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The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties

*John B. Oakley**

I. INTRODUCTION: THE GENESIS OF SCREENING PROGRAMS[1]

Lacking discretion to deny plenary review of cases reaching them from the district courts, United States courts of appeals

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1. Parts I-IV and V-A of this article follow closely the report of my Ninth Circuit screening research in Oakley & Thompson, *Screening, Delegation and the Values of Appeal: An Appraisal of the Ninth Circuit's Screening Docket During the Browning Years*, in RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 97 (A. Hellman ed. 1990) [hereinafter RESTRUCTURING JUSTICE]. (The Oakley and Thompson chapter in RESTRUCTURING JUSTICE has subsequently been cited in Judge Breyer's Donahue Lecture Series as empirical support for his own impressions of screening methods. *See* Breyer, *The Donahue Lecture Series: "Administering Justice in the First Circuit"*, 24 SUFFOLK U.L. REV. 29, 43-44 (1990).) As anticipated, this article supplements the earlier report with additional details and recent developments. *See* Oakley & Thompson, *supra*, at 98 n.5, 109 n.25 & 115 n.40. Where there was no useful change to be made, I have incorporated verbatim the language of the prior report. Further study of the data has resulted in minor changes to Figures 8 and 10. These changes are not of substantive significance.

I am very grateful to the co-author of the prior report, Robert S. Thompson, Legion Lex Professor of Law, Emeritus, at the University of Southern California Law Center and retired Associate Justice of the California Court of Appeal, for allowing me to retain his contributions throughout this article and especially in Parts I, III, and V-A. I am also most appreciative of the consent of the Cornell University Press and the volume editor, Arthur Hellman, for me to make unrestricted use of the previous report, and to reprint here their professionally enhanced improvements of the computer graphics I had submitted to them as illustrations for my research. This research would not have been possible without the cooperation and assistance of Judge Alfred T. Goodwin and his recent successor as Chief Judge of the Ninth Circuit, Judge J. Clifford Wallace. I am thankful to both. I have also benefited from the information and counsel generously provided by Janice Bergmann, Gordon Bermant, Leon Bloomfield, Dede Campagna, Cathy Catterson, Joe Cecil, Miguel Cortez, Arlen Coyle, Collins Fitzpatrick, Michael Gans, Francis Gindhart, Naomi Godfrey, Jerry Goldman, Mark Langer, Kathy Lanza, Thomas Marvell, Dinah Shelton, and Donna Stienstra, as well as the valuable research assistance of Janet Mueller and Gary Schwebach. Special thanks are owed to Judge James R. Browning and, again, to Arthur Hellman. As Chief Judge of the Ninth Circuit, Judge Browning both inspired and facilitated this research. As generous co-investigator and gracious editor, Arthur Hellman did Judge Browning justice.

first and foremost must decide these cases.[2] When caseload overtaxes the capacity of appellate judges to review personally, to discuss collegially, and to endorse collectively a written statement of the reasons for decision in each case on their docket, the imperative to decide is in tension with other fundamental values of appeal. If mechanisms are not developed to cope with docket overload, an appellate court cannot satisfactorily meet its obligation to individual litigants—the correction of prejudicial trial court error—much less its institutional obligations to declare precedent and to supervise the overall administration of justice by the trial courts. But unless caseload control mechanisms permit adequate participation by the parties in the proceedings which determine their fate, while preserving the court-like characteristics that legitimate the exercise of judicial power, other significant values of appeal are in jeopardy.

The principal caseload control mechanism developed by the United States courts of appeals and similarly burdened state appellate courts is the practice of "screening" their dockets to identify cases appropriate for procedural short-cuts.[3] In one way or another screening programs seek to divert the least difficult cases to a separate decisional track involving a significantly lesser degree of personal attention by judges. The federal courts uniformly forego oral argument in screened cases, and most courts further reduce the unit cost in judicial time of decisions in their "fast track" cases by placing primary reliance for the operation of the screening process on a centrally-organized, parajudicially-supervised group of staff attorneys.[4] The central

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2. The jurisdiction of the federal courts of appeals is not entirely mandatory, but their discretionary jurisdiction under the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b) (1988), is so narrowly circumscribed that it accounts for only a few tenths of one percent of the cases filed in the courts of appeals. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS 715-16 (4th ed. 1983).

3. *See generally* P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 48 (1976); J. CECIL & D. STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS (1987) [hereinafter CECIL & STIENSTRA II]; J. CECIL & D. STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS (1985) [hereinafter CECIL & STIENSTRA I]; J. OAKLEY & R. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS 22 (1980); Oakley & Thompson, *Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges*, 67 CALIF. L. REV. 1286, 1297 (1979).

4. *See generally* P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 3, at 46-51; CECIL & STIENSTRA II, *supra* note 3, at 15; J. OAKLEY & R. THOMPSON, *supra* note 3, at 6, 22-26; Dahlen, *Supreme Court Rule 24; Appellate Court Research Departments*, 69 ILL. B.J. 766, 767-70 (1981); Gammon, *The Central Staff Attorney's Office in the United*

premise of screening programs is that fast track procedures and substitution of staff for judicial time in the adjudication of screened cases can achieve procedural economies with no significant impact on substantive results. Generally, this premise is defended on the ground that screening programs remove from conventional appellate processing only simple cases destined to a single, obvious, and foregone result at the hands of any qualified decision maker.

In Part II of this article, I report on the various models of screening programs that have been adopted by the thirteen circuits of the federal courts of appeals.

Part III examines the values served by appeal and the nature of the challenge to traditional means for achieving these values that is posed when overloaded appellate courts are forced to adopt screening programs.

In Part IV my focus is on the screening program used by the Ninth Circuit from January 1, 1982, through June 15, 1988. I refer to this six and one-half year period as the "study period."[5] I was given extraordinary access to the Ninth Circuit's computerized docketing databases of records for all cases processed during the study period. From the Ninth Circuit's records, I was able to construct a personal database of information on the subject matter, process, and outcome of all cases decided on the

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States Court of Appeals, Eighth Circuit: A Five Year Report, 29 S. D. L. REV. 457, 459-60 (1984); Lesinski & Stockmeyer, *Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity*, 26 VAND. L. REV. 1211 (1973); Ubell, *Evolution and Role of Appellate Court Central Staff Attorneys*, 2 COOLEY L. REV. 157, 160-62 (1984); Ubell, *Report on Central Staff Attorneys' Offices in the United States Courts of Appeals*, 87 F.R.D. 253, 256-63 (1980). Not all courts rely on staff attorneys to run their formal screening programs. The Third Circuit is a notable exception. *See* CECIL & STIENSTRA II, *supra* note 3, at 118-20. In addition, all federal circuits engage to some degree in "informal screening" when argument panels decide not to permit oral argument in particular cases on their calendars. *See infra* text accompanying notes 10-11.

5. Since my research was conducted with the initial objective of contributing to a set of studies of appellate adjudication at the Ninth Circuit under the administration of Chief Judge James R. Browning, *see* RESTRUCTURING JUSTICE, *supra* note 1, I defined the study period as beginning on January 1, 1982, the day the screening program officially began, and ending at the close of business on the final day of Chief Judge Browning's administration of the Ninth Circuit: June 15, 1988. I do not mean by this attention to the day on which Judge Browning stepped down as Chief Judge to imply that the Ninth Circuit's screening program underwent immediate change when Judge Alfred T. Goodwin became Chief Judge. Significant changes in the Ninth Circuit's screening program have indeed occurred since the study period and are discussed in detail in Part V of this article. But these changes have occurred gradually, and did not figure in my definition of the study period.

merits during these six and one-half years. I use statistics generated by this database to analyze the screening mechanisms employed by the Ninth Circuit during the study period. I examine whether this approach to screening achieved a desirable balance between the efficiencies of screening and preservation of the values of appeal.

In Part V, my focus shifts from the eighties to the nineties. The Ninth Circuit's operation of its screening program during the study period was generally well-conceived and well-executed but was not beyond improvement. I discuss five previous recommendations for reform, use these suggested improvements as the bases for describing and evaluating the innovations in screening that the Ninth Circuit has adopted for the nineties, and offer two new recommendations responsive to current conditions. I conclude that the increasingly inquisitorial features of modern appellate adjudication are good reason for affirmative measures to be taken to enhance the waning role of counsel for the parties in the decision of appeals. To this end, I recommend that the screening process be supervised by formally appointed appellate commissioners rather than by anonymous staff attorneys and that a short argument calendar be instituted for cases that present marginal grounds for concluding that the voice of counsel would be of value to the court.

II. Screening Programs of the Federal Courts of Appeals

Screening in the federal courts of appeals is authorized by Rule 34(a) of the Federal Rules of Appellate Procedure (FRAP). Although the first sentence of the rule contains what appears to be a ringing commitment to oral argument,[6] the rule as a whole allows wide discretion to the courts to adopt summary procedures. The "minimum standard" is that oral argument will be allowed "unless (1) the appeal is frivolous; or (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument."[7]

In the early years of screening, the usual justification for

6. "Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed." Fed. R. App. P. 34(a).

7. *Id.*

considering oral argument in screened cases to be futile was the limitation of the screening docket to simple cases in which any qualified decisionmaker could reach only a single result.[8] But the third of the disjunctive criteria in FRAP 34(a) apparently permits assignment of a case to the screening docket even when it presents difficult issues of first impression, provided only that the judges unanimously agree on the subjective and necessarily speculative judgment that oral argument would not be helpful. The text of the rule thus allows a screening program to grow beyond a sorting device for hopeless cases to become a means for more generalized expression of judicial antipathy to the very idea of oral argument as a valuable feature of the appellate process. While that approach is surely contrary to the spirit of the rule, some lawyers think that it is already a reality.[9] My research attempts to shed light on the matter. Table 1 summarizes the seven approaches to screening that were in place among the federal courts of appeals during the 1982-88 study period in which Part IV's data on the Ninth Circuit was generated. Subject to the innovations discussed in Part V, this typology remains valid for the nineties.

The first two entries in Table 1 are reminders that screening can occur circumstantially or informally as well as by formal procedure. The Second Circuit's "null" screening model limits dispositions without oral argument to the bare minimum required by circumstances independent of court control. Informal screening by argument panels is also an important factor in curtailing the frequency of orally argued appeals. Next, in order, are the Fifth Circuit's formal screening model, the variations found in the Sixth, District of Columbia and Third Circuits, and finally the Ninth Circuit's blend of the Fifth Circuit model with the Second Circuit's strong norm in favor of oral argument.

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8. *See, e.g.*, D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 37 (1974); B. WITKIN, MANUAL ON APPELLATE COURT OPINIONS 57 (1977).

9. Illustrative is the statement of attorney John P. Frank during a discussion of the effect of screening and other efficiency devices on the quality of the Ninth Circuit's decisonmaking. "When you do your work on argued cases, I hope that you will give very serious attention to the bar attitudes. So far as we are concerned, and I think I speak for a large number, we regard screening as a device to push the lawyer out of the law entirely. We just don't count anymore." Hellman, *Conference on Empirical Research in Judicial Administration*, 21 ARIZ. ST. L.J. 33, 126, 127 (1989).

Table 1. Comparison of screening models of the federal courts of appeals

Model of screening	Attributes of screening
Second Circuit	The "null" model of screening. The court has a strong norm favoring oral argument. Every case is orally argued except in the cases of pro se incarcerated litigants or where argument has been waived by both counsel with the approval of the presiding judge.
Informal Screening	Argument panels acting ad hoc order cases to be submitted on the briefs without oral argument. Such cases are otherwise disposed of in traditional fashion, after face-to-face conference of the panel judges, with the assistance of in-chambers staff, and generally by written opinion.
Fifth Circuit	Staff attorneys screen cases for assignment to special screening panels.
Sixth Circuit	Staff attorneys screen cases for decision without argument by regular argument panels.
D. C. Circuit	Staff attorneys screen cases for decision by special screening panels; additional cases are formally screened and decided without argument by regular argument panels.
Third Circuit	Regular argument panels perform the formal screening function without staff assistance. There is a strong norm against oral argument. Most cases are screened, which results not only in decision without oral argument but also (in most such cases) decision without written opinion.
Ninth Circuit	Staff attorneys screen cases for decision by special screening panels operating in distinct parallel or serial fashion. There is a general preference for oral argument.

The Second Circuit has eschewed a formal screening program because of a particularly strong belief in the value of oral argument among the judges of that court. I have nonetheless included the Second Circuit approach to screening as the "null" model in my collection of screening program models, because even in the Second Circuit circumstances and procedures combine to result in significant numbers of cases being decided without oral argument. These are cases that cannot be argued because they involve uncounseled incarcerated litigants or because both parties have waived oral arguments and the presiding judge of the argument panel has permitted the waiver to take effect.[10]

The next model of screening involves a practice I call "informal screening." This occurs when cases are assigned to regu-

10. *See* CECIL & STIENSTRA II, *supra* note 3, at 7 n.2 & 15 n.22; CECIL & STEINSTRA I, *supra* note 3, at 7 n.14. *See generally* Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297 (1986).

lar argument panels but nonetheless are decided by these panels without oral argument. In some cases, this will be because of the waiver or impossibility of argument, as in the Second Circuit, but in other cases, this will be because the argument panels have decided for themselves that oral argument is not likely to be of substantial benefit. It is important to recognize not only that there are substantial numbers of these informal screening cases, as I shall show below with respect to the Ninth Circuit,[11] but also that this leads to a process of decision that is distinct from decision in those cases that remain on the formal screening track. In informally screened cases, the decision is generally reached by judges acting through some form of conference, rather than individually and in isolation; the judges' personal law clerks and other in-chamber staff participate in the decisional process; and the decision of the appellate panel is announced by a written opinion.[12]

The Fifth Circuit model is the oldest and the most common of the formal screening models. Its key features are the use of staff attorneys to process cases recommended for screening and the use of special panels to decide screening cases without oral argument.[13] The six circuits not otherwise mentioned in this

11. *See infra* text accompanying notes 71-72.

12. The model of informal screening proceeds much like the Third Circuit model to which it is compared in Table 1. *See infra* text accompanying note 25. The key difference is the preparation of opinions in screened cases. Under the informal screening model, the submission of the case on the briefs does not fundamentally change the process of justifying the court's decision. The Third Circuit's practice has been to decide many screened cases summarily and without opinion—a practice fraught with great danger to the values of appeal. *See* CECIL & STEINSTRA II, *supra* note 3, at 131-32.

