, thinking, and lines of deciding. And a choice between two alternatives is vastly more predictable than one among a welter. Betting on a football game is risky, but not as risky as betting on a steeplechase.

9. *Adversary Argument by Counsel*

The American appellate judicial tribunal moves into its deciding only after argument by trained counsel — argument always written and mostly oral as well. If the explicit issue-drawing directs, narrows, sharpens the deciding process; if limitation of available "fact"-material by the trial record renders the deciding an operation bounded and semitraceable, and insofar more reckonable and testable, by way of its fact-foundation; then the regime of argument renders the deciding also a process oriented partly from without by analysis, by arrangement of data, and by persuasion: oriented, however, not by judicially-minded helpful consultants but by adversaries to each of whom the tribunal serves either as an obstacle or as a tool, or, more commonly, as both at once. If counsel are skillful and reasonably in balance, I see argument as greatly furthering predictability by finding and pointing the significant issues, by gathering and focusing the crucial authorities, making the fact-picture clear and vivid, illumining the probable consequences of the divergent decisions contended for, and by phrasing with power the most appealing of the divers possible solving rules.

Moreover, and not to be forgotten, the *adversary* bar goes far to insure that the court shall be confronted with and pressed by the authorities, reinforcing that factor of continuity and reckonability which legal doctrine affords. Maitland — than whom our law has never had a shrewder observer — urged that our system of precedent itself drives far less from the bench than, once the courts had taken up a fixed site at Westminster, from the sergeants who would not let the bench forget what they had done before. Seldom indeed does it not pay at least one adversary to marshal and deploy "established law."

10. *Group Decision*

It is trite that a group all of whom take full part is likely to produce a net view with wider perspective and fewer extremes than can an individual; and it is a fair proposition also that continuity is likely to be greater with a group: prior action, attitudes, and unrecorded doubts or reservations which an individual can later easily overlook are likely to be recalled and revived by some other group member. The American appellate court, moreover, is guarded against one price too commonly attending the commitment of deciding to a group: the price of total inaction or indefinite postponement. The medieval day is gone in which decision could be refused; and even in the rather rare cases when the potato is hot or the court can find no answer which at all satisfies, a group decision does finally emerge. One recalls also that the drive for a written group opinion — with some members intent upon the past and typically some members concerned about the future — tends also to stabilization and to a consequent rise in reckonability in the deciding process itself. [23]

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[23] We commonly attribute to the multiman bench, in addition to steadiness, safety-factors against bias, effective corruption or improper influence, overhaste, slackness, etc., and increased likelihood perhaps of vision (which any member may provide), certainly of balance, so that safety may emerge even if vision be outvoted. The pattern has seemed to justify itself across nations and centuries; and non-judicial experience is in accord.

11. *Judicial Security and Honesty*

Not only can the decision of the highest appellate tribunal in any case not be upset, but appellate judge and appellate court are given institutional guaranty against repercussions or retaliations because some person or persons may dislike the decision or find it wrong. It will not do, because we are used to this, to take it for granted, or to overlook the degree to which it makes for reckonability by eliminating the incidence of fear or hope or secret favor. If (as in medieval times) a tribunal can be penalized for "wrong judgment," a factor of fear enters which increases chanciness of outcome. If a boss will fine, fire, exile, or kill for a vote or judgment which annoys him, but may reward the willing, then in any case in which his interest is not obvious, one big weight in the scales may drop blind until one knows the whether and the which-way of the fix. England's lesson under the Stuarts, and then under the Hanovers, ran indeed less to such uncertainty in lesser cases than to altogether too much certainty when the Crown was openly on one side, but we have seen enough in modern Europe to know that judicial servility produces not only injustice but a day-to-day unreckonability.

The immunity of court and judge from attack because of their judgments has the by-product of greater reckonability of those judgments chiefly, I think, because it presses the major factors which motivate decision so largely into the open, paralleling in this our institutional discouragement of presents, loans, and extramural solicitations from persons who do not happen to be in disciplinary position. I speak of a "by-product" because judicial independence, tenure for life or the term, the law and tradition against turning away after lucre and taking bribes or favors, are of course all aimed in first instance not against unreckonability but against the sin of the sons of Samuel: the perversion of judgment. But the very fact that not every threat, gift, or promise "works" (one remembers Pepys' pride in *not* being influenced in his award of contracts by the expected gift) points up the way in which a regime of offerings or hopes peppers the pot with extra *uncertainty*.

12. *A Known Bench*

The court before which the cause is to come has issued opinions which do more than lay down "law" on particular points; they also and especially cumulate to show ways of looking at things, ways of sizing things up, ways of handling authorities, attitudes in one area of life-conflict and another. Over a five-year, indeed over a one-year stretch these facets of the opinions furnish a revealing and appealing study which no appellate lawyer can afford to do without. For one must not forget that a particular bench tends strongly to develop a characteristic going tradition not only of ways of work but of outlook, and of working attitudes of one judge toward another. New judges get broken in to all of this, each normally adjusts largely to the harness which the going tradition seeks to fit upon him. Of course the tradition changes. Occasionally, it can change with relative speed. Thus a Cardozo joining the New York Court of Appeals, a Schaefer joining the Illinois Supreme Court, can be felt within a year or two,[39] and though with strong men beside them can within a few years have strong impact upon the tradition; but even this is a process which leaves its marks upon the published record, so that the going tradition of the moment, though in transition, can be somewhat known and to a greater degree felt.

This is not all: those strange and beautiful institutions, the signed opinion and the recorded vote,[40] allow particular study of the judges one by one — a fact long familiar and practiced on with regard to the Supreme Court of the United States but neglected in disheartening fashion by all but the best of our appellate bar in regard to most other courts.[41]

13. *The General Period-Style and Its Promise*

There is a further cluster of conditioning and steadying factors in the work of the appellate courts (and commonly at the same time of other branches of legal work) which has been curiously disregarded. It is the general and pervasive manner over the country at large, at any given time, of going about the job, the general outlook, the ways of professional knowhow, the kind of thing the men of law are sensitive to and strive for, the tone and flavor of the working and of the results. It is well described as a "period-style"; it corresponds to what we have long known as period-style in architecture or the graphic arts or furniture or music or drama. Its slowish movement but striking presence remind me also of shifting "types" of economy ("agricultural," "industrial," e.g.) and of the cycles or spirals many sociologists and historians discover in the history of political aggregations or of whole cultures.

14. *Professional Judicial Office*

Finally we recur to the most important among all the lines of factor which make for reckonability in American appellate judicial deciding: the office. The men who do the deciding hold office; they hold judicial office as full-time professionals. This is not a simple matter to be just glanced at or indeed assumed without a glance. Neither is it to be casually dismissed as a mere illustration, say, of role theory,[42] or with such a vague concept and label as "impartiality." In one aspect everything treated above enters into this line of factor as part or element; but there is enough extra to be worth scrutiny as a separate topic.

In our tradition *judicial* office is with peculiar intensity *office*, and is perhaps unmatched in the doggedness with which it presses upon the officeholder a demand to be selfless. Time, place, architecture and interior arrangement, supporting officials. garb, ritual combine to drive these matters home. The pressures are unremitting, time gives them further power; I hold this shaping force to be as important as the skill-values of bench-experience in making the case against unnecessary replacement of appellate personnel.

* * *

Here then are ten to fifteen clusters of what we may see as flywheel factors making for steadiness and reckonability in American appellate judicial deciding in contrast with any general type of group-deciding, factors which if they have any power should be expected to produce a degree of depersonizing in the deciding far beyond that when such flywheel factors are not present. With such clusters at work one can, as has been repeatedly indicated,

hope to get further down in than merely into the large and the long. "Steadiness" of our appellate judicial decision *over the decades,* as it has been so often praised,[45] is good for historians of culture or of government, but it affords to the person with pending litigation comfort as chilly as that which an economist's secular trend offers to a businessman contemplating a particular venture. Our factor-clusters whisper hope of something vastly different: a wherewithal, perhaps, of wrestling *in prospect* with the outcome *of the concrete appeal in hand.* We thus set ourselves against the wail of bar and public which has been waxing steadily stronger, in anger or in anguish, over forty years.

"ONE-MAN" DECISIONS ON APPEAL

Arthur T. Vanderbilt*

The charge that appellate decisions are the work of one man springs largely from the practice in this country of having one judge speak for the court. In order to ensure participation of each judge in the consideration and decision of a case, it is basic that each judge be familiar with the facts and law of the case, examining the briefs and record where necessary and hearing the oral argument. Thus, the holding of a court conference in itself was observed to be an inadequate safeguard unless based on prior study of the case by each judge. And the practice of having one member of the court prepare a statement of facts upon which the judges act in conference was censured as giving that judge a superior and controlling influence.[135] "One-man" decisions, written by one judge and concurred in by his colleagues without their sharing in the study of the records and briefs and other processes of decision, including court conferences, are frequently symptomatic of an overcrowded calendar with a consequent lack of time for all to participate in rendering each decision. It may be doubted that any rule by itself can prevent such decisions; that is, such a rule would not be self-operating and so the burden is on the courts to avoid one-man decisions. Given such determination, no such rule would seem necessary Since the problem is a complex one, an attempt was made to secure data on the pertinent aspects of the internal workings of the appellate courts in the various states; which are illustrative either of tendencies towards one-man decisions or which aid the courts in avoiding such decisions.

In *Arkansas, California, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia,* and *Wisconsin* cases in the highest appellate court are assigned to the judges for opinion writing in regular sequence This would seem to further one-man decisions, since the other judges, forewarned as to who would have the burden of opinion writing in each case, may feel less need to take a thorough interest in the case

*Late Chief Justice of New Jersey. Reproduced from MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION published by the Law Center of New York University in 1949.

in preparation for the oral argument, in listening to the oral argument, or in conference discussions. In *Arkansas* and *Kansas* the justice to whom the case is assigned may write the majority opinion even if he dissents; he then may, and often does, write a dissenting opinion, as may others. The assignment of cases by the presiding judge prior to oral argument, the practice occurring in *New York, Oklahoma, South Dakota,* and *West Virginia,* is subject to the same criticism as the assigning of cases for opinion writing in regular sequence. A quotation from one of the narrative reports on which this survey is based provides an interesting commentary on these practices:

> In our Supreme Court the writing of opinions is usually assigned to the judges in rotation. While it is possible for such an estimate to be upset by an unexpected division of opinion among the court, a justice can usually tell several days in advance which of the cases on the calendar will fall to his lot. This enables a justice to listen to arguments on a case which he knows will not come to him with complete detachment. It also means that the more spritely ornaments of our bench may satify their variegated interests while still carrying their share of opinion writing, without religiously attending every session of the court. One justice used to be very difficult to find in the capitol on the days when no case was his to decide. The others took advantage of rotational foreknowledge less regularly.

Other practices seemingly subject to criticism as leading possibly to one-man decisions are followed in various other states. In nineteen jurisdictions the record is read by all the judges only in unusual circumstances. In *Louisiana* the constitution provides that the record be read by at least two of the seven judges, and individual comments are expressed only after assignment of the record to two judges for such reading has been made. Individual opinions as to the case are expressed only after the case has been assigned to one judge in twenty jurisdictions, all but three of which, moreover, are jurisdictions in which assignment is made in rotation or before oral argument. In *Michigan* the judge to whom the case is assigned is required before oral argument, if there is any, to examine the record and briefs and state to the other members of the courts the facts of the case and the questions involved. It is obvious that in such circumstances a one-man decision is more likely.

Preferable practices lessening the chances of one-man decisions are utilized in various of the states. Thus, cases in the appellate court in *Arizona, Colorado, Connecticut, District of Columbia, Florida, Louisiana, Massachusetts, New Hampshire, New Jersey, North Carolina, Oregon,* and *Pennsylvania* are assigned to individual judges by the presiding

judge for consideration and the writing of an opinion only after oral argument and after discussion of the individual cases by the entire appellate bench. This would seem to be the best mode for eliminating one-man decisions.

In *Iowa, Kansas, New Jersey, Ohio, South Dakota,* and *Wisconsin* the record of a case in the highest appellate court is read by all of the judges of the court or division, as would seem preferable. In only one of these states, however, *New Jersey,* does the assignment for opinion occur after oral argument and court conference and not by rotation. In *North Carolina* the record is read by all the judges either before or after oral argument. The record is read by all the judges after oral argument in nine other jurisdictions, *Connecticut, District of Columbia, Florida, Kansas, Maine, New Hampshire, New Mexico, South Carolina, and Vermont;* in only four of which, however, *Connecticut, District of Columbia, Florida,* and *New Hampshire,* is the opinion of the court written by a judge selected after oral argument and not selected by mere rotation. In *Pennsylvania* the record is read by all the judges, but may be read before or after assignment for opinion writing. The record is read after such assignment in four other jurisdictions: *Alabama, California, New York,* and *Utah.* In *Nevada* the record is probably read by all the judges but the reporters were uncertain at what point this occurred.

The expression of tentative individual opinions before the case is assigned to one judge for the writing of an opinion, another preferable practice, is utilized in fourteen of the states: *Connecticut, Florida, Illinois, Massachusetts, Missouri, Nebraska, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah,* and *Washington.* Six of these, *Illinois, Missouri, Nebraska, Ohio, Utah,* and *Washington,* however, are states in which the case is assigned in rotation, thus lessening the beneficial effects of this desired practice. Separate opinions may be written by each judge at his discretion in *North Carolina, South Dakota,* and *Wisconsin;* thus, in those states it is recognized practice for each judge to speak for himself.

The writing of minority opinions and the practices connected therewith would seem to be indicative of the absence of one-man decisions, since minority opinions show a divergence of opinion or of reasoning characteristically absent from a court in which there are one-man decisions. In the highest appellate courts of the various states, the writing of minority opinions does not seem to follow any set practice. A judge is selected from the minority by the minority to write the dissenting opinion

in six states: *Georgia, North Carolina, Ohio, South Carolina, Vermont,* and *Wisconsin.* Each dissenting judge commonly writes a separate dissenting opinion in *Alabama, California, District of Columbia, Kentucky, Maine, Mississippi, New Hampshire, Utah, Washington, West Virginia,* and *Wisconsin;* while any dissenting judge may write a separate opinion in eighteen jurisdictions, *Arkansas, Connecticut, Idaho, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, Oklahoma, Oregon, Pennsylvania,* and *South Dakota.* No settled policy as to dissenting opinions exists in *Florida, Maryland, New Jersey, New Mexico, Ohio,* and *Texas.*

In conclusion it may be said that many practices are being utilized which tend to diminish the possibility of one-man decisions. The assignment of a case to one judge for opinion writing in rotation or before oral argument, however, and the failure of all judges to familiarize themselves with the record of the case in various states are practices which encourage one-man decisions.

DISSENT IN LEARNED HAND'S COURT

Marvin Schick*

A majority of appeals, about 85 per cent according to a recent writer,[95] are decided by a unanimous court, without concurring or dissenting opinions. This is not surprising in view of the size of the panels and the large number of frivolous appeals. In the remaining cases, dissenting or concurring opinions are filed or, once in a while, dissent or concurrence is noted without opinion. The latter practice is open to serious criticism since it deprives both the Supreme Court and counsel of the reasons for the disagreement with the majority.[96]

The decision of whether to file a separate opinion is left to each judge, although subtle pressures are at times exerted to maintain the appearance of unity. There was a favorable attitude on the Second Circuit toward dissent which was quite distinct during the chief judgeship of Learned Hand and for several years thereafter. Judge Clark, for many years the court's most frequent dissenter, wrote to a new colleague in the 1950's: "I suppose perhaps we have too much of a tradition of slugging it out, since this is now our life and our world." In a 1957 survey of operating procedures of appellate courts, the Second Circuit was the only court of appeals to indicate that dissent

[95] Karlen, "Court of Appeals for the Second Circuit," p. 509.

[96] Since it is obvious that dissenting and concurring judges disagree with the majority opinion, the most plausible explanation for the occasional dissents and concurrences without opinion is that the minority judge is unable or unwilling to spend time on a minority opinion. In United States v. Epstein, 154 F.2d 806 (2d Cir. 1946), Judge Frank simply noted concurrence in the result. Judge Clark, the author of the court's opinion, wrote: "I am surprised that you concurred only in the result, indicating something wrong with the opinion. I should have been glad to modify the opinion if I knew what was wrong" (CEC to JNF, March 21, 1946). In reply, Frank outlined his disagreement with the majority and then said: "I had one of three choices: to suggest rather sweeping revision of your opinion; to write a concurring opinion, pointing out where I differed from your generalizations; or to concur in the result. As you had Learned with you, so yours became the opinion of the court. I could see no harm in selecting the last choice" (JNF to CEC, March 22, 1946). But the explanation is weak, particularly in view of Frank's behavior in so many other cases. Why didn't he even attempt to convince Learned Hand?

Where an appeal is decided by a 2–1 vote, concurrence without opinion is quite unjustified. In Carrier Corporation v. National Labor Relations Board, 311 F.2d 135 (2d Cir. 1962), Decided 2–1, Judge Swan concurred "in the result of Judge Waterman's [majority] opinion." The losing party then petitioned for a rehearing because "there is no opinion of the Court to guide the Board, the parties in this case, or the unions or employers who will inevitably find themselves in similar situations in the future." Judge Swan then amplified; he "concurred in the result not because I disagree with anything stated therein (I do not) but because Judge Waterman's opinion failed to include certain additional grounds for affirmance which I thought relevant" (p. 155).

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was "encouraged." The general feeling on the court is not to "get too excited about the differences of opinion or the dissents. They are a sign of health and vigor."

But generalizations about encouragement of disagreement convey only a partly accurate picture of the tension and dynamics of a court faced with an almost unceasing torrent of opinions to prepare. An appellate judge must decide, if he has failed to convince his colleagues, whether to go along quietly or to file a separate opinion. There are situations in which the reaction of fellow judges has to be calculated before a decision is made. In such instances, the reactions of judges on the same court may vary a great deal, irrespective of the court's mood or style regarding dissent.

It is not surprising that the judges of the Learned Hand court disagreed as to when they should disagree. Judges Augustus Hand, Swan, and Chase were more likely than their volatile brethren to abstain from dissent when a reconciliation of views was not possible. After preparing a dissenting opinion, Swan complained, "In the manner of disagreement, this court is getting regrettably like its superior in Washington." Augustus Hand, in particular, sought to discourage dissent in panels over which he presided. The Learned Hand court was faced with no more bitter dispute than that which erupted between Judges Frank and Clark in *United States v. Sacher*,[101] which concerned the contempt of court convictions of the defense lawyers in the trial of the leaders of the Communist Party. The majority (Augustus Hand and Frank) upheld the convictions; Clark dissented. Shortly before the opinions were filed, after ten weeks of bitter memoranda, Hand made another attempt to get Clark to go along. Clark refused:

> I have pondered long—indeed to the extent to which I am capable—over your parting admonition or suggestion. Because of my respect and regard for you, I cannot take it lightly. Indeed, I have examined the possibility of going along, since I know your persuasive opinion will persuade all but inconsiderable doubters. And I see no immediate and perhaps no future results from a dissent. But if I get to relying on such considerations I really will have nothing to tie to during what may still prove to be a long course of future judging.

Second Circuit judges, along with most appellate judges, believe that by and large it is best to suppress disagreement in "unimportant" cases. This was the view of five of the six 1941–51 judges, including Learned Hand and Frank, who would make a point also of foregoing public disagreement if the issue raised on appeal had been previously decided contrary to their opinion by a Second Circuit panel.

There is no test of what is "important" in a case, although procedural issues usually are put in the unimportant category. However Judge Clark steadfastly refused to accept any notion that procedural questions are not of major import, and some of his strongest dissents were in protest against Second Circuit handling of the Federal Rules of Civil Procedure. Perhaps irrespective of his activities on behalf of

[101] 182 F.2d 416 (2d Cir. 1950).

procedural reform, he would have dissented frequently. His philosophy, as expressed in one dissent, was that "in the lonely task of judicial adjudication, each of us must finally act as his own faculties demand." Yet the evidence suggests that it was on procedural matters that he most strongly felt a need to voice his disagreements with colleagues. He could not permit what he regarded as Second Circuit tampering with procedural rules to go unchallenged; indeed, "the very brilliance of our court" contributed to Clark's uneasiness, "for the greater the judges, the less patience they will have with procedural matters." This attitude was fed by the recognition that "the Supreme Court has not much interest in procedural reform . . . ,"[106] so that it was incumbent upon him to protect the rules.

In addition to disagreeing as to when to dissent, judges differ on the effect of dissenting opinions. It was the view of Judge Parker "that most dissents do much more harm than good. They foster resentment on the part of the losing party, they encourage groundless appeals and they introduce an element of uncertainty where certainty should if possible prevail. . . . Sometimes a dissent is an appeal to the 'brooding spirit of the law.' More often it is nothing more than an expression of individual pride of opinion."[107] Few, if any, of the Second Circuit judges of the past quarter of a century would go along with such harsh condemnation, certainly not Judge Clark[108] or Judge Frank, who spent so much of his life debunking the idea of certainty in the law.

[106] CEC to Judge Henry W. Edgerton, February 4, 1943. On another occasion, Clark argued: "As we know, members of the [Supreme] Court have not background or interest in this field and react as, unfortunately, courts and lawyers have done from, I suppose, the beginning of time, that, while they despise procedural rules as mere machinery, unworthy of the thought of intellectual persons, yet it can be made use of as an excuse for reaching a result which justice seems to require in a particular case" (letter to Judge Frank, on Queensboro v. Wickard, July 14, 1943). In the same letter Clark suggested that "as to procedure we can have perhaps some more hesitation than in other cases as to just what" the Supreme Court required. In Zalkind v. Scheinman (pp. 906–7), Clark advanced the argument that Supreme Court refusal to review cases raising procedural questions was not very meaningful.

[107] Parker, "Improving Appellate Methods," p. 13.

[108] But in a letter to Professor Bernhard Knollenberg (May 31, 1944), Clark lamented, "I suppose that of the useless things which afflict mankind nothing is more useless than a dissenting opinion of an 'inferior' federal court where the Supreme Court refuses review." Many years later, Clark was gratified when the Supreme Court, in Watkins v. United States 354 U.S. 178 (1957), reversed the contempt conviction of one who refused to answer questions before the House Un-American Activities Committee, thereby accepting Clark's notable dissent in United States v. Josephson, 165 F.2d 82, 93 (2d Cir. 1948). John Frank wrote to Clark (June 21, 1957): "The parallelism between the two opinions is so strikingly close that it is obvious that in one of the most important works of your life you have been entirely vindicated. By being the first prophet to enter this field of thorns, you performed one of your life's public services; . . . this must indeed be, and should be, one of your proudest days."

In defense of dissents it should be pointed out that their frequency did not prevent the Learned Hand court from functioning smoothly; and that when judges disagree, to abstain from dissent in the name of preserving a mythical "certainty" is to disregard the judge's paramount responsibility, which is to decide each case as he believes it ought to be decided. Dissenting opinions in the courts of appeals also serve as cues to Supreme Court justices when they examine petitions for certiorari. A study of Supreme Court certiorari jurisdiction established that there is a significantly better chance of review being granted when there is dissent in the court below.[109] The dissenting intermediate appellate judge appeals not merely to the "brooding spirit of the law," but, more practically, to nine justices on the Supreme Court.[110]

[109] J. Tanenhaus, M. Schick, M. Muraskin, and D. Rosen, "The Supreme Court's Certiorari Jurisdiction: Cue Theory," in Glendon A. Schubert (ed.), *Judicial Decision-Making* (Glencoe, Ill.: Free Press, 1963), pp. 123–24.

[110] Actually, in another connection, we will see that overt appeals to the Supreme Court for reversal of court of appeals rulings, even by the majority, are not uncommon. One might argue that dissent is more justified, the lower a court is in the judicial hierarchy. Certainly there is less of a practical side to many Supreme Court dissents than there is to those of inferior judges. Something Jerome Frank once wrote comes to mind: " 'What,' someone once asked, 'has posterity done for me, that I should think of posterity?' " (Anon Y. Mous [Jerome N. Frank], "The Speech of Judges: A Dissenting Opinion," *Virginia Law Review*, 29 [1943], 640, n. 10).

SUPERNUMERARY JUDGES IN LEARNED HAND'S COURT

Marvin Schick*

there are several good reasons why intercircuit assignments should be stopped completely, even if it could be shown (which is doubtful) that they contribute to improved administration in the federal courts. These reasons stem from the circuit system itself, which, as it has developed, leaves each circuit free to operate as it pleases. Even the uniform rules of appellate procedure which have been recently adopted did not bring about a uniform decisional process in the courts of appeals.

This point is readily illustrated by reference to the Second Circuit. Unlike the overwhelming majority of federal and state appellate courts which hold their conferences to discuss argued cases either the same day as argument or shortly thereafter, the Second Circuit's long-standing practice is to hold the conference the week after argument. In the interim, panel members are busy writing memoranda on the cases to be considered at the conference. Visiting judges are not assigned for more than a week, and unless they remain in New York—perhaps reluctantly—there is apt to be some difficulty in disposing the appeals heard by them.

Moreover, many, though not all, of these judges have found the Second Circuit's memorandum system bothersome, if not an outright waste of time and energy. They do not see why it should be necessary for each panel member to write a preliminary opinion in most of the cases he hears. It is rumored, for example, that Calvert Magruder, former chief judge of the First Circuit and a very highly regarded federal judge, refused to prepare memoranda during his period of service on the Second Circuit in the October 1960 term. It is said that this, and his delays in getting out opinions assigned to him, displeased Chief Judge Lumbard, an apparent believer in the adage "When in Rome, do as the Romans do."

A more crucial aspect of the circuit system further undermines the rationality of intercircuit assignment. It is not always sufficiently appreciated, even among lawyers, that the courts of appeals sharply disagree on various legal matters that may not be decided with finality by the Supreme Court. The pages of the *Federal Reporter* are replete with specific rejections by courts of appeals of decisions of other circuits, and in a good percentage of these, probably more than half, the Supreme Court does not quickly resolve the conflict. In addition to overt conflicts, there are numerous differences between circuits which are more subtle, such as the varying approaches to administrative agency rulings; for these, the word of a court of appeals is the law of the circuit.

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Obviously, outside judges should not follow the law of their own circuit when it is in open conflict with that of the circuit they are visiting; but do they always adhere to the decisions of their temporary court? At home there is a tendency to follow circuit precedents even when contrary to personal judgment. Should the same be true of intercircuit assignments?

This problem came up several times in the 1940's, although the Learned Hand court made little use of outside judges. One of these, Judge Evan Evans of the Seventh Circuit, made it clear that "when sitting in the 2d Circuit a question arises which has arisen before in that circuit, I will follow the precedents of that circuit even though the decisions of the 7th Circuit are not in accord therewith." In an appeal heard by him and Judges Clark and Frank he became involved in a question that had bitterly divided the Second Circuit: whether defense counsel were entitled to examine notes prepared by F.B.I. agents relating to statements made by defendants while they were questioned. The trial judge had turned down the defense lawyer's request for the documents; the Second Circuit panel affirmed the conviction in a brief per curiam opinion, which said in part: "The majority of this court, for the reasons stated in United States v. Ebeling . . . find no error in the trial judge's action. Judge Frank, for the reasons stated in his dissent in the Ebeling case, is of the opinion. . . ."[18] Evans cast the deciding vote because he adhered to a Second Circuit precedent. However, privately "he was conscious . . . of a leaning toward the views expressed in the dissenting opinion in United States v. Ebeling" and he admitted that "if and when the question arises in the Seventh Circuit Court of Appeals, I believe I will adopt the dissenting opinion."

But this was not the policy of Judge Joseph Hutcheson of the Fifth Circuit, a noted opponent of the New Deal and federal administrative agencies. In *Security Exchange Commission v. Long Island Lighting Co.*,[20] a majority consisting of Judges Hutcheson and Charles C. Simons (Sixth Circuit)—both visiting judges—reversed the S.E.C., over the dissent of Judge Clark. Several years later the Second Circuit specifically rejected the decision in *Long Island Lighting*.[21]

In another case decided at about the same time, *Duquesne Warehouse Co. v. Railroad Retirement Board*,[22] the federal agency was overruled in a decision authored by Judge Hutcheson and joined by Judge Chase, probably the Second Circuit member least sympathetic to governmental agencies. The majority opinion is replete with arguments in favor of judicial control over administrative agencies which are clearly contrary to established Second Circuit policy. Judge Frank wrote a long, caustic dissent in which he discussed judicial review of administrative decisions at some length, "for fear that, unless I do, the views here expressed by Judge Hutcheson may be taken as indicating

[18] United States v. Cohen, 148 F.2d 94 (2d Cir. 1945).

[20] 148 F.2d 252 (2d Cir. 1945).

[21] West India Fruit & Steamship Co. v. Seatrain Lines, Inc., 170 F.2d 775 (2d Cir. 1948).

[22] 148 F.2d 473 (2d Cir. 1945).

the position of this Circuit." Then Frank lectured the visiting judge with sharp words:

> In this circuit, recognizing the Supreme Court as the authoritative head of the federal judicial hierarchy, we have heretofore felt obligated, as an intermediate tribunal, to follow the rulings of that Court whether or not any members of this court happened to like those rulings. Consequently, I do not feel it necessary to defend the Supreme Court against charges of heresy; for I think we must bow to its determination even if, perchance, we should find Judge Hutcheson's political philosophy and heresiography more attractive.

This "Second Circuit" decision was reversed by the Supreme Court.

The illustrations given here are all from the same period in the 1940's. It may be that after having made some use of outside judges, the Second Circuit decided that it could do well enough without their help. From what we know, during the last half-dozen years of the Learned Hand court, it got along excellently without such assistance.

(2) The Hierarchical Structure

STANDARDS RELATING TO COURT ORGANIZATION*

Appellate Court. The appellate court should fulfill the judicial functions of reviewing trial-court proceedings and formulating and developing the law. Where the volume of appeals is such that the state's highest court cannot satisfactorily perform these functions, a system of intermediate appellate courts should be organized.

(a) Supreme Court. The Supreme Court, or highest appellate court, should have authority to review all justiciable controversies and proceedings, regardless of subject matter or amount involved. Its authority should also include jurisdiction of original proceedings for mandamus, prohibition, injunction, and similar remedies, to protect its appellate jurisdiction and to effectuate its supervisory authority over courts below. The court should have not less than five nor more than nine members and its presiding officer should be the chief justice.

(b) Intermediate appellate courts. The organization of appellate courts below the Supreme Court should be guided by the following principles:

(i) Jurisdiction. Every level and division of appellate court should have authority to hear all types of cases; appellate courts of specialized subject-matter jurisdiction should not be established. An appellate court should have jurisdiction of original proceedings for mandamus, prohibition, injunction, and similar remedies, comparable but subordinate to that of the Supreme Court, to protect its supervisory authority.

(ii) Judges. The judges of each level of the appellate-court system should serve therein on the basis of a permanent appointment or for a substantial term of years.

(iii) Panels. The decision of an appeal should ordinarily be made by a panel of at least three judges.

(iv) Lodging of appeals. Appellate review should be initiated by a single filing procedure effective for the appellate court as a whole. Docketing of cases within the appellate court and transfer of cases between levels or divisions of the court should be by simple motion or order.

*This standard was tentatively proposed by the American Bar Association Commission on Standards of Judicial Administration in 1973. Hon. Carl McGowan is Chairman of the Commission and Prof. Geoffrey C. Hazard, Jr. is its Reporter.

Commentary

Appellate courts perform two basic functions. The first is reviewing trial-court proceedings to determine whether they have been conducted according to law and applicable procedure. The second is developing the rules of law that are within the competence of the judicial branch to announce and interpret. These functions have been described in various ways, with some differences in meaning and emphasis, but there is general agreement on their essential characteristics.

The reviewing function is normally performed at the instance of a party aggrieved by the result in the trial court, and is in any event performed chiefly for his benefit. The function of developing the law is performed for the benefit of the community-at-large. In court systems with an intermediate appellate court, review by the highest court also serves to coordinate the decisions of the lower appellate courts. In either case, review after the first appeal is only incidentally for the benefit of the particular litigants.

The appellate court should be organized with these functions in mind. The highest appellate court should have authority to review all types of cases, regardless of subject matter or amount involved, for important questions of substantive law and procedure can occur in cases of otherwise small significance. The highest appellate court should also have authority to entertain original proceedings, such as those for writ of mandamus or prohibition, in aid of performing its responsibilities as a court of review. This authority is generally and properly held to be an inherent aspect of a highest court's status as such.

A supreme court should be constituted of an odd number of judges, so that decisions can be reached by majority vote. The number most common and generally satisfactory is seven. This number facilitates the working relationships required to establish concurrence of opinion on difficult legal questions, while at the same time it is large enough to provide breadth of viewpoint and the manpower to prepare the opinions that are the principal work product of appellate courts. Nevertheless, some appellate courts have operated effectively with five judges, or nine, as in the case of the United States Supreme Court. Whatever the size of the court, its presiding officer should be the chief justice.

Where a supreme court, by reason of workload, is unable to perform both of its principal functions, some additional mechanism of appellate review becomes necessary. This situation has long since prevailed in states with large population, and is becoming increasingly prevalent in states of smaller population. The appropriate solution is the creation of an intermediate appellate court. Since there seems little prospect for a long-run decline in the volume of appellate litigation, once the surge of appellate cases has been felt in a state having only one appellate court, steps should be taken forthwith to establish an intermediate appellate court rather than temporizing with substitute arrangements.

In determining whether an intermediate appellate court is necessary, and in providing for its jurisdiction when it is decided that such a court is necessary, it should be recognized that a litigant has no unqualified right to an appeal and should have no more than one appeal as of right.

In the creation of an intermediate appellate court, there are certain organizational aspects that cannot be reduced to formula. One is the question whether the intermediate appellate court should be organized on the basis of geographical regions or as a single, centrally situated tribunal. This depends on such matters as the geographical size of the state, the location and size of its principal population centers, the pathways in which appellate litigation originates, and the cohesion of its political structure and its bar. Related to this is whether the judges of the intermediate appellate court are to be selected statewide or from regional districts. Another question is whether the judges of the intermediate appellate court should be organized in permanent divisions or should constitute a single body from which panels are constituted docket by docket. This depends on the considerations mentioned earlier, and also on such matters as whether the intermediate appellate court has important administrative responsibilities concerning the trial courts, the degree of deference which the intermediate appellate court judges are to give opinions by other panels or divisions of that court, and the frequency and character of the superintending review provided by the highest court.

There are successful intermediate appellate court systems that have important differences from each other in the respects referred to. At the same time, whether organized regionally or centrally, and whether constituted for hearing purposes or on a permanent or rotational basis, intermediate appellate courts should be organized in accordance with certain principles that implement their basic functions.

The first principle is that appellate courts of specialized subject-matter jurisdiction should not be established. The considerations weighing against specialized courts of original jurisdiction, stated in the Commentary to Section 1.12, apply to appellate courts. It is, of course, true that many specialized appellate courts have performed honorable and effective judicial service. It is also true that any disestablishment of such courts should be done with accommodation of the personal, professional, and institutional interests that should characterize all court reorganizations. Nevertheless, the appellate-court function of developing the law cannot be performed in a coherent and consistent way if jurisdictional divisions compel the law's fabric to be made in a decisional patchwork.

A second principle is that the judges for each level of appellate court should be appointed or designated to serve in their offices either permanently or for a substantial term. Maintaining the effectiveness of an appellate court structure requires recognition of the positions of authority held by the various elements of the structure. Rotation or short-term assignment of judges into positions on an appellate court reduces the authority of each incumbent, and thus ultimately weakens the authority of the court as a whole. Avoidance of this consequence is especially important with regard to the appellate courts' function of authoritatively expressing the applicable law. It is not inconsistent with observance of this general principle, however, to provide for temporary assignment of judges upward or downward within a court system. Assignment of trial judges to appellate courts, on a temporary basis and not to avoid creation of needed permanent appellate judgeships, provides valuable experience to the judges involved and an opportunity for assessing their proficiency in an appellate-judicial capacity.

A third principle is that an appeal should ordinarily be decided by a panel of at least three judges. This is both a long-established legal tradition and a recognition that an appeal is not merely the opportunity to substitute one judge's view of the law for another's. It does not follow, however, that oral argument must be afforded in every appeal, or that cases on appeal may not be screened to differentiate between those that require fullest consideration and those for which a more summary hearing is appropriate. Procedures by which fewer than three judges make these screening decisions have been successfully adopted in several court systems.

A fourth principle is that appellate litigation should be initiated by a single filing procedure, regardless of the court to which the appeal is taken and regardless of any expedited status that a particular type of appeal may enjoy. The same initial filing should be sufficient to confer jurisdiction for any subsequent appeal from the appellate court which heard the appeal in the first instance. All such matters of "traffic management" should be performed by motion or order without subjecting litigants to the risk of dismissal for want of jurisdiction in case of a mistake or misstep.

STATE COURT STRUCTURES

Graham C. Lilly & Antonin Scalia*

State[a]	*Population*[b]	*Number of Supreme Court Judges*[c]	*Panels*[d]	*Supplemental Judges*[e]	*Court of Appeals*[f]	*Type*[g]
California	19,300,000	7			Five Cts. of App., 13 divs., 48 judges	INT
New York	18,078,000	7			App. Div. of Sup. Ct., 4 dep'ts, 21 judges	INT
Pennsylvania	11,728,000	7			Super. Ct., 7 judges	TERM
Illinois	10,991,000	7			App. Ct., 5 dists., 25 judges	INT
Texas	10,977,000	9			Ct. of Civ. App., 14 dists., 42 judges; Ct. of Crim. App., 5 judges	INT TERM
Ohio	10,588,000	7			Ct. of App., 11 dists., 38 judges	INT
Michigan	8,739,000	7		Three comm'rs recommend action on discretionary matters	Ct. of App., 3 divs., 12 judges	INT
New Jersey	7,003,000	7	Occasionally less than all judges sit		App. Div. of Super. Ct., 12 judges	INT
Florida	6,151,000	7	Rolling panel of at least 5 judges	Dist. & cir. judges sit	Four Dist. Cts. of App., 20 judges	INT
Massachusetts	5,469,000	7	Rolling panel of 5 judges			

*Professors of Law, University of Virginia. Professor Scalia is also Chairman of the Administrative Conference of the United States.. Reproduced from Appellate Justice : A Crisis in Virginia, 57 VA. L.REV. 3, 22-26.

North Carolina	5,122,000	7			Ct. of App., 9 judges, rolling panel of 3 judges	INT
Indiana	5,061,000	5			App. Ct., 2 divs., 8 judges	TERM
Missouri	4,625,000	7	Two perm. divs. of 3 judges	Six comm'rs & special comm'r write opinions—special judges sit	Ct. of App., 3 divs., 9 judges	TERM
Virginia	4,595,000	7				
Georgia	4,568,000	7			Ct. of App., 3 divs., 9 judges	INT
Wisconsin	4,221,000	7				
Tennessee	3,975,000	5		Special justices sit	Ct. of App., 3 divs., 9 judges; Ct. of Crim. App., 7 judges	INT TERM
Maryland	3,754,000	7	Rolling panel of at least 5 judges		Ct. of Special App., 5 judges	INT
Louisiana	3,726,000	7		"Justice ad hoc" assigned to serve temporarily	Ct. of App., 4 cirs., 25 judges	INT
Minnesota	3,647,000	7	Rolling panel, C. J. & 4 judges	Retired judges & dist. judges sit		
Alabama	3,558,000	9	Rolling panel of 5 judges	"Supernumerary circuit judges" write per curiam opinions	Ct. of Civ. App., 3 judges; Ct. of Crim. App., 3 judges	TERM TERM
Washington	3,276,000	9	Two perm. dep'ts, C. J. & 4 judges	"Justices pro tem." sit (active or retired judges of cts. of record)	Ct. of App., 3 divs., 12 judges	TERM
Kentucky	3,220,000	7	Occasionally less than all judges sit	Four comm'rs & special comm'r write opinions		
Connecticut	2,963,000	6	Rolling panel of 5 judges	Super. Ct. judges occasionally sit	App. Div. of Cir. Ct., 3 judges	TERM

State[a]	Population[b]	Number of Supreme Court Judges[c]	Panels[d]	Supplemental Judges[e]	Court of Appeals[f]	Type[g]
Iowa	2,774,000	9				
South Carolina	2,664,000	5		"Acting justice" occasionally sits		
Oklahoma	2,520,000	9	Frequently less than all judges sit		Ct. of App., rolling panels of 3 to 5 dist. judges Ct. of Crim. App., 3 judges	TERM TERM
Mississippi	2,344,000	9	Rolling panel of 5 judges			
Kansas	2,293,000	7		Two comm'rs write opinions, which are "approved by the court"		
Colorado	2,043,000	7	Rolling "dep't" of 4 judges	Retired judges occasionally sit & write opinions	Ct. of App., 2 divs., 6 judges	TERM
Oregon	2,008,000	7	Two perm. dep'ts, C. J. & 3 judges & usually 1 "justice pro tem."	"Justices pro tem." & retired justices sit	Ct. of App., 2 perm. dep'ts, 5 judges	TERM
Arkansas	1,986,000	7		Special justices occasionally sit		
West Virginia	1,802,000	5				
Arizona	1,663,000	5	Rolling "div." of 3 judges	Lower ct. judges fill vacancies	Ct. of App., 2 divs., 9 judges	TERM
Nebraska	1,439,000	7	Frequently less than all judges sit	Dist. judges sit (as many as 3 on 7-man panel)		
Utah	1,034,000	5		Dist. judges sit & write opinions		
New Mexico	1,006,000	5	Rolling panel of 3 judges	Ct. of App. judges & dist. judges occasionally sit	Ct. of App., 4 judges	TERM
Maine	976,000	6	Frequently less than all judges sit			
Rhode Island	914,000	5				
Hawaii	780,000	5		Cir. judges fill vacancies		
Idaho	703,000	5		Dist. judges sit		
New Hampshire	702,000	5	Occasionally only 4 judges sit			
Montana	693,000	5		Dist. judges fill vacancies		
South Dakota	656,000	5		Cir. judges occasionally sit & write opinions		
North Dakota	627,000	5				
Delaware	534,000	3		Lower ct. judges sit		
Nevada	449,000	5		Dist. judges occasionally sit		
Vermont	425,000	5		Super. Ct. judges occasionally sit		

State[a]	Population[b]	Number of Supreme Court Judges[c]	Panels[d]	Court of Appeals[e]	Type[f]
Wyoming	315,000	4	Occasionally only 3 judges sit	Dist. Ct. judges occasionally sit	
Alaska	274,000	5	Occasionally less than all judges sit	Super. Ct. judges occasionally sit	

[a]The states are listed in decreasing order of population size. A fact that comes as a surprise to many is that Virginia is fourteenth.

[b]The figures shown are estimates as of July 1, 1968. Source: U. S. DEP'T OF COMMERCE, 1969 STATISTICAL ABSTRACT OF THE UNITED STATES, Table II.

[c]This column indicates the number of regular judges of the court of last resort *actually appointed*. In some cases a larger number is constitutionally permissible. Source: official reports of the respective courts.

[d]This column indicates the nature of any panel of less than the entire court that is (unless otherwise noted) regularly used to decide appeals. The term 'rolling panel' describes a panel with rotating membership. The conclusions as to use of panels have been drawn from examination of the recent decisions of the respective courts. Constitutional and statutory provisions for panels are an inaccurate guide, since in some states (such as Virginia) panels are authorized but not explicitly authorized.

[e]This column indicates the character of personnel, other than formally appointed justices, regularly (unless otherwise noted) used to decide cases, to make recommendations or to write opinions in the court of last resort. Again the basis for the conclusions is examination of recent decisions.

[f]This column shows the nature of any court within the state, other than the supreme court, the business of which is principally or exclusively appellate.

[g]This column shows the relationship of the appellate court described in the column headed "Court of Appeals" to the supreme court —i.e., whether it is INTermediate, so that it serves as a principal source of the supreme court's appellate business, or rather TERMinal, so that almost all the supreme court's appellate business consists of cases coming directly from the trial courts. Once again, this determination cannot be made on the basis of the state's constitution and statutes, since all systems establishing an inferior appellate court contain some provision for discretionary review by the supreme court. The crux is whether mandatory or discretionary review of the appellate court's decisions is granted frequently enough to constitute a significant portion of the supreme court's appellate caseload—as it is, for example, with the United States Supreme Court. Thus, the "Court of Appeals" column as INT or TERM has been based upon an examination of the frequency with which cases on appeal or certiorari from those courts appear in the recent reports of the respective state supreme courts.

B. INTERMEDIATE REVIEW: PROBLEMS OF HIERARCHICAL EXPANSION

(1) Prolonging the Process: Costs of Repetition

THE EFFECTS OF AN INTERMEDIATE APPELLATE COURT: THE NORTH CAROLINA EXPERIENCE

Roger D. Groot*

Methodology

The initial problem in attempting to measure the effect of the court of appeals on the supreme court work product was selecting samples with which to work. The years 1967 and 1969 were selected for several reasons.

The year 1967 was the busiest in the history of the supreme court and should most accurately illustrate what the court did in terms of coping with its overburdening caseload. The court of appeals had no effect on the supreme court's work in 1967 as the court of appeals did not begin docketing cases until October 1, 1967; by that time the supreme court had surely docketed and scheduled all cases it was to decide in 1967.

The year 1969 was selected as the comparison year because all "leftover" cases from the pre-court of appeals period should have been disposed of in 1968; 1969 should thus show the full impact of the court of appeals on the supreme court.

The second problem in measuring change was to establish measuring devices which would accurately measure work product without inserting large amounts of subjectivity into the results. Nine criteria were selected as measurement tools; in discussing each criterion it is essential to realize that it is intended to measure whether the supreme court, given fewer but more important cases with which to work, has justified the expectation that it would be able to produce a better product. "Better" is used here only in the sense of more thoroughly considered and explicated; "better" is not used to denote subjective concepts such as "right result" or "substantial justice." The criteria selected and the reasons for their selection are:

1. The split of the court. If each case before the court is an important case, and the court has more time in which to consider each case, the justices should be more likely to reach differing results. This should follow from a variety of factors: if each case is significant enough to reach the court under the new system, the questions in each case will be more difficult and the countervailing policies more pronounced--and this is especially true of those cases which reach the court because of a split court of appeals; each justice will be able to make an entirely independent evaluation of the existing law rather than relying on the recognized expertise of his brethren; and each justice will be able to explore more fully the ramifications of his decision. Thus split opinions should appear more frequently in 1969 than in 1967.

2. The frequency of concurring opinions. Because of the way in

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Reproduced from 7 WAKE FOREST L. REV. 548, 557-562, 565-569 (1971).

which a split court is defined for purposes of this paper, concurring opinions must be recorded separately. Although token concurrences will be counted, they do not reflect the same importance in this criterion that full concurring opinions do. In the pre-court of appeals period, a justice who agreed with the *result* reached by the other justices would be more likely to concur without opinion or simply go along with the majority even though his reasons were different. With more time available and more important questions in the balance this justice can be expected not only to formulate his own conception of the case, but also to express this conception in an opinion. It is thus expected that concurring opinions will appear with greater frequency after the inception of the court of appeals.

3. The frequency of dissenting opinions. Dissenting opinions should appear with greater frequency in 1969 than in 1967 for essentially the same reasons that concurring opinions will be more frequent. In addition, the appeal from a split court of appeals can be expected to produce additional dissents, since it is more likely that if the second highest court splits on an issue, the highest court will also. With the additional time available, these cases can be expected to lead not only to splits, but to dissenting opinions.

4. The frequency of per curiam opinions. Logically the least important and best settled cases under the old system should have produced per curiam opinions. If all of these cases have been removed from supreme court consideration, the per curiam opinions they generated should also disappear. In addition, under the overload of previous years, a case which would now merit a full opinion might have received per curiam treatment in the interest of time. Thus per curiam opinions should be less frequent in 1969 than in 1967.

5. The frequency of cases in which existing law is reexamined. There should be a strong tendency in a hurried court dealing with routine cases simply to apply existing law to the facts in the interest of providing a decision as correctly and rapidly as possible. In a less hurried atmosphere, dealing with a much higher percentage of significant cases, there should be a tendency for the same court to reexamine the policies of the law to determine if the results reached through the application of existing law are desirable in light of changes in society, changes in statutory law or trial procedures, or simply in light of a poor decision long followed. A higher percentage of reexamination is expected under the new system.

6. The frequency of cases in which existing law is reaffirmed. Reaffirmation of existing law can occur either with or without reexamination. The court could carefully reexamine existing law and decide it was still best, or it could simply reaffirm existing law without reexamination. If the assumption that there will be more reexaminations under the new system is correct, however, then it is logical to expect that at least some of those reexaminations will lead to rejection of existing law. Thus the percentage of reaffirmations should be lower under the new system than under the old. It must be noted here that the line between reexamination and reaffirmation can become very fine, especially in those cases where there is a definite reaffirmation of existing law, but this reaffirmation follows a limited examination of that law. For this reason no attempt is made to make these categories mutually exclusive. Also to be classified were those cases of first impression in North Carolina. These cases were treated as if the law used to decide the point were North Carolina law—the classification decision then depending upon whether the court reexamined the policies behind and the reasons for applying the foreign law, or whether the court simply applied the foreign law without examining the reasons for it.

7. The frequency of overruling. Overruling is the opposite side of the affirmation coin. An overruling by definition includes a reexamination, but never includes a reaffirmation. Thus any case had to be classified as either a reaffirmation or overruling. The same reasoning which leads one to expect a higher percentage of reexaminations under the new system also leads to the expectation that overrulings will occur more frequently.

8. The number of pages per opinion. Because the supreme court is expected to utilize the significant case factor and the increased time factor to produce more opinions in each case, to reexamine old law and justify overrulings, and to write fewer per curiam opinions, it is to be expected that the average number of pages devoted to each opinion will increase in 1969 over 1967.

9. The frequency of corrective action. This criterion is more exploratory than definitive. On the one hand, a lower percentage of corrections might be expected in 1969 since most cases will have filtered through one appellate level, on the other hand, the increased difficulty and importance of the cases considered by the supreme court, coupled with the additional time in which to consider each case, might be expected to lead to a higher rate of corrections.

In using these criteria it is essential to remember that they are

designed to measure change caused by restructuring. The measurements are meaningful only when projected on the backdrop of unchanged attitude on the part of the supreme court. For example, it must be assumed that the court attempted in both 1967 and 1969 to provide the best possible judicial effort for the state; thus the changes that occur between those years are the result of an increased capability to produce rather than an increased desire to produce. Overruling provides a convenient example from another aspect. If the court was reluctant to overrule existing law in 1967 and would do so only if the necessity was overwhelming, then the court must be assumed to be equally as reluctant in 1969. Hence if overruling occurs with greater frequency in 1969, it is because the new system enabled the court to see more clearly the overwhelming necessity rather than because the court became more willing to overrule.

Closely allied to the assumption of a constant attitude of the court is the assumption that the mix of cases in the total appellate structure remained unchanged. If as an abstract matter ten percent of all cases in the *appellate structure* (supreme court) in 1967 should have been reexamined, then it must be assumed that ten percent of all cases in the *appellate structure* (supreme court and court of appeals) in 1969 were also, in the abstract, ripe for reexamination. This does not mean that the court will reexamine ten percent of its cases in any year, but merely that there is an ideal toward which the system attempts to move. To the extent that the actual figures move closer to the ideal after the installation of the new system, that system is working by placing the proper cases before the court and providing an atmosphere in which the court can operate efficiently and effectively.

With these assumptions in mind, the cases decided in the comparison years can be classified and compared.

The Comparison

Comparing each criterion for the years in question shows the following results:

1. criterion: split opinions
   expectation: higher percentage in 1969 than 1967
   result:

1967	1969
19/473 = 4.02%	7/68 = 10.29%

2. criterion: concurring opinions
   expectation: higher percentage in 1969 than 1967
   result:

1967	1969
4/473 = 0.85%	3/68 = 4.41%

3. criterion: dissenting opinions
   expectation: higher percentage in 1969 than 1967
   result:

1967	1969
13/473 = 2.75%	5/68 = 7.35%

4. criterion: per curiam opinions
   expectation: lower percentage in 1969 than 1967
   result:

1967	1969
136/473 = 28.6%	2/68 = 2.94%

5. criterion: reexamination
   expectation: higher percentage in 1969 than 1967
   result:

1967	1969
26/473 = 5.50%	21/68 = 30.90%

6. criterion: reaffirmation
   expectation: lower percentage in 1969 than 1967
   result:

1967	1969
470/473 = 99.36%	66/68 = 97.1%

7. criterion: overruling
   expectation: higher percentage in 1969 than 1967
   result:

1967	1969
3/473 = 0.63%	2/68 = 2.94%

8. criterion: pages per opinion
   expectation: higher average in 1969 than 1967
   result:

1967	1969
2909/473 = 6.15	796/68 = 11.7

9. criterion: corrections
   expectation: none
   result:

1967	1969
183/473 = 38.7%	38/68 = 55.9%

The Analysis

As can be seen from the preceding section, the expectation under each criterion was satisfied. This leads to the tentative conclusion that the insertion of the intermediate appellate court has done all that was expected of it. Before this tentative conclusion can be finalized, however, additional analysis is necessary.

The split opinion, concurring opinion, and dissenting opinion criteria all showed an increased percentage of occurrence in 1969, but they all showed a decrease in the number of occurrences. If the attitude of the supreme court toward disagreeing with either the result or the reasoning used to reach it, and if the *number* of cases expected to produce these results remained constant in the *appellate structure*, some explanation must be offered for why the numbers of occurrences did not increase. The most obvious answer is that part of the cases which would produce these results were screened out by the court of appeals and never reached the supreme court. Of course, to the extent that the number of these occurrences indicate that significant cases are reaching the supreme court, then a lessening in number indicates that less than all significant cases are reaching that court. The conclusion must be, then, that some cases which should be reaching the supreme court are not reaching it. However, it still appears from an increase in frequency alone that the court has the time to produce these results in all cases meriting them which reach the court.

A decrease in the frequency of per curiam opinions was predicted and achieved. Although there were two per curiam opinions in 1969, they did not occur in independent cases. It thus appears that the restructuring has produced complete satisfaction here by causing one of two possible events: first, all cases so well-settled or insignificant that a per curiam opinion would have been written in 1967 were relegated to the court of appeals; or second, the supreme court had the time to write a full opinion in all cases before it, although the lack of time would have caused some of those cases to be per curiam in 1967. Whether either or a combination of these events occurred, the result is essentially complete satisfaction of expectations.

Reexaminations increased in percentage but decreased in number in 1969. Since the attitude of the court and total number of reexamination-worthy cases are assumed to be at least constant, the analysis problem here is similar to the split-opinion analysis. The additional-time-per-case effect of the court of appeals was undoubtedly felt by the supreme court as illustrated by the higher percentage of reexaminations. It also seems probable that the increased percentage illustrates that the supreme court received a better mix of cases in 1969 than previously. Thus the restructuring is working to the extent of giving the court more time and some better material. But some reexamination-worthy cases apparently did not reach the supreme court and the fault must lie either in a defective appeal-of-right process or in defective certification procedures.

Reaffirmations and overrulings, being absolute opposites, will be considered together. Reaffirmations decreased slightly in percentage as overrulings increased in percentage. This result was expected and is probably significant. The court should be expected to reaffirm in the vast majority of cases and overrule very seldom. Thus the fact that the cases ripe for overruling (or refusal to reaffirm) reached the court and that action was taken is sufficient to achieve satisfaction of expectations, especially since the cases were appeals-of-right cases.

The number of pages per opinion almost doubled in 1969. Although this is a very pedestrian criterion, it may be the most meaningful. This increase illustrates that the greater time available has given the court the opportunity to more fully explain and justify its decisions, that the cases reaching the court are important enough to require this additional effort, and thus that the restructuring is producing the desired results.

There was a substantial rise in the correction rate in 1969. While the overall percentage probably indicates at least that additional available time was utilized by the court, further breaking down the overall percentage is even more interesting. The correction rate of cases coming directly from the superior courts in 1969 continued at approximately 40 percent; the rate among cases which had been heard by the court of appeals was 65.9 percent. A further breakdown shows 52.4 percent of appeal-of-right cases corrected and 75 percent of certification cases corrected. The possibility posited earlier that corrections would decrease because of court-of-appeals filtering is roundly smashed. Rather it seems that court of appeals action increases the possibility of correction. Probable reasons for this phenomenon are that the supreme court was hearing more difficult cases—at least through certification—in which the court of appeals was failing to pick up the difficult points in the cases, that the court to some extent selected cases for certification that it thought were decided incorrectly by the court of appeals, and the supreme court had time to carefully study each case. Whatever the causes of the higher correction rate, it clearly is a healthy trend—the supreme court is exercising a strong leadership role and the law is being made more definitive.

THE PROBLEM OF DOUBLE APPEALS

Edson R. Sunderland*

The house of lords as an appellate court is strictly a court of second appeal. No case goes to that court from any trial court in England. It hears appeals in civil cases only after they have already been reviewed by the court of appeal; it hears appeals in criminal cases only after review by the court of criminal appeals. Its sole function is to review the action of reviewing courts, to reexamine judgments which have already been subjected to the careful study of an appellate tribunal. (9 Halsbury: Laws of England, 22.) It has no other appellate jurisdiction.

In the United States there is no appellate court, except the supreme court of Texas, with similar jurisdiction. The supreme court of the United States is partly a court of first appeal and partly a court of second appeal. In every state except Texas where there is an intermediate appellate court, the highest court is partly a court of first appeal and partly a court of second appeal. In other words, with the exception named, the highest courts in all our jurisdictions where intermediate courts exist, combine two functions—they correct the errors of trial courts in certain classes of cases and they review the considered opinions of appellate courts in other classes of cases.

There is, however, no uniformity among the various American jurisdictions in the classification of cases to be sent to the respective courts of review. Almost any case, which goes directly to the highest court in one state, may be sent to the intermediate court in some other state, and even in the same state successive statutes frequently shift jurisdiction back and forth between the higher and lower reviewing courts.

This system is a hybrid. It combines and intermingles two distinct theories of centralized judicial control.

One of these theories is that employed in the English system already described. The other theory is that employed in most American states, where a single reviewing court is so organized as to handle all the appellate business of the state and finally dispose of every case on first appeal from the trial courts.

Twelve states and the federal government combine the two theories, though each of these states originally employed the plan of one appeal to a single court of review, and later destroyed the symmetry of its appellate system by dividing appeals into two groups, one of which continued to go directly to the court of last resort while the other group was sidetracked into an intermediate reviewing court.

States Allowing Two Appeals

These states are Alabama, California, Georgia, Illinois, Indiana, Louisiana, Missouri, New Jersey, New York, Ohio, Pennsylvania and Tennessee. Three others, Colorado, Kansas and Kentucky, tried the plan, but abandoned it after several years' experience.

The inevitable result of any departure from the single reviewing court is the double appeal, as any adequate examination of the principle which should govern the assumption of jurisdiction by the highest court after decision by an intermediate court, must deal primarily with the problem of double appeals.

It is quite obvious that as a means of administering justice, *double appeals are seriously objectionable.*

In the first place they involve an economic waste of time, money and effort. The allowance of a second appeal is analogous to the granting of a new trial. Every observant lawyer is aware that the whole trend of modern procedure is toward the development of methods which will enable cases to be so prepared before trial, so presented at the trial, and so dealt with on review, that they will not have to be tried again. These are exactly the same reasons why cases should be so reviewed that they need not be reviewed again. Litigants *cannot afford* either the time or the expense of repeated appeals. The public cannot afford to maintain a judicial establishment for continually *doing over again* what ought to have been done well enough in the first place.

In the second place double appeals discredit the judiciary. Public confidence in the courts is undermined by the spectacle of one appellate court reversing another, particularly when such reversals are by divided courts and the final decision may represent the opinion of the minority of the judges who passed upon the case.

In the third place, double appeals introduce a gambling element into litigation, which discourages resort to the courts and thereby impairs their usefulness as instruments of government.

All of these objections will doubtless be conceded. They account for the strong and increasing opposition in England to the house of lords as a second court of review, and for the widespread regret that when that ancient tribunal was abolished as a judicial institution in 1873 a sudden revulsion of sentiment resurrected it from the grave. They explain the refusal of most American states to have anything to do with a judicial system which recognizes double appeals as a normal feature of appellate practice. And they invite inquiry regarding the means which they have adopted in those jurisdictions which employ intermediate courts of review, to minimize the burden of double appeals.

Restricting Second Appeals

The most obvious way to restrict second appeals is to limit the group of cases which goes to the intermediate court and enlarge the group which goes directly to the court of last resort. This method, as already suggested, has been employed to a greater or less extent in every American jurisdiction having an intermediate court, with the exception of Texas.

While it necessarily reduces the aggregate amount of damage which can be caused by the taking of successive appeals, its effectiveness depends entirely upon the distribution of first appeals between the two appellate courts.

An examination of the statutes discloses no sound principle upon which appeals can be divided between the intermediate and the highest court. Every jurisdiction differs from every other, and it may almost be said that there is not a case going to the highest court in one state which does not go to the intermediate court in some other state. This want of any stable basis for distribution of appeals is further exemplified by the continual shifting which has occurred in many states in apportioning appellate jurisdiction between the several courts.

Not only do we find this extraordinary variety in the character of the cases which enjoy the benefit of direct appeal to the highest courts, but there are wide differences in the proportion of first appeals and second appeals coming to those courts. In New York and Ohio the number of cases which can be taken on appeal directly to the highest courts is very small, and most of the business in those courts consists of second appeals brought up from the intermediate courts. They constitute from 80 to 95 percent of the appellate business done. In other states the percentage of second appeals is much smaller. In Tennessee about 35 percent of the cases in the supreme court are second appeals, and in California they constitute about 30 percent. The business of the supreme court of Illinois is about 16 percent second appeals, while in Georgia and Indiana from 10 to 20 percent of the cases in the highest courts are second appeals. In Alabama and Louisiana less than 10 percent of the cases in the supreme court are second appeals, and in Pennsylvania second appeals make up less than 3 percent of the business of the supreme court. (Third Report Jud. Council of Mich., 175.)

It is quite clear from these figures that in most of the states which have intermediate appellate courts, the possible use of double appeals has been severely restricted, and the court of last resort operates chiefly as a court of first review.

This at once suggests the question: If it is deemed advantageous to send so many cases directly to the highest court, in order to avoid the delay, expense and other evils incident to double appeals, why not send them all there? If a single appellate court is desirable for some classes of cases, why is it not equally desirable for all classes?

The only answer which could be made is that there is a limit to the load which a single court can carry, and that when the volume of appellate business exhausts the capacity of a single supreme bench, an intermediate court must be employed to draw off and dispose of additional business as it develops.

How to Avoid Great Waste

But a study of modern methods of appellate court organization leads to the conclusion that the operating capacity of a single reviewing court is far greater than might be supposed, and that its load may be almost indefinitely *expanded*

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without materially diminishing its efficiency or destroying the unity and harmony of its jurisprudence.

If this conclusion is correct, and some reasons in its support will presently be offered, the system of dividing appellate jurisdiction between two courts, one of which disposes of cases finally on first appeal while the other is a mere waystation from which cases must be taken to the higher court on a second appeal, is not a satisfactory method of appellate control over litigation.

Another method of curtailing the evils of double appeals is to make the decisions of the intermediate courts final in designated classes of cases.

Two of the bases for such a classification have been the character of the controversy and the pecuniary amount involved. One or both of these have been tried to a limited extent in Alabama (Code, 1928, Sec. 7309), Georgia (Central of Ga. Ry. vs. Yesbrik, 146 Ga. 620), Illinois (Laws, 1929, p. 578), New Jersey (Comp. Stat., 1910, p. 2207), Ohio (Const. Art. IV, Sec. 6; Throckmorton's Code, 1930, Sec. 12251) and Pennsylvania (P. L. 1895, p. 212).

Neither basis is sound as an absolute rule of jurisdiction. Litigants would doubtless have no just reason to complain over the refusal of a second appeal in cases involving small amounts, but the jurisprudence of the state would be likely to suffer from views announced by one intermediate court, which were inconsistent with the views of some other intermediate court, if they could not be reconciled or corrected by a central judicial authority. And as for prohibiting recourse to the court of last resort in certain types of controversies such a system would destroy the possibility of a unified jurisprudence in those fields of the law.

The comparatively slight use made of these restrictions upon the right to take successive appeals, would seem to indicate that they have little to offer as a practical remedy.

Appeal by Certiorari

But there is another method of restricting double appeals which is much more effective and far more widely used. I refer to the requirement that no second appeal can be taken unless leave is obtained either from the intermediate court or from the court of final review. Do either of these plans satisfactorily accomplish the purpose of reducing the number of second appeals to a sufficiently low point without impairing an adequate unified control over the jurisprudence of the state by the court of last resort?

The first is obviously insufficient. No court likes to be reversed, and it is too much to expect that an intermediate court would exercise a disinterested discretion in passing upon applications for leave to appeal from its own decision. But even the most objective attitude would give the higher court scant opportunity for controlling the administration of justice, for each decision rendered by the intermediate court would necessarily, in the absence of bad faith, represent the court's best judgment as to the law to be applied and the same reasons which actuated the court in reaching its original decision would ordinarily prevent it from discovering any need for allowing an appeal.

On account of this unavoidable tendency for courts to be satisfied with their own decisions, it is usually provided that the discretionary power in the intermediate court shall be exercised by certifying either the whole case or certain controlling questions in the case to the higher court. The certification in effect transfers the case, prior to any decision by the intermediate court, to the court of last resort. It relieves the lower court of the necessity of deciding the case, either absolutely or until the higher court has answered the certified questions. It is not, therefore, a technical review, although it may involve almost as much time and expense.

Where this procedure is employed there would be a tendency toward excessive certification, for in that way the intermediate court can escape much or all of the responsibility for its cases by passing them on to the higher court. The result would be a failure of the intermediate court to carry its proper load.

There appears, therefore, to be no way in which an intermediate court can satisfactorily exercise the authority to determine what cases should be carried up to the court of last resort.

We turn, then, to the other source of discretionary authority, namely, that of the highest court.

Every jurisdiction which employs an intermediate court system vests power in its highest court to authorize second appeals where they cannot be taken as a matter of right. In a number of states, including Alabama, Georgia, Illinois, Louisiana, New York, Pennsylvania and Tennessee, there is merely a grant of general discretionary power to allow such appeals. In California leave will be granted when it is necessary in order to secure uniformity of decision or the settlement of important questions of law. In Missouri leave will be granted when it appears that the intermediate court failed to follow the last previous ruling of the Supreme Court. In Ohio leave will be granted in cases of public or great general interest. In Texas a second appeal will be allowed when the court of civil appeals has erroneously declared the law of the case. (See Third Report of Jud. Council of Mich., pp. 176-183.)

It is obvious that under any of these provisions the losing party in the intermediate court can always make at least an arguable showing for a second appeal. If the highest court exercises a general and undefined discretion, the latitude of the applicant in making this showing is almost without limits. If it is necessary for him to show the upper court that the objectionable

decision destroys the uniformity in the jurisprudence of the state, or that it contravenes the last previous ruling of the supreme court, or that it involves a question of public or general interest, or that it constitutes an erroneous declaration of the law of the case, he can not only assert that such is the case but he can always produce a host of reasons and abundant authority to prove it. The result is that no decision of the intermediate court is really final, and every one carries within it the possible grounds for a second appeal.

Litigants, under such a system, are caught in the toils of a procedural complex which may in any case, in spite of all that can be done to prevent it, involve them in the expense, delay and uncertainty of a double appeal. It is a definite risk which must be reckoned with in every resort to litigation, and it may well deter a prudent party from making any attempt to invoke the aid or protection of the courts. If he simply charges off his own claim as a loss, or settles the claim against him on any basis which will keep him out of the clutches of the law, he will at least know the amount of his loss, will be free from a contingent liability for an indefinite series of costs and fees, and will escape the long uncertainty which in itself constitutes one of the heaviest burdens of litigation.

Second Appeals Too Frequent

That the risk of double appeals is by no means a remote one is shown by figures obtained in a number of states. In California, in the three years from 1925 to 1928, 2,907 opinions were rendered by the intermediate courts, and there were applications for second appeals in 1,115 of those cases. (Waste, C. J., in 1 Cal. St. Bar. Proc. 93.) In Indiana second appeals are sought in one out of three of the cases decided by the intermediate court (6 Ind. L. J. 50), and in Ohio second appeals are sought in one out of five cases (35 Ohio L. Bulletin 530). These figures probably represent prevailing tendencies everywhere.