For a similar distinction between a formal screening program ("the court's only formal method for selecting non-argument cases") and informal screening ("additional cases are decided without argument by the panels to whom they were initially assigned for argument"), see D. STIENSTRA & J. CECIL, THE ROLE OF STAFF ATTORNEYS AND FACE-TO-FACE CONFERENCING IN NON-ARGUMENT DECISIONMAKING: A VIEW FROM THE TENTH CIRCUIT COURT OF APPEALS 16 (1989).

13. *See* CECIL & STEINSTRA II, *supra* note 3, at 35-66.

summary—the First,[14] Fourth,[15] Seventh,[16] Eighth,[17] Tenth[18] and Eleventh[19]—have adopted screening programs that follow the basic contours of the Fifth Circuit model.

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14. The Senior Staff Attorney of the First Circuit, Kathy Lanza, described the First Circuit's screening program as one conceived by judges with a strong preference for oral argument. There is a presumption against oral argument in *pro se* appeals, social security disability appeals, and appeals of orders involving bail and recalcitrant witnesses. The vast majority of other cases are orally argued, but in conditions of docket overload the court's seven staff attorneys may screen pending cases and select additional cases for submission without oral argument. All screened or "submitted" cases are processed in general conformity to the Fifth Circuit model: after preparation of staff memoranda they are routed to a screening or "duty" panel of three judges who consider the screened cases serially (except when time pressure for immediate disposition forces parallel consideration). Unless the panel rejects non-argument disposition of a case, it will review the staff's memorandum and proposed disposition and issue an opinion. Informal screening by argument panels is rare, since the time period between the calendaring of a case and the date set for oral argument is very short—as little as one week. Telephone interview with Kathy Lanza, Senior Staff Attorney of the First Circuit (Jan. 10, 1991).

15. For further information on the Fourth Circuit, see the discussion in Part V, *infra* text accompanying notes 95-96.

16. For further information on the Seventh Circuit, see the discussion in Part V, *infra* text accompanying notes 89, 92-93.

17. The screening procedures of the Eighth Circuit show continued conformity to the Fifth Circuit model, except that with the advent of an electronic mail system the screening panels review cases in parallel, much in the fashion of the parallel Ninth Circuit screening panels described in Part IV, *see infra* text accompanying notes 44-46. Under the former procedure, the lead judge acting alone would review the case before submitting it for consideration by the other two screening panel judges. Telephone interview with Michal Gans, Chief Deputy Clerk of the Eighth Circuit (Jan. 8, 1991). *See* Gammon, *supra* note 4, at 460.

18. For further information on the Tenth Circuit, see the discussion in Part V, *infra* text accompanying notes 90-91.

19. The Eleventh Circuit is a lineal descendant of the Fifth Circuit, which was reduced in size to form the Eleventh Circuit in 1980. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994. At the time of the administrative reorganization of the old Fifth Circuit its well established screening program remained in operation in both the revised Fifth Circuit and the new Eleventh Circuit. The Eleventh Circuit's screening program continues to conform to the Fifth Circuit model. All fully briefed cases are reviewed by the central staff. A fairly constant 52 percent of the court's dispositions result from the court's "summary calendar" of screened cases decided without oral argument by special screening panels. The remaining 48 percent of merits dispositions result from decisions of cases on the court's "oral calendar." Of the cases assigned to the summary calendar, roughly half (about 80 cases a month) are cases reviewed and analyzed by the central staff of 16 attorneys. These staff-processed cases consist of all of the following types of cases: *pro se* cases, social security cases, direct criminal appeals, habeas cases, civil rights cases, and black lung cases. Other types of cases may also be screened for decision on the summary rather than the oral calendar, but screened cases not within one of the above categories are sent to the screening panel without staff review and analysis. The screening panels operate in a serial or "round robin" sequence, with the initiating judge the most likely to reject a case from screening by reassigning it to the oral calendar. Telephone interview with Miguel Cortez, Clerk of the Eleventh Circuit (Feb. 12, 1991); telephone interview with Naomi

The Sixth Circuit,[20] whose model is also used by the Federal Circuit,[21] follows the Fifth Circuit model by using staff attorneys to process screening cases but diverges from the Fifth Circuit by routing screening recommendations to regular argument panels. These panels then decide screening cases as part of their normal daily calendars—generally on the ratio of five argued to two non-argued cases per day per panel.

The District of Columbia Circuit assigns formal screening responsibilities to both staff attorneys and regular argument panels.[22] All cases are inventoried by staff attorneys, who classify nearly one-half of the cases as suitable for disposition without oral argument. These cases are submitted to special screening panels for decision.[23] Except for a few complex cases, all other cases are scheduled for submission to regular argument panels. A second formal screening process operates at the argument panel level. For each case calendared before a particular argument panel there is a designated screening judge who, with the concurrence of the balance of the panel, can order the case submitted to the panel without oral argument.[24]

The Third Circuit routes the entire flow of cases to the argument panels without any staff input on cases suitable for screening. The argument panels themselves decide which cases to set down for oral argument and which cases to decide on the briefs.[25]

The Ninth Circuit's "Submission Without Argument Pro-

Godfrey, Supervising Staff Attorney of the Eleventh Circuit (Feb. 12, 1991).

20. *See* CECIL & STIENSTRA II, *supra* note 3, at 87-112. In recent years the Sixth Circuit's screening program has been complemented by an aggressive and successful program of pre-argument conferences in non-screened cases. *See* J. EAGLIN, THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS (1990).

21. The Federal Circuit continues to adhere to the general contours of the Sixth Circuit's model of screening. After the court staff selects cases for screening, the cases are routed to regular argument panels for disposition as those panels see fit. No central staff memoranda are prepared in these cases. A bench memorandum, if any, is prepared by the individual "elbow" clerks of the argument panel to which a screened case is assigned. The Federal Circuit does not publish opinions in any unargued cases. Telephone interview with Francis Gindhart, Clerk of the Federal Circuit (Jan. 8, 1991).

22. This two-tiered screening program took effect in August 1986. It is described in GENERAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES 36-37, 57-59 (1987) [hereinafter D.C. CIR. R.].

23. For further information on the operation of the District of Columbia Circuit's screening panels, see the discussion of face-to-face conferencing by screening panels and oral presentations by staff attorneys in Part V, *infra* text accompanying notes 92-94.

24. *See* D.C. CIR. R., *supra* note 22, Rule 13(i) at 58-59.

25. *See* CECIL & STIENSTRA II, *supra* note 3, at 113-32.

gram" instituted in 1982 a formal screening program modeled basically after that of the Fifth Circuit but with distinctions important enough to merit separate classification.[26]

III. The Conflict of Values and Volume in Modern Appellate Administration

A. *Normative Assumptions*

My discussion of the values of appeal relies implicitly on assumptions that Robert Thompson and I have previously proposed and defended.[27] These assumptions are:

(1) It is important that appellate judges decide cases by personally developing the reasoning that disciplines their decisions. It is not enough that judges merely accept responsibility for decisions made by others.[28]

(2) Nevertheless, assistance rendered by aides to judges is both legitimate and necessary to the judicial function. Where judges are faced with rising caseloads this assistance properly includes some form of screening to identify those cases that require a particularly low (or high) degree of the personal attention of the judges.

(3) Cases suitable for "screening to decision"[29] with mini-

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26. *See* Cecil & Stienstra II, *supra* note 3, at 67-86. For an account of the origins of the Ninth Circuit's screening program, see Goldman, *Appellate Justice Economized: Screening and Its Effects on Outcomes and Legitimacy*, in Restructuring Justice, *supra* note 1, at 138. In Part IV, *infra* text accompanying notes 42-58, I present a detailed description and evaluation of the Ninth Circuit's screening program as it operated through mid-1988. In Part V, *infra* text accompanying notes 97-104, I complete my account by describing and evaluating the innovations in screening that the Ninth Circuit had adopted as of early 1991.

27. *See* Thompson & Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 Ariz. St. L.J. 1, 9-10, 13-14, 52-56; Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections and the California Supreme Court: Defining the Terms of the Debate*, 59 S. Cal. L. Rev. 809, 830-33 (1986).

28. One defender of judicial delegation of opinion-drafting seemingly takes for granted a distinction between reasoning as a process of decision and the writing out of reasons as a process of articulation. "[C]ourts need not seek excuses for delegating part of the opinion-writing function to talented experts, with superior legal training and experience in writing. It is the task of stating reasons for the decision, not the authority to decide, that is delegated." B. Witkin, *supra* note 8, at 16. More persuasive are the observations of judges who find that the reasoning process is not complete until it has been tested through writing. *See, e.g.*, McCree, *Bureaucratic Justice: An Early Warning*, 129 U. Pa. L. Rev. 777, 790-91 (1981); Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. Chi. L. Rev. 211, 218 (1957).

29. For the sense in which I use "screening to decision" and refer to cases "screened to decision," see *infra* text accompanying notes 60-61.

mum judicial review of the staff product should be those in which the decision is essentially rule bound. Cases in which the result turns on principle that is indeterminate as applied should be rejected from screening.

(4) In cases screened to decision, the staff product should supply the judges with information adequate to support the memorandum's statement of controlling precedent and of the facts in the record that render the doctrine applicable.

(5) The greater the degree of appellate judicial discretion inherent in a question, the more important it is that the discretion be exercised with the fullest information feasible. Issues of whether trial court error was harmless, whether an issue raised on appeal is timely, whether trial court factual findings survive the clearly erroneous test, and whether trial court discretion has been abused fall within this category of cases.

(6) The adversary system can be, and generally is, a trustworthy and effective device for assembling and processing information to be used by judges in their decisions.

When I refer in this article to "error" in the screening process, I use the term primarily to denote a conclusion recommended by staff that would not have been reached by the panel of judges adopting the conclusion if these judges, fully informed by oral argument and uninfluenced by a central staff memorandum, had heard the case without screening.[30]

B. The Values of Appeal

There are important reasons to provide parties with a right to appeal decisions by courts of first resort. At least four values are served by the right to appeal.

First, appeal is a mechanism for *correcting mistakes* by trial courts in resolving disputes about law or fact. Society places a high value on having individual cases rightly and consistently decided. The more measured pace of appeal vis-a-vis trial and the sharper focus on discrete issues by both counsel and the ap-

30. Of course the word "error" could have other meanings. For example, it could mean error in the abstract despite the impossibility of proving this sort of error. It might mean that most qualified observers would find the result of the case wrong or that these observers would find the reasoning of the opinion or staff memorandum to be wrong. My definition reflects the purpose of this research which is to examine the compatibility of screening mechanisms with the institutional assumption that federal judicial power should be exercised exclusively by duly commissioned article III judges.

pellate court are important guarantors of the correctness of a judicial decision that has been tested by appeal.

Second, there is value in having a mechanism for *reviewing institutional impact.* Institutional impact takes three forms. First, some trial judges may not be operating their courts properly. Appeal serves to keep trial courts on the procedural tracks laid down by the general legal system. Second, in responding to the facts of particular cases, trial courts may propound rules likely to be applied in other cases. This is especially likely where there is a practice, as in the federal courts, of publishing trial court opinions. Lawmaking by the judicial spokes of a legal system needs to be bound by the reviewing authority of an appellate hub and its circumscribing precedent. Third, and conversely, trial courts may reach unpublished resolutions of issues of law that should be considered and memorialized in an opinion published by an appellate court for the future guidance of other trial courts and the public.

The third value of appeal is to foster a sense of *participation* by the parties in the fate of their lawsuit at the hands of the state. Adjudication of a dispute is distinct from settlement by executive fiat. The participation of parties in the formulation of issues and the opportunity for parties to persuade the decisionmaker according to pre-existing rules are important elements in the distinction between the rule of law and the rule of a totalitarian state.[31] The sense of party participation in the binding, but nonviolent resolution of disputes according to general rules is enhanced by placing the first-instance decisionmaker under the yoke of party-driven review and possible reversal.

Finally, there is *legitimation* of the judicial decision by a process which draws upon form and ritual to inspire a sense of duty to obey judicial decisions even when the substantive premises or outcomes of such decisions are controversial or unpopular. We all sense, by intuition or experience, that the determinations of courts in cases brought before them by others may ultimately bear on disputes in which we later become personally involved. Through precedent we are governed by law declared without our vote or participation. The integrity of the judicial

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31. *See generally* Oakley, *The Legality of a Political System: Positivism, Political Morality and the Point of Theories of Law*, in 9 RECHTSTHEORIE BEIHEFT: SOCIOLOGICAL JURISPRUDENCE AND REALIST THEORIES OF LAW 83, 89-92 (E. Kamenka, R. Summers & W. Twining ed. 1986).

process, including the important feature of appeal, thus serves to legitimate a system of dispute resolution which governs even the uninvolved, the unrepresented, and the unwitting.

In sum, it is difficult to conceive of a functional and acceptable judicial system, one more dependent for its efficacy on acquiescence than coercion, that would operate without a comprehensive system of appeal. The idea that justice demands the right of appeal may not yet be understood as a principle of due process under our enacted Constitution. But in the old and still true sense of our British legal inheritance, the right to appeal is part of our unwritten constitution. Although diminishing returns argue against an undue number of levels of appeal, at least one appeal from trial court decision inheres in our present social conception of what just adjudication requires.[32]

The constant struggle of the modern intermediate appellate court is to maintain the values of appeal in the face of overloaded dockets.[33] There are practical limits to the number of judges who can operate consistently and harmoniously within a given appellate court and to the number of courts that can consistently and harmoniously share appellate jurisdiction at the same intermediate tier of a judicial hierarchy. These practicalities have made an increase in per-judge caseload, rather than an increase in judges per court and courts per jurisdiction, the favored means of dealing with the crisis of volume while preserving the values of appeal. But judges' days still have but 24 hours. There are substantive limits to the productivity we can expect of the ordinary mortals whom we recruit, by and large, to wear judicial robes.[34] We have probably exhausted the utility of ex-

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32. *See generally* ABA Standing Committee on Federal Judicial Improvements, *The United States Court of Appeals: Reexamining Structure and Process After a Century of Growth*, 125 F.R.D. 523, 531, 547, 549 (1989) (justice requires effective process for correcting trial court mistakes); Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 860-62 (1984) (fundamental but unwritten right to appeal has evolved in the United States through two hundred years of procedural innovation).