In considering the effect of a system of possible second appeals upon the usefulness of the courts, it is not so important how many appeals are actually granted nor how many reversals occur. It is the threat of a second appeal in every case taken to an intermediate court which makes the system so unsatisfactory to ordinary litigants. Most people feel it necessary to know approximately how much time a journey will take and what it will cost, before they embark on it. If they cannot find out they will stay at home, unless forced by extraordinary necessity.

But wholly aside from its deterrent effect upon public recourse to the courts, discretionary second appeals are intrinsically unsatisfactory. They impose the burden upon the highest court of investigating a large number of applications most of which are without merit. All the labor devoted to cases in which the application for a second appeal is refused, contributes nothing to the jurisprudence of the state.

Furthermore, parties applying for a second appeal are not satisfied by the denial of their requests with no reasons offered in support of such denial. There is frequently the suspicion that the application was not properly considered, or that it was refused in order to save the court trouble rather than because it had no merit. Where the discretion is a broad one it is impossible to determine, from a study of applications granted and refused, any principle upon which the court acts in exercising its discretion.

In an exhaustive study of Appellate Court and Appellate Procedure in Ohio, made by Professor Silas A. Harris of Ohio State University and just published by the Johns Hopkins Institute of Law, it was sought to discover the principles upon which the supreme court of that state administered its authority to certify cases from the intermediate courts on the constitutional ground that they involve questions of public or great general interest. As Professor Harris pointed out, a court will be overloaded with such motions to certify if lawyers and litigants believe that one case has as good a chance as another to get a hearing. (p. 42.)

Here is the specific question to which he directed his investigation: "Is this device [the motion to certify] used merely to check the amount of business the court will handle, or is it used primarily to clear up and correct complicating and erroneous rules of law . . . ?" (p. 45). In an attempt to answer this question he examined all the motions to certify filed in the supreme court during a period of two years. There were 898 of these cases, which he classified according to type of case, disposition below and appellate districts. His conclusion was that it was impossible "to find the existence of a policy of the supreme court with respect to granting motions to certify. There are too many variable factors involved to justify . . . any satisfactory conclusions." (p. 47). But he added:

"These data do, however, show that a large part of the court's time is taken up with the determination of questions without making any contribution to the law of the state or giving counsel or litigants any answer to the inquiry they may make with respect to disputed matters of law. The only result of the court's action is the termination of litigation. To this extent the court is not performing its chief function of making the law uniform and unambiguous throughout the state." (p. 49.)

It is very clear from this brief examination of the problem that any system of intermediate appellate courts is subject to serious objections of many kinds. The only alternative is a single reviewing court.

(2) Competing Among Courts: The Problem of Coherence

MORE APPELLATE COURTS

Geoffrey C. Hazard*

I think it also necessary to reject an increase in the number of appellate judges as a long range solution. Obviously some efforts can be made in this direction. Thus all states that now have a two-tier system of courts could introduce an intermediate appellate court system without complicating their judicial establishments beyond what has been found tolerable in the more populous states. Some increase could be made in the number of intermediate appellate courts, and in the number of judges now sitting on present intermediate appellate courts. But the danger lies not far ahead that proliferation of the number of intermediate appellate courts and intermediate-appellate-court judges will have serious consequences for the integrity of the judicial establishment.

This is not a phantom fear. It is a known fact, for example, that a committee ceases to be effective as such when it becomes enlarged beyond a certain point, and this is also true of a legislative body, as attested by accepted limitations on the size of Congress and the state legislatures. The same intrinsic limitations of scale are found in business and public administration and, indeed, are the subject of a management subscience. It seems to me that the same is true of the judicial establishment. The federal system is already confronted by this dilemma.

* * *

In California an effort has been made to maintain the full function of the intermediate appellate courts. To sustain this burden, the number of intermediate appellate courts has been increased from three to five, and there has been an even greater increase in the number of judges sitting on those courts. To push the California development a few steps further, suppose that there were ten or fifteen intermediate appellate courts in that state ten years hence. In such circumstances, what were once authoritative appellate tribunals, subject to occasional review by the Supreme Court of California, would have been converted into a judicial Tower of Babel. The proliferation of utterances could divest any one of these courts of significant authority.

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A PROPOSAL FOR A "TERMINAL" INTERMEDIATE APPELLATE COURT FOR VIRGINIA

Graham C. Lilly & Antonin Scalia*

The foregoing suggests that the fact that the Supreme Court of Appeals has many more cases than it can handle adequately is the bright side of the picture. What makes the situation truly bleak is that the Court has so many *fewer cases than it should*. The real indictment of Virginia's appellate system is not those figures demonstrating that the Court is being confronted with a burden that is becoming unmanageable. Rather, it is the statistics showing that between 1960 and 1969, while civil litigation concluded in the trial courts was increasing 43 percent[166] and jury trials in law cases were increasing 74 percent,[167] the appeals sought in civil cases were actually *decreasing*.[168] In 1959, the ratio of civil appeals sought to civil trial cases concluded in Virginia was 1 to 116; in 1964 it was 1 to 136; and in 1969 it was 1 to 176.[169]

What is clearly needed, then, is a reform of major proportions. We must fashion an appellate system that not only can meet the presently increasing caseload but also can handle many appeals currently rendered impracticable--and that can devote to all of these cases a degree of attention beyond what is now accorded to the denial of a petition for appeal. Such a substantial improvement simply cannot be achieved by any or all of the desirable internal reforms. It might be achieved by increasing the size of the Court substantially and having it sit in a number of separate divisions--perhaps as many as five. But, in addition to encountering the disadvantages discussed earlier in connection with the permanent division, this solution is simply an unintelligent allocation of available talent. In any field of business or government, when decision-making capacity must be increased the solution is not to enlarge the number of decision-makers at the highest level. It is rather to delegate the decision of matters of lesser consequence to other decision-makers, while retaining at the top unity of control. Or, to apply this concept to

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the judicial system, the solution is to consign the less important appeals to an inferior appellate court.

The idea of a lower appellate court has been opposed officially by the State Court System Committee of the Virginia Trial Lawyers Association[110] and unofficially (in correspondence with the authors) by the Virginia State Bar Committee on Judicial Selection and Tenure.[111] It is probably correct to state that the vast majority of the practicing bar in the Commonwealth is opposed to the concept of an inferior appellate court. It is possible that some of this opposition is attributable to an inadequate appreciation of the current critical condition of the state's system of appellate justice, a subject discussed earlier. But it is certain that the root cause of almost all of this opposition is an aversion to the notion of a double appeal. That aversion is certainly justified. A second appeal is economically wasteful, both to the litigants and to the system that must provide it. It denies the substance of justice by delaying it; and it often destroys the appearance of justice by providing the spectacle of a judgment reversed and then reinstated. It is doubtless true that when one thinks of a lower appellate court one envisions the systems in states such as New York or Ohio, which present these evils. In other words, the lower appellate court is generally considered synonymous with the intermediate appellate court—the type of lower appellate court from which second appeals are routine.

This identification is unfortunate. Acceptance of a lower appellate court does *not* require approval of double appeals. In 11 of the 24 states that have inferior courts of appeals, those courts are *not intermediate but terminal*, in the sense that almost all the supreme court's business comes directly from the trial courts and not up on second appeal.[112]

Once it has been determined that all appeals will not be funneled through the lower appellate court on their way to the court of last resort, the most acute problem presented is that of deciding which appeals will go to the high court. The issue is especially important in a terminal system, since the cases assigned to the lower court will not merely be delayed in their progress to the high court, but will be subjected to final disposition.

Before proceeding to a practical discussion of this issue, it might be well to call to mind the basic purpose to be achieved. At least in an

appellate system with a terminal lower appellate court, the object is delegation, and what is sought to be delegated are the less important appeals. But what are the criteria of "importance"? There is probably general agreement that they are twofold: (1) *The significance of the appeal for the legal system as a whole.* This criterion embraces those cases that raise issues of importance not just to the parties involved but to other litigants, and perhaps to all citizens. For example, a suit for damages involving a small monetary amount (and thus of relatively modest consequence to the immediate parties) might raise the issue whether the exemption of charities from tort liability should be continued. (2) *The significance of the appeal for the particular parties.* This criterion includes those cases that have little social importance, but are of grave private consequence to the litigants involved. Thus, an appeal from a life sentence in a criminal case, or from a $50,000 judgment in a civil case, may raise no legal issue beyond the adequacy of the evidence to sustain the judgment below.

The usual bases for dividing appeals in other states—both those with intermediate and those with terminal systems—are subject matter and monetary amount. In Texas and Oklahoma, for example, all criminal appeals go to a separate Court of Criminal Appeals;[115] in Indiana, cases involving condemnation of land or the constitutionality of a statute go directly to the supreme court;[116] Georgia divides its appeals by subject matter in several ways, both according to the legal categories into which the causes of action fall (for example, equity and domestic relations) and according to the legal categories of the issues presented (for example, extraordinary remedies and constitutionality).[117] Illustrative of division by monetary amount is the provision of Missouri law granting the supreme court exclusive appellate jurisdiction in cases involving amounts in excess of $15,000.[118]

One problem with both these bases of division is that they are difficult to apply. Any lawyer knows that even such a fundamental subject-matter distinction as that between tort and contract cannot always be drawn with precision. As for monetary amount in dispute, how is this to be determined in a suit for pain and suffering (unless the plaintiff's claim is to be taken at its face value); or when the claim is $10,000 but the judgment merely $2,000; or when the suit seeks nonmonetary relief?

A convincing demonstration of the complexity of seemingly straightforward subject-matter and monetary divisions is contained in the 317 pages of the 1964 *Washington University Law Quarterly* devoted entirely to a discussion of the law relating to the allocation of original appellate jurisdiction in Missouri.[119] That symposium cites literally hundreds of cases in which jurisdictional conflicts between the appellate courts were argued and decided—hardly an efficient use of judicial time. Division by subject-matter or monetary amount also raises the problem of facile abuse, since it is relatively easy for a skillful attorney to inject a plausible issue or inflate the monetary value of what is sought.

But most important of all, division by subject-matter or by monetary amount simply does not achieve the goal of delegating cases to the inferior court on the basis of their relative *unimportance*. All tort cases are *not* of negligible social importance; nor are all cases raising constitutional issues of general public concern—if for no other reason than that the issue is frivolous. Likewise, one cannot categorically state that all cases involving real estate are of grave private concern, while all adoption cases, which have no monetary value, are necessarily of minimal public consequence. Subject-matter and monetary divisions, which generally represent an *attempt* at winnowing out the cases of importance, are simply not effective in doing so. There is, in fact, no manner of doing so except on a case-by-case basis.

Case-by-case selection of the "important" cases is made regularly by the United States Supreme Court and by many state supreme courts as well. A similar system should be adopted in Virginia, with one important difference: The selection should be made upon appeal from the judgment of the trial court, rather than after an intermediate appeal. In other words, the Supreme Court of Appeals of Virginia would merely continue its present practice of hearing petitions for appeal. Its determinations would, however, no longer purport to be based upon the "merits" of the cases, but rather upon the public or private importance of the issues presented—a factor much more readily examined. The simplified procedures for hearing petitions, which have been criticized above as an inadequate substitute for a genuine appeal, would be entirely appropriate for this new purpose of merely dividing jurisdiction.[120] The

effect of the denial of a petition would no longer be the affirmance of the judgment below but merely the transfer of the appeal to the lower appellate court. The number of petitions to which the Court would have to devote its attention would probably not exceed what it would be under the present system, if the costs of an appeal to the Court are not reduced and if a substantially less expensive appeal to the lower appellate court is made available of right. Most appellants could be expected to select the lower court of their own accord, and most appellees would be content to let the controversy rest there.

Some modifications to the purity of this system are required under present law, and some others may be desirable. Appeals from the State Corporation Commission and from disciplinary proceedings against members of the bar *must* be accepted by the Supreme Court of Appeals under current statutes;[121] they would probably all be of sufficient social or private importance to be accepted anyway. Beyond these, no other appeal is currently mandatory.[122] It might in addition be desirable to require the Court to accept appeals from criminal convictions in which the penalty imposed is set at death, life imprisonment or a term of years practically equivalent to life imprisonment. These are cases of enormous importance to the individual, and appeal would probably be routinely granted anyway. A statutory provision that they be placed automatically upon the hearing docket would therefore conserve time as well as ensure a full review at the highest judicial level. Further tampering with the discretionary character of the appeal to the Supreme Court would be unwise. It might at first seem useful, for example, to exclude petitions in civil cases seeking money only where the claim is below a specified amount; but one such case might involve a legal issue of major societal importance. Or it might seem desirable to require the Court to accept civil appeals in excess of a specified monetary value; but this injects the complexity of determining in each case what the real value is. Moreover, each statutory provision requiring either acceptance or rejection of a certain type of appeal deprives the system of a portion of its major benefit: the Court's ability to take as many cases of genuine importance as its schedule will allow.

This proposed system of dividing jurisdiction does not drastically alter present practices of the Supreme Court of Appeals—if it is true,

as conjectured earlier, that the "merits" determination of a petition for appeal is really becoming something less than that. The cases accepted for review might well be identical in kind to those accepted at present, though one might expect some increase in the number of cases accepted, since the simplification of the task of hearing and considering petitions would leave more time available for considering appeals. The fundamental difference between present and proposed practice is that under the latter the appeals refused by the Supreme Court would be heard by the lower court.

In those judicial systems in which the lower appellate court is intermediate in nature, control of the course of its decisions is achieved by directly reviewing them. When the lower court is terminal, the problem is more complex. There are really two types of control that must be considered. First, and more important, is control over development of the state's common law and the interpretations placed upon her statutory and constitutional provisions. The necessity of retaining this control in the high court is another reason for rejecting the topical or subject-matter division of jurisdiction: If the lower court is to handle all criminal cases, for example, how is the Supreme Court to guide development of the state's criminal law? But under the division of jurisdiction proposed above, control over the state's corpus juris will be assured. The Supreme Court of Appeals will have placed before it, for its selection, a broad cross-section of all the legal business of the Commonwealth. The judicial resources that it now expends in hearing petitions for appeal will be devoted to choosing from among these cases those of the greatest importance. For the infrequent occasions on which an appeal rejected and transferred to the lower appellate court (or an appeal presented originally to the lower appellate court) contains a substantial new issue of law, an extraordinary procedure for certification may be provided. The chief judge of the lower court, when he deems it appropriate, might submit to the Supreme Court a brief statement of the facts and issues presented in a case and "certify" a legal question to be answered. The high court would either answer the question, or transfer the entire case to its own jurisdiction, or decline to give the requested ruling. The answer to the certified question could be quite short in many instances, and it would be published, along with a brief statement of facts and issues, in the Virginia Reports. That this

procedure may exist without being abused is proven by the infrequent use of a similar provision in the federal court system.[123] Essentially, however, the proposed appellate system assures the Supreme Court's control of the jurisprudence of the Commonwealth by the fact that a representative selection of cases of every type will be presented directly to it.

The second kind of control pertains to the correct functioning of the lower appellate court. It may happen, for example, that the lower court neglects to apply a certain well-established principle of Virginia law and thereby reaches the incorrect conclusion in a particular case. In a truly "intermediate" appellate system, this error would be subject to control upon appeal. A terminal system, however, rests upon the judgment that this type of control, except in cases of flagrant abuse, is not worth its high cost. Against the extraordinary contingency of intentional misapplication of the law or other judicial impropriety there may be allowed a writ of certiorari from the judgment of the lower appellate court *on the narrow ground* that a fair and impartial review was not provided. (Sanctions should be imposed for the abuse of this writ, and it is expected that it would almost never be granted.) But against the more probable human errors of the lower appellate court, the one protection would be that the litigant is given the benefit of the collective judgment of a panel of competent jurists, who exchange deliberations before arriving at a decision. Error, when there is any, will be unlikely to extend beyond the particular case in the system here proposed, since, as will appear below, few of the opinions of the lower court will have any precedential effect, and those that do will be subordinated to cases decided by the high court.

The proposed system would function as follows: From the date of judgment in the trial court, the losing party will be allowed thirty days in which to file with the trial court and serve upon the successful party a notice of appeal. This notice shall specify whether the appeal is being taken to the lower appellate court or is sought to be taken to the Supreme Court of Appeals. In the latter case, the appellant shall have an additional period (20 to 30 days) in which to present his petition for appeal to the high court. A copy of this petition will be served upon the appellee. The appellee shall then have thirty days after such service in which to file a counter-petition opposing the Court's acceptance of the appeal—or, if he wishes, supporting it. (Note that he may wish to support the high court's acceptance, because the effect of rejection is not affirmance of the judgment, but transfer of the appeal to the lower appellate court.) The petition and counter-petition may be typewritten, and their form and content should be prescribed by rule of court. Basically, however, the petition should contain (1) a statement of the issues presented; (2) a statement of the case summarizing those parts of the controversy germane to the appeal; and (3) a section setting forth the reasons for granting the appeal. The purpose of the last section, of course, is to persuade the Supreme Court to hear the case. It would not be to the point to argue that the decision below is erroneous; what would be required is demonstration that the question presented is sufficiently important for the Supreme Court to review. Such "importance" might be founded upon the public significance of the issue, the apparent conflict or absence of legal authority, or merely upon the immediate consequence to the parties concerned.[127] It is imperative to the expedi-

tious operation of this system that the petition and counter-petition be kept reasonably short.

The Supreme Court of Appeals will then accept or reject the appeal *on the basis of the petition and counter-petition alone.* No oral hearing will be accorded. The decision will be made by the Court in the same manner as decisions on petitions are now usually made—initially by a single justice, followed by consultation with two others.[128] It should be emphasized, however, that the justices will be examining the case at this stage only for its importance and not for its merits (except, of course, to the extent necessary to weed out frivolous cases). If the appeal is accepted, the case will be set on the docket in the usual fashion, briefs will be scheduled and oral argument will take place. If the appeal is rejected, the entire file will be sent to the lower appellate court, and the case shall thereafter proceed as though it had originally been filed there.

Conversely, if the appellant's notice of appeal specifies appeal to the lower court, the appellee shall have fifteen days in which to file and serve a notice of removal, which will be indication that he desires the appeal to be heard by the high court. He will then file a petition for removal, which in substance is like a petition for appeal, and his opponent may file a counter-petition. The case would then be disposed of in the fashion described above.

If, to consider the final possibility, the appellant's notice of appeal specifies appeal to the lower court and the appellee files no notice of removal within 15 days, appellant shall have thirty days in which to file his brief with the lower court of appeals, and the appellee thirty days in which to reply. All documents filed with the lower court of appeals may be typewritten, including excerpts of the record below. At any time prior to rendering a decision in the case, the lower court of appeals may, on its own motion, certify a question of law to the Supreme Court of Appeals. The latter may either respond to the question, reject it, or require that the record be sent up for decision of the entire matter in controversy. If the entire case is docketed in the Supreme Court, it will be disposed of pursuant to the usual procedures. At any time within thirty days following a decision by the lower court of appeals, the losing party may apply for certiorari to the Supreme Court of Appeals on the sole ground that he was denied a fair and impartial review.

THE EROSION OF FINAL JURISDICTION IN FLORIDA'S DISTRICT COURTS OF APPEAL

William D. Rives III*

From the the time of its origin the supreme court has experienced a steady increase in its caseload, and by 1956 the point was reached where over 1,300 cases were added to the court's docket in a single year. With a workload of this magnitude a single court of only seven judges could not be expected to provide a prompt and adequate review in each case. It had become apparent by this time that the wheels of justice were grinding slowly to a halt with no sign of relief for the future unless effective changes could be made in the appellate system. The Judicial Council of Florida[4] undertook this task and began a study of judicial review. After evaluation of a number of plans, the council settled on the addition of another tier of appellate courts as the proposal that would best meet the needs of the state. The advantages to this plan were twofold. First, the additional courts would drastically reduce the workload of the supreme court, and second, the long trek to Tallahassee for every appellate review would be ended since the courts could be located throughout the state where litigation was heaviest.[6]

The draft of the proposal submitted to the legislature could have been framed so that the jurisdiction of the supreme court would have remained intact. Had this been done, the district courts would necessarily have enjoyed a restricted jurisdiction that would have limited them to an *intermediate* court status. However, a more important role was envisioned for the proposed courts. Consequently, the council recommended that the jurisdiction of the supreme court be constricted to the extent necessary to insure that most litigation in the state would not go beyond the district courts.[7] The proposal was accepted by the legislature,[8] and after ratification by the voters[9] the district courts of appeal became a reality.[10]

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*J.D., U.Fla. 1970. Reproduced from 21 U.Fla.L.Rev. 375.

6. A major deficiency in the pre-district court judicial system was the time and expense required for an appeal. Since the supreme court was located in Tallahassee, a trip of over 500 miles was required of litigants from South Florida. Singer, *Convenience and Time Justify Cost*, 30 FLA. B.J. 149 (1956). The new courts initially divided the state into three districts. The First District Court of Appeal was located at Tallahassee, the Second at Lakeland, and the Third in Dade County. FLA. STAT. §35.05 (1967). The constitution was amended in 1965 to provide a Fourth District Court of Appeal. FLA. CONST. art. V, §5 (i) (1885), *as amended* (1965). This court is located in Palm Beach County. FLA. STAT. §35.05 (1967).

7. The *Florida Bar Journal* carried a number of articles by council members and other concerned Floridians illustrating the type of court system that was envisioned. Some of the more pertinent excerpts follow:

"Many lawyers in the past have opposed the creation of any appellate courts in addition to the supreme court on the assumption that the new courts would be be 'intermediate' only, thereby requiring the labor and expense of *two* appeals instead of just one. The proposed revision guards against this result by giving the district courts of appeal *final* appellate jurisdiction. Only in a very limited area is there the possibility of a further appeal.

The narrow scope of supreme court jurisdiction to review district court decisions is specified in the amended constitution. Review by appeal from those courts is restricted to decisions: (1) initially passing upon the validity of a state or federal statute or treaty, or (2) initially construing a controlling provision of the Florida or federal constitution.[9] Since an appeal is granted to a litigant as a matter of right,[10] it is apparent that a district court was not intended to be the last stage in litigation involving the validity of statutes or the construction of constitutions. Instead, it is clear that the supreme court is to pass ultimately upon such questions.

Jurisdiction of the supreme court to review district court decisions by certiorari, however, reflects a different purpose. Under these provisions the court is not required to assume jurisdiction,[11] but in its discretion may do so when the district court decisions:

> (1) affect a class of constitutional or state officers, or
> (2) pass upon questions certified by the district court to be of great public interest, or
> (3) are in direct conflict with another district court or the supreme court on the same point of law.[12]

The narrow scope of review afforded by these provisions, when considered in light of the purposes underlying amended article V suggests that the broad area of *judge made* law was to be left to the district courts without significant interference by the supreme court. The application of the certiorari provisions, however, has failed to reflect the original intent of the constitutional draftsmen. Rather than sustaining the finality of the district courts, these provisions have instead proved to be the source of their erosion.

"It is not too much of a stretch of the realities to view the proposal as creating one appellate court of four branches or divisions. The coordinating division will be the supreme court itself which will reconcile any conflicts that may develop in decisions of the other three branches . . . . The other three divisions (the district courts of appeal) will have *final* appellate jurisdiction of substantially all other cases arising within their respective districts." Beggs, *A Foundation on Which Other Improvements Can Be Erected*, 30 FLA. B.J. 155-56 (1956).

"*These district courts are not intermediary courts. They have final appellate jurisdiction in most cases.* Cases of major importance would go directly to the Supreme Court. Thus the new courts do not present a means for a second appeal, but can held keep dockets current." Gaines, *The Pending Amendment Will Enhance Regard for Judicial System*, 30 FLA. B.J. 142 (1956).

"If the judges of Appellate Courts are men of stature — and the responsibility of seeing that they are rests squarely with the Bar — their decisions should have a convincing finality that is not now possible with an overloaded Supreme Court calendar and overworked justices.

"The District Court of Appeal could, with the cooperation of litigant-conscious lawyers, acquire an acceptance in most matters that would about equal that of the Supreme Court. They could provide an early 'end of the road' for much litigation.

"If, however, with this remedy at hand, the Supreme Court permits itself to continue to be involved in the wallow of too-much-to-do, it will endanger that prospect." Pennekamp, *A Personal Obligation*, 30 FLA. B.J. 136 (1956).

Although the district courts have been a postive addition to the judiciary of Florida, there are instances where they have failed to perform functions that their constitutional underpinnings would permit. This is to be seen occasionally in those cases where unerring application of *stare decisis* leads to the utilization of a Florida supreme court decision as precedent in a district court case. Under these circumstances the constitution does not provide for review by the supreme court unless a district court chooses to certify its decision as a question of great public interest.[13] If the district courts choose to assume this finality without remaining alert to the continued viability of the doctrines and rules that are applied, the danger arises that the legal demands of Florida will outpace the growth of its case law.

An example of this problem[14] is found in *Wilson v. Redding*,[17] a case based upon a suit to recover damages for injuries sustained in an automobile collision. While the case was in the trial court, a count filed by the wife for loss of consortium was dismissed. The district court affirmed this action on the authority of *Ripley v. Ewell*,[18] a 1952 Florida supreme court case, which held that a wife cannot maintain an action for loss of consortium. Referring to the *Ripley* decision, the district court noted that "Florida followed the common law rule and, there having been no statutory changes since, that case is still controlling."[19] The language in the *Ripley* case reveals that the doctrine when established in 1952 was not based on the needs of the state. It was adopted instead because it was part of that amorphous body of common law that Florida by statute inherited from England.[20] Since a wife could not maintain an action for loss of consortium in Britain, the court reasoned that Florida's acceptance of the common law carried with it the same prohibition. An insight into the earlier philosophy of the supreme court is to be found in its recognition of a decision in the federal courts, which had termed the consortium rule "specious and fallacious."[21] Despite this attitude, the court nonetheless thought it should only consider what the law was, and not what it should be.[22]

In the years since *Ripley* the supreme court has taken a more positive attitude toward judicial lawmaking and, consequently, it is doubtful that the court would feel itself constrained today to adopt a rule of law whose primary virtue rests on its antiquity.[23] By the same token, the district court would have been justified in assuming a less quiescent role in the *Wilson* case. There was no assurance that the consortium rule when first adopted in the state satisfied any legitimate purpose. To apply the same principle, years later, solely on the basis of *stare decisis* is to perpetuate precedent at the cost of legal development. While there may be valid reasons to support retention of the rule, the *Wilson* court failed to discuss them. A more meaningful decision would have been possible had the court instead based its holdings

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17. 145 So. 2d 252 (2d D.C.A. Fla. 1962).
18. 61 So. 2d 420 (Fla. 1952).
19. Wilson v. Redding, 145 So. 2d 252, 253 (2d D.C.A. Fla. 1962).
20. FLA. STAT. §2.01 (1967).
21. Hitaffer v. Argonne Co., 183 F.2d 811, 819 (D.C. Cir. 1950).
22. Ripley v. Ewell, 61 So.2d 420, 423 (Fla. 1952).
23. *See* Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).

The preceding cases center about the difficulties that may arise if the district courts combine an *intermediate* court attitude – through failure to evaluate precedent – with an assumption of finality. We turn now to a more common occurrence where the courts, aware of the need for reevaluation, refuse to carry it out. The district courts have long thought that doctrinal development lies within the exclusive prerogatives of the Florida supreme court. Commenting upon what it thought to be the proper technique for reexamination, the district court in *Walker v. United States Fidelity & Guaranty Co.*[32] stated:[33]

> If this is to be done, it is our view that such re-examination should be made by our Supreme Court which first pronounced the doctrine as the law of Florida.

The district courts have consequently turned to the use of certification in order to allow the supreme court to review its earlier pronouncements. However, as the court in the *Walker* case learned, there are drawbacks to this procedure. In that case, the district court stated that its decision was controlled by a 1939 Florida supreme court decision,[34] which held that a sheriff or his surety may be held liable for acts done by virtue of the office, but not for acts done under color of the office. Upon the district court's refusal to deviate from the doctrine, the appellant petitioned for certification, alleging that the supreme court in more recent decisions had cast doubt on the validity of the rule, and also that it had "been discredited and receded from by recent decisions rendered in other jurisdictions."[35] It was recognized by the court that there were "cogent reasons" to support reexamination. Yet in certifying the case, the district court was careful to point out that it was not advocating a change in doctrine. The majority preferred instead to remain neutral and let the supreme court have the opportunity to reevaluate its earlier decision. However, the supreme court simply denied the petition and thereby frustrated the desires of the district court that the law be reexamined.[36]

On occasion the district courts have turned to judicial advocacy in an attempt to avoid consequences similar to those in the *Walker* case. By this technique they are able to decide a case in accordance with supreme court decisions while at the same time protesting the result. Then, as *Hines v. State*[37] points out, upon certification, the supreme court will have the district court's opinion for its consideration. In *Hines* the prosecutor during his questioning of the appellant brought out the fact that he had failed to testify in his behalf at the preliminary hearing. This procedure was asserted to be a violation of the statute providing that no prosecutor shall comment on the failure of an accused to testify in his own behalf. The philosophy of the district court was exposed by its confrontation with a 1939 Florida supreme court case,[38] which in effect held that the procedure utilized in *Hines* was prejudicial

32. 101 So. 2d 437 (1st D.C.A. Fla. 1958).
33. *Id.* at 438.
34. Malone v. Howell, 140 Fla. 693, 192 So. 224 (1939).
37. 186 So. 2d 820 (1st D.C.A. 1966), *rev'd*, 195 So. 2d 555 (Fla. 1967).
38. Simmons v. State, 139 Fla. 645, 190 So. 756 (1939).

to the accused and deprived him of his constitutional right to a fair trial. Although the district court felt constrained to follow this precedent, it stated that "in all candor" were it not for the supreme court decision a contrary ruling would have been adopted. The court went on to set forth the changes it thought desirable, and upon certification the supreme court accepted jurisdiction and modified the law to conform to the district court's recommendations.[39]

A comparison of the decisions in *Walker* and *Hines* reveals their divergence on a significant point. In the former case the court was aware of "cogent" reasons for reevaluating supreme court precedent, yet the judges thought that task beyond their sphere of responsibility and consequently refused to give any indication of their views. This is disturbing in view of the fact that the district courts were given sufficient jurisdiction to participate in the development of Florida's law. The *Hines* case is beyond criticism on this point since the judges expressly advocated a change in their opinion. But even that court failed to take the ultimate step to achieve an independent decision and instead thrust that burden on the supreme court. The question must be asked whether either court was under some compulsion to shift the responsibility of doctrinal development onto the shoulders of the supreme court. Of course, many elements found within our scheme of jurisprudence would predispose a court toward this procedure. *Stare decisis* alone, with its deep historical roots, would certainly weigh heavily in a court's desire to maintain at least a degree of superficial consistency in the body of doctrine. There is also the normal judicial hierarchy that exists in most states, characterized by the deference paid to the supreme courts. Choosing between these reasons, it appears that the former is of primary concern to the courts in Florida. The district courts, especially, have grounded their refusal to engage in doctrinal evaluation in the need for uniformity of precedent in the state.

Although uniformity of doctrine is undoubtedly of importance, there are other considerations that might also be taken into account. As Chief Judge Sturgis suggested in his dissent to the *Walker decision*,[40] the district courts could refuse to follow supreme court precedent if they chose to do so. The chief judge's contention finds substantiation in the constitutional language creating conflict jurisdiction in the supreme court. As he viewed the language, it implies that the rule of *stare decisis* applies without distinction between decisions of the district courts and the supreme court. The constitution does recognize the potential existence of conflict between the courts, and more significantly, since the supreme court has only discretionary reviewing powers in the case of conflict, the constitution envisions a situation where a district court might depart from supreme court pronouncements with no further review of the decision.

It should also be recalled that the district courts were meant to assume in large measure the functions of the supreme court. Both commentators[41] and the supreme court[42] have recognized this by their pronouncements that the district courts are final courts in the judicial process of Florida. Consequently, they do have the freedom to escape from an intermediate court philosophy, which so often prevents them from molding law to meet the changing needs of the state. As Chief Judge Sturgis pointed out, there are times when the

district courts will have occasion to decide cases contrary to prior decisions of the supreme court:[46]

> [A]ny decision of a district court [of appeal] that is worthy of being certified . . . as . . . of great public interest should always be a decision that has been rendered on principles of law, ethics, and logic, attuned to the ever-living present, and that such should be so even if it is found necessary to depart, however reluctantly, from the rule of *stare decisis*.

Assuming that a district court would accept this challenge, the chief judge noted that the initial result would be a modification of doctrine that would become controlling under the rule of *stare decisis*. The supreme court would then have the option to let the case stand, or if it thought the need for conceptual consistency sufficiently great, it could review the case through the exercise of its conflict jurisdiction. In either event, the district court's ruling, substantiated by its written opinion, would be available for consideration. It is quite possible that the preexisting doctrine might find continued application, but at least it would be the product of active evaluation rather than from unyielding adherence to the rule of *stare decisis*.

Soon after the district courts became operational the supreme court enunciated its view of the respective spheres of jurisdiction that were to be enjoyed by the appellate courts. As the court emphasized in *Ansin v. Thurston*:[47]

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of . . . principle and practice, with review by the district courts in most instances being final and absolute.

The question to consider is whether the supreme court has remained true to the pronouncements of *Ansin v. Thurston*. Any encroachment upon district court finality would have to originate in the conflict certiorari provisions of amended article V because, unless the supreme court is able to find

47. 101 So. 2d 808, 810 (Fla. 1958). The court also expressed the view that failure "to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy." *Id.*

jurisdiction within the ambit of this section it has no authority to initiate certiorari review.[48] As the following discussion will show, the conservative philosophy expressed in *Ansin* has not been followed. By definitional expansion of *decisions in direct conflict on the same point of law*,[49] the court has been able to carry its jurisdiction far beyond the limited scope envisioned by the courts and the constitution.

Certiorari Review of District Court Decisions Without Opinion

The expansion of the supreme court's jurisdiction and concomitant restriction of the finality of district court decisions has been especially pervasive in those cases where district courts have rendered decisions without opinions. *Lake v. Lake*,[50] the first case to raise this problem, established the procedure the supreme court initially was to follow. In *Lake* the court was requested by petition for certiorari to review a judgment in which a district court affirmed a circuit court decision without opinion.[51] The petition was denied, the court holding that it would not examine the record to determine whether the district court's affirmance would create jurisdictional conflict with an earlier decision of the supreme court.

The decision reflected the underlying history and purpose for the amendment to article V. As the court noted, the district courts were established to be final appellate courts rather than "way stations on the road to the Supreme Court."[52] Referring to the responsibility of the supreme court, Justice Thomas stated:[53]

> Sustaining the dignity of decisions of the district courts of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own powers by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether the Supreme Court agrees with the district court of appeal about the disposition of a given case.

However, by suggesting that there might be exceptional cases where an examination of the record would be undertaken, the court did leave the door open to the subsequent enlargement of its reviewing powers.

The supreme court's dissatisfaction with self-imposed jurisdictional limitations led to the gradual erosion of *Lake v. Lake*. In *Scott v. Rosenthal*,[54] for instance, a majority of the district court had reversed a circuit court in a per

48. Assuming that no grounds exist for an appeal, and that a district court has not certified the case as one of great interest, conflict is the only remaining basis for jurisdiction. The supreme court would have to establish the existence of a conflict on the same point of law between the decisions of two district courts or between the decisions of a district court and the supreme court. FLA. CONST. art. V, §4 (2), *as amended* (1956).

50. 98 So. 2d 761 (2d D.C.A.), *cert. denied*, 103 So. 2d 639 (Fla. 1958).

54. 119 So. 2d 555 (3d D.C.A. Fla. 1960), *cert. granted*, 131 So. 2d 480 (Fla. 1961).

curiam decision without opinion. However, a concurring opinion was found to contain *adequate factual background* for the supreme court to entertain the petition for certiorari.[56] In an attempt to resolve the jurisdictional issue, the court returned the case to the district court so that it could adopt an opinion setting forth the theory and reasoning in support of its reversal. The dissent by Justice O'Connell[57] forewarned of the emerging controversy. Although he agreed that an opinion would facilitate disposition of the jurisdictional problem, the justice thought it beyond the power of the court "to direct a court of final appellate jurisdiction to write an opinion in any case."[58]

The factionalism that had developed among the judges came to the surface in *Donoghue v. Beeler*,[59] where a majority of the court denied a petition to review a district court decision without an opinion. Justice Hobson, speaking for the three dissenting judges,[60] argued that *Lake v. Lake* was distinguishable because in *Donoghue* a dissenting opinion had been filed by a district court judge. Consequently, he would adopt the *Rosenthal* rationale to consider whether the factual background set out in the dissent indicated the presence of jurisdictional conflict. This procedure, according to Hobson, would be consistent with the court's duty to maintain uniformity because of the precedental value of the case.

The turning point was reached in the landmark decision of *Foley v. Weaver Drugs, Inc.*,[61] which reached the supreme court[62] on petition for certiorari to review a district court decision without opinion.[63] After examining the *record proper* for probable jurisdiction, the court postponed its final determination and returned the case to the district court for an opinion. Justice Thomas considered this procedure as a flagrant distortion of the constitution designed to support the court's arrogation of power. He argued that the court's action was not necessary to harmonize the law, but was instead an attempt to see if the district court would write something inconsistent with the views of the supreme court or another district court so that the supreme court could determine whether it thought the case was decided properly.[64]

The district court,[65] refusing to comply with the supreme court's request, would not outline reasons in support of its decision and the case was returned to the supreme court. In a 4-3 decision, the court receded from *Lake v. Lake* to hold that per curiam decisions without opinion by the district courts would be subjected to an examination of the record proper on the question of

58. 149 So. 2d 534 (Fla. 1963).

60. 146 So. 2d 631 (3d D.C.A. 1962), *cert. granted*, 168 So. 2d 749 (Fla. 1964), *on rehearing*, 172 So. 2d 907 (3d D.C.A.), *writ discharged*, 177 So. 2d 221 (Fla. 1965).

conflict jurisdiction.[66] The opinion of the court failed to consider the question of district court finality. The primary consideration instead was the supreme court's obligation to maintain uniformity and harmony in the laws of Florida. This function, according to the court, could only be performed by examining the record proper when district court decisions are not supported by opinions.[67]

Chief Justice Drew reached the constitutional issues, which the opinion of the court had avoided.[68] Since constitutional jurisdiction extends only to decisions of district courts, Drew argued that an affirmance without opinion of a trial court's decision is the equivalent of the adoption of that decision by the district court. Drew also thought the decision of the court was justified in light of the supreme court's duty to maintain harmony in the laws. He expressed concern that the Florida court system might fail if the supreme court should find it impossible to review decisions of the district courts. Although this was conceded by the justice to be unlikely, he nevertheless thought it the constitutional duty of the court to foreclose any possibility. The chief justice was not unmindful of the need to insure the finality of district court decisions. And his statistics do suggest that in large measure finality of those courts has been preserved.[69] But as Justice Thornal noted, the statistics reflect practices prior to the *Foley* decision.[69]

Criticizing the expansion of the court's jurisdiction, Justice Thornal argued it was contradictory to the sentiment that motivated the amendment to article V. Moreover, the justice contended, the language of the constitution will not support an examination of the trial record to *create* jurisdictional conflict.[70] Elaborating on the impact of the opinion by the court, Thornal said:[71]

> All of this simply means that the District Court decisions are *no longer final* under any circumstances. It appears to me that the majority view is an open invitation to every litigant who loses in the District Court, to come on up to the Supreme Court and be granted a second appeal.

68. According to Chief Justice Drew, less than 30% of the petitions for certiorari were granted by the supreme court. Of this number two-thirds of the district court decisions remained undisturbed after review by the supreme court. *Id.* at 230.

69. Justice Thornal suggested that the small percentage of district court decisions disturbed by the supreme court was due to two factors: "(1) the judicial restraint which this Court has heretofore exercised in refusing to extend its jurisdiction beyond constitutional limitations, and (2) the excellent judicial competence of the District Courts themselves." *Id.* at 234.

70. "It should be recalled that we are dealing with that provision of our Constitution which authorizes this Court to review by certiorari 'any decision of a district court of appeal that is in direct conflict with a decision' of the Supreme Court 'on the same point of law . . . .' Let us not forget the proposition that we here deal with judicial power to act. If the Supreme Court has the power to act in the instant case we must find it imbedded in the language of the Constitution." *Id.* at 233.

71. *Id.* at 234.

Beyond Foley. The expanded jurisdictional powers assumed by the majority in the *Foley* case have been exercised frequently since that decision. The significance of these cases is perhaps assessed most effectively by the justification that the court has advanced for its action. As a primary reason for bringing the record proper within its jurisdictional prerogatives, the court has often mentioned the necessity of maintaining uniformity in the law.[72] Evaluation of the *Foley* decision by this criterion suggests there is merit to the court's position, because if the court should be unable to review a district court's decisions where no opinion is written, then irreconcilable conflict might develop. To illustrate this point, *Seaboard Air Line R.R. v. Williams,*[73] emphasizes the wisdom of retaining the power to review the record proper.

The jury in the *Williams* case had been instructed on the railroad "comparative negligence" statute,[74] and while the trial court's decision was pending appeal in the district court, the statute was held unconstitutional by the supreme court.[75] The district court, however, denied a motion that would have reflected the supreme court's holding. Upon affirmance by the district court without opinion, the supreme court accepted conflict jurisdiction and remanded the case for a new trial.[76] As justification for its jurisdiction, the supreme court noted that it had remanded two other cases for new trials because the comparative negligence statute had been applied. Consequently, the inconsistency among the districts would have been apparent if the court had failed to exercise jurisdiction.[77]

The *Williams* case does suggest that an absolute bar to the consideration of district court decisions without opinions would prove unsatisfactory in view of the supreme court's obligation to maintain harmony in the law. This does not mean though that uniformity will support unlimited review of the record proper behind a decision. As long as the scope of review remains correlative to the requirements of uniformity, then some review of the record proper may be justified. Unfortunately, the supreme court has not seen fit always to evaluate the scope of its review in light of its constitutional obligations.

Saf-T-Clean, Inc. v. Martin-Marietta Corp.[78] is indicative of the extent to which the supreme court has expanded the scope of its jurisdiction. After the case was decided by the district court without opinion,[79] The supreme court accepted conflict jurisdiction, citing *Foley* as authorization for an examination of the record proper. The basis of conflict, however, was

72. *E.g.*, Kennedy v. Vandine, 185 So.2d 693 (Fla. 1966).
73. 189 So. 2d 417 (4th D.C.A. 1966), *aff'd*, 199 So. 2d 469 (Fla. 1967).
74. FLA. STAT. §768.06 (1957).
75. Georgia So. & Fla. Ry. v. Seven-Up Bottling Co., 175 So. 2d 39 (Fla. 1965).
76. Seaboard Air Line R.R. v. Williams, 189 So. 2d 417 (4th D.C.A. 1966), *aff'd*, 199 So. 2d 469 (Fla. 1967).
77. Justice Drew, concurring, considered the *Seaboard* case as the fulfillment of his prophecy in the *Foley* case that there would be chaos in the judicial system if it were impossible for the supreme court to review district court decisions without opinions, 199 So. 2d at 471, 472 (Fla. 1967).
78. 185 So. 2d 15 (3th D.C.A. 1966), *cert. granted*, 197 So. 2d 8 (Fla. 1967).
79. *Id.*

language in a 1934 supreme court decision[80] that the court conceded was arguably dictum. If justification for the court's review must be found in its duty to maintain uniformity, then *Saf-T-Clean* suggests that the definition of conflict jurisdiction has overreached its foundation. In a case of this nature it would appear that the court is exercising its jurisdiction in order to determine the correctness of a district court holding, a function not provided for by amended article V.[81]

Examination of the Record Proper Behind District Court Opinions

The jurisdictional concepts established by the supreme court in *Foley* have been extended to district court decisions, which are accompanied by opinion. This step was taken in *Sinclair Refining Co. v. Butler,*[82] a case based upon Florida's *survival statute.* The trial court's instructions on the question of damages were alleged as error, the pertinent provisions of the district court's opinion stating: "Sinclair urged error in the following particulars: (1) The trial court's instructions to the jury on issues of damages. . . ."[83] Disposing of this question the district court stated it had reviewed the instructions and had found no harmful error committed by the trial court. Petition for certiorari based on alleged conflict was denied by the supreme court after oral arguments. But upon a rehearing, the court went behind the district court's opinion in an examination of the record proper. Reviewing the jury instructions, the court noted that the trial judge had instructed that funeral expenses could be considered in awarding damages. Since another district court[84] had disallowed funeral expenses under "somewhat similar" circumstances, the supreme court held that it had jurisdiction of the case. According to a majority of the court, the conflict was "no less real" because the district court had not discussed the point in question. It was sufficient that the point of law "was, in effect, affirmed without discussion by the district court."

As Chief Justice Thornal noted in dissent,[85] the *Sinclair* decision carries the jurisdictional concepts of *Foley* one step further. Not only has the supreme court arrogated to itself the power to "excavate" trial records in an attempt to find a conflict when a district court fails to write an opinion, but as Thornal said:[86]

80. Croker v. Powell, 115 Fla. 733, 156 So. 146 (1934).
81. "When our jurisdiction is invoked pursuant to this provision of the [Florida] Constitution, we are not permitted the judicial luxury of upsetting a decision of a Court of Appeal merely because we might personally disagree with the so-called 'justice of the case' as announced by the Court below. In order to assert our power to set aside the decision of a Court of Appeal on the conflict theory we must find in that decision a real, live and vital conflict within the limits above announced." Nielson v. City of Sarasota, 117 So. 2d 731, 734-35 (Fla. 1960).
82. 172 So. 2d 499 (3d D.C.A. 1965), *cert. granted on rehearing*, 190 So. 2d 313 (Fla. 1965).
83. Sinclair Refining Co. v. Butler, 172 So. 2d 498, 501 (3d D.C.A. Fla. 1965).
84. Doby v. Griffin, 171 So. 2d 404 (2d D.C.A. Fla. 1965).

> Now they tell us that even when a District Court files a complete and detailed opinion, the Supreme Court may *sua sponte* dig back through the trial record in an effort to pick up something which, in its opinion the District Court has allegedly overlooked.

The decision in *Sinclair* has in effect overruled the earlier case of *South Florida Hospital Corp. v. McCrea.*[87] The court in that case justified its refusal to examine a record behind an opinion on the grounds that legal principles are to be found in the language of opinions rather than in the record. In *Sinclair* the jurisdictional "point of law" was found not in the opinion, but in the jury instructions. With the inconsistency obscured to that extent, it becomes difficult to rationalize an examination of the record in terms of any duty to maintain harmony in the law. As Justice Thornal suggested, it appears instead that the court has utilized *Foley* as a vehicle that will enable the court to choose which rule it thinks should be applied.

Although a district court decision without an opinion may warrant an examination of the record, the same considerations fail to support the supreme court when it undertakes an examination of a record behind an opinion. As Friedrich Kessler has pointed out, there has been a trend away from *stare decisis* in the direction of *stare dictus*. But even though dictum has gained significance as precedent, there is as yet little precedential value to be found in the underlying record. Consequently, it is difficult to justify the court's action in *Sinclair* as necessary to maintain uniformity in the law.

Most trial records are replete with language that to some extent may be inconsistent with language in another record or opinion. When the supreme court begins to sift through this material in search of something a district court has overlooked, one gains the distinct impression that the court is concerned not so much with the precedential value of a case, but rather with whether the supreme court thinks the district court decided the case correctly. While this may be a natural predilection of an appellate judge, it should be recalled that the constitutional amendment in 1956 removed this function from the court's consideration. Instead, the court was to act in a supervisory capacity, maintaining uniformity in the decisions of the appellate courts of Florida.

Conclusion

This note has attempted to expose some of the major factors that have contributed to the erosion of the district courts' stature. No attempt has been made to catalog all possible underlying causes, nor will this writer try to run the gauntlet of potential consequences. Yet there are some problems that should definitely be considered. Among the more practical is the question of whether the United States Supreme Court is empowered to entertain review of a decision of a Florida district court. The Court's appellate jurisdiction is limited to a review of judgments of the highest court of a state in which a decision could be had.[88] Florida's district court decisions have

87. 118 So. 2d 25 (Fla. 1960).
88. 28 U.S.C. §1257 (1964).

been accorded this finality[89] and have been subject to review by the High Court. *Fort v. City of Miami*[90] is an example. In that case the state argued to the United States Supreme Court that the petitioner should have invoked conflict jurisdiction to obtain review by the Florida supreme court. However, neither the state nor the petitioners referred the court to any conflicting decisions in Florida's appellate courts. Consequently, the Court decided that *Fort* had sufficient finality to support federal review.

A consideration of the trial record in the *Fort* case might have produced some degree of inconsistency with language in another decision in one of Florida's appellate courts. The United States Supreme Court would then have been presented with the question whether the inconsistency was sufficient to activate the conflict jurisdiction of the Florida supreme court. Since the concept of *conflict* on the *same point of law* as yet apparently has no outer bounds, it would be difficult for the United States Supreme Court to assess the finality of a district court decision without a determination of that question by the Florida court. And unless the Court is able to determine the issue of finality it would have no jurisdiction to entertain the case. Thus, the present scope of conflict jurisdiction exercised by the Florida supreme court would support the argument that there should never be a review of a district court decision by the United States Supreme Court.

Another problem relates to the primary reason behind the establishment of the district courts. It will be recalled that they were largely a response to the overwhelming caseload of the supreme court, and for a time they did reduce this load to manageable proportions.[91] Each year, however, the number of cases on the supreme court's docket has increased until today its dimensions exceed those that existed before the addition of four more appellate courts to the judicial system.[92] It is true there have been procedural revisions that have been able to alleviate some of the increasing burdens, but as a compensating factor, procedure has its limitations. If experience is any indication of the future, we can expect to witness the continual expansion of the supreme court docket as the district courts send more cases for further review and as the supreme court itself increases its burdens by encroaching further into the jurisdiction of the district courts.

89. *E.g.*, Nash v. Florida Indus. Comm'n, 389 U.S. 235 (1967); Callendar v. Florida, 380 U.S. 519 (1965).
90. 389 U.S. 918 (1967).
91. Although the supreme court's caseload never decreased to the recommended level of 300 cases per year, the number did decrease substantially after the district courts became operative. In 1957, for instance, the court's caseload was 470, Fifth Ann. Rep., Judicial Council of Fla. 13 (1958).
92. In 1956, immediately before the district courts were established, the supreme court caseload was 1,903, *see* note 2 *supra*. By 1967 the total caseload had reached 1,469, of which there were 526 petitions for certiorari from the district courts. Thirteenth Ann. Rep., Judicial Council of Fla. (1966).

(3) Integrating Appeal and Trial

APPELLATE TERMS IN TRIAL COURTS

Roscoe Pound*

The ideal of appellate procedure should be an application for rehearing, new trial, vacation or modification of a judgment, order, or decree, as the case may require, made in the same cause before another branch of the same tribunal. There is no reason why it should be more formal or require more in the way of procedural steps than such a motion made in the court of first instance. In substance, it is such a motion made in a higher tribunal. That we do not so treat it is due partly to taking the procedure in the House of Lords or in the King's Bench on error as a model, and partly to an endeavor to make appellate proceedings bear the brunt of developing the law and a consequent feeling in our formative era that what happened to the litigants in any concrete cause was something of minor importance. The rise of administrative tribunals in the present century ought to warn us that the attitude can be carried too far.

Let me repeat, for this is the crux of the matter, the ideal is to hear motions for new trials, or to set aside findings, or to render judgment upon or notwithstanding verdicts or findings, or to modify or set aside decrees or orders, before a bench of three judges of the court of general jurisdiction at appellate terms or in an appellate division, as the exigencies of business require, with no more formal or technical procedure than is involved in such motions made in a trial court today. This would provide a simple, speedy, relatively inexpensive, means of reviewing the great bulk of the litigation in the court of general jurisdiction of first instance. Even more it would help rid of us the burdensome multiplication of reports which has come with the development of intermediate appellate courts. Such courts have tended to imitate the ultimate appellate courts. If only as a matter of dignity it is felt that appellate courts must write opinions, and if written they must be published. Indeed, statutes sometimes require them to be written in all appellate courts. But if there is no appellate court, short of the ultimate court of review, a written opinion on every motion in the court of general jurisdiction will not seem to be required in the nature of things. It is true there is a real and important function of an opinion as a check upon the bench. But that purpose and the purpose of advising the reviewing court, if the cause goes to the ultimate court of review, as to the reasons and basis of the decision, would be served sufficiently by a memorandum of the questions decided and the grounds of decision. Much time and energy are spent in writing opinions in cases which involve no new questions or new phases of old questions. This is a prime source of waste of judicial power in our higher courts. A short statement of points and reasons will suffice both as a check and as an aid to the higher court. A qualified and responsible reporter, having no interest except to make the reports useful to the public and the profession, could select occasional memoranda worth publishing. Even at appellate terms of a well-organized inferior court or court for small causes and magistrate's cases, it might well be at times that questions would come up and be decided which will deserve publication of the grounds of decision. An energetic head of the judicial system, with the help of a Judicial Council, could devise rules to govern these things. Then if the courts and the bar were given control of reporting, as the bar has long had control in England, a troublesome problem of the law and of the profession in America, the multiplication of reports, would be solved. The time and energy saved by not writing elaborate opinions in cases involving nothing new, could be applied profitably to the full hearing and consideration of the cases themselves. After all, that is the real function of a reviewing tribunal. Development of the law would be better confined to the ultimate court of review to which every case appealed should not go but only those, selected upon application for leave to appeal, which were shown to involve new points or questions of law, or to involve conflict between views adopted in different appellate terms or to raise questions of exceptional significance or much public importance.

One result of such a procedure would be to rid appeals of the remnants of the idea of preserving questions for review. Chief Justice Field of Massachusetts exhorts the young lawyer to learn the practice so that he "will not lose the chance to argue really substantial questions of law." [1] That good points, material to just disposition of causes according to the substantive rights of the parties, can be "lost" because not saved in a prescribed way that involves nothing more than a historically given practice, is a reproach to a modern system of procedure.

It is not necessary to unify the organization of courts in order to set up such a simple system of review of causes in the court or courts of first instance. Legislation setting up appellate terms in those courts with provision for assignment of judges to them by an administrative head, such as all courts ought to have nowadays, and for prescribing the procedure therefor by rules of court, could do all that is required.

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Reproduced from APPELLATE PROCEDURE IN CIVIL CASES, published by Little, Brown & Co. in 1941.

[1] From Writ to Rescript, Lectures Delivered Under the Auspices of the Bar Association of the City of Boston, 299 (1941).

THE COURT OF REVIEW: A New Court For California? *

OVER THE PAST TEN YEARS, the business of our appellate courts has grown at an alarming rate. Total filings in the Supreme Court rose from 1313 to 3400 (259 per cent), while the total business in the Courts of Appeal increased from 4109 to 14,500 (353 per cent).

Functions of the Appellate System

The appellate system in California peforms a number of different functions, but they may be classified under two general headings:

(1) "Review for Correctness"—a review of the proceedings of the trial court to determine whether or not it decided the case correctly for the parties.

(2) "Institutional" functions—those functions which are principally governmental, rather than simply for the resolution of a dispute betwen the parties.

Review for Correctness.

The review of the trial court for error is traditionally a function of the appellate courts, and the only one generally recognized by the public at large. The Committee endorses the principle that the litigants are entitled to one review of the trial court judgment as a matter of right.

But that right of review is severely limited in some respects. The appellate courts review the *legal* determinations of the trial court, with very few limitations; however, they review the *factual* determinations of the trial court only within very narrow boundaries. Within many areas, factual determinations of the trial court are final when the judgment becomes final in that court, and are not subject to further review.

The reasons for the lack of review of facts in the appellate court are not easy to determine. The principal reason stated is that the appellate court has not seen the witnesses; it, therefore, does not have as sound a basis as the trial judge for determining credibility. A further stated reason is that the appellate courts simply do not have time to undertake the review of the facts. However, there are undoubtedly many cases where the credibility of witnesses, per se, is not the factor which decides a contested issue of fact, and often it doesn't help much whether the judge has "looked him in the eye" or not.

The refusal of the appellate court to review the findings of the trial court for error has important consequences. The court system may impose as grave an injustice by an error of fact as by an error of law. Many lawyers are reluctant to waive a jury because they do not want to rely upon the judgment of one man, the judge. And the present restrictions permit a judge to "fudge" his facts to reach a result in the trial court which will not be subject to reversal on appeal, or to avoid the necessity for deciding a difficult legal issue.

Institutional Review

The institutional function of our appellate court system is really the performance of the business of government. The appellate courts, particularly the highest court of the jurisdiction, have the responsibility of handing down the definitive interpretations of the Constitution and statutes, and the development

*A Report of the Special Committee re Appellate Courts of the State Bar of California , Seth M. Hufstedler, Chairman. Reproduced from 47 CALIF. S.B.J. 28 (1972).

of the common law. Under the doctrine of *stare decisis*, each decision of the court becomes the rule of the jurisdiction. Courts thereby lay down binding rules on the issues they decide, some of which involve critical social and political questions of the day.

In addition to the broad power to decide issues of precedential importance, the highest court of the jurisdiction has traditionally regulated the operation of the court system and its procedures, and maintained uniformity of decision throughout the court system.

Comparison of Correctness and Institutional Functions

(i) *Purpose*

The purposes of the two kinds of review are quite different. The review for correctness is simply to determine whether or not the trial court reached the right result as to the parties, and to advise them of the basis for the decision. On the other hand, where an institutional function is served, the opinion declares authoritatively the law of the entire jurisdiction, binding upon all persons, not simply the parties.

(ii) *Right of parties to be heard*

In the review for correctness, the parties have an absolute right to appeal and to be heard. Quite to the contrary, under the institutional review, there need be no right to be heard without the approval of the court.

(iii) *Emphasis*

In the review for correctness, the emphasis is upon having a simple and inexpensive method of providing a final determination as soon as possible. Intellectual exhaustion of the issues does not have a high priority. On the other hand, for an institutional review, the purpose is to have thorough consideration and careful draftsmanship of an authoritative declaration of the law.

(iv) *Opinions*

The opinion is required only to the extent necessary to serve the purposes of the proceeding. In a review for correctness, the opinion only need state the resolution in such a manner as to advise the parties of the determination and the reason for it. Opinions need not be law review articles nor need they be published.

Where an institutional function is concerned, however, the opinion should be well considered and carefully drafted, as a new contribution to the law of the jurisdiction. When completed, it should be published.

The Design of Our Present Appellate System Is for Institutional Review

Although the principal workload of our Courts of Appeal today is the review for correctness of the trial court, the system has been, at least until very recent times, designed to operate solely on an institutional basis. We have assumed that every case appealed is a suitable vehicle for institutional determination simply because one of the parties appealed. Cases have, therefore, been accorded the kind of preparation, briefing and argument, consideration and opinion drafting suitable for an institutional review. Yet, of 3,384 majority opinions written by the Court of Appeal judges in 1969-70, 2,054 or 51 per cent were certified for non-publication. In criminal cases, 74 percent of the opinions were certified for non-publication.

Thus, under our present appellate structure, six out of every ten cases heard on appeal receive the full treatment and attention of a case worthy of the institutional role of the court, notwithstanding the fact that these same cases do

not involve a new and important issue of law, a change in an established principle of law, or a matter of general public interest. Three out of every four criminal appeals are accorded the full treatment and review worthy of cases that are suitable for the institutional review of the court, although their subject matter apparently does not justify it.

Unfortunately, the treatment of a review for correctness as an institutional review may be erroneous and wasteful in two respects. Many of the requirements for an institutional review are not necessary in a review for correctness. We have recently begun to recognize that when an appeal is simply one to review for correctness, it should be treated in a more summary fashion. Some of the federal courts have instituted a screening process, limiting arguments and opinions in certain cases. In our State courts, a rule authorizes non-publication of opinions, at least in part so they can be treated less carefully than opinions which are published. Major efforts are being made now to reduce the length of opinions or to handle some cases by memorandum opinions. These are a tentative recognition of the principle that cases being reviewed simply for correctness need not have full institutional treatment.

Cost Cutting

In addition, the institutional review may not be the right kind of review when a case is being examined for correctness. As indicated above, it does not reach factual errors of the trial court. Furthermore, the process has proved to be one requiring considerable time and expense. Why should the ordinary litigant be required to pay the cost and suffer the delays of an institutional review when he simply wants a review for correctness?

Tailoring Procedures to the Purpose to be Served

So long as a judicial system is small and the volume of litigation is not straining its resources, it may not be critical to have its procedures specifically tailored to the requirements of the cases before it. But we have long since reached the point where we do not have surplus judicial time to squander on unnecessary procedures.

A careful examination should be made to determine whether or not it is possible to devise an appellate system which will more exactly accomplish the jobs which need to be done. An obvious step is to consider whether or not a more effective review for correctness can be devised. Its general requirements can easily be specified:

Simplicity Stressed

(i) It should be prompt to follow the trial of the case as soon as the record and the parties can be ready. They should be compelled to be ready in days and not months as now. The final judgment should be rendered as soon as possible (subject only to such further hearing as might be granted on petition).

(ii) The procedure should be simple and inexpensive.

(iii) The proceeding should receive only that care and attention necessary to satisfy the three judge court that the determination is correct.

(iv) The opinion of the Court should be limited to advising the parties of the determination and the reason for it, and stating the issues which have been resolved.

(v) The opinion can be stated from the bench or can be drafted as the court prefers; it should not be published or used as authority in other cases.

On the other hand, the process for any further review should be continued appreciably as it is at present. It should be available, however, only upon the approval of a petition for hearing. No party should have the right to further review following the quick and simple review for correctness unless the Court in which the hearing was sought determined that the case should be heard.

Further hearings should be granted only in those cases which are thought to have precedential value or to be otherwise useful in performing the institutional functions of the appellate court. All institutional opinions should be carefully considered, carefully drafted, and published. The judges should have adequate time for this care, and should not be subject to a caseload which will require them to write sixty or seventy opinions per year. In deciding upon petitions for hearing, the judges of the courts handling institutional matters could regulate the flow of cases to a volume which they feel they can handle adequately.

PROPOSALS FOR DISCUSSION: (1) IMMEDIATE REVIEW FOR CORRECTNESS, AND (2) ESTABLISHMENT OF A "COURT OF REVIEW"

The Committee has considered several proposals for important changes. We believe the following combination of suggestions is promising, and we suggest that the State Bar encourage discussion of these and other proposals aimed at solving the problems of the appellate courts. We hope such discussions will produce sound and firm proposals for modification of our appellate court structure.

The primary objectives of these modifications are fourfold:

(1) PROMPTNESS: To establish a procedure so the parties can have one review for correctness as a matter of right, concluded within 60-90 days after judgment of the trial court;

(2) SIMPLICITY: To establish a simple procedure to review for correctness which does not result in written, precedential opinions;

(3) SCREENING: To provide a more effective screening mechanism for matters ultimately addressed to the highest court to determine which cases should be heard as institutional cases, and which will remain under the jurisdiction of the Supreme Court;

(4) QUALITY: To allow courts writing important opinions the time necessary to produce opinions of quality.

In general terms, these objectives can be accomplished by dividing the present functions of the Court of Appeal into its two component parts: the review for correctness, and the institutional review. The review for correctness can be joined directly to the trial of the case, to eliminate time lag. And a new, small court can be created (the "Court of Review") to handle institutional appeals and screen cases for the Supreme Court.

The new appellate structure would work like this:

(1) The review for correctness should immediately follow the trial.[1]

[1]The minimum time necessary to prepare the court and parties for a hearing depends in large part upon the volume of the transcript reproduced, if any, and the method of reproduction. A number of studies are under way on these questions by others and this committee has not attempted to determine the best presently available method.

(a) The three man "appellate" court would consist of the trial judge and two Court of Appeal Judges.[2]

(b) The procedure would be patterned after the present motion for new trial.

(c) A motion for a new trial may be filed only after obtaining leave of the trial court judge.

(d) The Appellate Court would have all of the powers of the trial court on motion for new trial or other post-judgment or post-conviction motions, and of the Appellate Court.

Functions Recommended

It could:

(i) Re-evaluate evidence;

(ii) Affirm the judgment;

(iii) Enter a new or different judgment;

(iv) Modify sentences or damages;

(v) Order a new trial on all or certain of the issues.

(e) The decision of the Appellate Court should be delivered by one of the Appellate Court Judges. It should be brief, preferably orally delivered at the hearing, and aimed at telling the parties why the result was reached, and defining the principal legal issues in the case.

(f) The decision of the Appellate Court is not subject to appeal, but only to review on petition.

(2) A new court, "The Court of Review," would be inserted into the appellate structure between the present Court of Appeal and the Supreme Court.

(a) It would be a small, statewide court (of perhaps 12 judges, 4 panels of 3 each).

(b) Cases would be accepted only upon granting a petition for hearing.

(c) It would accept only those cases suitable for Supreme Court consideration.

(d) It would take appropriate time to consider important cases carefully. The caseload per judge should be of the order of a maximum of 30 to 40 opinions per year.

(3) The Supreme Court would supervise the entire system.

(a) After determination in the Court of Review, a party could petition for hearing in the Supreme Court.

(b) A by-pass of the Court of Review would be possible for cases of unusual public concern or precedential value.

Advantages of New Proposal

1. A final decision on appeal will be reached in a period of about 60 days from judgment, rather than in a year or two or more. Further review will be only on petition for hearing.

Many important considerations will flow from such prompt final determinations. In criminal matters, experts tell us that promptness and certainty of punishment are the most effective deterrents. We can avoid some of the "dead time" problems and most of the problems of bail pending appeal. If a case must be retried, the parties will know it promptly, before witnesses have disappeared and memories faded further.

Similarly, in civil litigation, all parties will benefit. Often the status quo can't be maintained pending appeal. If errors are promptly returned to the trial courts, often trial of a limited issue may be adequate. Appeals for the purpose of delay will be largely avoided. Problems of bonding and stay on appeal will be greatly reduced and simplified. Court time will be spared from many of the problems caused by mere delay.

2. The total cost to the litigant of trial of an action through appeal will be appreciably less. Elimination of the delay on appeal, elimination of most transcripts, and virtual consolidation of the appeal with the trial will mean that the appeal will be handled at very little additional cost.

Case in Mind

At the conclusion of trial a lawyer is best prepared to present his important contentions and has the evidence and exhibits in mind more in detail than any other time. If he waits two or three—or often six or seven—months to write a brief, he must review the entire case. All this effort must be duplicated another time when he prepares for argument. The client pays for needless duplication.

3. Many errors can be corrected on the spot without the necessity of further trial or other proceedings. Under the present procedure, when the Appellate Court determines there is error, it then must decide whether or not the error was prejudicial. If it was prejudicial, the case has to be returned for other proceedings. With a panel of judges including the trial judge who can re-evaluate the facts and the evidence, many errors may now be disposed of at the same hearing, and an appropriate judgment then entered. Thus, many cases could be completed immediately without further retrials and new appeals.

4. Better trial decisions will result. A trial judge will know that he must have a basis for his determination, and be able to state it to reviewing judges. Arbitrariness by the trial judge should be eliminated; he can no longer impose unreasonable sentences, make erratic damage awards stand up, or "fudge" his findings to evade hard issues or hide his mistakes.

Better Coordination

5. Appellate decisions should be more realistic. Appellate judges will be reacquainted with the trial courtroom and the problems of the trial judge. The trial judge will have an opportunity to point out the important occurrences in the trial courtroom.

6. The Court of Review will be able to devote appropriate time and attention to its institutional function in our government: the consideration of a few appeals (30-40 per year per judge instead of 60-80 per year for each judge) of broad importance, and the screening and preliminary review of cases for the Supreme Court.

7. In criminal trials, all post-conviction remedies (except those involving collateral estoppel, but including review of sentences) can be combined in a single hearing.

8. The door will be opened to the possible adoption of other procedures in the trial court saving trial time. More civil and criminal juries may be waived because three judges will pass upon the facts and the sentences. The trial judge may be given more discretion to limit evidence.

9. The Supreme Court will have more time for its important work.

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[2]The Committee has found, in its deliberations, and in discussions with other lawyers, that the proposal to include the trial judge on the three-judge panel prompted much reaction, some favorable and some unfavorable. The inclusion of the trial judge is not essential to the main objectives of the proposal. Two alternatives which were considered were (1) following the same procedure with three appellate judges, and (2) having a simultaneous hearing before the trial judge (on the motion for new trial) and three appellate judges (on the review for correctness). The Committee felt that the advantages of including the trial judge on the three-judge review for correctness outweighed the disadvantages and therefore propose it for discussion.

Instead of the necessity of reviewing over 3,000 petitions per year from previously decided cases on appeal (anticipated to be 10,000 ten years from now), it will be reviewing approximately 500 initially and perhaps 1,000 in a few years to come. It should then have adequate time to write the 100 to 150 opinions per year necessary to lay down the important principles of law, and still have additional time remaining to supervise the rest of the court system and bring directly to the Supreme Court those matters which require immediate attention.