33. *See* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 65-129 (1985). The problem is not confined to the federal system. *See* Marvell, *State Appellate Court Responses to Caseload Growth*, 72 JUDICATURE 282, 282 (1989). "The [state] appellate caseload explosion and the resulting pressures on the courts are hard to exaggerate. Appeals have been doubling about every decade since World War II, placing extreme demands on judges to increase output." *Id. See generally* D. MEADOR, *supra* note 8.

34. Some judges possess extraordinary capacities, of course, but current conditions conspire to reduce rather than to increase the number of super-lawyers among the judiciary. *See* R. POSNER, *supra* note 33, at 34-45 (low salaries and overloaded dockets reduce attractiveness of federal bench to outstanding lawyers); *id.* at 46-47 (state court conditions are even worse, especially in states where judicial elections deter lawyers from ac-

horting judges to work harder; like any set of galley slaves, they must surely be tempted to increase their tempo quantitatively by qualitatively shortening their strokes. It is no less idle to expect further substantial gains in judicial productivity through streamlining the processing of cases by individual judges. The length of briefs could be restricted, the time for argument shortened, the incidence of publication of opinions reduced—but the compound effect of successive rounds of cutbacks in the time judges allot to the discrete tasks of appellate adjudication would soon have judges going through the motions and little else. We are already operating at the margin of the efficiency with which traditional appellate adjudication can be delivered.[35]

The only realistic way to increase the productivity of individual judges past the point achieved through diligence and exhortation has been to adopt efficiency devices that drastically reduce the mean amount of individual judge-time required to decide *some* appeals, thereby increasing the productivity of appellate judges when averaged over *all* appeals. Abridgment of traditional methods of appellate adjudication in selected cases enables the court to maintain an acceptable net rate of disposition while continuing to offer traditional adjudicatory procedures in the remaining cases. But this compromise has not generally been regarded as advantageous to the litigants who receive the non-traditional treatment. The fear is that in appellate decisionmaking, as in most of life, acceleration entails a tradeoff between the goal of the quick and the risk of the dirty. This presents an overloaded appellate court with the difficult issue of which cases to decide under summary, but arguably more error-prone, procedures.[36]

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cepting judicial appointments).

35. *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, PART II: SUMMARY OF RECOMMENDATIONS 110 (1990) ("[t]he appellate courts have avoided major deterioration only by pushing productivity to maximum levels and by adopting truncated procedures that probably have reached the limits of their utility without compromising the quality of the process"); *see also* 2 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, PART III: WORKING PAPERS AND SUBCOMMITTEE REPORTS, *Report of the Subcommittee on Administration, Management, and Structure* (1990).

36. I refer to error in the sense previously noted: a difference in outcome from that which would have occurred had a case been processed in the traditional fashion. *See supra* text accompanying note 30. An apparent example of the phenomenon has been furnished by Supreme Court Justice John Paul Stevens. A panel of the Fifth Circuit Court of Appeals, in an unpublished opinion, rejected a criminal defendant's claim that the district court had improperly departed from the Sentencing Guidelines. The identical claim was found to be meritorious by another panel in a published opinion issued two

One method of speeding up appellate adjudication would be an even-handed rationing of judicial time, giving every case an equal but less-than-ideal amount of personal judicial attention. Common sense has prevailed, however, and the firmly established norm is to discriminate among cases according to the complexity or difficulty of the issues they appear to present. The goal is to identify early in the appellate process cases so routine or hopeless (or both) that any judge must reach the same result. Such cases clearly exist in abundance in the caseload of any modern American appellate court with a mandatory jurisdiction. Here, surely, conventional appellate procedure is most wasteful of judicial time that could be better spent on more difficult cases, and the risk of error from summary procedures is least—provided that such simple cases can be accurately identified by means more efficient than conventional appellate procedure.

C. Screening and the Problem of Bureaucracy

Thus we arrive at screening as a prevalent modern response to the crisis of volume at appellate courts.[37] A screening program seeks to filter from the flow of cases those of such an apparently meritless or routine nature as not to require full-scale judicial involvement. Because it can quickly become counter-productive to expend judge-time in deciding which cases do not merit judge-time, staff attorneys commonly play a major role in the screening process. For reasons partly constitutional and partly

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days later. (Both cases were decided without oral argument.) Justice Stevens commented,

> It is unfortunate that the summary disposition of petitioner's case by the Fifth Circuit and this Court may require petitioner to serve [a longer prison sentence than the Sentencing Guidelines provide]. That, however, is the kind of burden that the individual litigant must occasionally bear when efficient management is permitted to displace the careful administration of justice in each case.

Taylor v. United States, 110 S.Ct. 265, 265-66 (1989) (opinion of Stevens, J., respecting the denial of certiorari).

37. For discussion of such other responses as increasing the number of judges, courts, and parajudicial personnel, or altering traditional appellate procedures by curtailing oral argument or deciding cases with unpublished opinions or no opinions at all, see R. POSNER, *supra* note 33, at 94-129; Marvell, *supra* note 33, at 282. Some of these other responses may be adopted by an overloaded appellate court not as alternatives to screening but rather as constituents of a screening program, which generally entails increased use of parajudicial staff, curtailment of argument, and the abbreviation and nonpublication of opinions announcing appellate judgments. *See* Marvell, *supra* note 33, at 282 n.3.

traditional, the ultimate act of decision in screened cases is still performed by commissioned judicial personnel. But the decision generally will not have been by oral argument;[38] and, if announced in an opinion at all, the opinion will usually be unpublished and not intended for the guidance or scrutiny of nonparties.[39]

This screening process risks considerable dilution of the values of appeal. If the screening is too crude, and the treatment of a screened case too summary, trial court errors may go uncorrected. Moreover, the abbreviated treatment forecloses party participation and reduces the social legitimacy of result and process. The legitimation value of appeal is particularly threatened by the bureaucratic apparatus of screening. Snap judgments by judges unaided by staff about which cases are to be disposed of summarily — screening and decision occurring virtually simultaneously — risk a merger of the quick and the dirty that is inappropriate where society by statute or constitution has afforded the litigants appeal as of right rather than at the grace of the judges. Thus, careful administration of a screening program that achieves a significant increase in productivity per judge will require the use of staff, and the use of staff introduces an element of bureaucracy into the performance of the adjudicatory function.

I do not refer to the concept of bureaucracy in a perjorative sense. It is what modern appellate justice requires. But we must look carefully at the characteristics of the bureaucratized decisionmaking that screening programs generally employ.

The goals and procedures of a bureaucratized process differ from the norms we associate with traditional appellate adjudication. Virtually by definition, bureaucracies give primacy to quantitative goals, and even in the qualitative realm they emphasize goals of conformity, consistency, and cohesion rather than innovation or reinterpretation. In order to achieve efficiency and consistency across the great mass of decisions that bureaucracies are charged with, internal norms may develop by

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38. Systematic exclusion of cases from the oral argument track is definitional of "screening" in federal appellate practice. Some state court systems, such as California's, operate under a local constitutional requirement that all appeals be orally argued absent waiver of that right. Such systems nevertheless have procedures for disposing of routine cases that are functionally equivalent to the screening of cases in the federal courts of appeals. *See* Thompson & Oakley, *supra* note 27, at 23.

39. As reported by Figure 8, pg. 898, published opinions are issued in only six percent of the cases decided on the merits by the Ninth Circuit's screening panels.

which presumptions replace analysis in the determination of which cases are routine and appropriate for low-cost bureaucratic processing.[40]

The great challenge for an appellate court seeking relief from the crisis of volume through a screening program is to shape a bureaucratic system that processes only those cases that are appropriate for bureaucratic disposition. Screening loses its value if too much of already scarce judicial time is devoted to the classification process. This sets up the problem of the bureaucracy making its own choice of which cases to feed itself.

In a previous work Robert Thompson and I have identified what we consider to be significant problems in the accuracy of bureaucratic assessment of whether cases in fact fall into the routine categories fit for bureaucratic treatment.[41] The net result is that certain kinds of cases may be treated by staff in a routine fashion with inadequate attention to actual merit. This may occur with the best of intentions because the perception of their role by bureaucratic participants leads them to view and describe cases in a way that minimizes their novelty and maximizes their apparent suitability for staff-generated bureaucratic disposition.

IV. Screening in the Eighties: Operation of the Ninth Circuit Model During the Study Period

A. Structure and Process

1. Staff attorney analysis of every screened case

The Ninth Circuit's model of screening follows that of the Fifth Circuit in two key respects: (a) staff attorneys review and analyze cases that have been placed on the screening track; and (b) screened cases are routed to special "screening panels," rather than to regular argument panels, for decision on the merits.[42] The Ninth Circuit's use of staff attorneys to process screening cases prior to their submission to screening panels has always been more extensive than the Fifth Circuit's, however. While at the Fifth Circuit only about half of the cases routed to screening panels are accompanied by staff memoranda, the

40. *See* Thompson & Oakley, *supra* note 27, at 35-36.

41. *See, e.g.*, J. Oakley & R. Thompson, *supra* note 3, at 66, 85-86, 136-38; Thompson & Oakley, *supra* note 27, at 61-62.

42. For an account of the origins of the Ninth Circuit's screening program, see Goldman, *supra* note 26, at 138, 142-45.

Ninth Circuit practice during the study period was to have a staff memorandum prepared in every case submitted for decision by a screening panel.[43]

2. Screening panel discretion to operate in either serial or parallel modes

The screening panels of the Fifth Circuit review screened cases in "serial" or "round robin" fashion. This mode entails submission of a screened case to one judge at a time. The first or "initiating" judge either rejects the case from the screening docket or prepares a proposed disposition and forwards the case to the second judge. The third judge does not see the case unless the second judge has concurred both in the screening docket status of the case and a proposed disposition. This system saves judicial time when the first judge rejects the case from the screening docket without investment of time by the other judges, but once the initiating judge has invested time in reviewing the case and preparing a proposed disposition, the successive judges may feel less free to moot this effort by rejecting the case from the screening docket.[44] In adopting a screening program modeled upon the Fifth Circuit's, however, the judges of the Ninth Circuit insisted on allowing screening panels to choose to operate in "parallel" rather than serial fashion.[45] The judges of a parallel panel deliberate simultaneously on whether a particular case was appropriate for the screening docket, generally conferring by telephone or electronic mail.[46] During the period of our study, parallel panels processed forty-three percent of the cases assigned to the Ninth Circuit's screening docket.[47]

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43. *See* CECIL & STIENSTRA II, *supra* note 3, at 72, 75.

44. *See* J. CECIL, THE ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT 55-57, 73-75 (1985).

45. *See id.* at 58; *see also* CECIL & STIENSTRA II, *supra* note 3, at 76-78.

46. A number of investigators have noted some convergence over time in the procedures employed by the two types of Ninth Circuit screening panels during the study period. *See* CECIL & STIENSTRA II, *supra* note 3, at 78-80; J. CECIL, *supra* note 44, at 57-58; Goldman, *supra* note 26, at 148. My research confirms that judges of the Ninth Circuit serving on parallel screening panels had developed the practice by the end of the study period of conferring principally by electronic mail rather than by telephonic "real-time" conferences. At least some judges serving on serial panels in the latter part of the study period had developed the practice, when considering whether to reject a case from the screening docket, of first consulting with the other panel judges.

47. Of the 16,263 cases with valid calendar codes that were disposed of after having been placed on calendar during the study period, *see infra* note 65, there were 3,019 cases (19%) assigned to the calendars of the screening panels. I obtained valid panel

3. *The inventory process and assignment of case weights*

The mechanics of the Ninth Circuit's formal screening program have always been based on an initial "inventory" process for sorting and weighting cases. During the study period every case decided by the Ninth Circuit had been inventoried by a central staff attorney as soon as it was fully briefed.[48] The inventory process checked for jurisdictional defects, coded issues for future tracking and docketing of cases presenting similar issues, and assigned a case weight reflecting the difficulty of the issues and the complexity of the record.[49]

Case weights were the linchpins of the court's calendaring system during the study period. They were used to balance the workload of the argument panels, with each day's calendar of argued cases being bundled into a set of case weights equalling eighteen.[50] Of more immediate concern here, case weights were also used to determine whether a fully briefed case was assigned to an argument panel at all, or to a screening panel instead. Case weights were thus the attribute that symbolically was caught when the court's caseflow was "screened."

The case weights used during the study period were the screening-level weights of "1" and "3L" (later combined into a single generic "S" weight), and the argument-level weights of 3,

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method data for 2,953 (98%) of these screening docket cases. Of these 2,953 cases, 1,260 (43%) were processed by parallel screening panels, and the remaining 1,693 cases (57%) were processed by serial screening panels. Not all of these 2,953 cases were screened to decision, since 424 (14%) of the total of 3,019 cases originally assigned to screening panels were rejected from the screening docket. For a description of the rejection process, see *infra* text accompanying notes 57-58, 60-61. The total number of rejected cases within the Study Group, *see infra* text accompanying notes 68-69, is fewer than the present figure of 424 rejected cases because the total number of cases in the Study Group is only 12,677 (of which 381 were rejected from screening), while the total number of cases here in issue is 16,263 (of which 424 were rejected from screening). The winnowing of the 16,263 cases to the 12,677 Study Group cases is necessary for my analyses of case-type distribution and form of decision, but all that is needed to determine the rate of assignment to parallel or serial panels are valid calendar code data for cases processed during the study period. Whenever possible I have drawn my statistics from the largest set of valid data. Hence the parallel/serial panel ratio is determined from the 16,263-case dataset of cases with valid calendar codes that were calendared during the study period and disposed of during the study period. *See infra* notes 52 & 65.

48. In the ordinary case, the filing of the appellee's brief was the trigger for inventory readiness. Reply briefs are permissive under FED. R. APP. P. 31(a), and ordinarily the inventory process was not delayed while the time for filing a reply brief passed.

49. The inventory process was established prior to the screening program. *See* Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CALIF. L. REV. 937, 963 (1980).

50. *See* J. CECIL, *supra* note 44, at 28-29.