10. The number of precedential opinions will be drastically cut down. Two or three volumes per year should hold them all. Lawyers and judges can read the advance sheets again in a timely manner!

Conclusion

Every society must have its dispute-resolving mechanisms. The argument need not be made to lawyers that the court system and, in particular, the appellate structure is an essential part of society today and must be maintained at all necessary costs. The court system must operate not only to give a fair result, but it must give those who use it a feeling of confidence that they and their rights will be protected.

Courts have been forced into the spotlight in recent years. Rising crimes rates alone would have been adequate to do that; but many of the pivotal issues of our times have reached the courts; and the courts have therefore become more interesting, more important, and consequently more the target for criticism. Of the many different criticisms made of the courts today, some are quite sound: the criticisms of court delay are justified, and have been for many years. However, many of the criticisms of the court system are not sound: the delay in the courts is not due mainly to lazy judges or obstructionist lawyers, or to a system of justice which will not work. It is due to an unprecedented deluge of litigation, primarily criminal, which requires resolution. The present system does not have the capacity to handle today's volume of litigation, much less the increased volume of tomorrow. The minor changes made to date distract our attention from the important problems which must be faced.

It is not too late to change our ways. Our job today is to define what disputes the courts should resolve in the light of new and changed circumstances, set up the most efficient procedures we can for the accomplishment of that job, and then make the system adequate to handle the anticipated volume on a current basis.

Faster, cheaper and better justice can be attained for the parties; greater attention can be given to the truly significant cases worthy of the governmental role of our appellate courts. We should begin the task of accomplishing these results.

The Committee is not here proposing the adoption of the Court of Review. It is proposing the serious discussion of the basic ideas and problems involved, in the hope that they, or improvements or alternatives to them, will lead to the development of a better system of delivering justice.

ARIZONA APPELLATE INITIATIVE

Mary M. Schroeder*

In cooperation with members of the Advisory Council on Appellate Justice and the staff of the National Center on State Courts, this pilot project is being conducted in Arizona to determine to what extent it is possible for an appellate panel to render immediate and just decisions soon after the civil trial verdict. The study is funded by an LEAA grant to the Arizona Supreme Court. It is designed in major part to test the hypothesis that many appeals involve correction of error problems peculiar to the individual case and which are of no significance beyond the interests of the particular litigants. This project is an attempt to find out, among other things, whether such so-called error-correcting cases may be decided at an early stage and separated out from those cases which involve issues of precedential importance requiring full briefing, research and full appellate opinions.

In practical operation, the demonstration will involve approximately 100 civil cases selected for likelihood of appeal. Demonstration appellate panels will simulate an actual appellate court panel at the hearing on the motion for a new trial. The panel will have the benefit of counsels' memoranda and a staff summary. Immediately following the hearing on the motion, the experimental panel members (out of the presence of the trial judge) will hear any other additional arguments and examine excerpts of the trial court record as might be necessary to present the issues that will later be argued to the real appellate court in the same case. The demonstration court panel will deliberate privately and record confidentially with project staff of what disposition it would make of the case. All participants, including the counsel for the litigants, the experimental court panel members, and staff will fill out questionnaires designed to gather information as to the time factors involved and the degree of fairness and satisfaction such summary review can provide in comparison with conventional appeals.

* Member of the Arizona Bar; memorandum not previously published.

After the cases have completed the course through a real appeal, the results will be compared with those reached by the demonstration panel. The comparison will include the substance of the disposition, the time elapsed in the two processes, cost and the subjective evaluation of the participants. It is hoped that data from this experiment can eventually be used for restructuring of appellate practice in the criminal as well as the civil area. The operational phase should be completed this summer. The experiment draws heavily upon the proposals of The Honorable Shirley M. Hufstedler, and Seth M. Hufstedler. Several members of the Council for Appellate Justice serve on the Advisory Committee monitoring the project. An Executive Committee of that advisory group consists of Judge Eino Jacobson, Chief Judge of the Arizona Court of Appeals, and Mary M. Schroeder of the Arizona Bar.

CALIFORNIA SUPREME COURT REVIEW: HEARING CASES ON THE COURT'S OWN MOTION*

A hearing before the California Supreme Court, granted at the court's discretion, is ordinarily obtained by petition of a party to an action following final decision in the court of appeal.[1] The supreme court can also transfer cases awaiting hearing in the courts of appeal from one court of appeal to another, or transfer the action directly to itself for hearing.[2] This transfer procedure is used mainly to distribute the case load among

1 CAL. RULES ON APPEAL 28 (West 1964) [hereinafter cited as CAL. RULES] *See also* 3 B. WITKIN, CALIFORNIA PROCEDURE *Appeal* § 205 (Supp. 1967); Poulos & Varner, *Review of Intermediate Appellate Court Decisions in California*, 15 HASTINGS L.J. 11, 20 (1963).

California has three levels of appellate courts and two levels of trial courts. The lowest level trial courts are the municipal and justice courts which have jurisdiction over misdemeanors and small civil claims. Generally, justice courts have a slightly more limited civil jurisdiction than the municipal courts and are located in rural areas. Felonies and civil claims involving amounts outside the jurisdiction of the municipal and justice courts are tried in superior courts.

The lowest appellate court is the appellate department of the superior court; it hears appeals from the municipal and justice courts. Next highest is the court of appeal which has jurisdiction over actions appealed from the superior court. Finally, the supreme court hears appeals from the court of appeals, although in some instances it hears appeals directly from the superior court.

California is divided into five appellate districts, each of which is presided over by a court of appeal. A decision by one court of appeal is not binding precedent on other courts of appeal, but only on the inferior courts within its own appellate district, creating the possibility of conflict between appellate court decisions. A decision by the supreme court, of course, is binding on all the courts in the state.

The supreme court has been vested with the power to transfer cases within its original appellate jurisdiction to the courts of appeal and almost invariably does so. Superior courts have the power to certify cases within their original appellate jurisdiction to the courts of appeal or, alternatively, the courts of appeal possess a limited power to transfer cases from the superior courts on their own motion. It is therefore possible for a case originating in any trial court in the state to eventually reach and be decided by the supreme court, provided the supreme court exercises its discretionary power to hear the case. *See generally* C. FRICKE & A. ALARCON, CALIFORNIA CRIMINAL PROCEDURE 3-4 (7th ed. 1967); 1 B. WITKIN, CALIFORNIA PROCEDURE *Courts* §§ 70-117, *Jurisdiction* § 12 (1954, Supp. 1967); Poulos & Varner, *supra*.

2 The Supreme Court may, before decision becomes final, transfer to itself a cause in a court of appeal. It may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another. The court to which a cause is transferred has jurisdiction. CAL. CONST. art. VI, § 12.

This provision embodies former article VI, sections 4 and 4d, and prior to 1955, article VI, sections 4 and 4c. *See also* CAL. RULES 20.

When a case awaiting hearing in a court of appeal is transferred to the supreme court it is removed from the jurisdiction of the lower court and is before the supreme court as though it were within its original appellate jurisdiction and had never been before the court of appeal for hearing and decision. Moran v. District Court of Appeal, 15 Cal. 2d 527, 102 P.2d 1079 (1940).

*Unsigned comment, reproduced from 41 S.Cal.L.Rev. 749 (1968).

California's five appellate court districts, thereby assuring a speedier disposition of cases on appeal.[11] It is possible, however, for parties to find themselves before the supreme court even though they have not sought further review. The California Constitution also gives the supreme court the power to transfer a case to itself for hearing after a decision in a court of appeal although no party has petitioned for supreme court review.[12] This transfer power is distinguishable from the power to transfer cases pending before the courts of appeal on petition in that the supreme court can act entirely on its own motion and not in response to any affirmative act by one of the parties.

Prior to 1965 the court seldom[13] used its unique power to initiate review on its own motion[14] and, except in rare instances,[15] exercised it only when there was an unauthorized or belated petition for hearing.[16] Recently, under Chief Justice Traynor,[17] there has been an increased use of this power in both criminal[18] and civil[19] actions. The Traynor court has exercised its sua sponte power to direct courts of appeal to recent supreme court cases, to reconcile a court of appeal opinion with a forthcoming supreme court decision, and to clarify or restate important legal doctrines.[20]

I. The Decision to Transfer Sua Sponte

A. *Reconsideration in Light of Recent Decisions*

When the supreme court calls up an action sua sponte, it may either decide the case or send it back to the court of appeal for reconsideration. If the supreme court has recently decided a related case, it will transfer the action to the court of appeals; if the related case is yet to be decided, or if there are no related cases before the court, the supreme court will itself conduct the hearing.

The first case which the Traynor court called up on its own motion was *In re Sterling*.[21] The defendants had been convicted in municipal court of gambling. The appellate department of the superior court rejected their argument that the evidence against them was illegally obtained, and refused to certify the case to the court of appeal.[22] Defendants then sought a writ of habeas corpus from the court of appeal; the writ was issued and on hearing the trial court the conviction was vacated. The court ruled that certain evidence had been illegally obtained and must be excluded from any subsequent trial.[23]

The supreme court called up the action on its own motion and then transferred it to the court of appeal for reconsideration in light of three recent supreme court cases.[24] On rehearing the court of appeal distinguished these cases and again vacated the trial court conviction.[25] The supreme court, responding to a formal petition by the state, granted a hearing[26] and discharged the writ. Applying its three recent decisions the supreme court held that habeas corpus proceedings could not be used to determine the legality of a search or seizure.[27]

[13] 63 Cal. 2d 486, 407 P.2d 5, 47 Cal. Rptr. 205 (1965) [See 62 A.C. No. 22, Minutes, at 2 (Mar. 31, 1965).]

The multiplicity of hearings in *Sterling* raises the question of whether a better approach would have been to transfer the case directly to the supreme court, mentioning the lower court's obvious handicap in not having had before it the intervening supreme court opinions. The court of appeal's resources would not have been expended needlessly and the parties would have been spared the cost and delay of an additional hearing. By transferring the case back to the court of appeal the supreme court left itself little choice but to grant a subsequent petition, if filed, or call up the case on its own motion if the court of appeal misinterpreted its directive. Denial of a petition or failure to hear the case sua sponte would give the appearance of approving the law as stated in the revised court of appeal opinion.[33] Of course, it is difficult for the supreme court to assess how the court of appeal will respond to a remanded case. The supreme court may well think the best allocation of judicial resources will be achieved by remanding the case and trusting the competence of the court of appeal in a majority of situations.

Exercise of the sua sponte transfer power is not analogous to the granting of a rehearing when the supreme court calls up a case while it has before it an undecided case involving the same legal issue. The court's action more closely resembles what the probable response of the party would be if he had knowledge of the court's intention to announce a new legal rule. In effect, the court files a petition to preserve the party's interest. Illustrative is *People v. Williams*[35] in which the defendant had originally denied that he had a prior felony conviction. During his trial, however, he admitted the conviction and was found guilty of burglary. The court of appeal rejected the defendant's claim that the trial court should have determined, on its own motion, whether the prior conviction had been obtained in violation of defendant's right to counsel. The court of appeal held that *People v. Shanklin*,[36] requiring the trial court judge to ascertain whether the accused had been advised of his right to counsel in a former trial, applied only when the prior conviction was introduced to show habitual criminality or to raise a misdemeanor charge to a felony.[37]

[33] *Cf.* Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. Chi. L. Rev. 211, 214 (1957):

> The selection—the granting or denial of a petition—determines the course of the law as decisions determine its content. If the court errs in the granting, it will at worst have created needless work for itself and delayed decision to the prejudice of the parties. There is no procedure for retracting a grant. . . . But if it errs in denying a petition, there are graver evils than needless work and delay, for it thereby tends to perpetuate an erroneous decision. If the intermediate court has correctly stated the law, but erroneously applied it to the case at hand, there is still injury to the petitioner. Even if it is fortuitously right in result, but wrong in reasoning, there is still injury to the law, for its decision not only persists as precedent, but gains in weight. If it is wrong in both result and reasoning, there is both injustice to the petitioner and injury to the law.

As Chief Justice Traynor indicates, the denial of a petition by the supreme court gives weight to an erroneous lower court opinion. This would not be as true where the court decides against sua sponte transfer of a case which has not been placed before it by formal petition. The above remarks, pertaining to review in response to petition, may ellucidate current supreme court thinking as to the purposes of appellate review. Another comment is suggestive:

> Arguably a petitioner is entitled to only one review of his case, unless it is of significant public importance. . . . The supreme court has been aptly described as a monitor, standing ready to review only when it disapproves of what the intermediate courts have done.

Id.

[35] 67 A.C. 167, 430 P.2d 30, 60 Cal. Rptr. 472 (1967).
[36] 243 Cal. App. 2d 94, 52 Cal. Rptr. 28 (Dist. Ct. App. 1966).
[37] 248 A.C.A. 573, 579, 56 Cal. Rptr. 467, 471 (Dist. Ct. App., Feb. 8, 1967).

The supreme court anticipated that it would soon decide *People v. Merriam*[38] and *People v. Coffey*,[39] both dealing with the same legal issue. It called up *Williams* sua sponte on the same day that it granted Coffey's petition for hearing.[40] In *Merriam*[41] the court further limited the *Shanklin* holding which had been distinguished by the court of appeal in *Williams*. The supreme court applied the revised standard to *Williams* and *Coffey*,[42] affirming Williams' conviction: " 'the burden of initiating inquiry into the constitutional basis of a prior conviction lies with him who would challenge its validity rather than with the trial court.' "[43] The supreme court could have established the new rule without hearing *Williams*. However, transferring all of the cases involving the same legal issue gave the supreme court a broader decisional basis. It could draw on a number of factually different cases in framing its new rule. Moreover, the opportunity available to the *Sterling* and *Gant* defendants to petition for a hearing after the announced change in the law[44] would not have been available to *Williams*.[45] It would seem unjust to penalize a party for not anticipating the court's immediate intention to consider the adoption of a new rule. By disposing of both *Coffey* and *Williams* together, the court minimized the expenditure of judicial resources required to rehear the cases, spending only a fraction more time than it otherwise would have spent in deciding a single case before the court on petition.

C. *Clarification of the Law*

The supreme court has also called up actions to correct what it regarded as erroneous or incomplete opinions by lower appellate courts, allowing it to restate and clarify troublesome areas of the law. In such instances no purpose would be served by referring the case back to the lower appellate court. There are neither intervening nor forthcoming supreme court decisions to serve as guidelines. Unlike the previously discussed exercises of judicial sua sponte power, the case is not brought up merely to be reconciled with related cases, but itself becomes the vehicle for innovating judicial pronouncement. This use of the sua sponte transfer power is especially unique and worthy of analysis.

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38 66 Cal. 2d 390, 426 P.2d 161, 58 Cal. Rptr. 1 (Apr. 19, 1967).

39 67 A.C. 145, 430 P.2d 15, 60 Cal. Rptr. 457 (July 28, 1967).

40 66 A.C. No. 2, Minutes, at 2 (Mar. 15, 1967).

41 66 Cal. 2d at 398, 426 P.2d at 166, 58 Cal. Rptr. at 6.

42 Both of these cases were decided by the California Supreme Court on July 28, 1967.

43 67 A.C. at 173, 430 P.2d at 33, 60 Cal. Rptr. at 475. The quotation is from People v. Merriam, 66 Cal. 2d 390, 398, 426 P.2d 161, 166, 58 Cal. Rptr. 1, 6 (1967).

In *People v. Rivers*[46] the defendant had been convicted of robbery.[47] The court of appeal determined that there had been no error committed in admitting into evidence a post-arrest conversation between the defendant and a police officer, even though the accused had not been advised of his constitutional rights.[48] Relying on *Johnson v. New Jersey*,[49] the court held that *Escobedo v. Illinois*[50] and *Miranda v. Arizona*[51] did not apply retroactively to the appellant whose trial had occurred four years before either of these cases had been decided.[52]

Probably to resolve the uncertainty that the *Johnson* decision might cause in lower state courts, the supreme court called up *Rivers* on its own motion.[53] It affirmed the conviction, observing that the *Escobedo-Dorado* rules[54] would cause serious disruption if used to require retrials where statements were obtained in compliance with the law at the time received and held the rules should not be applied to reinstated appeals.[55] The court indicated that it would follow the *Johnson* trial date rule[56] with regard to the retroactivity of *Miranda* but would retain the final-judgment date rule when applying *Escobedo*.[57] It appears the supreme court used the *Rivers* case to clarify the rules of retroactivity for the lower California courts.

The supreme court has also used its sua sponte transfer power in civil actions. . . .

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46 66 Cal. 2d 1000, 429 P.2d 171, 59 Cal. Rptr. 851 (1967).

47 Defendant abandoned his appeal when his application for counsel was denied by the court of appeal. Several years later the supreme court mandated the lower appellate court to reinstate the appeal and appoint counsel. The supreme court directive was issued pursuant to Douglas v. California, 372 U.S. 353, *rehearing denied*, 373 U.S. 905 (1963), and *In re* Martin, 58 Cal. 2d 133, 373 P.2d 103, 23 Cal. Rptr. 167 (1962).

48 243 A.C.A. 828, 829, 52 Cal. Rptr. 695, 696 (1966). The court was referring here to those rights defined in Escobedo v. Illinois, 378 U.S. 478 (1964), and People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965). In *Escobedo* the United States Supreme Court announced that where a criminal investigation focuses on a suspect who is in police custody and the interrogation elicits incriminating statements, such statements are inadmissible at defendant's trial unless he has been effectively informed of his constitutional right to remain silent and has not been denied access to counsel. *People v. Dorado* amplified *Escobedo* by requiring that the accused not only be given the benefit of counsel when requested, but he also must be informed of his right to such legal assistance unless it can be established that he knew of his right to counsel at the time of interrogation and voluntarily waived it.

49 384 U.S. 719 (1966).

50 378 U.S. 478 (1964).

51 384 U.S. 436 (1966). In *Miranda* the Supreme Court required that the suspect be warned that his statements could be used against him and be informed of his right to counsel and to remain silent, as the California Supreme Court had already done in People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).

II. The Role of the Sua Sponte Transfer Power in the California Judicial System

In harmony with the role of courts as dispute-settlers, common law jurisprudence has long been based on the adversary principle. Traditionally, courts are viewed as basically passive instruments, intervening in society's affairs only when cajoled into action by the disputants.[73] However, courts have long possessed the power to determine jurisdictional matters on their own initiative.[83] They may examine their own jurisdiction, or that of a lower court from which a case has been transferred.[84] The power to examine jurisdiction enables the court to refuse to hear some disputes that at least one of the parties desires it to decide. It does not enable the court to decide a dispute which neither of the parties have asked it to consider.

Traditionally courts have also had the power to regulate sua sponte the timing of the various phases of dispute determination.[85] For instance, courts have discretion in the setting of hearing dates, the scheduling of oral argument, and the granting of motions for delay. Judicial supervision of progression of the action makes it possible for the court to organize its limited facilities to provide the most efficient use of judicial resources.

These above modifications to the general policy against judicial intervention do not appear broad enough to encompass the California Supreme Court's power to hear cases on its own motion. The court's self-ordered hearing is not an examination of its power to hear a matter presented by the disputants; to the contrary, it is an assertion of jurisdiction over an action in which the parties have not solicited its intervention. Rather than a limiting device, the sua sponte transfer power expands jurisdiction. Nor is the sua sponte transfer of the case to the supreme court an exercise of the court's control over the progression and timing of the case. Problems of scheduling are rarely the central reason for the court's action.[86] In fact, the decision to hear the case may cause further congestion of the court calendar. The sua sponte transfer is outside the scope of the traditional powers possessed by appellate courts; consequently, its use requires further justification.

A criminal conviction involves possible deprivations of life or liberty, as well as severe informal social sanctions. Society has therefore circumscribed the determination of criminality with numerous safeguards to assure fairness and accuracy. The use of scarce judicial resources to insure that these safeguards are preserved seems justified. The proper functioning of an adversary system of justice may require even greater expenditures of judicial resources where a criminal defendant, because of economic hardship, is effectively barred from an available appeal or aid of counsel.[87]

Civil cases, by contrast, are generally deemed to involve less severe legal and social sanctions. In civil litigation the court system is regarded more as a dispute-settling mechanism—a system relatively unconcerned with accomplishing "absolute justice." Illustrating this, a lesser burden of proof is required. The court's primary interest is to minimize the social and economic disruptions generated by the dispute.[88] The absence of a petition for hearing before the supreme court probably indicates that the disagreement and the ensuing disruption may have been satisfactorily minimized.

The oversimplified criminal-civil dichotomy does not accurately reflect the importance of individual civil or criminal cases. A criminal action involving a minor misdemeanor for which a small fine is levied involves less disruption, less severe sanctions, and a milder remedy than does, for example,

a cancer victim's test case against a cigarette manufacturer. The far-ranging repercussions of such a civil action on potential litigants similarly situated elevates the case to a position of extreme importance; much more than a purely private dispute is involved.

Many of the persons affected by a lower court's decision have no appellate remedy because they are not parties to the action. The supreme court's transfer of the proceedings sua sponte protects their interest, making it possible for them to be represented as amicus curiae. They are protected against the possibility that financial and emotional burdens of litigation, or merely inertia, will deter a further appeal by the immediate parties to the proceeding. Although it would be possible for an interested non-litigant to file a separate action (possibly for declaratory relief) the result would be delay in the final disposition of the issue. The action would have to be initiated at the trial court level and proceed through the court of appeal before finally reaching the supreme court on petition. Until the issue was so ultimately resolved, a large number of people might have to conform to a rule which the supreme court will ultimately reject. Nonetheless, the sua sponte transfer will result in delay and some additional cost[89] to the immediate parties.[90] On the other hand, the importance of the case to non-parties might make them willing, as amicus, to bear the burden of argument. The delay avoided by settling the issue quickly may well outweigh the relatively short delay to the primary parties.

The civil cases transferred sua sponte by the Traynor court have generally had significant extra-party effects. . . .

The criminal cases which the California Supreme Court has selected to call up on its own motion have involved significant procedural and evidentiary issues—issues likely to be the recurring subject of litigation. The court's selection of civil cases has also involved issues likely to recur and to be of concern to a significant number of prospective litigants.

The balance between affirmance and reversal of lower court decisions indicates that the supreme court's sua sponte activity may be primarily motivated by a desire to assure correct precedent. The criminal proceedings have generally resulted in affirmance; the civil actions have been reversed. This may indicate that the supreme court is more willing to exercise the sua sponte power in a criminal proceeding, even to merely revise the lower court's opinion without altering the result. In civil actions, the court may feel it desirable to call up only those cases which it regards as so erroneous as to call for complete reversal.

The discriminate use of the sua sponte transfer power can provide an effective tool to improve judicial administration in both civil and criminal proceedings, minimizing inefficient duplication of judicial effort. It can help answer the questions once posed by Chief Justice Traynor:

> In sum, do we take on the proper cases for review; do we review efficiently; do we conserve our intellectual forces in routine cases to mobilize them effectively for the crucial and novel ones?[92]

[92] Traynor, *supra* note 33, at 212.

C. PANELS AND DIVISIONS: PROBLEMS OF LATERAL EXPANSION

(1) Sittings in Sub-Groups

ADVANTAGES OF A SINGLE COURT OF REVIEW SITTING IN DIVISIONS

Edson R. Sunderland*

The two chief defects in the intermediate appellate court system are uncertainty of jurisdiction and double appeals. They can be removed only by removing the cause and establishing a single appellate court to which all appeals go for final disposition. Such a court could sit in as many divisions as were necessary, and the divisions could be located wherever convenience directed. A disagreement might be sufficient to authorize a rehearing before the division with one or two judges added, or before the full court. A considerable number of states have authorized the divisional organization of their courts of last resort: California, 1879 (Const. art. 6, § 2); Missouri, 1890 (Const. art. 6, Amend. of 1890); Georgia, 1896 (Const. art. 6, § 2; L. 1896, No. 51); Kansas, 1900 (Const. art. 3, § 2); Florida, 1902 (Const. art. 5, § 2); Alabama, 1903 (Code of 1907, § 5949); Colorado, 1904 (Const. art. 6, § 5); Washington, 1909 (Const. art. 4, § 2; L. 1909, ch. 24); Oregon 1913 (Gen. L. of 1920, § 3045); Iowa, 1913 (Gen. A. ch. 22); Mississippi, 1914 (L. 1916, ch. 152); Oklahoma, 1919 (L. 1919, ch. 127).

In addition to the foregoing, there are two states having supreme court commissions sitting in divisions: Nebraska (P. A. 1927, p. 232); Texas (Rev. Civ. Stat. 1925, art. 1783). For practical purposes these commissions are parts of the Supreme Court. Their personnel must meet the same qualifications as members of the Supreme Court, and their duty is to examine the records and hear the arguments in the cases assigned to them and to prepare opinions which are submitted to the Supreme Court itself, and if adopted, they become the opinions of the Supreme Court.

Use of Divisions

There are 28 states which have courts of last resort which are large enough to operate in divisions and half of these authorize the divisional arrangement and employ it constantly. Inquiry among lawyers in several of these states has failed to disclose any professional dissatisfaction with the plan. A limited inquiry among judges sitting upon these divisional courts indicates that the judges themselves are entirely satisfied.

In addition to the 14 states above named in which the divisional arrangement is employed in the courts of last resort, there are 8 states having intermediate appellate courts which sit in divisions. These courts exercise a jurisdiction designed to be final in most cases, so that the problem is essentially the same as in the case of courts of last resort. These states are California, Georgia, Illinois, Louisiana, Missouri, New York, Ohio and Texas.

In addition to the state courts which are organized so as to sit in divisions one of the federal circuits has also been organized in that way. This is the Eighth circuit which prior to the recent act of Congress reducing the size of the Eighth circuit and creating a new Tenth circuit covered a very extensive territory which was difficult to administer with a single division of the Circuit Court of Appeals. Two divisions were therefore ordinarily made up from time to time which sat at St. Paul and St. Louis.

There was a strong effort made in the New York Constitutional Convention of 1915 to authorize the New York Court of Appeals, which is the court of last resort, to sit in two divisions. The judiciary committee of that convention, with George W. Wickersham as its chairman, recommended that the Constitution be amended so that whenever, on January 1st of any year, the Court of Appeals had an accumulation of more than 500 cases on its calendar to dispose of, the court should designate not less than four nor more than six justices of the Supreme Court to sit as members of the Court of Appeals, and the court should thereupon divide itself into two parts, distributing the permanent and temporary judges equally between the two parts, each part to have jurisdiction to hear and dispose of cases; and when the number of cases on the calendar was reduced to 200 the Supreme Court justices should return to their court and the Court of Appeals should resume its normal condition.

There is in every one of these constitutional or legislative enactments authorizing the court of last resort to sit in divisions, suitable provision for bringing such cases before a larger number of judges or before the entire court as should receive such additional attention. Some provide that if there is a dissent in any division the case shall go to the whole court; others authorize the chief justice or a specified number of associate justices to make such an order; some require all constitutional questions to go to the full court and others prohibit any former adjudication to be overruled or modified except by the full court; some leave it to the court itself to decide how cases shall be assigned or referred to the full court or to divisions.

The experience of England is extremely suggestive as to the great possibilities of the divisional organization of a court of review. By the Judicature Act of 1875 the Court of Appeal was authorized to sit in two divisions. After twenty-seven years of successful administration under this act the principle was extended by the Judicature Act of 1902 whereby the Court of Appeal was authorized to sit in three divisions and this plan has now been in operation for twenty-six years to the entire satisfaction of the bench the bar and the public. The arrangement of divisions is elastic, two being the normal number and three being used whenever the amount of business before the court makes it advisable to employ an additional division. Three judges ordinarily sit in each division of the court.

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There are three ways in which the divisional arrangement increases the efficiency of the court.

In the first place, since fewer judges participate in the hearing of each case, the time required for this purpose from each judge could be reduced in proportion to the number of divisons. Or, if it seemed advisable to allow fuller arguments, the time allotted to counsel could be enlarged in the same proportion, without requiring longer hours from the judges.

The latter alternative is perhaps the more beneficial of the two. The English Court of Appeal has no time limit for counsel, with result that every case is fully and carefully argued before the court. This increases the importance of the oral argument as compared with the printed brief and enables counsel to render much more effective aid to the court, and this result in turn tends to develop specialists in appellate court practice. It is a question worthy of serious consideration whether the time limits which inexorably restrict argument in a court which always sits en banc, have not become a real menace to the enlightened development of our jurisprudence.

In the second place, each judge will no longer be expected to investigate all the cases coming before the court and to participate in consultation regarding them, but his duties will ordinarily be limited to those cases assigned to his own division. By this means the number of decisions for which each judge will be responsible can be reduced in exact proportion to the number of divisions.

In the third place, while the number of opinions to be written by each judge will not be affected merely by organizing the court into divisions, the divisional arrangement will make it practicable to add new judges when needed, and thereby keep the number of cases assigned to each judge within reasonable limits, without making the court so unwieldy as to interfere with its effective operation.

The apparent objections which readily suggest themselves do not seem to be meritorious. One is the possibility of inconsistencies between the different divisions. But this cannot be greater than the possibilty of inconsistencies between an intermediate and a Supreme Court, or between different divisions of an intermediate court, or between different cases decided by the same court at different terms. But the danger of inconsistencies is very small. In any event the judges cannot personally remember prior decisions of the court and must rely upon their own study of the reports and the diligence of counsel, and it will make very little difference whether the prior decisions happen to be made by an undivided or a divisional court.

PANEL SIZE

Roscoe Pound*

In connection with organization of courts there is another matter which has direct and significant bearing on review of decisions rendered at first instance, namely, the waste of judicial power involved in the number of judges who sit on particular appeals. Three ought to be enough in ordinary appeals, and five in the ultimate court of review. Only in cases of unusual difficulty or public importance in the ultimate court of review should there be seven. Three sit regularly in the federal Circuit Courts of Appeals and in the intermediate appellate courts in Alabama, California, Georgia, Indiana, Missouri, New Jersey, Ohio, and Tennessee. For the most part, the feeling of lawyers in the United States that five or more judges make up a court of review is simply traditional from the courts of our formative era where there was no great press of work. In England, until the last third of the nineteenth century, three lords sat habitually on writs of error and appeals in the House of Lords, and three members of the Judicial Committee of the Privy Council have commonly sat in the ultimate court of review for the British colonies and dominions. In exceptionally grave constitutional cases five have sometimes sat. Five commonly sit in appeals in the House of Lords today, three sit in appeals in the Court of Appeal, and three in even the most serious criminal cases in the Court of Criminal Appeals. Down to the Judicature Act, three sat in the old Court of Appeal in Chancery. Down to 1830, four justices of the King's Bench heard writs of error to the Common Pleas. There is a serious waste of judicial power in the large benches habitually sitting on ordinary appeals in our courts.

It is not necessary to have a large bench sitting on each case in order to prevent conflict of decision or impairment of the uniform course of decision. It is true there has been some conflict of decision between separate intermediate appellate courts in Ohio and in Texas, between the Supreme Court and the Court of Criminal Appeals in Texas, and at times between federal Circuit Courts of Appeals. But in these cases there was no common head over the distinct tribunals to scrutinize their work as it went on and insure uniformity of decision. Where a head of the judicial organization is empowered to take care of this matter by directing a hearing in which the conflict can be resolved, and is responsible to the public and the profession for exercising his power, there is little reason to apprehend such conflicts. In England, where the Court of Appeal sits in divisions of three, they are unknown. The seven judges who sit on ordinary cases in very many of the states are too many. Eleven to sixteen judges, which the reports show as sitting habitually in the Court of Errors and Appeals in New Jersey is sheer waste.

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DIVISIONS AND PANELS

Karl N. Llewellyn*

To relieve the pressure of the docket, more and more courts have been turning to operation either in fixed divisions or in shifting panels of judges. Except as it bears on the advocate's problem ~~(pp. 251 ff.)~~, such operation is in one sense outside of the immediate focus of this study: the process of deciding, the competing goals of the process, the culmination in an opinion, and the most telling procedures in regard to each of these differ not at all whether the bench be made up of three or of nine, whether it be a panel or a division or a whole court.

Insofar, however, as we are addressing ourselves to the law-building effects of decisions, a regime of either division or panel, as all men know, raises special questions; and there are related, though lesser, questions which have to do with what help is to be gotten from the advocate. Useful general lines of guidance are hard to find. Primarily, it seems to me, this is because the attitude of the judges differs so largely among the courts. The most striking variable here is the degree to which each individual member is imbued with active responsibility for the team-product; almost equally weighty is the working intensity among the membership of a felt need for conscious continuity of the work from year to year, and for keeping the doctrines which are brought to bear harmonious in both their operation and their articulation. We have had courts — we seem still to have some — in which once the conference has come to an accord the opinion-writer is pretty much on his own. We have indeed had courts in which he was assigned the case before the hearing, in which he reported on it at the conference as the sole person present who had read either record or briefs, and in which he found his recommendation normally concurred in without further check. We have had courts — and some are still with us — in which pride of opinion, or bother about offending such pride, or weird views about manners or delicacy, have made any suggested change of wording, thought, even of citation, a thing to worry over or to shrink from as threatening ill-feeling in the college. It is manifest that any of such ways of individual withdrawal from the team-job, or of such resultant overdelegation of the control and shaping of the job as hinders real and firm team cross-check, raises tremendously the likelihood of discontinuity among a court's results over the years. The enlistment of more memories, of more individuals' recalled experience, cannot help but produce more lines of guidance as well as more threads to be tied in; the enlistment of more imaginations and more individuals' projections of possibility and likelihood cannot help but call forth a more serviceable advance exploration of the prospective bearings of the announced reason and rule.

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In all of this there is nothing new. But it is worth while to gather some of the devices that testify to courts' awareness of the price in continuity which divided operation threatens to exact. The most conspicuous maneuver has been to keep the chief in the chair, regardless of division or panel membership, thus assuring that at least one man is in on every case, and putting on him the consequent responsibility, as occasion requires, for initiating some procedure to preserve or repair continuity. Least conspicuous, perhaps, but surely of the essence, is reliance on the advocates in each pending case to gather and present relevant material from the court's past work. Help is here, but stinted help: in both diligence and skill, counsel remain, as has been noted, alarmingly uneven; and even though counsel should offer peak performance, their tools are faulty: we have in this one study, in passing, come across two of the countless instances in which a valuable point of ruling has completely escaped those indexing techniques which are counsel's almost sole machinery for prospecting.[290] Besides, wherever memorandum decisions are in use, and repeatedly in regard to regular opinions, there are notes and memories of various sitting members of the court which counsel cannot reach, but which shed often enough most worth-while light on that continuity in results which must not infrequently elude the language of the moment.