5, 7, and 10. The screening-level weights would "stick" to the screen, while the other weights would pass through to qualify for calendaring before the argument panels.[51] During the study period, a screening-level case weight automatically resulted in that case being assigned by the clerk to the calendar of a screening panel rather than an argument panel. During this period twenty-two percent of all cases disposed of on the merits after calendaring had initially been routed to screening rather than argument panels.[52]

4. The search for needles in the haystack: three stages of review of assignment of a case to the screening docket

During the study period, there were three stages of review of the initial staff attorney's inventorying decision to assign a screening-level case weight to a particular case. Sacrificing con-

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51. The case weight of "S" was introduced at the Ninth Circuit in the spring of 1988. For most of the study period the least difficult cases were classified as either "1" or "3L", and these weights were automatically assigned to screening panels rather than argument panels. The "S" or "screener" designation simply replaced the "1" and "3L" classifications without substantive change.

The use of a two-tiered set of screening-level weights for most of the study period creates interesting research possibilities, since it permits comparative study of the form and result of decision in cases inventoried as truly "bottom-of-the-barrel" cases—the "1" weights—vis-à-vis cases assigned to the screening track with explicit recognition that the case was at the margin of the degree of difficulty or complexity meriting oral argument—the "3L" weights. For scheduling reasons, some of these screening-weight cases were, from time to time, taken off the screening docket and assigned for decision to regular argument panels, potentially creating a fortuitous "control group" permitting study of the effect on the nature and form of decision when that decision occurs according to the procedures of the screening docket as opposed to the regular docket. For an example of such research, see Goldman, *supra* note 26, at 149-57.

In his report Professor Goldman anticipated that the previous report of my Ninth Circuit research, *see* Oakley & Thompson, *supra* note 1, would include evidence about this "control group" tending to support different (but not necessarily conflicting) conclusions about the effect of screening on the outcome of cases than were supported by Professor Goldman's data. *See* Goldman, *supra* note 26, at 150 n.30. Preliminary presentations of my research raised questions among Ninth Circuit staff attorneys about whether the "control group" as I had defined it (Professor Goldman's dataset was somewhat different) was in fact a random selection of screening-weight cases assigned for decision to regular argument panels purely for reasons of administrative convenience. Pending resolution of this question I have not reported my "control group" data.

52. As previously noted, of all 16,263 dispositions after valid calendaring during the study period 19% (3,019) were initially assigned to screening panels. *See supra* note 47. When the total dispositions are further refined according to the criteria for the Study Group on which my research focused, *see infra* text accompanying notes 64-68, the number of cases initially assigned to screening panels was 22% (2,758) of the 12,677 cases meeting all of the Study Group criteria.

sistency of metaphor for ease of exposition,[53] I shall refer to this process of review of a screening decision as a search for any "needles"—misclassified cases—within the haystack of the screening docket.[54]

The Ninth Circuit looked for needles on three occasions. Each occasion was like the passing of a magnet through the screening docket. The first pass occurred when the case weights assigned by staff attorneys to individual cases were discussed during the weekly division-chief reviews of staff attorney cases and work product. There were three divisions, and between fifteen and thirty cases were reviewed each week within each division. The division chief relied on the attorney's thumbnail sketch of a case—a summary only a paragraph or two in length[55]—in making a snap judgment whether the case weight accorded to it by the reporting staff attorney "sounds right." Absent a false note in the summary, this was not an occasion at which the assessment of the facts and legal contentions of a case by the reporting staff attorney would be reviewed by independent examination of the case record.

The second pass of the magnet was the opportunity for reconsideration of the screening classification when a staff attorney prepared the bench memorandum that accompanied the case to a screening panel for decision.[56] However, staff attorneys

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53. I have previously referred to "screening" as literally the filtration of sludge out of the case flow. Henceforth I treat "screening" not as a mechanism for combing the extraordinary out of the mass of the ordinary but simply as a process for inventorying and weighting cases such that they are submitted for decision either by oral argument panels or by screening panels.

54. *Cf.* A. LEWIS, GIDEON'S TRUMPET 34 (1964) (referring to the Supreme Court's *in forma pauperis* docket):

> Given the difficulty of processing all these applications, it would be understandable if the Court did not try very hard to find the occasional needle in the haystack. But as Justice Walter V. Schaefer of the Illinois Supreme Court once said of a comparable problem, "It is not a needle we are looking for in these stacks of paper, but the rights of a human being."

55. For instructive examples of these summaries, reprinted from the March 1987 screening calendar of the Ninth Circuit, see CECIL & STIENSTRA II, *supra* note 3, Appendix D, at 201-20.

56. This attorney will probably (but not necessarily) be the attorney initially responsible for the inventorying of the case and its assignment to the screening docket. There is no court policy of assigning the writing of bench memoranda in screened cases to an attorney other than the inventorying attorney, in order to assure a fresh look at the merits of the case. Since the initial inventory process is expected to take only 30 to 60 minutes of attorney time, it is questionable whether reassignment of the case to the same attorney for the writing of the bench memorandum saves sufficient attorney time to justify the loss of "fresh look" reevaluation of the screening classification by the prospective

were reluctant to recommend reclassification from the screening to the argument docket after expending substantial effort at drafting a bench memorandum. Staff attorneys had monthly quotas of bench memoranda, and received no credit for the research and writing they would moot by "kicking" a case from the screening docket after commencing work on its bench memorandum.

I focused my research on the third and last pass of the magnet: the review of a screened case by the screening panel of three judges to whom it had been submitted for disposition. As previously explained, every Ninth Circuit case submitted to a screening panel during the study period was accompanied by a bench memorandum. The screening panels organized themselves to take action either serially or in parallel, with the serial method predominating during the study period.[57]

The screening panels were governed by Rule 34(a) of the Federal Rules of Appellate Procedure[58] and the related Ninth Circuit Rule 34-4. These rules required advance notification to the parties that a case had been assigned to the screening docket, giving them an opportunity to object to the screening classification. By requiring unanimity of the three-judge screening panel, the rules permitted any of the three judges unilaterally to "reject" a case by declaring it unsuitable for decision without oral argument according to the criteria of Rule 34(a).

B. Statistical Analysis of the Ninth Circuit's Screening Docket

Figure 1 puts in perspective the work of the Ninth Circuit's screening panels during the study period. It compares the overall rate of disposition without oral argument in the Ninth Circuit during the last full year of the study period with that of the other regional circuits. The vertical bars display the percentages of appeals terminated on the merits but without oral argument.[59] Of particular interest are the four darkened columns.

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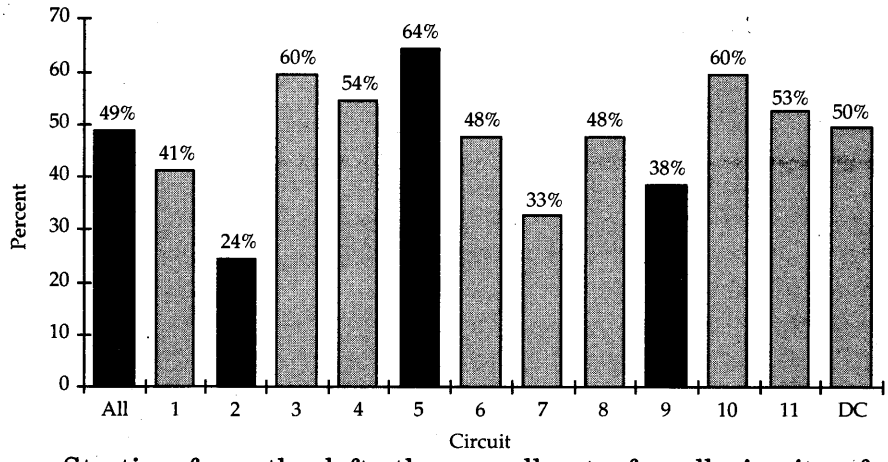
author of the bench memorandum.

57. During this period 57% of screened cases were processed by serial as opposed to parallel panels. *See supra* note 47.

58. *See supra* text accompanying notes 6-9.

59. These figures are from Table S3, at page 106, of the 1987 Annual Report of the Director of the Administrative Office of the United States Courts. 1987 DIRECTOR ADMIN. OFF. U.S. CTS. ANN. REP. 106.

Figure 1. Percentages of appeals decided on the merits without oral argument



Starting from the left, the overall rate for all circuits of cases decided on the merits without oral argument is forty-nine percent. Lowest among the circuits, at half the overall rate, is the Second Circuit. But even with that court's strong preference for oral argument, nearly a quarter of the cases decided on the merits nonetheless are heard on the briefs alone. At the other end of the spectrum is the Fifth Circuit, with nearly two-thirds of its cases decided on the briefs. The Ninth Circuit stands third among the circuits in its affinity for oral argument, with only the Second and Seventh Circuits hearing argument in a higher proportion of their cases.[60] Thus the Ninth Circuit's approach to screening must be understood in the context of a court that remains unusually committed to oral argument as the rule rather than the exception when the court is adjudicating the merits of an appeal.

The statistics reported below allow me to develop profiles of the Ninth Circuit's screened cases and their outcomes and to compare these with profiles of cases disposed of by the court's

60. The criteria used by the Administrative Office of the United States Courts (A.O.) to identify dispositions "on the merits" inflate the proportion of unargued to argued cases by including some forms of motion panel dispositions. The Ninth Circuit's rate of 38% by the A.O. criteria of dispositions "on the merits" is 31% by the criteria for dispositions "on the merits" used to define my "Study Group" of cases. *See infra* text accompanying notes 67-68. The latest available data, for the year ending June 30, 1989, show the Ninth Circuit's affinity for oral argument holding steady. *See infra* note 92. In that year 39% of the Ninth Circuit's dispositions "on the merits" (by the A.O. criteria) were dispositions without oral argument, versus the figure of 38% depicted in Figure 1 on the basis of the 1987 A.O. data.

conventional argument panels. The latter will include cases originally assigned to screening panels and reassigned to argument panels after rejection from screening by one or more of the screening panel judges.

I use these comparisons to judge how well the Ninth Circuit's screening system was working during the study period. Two questions are fundamental to my appraisal. The first concerns cases "screened to decision," that is, those cases assigned to the screening track which remain there until disposition on the merits by a screening panel. By analyzing the nature and form of dispositions in these cases I test the validity of the premises that screening does not affect outcome and that screening filters from the conventional appellate process only cases that any competent decisionmaker would decide the same way. The second fundamental question concerns cases that were initially assigned to the screening docket but were "rejected," that is, reassigned to the conventional appellate track by one or more judges of the screening panel to which a screened case had been assigned for decision. Ideally, rejection should be reserved for true "needles in the haystack," which is my term for novel or difficult cases that have been misclassified as appropriate for screening. During the study period, did the Ninth Circuit's model of screening approximate this ideal? If not, did it reject cases too freely (at the cost of efficiency) or too rarely (compounding the threat posed by screening to the values of appeal)?

1. Derivation of the "Study Group" of analyzed cases

The principal source of my figures is the Appellate Records Management System (ARMS), the Ninth Circuit's computerized docketing database throughout the study period.[61] There are three datasets within ARMS: the Appellate Docket, the Screening Docket, and the Staff Attorneys' Data Base. I deal here with statistics drawn from the Appellate and Screening Dockets.[62]

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61. *See generally* Weis & Bermant, *Automation in the Federal Courts: Progress, Prospects and Problems*, JUDGES' JOURNAL, Fall 1987, at 14, 15-16.

62. ARMS is resident on a mainframe computer of the Administrative Office of the United States Courts. Chief Judge Browning and his successor, Chief Judge Goodwin, graciously arranged for me to have password privileges for timesharing access to ARMS via modem and personal computer. In addition, the Ninth Circuit supplied me with computer tapes of ARMS data. I combined the ARMS data with data I had independently compiled to produce my own SPSS (Statistical Package for the Social Sciences) database on a minicomputer at the University of California at Davis. My SPSS database started with the ARMS Screening Docket records of all cases calendared before screening panels

I begin my statistical analysis with some gross comparisons of the court's workload overall, its calendared cases, and its screening docket.[63] I start with the total number of cases disposed of during the study period in any fashion—this beginning figure is 32,034 cases.[64] However, to get an informed sense of the role of screening in the court's work, I have to refine this raw figure to focus on the part of the court's business that screening affects and to count cases in ways that accurately reflect the court's handling of them. This winnowing process entails successively eliminating six categories of cases.[65]

(1) Thousands of cases terminate because of settlement, lack of prosecution, lack of jurisdiction, or other procedural grounds not requiring adjudication on the merits. Other cases (many fewer) are disposed of on the merits under expedited procedures afforded by the court in exigent circumstances. Screening has no impact on these cases. Screening is simply a system for assigning cases to calendars according to perceived difficulty.

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during the study period. I merged with these data the ARMS Appellate Docket records of the same cases and added my own data on the particular screening panels, their method of operation (not recorded in ARMS), and their judges.

63. I use the terms "appellate docket" and "screening docket" without capitalization to refer generically to the entire set of cases filed with the Ninth Circuit (appellate docket) and to the subset of those cases assigned to the calendars of screening panels (screening docket). When I refer to the "Appellate Docket" and the "Screening Docket" with capitalization, I refer to the ARMS datasets bearing these names. Thus "screening docket" refers to a collection of cases, and "Screening Docket" refers to a collection of records about those cases.

64. For convenience I refer to this figure as the total number of cases disposed of during the study period. In a few cases, however, there was a second or renewed appeal after an earlier procedural disposition or remand. These returning cases were generally docketed under the original docket number with a suffix added to indicate that the case had been reopened. The old docket number plus the suffix thus became a unique record in the datasets I examined. Such multiple appeals and remands cause my figure of 32,034 total "cases" disposed of during the study period to be slightly higher than the actual figure of "cases" (exclusive of renewed and multiple appeals) would be. For almost all practical purposes, the proceedings in renewed or multiple appeals are not made less burdensome by the fact of the former proceedings; therefore, my figures are an accurate indication of actual workload.

65. Some of the six winnowing steps described in the text were combined in the actual generation of the data, and the sequence of the steps used to generate the data differed from the sequence used for clarity in describing the winnowing process. In creating the dataset, the 32,034 beginning figure was first reduced to 17,044 cases by excluding all cases disposed of prior to calendaring and also by excluding those few cases disposed of after calendaring for which ARMS recorded invalid or inapposite calendar codes. This figure of 17,044 cases was then reduced to 16,263 cases by the exclusion of cases disposed of during the study period but calendared prior to the study period. The resulting figure of 16,263 cases was in turn reduced to the ultimate Study Group figure of 12,677 cases by successive application of the remaining winnowing criteria.