A third device is circulation among the whole court of all the prospective opinions. Here, even in a court which has already built club and team feeling, with critique and suggestion both ready and welcome, one is still faced with the inertia of the man whose attention is engaged by his own unending load, and with the time-competition from that same burden. What concerns one in regard to this particular problem of continuity and doctrine-tidying is that under these circumstances special attention to those cases in which the division or panel has split will provide less guaranty of help than one could wish. For division in any court not only goes in first instance to result, and not only turns half or more of the time on the gestalt or pattern into which the diverging voters have arranged the facts, but by sharpening an internal issue it tends to drive the two sides into *ad hoc fighting* positions, as contrasted with long-range *judging* positions. True, it is possible in theory for the more detached colleague from off the panel to spot a line of solution wiser than either line of battle, one which with fitness and flavor will both resolve the tensions and avoid the extremes; but rarely does such insight come without the kind of soaking in the detail of record and authorities for which the nonparticipant has trouble finding time. Unless therefore the matter goes into banc, he tends simply to throw his counsel to one side or the other of an issue which, I repeat, is likely enough to jar in either version. And even where such mishaps are escaped, a major hazard to continuity seems to me to be the recurrent case where the outcome is too clear to bother about; where, therefore, precisely because no worry is involved, the temptation is strong to hang that judicial hat on any convenient peg.

I have wondered, therefore, where the court sits in fixed divisions, whether one small line of insurance might not be to pass around, week by week, in each division the burden of reporting on the current proposed opinions of the other. From outside, I find myself dubious about the return per man-hour of a procedure in which the full bench "listens" to the reading of all proposed opinions; some courts seem to find that procedure to elicit real and effective improvement, but my own experience with men of law has been that few of them do much to better a text without the use of eye and pencil; and at least one court has found the substitution of circulated copies to step up the effectiveness of corrective "listening" in very gratifying fashion. Most baffling, in regard to possible cross-check machinery, I find the spreading practice of sitting in shifting panels, unless some rough division of check-up responsibility can be arranged by subject matter.

Two other points may merit attention. The one: the more I meditate, the more it seems to me that sitting in panels or divisions is more wisely done by even numbers than by odd. It was the older English experience. Each of the old courts was a four-man court. And today, on the public relations side, a three-to-one vote is immensely easier to stomach than a three-to-two, when there is another batch of judges not sitting on the particular bench. On the side of an easy test for hearing en banc, a four-man bench is automatic on a two-man vote, which would again seem to have some working value. Moreover, when it comes to the shaping of issues on opinions circulated for the views of nonparticipants, while I have made no study and while I have in mind some cases in which with but a single dissenter the issue has been sadly overdrawn, yet I lean to the view that that phenomenon is materially more likely where a sitting court divides into two camps. Finally, of course, as against fives, fours save hearing time.

The other point has to do with a court where by etiquette, practice, or temper of the current bench opinions and their authors are lightly or heavily insulated against "meddling." One rather feasible road toward slow betterment of any such regrettable condition lies open and inviting: few indeed are the men of the law whose craftsmanship and vanity are proof against a request from time to time for critique and suggestion about a drafting job, such as the requester's own proposed opinion. One swallow does not make a summer, but a dribble of such requests judiciously distributed and spaced by even a single judge can hope to change attitudes and even a regime.

THE PANEL SYSTEM

Graham C. Lilly & Antonin Scalia*

Another means of increasing the productivity of the Court is to eliminate the practice of hearing all appeals en banc—to make use of "panels" or "divisional sittings." Such a step can hardly be termed a radical departure from sound judicial procedure, since it is used by the highest appellate courts of many (indeed, probably most) Western nations.[68] Nor can it even be considered at odds with common American practice, since it is used, in one form or another, by at least a dozen supreme courts.[69]

The principle by which this device achieves increased efficiency is again that of delegation, but delegation to a portion of the court's membership instead of some other functionary. There are two basic methods of applying the device: The first is the establishment of permanent sub-groups or "divisions" among the membership of the court, each with authority (subject, perhaps, to certain exceptions) to act on behalf of the whole court. Thus, the nine-judge court of Washington is divided into two "departments," each consisting of four justices and the chief justice;[70] and Oregon's seven-man court has two permanent departments of three justices and the chief justice.[71] The second method, which is much more common among the courts of last resort in this country, consists of using what might be termed a "rolling panel" to dispose of the court's business—that is, a group composed of less than the entire court, which constantly shifts its membership from one case to the next. Thus, in many courts having a total membership of seven justices cases are regularly disposed of by only five members of the court. This practice prevails, for example, in Florida, Massachusetts and Maryland.

The Permanent Panel or Division.—Of the two methods, the permanent panel or division system has the advantage of being more efficient. It consumes, of course, less administrative effort in the constant assignment and reassignment of judges; and, by enabling judges to work together more regularly, it probably causes them to work together more efficiently. It also almost doubles the capacity of the court to hear and decide cases, since the justices (except, usually, the chief justice) are divided into two separate groups. (Of course the capacity could be tripled or quadrupled by the creation of still more separate groups.)

The principal defect of the division system is that it creates a serious risk of inconsistency between the sections of the court. To be sure, an inconsistent holding would probably not occur by inadvertence, since the chief justice would be a common member of both divisions, and since prior decisions of both divisions, being opinions of the court, would presumably be cited by counsel. But suppose an issue is presented to one division of a nine-judge court and was earlier decided

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Reproduced from Appellate Justice: A Crisis in Virginia, 57 VA.L.REV. 3, 34-42 (1971).

by a 4-1 vote, or a 3-2 vote, of the other division. Should such a minority of the court bind the majority? If the second division reaches a different result, what is the status of the issue? And what if the decision of the second division is also less than unanimous? The problem might be somewhat alleviated (at some expense in efficiency) by requiring a hearing en banc whenever one division wishes to depart from a holding of the other division. This solution is applied in the German Bundesgerichtshof and the French Cour de Cassation.[72] Though it may work well enough in those legal systems, where lawyers rely relatively little upon court decisions in giving advice, in our common law system it would create a vast number of quasi-precedents consisting of those divisional decisions not yet tested and affirmed by the court en banc. Moreover, the device would not eliminate one type of inconsistency that may develop between divisions: Many of the matters an appellate court must decide are so-called mixed questions of law and fact—for example, whether the evidence below was sufficient to sustain the verdict, or whether a confession admitted at trial was coerced. The ability to predict the court's answer to questions of this type is one of the appellate lawyer's essential skills—and also an important factor in keeping down the number of appeals. Yet the court's holding on such a matter usually has little stare decisis effect, strictly speaking, since it is so intimately connected with the peculiar facts of the particular dispute. It would therefore be very difficult to say, if a mixed question of law and fact were involved, that a division really was "departing" from an earlier holding of the other division, even though the judicial philosophy of the permanent members of the second division caused them to decide the issue in a way in which the members of the first division, given their philosophy, surely would not. The requirement for hearing en banc would therefore be inapplicable, and the necessary consistency and predictability unattainable. Inevitably, one division would acquire the reputation among the practicing bar of being "soft," or "plaintiff-oriented," or what have you—and the other the opposite. Finally, the device of rehearing en banc would not prevent the division system from destroying the value of that tremendously useful impropriety, the dictum.

The only possible solution for these last-mentioned defects of the permanent-panel system is to require a rehearing en banc of all cases decided by less than a majority of the entire court—that is, less than unanimously by either division. This solution, however, presupposes on the part of the chief justice a consistency unlikely to be found in any individual, as well as an unseemly readiness to dissent, even when the mere dictum of the opinion does not suit him. Moreover, even if it should work, it would result in a volume of wasteful rehearings, which would destroy the very efficiency that prompted adoption of the permanent instead of the rolling panel. It is probably because of its inability to afford the high degree of consistency absolutely essential at the highest level of appeal that the permanent-panel system (although very common in both state and federal *intermediate* courts)[73] has been adopted by the courts of last resort in only Missouri, Oregon and Washington.[74]

There is one means by which all these evils of the division system can be avoided. No possibility of inconsistency exists when the two divisions are dealing with entirely separate subjects. In our legal system, civil and criminal matters come very close to being "entirely separate." A legal or factual controversy arising in one of these fields is very unlikely to be relevant to the other—although one may conceive of a few, such as a dispute concerning ownership arising in the course of a larceny prosecution. Accordingly, the State Court System Committee of the Virginia Trial Lawyers Association has proposed that the Supreme Court of Appeals of Virginia be modeled after the English Court of Appeal,

> to sit in two separate and independent divisions to be known respectively as the Civil Division and the Criminal Division, the former to have exclusive final appellate jurisdiction and to constitute the Supreme Court of Virginia in all civil matters, the latter to have exclusive final appellate jurisdiction and to constitute the Supreme Court of Virginia in all criminal matters, the Chief Justice to assign from time to time to each division such number of justices as the work load of that division might at that time require, the justices so assigned having the power to sit in bank or in panels under such regulations as the Court may promulgate, but no decision in either division to become the judgment of the Court except on the concurrence of at least three justices and no law to be declared unconstitutional under either the Virginia or United States Constitution except on the concurrences of at least four justices.[75]

The proposal is deserving of serious consideration, especially now that the criminal workload of the Court seems to be approaching one-half of its total business.[76] The merits of the proposal as related to the establishment of a lower appellate court will be considered below; at present we are only concerned with its desirability as a means of enabling the Supreme Court of Appeals to dispose of more cases. In this context, the objections are twofold: First is the fact that it will be extremely difficult to induce first-rate lawyers to serve as judges hearing nothing but criminal appeals. Nor could any judge be expected to give the same careful consideration to a full docket of criminal appeals as he might give to the same cases mixed in a more varied caseload. Criminal cases are generally regarded by appellate judges as the dullest, the least challenging and the most repetitive component of their business. The second point is less practical but vastly more important: The complete separation of the work of divisions which is the major virtue of the proposal is also its greatest vice. When there exist two discrete "divisions," neither of which has any competence in the field of law overseen by the other, can there still be said to be one supreme court? Are unification of administration and the possibility of occasional transfer of personnel really sufficient to make the two divisions "one" court in any world except the world of words? The New York Supreme Court, for example, also has two divisions. They consist of the Trial Division, comprising all the trial courts of general jurisdiction, and the Appellate Division, which is an intermediate court of appeals. Are these really a

single court? Unity in name with separation in function may be acceptable for intermediate appellate courts, but is it acceptable for the tribunal that purports to be the head of one of the three branches of governmental power? No one would propose weakening the supreme executive power by dividing it between two individuals. It seems no more desirable to split the judicial branch, even if the Constitution's requirement of a single Supreme Court of Appeals, to which all other courts are to be "inferior," is technically met by calling the separate Supreme Court of Criminal Appeals a "Criminal Division." It is noteworthy that the English Court of Appeal, which the State Court System Committee's proposal uses as a model, is *not* the English equivalent of Virginia's Supreme Court of Appeals; it is not the court of last resort, and the decisions of both of its divisions are subject to review by a single, unified, supreme judicial authority, the House of Lords.[77] In this country, both Texas and Oklahoma do have separate courts of last resort for criminal appeals, but these courts are explicitly authorized by their constitutions.[78]

The Rolling Panel.—The vast majority of state supreme courts that employ the panel system use that form of it that we have described as the "rolling panel." At present, there appear to be 13 state supreme courts in which cases are with some regularity heard and decided by panels of constantly varying membership.[79] In one of these, Colorado, the system really amounts to only a minor modification of the division system: There are two separate "Departments," each consisting of three of the six associate justices and the chief justice, but membership in the Departments is rotated. Rotation reduces the danger of the panels' acquiring a reputation as "hard" or "soft" because of consistent memberships, but it eliminates none of the other risks inherent in the division system. In most of the other 12 states, however, the rolling panels are composed of a substantial majority of the court, usually five of the seven justices. When this system is used, the saving of judicial time is not as great, but all of the dangers of inconsistency described in the preceding section can be entirely eliminated. When a seven-judge court sits in panels of five, the opinion is that of a majority of the court even when there is a dissent by one of the judges. So long as there is provision for rehearing in the relatively rare cases decided by a 3-2 vote, consistency in all matters—legal holdings, determinations of mixed questions of law and fact, and dicta—can be assured.

Some of the states that employ rolling panels do so by explicit constitutional or legislative authorization. The Constitution of Maryland, for example, not only *authorizes* the use of only five of the seven justices in each case, but positively *requires* it—and even makes express provision for rehearing en banc in case of a 3-2 split.[81] Many courts, on the other

[77] Appellate Jurisdiction Act of 1876, § 3, 7 HALSBURY'S STATUTES 529 (3d ed. 1969); Criminal Appeal Act of 1968, § 33, 8 HALSBURY'S STATUTES 712 (3d ed. 1969).

[78] TEX. CONST. art. 5, §§ 1, 5; OKLA. CONST. art. 7, § 4. As noted in Figure IV *supra*, Alabama and Tennessee also have separate courts of criminal appeals that are, in their practical operation, terminal. Neither is, however, of equal dignity with its state's highest court by which its judgments are reviewable on certiorari. ALA. CODE tit. 13, §§ 111(10), (32) (Supp. 1969); TENN. CODE ANN. § 16-452 (Supp. 1970).

[79] See Figure IV *supra*.

[81] MD. CONST. art. IV, § 14 reads in part as follows:

> Five of the judges shall constitute a quorum, and five judges shall sit in each case unless the Court shall direct that an additional judge or judges sit for any case. The concurrence of a majority of those sitting shall be sufficient for the decision of any cause, and an equal division of those sitting in a case has

hand, rely for their use of rolling panels only upon the fact that the state constitution and statutes require less than the entire court to constitute a quorum.[28] Virginia's present Constitution offers more support for such a practice. Since 1928 it has provided for a quorum of four, and it has also explicitly provided that "the judges may sit in bank, or in two divisions, consisting of not less than three judges each, as the Court may, from time to time, determine."[29] These provisions are tracked verbatim in the applicable statutory provision.[30] The quorum requirement, which is common, reflects a judgment that it is not necessary for all the judges to be present in each case; and the provision for divisions, which is not found in most state constitutions or statutes, makes it absolutely clear that incapacity or disqualification is not the only reason that may justify the use of less than all the justices—considerations of efficiency may suffice. It might be argued, applying the rule *inclusio unius, exclusio alterius*, that the explicit provision for separate divisions by implication forbids the use of less than the entire Court in any other fashion. This argument can be buttressed by the fact that special safeguards are provided for divisional sitting, which should not be circumvented by the use of a rolling panel. Both the Constitution and the statutes provide that, if "the judges composing any division shall differ as to the judgment to be rendered in any cause or [if] any judge of either division . . . shall certify that in his opinion any decision of any division of the Court is in conflict with any prior decision of the Court, or of any division thereof, the cause shall then be considered and adjudged by the full Court, or a quorum thereof."[31] Whatever may be said in favor of this argument, what may be said against it is that it has been pointedly rejected by the Supreme Court of Appeals. The Rules of Court provide, and have provided since 1930, as follows:

> Whenever four or more of the Justices are convened, the Court shall be deemed to be sitting in banc, and so vested with all of the powers of the Court. Whenever three of the Justices are convened, the Court shall be deemed to be sitting as a division, and vested with all of the powers of a division of the Court.[32]

The revised Constitution, which takes effect July 1, 1971, does not alter the foregoing analysis. It fixes no quorum requirement but provides that any decision requires the concurrence of three justices. It also specifies that "[t]he Court may sit and render final judgment en banc or in divisions as may be prescribed by law."[33] Since, unlike the present Constitution, it does not place any special restrictions on "divisional" sitting, the validity of using less than all the justices for "en banc" sitting is even clearer than it is under the existing provisions.

What appears to be overlooked by those who decry the use of any panel system as an abasement of the Court is the fact that the Court has made extensive use of the rolling panel in the past, with apparently

no lasting ill effects. When, following adoption of the 1928 Constitution, the Court was first expanded from five to seven members, it simply continued to sit five judges at a time for most cases. The absence of two of the justices became so common that in Volume 155 of the Virginia Reports, covering the period June 1930-January 1931, the reporter altered his past practice of listing those justices who were "absent" (perhaps because that description, repeated, as it had to be, in case after case, tended to create the impression that the justices were shirking their duties) and adopted the practice, which has continued to the present day, of listing the many justices "present" instead of the few not sitting. It was also during this period that the Court first adopted the Court rule quoted above, to make it clear beyond question that its rolling panel was not subject to the constitutional and statutory limitations upon divisions.[34] Gradually, as the docket crisis that had prompted the expansion of the Court (and that had also caused the 1927-28 convening of the Special Court of Appeals[35]) subsided, the full Court began to sit for more and more cases, until that became what it is today, the regular practice. Now that a crisis is once again upon us, there is no reason why the seven-judge Court should not return to its original procedures.

DIVISIONAL SITTINGS

Charles W. Wolfram*

Another alternative in responding to the recent increase in its caseload was given the Court in 1957 when the legislature authorized consideration of cases by divisions of less than the entire membership.[75] Inspired by a desire to increase the productivity of each justice,[76] the Supreme Court on October 3, 1967, adopted Rule 135 of the Rules of Civil Appellate Procedure, the text of which is quoted in the margin.[77] This divisional scheme was in operation for nine months of the 1967-1968 Term, producing sufficient data to warrant study and comment.

Under Rule 135 all cases coming before the Court are first reviewed and classified by the Administrative Assistant.[78] Those cases considered to be of "less legal and judicial significance"[79] are assigned for divisional consideration while those considered more significant are assigned for hearing en banc. A single justice can insist that a case assigned for divisional hearing be redesignated for hearing en banc. The Chief Justice possesses the power to accept, reject or modify the Administrative Assistant's classification.[80]

The Court's clerk prepares two calendars, one for divisional hearings, another for en banc hearings. The Chief Justice then assigns to each of the divisional cases four associate justices who, together with himself, sit for argument and decision of the case. The Rule states that the associate justices are to be selected on a "rotating" basis, so that the free time created by absence from a divisional sitting will be equally apportioned to each.[81] Significantly, the Rule also states that a retired justice

77. (1) Cases set for oral argument or submitted on the briefs will be heard either en banc or by a division of the court. The Chief Justice will sit with each division and will assign 4 associate justices, including any retired justice serving pursuant to Minnesota Statutes, Section 2.724, Subd. 2, to sit as a division of the court to hear and decide cases assigned to such division. The assignment of associate justices will be made on a rotating basis and may be changed as may be required by disqualification or illness of a justice.

(2) The administrative assistant to the court is hereby designated as a referee of the court for the purpose of reviewing the record, transcript, and briefs in all cases and submitting to all justices of the court his recommendations for the classification of cases for assignment to the en banc or to a division calendar, according to the legal and judicial significance of the issues raised. Any one justice of the court may order a case to be placed on the en banc calendar rather than a division calendar. The Chief Justice, in his discretion and according to the requirements of composing the calendar, shall accept, reject, or revise the recommended classification of cases. Thereafter, the clerk shall prepare the calendar.

(3) The decision of a case by a division of the court shall be by the concurrence of four justices. If four justices do not concur in the decision, the case shall be re-set for an en banc hearing. A copy of the tentative written opinion of a division in each case, prior to filing with the clerk, shall be circulated among the justices who did not sit on the case, and any two justices of the court by questioning the decision, may signify their doubt as to the decision of the division, in which event the case, at a further conference of the court, may be re-set for an en banc hearing. An en banc hearing under this paragraph shall be scheduled at the earliest practicable date, at which hearing the argument time allotted by Rule 134 shall *not* apply, but counsel for the parties will appear to answer legal or factual questions posed by the court. No additional briefs need be filed unless requested by the court.

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sitting pursuant to Minnesota Statutes section 2.724, subdivision 2, may be assigned to a division.[82] This has meant that Mr. Justice Gallagher has become virtually a full member of the Court with respect to divisional sittings.[83] This, however, has created other problems.[84]

While perhaps the least disruptive method of coping with an expanded docket, the divisional system must inevitably result in a substantial diminution of collegial interaction among members of the Court. It is probable that most justices will virtually ignore all but the major outlines of most division decisions in which they did not take part.[85] Unfortunately, most members of the Court perceive themselves as primarily opinion-draftsmen, and are determined to reduce the number of distractions from this task. Whether the quality of the decisional process can be maintained with such emphasis upon individual resolution of legal issues is questionable. Nonetheless, as it is likely that the divisional system will survive for a number of years at least, rather substantial modifications, both in design and in operation, seem required.

Rule 135 states that the assignment of associate justices to divisions will be made "on a rotating basis," with such adjustment as absence or recusal may require.[86] It would seem necessary that a rotation system accomplish at least two essential functions: (1) permitting each justice an equal amount of "free" time by absence from divisional sittings; and (2) ensuring that each justice sits with every other justice roughly an equal number of times. In the nine months of the 1967-1968 Term, during which the divisional system was in operation, 255 decisions were released, 151 by the full Court, and 104 by divisions.[87] As contemplated by the Rule, Chief Justice Knutson sat on all divisions. Justice Nelson was absent from 40 divisions; Justices Rogosheske, Sheran, Peterson and Gallagher from 45 divisions; and Justices Murphy and Otis from 46 divisions.[88] Thus, each associate justice was afforded roughly an equal amount of additional time for the preparation of opinions, the major purpose of the innovation.

In sharp contrast, however, analysis of the figures in Table III for the 1967-1968 Term discloses a much greater disparity in the extent to which any one associate justice sits with certain of his colleagues. To take the most extreme example, Justice Rogosheske sat on divisions with Justice Peterson a total of 50 times and with Justice Otis only 16 times.[89] While it is virtually inconceivable that such a Balkanization of the Court is intentional, it is a matter that requires immediate correction. The circu-

lation of all division opinions among those justices who did not sit at oral argument[96] is doubtless intended to prevent them from losing whatever influence upon the Court's activities they would have had if the case had been heard en banc. But this is hardly an adequate guarantee that bloc voting will not occur.[97] First, the justices likely give less attention to the opinions of divisions on which they did not sit and thus are unlikely to form a forceful position on such cases. Second, there is no formalized procedure for either consultation or exchange of memoranda to elicit the views of the non-sitting justices. Without such a procedure it is doubtful that much interchange occurs. Third, Rule 135(3) provides that objections by both sitting and non-sitting justices be to the proposed "decision" of the division.

The problems regarding appointment of divisional justices are heightened by the question of the appropriate role for a retired justice sitting pursuant to Minnesota Statutes section 2.724, subdivision 2. As mentioned previously, in January, 1967, Mr. Justice Gallagher was assigned to sit as an "associate justice," rather than as a "commissioner."[98] The statute provides that the Court ". . . may by rule assign temporarily any retired justice of the supreme court or duly appointed commissioner of said court, or one district judge at a time to act as a justice of the supreme court. . . ."[99] I do not know whether Mr. Justice Gallagher presently is exercising a vote in divisional decisions.[100] But whether he is or not problems are presented.

The Rule 135(1) standard for case assignment—"legal and judicial significance of the issues raised"—provides no assistance in determining the appropriateness of divisional disposition for any particular case.[101] A more satisfactory explanation of the factors properly influencing the exercise of discretion in such a determination was given by Mr. Chief Justice Knutson. The specific factors he listed were:

> . . . the novelty or difficulty of the legal or factual issues involved, the seriousness of the criminal offense charged, the presence or absence of important constitutional questions, or the construction of legislation as a matter of first impression.[102]

Yet the Court has been only moderately successful in choosing the cases to be accorded less than the full attention of all members. There are two distinguishable problems involved. First, there is the question of whether cases raising certain predictable issues in a predictable manner should be relegated to divisional hearing. Second, there is the somewhat more difficult question of how to handle the apparently "routine" case that develops, either upon argument or during division deliberation, into a case of more than routine proportions.

(2) En Banc Procedure: Problems of Coordination

THE USE OF FULL COURTS IN THE APPELLATE PROCESS

L.J. Blom-Cooper and Gavin Drewry*

THE English judicial process is exemplified by a pyramid of courts. When a piece of litigation—civil or criminal—is launched, its future progress through the courts can invariably be predicted by reference to two factors: the type of court in which proceedings were begun and the subject-matter of the case. There is one hierarchy for criminal proceedings tried summarily, another for trials on indictment, another for revenue proceedings, another for interlocutory proceedings, and yet another for proceedings started by motion in the Divisional Court of the Queen's Bench Division, and so on. The apex of each hierarchy is either the House of Lords or (in cases such as bankruptcy proceedings where appeals to the Lords are proscribed or restricted by statute[1]) the Court of Appeal. Not surprisingly the bulk of litigation goes no further than the court of first instance: the litigant will frequently not wish, or will deem it inexpedient to appeal. And sometimes the right of appeal—even to the Court of Appeal—is subject to statutory limitation.[2] Thus judicial hierarchy is of practical significance only in a minority of cases, though its theoretical significance to students of the judicial process is considerable.

The existence of identifiable court hierarchies is part of the order which is a feature of all legal systems. Another manifestation of legal order is to be found *within* the hierarchies: it takes the form of a predictable progression in the *sizes* of courts at different levels. A litigant at first instance will always[3] be faced by a trial judge sitting alone (or with a jury); his first appeal will almost invariably be to three judges; and if he wishes and is permitted to appeal to the House of Lords his appeal will be heard by five Law Lords. There are logical reasons for this arithmetical progression. First, our appellate system is based upon a general philosophy of "good, better, best"; not only are appeal judges *promoted* (i.e. moved up the hierarchy on the basis of merit and seniority[4]) but they also present a phalanx of combined expertise numerically sufficient to overrule (where necessary) the judgment below. In one sense the larger size of the higher court is a face-saver for trial judges who are found to have fallen into error; though sheer weight of numbers is not, by itself, synonymous with greater expertise.

The hierarchy of courts is reinforced by that aspect of the doctrine of *stare decisis* which makes the decisions of higher courts binding upon the lower courts. This can lead to the alarming phenomenon of a House of Lords judgment being a final decision based upon an overall minority of judicial opinion; technically it would be possible for the combined opinions of a three-judge Divisional Court, a three-judge Court of Appeal and two dissenting Law Lords to be overridden by the votes of only three Law Lords.

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Another principle which plays a part in determining the size of a court is the desirability of clear-cut decisions; this means that, wherever possible, courts should consist of an uneven number of judges.[13]

The minimum sizes of appeal courts are laid down by statute but, as a rule, the legislature has imposed no upper limit except to the extent of supplying only a limited number of judges qualified to sit in a particular court. Both the Court of Appeal and the House of Lords normally sit with more than a bare quorum of judges: the former with three Lords Justices (the quorum is two) and the latter with five Law Lords (the quorum is three). But in certain circumstances both courts sometimes sit with more judges than is usual, as a full court: and it is the function of these full courts which is the central theme of the present article.

In recent years there have been only two instances[14] where the House of Lords has sat with more than five judges: the cases were

Full courts have become an isolated curiosity in the House of Lords, and neither *Gourley* nor *Ross Smith* is a particularly persuasive advertisement for their extended use. Five dimensions of diverse reasoning are confusing enough without adding further elements of confusion. Technically there is nothing to prevent all the Law Lords from being convened simultaneously to hear an appeal—and the House could still call upon the judges of the Queen's Bench Division to assist in their deliberations, though this has not happened since 1898.[15] The case for summoning full courts has never been very strong, and it is surprising that there is now a glimmer of a suggestion that reversal of an earlier decision—particularly one recently handed down—will be effected only by a full court.[21]

In the lower appeal courts the role of full courts is quite different and, as we shall see, on the criminal side they have been employed quite frequently. In the civil Court of Appeal, notwithstanding recent statements to the contrary by Lord Denning M.R.,[22] it is clear that the court is bound by the self-imposed fetter of its decision in *Young* v. *Bristol Aeroplane Co.*,[23] which permits it to depart from its own previous decisions only in very limited circumstances.[24] The tariff of exceptions laid down in that case does not include any power of a full court to overrule decisions reached by ordinary sittings of the court, and full courts in the civil Court of Appeal are almost as rare as those in the House of Lords.

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14 [1956] A.C. 185.
15 [1903] A.C. 280.

22 *Gallie* v. *Lee* [1969] 2 Ch. 17; and *Hanning* v. *Maitland* (No. 2) [1970] 1 Q.B. 580. The principle as enunciated by Lord Denning was discussed on a different level in *Broome* v. *Cassell & Co. Ltd.* [1971] 2 W.L.R. 817, namely to what extent may the Court of Appeal decline to follow a binding decision of the House of Lords itself.

23 [1944] K.B. 448.

24 (1) It can resolve two conflicting decisions of its own; (2) it can reject a decision which cannot stand with a subsequent decision of the House of Lords; (3) it can reject a decision reached *per incuriam*.

In the Court of Criminal Appeal (now the Criminal Division of the Court of Appeal) there has been a general practice of following previous decision [25]—though there is no unequivocal authority on the matter. The criminal law, unlike most civil law, tends to be based most upon social *mores* which are in a perpetual state of flux: hence it may be argued that the criminal courts should be particularly flexible, particularly as criminal proceedings often involve both rigorous social stigma and severe penal sanctions, for those convicted. But, equally, the reverse may be true: it can be argued that for the same reasons (stigma and punishment) the criminal law should be clearly and firmly stated by the courts so that potential deviants can ascertain precisely where they stand. The former principle seems to have prevailed to the extent that the Court of Appeal (Criminal Division) has never laid down a "Bristol Aeroplane doctrine," and, as we shall show later, it is far freer than its civil counterpart in convening full courts—mainly for the purpose of reconsidering previous decisions of its own.

. . .

Continuing our search for a hypothesis for the use of the full-court procedure, we next decided to turn to the practice of the Court of Criminal Appeal, particularly since, until the Administration of Justice Act of 1960, that court was effectively the final appellate court in criminal matters. (Certainly, the court itself had no control over further appeals to the House of Lords: appeals were allowable only on the fiat of the Attorney-General and this was very seldom granted.)

We approached the material with two hypotheses in mind: (1) that the cases which received the full-court treatment involved *predominantly* important points of substantive, evidential or adjectival law; and (2) that these cases were of greater importance than run-of-the-mill criminal appeals. If these assumptions proved correct, one might expect the civil Court of Appeal, in the absence of a higher appellate court, to adopt a similar policy in the use of full courts. If the assumptions proved false, one would have no reason to suppose that the civil appeal court, thrust into an unaccustomed role as court of last resort, would be any more successful in formulating a coherent policy towards the full court procedure which would accord with the public interest in having a tribunal in which important points of law can be fully and comprehensively argued out.

During the period 1951–60 [26] there were, so far as we have been able to discover, twenty-seven full court decisions out of 476 reported decisions of the Court of Criminal Appeal—5·6 per cent.

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25 See R. Cross, *Precedent in English Law* (2nd ed.), pp. 110 *et seq.*

32 [1966] 1 Q.B. 273, 278.

33 [1937] 2 K.B. 120. In *Ward* v. *James* the Court of Appeal purported not to reverse *Hope* but to "reinterpret" the decision: a piece of sophistry clearly intended to side-step the *Bristol Aeroplane* doctrine, *supra*.

(Annexed is a list of these cases—Annex A—all but one of which is reported: and there is a brief reference in *Anderson* v. *Morris* [35] to the one unreported case, *Smith*, November 6, 1961.) We have broken down the period into two parts: (a) 1951–60, the period when criminal appeals to the House of Lords were very rare and leave to appeal depended upon the fiat procedure; and (b) 1961–66, when there were considerably more appeals to the House of Lords.

At the outset we should repeat that the Court of Criminal Appeal normally followed its own previous rulings on points of law but was not absolutely bound by them: it could and did overrule them if it felt it was desirable to do so. The usual procedure, when an earlier statement of law was to be seriously questioned, was to summon a full court of five or more judges, the classic example being *Taylor*.[36] This was not, however, the invariable practice: to quote Mr. Michael Knight, " it is not unknown for a normal division of three judges in no way specially summoned to state in a later case the exact contrary of an earlier three-judge ruling and yet not expressly overrule it." [37]

Over the whole period, 1951–66, the full court was regularly used, not predominantly to deal with cases involving particularly difficult points of law but primarily because the court was confronted with an awkward precedent it wanted to by-pass or overrule. In eleven out of the twenty-seven full-court cases (41 per cent.) it was clear that awkward precedents were the reason for the composition of a five-judge court. . . .

In some of the remaining sixteen cases, while there was not an awkward precedent seemingly standing in the path of modern attitudes to the criminal law, to be overruled, distinguished or to have its reasoning doubted or explained, there was a morass of case law on the point. . . .

For the rest, with the exception of *Vickers* which needed a five-judge court to resolve the three-judge court impasse (one judge in private had declared his tentative dissent) a full court was summoned simply because of the intrinsic importance of the case. . . .

If the twenty-seven cases are broken up into the two periods, it is interesting to note that in the period before the coming into force of the Administration of Justice Act 1960, most of the fifteen cases were on important points of law, whereas, post-1960, out of eleven reported and one unreported cases, eight were concerned with awkward precedents.

Taken as a whole, the full-court process has proved to be rather a nonentity, even in the criminal appeal court where it all but died out after 1966. (And the cautious judgment of Widgery L.J. in *Newsome*, *supra*, where the use of a full court involved only an issue relating to judicial discretion, hardly heralds the outbreak of an epidemic of five-judge courts in the foreseeable future). It has sometimes been used to disentangle the law from the awkwardness of precedent; and only in a few cases has the intrinsic importance of the case been a governing factor in convening full courts. Even a slight change of heart, post-1960, hardly upgrades the procedure from its unimportant role in the criminal appellate process, and the almost total disappearance of full courts from the criminal scene since 1966 tends to endorse this view.[50]

The inutility of the full-court process is further underlined if one tests the other assumption, that full-court decisions are (by the somewhat arbitrary criteria we have used) the more important appeals. We are convinced that there are literally dozens of reported cases in the period 1951–66 on topics as important as, if not more important than, the cases given the full-court treatment. We attach a list of some criminal cases (Annex B) which we think, on the grounds of importance, merited the full-court procedure. A third of them were pre-1960, but none of the other (post 1960) cases in fact went on to the House of Lords. Our view is of course highly subjective, but we venture to think that most criminal law practitioners would agree with us on at least a high proportion of our examples.