A case dismissed or decided by emergency procedures prior to calendaring has never reached the screening stage. I restrict my analysis therefore to only those cases disposed of after briefing had been completed, any preliminary motions to dismiss had been overruled, and the cases had been placed on the calendar of a panel of three judges as ripe for disposition on the merits.[66]

(2) Since the screening program could have no effect on cases calendared before the screening panels were created, I also exclude cases placed on calendar before January 1, 1982, even if they were disposed of during the study period.[67]

(3) A few cases settled or otherwise washed out after calendaring but before submission to a panel. These cases too have been eliminated from the study group.

(4) I further limit the study group to lead or single cases, excluding consolidated or otherwise associated cases that were not really discrete cases requiring a full measure of decisional time and attention.

(5) I include only cases that were decided by the court's regular panels of judges (either argument or screening panels) rather than by motions panels or other *ad hoc* decisional panels.

(6) I include only cases disposed of on the merits, meaning that the nature of the disposition recorded by ARMS was not a procedural dismissal, transfer, or vacation of the appeal, but rather a disposition that reached and resolved the merits by letting the action below stand, reversing or modifying that action in whole or in part, or remanding for further action below.[68]

This six-step winnowing process reduces the initial gross figure of 32,034 cases disposed of during the study period to a net of 12,677 cases meeting all of my study criteria. I call these 12,677 cases the "*Study Group*," and they constitute the master set for purposes of all further analysis in this Article. The major

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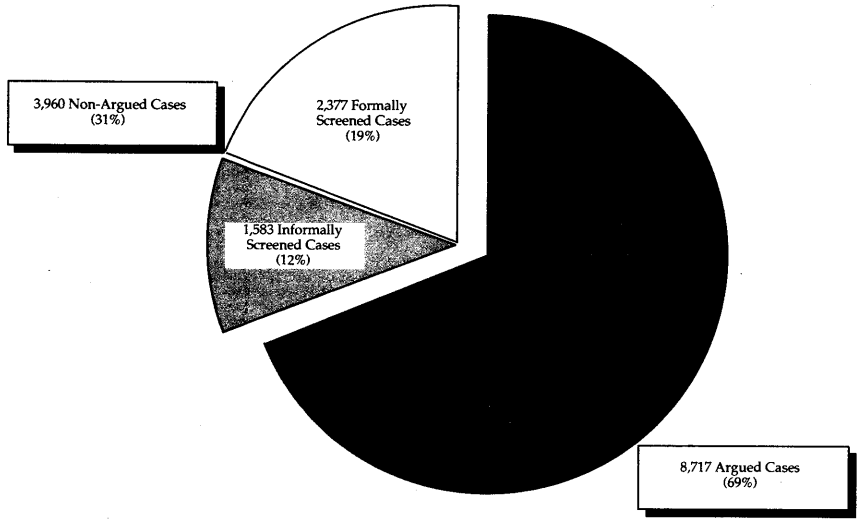
66. I refer to assignment of a case to the docket of an argument panel or screening panel as "calendaring" that case or as putting the case "on calendar." The cluster of cases assigned to be heard on a particular day by an argument panel has traditionally been called that day's "calendar" of cases. The terminology has been carried over to the cluster of cases scheduled to be submitted on any given day for decision by a screening panel.

67. The screening program officially began on January 1, 1982, and I use this date to define the study period. But New Year's Day 1982 fell on a Friday, and the first business day of 1982 was therefore January 4th. On this day 24 cases were placed on calendar, with two of these cases being assigned to the new screening panels.

68. I also excluded from the study groups any cases that did not have valid codes for the ARMS field in question—*i.e.*, those with missing or unrecognized values for that field.

subgroups within the Study Group are illustrated in Figures 2 and 3. A more detailed picture of the composition of the Study Group, including the relative distribution of case types within each subgroup, can be found in Table 2, page 888.

Figure 2. Composition of the Study Group



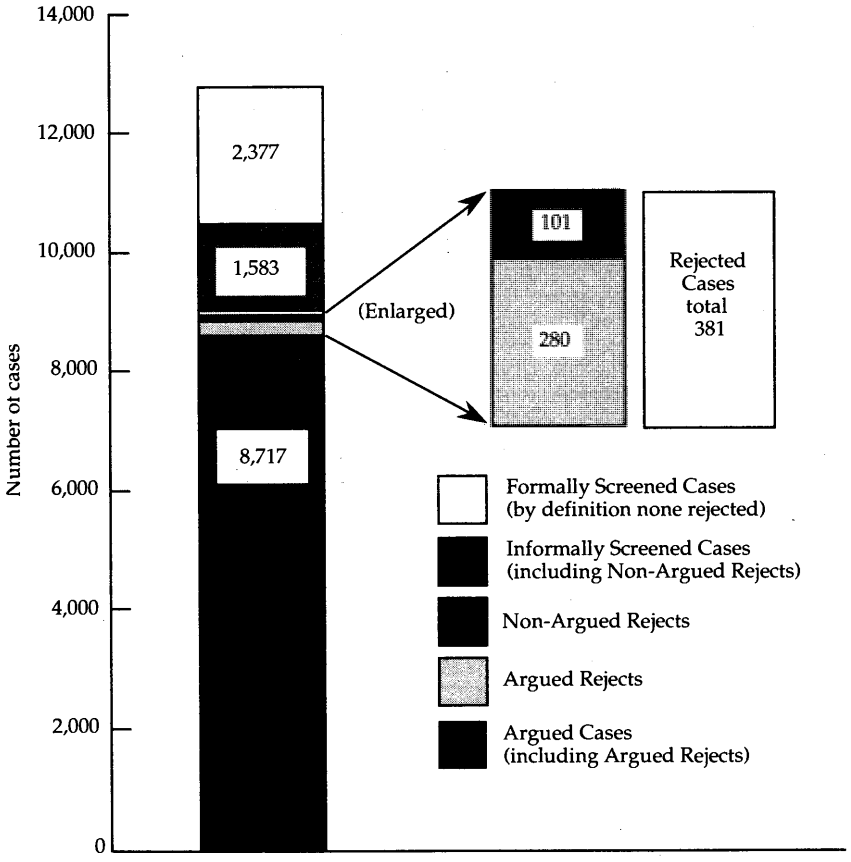
2. Identification of subgroups within the Study Group

Figure 2 shows how the Study Group breaks down into two components, one of which also reduces into two further subgroups. The 12,677 Study Group cases consist of 8,717 cases that were submitted after oral argument (sixty-nine percent), and 3,960 cases that were submitted on the briefs (thirty-one percent). I call the 8,717 cases the "*Argued Cases.*" The 3,960 cases that were not argued consist first of 1,583 cases decided without oral argument but by argument panels rather than screening panels. In accordance with my previous discussion, I call these cases the "*Informally Screened Cases.*" The remainder of the non-argued cases are the 2,377 cases that were assigned to the screening docket, were not rejected from screening, and were finally decided on the merits by the screening panels. I call these the "*Formally Screened Cases.*"

Figure 3 presents more information on the important subset of 381 cases within the Study Group that were originally assigned to the screening docket but were rejected by screening panels. I call this group of 381 cases the "*Rejected Cases,*" and note that they constitute a slice of cases figuratively drawn from

the marginal area of the Argued Cases and the Informally Screened Cases in Figure 2. Most of the Rejected Cases were duly argued. Thus, 280 of the Argued Cases are drawn from the 381 Rejected Cases. I call these 280 cases the "*Argued Rejects.*" But 101 of the Rejected Cases were decided by argument panels without having heard oral argument. These 101 Rejected Cases thus belong to Figure 2's group of Informally Screened Cases. In Figure 3 I call these 101 cases the "*Non-Argued Rejects.*"

Figure 3. Profile of the Study Group and the Rejected Cases



3. *Dimensions of screening at the Ninth Circuit*

Two conclusions stand out from the data reported thus far. First, only twenty-two percent of the court's cases were even

placed on the screening docket,[69] and only nineteen percent were actually disposed of by screening panels.[70] This was a conservative use of screening by a busy court. Second, informal screening by argument panels accounted for twelve percent of the court's dispositions on the merits overall.[71] In terms of effect on the Ninth Circuit's rate of disposition after submission but without oral argument, informal screening by argument panels was almost as significant during the study period as was the court's formal screening program.[72]

4. Needles in the haystack

I seek to evaluate the success of the Ninth Circuit during the study period in screening cases without leaving needles in the haystack. It would obviously be an immensely burdensome and probably unpersuasive procedure for me to read all or some substantial selection of the cases under study in order to offer my subjective judgments about how many might usefully have been orally argued. Instead I have generated statistical profiles of the Study Group cases and the various sub-groups that allow me to compare screened and unscreened cases according to distribution of case types, non-affirmance rates, and publication rates.

The data on case-type distributions are presented in Table 2 and Figure 4. Table 2 presents the data on relative distributions of case types for all cases in the Study Group as a whole, and then for three previously identified subgroups: Argued Cases, Formally Screened Cases (cases screened to decision), and Rejected Cases. The case types are those identified in the ARMS database. Figure 4 recasts the data, lumping the habeas corpus/prisoner's rights categories together and omitting case-type categories with fewer than one hundred cases in the Study Group.

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69. If the 381 Rejected Cases are added to the 2,377 Formally Screened Cases, the total of 2,758 cases initially assigned to the screening docket constitutes 22% of the 12,677 Study Group cases.

70. The 2,377 Formally Screened Cases are 19% of the 12,677 Study Group cases.

71. The 1,583 Informally Screened Cases are 12% of the 12,677 Study Group cases.

72. As shown in Figure 1, however, the Ninth Circuit remains one of the circuits most committed to oral argument as a standard feature of appellate adjudication. *See also supra* note 60.

Table 2. Relative distribution of case types by docket type

Case type as coded in ARMS[a]	Study Group		Argued		Formally Screened		Rejected	
	Cases submitted[b]	% submitted	Cases argued[b]	% argued	Cases screened[b]	% screened	Cases rejected	% rejected
Administrative agency (AGCY)	417	3.29	315	3.62	56	2.36	6	1.57
Bankruptcy (BKCY)	204	1.61	169	1.94	14	0.59	2	0.52
Civil rights (CIVR)	653	5.16	311	3.57	245	10.32	41	10.76
Criminal (CR)	2,845	22.48	2,034	23.37	435	18.32	70	18.37
Habeas/prisoner's rights (total)	251	1.98	110	1.26	97	4.08	22	5.76
State habeas corpus (SH)	*158*	*1.25*	*80*	*0.92*	*54*	*2.27*	*18*	*4.72*
Federal habeas corpus (FH)	*51*	*0.40*	*26*	*0.30*	*20*	*0.84*	*1*	*0.26*
Other habeas corpus (OH)	*4*	*0.03*	*1*	*0.01*	*1*	*0.04*	*1*	*0.26*
Prisoner's rights; not habeas (PR)	*38*	*0.30*	*3*	*0.03*	*22*	*0.93*	*2*	*0.52*
Immigration (AINS)	658	5.20	315	3.62	267	11.24	69	18.11
NLRB (ANLR)	261	2.06	222	2.55	20	0.84	7	1.84
Private civil (CIV)	6,485	51.23	4,671	53.66	999	42.06	142	37.27
Tax court (TAXC)	336	2.65	170	1.95	131	5.52	5	1.31
U.S. defendant (CIVD)	419	3.31	269	3.09	109	4.59	14	3.67
U.S. plaintiff (CIVG)	79	0.62	74	0.85	2	0.08	1	0.26
Bail (BAIL)	1	0.01	1	0.01	0	0.00	0	0.00
Civil grand jury (CVGJ)	3	0.02	3	0.03	0	0.00	0	0.00
Revenue (REVN)	10	0.08	8	0.09	0	0.00	1	0.26
Writ (WRIT)	30	0.24	28	0.32	0	0.00	0	0.00
Other (OTHER)	6	0.05	5	0.06	0	0.00	1	0.26
Total	12,658	100.00%	8,705	100.00%	2,375	100.00%	381	100.00%

[a]The categories are listed in the order of their presentation in Figures 4 through 6

[b]The case-type totals for Study Group, Argued Cases, and Formally Screened Cases are slightly less than the totals for each group stated in Figure 2 and in the text. I lack valid case-type data for 19 of the 12,677 cases in the Study Group, including 12 of the 8,717 Argued Cases and 2 of the 2,377 Formally Screened Cases.

My primary interest in the Formally Screened Cases now lies in comparing them with the Argued Cases rather than with the Informally Screened Cases. I shall refer to the Formally Screened Cases as the screening track and the Argued Cases as the argument track.

Figure 4. Distribution of case types within the Study Group

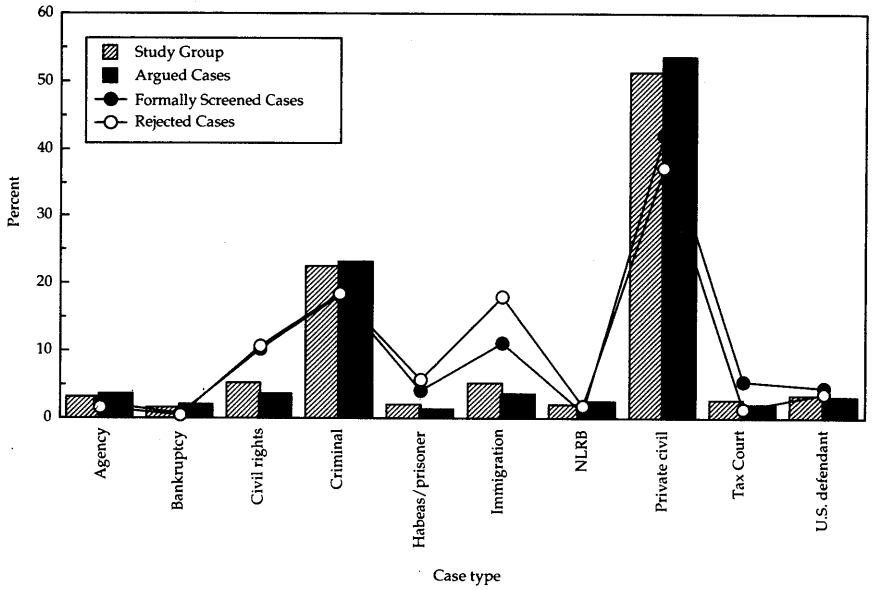


Figure 4 graphically demonstrates that there are few major discrepancies in the case-type distributions across the groups under study. The distribution of case types within the entire Study Group is very close to the distribution of case types within the Argued Cases as to every case type. There is a slightly higher incidence of private civil cases on the argument track and a slightly lower incidence of immigration and civil rights cases, for example, but the differences are hardly dramatic.

There are more pronounced differences in the case-type percentages for the screening track vis-à-vis the argument track and the entire Study Group. Immigration and civil rights cases each account for more than ten percent of the screening track, compared with less than four percent of the argument track and fractionally more than five percent of the docket as a whole. There are three times as many habeas corpus/prisoner's rights cases on the screening track than on the argument track; the figure is twice their percentage in the overall Study Group. Appeals from the Tax Court are also overrepresented on the

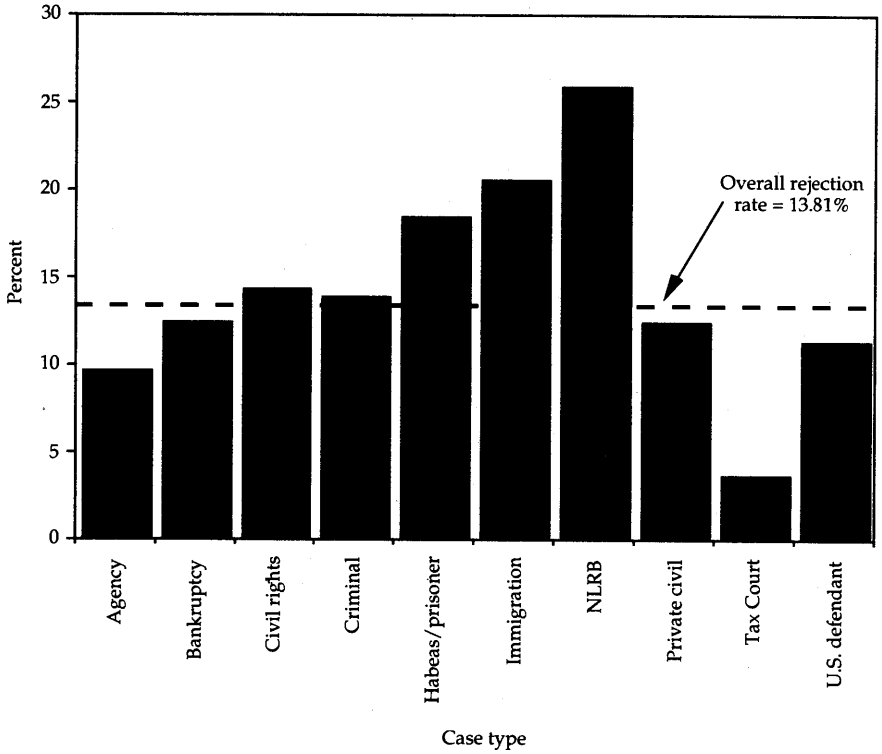
screening track (especially in comparison with the argument track)—so, to a lesser degree, are civil cases in which the United States Government is the defendant (U.S. defendant cases). Private civil cases and, interestingly, general criminal cases (where the lack of any disincentive to indigent appeals is commonly thought to produce a higher than normal proportion of meritless appeals) are underrepresented on the screening track.

The data also reveal, however, that the screening panels were acting with considerable independence in their rejection of cases from screening, providing dynamic feedback to the screening staff to expand or check the screening of cases in under- and overrepresented categories. Figure 5 shows how rejection rates in particular categories of cases compare not only with each other but also with the overall rejection rate of 13.81%. Figure 6 presents a side-by-side comparison of the absolute number of cases of each category that were initially assigned to screening panels during the study period.[73]

73. The overall rejection rate of 13.81% in Figure 5 is derived from the data presented in Figures 2 and 3 for the entire Study Group. This figure is the result of dividing the number of Rejected Cases (381) by the sum of all cases initially assigned to screening panels (2,377 Formally Screened Cases + 381 Rejected Cases = 2,758 cases initially assigned to screening panels). As noted in Table 2, the data used to analyze case-type distributions and to generate Figures 4, 5, and 6 yield a total of 2,375 cases in the Formally Screened category, rather than the total of 2,377 Formally Screened cases featured in Figures 2 and 3, because valid case-type data is lacking for 2 of the Study Group's 2,377 Formally Screened cases. When these 2 cases are excluded, the rejection rate becomes 13.82% (381 ÷ 2,756).

The numbers in Figure 6 are derived from Table 2 by adding the number of Rejected Cases for each category to the number of Formally Screened cases (the cases actually decided by the screening panels).

Figure 5. Rejection rates by case types

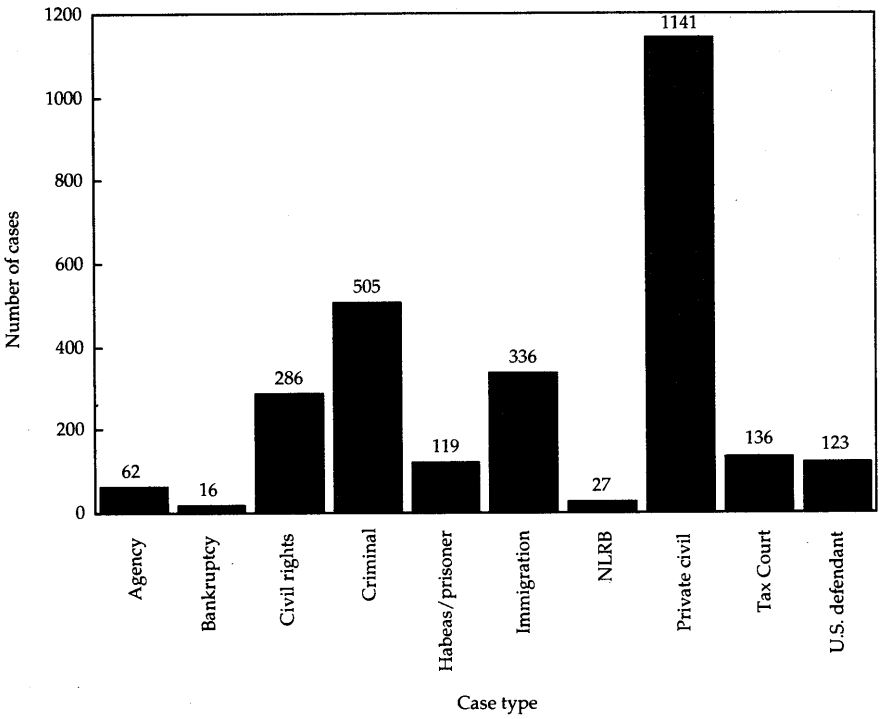


In the category of cases with the greatest overrepresentation on the screening track, immigration cases, the rejection rate is substantially above the norm—almost half again as high as the overall rate.[74] This suggests that screening panels were conscious of the imbalance and were cautious about agreeing with a staff screening decision in this overrepresented area. The same pattern can be seen in the habeas corpus/prisoner's rights category: substantially overrepresented on the screening track, it generates the third highest rejection rate among the ten case types. (The category with the highest rejection rate consists of appeals from the National Labor Relations Board (NLRB), but as can be seen in Figure 6, the number of NLRB cases initially routed to screening panels was quite small, thus reducing the signifi-

74. Immigration cases have been extremely controversial within the court of appeals. In 1985, then-Circuit Judge Anthony M. Kennedy pointed to deportation appeals under the 1980 Refugee Act as exemplifying an area in which the court was "quite frankly in disarray." *Los Angeles Daily Journal*, Oct. 18, 1985, at 18. More recently, the judges engaged in an internal debate over the appropriateness of deciding immigration cases via the screening docket. *See also* CECIL & STIENSTRA II, *supra* note 3, at 82 n.109.

cance of the rejection rate.)[75] Conversely, the staff assigned disproportionately few private civil cases to the screening docket, but the screening panels rejected a somewhat lower than average proportion of the cases in this category that did come before them. Far from encouraging staff to be conservative in the screening of private civil cases, this behavior provided a modest incentive to the staff to be more liberal in designating such cases for the screening route.

Figure 6. Case types of cases initially routed to screening panels



The one type of case that is overrepresented on the screening track in the absence of a disproportionate number of screening panel rejections consists of appeals from the Tax Court of the United States. Almost certainly, this came about because a high proportion of Tax Court appeals are brought by tax protesters whose claims are clearly without merit if not actually frivolous. Indeed, a substantial number of the Tax Court cases de-

75. The relative numbers of cases within each category assigned to the screening docket—the size of the pool from which rejected cases were withdrawn—can be gauged from the figures given in Table 2, page 888, and charted in Figure 4, page 889.

cided during the study period resulted in the imposition of sanctions for filing a frivolous appeal.[76]

I conclude that case-type distribution does not suggest a significant likelihood that cases deserving of rejection from screening remained on the screening track after review of the screening decision by the screening panel judges. Although the screening track was skewed in favor of screening particular types of cases, this skew was counteracted by the rejection rates of the screening panels. There is only one category of case that was both adjudicated on the screening track at a distinctly higher than normal rate and rejected from screening at a proportionately lower rate, and its treatment is easily explained by considerations that do not suggest systemic flaws in the screening process. Moreover, the two substantial categories of cases with the highest rejection rates (immigration and habeas/prisoner) are categories involving liberty interests in which the values of appeal served by traditional appellate procedures have a particular call on the conscience of the court. Overall, the findings indicate that during the study period the Ninth Circuit's staff attorneys and screening panel judges were conscious of the dangers of leaving needles in the haystack and were anxious to catch them by means of the rejection process.

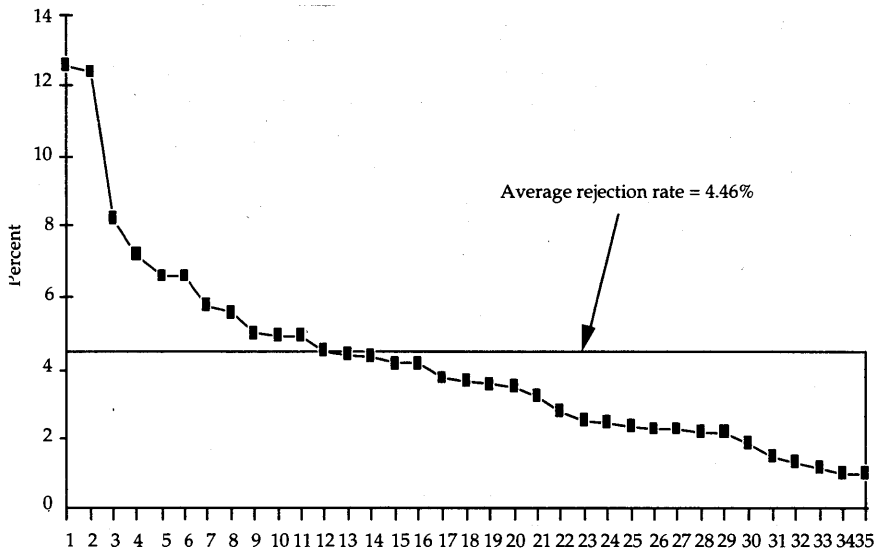
5. Idiosyncracy and efficiency in the rejection process

I next direct attention to Figure 7, which shows great variation in the rejection rates of individual screening panel judges. Data are given only for judges who participated in at least fifty decisions as members of screening panels. The rates vary from

76. For an example, see Wilcox v. Commissioner, 848 F.2d 1007 (9th Cir. 1988) (screening panel case), one of the few cases of this kind that was decided by published opinion.

12.54 to 0.99%,[77] although most are within two points of the average rejection rate of 4.46%.[78]

Figure 7. Rejection rates of individual screening panel judges



The data presented in Figure 7 suggest that the process of rejecting (or not rejecting) cases from the screening docket during the study period was dependent on idiosyncratic judicial attitudes favoring or disfavoring oral argument. This raises the possibility that the court's search for needles in the haystack was unfocused and inefficient, and therefore was at risk of finding phantom needles and missing real ones.

The data provide a means of determining whether the sig-

77. In 18 cases ARMS records rejection by "all" panel judges rather than by just one of the three. These cases are not a random subset of all rejections—16 out of the 18 were rejected by parallel rather than serial panels, despite the fact that overall only 43% of screened cases during the study period were reviewed by parallel screening panels. It would understate the rejection rate of parallel panel judges to ignore these special cases, and it would overstate the rejection rates of the judges involved to credit three judges at once with the rejection of each such case. Moreover, to credit one rejection to each of the three panel judges involved in the 18 "all" rejection cases would produce a total of individual judge rejections that was 36 cases higher than the actual count of rejected cases. (For these 18 cases there would be 54 individual judge rejections tallied, an excess of 36.) My solution was to credit each panel member with one third of a rejection in each of these 18 cases.

78. Since there were three judges on each screening panel and any one of the three judges could reject a case, the overall rejection rate is three times the average per-judge rejection rate. For this particular data set, which excludes judges with fewer than 50 screening panel participations, the rejection rate per panel is 13.38% rather than the overall rejection rate of 13.81% reported earlier.

nificant variation in individual judge rejection rates is indeed a sign of fundamental flaws in the rejection process. Except when chance dictates otherwise, the three judges of the oral argument panel that heard a case after it had been rejected from screening were not the same three judges who had rejected the case from the screening docket. Rejected cases thus were independently reevaluated when subsequently decided by argument panels. The nature and form of dispositions reached by argument panels in rejected cases should indicate whether significant numbers of cases rejected from screening were so routine as to have merited remaining on the screening docket all along. The same mode of analysis can also shed light on the converse and more important question—whether the rejection process during the study period missed many needles in the haystack by failing to identify (and reject from the screening docket) some cases that were *not* routine.

My reasoning takes the following steps. A routine case will typically be affirmed on appeal by an unpublished opinion or order. A controversial case is more likely to involve some modification of the judgment entered by the court below and to warrant publication of the reasoning on appeal. We would expect to find distinct differences in the degree of controversiality of outcome in the disposition profiles of cases screened to decision (decided by screening panels) vis-à-vis cases disposed of conventionally (decided by argument panels without ever having been assigned to screening panels). Cases assigned to the screening docket and not rejected from it are supposed to be routine cases. The disposition profiles of these cases should show a distinctly lower degree of controversiality than cases disposed of conventionally. In other words, screening docket dispositions ought to have lower rates both of non-affirmance of the decision under review[79] and of publication of the opinion announcing the disposition.