We conclude from this study that if it is left to the first-tier appeal courts alone to determine whether the full-court procedure should be employed, a number of important points of law will not get the special treatment afforded by a more thorough review, and that a full court will tend to be used primarily whenever the Court of Appeal wants to reverse its own previous decisions. If, however, litigants were able to apply for a full-court hearing, in much the same way as they now apply for leave to appeal to the House of Lords, the full-court procedure would be likely to be used at least as often as appeals are now heard by the House of Lords. If a larger court is used merely as a substitute for a first appeal to an ordinary three-judge court, then any benefit of a second appeal derived from a saving of judicial man-hours is, at one blow, lost. If full courts are combined with a modified two-tier system, with a first hearing before three judges, who refer the case to a larger court, then the system has gained little or nothing.

The only lesson to be learned from the examination of the use of full courts in recent years is that they are used sparingly and in restricted circumstances—and they hardly provide a model system which might replace the House of Lords. This is not to say that full courts in some shape or form might not be employed as the court of last resort, but they would have to be something a great deal more high-powered and purposive than the anaemic specimens produced in recent years. If this story has produced nothing more exciting than re-affirmation of the value of a three-tier system of courts it is as well to remind oneself that proving a negative, if somewhat dampening to the ardour of a reformer, has a useful function in clearing away the deadwood of ill-considered proposals for reform.

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[35] (1966) 50 Cr.App.R. 216.
[36] (1950) 34 Cr.App.R. 128.
[37] "The Court of Criminal Appeal and Binding Precedent," 113 *Law Journal*, 589 (September 13, 1963).

[50] The total disappearance of full courts, post-1966 and pre-*Newsome*, may reflect, not only the fact that the House of Lords has continued to expand its activities in the field of criminal law, but also that the Criminal Division of the Court of Appeal now includes Lords Justices who can perhaps more authoritatively reconsider previous decisions (particularly those of the old Court of Criminal Appeal) in a three-judge court, while still leaving important points of law to be determined by the House of Lords.

EN BANC HEARINGS IN THE FEDERAL COURTS OF APPEALS: ACCOMMODATING INSTITUTIONAL RESPONSIBILITIES

H. Lamar Alexander*

II

The Historical Perspective: Development of Divisional Sittings in American Appellate Courts of Last Resort

A. The State Court Experience

Population increase, industrial expansion and the beginnings of social legislation were among the forces which multiplied the business of state appellate courts in the late nineteenth century.[10] In response to the need for more efficient court organization, California was the first state to adopt the English innovation of simultaneous divisional sittings.[11] The California Constitution of 1879 authorized the seven justices of the state's supreme court to sit in two departments, each equally competent to hear and decide appeals.[12] Divisional sittings in state courts of last resort subsequently became a favored method of court organization. The procedure was less expensive than the suggested alternatives of adding judges or creating intermediate appellate courts. It also increased the efficiency of the courts by diminishing the aggregate number of hours each judge devoted to oral argument and decision-making.[13] By 1930, twenty of twenty-eight states with supreme courts large enough to utilize the arrangement had adopted some variation of the divisional system.[14]

Judges and lawyers generally applauded the divisional arrangement.[15] But the full membership of state supreme courts and the United States Supreme Court had traditionally reviewed even the most routine appellate proceeding, and some members of the bar continued to insist that every appeal was entitled to the attention of the full court.[16] That review by fewer judges diminished the apparent authority of divisional decisions probably accounted for a good deal of the dissatisfaction.[17] To meet this objection, each of the legislative or constitutional provisions which authorized divisions also authorized en banc hearings, and the courts continued to lend to some cases the imprimatur of decision by the full membership.[18] Questions of public importance or those involving construction of state or federal constitutions often were heard en banc,[19] as were cases involving overruling,[20] the death penalty, and grants of original writs calling for the application of extraordinary remedies.[21] The authority of divisional decisions was

*J.D., N.Y.U., 1966; reproduced from 40 N.Y.U.L.REV. 563, 565-575, 578-596, 598-600, 726-730, 732-734, 136-138, 740-741 (1965).

13. Curran & Sunderland, The Organization and Operation of Courts of Review, 3 Mich. Judicial Council Rep. 51, 146-47 (1933).

15. Dean Pound has described divisional sittings as the most significant 19th century contribution toward solving organizational problems of courts of review. Pound, supra note 10, at 223. See also Parker, A Supreme Court with Two Divisions, 6 J. Am. Jud. Soc'y 177 (1923); Sharp, Supreme Courts Sitting in Divisions, 10 N.C.L. Rev. 351 (1932). The California bar approved a proposition to urge its supreme court to "hear a substantial number of cases in departments" by a vote of 2265 to 999. 7 Cal. S.B.J. 270 (1932).

further impaired because the arrangement provoked concern that the decision of a division might depend upon its fortuitous composition.[32] Frequent rotation of personnel helped to meet this objection by avoiding the development of identifiable attitudes by particular blocs of judges.[33] In some courts en banc consideration was automatic when there was a dissent in the division.[34] Assignment of judges was made exclusively an intramural concern of the court, so that attorneys were unable to manipulate cases to appear before more favorable divisions.[35]

The possibility that inconsistent decisions by different divisions might disrupt the uniform and certain development of the law also contributed to displeasure with the new system.[36] Accordingly, the courts developed devices to keep judges aware of recent precedents. The Chief Justice often sat with each division.[37] Opinions were circulated to each judge of the court before being filed.[38]

Some courts found divisional hearings inadequate for decision-making. The Arkansas Supreme Court divided only for the purpose of reading briefs.[39] The Supreme Court of Kansas reverted to regular en banc proceedings whenever its caseload permitted it.[39] In Maine, the legislature abolished divisional sittings because it doubted that the procedure was compatible with the constitutional authorization for "one" supreme court.[31] The Chief Justice of Louisiana, explaining his court's abandonment of the practice after eleven years, noted that the divisional system gained little in efficiency because of the increase in motions for rehearing.[32]

B. The Federal Court Experience[30]

Factors similar to those at work in the state courts, together with expanded jurisdiction and new federal laws, stimulated a flood of cases in the federal courts following the Civil War.[31] The framework of the courts, fundamentally unchanged since the Judiciary Act of 1789, was ill-equipped to handle the burden.[35] Drastic reorganization was imperative.

1. The Supreme Court

The attention of a few early reformers turned to the Supreme Court, where the nine Justices faced a burgeoning caseload though shackled with circuit court duties.[33] In order to facilitate disposition of the caseload, several unsuccessful attempts were made to introduce divisional hearings in the Court. Representative Thurman of Ohio in 1869 urged a Supreme Court of twenty-four, sitting in three divisions, patterned after the French Court of Cassation.[34] Beginning with the Forty-Sixth Congress, Representative Manning of Mississippi introduced a series of bills urging division of the Supreme Court.[33] The proposal reappeared following World War I with some support from the American Bar Association but never matured into legislation.[34] Supporters of President Roosevelt's 1937 "Court-packing" plan proposed divisions to counter arguments that more than nine Justices could not function effectively as an institution.[33]

A persistent obstacle to Supreme Court divisions has been that divisions would constitute separate courts in derogation of the constitutional provision for "one Supreme Court."[34] But other American and English courts of last resort which employ divisional hearings regard divisional decisions as decisions of the full membership.[32] And since the statutory quorum for the Supreme Court is six, by rotating personnel

31. See Cornish, A Century of the Supreme Judicial Court of Maine, 22 Me. S.B.A. Rep. 109, 126-27 (1924).

32. Address by Hon. Charles A. O'Niell, Chief Justice of the Supreme Court of Louisiana, May 18, 1923, in 24 La. B.A. Rep. 14, 20-21 (1923).

the Justices presumably could improve efficiency by hearing cases in sixes.[42]

Nevertheless, as some Justices have argued, divisions probably would be impracticable because of the nature of the Supreme Court's caseload.[44] Shifting responsibility for the final resolution of federal trial court error to the courts of appeals has relieved the Court of most private common law litigation, so that about one-fourth of the cases currently decided in the Supreme Court involve constitutional issues; the remainder are largely public-law questions.[45] In the case of such issues of great public importance, state supreme court experience with divisional hearings indicates that en banc decisions are desirable to fulfill a court of last resort's responsibility to formulate authoritative precedents. Moreover, since divisional resolution of the numerous issues which provoke disagreement among the Justices might inhibit continuity of decision, en banc hearing of controversial issues is more consistent with the Court's further responsibility to develop the law uniformly and finally.

2. The Courts of Appeals

Three-Judge Hearings in the Circuit Courts of Appeals.—Neither reorganization of the Supreme Court nor restriction of federal jurisdiction[46] offered an acceptable remedy for the overburdened federal appellate docket. The Evarts Act of 1891[47] finally provided relief by interposing circuit courts of appeals between the Supreme Court and the trial courts. Such intermediate appellate tribunals were new in the federal system.[48] Circuit courts from 1789 had possessed a limited appellate jurisdiction, but these curiously organized tribunals, which had no judges of their own, had functioned more importantly as nisi prius courts.[49]

The most important innovation of the Evarts Act was authorization of review by certiorari for the bulk of Supreme Court business. By curtailing obligatory review in the Supreme Court and eliminating the appellate jurisdiction of the circuit courts, the act established circuit courts of appeals as the courts of last resort for virtually every federal litigant.[50]

Although Congress since 1891 has created two new circuits,[51] the primary response to a growing number of appeals has been adding circuit judgeships to the existing circuits. By 1938 all but two of the eleven circuits had more than three circuit judges.[52] Yet because of the three-judge provision of section 117, only the District of Columbia Circuit Court of Appeals ever sat with more than three judges.[53]

Thus, divisional hearings had in effect developed within most circuit courts of appeals without a corresponding development of en banc proceedings in which all the judges assigned to the circuit were seated. By contrast, state courts of last resort which used divisional hearings continued frequently to sit en banc. The difference may be partially attributed to the diminished authority of divisional decisions in state courts which traditionally sat always en banc. In the federal system there was no corresponding lessening of authority. Three-judge tribunals had decided appeals since the circuit courts were created in 1789; three-judge decisions therefore were acceptable even after three judges had become in effect a division of the court. In addition, splitting state supreme courts into divisions seemed immediately to threaten uniformity of decision. But in circuit courts of appeals, the divisional arrangement grew almost imperceptibly as circuit judges gradually were added;[54] upon each single addition, the possibility of a fractionalized court was not as apparent as it had been in the state court situation.[55] And even after circuit courts of appeals emerged clearly as

44. Justice Stone believed "it would be a serious loss to the continuity and thoroughness of the work [of the court] if every member did not participate" in each case. Mason, Harlan Fiske Stone and FDR's Court Plan, 61 Yale L.J. 791, 798 (1952). Chief Justice Hughes thought divisional hearings "impracticable." Hart & Wechsler, supra note 35, at 1402.

courts of last resort, certification to the Supreme Court was counted upon to resolve conflicting decisions of differently composed divisions of the same circuit.[56]

Inherent Power To Sit En Banc.—The Supreme Court granted certiorari in *Textile Mills Sec. Corp. v. Commissioner*[64] to consider a conflict between circuits over whether a circuit court of appeals may be composed of all the active judges of the circuit sitting en banc.

The Supreme Court unanimously agreed with the Third Circuit that, despite the statutory ambiguity, the three-judge provision of section 117 could not have been intended to defeat the "avowed purpose" of section 118 to create courts consisting of all the active circuit judges of the circuit; that being so, the courts have power to hear and decide cases en banc.[65]

Congress codified the *Textile Mills* decision in Section 46(c) of the Judicial Code of 1948.[72] An equally important congressional purpose was to safeguard further intrusion of the three-judge tradition by providing that ordinarily divisions would dispose of appeals.[66a] Following the circuits' practice, the section vested responsibility for initiating en banc hearings or rehearings in the majority of active circuit judges of the circuit. Section 46(c) apparently stimulated the first en banc proceedings in the Fifth and the Eighth circuits.[74] Nevertheless, the total number of cases disposed of en banc in the courts of appeals averaged less than fifteen each year between 1949 and 1953.

In *Western Pac. R.R. Corp. v. Western Pac. R.R.*,[75] decided in 1953, the Supreme Court established some "fundamental requirements" for en banc procedures in the courts of appeals through its supervisory power over the federal judiciary. These requirements related principally to establishment of a limited right of litigants to participate in the initiation of the en banc procedure: first, the litigant should be permitted to suggest to the judges the appropriateness of his case for en banc hearing or rehearing; and second, the court should make its en banc procedure known to litigants.[76]

What the Supreme Court did not attempt to do in *Western Pacific* is equally important. It did not divest full control of the en banc procedure from the active circuit judges; the litigant may suggest, but may not compel, the initiation of an en banc proceeding. Neither did it compel the circuits to adopt a particular procedure, nor to establish standards for determining what cases shall be heard en banc.

IV

The Institutional Responsibility to Develop the Law Uniformly: En Banc Proceedings To Resolve And Avoid Intra-Circuit Conflict

Because panels have coordinate power to make decisions, one panel may decide a case in conflict with a circuit precedent established by a differently composed panel. Conflicting views cannot remain within a single court of appeals; as a result, the latter decision is held to overrule the former.[85] But the inadequacy of panel hearings to overrule or modify circuit precedent occasionally inhibits fulfillment of each court of appeals' responsibility to develop the law uniformly.[86] The example following demonstrates why en banc proceedings are sometimes the only appropriate method of dealing with serious intra-circuit conflict.

64. 314 U.S. 326 (1941).

75. 345 U.S. 247 (1953). See generally, Note, Hearings and Rehearings In Banc in the United States Courts of Appeals, 57 W. Va. L. Rev. 62 (1955).

In *Mottolese v. Kaufman*,[97] the federal district court stayed its proceedings pending state court determination of the same claim against substantially the same defendants. Plaintiff petitioned the six-judge Second Circuit for a writ of mandamus ordering the district judge to proceed with trial. Judges Learned Hand, Frank and Swan formed the panel which heard the petition. Judges Hand and Swan voted to deny the petition; Judge Frank dissented, finding that the district judge's stay constituted an abuse of discretion.

Within two years, *Beiersdorf & Co. v. McGohey*[98] again presented virtually the same question to the Second Circuit. Although the personnel of the circuit had not changed, the *Beiersdorf* panel was composed of Judges Chase, Clark and Frank. Judge Chase felt that *Mottolese* was both correctly decided and controlling. Judge Clark apparently regarded *Mottolese* as incorrectly decided but was able to distinguish *Beiersdorf*. Although Judge Frank thought *Mottolese* controlling, in Judge Clark he now had an ally on the panel who believed the precedent wrong. Judges Frank and Clark therefore had to determine to what extent considerations of stare decisis limited their freedom to disregard a recent circuit precedent established by a differently composed panel.

A. Panel Overruling and the Limits of Stare Decisis

Convincing arguments can be made which discourage the use of panel overruling. Courts generally respect the doctrine of stare decisis and adhere to their prior holdings. The practice helps to avoid unfairly defeating the expectations of litigants and others who may rely on well-established precedents. It promotes stability in the law, thereby encouraging private ordering of affairs. Adherence to precedent also avoids the cost and inefficiency of de novo examination of every question of law.[99] Since Congress has specifically provided that the decision of a panel is the decision of its court of appeals,[100] panels of the same circuit do not constitute separate courts and considerations of stare decisis are applicable between them.

Still, Judges Clark and Frank might have overruled the binding precedent with which they disagreed. The doctrine of stare decisis has never been thought to be a limit on a court's power to modify or overrule in appropriate instances.[101] Particularly in a court of last resort judges should not be frozen to a rule which works injustice in a specific case or which retards a desirable progression in the law.[102] Overruling *Mottolese* would not have contradicted the views of a majority of active judges of the circuit since only three of the six had expressed disagreement with Judges Clark and Frank. And overruling *Mottolese* should not have unfairly defeated the expectations of the litigants since reliance upon the procedural matter at issue would be unlikely. If unfair surprise had been shown, the panel might have voted to overrule prospectively.[103] Even if the alternative of prospective overruling were unavailable, it is questionable whether Judges Clark and Frank should have voted against their convictions simply because of the possibility of unfair surprise.

97. 176 F.2d 301 (2d Cir. 1949).
98. 187 F.2d 14 (2d Cir. 1951).

Nevertheless, other considerations supporting the doctrine of stare decisis made a panel overruling of *Mottolese* inappropriate. If the *Beiersdorf* panel could properly overrule *Mottolese*, the next panel could properly overrule *Beiersdorf*. The accident of panel composition would determine the result in each case. To illustrate, assume the sixth Second Circuit judge agreed with Judges Clark and Frank. Twenty different panel combinations of the six are possible. If the *Mottolese-Beiersdorf* question arose twenty consecutive times before differently composed panels and each judge voted his conviction, ten decisions would affirm and ten would overrule the *Mottolese* rule. Such unequal treatment is unfair to litigants. Were there substantial reliance on the uncertain rule, private ordering of affairs would be disrupted. Uncertainty also would encourage relitigation of the same question, which is both costly to litigants and burdensome to the courts. In short, the court of appeals, ordinarily the court of last resort, would have defaulted in its responsibility to develop the law of the jurisdiction uniformly and finally..

As *Beiersdorf* was eventually decided, all three judges deferred to stare decisis, although Judge Clark dissented because he was able to narrow the precedent and distinguish *Beiersdorf* on the facts. While this approach avoided panel overruling, it was not altogether satisfactory. Judge Frank had cast the decisive vote to create a result he firmly believed wrong. More important, the decision did not effectively resolve the intra-circuit controversy. Judge Clark had, in *Beiersdorf*, demonstrated his willingness to modify the disagreeable precedent in order to avoid applying it to barely distinguishable facts. Judge Frank might be subsequently inclined to one of the numerous methods of avoiding or modifying the precedent which he also disliked.[104] Uncertainty therefore remained because panel composition might continue to be a factor on appeal.

In situations where future controversy among the active judges is improbable, the more efficient panel overruling may be appropriate.[105] For example, the panel which established the questioned precedent may have misread or failed to consider a material fact, issue or controlling precedent.[106] A statute or decision upon which the precedent was based may have been altered.[107] Change in circumstances may have made an aged precedent obsolescent.[108] *Chabot v. National Sec. & Research Corp.*[109] suggests an even broader ground to justify panel overruling. Two controlling circuit precedents had created an exception to a Supreme Court decision. An important commentator and the only judge who had cited the ten-year-old precedents disapproved of them. The panel of three active judges which overruled regarded the decisions "plainly wrong."[110]

Although panel overruling may be appropriate in such situations, agreement that the prior rule is "plainly wrong" should not obscure the possibility of disagreement among nonparticipating active judges upon what the new precedent should be. Thus, a panel of judges

109. 290 F.2d 657 (2d Cir. 1961).

decided *Durham v. United States*,[111] radically altering the rule of criminal responsibility for the District of Columbia Circuit. Assuming all the active judges agreed that the prior rule was inadequate,[112] the failure to obtain en banc agreement upon how the new rule should be applied may have contributed to the questioning of the rule by differently composed panels which appeared soon after the *Durham* decision.[113]

In situations where panel overruling seems appropriate, to insure against subsequent disagreement, panel opinions which overrule should be circulated among all active judges to ascertain the degree of present disagreement.[114] In two recent instances in the Second Circuit, the judges of the overruling panel secured the assent of the surviving judges of the overruled panel.[115] This practice should discourage relitigation of the issue by making clear to future litigants the improbability of inconsistent decisions by different panels. But in most situations, as in *Beiersdorf*, panel overrulings are disapproved, primarily because of the threat of subsequent inconsistent panel decisions.

B. The Possibility of Supreme Court Resolution of the Intra-Circuit Controversy

Judge Frank attempted to avoid uncertainty and to justify his vote for what he believed an unjust decision by inviting the Supreme Court to review *Beiersdorf*.[116] The effort was futile because the losing party failed to petition for writ of certiorari. Had he petitioned, review still would have been uncertain because the Supreme Court grants only about one in thirty applications for writ of certiorari.[117]

Moreover, the mere existence of an intra-circuit conflict is not sufficient reason to cause Supreme Court review. Not only would the additional burden of maintaining intra-circuit harmony be considerable, but the Supreme Court now refuses to accept certification of an intra-circuit conflict on the grounds that it is the institutional responsibility of a court of appeals to resolve its own internal conflicts and uniformly develop circuit precedent.[118]

C. En Banc Hearing for Resolution of the Intra-Circuit Conflict

Judge Clark suggested in *Beiersdorf* that, because of the intra-circuit controversy, the active judges should reexamine the *Mottolese* precedent en banc.[119] Indeed, most circuits have a rule of practice prohibiting panel overrulings and requiring that the court en banc reexamine circuit precedents.[120] Such a rule has much to recommend it. En banc hearing would have permitted Judge Frank to vote for what he considered the just result without the adverse effects of panel overruling. It would also have facilitated resolution of the intra-circuit controversy by establishing a majority view of the active judges.

The majority view emerging from an en banc hearing would have had the further advantage of preventing subsequent inconsistent panel decisions. En banc decision of *Beiersdorf* might have established a rule contrary to the views of Judges Clark and Frank. If, in a later panel consideration of the same issues, Judges Clark and Frank adhered to the en banc precedent, it is true that they would be voting to create what they considered unjust results. Yet if they did not follow the rule, the active majority en banc would presumably reverse the panel decision in order to avoid inconsistent decisions. To eliminate the inefficiency of repeated en banc consideration, therefore, after the

en banc precedent is established, Judges Clark and Frank should attempt to decide the case just as the en banc court would. As this example demonstrates, a precedent established by the court en banc will be more binding than a panel precedent.

Nevertheless, the en banc proceeding has proven to be more a palliative than a cure for intramural controversy. In most circuits en banc hearings do not actually resolve disagreement among the judges. In the Second, Fifth and District of Columbia Circuits, four out of five en banc decisions include at least one dissent: in two out of five the margin of decision is no more than one vote.[121]

The inability of some circuits to agree more successfully in en banc decisions has seriously limited the effectiveness of the proceedings. Failure to agree en banc may leave judges unwilling to respect the en banc precedent strictly in subsequent panel decisions. For example, despite en banc consideration, different panels of the District of Columbia Circuit have established seemingly irreconcilable variations of the *Mallory* rule regulating admissibility of confessions.[122]

Even if judges are willing to abide by en banc precedents, the inability to resolve differences en banc occasionally prevents formulation of a precedent. In a few instances the judges agree upon a result but not upon a single principle of law.[123] More often, a bewildering array of opinions obscures a purported majority view and leaves the troublesome issue subject to wide interpretation by subsequent panels.[124]

Further, of 84 instances in which the District of Columbia, Second, Third, Fifth, Ninth and Tenth Circuits have sat en banc with an even number of judges, 14 have resulted in an evenly divided court.[125] The circuits follow the Supreme Court practice of affirming the lower court decision in such instances but awarding no precedential value to the decision.

D. En Banc Hearing to Avoid Imminent Intra-Circuit Panel Conflict

Although the en banc decision of *Beiersdorf* might have had the beneficial effect of resolving intra-circuit controversy and establishing a majority circuit rule, it might also have overruled *Mottolese*. The undesirable effects of such an overruling could have been avoided had the judges anticipated the possibility of conflict and decided *Mottolese* en banc.

The clearest example of a case requiring en banc decision to avoid anticipated intra-circuit conflict is where panels simultaneously hear the same issue and tentatively reach different results. For example, in a recent Fourth Circuit case, a divided panel decided to reverse a district judge's ruling to admit certain evidence. Before the opinion was filed, the dissenting judge joined the remaining two judges of the circuit to affirm unanimously an identical ruling by another district judge. The court of appeals resolved the issue en banc and thereby avoided announcing conflicting decisions simultaneously.[131]

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122. Compare the en banc decision in Naples v. United States, 307 F.2d 618 (D.C. Cir. 1962) with the apparently conflicting subsequent panel decisions in Spriggs v. United States, 335 F.2d 283 (D.C. Cir. 1964), and Perry v. United States, No. 18241, D.C. Cir., Nov. 5, 1964. See also Judge Wright's dissent to the denial of petition for rehearing en banc in Perry.

131. See Kissinger v. Frankhouser, 308 F.2d 348 (4th Cir. 1962), cert. denied, 372 U.S. 908 (1963) and Thomas v. Hogan, 308 F.2d 355 (4th Cir. 1962);

V

The Institutional Responsibility to Develop Authoritative Precedents: Maintaining Active Majority Control of Important Cases

Since panel decisions are deemed decisions of the court of appeals, it might be thought that every panel decision not reconsidered en banc reflects the majority view of the active judges. This assumption is probably true in the majority of cases, where the law and its application are clear. But in those cases where the law or its application is doubtful, a divided or unanimous panel decision for one party might be decided en banc five-to-four or six-to-three for the other. These troublesome cases probably should all be heard en banc in order to avoid decisions which have the appearance of being determined by the fortuitous composition of the panel. But heavy circuit workloads do not permit en banc control of all cases which provoke disagree-

More commonly, a single case warns of subsequent panel conflict and thus justifies en banc consideration. . . .

ment.[134] Therefore, except for cases which cause or presage intra-circuit panel conflict, judges do not vote for en banc hearings every time they disagree with the decision the assigned panel has made or is likely to make.[135] Rather, an attempt is made to draw from the controversial cases those which are exceptionally important.[136] In some circuits the *principal* use of the en banc proceeding is to allow the active majority to control the disposition of important cases.[137] Consideration of these cases en banc may be justified by the court's institutional responsibility to develop authoritative precedents.

One example of such an important case is the so-called "leading case," which affects many future decisions by determining major doctrinal trends.[138] Thus, in *Hickman v. Taylor*,[139] the Third Circuit sat en banc to create the rule that an attorney's work product is confidential and is not subject to discovery under the Federal Rules of Civil Procedure.

Similarly, a court of appeals sometimes deems important enough for en banc consideration issues involving a type of litigation that is concentrated in the circuit but recurs frequently in other circuits.

It has also been suggested that cases involving extraordinarily large sums and numerous litigants are important enough for en banc hearing.[142] When 8,485 plaintiffs sued the United States for $200 million upon claims growing out of the Texas City disaster, the Fifth Circuit sat en banc to hold that the evidence did not establish a case within the Federal Tort Claims Act.[143]

Some "hard cases" are deemed important enough for en banc consideration, apparently because they contain issues which provoke judges' emotional involvement.[144] Civil rights litigation in the Fourth and Fifth Circuits is a conspicuous example.

139. 153 F.2d 212 (3d Cir.), aff'd, 329 U.S. 495 (1945).

143. In re Texas City Disaster Litigation, 197 F.2d 771 (5th Cir. 1952), aff'd sub nom. Dalehite v. United States, 346 U.S. 15 (1953).

Another class of cases which judges regard as important enough for en banc treatment are those which involve extraordinary action against a judge. Thus, circuits have convened en banc to overrule orders issued by a single judge.

Judges regard en banc consideration as more appropriate than panel hearing for such important cases for several reasons other than improving the palatability of the decision by eliminating any fortuitous element of panel composition. First, the attention of the full court is said to insure a more competent decision. When issues are complex, an en banc decision may call forth "a more serviceable advance exploration of the announced rule and reason."[157] It is also supposed that full court consideration insures against overlooking the subtlest hint of error.[159] And in the event of Supreme Court review, en banc consideration has the advantage of presenting to the Court the full wisdom of the court of appeals.[158] Second, it has been suggested that permitting en banc consideration of important cases promotes harmonious institutional functioning of the court of appeals since each judge knows he will be able to participate in a case about which he has strong feelings.[160] Finally, it may be thought that merely lending the imprimatur of the full court to an important case improves the authority of the decision.

But the propriety of using "importance" as an independent reason for considering a case en banc is questionable because some aspects of the alleged superiority of en banc decisions over panel decisions are at best minimal. Judges have denied that the three-judge court's ability to produce a competent judicial opinion has ever proved inferior to that of a larger court.[164] Moreover, en banc consideration of important cases has not promoted institutional harmony in some circuits. En banc review of "hard" cases about which judges hold strong feelings sometimes exacerbates rather than accommodates personal differences.[165] Further, the sheer numbers of an en banc assemblage probably does not add significantly to the authority of a decision since three-judge appellate hearings have been employed in the federal system since 1789, and the authority of their decisions has gained widespread acceptance.[166]

Therefore, the only substantial justification for en banc control of important cases is to improve the palatability of decisions in which the law and its application are doubtful, by eliminating the possibility that the fortuitous composition of the panel might have determined the result.

VI

Miscellaneous Factors

A number of factors which bear on the propriety of an en banc convocation are less obvious and compelling than, for instance, the court's responsibility to resolve intra-circuit conflicts. Yet in appropriate circumstances, these other considerations should be accorded some weight in deciding whether or not to sit en banc.

A. Stymied Panels and En Banc Hearing as an Aid in the Decisional Process

Infrequently an assigned panel is unable to dispose of an appeal because the judges cannot agree upon a solution.

160. Maris, Hearing and Rehearing Cases In Banc, 14 F.R.D. 91, 96-97 (1954).

B. *Inter-Circuit Conflict as a Factor in Causing En Banc Hearings*

A court of appeals is often not effective in resolving an existing inter-circuit conflict because its decisions are only persuasively binding on other circuits.[181] But courts of appeals sitting en banc may relieve the Supreme Court's traditional burden by making a more deliberate effort to avoid or eliminate circuit panel decisions which create inter-circuit conflict.

Thus, the en banc majority might erase a circuit precedent established by a minority of the court which has subsequently been contradicted by other circuits. In *Stewart v. United States*,[182] the Tenth Circuit en banc unanimously agreed to overrule an earlier precedent established by a divided panel which had been disavowed by two circuits and questioned by another.

C. *Service of Nonactive Judges on Panels as a Factor in Causing En Banc Hearings*

Although the mere presence of a nonactive judge on a panel does not justify en banc review of a case that otherwise does not deserve it,[183] the substantial service of nonactive judges apparently does increase the number of panel decisions appropriate for en banc consideration. The larger number of possible panel combinations which is present merely because more judges are available in the circuit increases the probable number of inconsistent decisions which require en banc resolution. Similarly, more judges in the circuit increase the likelihood of panel decisions in important cases made contrary to the views of the active circuit majority, a situation which may be corrected en banc.

VII

En Banc Rehearing of Announced Panel Decisions

In terms of reduced efficiency, en banc rehearings are more objectionable than en banc hearings because deciding the same case twice duplicates effort and delays litigation. But the more serious objection to an en banc rehearing is its unsettling effect on finality of panel decisions. Litigants in the federal system have historically been limited to one appeal from a trial court decision, so that the final determination of claims may be made speedily.[209] Thus, the decision of the court of appeals should be the final disposition absent Supreme Court review, which occurs in only about three per cent of the cases.[210] Courts of appeals respect this principle by almost never reconsidering their own judgments, though they have power to do so.[211] Even when a retrial results in a second appeal, circuits generally observe the law of the case announced in the former appeal.[212]

It might be argued that, by providing for en banc rehearings in section 46(c), Congress established, within each court of appeals, a superior appellate tribunal; therefore, a panel decision would not be considered the final decision of the court of appeals until a requested en banc rehearing was concluded or denied. But though en banc rehearing may seem in the nature of an appeal because different judges fully reconsider the panel decision, courts have repeatedly denied that section 46(c) contemplated a second appeal.[213] Rather, en banc rehearing is a reconsideration by the court of appeals of its own decision. Thus, the effect of en banc rehearing is to supplant, rather than to reverse or affirm, the panel decision.[214] En banc rehearing therefore

182. 267 F.2d 378 (10th Cir.), cert. denied, 361 U.S. 844 (1959).

squarely contradicts the principle that there shall be one, final decision of the court of appeals.

Since less than one per cent of all panel decisions are reheard en banc, the damage to finality might be thought to be de minimis. But the effect of a few rehearings en banc is not limited to the cases actually reheard. The mere existence of the procedure encourages attempts to invoke it in all cases conceivably eligible for an en banc proceeding.

En banc rehearings therefore should be strongly disapproved. A case which deserves to be heard by the whole court should be singled out for en banc treatment before the panel decision is announced. Where this was not done, in most instances the case should probably be left to rest on the panel decision to avoid the damage to finality caused by rehearing en banc.[218]

VIII

Developing a Workable En Banc Procedure

A. *Initiating the Procedure*

1. *By Sua Sponte Motion: The Importance of an Effective Intramural Warning System*

Usually a panel member or a nonsitting active circuit judge suggests the appropriateness of an en banc proceeding for a case which has been assigned to a panel. It is important that such suggestions be made as early as possible in the litigation in order to avoid unnecessary delay and duplication of judges' efforts. An effective en banc procedure should discover the cases which might deserve the full court's consideration before panel decision is filed, at the latest, in order to avoid the disturbance to finality caused by en banc rehearing.

Occasionally judges will assign a case to the court en banc at original calendaring.

More frequently, therefore, the assigned panel will suggest the appropriateness of the case for en banc consideration. En banc indications may appear during brief-reading, oral argument, panel conference or opinion-writing. The panel member assigned to prepare an opinion in accordance with the panel conference usually prepares a draft which is circulated to the other panel members for their suggestions, concurrences, or dissents.[232] Some circuits also circulate the draft opinion to nonsitting active circuit judges to ascertain whether they desire en banc consideration of the case.[233]

Circulation of prospective opinions to the whole court, in draft or finished form, is clearly the most effective intramural method of discovering possible en banc indications before panel decision is announced.[234] One such indication is whether the majority of active circuit judges might disagree with the panel's disposition of the case. If so, and if the case is sufficiently important, or creates conflict with a case under advisement by another panel, or is a frequently recurring issue, en banc consideration may be appropriate. The panel alone is ill-equipped to make such determinations.

A reason why more circuits do not circulate draft opinions may be a combination of the notion that the panel is the "court"[235] and an unwillingness to meddle in other judges' opinions unless invited.

Probably the most important reason draft opinions are not fully circulated is that consistent attention to decisions of other panels takes a great deal of time from a busy judge's own panel duties.[238] But if a court of appeals is to maintain, as an institution, a unified attitude on issues about which judges disagree, it is imperative that each judge at some time familiarize himself with precedents established by panels on which he did not sit. Thus, judges regard it as part of their regular duties to read all "slip opinions" issued by the clerk after a decision is announced.[239] Such familiarization with circuit precedent can as well be done by reading opinions before the panel decision is announced. If consistent attention to draft opinions would somewhat delay announcement of panel decisions, that would still seem preferable to en banc rehearing.

If time became a prohibitive factor, all draft opinions would not need to be circulated. Circulating all opinions which overruled or seriously modified circuit precedent would include a very small number. Circulating the opinions which provoked a concurrence or dissent might include only about fifteen per cent of all opinions.[240] To these categories might be added cases involving related issues under advisement by other panels, and cases which panel members suspect may cause disagreement among the nonsitting judges.