In contrast to the low degree of controversiality of cases screened to decision, the degree of controversiality of cases assigned initially to the argument docket ought to be in the middle range. We would not expect every case decided by an argument panel to result in reversal by published opinion, but we would

79. The common significance of non-affirmance dispositions is that in every such case the appellant benefitted in some way from the appeal—the effect of the decision below was in some way blunted after consideration of the merits by an appellate panel.

expect such results more frequently from argument panels than from screening panels.

Our starting-point, then, is that the disposition profiles of particular groups of cases may be ranked by degree of controversiality, measured by non-affirmance and publication rates. With that idea in mind, we can ask how we would expect the disposition profiles of *rejected* cases to compare with (a) the expected low degree of controversiality of dispositions in cases screened to decision and (b) the expected medium degree of controversiality of dispositions in cases assigned from the start to the regular docket, *i.e.*, the docket of cases assigned for decision by argument panels.

If we were to find that rejected cases reach outcomes with a low degree of controversiality despite their submission for decision by argument panels, it would indicate that the rejection process was not catching and correcting improper screening classifications. The cases diverted from the screening docket are reaching just the outcomes we would expect had rejection not occurred. In other words, when cases rejected from screening are subjected to the independent reevaluation and more searching scrutiny of argument panels, they are turning out to be just the sort of routine cases that *should* be assigned to the screening docket and should have remained there.

We would conclude from this scenario that the screening panels' rejection process was a costly waste of time. The low degree of controversiality in the outcomes of the rejected cases would indicate that the rejection process was failing to find a significant number of actual "needles" in the haystack of the screening docket. Either the process was defective, or the needles were not there to be found. Meanwhile, the rejection process would ironically have caused some of the least meritorious cases to be considered by as many as six judges (depending on the type of screening panel and the point at which rejection occurred) rather than the statutorily required three. And finally, this unnecessarily elaborate process of decision would have delayed the disposition of some of the court's easiest cases.[80]

If we were to find, however, that the disposition profiles of rejected cases show a significantly higher degree of controversial-

80. For an example of judicial concern over this double cost of a flawed rejection process—rejected cases get considered twice, entailing both "misuse of judicial resources" and "time delay"—see the comments of Judge J. Clifford Wallace, now Chief Judge of the Ninth Circuit, in Hellman, *supra* note 9, at 118.

ity than the disposition profiles of cases screened to decision, we would have evidence that at least *some* genuine needles were indeed being detected and diverted to the regular docket by the screening panels' review and rejection process. The degree to which the rejection process was underinclusive or overinclusive would be revealed by the degree of controversiality of rejected cases relative to the regular docket.

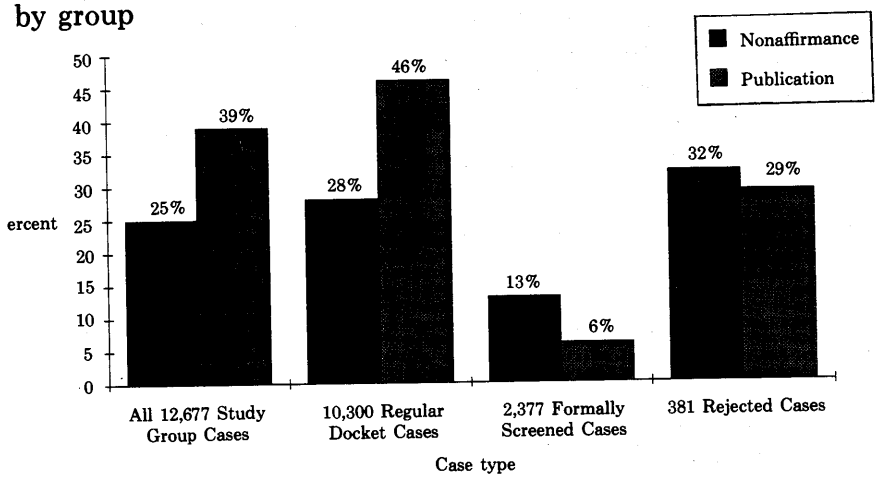
In this scenario, if the rejected cases showed a high degree of controversiality—distinctly higher than the middle range of controversiality we would expect overall of cases decided on the regular docket—we would have evidence of an *underinclusive* rejection process. That is, if nearly every rejected case were proving to be controversial—nearly every one a "needle"—this would suggest that only the most obviously controversial cases were being rejected, leaving other less obvious needles undetected among the unrejected cases destined for the summary procedures and routine results of adjudication by screening panels. By contrast, if the rejection process were to properly catch only cases that should never have been screened in the first place, we would expect those cases to come to the same distribution of outcomes—in the middle range of controversiality—as the regular docket.

To the extent disposition profiles of the rejected cases show a higher degree of controversiality than the unrejected cases that were screened to decision, we could conclude that some needles were being caught, but to the extent that this degree of controversiality of the rejected cases was less than that of the regular docket as a whole, we would also have to conclude that the rejection process was *overinclusive*. In this scenario, some cases were being rejected (out of an excess of caution) that proved ultimately to be routine cases destined for routine outcomes, and this would have lowered the degree of controversiality of the rejected cases relative to the regular docket cases. Thus, ideally, rejected cases should have disposition profiles showing the same middle range of controversiality as the court's regular docket.

As shown in Figure 8, the Ninth Circuit's rejection process approximated this ideal result during the study period. The rates of non-affirmance and publication of opinions in the 381 Rejected Cases are much more similar to those of the 12,677 Study Group cases and of the 10,300 Regular Docket Cases than to the rates of non-affirmance and publication of the 2,377 Formally Screened Cases. The argument panels that decided the re-

jected cases clearly did not treat them as routine cases that should have remained on the screening track. The incidence of non-affirmance is nearly 250% higher for Rejected Cases vis-à-vis Formally Screened Cases that remained on the screening docket; the incidence of issues deemed worthy of publication is nearly 500% higher.

Figure 8. Comparative rates of nonaffirmance and publication, by group



The rejected cases did not prove to be *more* controversial than the mainstream cases, however. The disposition profiles of the 381 Rejected Cases are slightly more routine than the disposition profiles of the 10,300 Regular Docket Cases in terms of publication rate and slightly less routine in terms of non-affirmance rate. Overall, the Rejected Cases appear to have been regarded by the regular argument panels to which they were reassigned as almost, but not quite, as controversial as the typical case assigned to the regular docket *ab initio*. Thus I conclude that the Ninth Circuit erred, but only slightly, in favor of underscreening by rejecting a few too many cases from the screening docket during the study period. To put it another way, a few more cases were rejected than appears warranted by the rate at which needles actually turned up when the argument panels reexamined the rejected cases. The fact that the court's screening panels tended to underscreen by over-rejecting—erring in favor of reassigning the doubtfully routine case to the argument panels—confirms my earlier conclusion that during the study period the Ninth Circuit made cautious use of screening for such a busy court.

One other aspect of the screening program data deserves examination. Figures 9 and 10 offer statistical comparisons of the two screening panel methods. Figure 9 indicates that the disposition profiles of cases rejected by parallel as opposed to serial panels are similar. However, if the rates of non-affirmance and publication subsequent to rejection are accepted as indicators of efficacy at rejecting cases constituting true needles in the screening haystack, parallel panels are marginally more effective at the rejection process. Figure 10 suggests that parallel panels operate not only more effectively but also more efficiently, since their more accurate identification of needles is achieved despite a significantly lower rate of rejection. In short, parallel panels reject fewer cases than serial panels, but the cases they do reject are more likely to be found interesting or meritorious by the argument panels than are the cases rejected by serial panels.

Figure 9. Disposition profiles of cases rejected by parallel versus serial screening panels

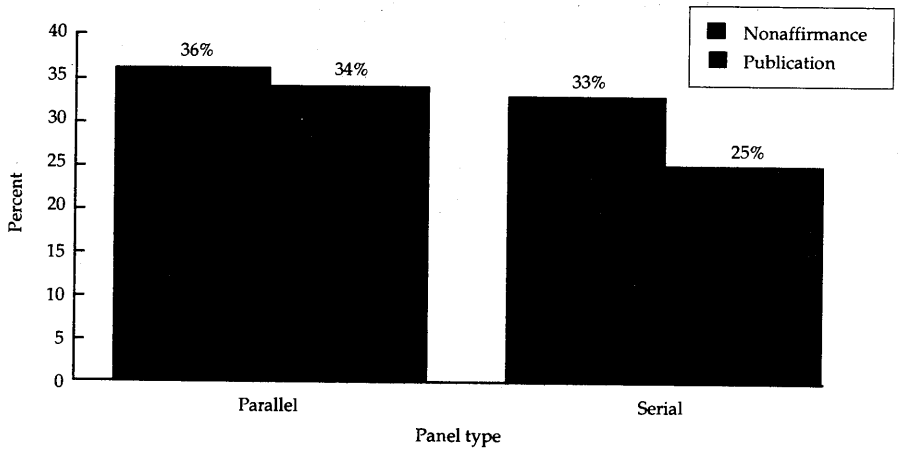
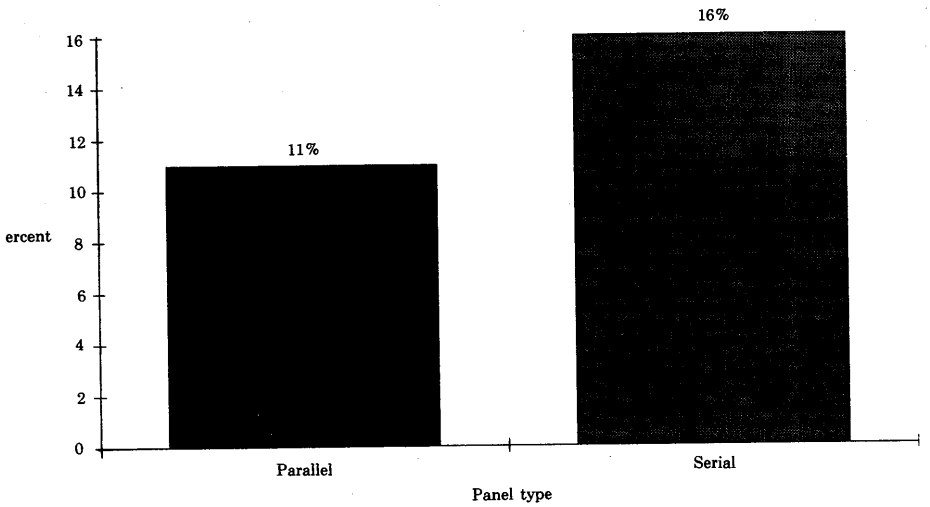


Figure 10. Relative rejection rates of parallel versus screening panels



V. New Directions for Screening in the Nineties

A. *Recommendations Based on the Study Period Research*

The disposition profiles of screened cases that were rejected by screening panels indicate that during the study period the Ninth Circuit's rejection process worked well at finding genuine needles in the screening haystack. The rates of non-affirmance and publication in rejected cases were very close to the rates for all cases decided by argument panels. From these data, I have concluded that there was a modest degree of underscreening, overall, after the screening docket had been pared down by the rejection process. The rejected cases reached non-controversial outcomes slightly more frequently than mainstream cases, indicating that screening panel judges were erring in favor of rejection, and hence in favor of underscreening, when they found and rejected an arguably troublesome case that had been assigned to the screening docket.

Contemporary research by another scholar indicates that cases screened to decision would be perceived as more significant (i.e., more worthy of publication) but would not be decided differently, if screening were disestablished and these cases were returned to the mainstream of the court's docket for decision

after calendaring before regular argument panels.[81] Nonetheless, he finds that screening threatens substantial impairment of litigants' perceptions of appellate justice.[82]

These factors suggest that the operation of the Ninth Circuit's screening program during the study period produced satisfactory "output," and that recommendations for improvement should focus on reducing the "cost" of screening in terms of the judicial resources devoted to the administration of the screening process and perceptions of illegitimacy of process engendered by screening in the minds of "consumers"—the litigants in screened cases. Are there innovations or alternative procedures that promise to refine the screening process so that fewer cases need be rejected (and hence reviewed twice by panels of judges), while maintaining the Ninth Circuit's good record at confining screening to truly non-controversial cases and also improving the perceptions of legitimacy of losing litigants whose cases are screened to a decision of affirmance? In an earlier report, Robert Thompson and I offered four recommendations for improving the Ninth Circuit's screening program as a matter of short-term operational detail, and one further recommendation for far-reaching structural improvement.[83]

1. Modification of the staff memorandum

We called for a change in the form of staff attorneys' memoranda to assure that screening panel judges are clearly alerted when a case has been assigned to the screening track because the dispositive issues—such as insufficiency of evidence, abuse of trial court discretion, harmless error, and failure to preserve the error for appeal—call for the essentially standardless exercise of reviewing discretion and historically have rarely engendered reversible error. Such cases leave staff attorneys grasping at straws, but the occasional needle can almost instantly be perceived by a properly alerted judge based on that judge's sense of the "flavor" of the record.[84]

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81. *See* Goldman, *supra* note 26, at 152-54.

82. *See id.* at 161-62.

83. Oakley & Thompson, *supra* note 1, at 129-37.

84. *Id.* at 130-32.

2. Using the adversary system as an aid to screening

We recommended putting the adversarial process to use as a check on the failure of a staff attorney's memorandum to convey crucial information to the screening panel judges. Federal Rule of Appellate Procedure 34 requires that counsel be notified of the court's decision to dispose of the case without oral argument. We called for a copy of the staff attorney memorandum analyzing the issues in a screened case to be distributed to counsel along with the Rule 34 notice, so that any objection by counsel to the screening decision could be responsive to the premises of that decision.[85]

3. Clarifying standards for the appointment of counsel in pro se *cases*

We recommended clarification of the standards under which a staff attorney should recommend appointment of counsel in a *pro se* case. Rule 34's standards for determining that a case has been adequately briefed and that "the decisional process would not be significantly aided by oral argument" do not facially consider the deep discount in the probable value of oral argument when a litigant is uncounseled—and often incarcerated as well. We called for the Ninth Circuit's standards for appointment of counsel in *pro se* appeals to be harmonized with Rule 34 so that oral argument is not dispensed with in a case in which oral argument would sharpen the issues for judicial decision, simply because a litigant is uncounseled.[86]

4. Addressing litigants' perceptions of the legitimacy of screening

We advocated more extensive public disclosure of the screening process and the great care taken by the Ninth Circuit to preserve the values of appeal in the absence of oral argument. We called for greater publicity of the goals, methods, and results of screening as the best antidote for the perceptions of lawyers and litigants that justice has been cheapened by the screening process.[87]

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85. *Id.* at 133-34.
86. *Id.* at 134.
87. *Id.* at 134-35.