2. By Petition of Counsel: An Impediment to Effective Judicial Administration

In the *Western Pacific* case,[241] the Supreme Court considered the question of what part—if any—the claims of litigants should play in the initiation of en banc proceedings. A panel of Ninth Circuit judges had struck, as unauthorized, a defeated litigant's petition for en banc rehearing.[242] Petitioner argued that section 46(c) established his right to compel every active judge formally to rule on the question of whether his case should be reheard en banc. Rejecting petitioner's claim, the Supreme Court held that section 46(c) is not addressed to litigants and establishes no rights in them. Rather, it vests the power to sit en banc and its exercise in the majority of active circuit judges of a court of appeals; "it neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing en banc."[243] But the Court noted that because counsel "are often well equipped to point up special circumstances and important implications calling for en banc consideration," their aid would help the judges more effectively to implement the en banc power.[244] Therefore, upon the basis of its supervisory power, the Supreme Court established the vague requirement that litigants be free to "suggest" to the court of appeals that a particular case is appropriate for en banc consideration.[245]

The result of the decision has been the institutionalization in circuit practice of counsels' petitions for en banc consideration. Petitions for hearing en banc are rare, but petitions for en banc rehearing were filed in the fiscal year ending June 30, 1964 by as many as one-fourth of the defeated litigants in some circuits.

In *Western Pacific* the Supreme Court also approved final disposition of unmeritorious petitions by the panel, as long as majority control of the en banc procedure was not irrevocably delegated in contravention of section 46(c).[246] Mr. Justice Frankfurter, while concurring generally, nevertheless thought failure to circulate petitions to every active judge was inconsistent with the majority control directive of section 46(c).

The Second Circuit practice of full circulation of petitions after panel recommendation is more consistent with section 46(c). But it is subject to the hazard that nonsitting judges will perfunctorily defer to the panel's recommendation or perhaps not even read the petitions.[247]

A combination of reasons explains why four circuits do not initially submit every petition for en banc consideration to every active judge. The primary reason is that consideration of petitions absorbs too much time in courts of appeals working at or near capacity.
In the District of Columbia and Second Circuits, merely a ten-minute glance at each of the approximately 130 petitions filed during 1964 would have consumed about three eight-hour working days of each judge; the total number of five-day working weeks consumed in each of the nine-judge circuits would be about five. In addition, some judges feel that a requirement that all active judges read petitions would encourage counsel to file more petitions.[247] Not only would this increase the burden of reading them, but it would disparage the finality of panel decisions by making it appear that en banc review is a regular method for obtaining reversal of a panel judgment.

A second reason why circuits do not fully circulate petitions may be because they have proved to be of minimal aid in deciding whether to implement the en banc power.

Finally, most judges seem to regard counsel's petitions as unnecessary to the effective implementation of the en banc power.[248] Most judges apparently find that reading opinions of panel decisions in which they did not participate and informal discussion with other judges are superior methods of discovering cases that deserve en banc treatment.

With remarkable prescience, Mr. Justice Jackson, dissenting in *Western Pacific*, predicted that "today's decision will either be ignored or it will be regretted."[249] For a time it seemed the former would be the case.[250] Today, most circuits have complied with the requirements of the decision but the number of circuits that regret the imposition of the requirements is growing. Circuit experience with counsels' petitions for en banc consideration strongly suggests that *Western Pacific* should be overruled insofar as it requires courts of appeals to entertain such petitions. First, the rationale of *Western Pacific*—that petitions will aid the judges in effectively implementing the en banc power—has proved invalid because the petitions are usually unmeritorious and often poorly constructed. Further, even if petitions were eliminated, a judge could still discover a case deserving en banc consideration by reading the panel opinion which "states the issues and gives the grounds for its conclusion and thereby sufficiently alerts the minds of experienced judges to what is at stake."[251]

Moreover, the petitions—which should be fully circulated among all the active judges to be effective—have in some circuits created a burden on the judges and a delay in finality of many panel decisions. It would seem preferable to eliminate petitions, which do not involve litigants' rights, thereby allowing judges more time for panel duties where litigants' rights are at issue.[252] Moreover, the luxury of both petitions and circulated opinions as a means for discovering en banc indications seems an impermissible duplication of function in the courts of appeals working at or near capacity. If a choice between the two devices must be made, petitions are clearly the more dispensable since judges must familiarize themselves with circuit precedent in order for courts of appeals to maintain institutional attitudes on controversial and important questions.

Therefore, the most salutary approach would be to eliminate rehearings en banc by circulation of draft opinions, so that all cases deserving en banc consideration would be discovered before panel decision is announced. Even though the right to petition for rehearing en banc would not be abolished, exercise of the right should be eliminated by the knowledge that no petitions would be granted.

B. Voting for an En Banc Proceeding

As judges have indicated, the preferable practice is that denial of a suggestion for en banc consideration does not indicate the majority's attitude toward the merits of the case.[200] This practice parallels the Supreme Court's insistence that denial of application for writ of certiorari is no expression of opinion on the merits.[201] But the question on granting or denying certiorari is whether or not Supreme Court review is necessary to maintain inter-circuit uniformity or to establish a precedent of national importance.[202] Error in the lower court decision is theoretically not a factor.[203] The different threshold question in almost every decision whether to sit en banc is whether the majority of active judges disagree with the decision the panel has made or is likely to make. Still, it would be speculative to assume that denial of a suggestion for en banc consideration reflects full court approval of the panel decision. Since the circuits are too busy to reverse en banc every panel decision with which the majority disagrees, denial of the suggestion may have been caused by the unimportance of the case. Or the case may not have been the appropriate one for formulation of an important en banc precedent.[204] Or, because only an even number of judges were available for the en banc proceeding, the judges may have preferred to delay en banc hearing to a later case in order to avoid an evenly divided court.

C. Decision-Making by the Court of Appeals En Banc

If a panel decision is reviewed en banc, ordinarily a half-dozen or more of the judges will not have heard the oral argument. Therefore, attorneys are generally permitted to reargue the case on en banc rehearing, although this practice is not uniformly observed among the circuits.[320] Despite uneven performances by attorneys, appellate judges usually consider oral argument of crucial importance in the decisional process;[321] it would seem even more crucial in en banc proceedings, which usually involve important and complex issues deserving the fullest exploration. Thus, en banc courts of appeals occasionally invite amici also to participate in oral argument.[322]

It seems equally desirable to permit counsel to file new briefs if his case is reheard en banc. Preparing briefs for the different group of judges may permit more effective appellate advocacy since "to brief with the tribunal undetermined is to battle in the fog."[323] And because en banc proceedings are usually reserved for issues which transcend the particular dispute, judges seem more likely, sua sponte, to raise issues not briefed or argued by counsel.[324] In such instances, the adversary system or due process may require that counsel have the opportunity to present written or oral argument to the newly discovered issue the court deems determinative.[325]

D. STABILIZED ASSIGNMENTS AND SPECIALIZATION: PROBLEMS OF CELLULAR GROWTH

(1) The Tradition of General Competence

SPECIALIZED COURTS OR SPECIALIZED JUDGES

Roscoe Pound*

As has been said in other connections, instead of setting up a new court for every new task we should provide an organization flexible enough to take care of new tasks as they arise and turn its resources to new tasks when those to which they were assigned cease to require them. The principle must be not *specialized courts* but *specialized judges,* dealing with their special subjects when the work of the courts is such as to permit, but available for other work when the exigencies of the work of the courts require it. For two generations, at least, we have not fully utilized the judges of our courts, although we have often made them work very hard. Before adding more judges or more courts, we should be sure we are making the best and fullest use of those whom we have.

* * *

Again, unification of the judicial system would do away with the waste of judicial power involved in the organization of separate courts with constitutionally or legislatively defined jurisdictions and fixed personnel. Moreover, it would make it the business of a responsible official to see to it that such waste did not recur and that judges were at hand whenever and wherever work was at hand to be done. It would greatly simplify appeals to the great saving not only of the time and energy of appellate courts, but to the saving of time and money of litigants as well. An appeal could be merely a motion for a new trial, or for modification or vacation of the judgment, before another branch of the one court, and would call for no greater formality of procedure than any other motion. It would obviate conflicts between judges and courts of coordinate jurisdiction such as unhappily have too often taken place in many localities under a completely decentralized system which depends upon the good taste and sense of propriety of individual judges, or appeal after some final order, when as like as not the mischief has been done, to prevent such occurrences. It would allow judges to become specialists in the disposition of particular classes of litigation without requiring the setting up for them of special courts.

In a unified court judges can be assigned permanently to the work for which they prove most fit without being drawn permanently from the judicial force so that they cannot be used elsewhere when needed. This is likely to be increasingly important. Specialization will probably become increasingly desirable in the future. But concurrent jurisdictions, jurisdictional lines between courts, with consequent litigation over the forms and venue at the expense of the merits, and judges who can do but one thing, no matter how little of that is to be done nor how much of something else, are not the way to promote efficient specialization. As cases of some class become numerous and require that a specialist pass upon them, judges or a judge would be designated for that purpose from the staff of the whole court, and the cases would be assigned to them in the one court in which all causes would be pending, even if in different branches or divisions, by some responsible functionary whose duty it would be to see to it that the whole judicial power of the state was fully utilized to the best advantage. When judges make assignments among themselves the tendency to perfunctory routine and to follow the line of least resistance will keep up the practice of rapid periodical rotation which has been a bad feature of many courts.

Again, from time to time exceptional causes come before the courts in which it is desirable to assign the best talent for that sort of case that the staff of the court affords instead of leaving the case to the chance of what judge happens to be at hand at the time and place.

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Power to assign and duty of assigning the most experienced and skillful judge for such cases to the trial of the particular case may save much delay and expense and prevent miscarriage of justice. If it be said that there is danger of abuse of this power of assignment of a particular case, the answer must be that jockeying to get such cases before a particular judge in a rapidly rotating bench of judges is not unknown today, and that the power of assignment will be exercised by a functionary definitely pointed out as responsible and subject to responsible control by a superior of conspicuous position. Divided responsibility is no responsibility. Concentration of responsibility in a chief justice with corresponding power will correct, indeed will compel correction of, many abuses which have grown up because no one had the responsibility for preventing or removing them. Unless responsible headship for the whole judicial system is provided and given power to meet the exigencies of the responsibility, there is real danger that an administrative superintending control of the courts will be set up from without. This would not merely infringe the constitutional separation of powers. It would be a dangerous subjection of the courts to the executive at a time when executive hegemony has become a conspicuous feature of our policy.

THE COURT'S EXPERT OR THE EXPERT COURT

Karl N. Llewellyn*

If situation-sense and the equities or immanent law of the significant type of situation are a dominant factor in the right shaping of the rule, in the wise determination of principle, and in the outcome of the case, then the question arises as to whether such twigs as are pliable should not be bent toward insuring, inside the appellate judicial institution itself, the development of such knowledge as, to paraphrase Brandeis, is essential to understanding, just as understanding should precede judging. Mansfield informed himself on commercial matters *inter alia* by way of his special jurymen; on certain technical matters of conveyancing, information was stuffed by Fearne down a most unwilling Mansfield gullet. Continental countries specialized out commercial courts, as we (as if on the model of the ancient Court of the Exchequer) have specialized out Courts of Customs Appeals and of Tax Appeals. The old Reichsgericht not only divided off those benches which heard solely criminal cases, but did a good deal of subject matter specialization among the six benches which sat on civil matters. The French have a special judicial system to handle administrative cases. There have been specialized labor courts, military courts, courts dealing with matters of family and inheritance, juvenile courts. There is no end.

In regard to all of this my own view has over the years settled into clarity. In regard to first instance litigation, I see great values in the specialized tribunal. Our Workmen's Compensation schemes appeal to me, for instance, as our Federal Employers' Liability scheme does not; and I see great value to be had from putting traffic accident litigation on some similar basis.[sic] And little though I like the probate rackets I have run into, I think a special court for that class of business (as for family matters) so useful when handled moderately well as to outweigh the dangers of politics and patronage. And I expect shortly to be devoting a good deal of personal time to the development of a commercial tribunal to pass on questions of commercial fact with commercial sense in a commercial manner. When all of that has been said, however, and much more, it still seems to me that increasingly as technological complexity piles high, our ancient institution of ultimate review by those complete nonspecialists, the

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* Late Professor of Law, University of Chicago. Reproduced from THE COMMON LAW TRADITION--DECIDING APPEALS, pages 333-335 (Little, Brown & Co., 1960).

general Supreme Court, stands out as one of the wisest institutions man has thus far managed to develop.

The days are gone, we must remember, and tiny is their chance of ever recurring, in which our courts of review either esteemed themselves omnicompetent or viewed with jealousy the regulatory or decisional activities of more specialized governmental bodies. Today the expert technician is handled with a gentle rein, indeed — granted only that he use good faith and a decent modicum of fair procedure. But until our technical kings become philosophers (and I will hope, even then, not Plato's) we surely need, to keep them from unbalanced divagation, an ultimate possibility of review by our sole official voices of noncombatant, residual horse sense: the bench of the *un*specialized appellate court. No gain in expert competence could make good a loss of that grass-roots soil-cover and earth-feel.

Yet much of the value of expertise is available within that framework. Water experts tell me that the elder Sanborn stood majestic in that life-giving field; I have myself measured the sureness in commercial matters of Hough and Learned Hand, and Swan, and Cowen; Lehman's understanding of realty dealings was like a good violinist's of his instrument. True, surpassing intellectual power is by definition rare, not many judges are called to make, or remake, the law of water rights or of realty dealings or overseas contracts or of contracts in general or otherwise to occupy a niche in the judicial hall of fame; nor can we demand or hope from many the prodigious labor of a Brandeis or Cardozo. But an appellate judge is entitled to a few hobbies, like any other man, and it does not take too much sustained reading and observation to build some interest in and understanding of one or another industry or line of activity or problem in this bewildering but bewitching world around us. That is what gives the relevant law-stuff — cases, statutes, briefs — body, depth, meaning. Yet insofar as bent or hobby may make any appellate judge, on and inside his own court, an expert or the expert in any field, he will be still subject to the sound review to which his court subjects all other experts. Traynor's neat phrasing has already been quoted: "Actually the expert in water law or tax law or oil and gas law knows more than most the complex uncertainties of his subject and the risks that would attend insulated study. *What knowledge he has he can share with his colleagues, who are competent to understand him if they are competent to sit on a court.*" [314] (My italics.)

[314] Some Open Questions on the Work of State Appellate Courts, 24 U. Chi. L. Rev. 211, 217 (1957).

But when the expert (who should be measured by his knowledge and understanding of the facts far more than of the law) has persuaded his colleagues, if he does, then there is real value in having the expert do the writing up of the results. Above (pp. 241 ff.), in addressing the advocate, there was indication of the blurring or misleading implication which lies so close when a writer does not "know the complex uncertainties of his subject." Commonly, difficulties are weathered, and better law is made cleaner and faster, when the phrasing is done by the man most aware of the whole problem-situation. *Per contra,* there is a strong case to be made *against* having that man do any preliminary report on a case in his chosen field. There *are* "risks that would attend insulated study," and the best guaranty against such insulation is the committing of the preliminary study to some person outside the insulation. That raises high probability of effective cross-lighting: for it is a rare expert who can keep from digging, on his own, into his own favorite corner of the legal garden. Any time-cost of having report and opinion by two different men would therefore normally be halved; and it can be argued with some force that even the half would be far from wasted, as knowledge of an expert field would come to spread around the college.

THE EXPERT ON LEARNED HAND'S COURT

Marvin Schick*

Several members of the Second Circuit said in interviews that there is some tendency to assign cases to experts, but other judges disagreed. Review of 1941–51 cases reveals several assignment patterns: patent cases went to Learned Hand or, in his absence, to Judge Chase; Judge Swan wrote often in immigration and naturalization appeals; Judge Augustus Hand specialized somewhat in selective service appeals; where Connecticut law was involved, Judge Clark would get the call, while most of the few Vermont cases went to Judge Chase.[30]

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Reproduced from LEARNED HAND'S COURT 101 (John Hopkins Univ. Press, 1970).

SUBSTANTIVE DIVISION OF THE CIRCUITS

Paul D. Carrington*

A better solution than creating smaller geographical units is to divide the large circuits into divisions based on subject matter of cases.[204] For purposes of illustration, let us assume a court with 1000 filings and twelve judges. Such a court would be expected to hear and decide in excess of 600 cases a year, the balance being terminated before hearing or submission.[205] On the basis of records available for prior years, it would be a simple task to divide the circuit's docket into equal halves by subject, so that about 500 filings will be listed on the docket of each division. For example, the 500 cases for Division A could be composed of the following categories, estimated with reasonable accuracy: about 150 administrative appeals, thirty tax appeals, twenty labor relations cases, eighty diversity and local cases, 130 habeas corpus petitions from state prisoners, seventy government property and contract claims, and perhaps twenty government tort claims.[206] Division B would hear the balance. Only those judges assigned to each division would participate in the formulation of the law of the circuit with respect to the matters assigned to its docket; in this way, the number of participants could be kept within manageable limits, assuring a reasonable measure of stability. It would be expected that all the judges assigned to a division would maintain an awareness of the work of their colleagues within the division, and that the group would sit en banc to resolve vexing problems. The law applied by the judges assigned to the other division, however, would not be their responsibility or concern.

On the basis of 500 filings per division, six judges would be assigned to sit on cases assigned to Division A; the remaining six, to Division B. Judges might be rotated between the divisions, assuring a full range of experience for each judge while limiting in each substantive area the number participating in a particular year in the making of the law of the circuit. Every term, two judges from each division would exchange assignments, so that no judge would remain in the same division for more than three years.

A strength of this system would be its flexibility. In addition to the rotation of judges, no litigant would be regarded as having a right to have his case decided by a panel from one division rather than the other. However, the lines between divisions would not be "jurisdictional," and in urgent situations, matters might be assigned to any panel available, irrespective of divisional arrangement. If one division proves to be overburdened, divisional lines could be rearranged or personnel assignments could be altered from an even distribution of judges to a seven-to-five division. When visiting judges, senior judges, or district judges are used to fill out the court, they could be allocated between the divisions according to immediate need.

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[205] About two appeals in five do not reach hearing. In 1967, 2225 cases were disposed of without hearing or submission; 4468 were decided by the courts of appeals. 1967 ANNUAL REPORT 180.

[206] These figures are roughly proportional to recent experience in the Ninth Circuit. *See, e.g.*, 1967 ANNUAL REPORT 19.-93 (comparable data on all circuits).

Moreover, under this mode of operation a circuit could easily assimilate more permanent judges. If the Fifth Circuit is to have fifteen judges, its docket might have three divisions, each employing the services of five judges. On the addition of the twenty-second judgeship, a fourth division would be added. With five divisions, a single circuit could assimilate as many as thirty-five judgeships and yet maintain a reasonably stable law of the circuit. At some point, of course, the subject matter of the docket could not stand further subdivision, and so there is an absolute limit to the number of divisions that might be created. Perhaps the number of judges assigned to a division could exceed seven, but at some point, not much beyond that number, it seems likely that the increased stability gained by the division scheme would diminish below the point of justification for the change.

The most obvious critical response to this proposal is to condemn it as a specialization of the federal judiciary.[205] But under this plan there is limited danger of specialization, for the efforts of judges would be focused for limited periods of time and on a wide range of cases. The breadth of subjects assigned to each docket and the steady turnover of personnel greatly reduce the likelihood that judges would become so specialized and absorbed in the intricacies of their expertise as to be unable to view problems as a whole. Indeed, the plan may have the advantage of diminishing the impact of "expertism" on federal law. The present general docket affords the judge who formerly was an experienced tax or utilities lawyer an opportunity to overpower his less expert colleagues. Under the proposed plan, as judges concentrate on a narrower range of subjects, the disparity in the level of expertise should be reduced. Also, the proposed dockets would be wide enough in range to foreclose any danger of the harm attendant upon intellectual inactivity, and triennial rotation would prevent the judges from settling too deeply into intellectual ruts.

The effect of specialization on the recruitment of judges is a related concern, and the fear has been expressed that the best lawyers would be less willing to devote their careers to an office too restricted in compass. It seems quite unlikely, however, that the kind of change proposed would make the office less attractive to the best lawyers, for it would surely be recognized that the effect of the change would be to enlarge the creative opportunities of the circuit judges, as well as to relieve some of the burdens of the present arrangement. Circuit judgeships would surely remain among the most prestigious professional opportunities available to American lawyers. Another danger of specialization is that it indirectly affects the integrity of the process of judicial selection. When a court is limited to a few kinds of matters, those involved in the litigation are quite likely to make an extraordinary effort to control the selection of its judges. This was, for example, the undoing of the old Commerce Court, which failed because it became a railroaders' court.[206] But sharply identified interests tend to neutralize themselves in appointments to courts of general jurisdiction. For this purpose, it is clear that the rotating assignments in the proposed plan would evoke generalized, not specialized, appointments, and there would be no greater chance than at present for any interest to dominate the selection of circuit judges.

Other objections to the proposal are more substantial. Undeniably, by dividing the court the plan would create some risk of aberrational decisions by a minority of a circuit, for the judges assigned to a particular division might not be representative of the whole.[208] But this risk is not different in kind from the danger involved in permitting any small group of judges to make decisions for the whole. Moreover, the proposed scheme has enough flexibility to handle this problem. The dockets and personnel assignments would be subject to annual review by the judges of the circuits sitting in the Circuit Council.[210] Thus there is available a measure of indirect control by the group, which would be lost if the circuits were divided geographically. The Circuit Council might be tempted to let a judge's decisions influence reassignments, an undesirable practice but one which may not be totally absent in the present method of assigning cases to panels. To some extent, careful administration of the divisions could reduce a tendency in the scheme toward schisms and cliques. For example, to avoid the permanent pairing of judges in the rotation, new judges could be put at the bottom of the rotation order in the divisions to which they are assigned. The tendency of a rhythm of rotation to keep some judges together can also be restrained by increasing the number of divisions, so that the judges are not full-time members of one subgroup, but are members of more than one division. Carried too far, this would make the scheme too complex. But it would not, for example, be difficult to divide a docket four ways rather than two, assigning each judge to half-time duty in two of the four divisions.

Another concern is the prospect that the scheme might purchase geographic stability at the cost of doctrinal instability over time from the rapid turnover within the divisions. But the risk of instability over time should be weighed against the stabilizing influence which results from defining the judicial office in terms of specific substantive responsibilities. This proposed substantive division would lead judges to define their duties as the making of tax and labor law rather than regional law, rendering the responsibility for doctrinal stability explicit. This self-image might usefully be contrasted with the definition of office that would result from the splitting of circuits geographically, which might lead judges to think of their creative duties as law making for Manhattan or some larger area. Also, instability attendant on quick turnover must be balanced against the risk of intellectual torpor in extending greatly the length of their service within a single division. The assignment of each judge to two divisions with a biennial revision of one half of the judge's duties might reduce the risk enough to permit the use of a four-year norm. Alternatively, if greater weight is to be placed on the need for stability over time, judges could be kept on partial call for a period following their rotation. Thus, the 1000-case docket might be divided into three divisions. Seven judges would be assigned to each, one rotating each year, but only the four junior in service in each di-

vision would sit on ordinary panels, the other three being available only as ballast in the operation of the divisional en banc procedure. Each judge would devote most of his time to one division during his three- or four-year assignment, while retaining for two or three years some control over radical shifts of view resulting from his departure. Within the framework of a twelve-judge court, both of these suggestions could easily be used. Six divisions would be created, with each judge sitting regularly on two of the six, and on en banc proceedings only in one or two of the others. This method of operation would tend to preclude clique formation, and, by extending the divisional turnover period to six years, would assure reasonable stability over time to the law of the circuit.

These added wrinkles, however, would cause problems in the larger circuits, the Fifth, Ninth, and Tenth. The proliferation of divisions would give rise to some difficulty in scheduling court dates convenient to all parts of the circuit. If, for example, each division must be available in Jacksonville and Fort Worth every month, the amount of travel required of the judges would be unreasonable. A partial answer to this problem could be found in the use of somewhat less complex schemes in the far-flung circuits. Alternatively, a remedy might lie in a partial circuit split, a reasonable possibility with a divisional scheme. Some divisions, handling classes of cases with respect to which the harmonization of national law presents less of a problem, might be localized without harm to the policies served by maintaining the unity of the larger circuits. Thus, little would be lost if the divisional scheme were employed to divide the geographically large circuits with respect to diversity and criminal litigation.[211] For example, it might be contemplated that in the Fifth Circuit some judges would be permanently assigned to a division which would hear all diversity and criminal matters coming up from Texas, Louisiana, and Mississippi. Or, perhaps, there might be three such geographical divisions. All the judges would then be available to devote about half their time in rotation among the other substantive divisions. The subject-matter divisions might thus be limited in number to two or three so that they could sit frequently enough to provide adequate service to all parts of the circuit. This approach to the problem of the big circuit would appear to secure most of the benefits of the geographic split, without aggravating the problem of intercircuit instability.

[211] The homogeneity of the national law is, of course, a serious problem for criminal litigation, but this is an area where the Supreme Court can be expected to handle the problem of intercircuit conflict. Furthermore, the percentage of routine cases presenting no significant legal issues is very high, and the need for dispatch in the handling of these matters is great.

Another hazard is that the administrator of this plan might be unable to keep case assignments discrete by divisions because of overlapping of issues in individual cases. The administrative task of assigning cases, however, is easier than might appear, for many, if not most, classes of federal litigation are integral and not overlapping.[212] Thus, in the simple two-division breakdown, it is easy enough to select categories, such as revenue or administrative appeals, which present no problem of identification. And a miscellaneous docket would be maintained for those cases containing issues beyond any one division's docket. A possible division of the Fifth Circuit docket reveals little likelihood of overlap if the proposed scheme were employed. After the diversity and criminal cases are set aside for separate treatment, 500 federal civil appeals in the circuit could reasonably be anticipated for the current year. They might be divided thus:

Division A: Employers Liability (25); Original Proceedings (20); Taxation (85); U.S. Tort Claims (30).

Division B: Bankruptcy (30); Eminent Domain (10); Labor Relations (80); Labor Standards (15); Miscellany (35).

Division C: Administrative Business Regulation (25); Antitrust (10); Civil Rights (70); Government Contracts and Property (20); Miller Act (10); Patent & Trademark (15); Social Security (20).

These categories are not all integral. It is possible, for example, that a tort claim against the Government might be joined with a claim that property is being taken without just compensation. More troublesome, perhaps, are the situations in which issues might be presented out of the usual context, as where the Government asserts a tax claim in a bankruptcy proceeding. Such complexities would require a careful exercise of the administrator's discretion in assigning cases to divisions. But difficulties should be rare, and the worst consequence of an incorrect or incomplete assignment would be that a case might be decided by a different group of judges than the parties might have expected. But the likelihood that an "outside" panel would depart from the law of the circuit because of inexperience with the substantive field of law would be tempered by their awareness that they are in an unusual situation. The ability of federal judges must not be slighted; they certainly should have no more difficulty understanding precedents from another division than would any other participant in the litigation.

Interdivisional splits on interpretations of Rules of Civil Procedure, provisions of the Administrative Procedure Act, or the Judicial Code, which govern matters coming before all divisions, will not be uncommon. However, this is not a serious problem for the reason that such provisions pertaining to procedure and institutional arrangements are not, despite their apparent generality, applicable with precisely equal force to all classes of cases, without regard for substantive differences. That discovery rules, for example, operate somewhat differently in antitrust cases and civil rights cases should not be regarded as extraordinary or disturbing; while the institutional apparatus is the same, the mix

of values weighed in the decisions is inevitably different. There is no unfair discrimination in treating different cases as if they were different: nor is there disturbance to legal planning activities, because institutional practices are too remote from their concern.[213]

Still, the presumption in favor of uniformity in the Federal Rules must be acknowledged, and the division scheme cannot fully meet its demands. Since a problem of procedure will often be raised in a case posing a substantive issue as well, procedural cases must be handled with somewhat less concern for unifying discipline. It seems sufficient to designate one of the divisions as having a senior responsibility for matters pertaining to the rules of procedure and the interpretation of the Judicial Code, and its decisions would generally establish the law of the circuit with respect to these questions. Other divisions would be expected to conform, unless there appeared to be a compelling substantive reason for proceeding differently. It would seem appropriate in circuits having a single division charged with responsibility for diversity of citizenship cases that such a division be designated as the procedure division as well, both because a high percentage of the significant issues raised by diversity appeals are institutional and because service in the diversity division may otherwise be regarded as a less attractive assignment. It would not be inappropriate to authorize the administrator to assign occasional cases involving difficult procedural issues to the designated division despite the fact that substantive issues presented indicated different assignments; this would be sensible, for example, in the rare case in which one party is seeking to mount a broad scale attack on a federal rule.[~~214~~] This creates some risk of blurring the divisional lines, but rigid maintenance of these lines is not essential; the parties will receive a full hearing before a fully qualified panel of judges.

Little legislation seems needed to create substantive divisions for courts of appeals. The present provisions of the Judicial Code pertaining to en banc procedure[~~215~~] could be amended to make them inapplicable to circuits of ten or more judgeships. The Code would then provide that such circuits be divided into divisions in accordance with rules of court promulgated by the local Circuit Council, subject perhaps to some minimal statutory standards. With substantive divisions, the courts of appeals could assimilate as many as thirty-five new judgeships, which, on the basis of present output, could handle 2800 appeals a year. Thus, we might hope to preserve for some time the integrity of the law of the circuit without imposing unacceptable burdens on the Supreme Court and without risking any significant changes in the nature of the federal judicial process.

[213] *Cf.* H.M. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513 (1954).

THE MAXIMUM SIZE OF A COURT

Henry T. Friendly*

We thus reach the question whether there is any sufficient objection to increasing the number of judges in a court of appeals above nine. While I confessed that the case for not increasing the number of district judges in any large measure was not one that could be proved, I have no such doubt with respect to the courts of appeals. The essential difference is that the latter are collegial. Under the Act of 1891 they had only three judges each, so the same judges always sat together. As the business increased, more judges were added and the three-judge panel system developed. There was no great trouble in maintaining this effectively so long as there were no more than five judges in any court of appeals. According to my rudimentary mathematics, with five judges there would be ten possible panels and every one would have at least one member who had been on any previous panel. The possibility of one panel's proceeding in ignorance of what another was doing thus did not exist. Even with the six judges of "Learned Hand's Court"[151] the chances of this were small. With nine they are much greater, and with eleven, thirteen or fifteen, greater still. There is a method for dealing with this problem, namely, the circulation of all proposed opinions to each judge, as is done to a considerable extent in the Third, Fourth and District of Columbia Circuits, but this means more work[152] and certainly more delay, particularly in view of the present condition of the mails. An increase in the number of judges would increase the number of requests for votes upon en banc consideration, although not in direct proportion, and would greatly enhance the difficulty of handling those that were granted. And the suggestion that en banc proceedings be limited to a "reviewing division," presumably of the active judges ranking highest in precedence although with an age limitation,[153] would inevitably breed justifiable dissension.

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Again, the judges of the circuit "in regular active service" constitute the judicial council for the circuit, which is directed to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit."[154] Since an increased number of judges would interfere with this function, it has been proposed that only the senior five, or seven, or what-have-you, should participate. I do not like the idea of second-class judges. Moreover, I am not confident that the oldest judges can make the greatest contribution to some of the council's work; yet they would rightly resent being ruled by their juniors, especially with respect to the management of their own court.

152. If it be said the procedure would not involve more work since, presumably, all the judges read all the opinions *after* they appear, I would strongly disagree. The responsibility I would feel with respect to a proposed opinion is quite different from that concerning one that has already appeared. In the latter case, I am concerned only with two situations: One is where the result seems so wrong on a point within the ambit of F.R.A.P. 35(a)—a situation usually flagged by a dissent—that I should make or support a request for reconsideration en banc. The other is where some remark, very likely not affecting the result, is in conflict with a previous decision of our court or the Supreme Court or otherwise contains serious seeds of future trouble, so that I should ask the opinion writer to consider a modification. If I saw the opinion prior to its filing and thought the result wrong, could I in good conscience refrain from saying so, even though I would not regard the precedent as sufficiently important that I would support reconsideration en banc? Would I not feel an obligation to suggest changes where I thought the language murky or the reasoning illogical, even though I agreed with the result? In short, does not the practice result either in largely defeating the very objective of the panel system or in a judge sitting by and saying nothing about what he regards as mistakes? To me neither result is attractive.

153. *See* testimony of Judge J. Skelly Wright in *Revision of Appellate Courts, Hearing on S.J. Res. 122 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 21–22 (1972). The asserted analogy to the

Beyond all this is the desirability of judges of a collegial court really knowing each other, by talking together, lunching together even—perhaps particularly—drinking together. This promotes understanding, prevents unnecessary disagreements, and avoids the introduction of personal animosity into those differences of opinion that properly occur. I believe that close personal relationships have been one of the sources of strength of the Supreme Court; when these have degenerated, so has the Court's performance. I thus agree again with Professor Geoffrey Hazard that "[i]t will therefore be simply impossible, in the foreseeable future, to solve the problem of 'too many appeals' by increasing the number of judges."[155]

155. Hazard, *supra* note 127, at 82. *See also* FRANKFURTER & LANDIS 187, and the views of Judge Lumbard, *supra* note 116, at 21–22.

Professor Carrington has proposed an elaborate plan for endeavoring to meet the problem by separating courts of appeals of many members into subject-matter divisions through which the various judges will rotate and which will be the ultimate authority, subject only to Supreme Court review, in the type of cases confided to them. *See* Carrington, *supra*, 82 HARV. L. REV. at 587–96. Many of the difficulties in this scheme are recognized by the author but, to my mind, are not answered. A complete analysis of my grounds for disagreement would be too space-consuming. Some have been suggested in the preceding text. Another is that appeals do not neatly divide by subject-matter. For example, a criminal case may turn on the construction of a labor statute, a tax statute, or a securities statute. A tax claim can turn up in bankruptcy. Questions under the Administrative Procedure Act may arise in almost any litigation against government officers or agencies; issues under the Federal Rules of Civil Procedure may crop up in every piece of civil litigation. Evidence questions can arise anywhere. Furthermore, a judge of the court of appeals should not be required to sit by and allow a decision of his colleagues on an important matter with which he disagrees to become "the law of the circuit" and remain so unless and until other judges constituting that "division" choose to reconsider. While Professor Carrington is to be applauded for trying, his proposal would introduce more problems than it solves.