5. Administration of the screening program by appellate magistrates

Our proposal of a structural reform to deal with the even larger caseloads likely in the future was elevation of the present top tier of supervising staff attorneys to the parajudicial rank of appellate magistrate or commissioner. We recommended that appellate magistrates exercise an expanded screening function, and that oral argument be permitted as of right to the appellate magistrate assigned to decide in the first instance whether to grant relief in a screened appeal. Review of the decision of the appellate magistrate by Article III appellate judges would be discretionary with the following exception. To preserve the dignity and (possibly) the constitutional authority of Article III trial court judges vis-à-vis appellate magistrates, we called for a magistrate's recommendation of reversal of the judgment below to have the effect only of "rejecting" the case from the screening program, so that it would be redocketed for oral argument and *de novo* decision by a conventional panel of Article III appellate judges, *i.e.*, circuit judges and district judges sitting by designation.[88]

B. Innovations in Screening: Face-to-Face Conferencing and Oral Staff Presentations

Two innovations in screening procedure, developed by other circuits contemporaneously with the study period, have since been adapted to and incorporated into the screening program of the Ninth Circuit. They represent modifications in the operational practice but not in the basic philosophy of screening at the Ninth Circuit. "Face-to-face conferencing" by screening panel judges brings together at one time and place the three judges assigned to rule on a particular set of screened cases. "Oral staff presentations" to screening panel judges supplement or supersede written analyses of screened cases by staff memoranda with oral discourse between staff attorneys and screening panel judges.

1. Developments in other circuits

Beginning in the late 1970s the Seventh Circuit began to experiment with oral staff presentations to individual screening

88. *Id.* at 135-37.

panel members.[89] The Seventh Circuit had adopted a screening program modeled on that of the Fifth Circuit, with screened cases reviewed by staff and then submitted for decision by special screening panels that considered the cases serially, by "round robin" distribution to one judge at a time. Staff attorneys seeking feedback on their analyses and recommendations had a special interest in consulting with the screening panel judge designated as the lead judge in a particular case, but since all Seventh Circuit judges then maintained chambers in a single location shared with the offices of the staff attorneys, a staff attorney could easily "walk" a screened case around the building by visiting in turn the chambers of each judge on a particular screening panel.

In the early 1980s the Seventh Circuit's innovation of live contact between staff attorneys and screening panel judges was experimentally adapted to the conditions of the Tenth Circuit. The Tenth Circuit's staff attorneys were dissatisfied at the lack of feedback they were receiving from the screening panel judges to whom they were submitting memoranda and proposed dispositions in screened cases. The geographical dispersion of the Tenth Circuit's judges prevented direct emulation of the Seventh Circuit's practice of informal consultation between screening panel judges and staff attorneys and seriatim presentation of a particular case to each judge on a serially organized screening panel. General liaison conferences between staff attorneys and circuit judges who happened to be assembled for oral argument at the court's headquarters in Denver proved to be ineffective, since the judges' attention at such times was focused on the oral argument calendar, not on the strong and weak points of staff analyses in specific screened cases.

Three judges assigned to a particular oral argument calendar in Denver agreed to serve also as a special panel for a set of screened cases that would be presented to them by staff attorneys meeting with all three judges at once. This "conference calendar" proved an immediate success, and with the exception of one serial screening panel assembled to accommodate a single

89. My outline of the origins of oral staff presentations at the Seventh Circuit is based in part on the background discussion of the Seventh Circuit's screening program in the Federal Judicial Center's detailed study of the origins and operation of the Tenth Circuit's screening program. *See* D. STIENSTRA & J. CECIL, *supra* note 12, at 6, 31. My account has also been informed by telephone interviews with Collins T. Fitzpatrick, Circuit Executive of the Seventh Circuit (Jan. 8 and Feb. 14, 1991).

senior judge who prefers the old system of serial in-chambers review of screened cases, by 1989 all screened cases at the Tenth Circuit were submitted for decision on the conference calendar.[90] Every two months, a Tenth Circuit screening panel assembles specially in Denver to decide roughly sixty conference calendar cases presented to it orally by the responsible staff attorneys.[91]

The Tenth Circuit's institutionalization on a grand scale of face-to-face conferencing and oral staff presentations paralleled developments at three other circuits. The Seventh Circuit has traditionally made very limited use of screening.[92] The Seventh

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90. At the end of 1989, the Tenth Circuit further modified its procedures so that some screened cases are now decided by screening panels without any staff review at all. This modification accompanied a change in the court's assignment of responsibility for the initial screening decision. Most of the court's screening docket had been composed of two classes of presumptively screened cases: *pro se* cases and counseled cases in which both sides had waived oral argument. A few briefed cases were also screened without waivers by counsel, and this decision had previously been the responsibility of a single active judge resident in Denver, who generally acted upon the recommendation of the court's "appeals expediters." These are two attorneys employed by the clerk's office to review each new case twice, first when docketed and then again when fully briefed. As a result of the success of the conference calendar system for deciding screened cases, the court has been enlarging its screening docket by diverting to the conference calendar an increasing number of non-waiver counseled cases. The court has accordingly shifted the initial screening responsibility to a special screening panel that remains in Denver for an extra day after oral argument, reviews all new fully briefed cases, and assigns each case to one of four tracks: the conventional oral argument calendar, the "short argument" calendar (where oral argument is kept very brief), the conference calendar, or an immediate decision track (composed primarily, but not exclusively, of *pro se* cases) in which the screening panel decides the case forthwith. The advent of this immediate decision track, by relieving the staff attorneys from consideration of most *pro se* cases, has facilitated the shift to the screening docket of a greater number of counseled cases, which now form the great bulk of the conference calendar. *See* D. STIENSTRA & J. CECIL, *supra* note 12, at 11-12, 33-35, 45 & nn.41-42.

91. When the face-to-face conference is underway, some presiding judges ask the responsible staff attorney to initiate discussion of a particular case by giving the screening panel a brief introductory statement of its facts, issues, and staff-recommended disposition. Other presiding judges perform this role themselves. Thereafter, staff attorneys rarely volunteer contributions to the discussion among the panel judges but are frequently asked for their reactions to points raised in the course of the conference. *Id.* at 27. The oral presentations by Tenth Circuit staff attorneys are supplementary to their written memoranda and proposed dispositions, which have been sent to the screening panel judges in advance of the conference calendar session. Each of the three conference calendar judges is assigned as lead or "mentor" judge for one-third of the conference calendar cases. The written staff product is prepared in consultation with the mentor judge responsible for each staff-processed case. *Id.* at 21-23.

92. During the study period, the Seventh Circuit ranked second only to the Second Circuit in fewest numbers of cases decided without oral argument. *See supra*, Figure 1, page 881. The court retains a strong presumption in favor of oral argument. The latest data show that the Second Circuit decides 19.8% of its cases without oral argument, followed by the Seventh Circuit (30.4%), the First Circuit (32.4%), and the Ninth Cir-

Circuit does have a formal screening program, however, with staff attorneys assigned to review cases screened by the Circuit Executive and to prepare for the screening panel a proposed disposition incorporating reasons for the decision.[93] The oral presentation of the staff attorneys now occurs collectively when the entire screening panel assembles for "collegial decisionmaking" according to processes quite similar to the Tenth Circuit's "conference calendar."

The combination of face-to-face conferencing by screening panel judges with oral staff presentations is also a feature of current practice at the District of Columbia Circuit and the Fourth Circuit. Staff-screened cases at the District of Columbia Circuit are routed to a special screening panel, called the "Special Panel," that also passes upon dispositive motions. Each screened case, called a "Rule 13(i) case" by local practice, is submitted to the Special Panel accompanied by a staff-prepared draft judgment and bench memorandum. The staff attorneys attend the fortnightly conferences of the Special Panel and respond to questioning from the Special Panel judges. In the District of Columbia Circuit, as in the Tenth Circuit, the staff oral presentation supplements rather than supersedes a comprehensive bench memorandum.[94] In the Fourth Circuit, the standard mode of processing a screened case conforms to the Fifth Circuit model of screening, with staff-processed cases submitted for "round robin" consideration by special three-judge screening panels.[95]

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cuit (39.2%). 1989 Dir. Admin. Off. U.S. Cts. Ann. Rep. 107 Table S-3.

93. Seventh Circuit practice is to limit the staff attorneys' written product to this proposed disposition. No separate bench memorandum is prepared, as in the Tenth Circuit. Thus the oral presentation by staff attorneys supersedes rather than supplements the presentation of background information that might conventionally be included in a bench memorandum. Interviews with Collins T. Fitzpatrick, *supra* note 89; *see also* D. STIENSTRA & J. CECIL, *supra* note 12, at 2 n.4.

94. The convention at the District of Columbia circuit is for the junior judge of the Special Panel to lead off the discussion of each case. The oral presentations of staff attorneys occur in response to questioning from the judges. My description of face-to-face conferencing and oral staff presentations at the District of Columbia Circuit is based primarily on an interview with Chief Staff Counsel Mark Langer, in Washington, D.C. (May 15, 1989). *See also* D.C. CIRCUIT R., *supra* note 22, at 36-37.

95. Of the roughly 3000 cases filed each year in the Fourth Circuit, about one-half are *pro se* cases. It is presumed that *pro se* cases will be disposed of without oral argument, and as such they are routed to the office of staff attorneys for case preparation. Argument is never allowed in a *pro se* case without appointment of counsel, which occurs perhaps 25 times a year. The remainder are screened to decision. Screening has a more modest impact on the decision of counseled cases, as to which there is a presumption in favor of oral argument. All fully briefed, counseled cases are screened by the Senior Staff Attorney, who assigns about 15% to 20% to the screening docket. All screening docket

There is an alternative "oral submission" mode, however, that accounts for a substantial proportion of the court's screening docket dispositions. When the staff attorney working on a screened case finds it suitable for accelerated disposition, a very brief proposed opinion is prepared, but the conventionally more detailed background memorandum is omitted. Instead, the case is orally presented by the staff attorney to a specially convened screening panel, which meets once a month from October through June to dispose of 80 to 120 cases per day at each such session—almost all of these *pro se* cases.[96]

2. *The Ninth Circuit's innovations*

Early in 1989, one of the Ninth Circuit's screening panels began experimenting with face-to-face conferencing and oral staff presentations. The experiment proved popular and has led to these innovations becoming standard practice in the Ninth Circuit's screening program.

As of early 1991, approximately 300 fully briefed cases were being inventoried each month at the Ninth Circuit.[97] The inventory process is now being performed by a cohort of four staff attorneys who work in the office of the Clerk of the Court. The current case weight options are "1," "3," "5," "7," and "10." The screening designator is the case-weight of "1," but not all 1-weight cases are decided on the screening docket. Given the number of staff attorneys available to work on the screening docket,[98] only about 60 to 70 out of the monthly inflow of 100 or

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cases are reviewed by staff, and except for the oral presentation cases, *see infra* text accompanying note 96, a proposed disposition and bench memorandum is prepared by staff to accompany the case when it is submitted for disposition by the screening panel. The screening panels are randomly generated by computer. In an interesting combination of serial and parallel procedure, all three panel judges receive the staff attorney's work product simultaneously, by electronic mail, but the rest of the case material is sent only to the randomly-designated lead judge. Although the rejection rate by the screening panel judges is probably less than eight percent overall, when the *pro se* cases are excluded the rejection rate of counseled cases may be as high as twice the net figure, in roughly the 15% range. (No exact figures are available; these are estimates.)

96. My information on the Fourth Circuit screening program was obtained in a telephone interview with Arlen Coyle, Senior Staff Attorney of the Fourth Circuit (Jan. 9, 1991).

97. My most recent information on the Ninth Circuit's screening program was obtained in telephone interviews with Cathy Catterson, Clerk of Ninth Circuit (Feb. 11, 19, and 25, 1991).

98. Since 1979 the general policy of Congress has been to fund one staff attorney position per active circuit judge. The Ninth Circuit already had 30 staff attorney positions when this policy was adopted, and, while this number has been maintained, the size

so 1-weight cases can be assigned to the screening docket for staff processing and screening panel decision.[99]

The overflow of 1-weight cases cannot be allowed to accumulate. Many are criminal appeals or are among the other categories of cases entitled to priority of decision under various statutes and Ninth Circuit Rule 34-3.[100] The court has accordingly raised the daily total of case-weights assigned to oral argument panels from eighteen to twenty-one,[101] and has taken advantage of the extra room on oral argument calendars by adding 1-

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of the staff has been steadily diluted in proportion to caseload and number of active judges, which now stands at 28. The borrowing of an unused law clerk position and various other administrative adjustments has allowed the court as of 1991 to fill a total of 35 staff attorney positions. Of these, two are the Director and Assistant Director of the Office of Staff Attorneys, 13 are assigned to deal with civil and criminal motions, three are assigned as "conference attorneys" to explore with litigants the possibility of settlement or other alternatives to appeal, four are assigned as "case management attorneys" to work within the Clerk's office on the inventorying and case-weighting functions, and the remaining 13 are organized into a research unit staff composed of three divisions, each with a division chief and three or four additional staff attorneys, and each specializing in cases raising particular issues. The principal sources of my information on the organization of the Ninth Circuit's central staff are an interview with Leon Bloomfield, Assistant Director of the Office of Staff Attorneys, in San Francisco (Feb. 4, 1988), as updated by more recent information obtained in a telephone interview with Cathy Catterson, Clerk of the Court (Feb. 25, 1991), and a telephone interview with Janice Bergmann, Acting Director of the Office of Staff Attorneys (Feb. 25, 1991). *See also* CECIL & STIENSTRA II, *supra* note 3, at 71-72.

99. The number of screening docket cases handled in this way is purely a function of the size of the central staff. The court would prefer to assign 1-weight cases to the screening docket. The shift of the initial inventorying and case-weighting function to the four staff attorneys within the Clerk's office has allowed the central research unit staff to concentrate on the processing of screened cases, but each of these 15 staff attorneys can process only four or five cases a month, on average throughout the year. If Congress acts on a pending recommendation by the Administrative Office of the United States Courts to increase the number of staff attorney positions beyond the current 1-per-active-judge ratio, the Ninth Circuit would gain eight or ten new positions and would be able to have the central staff process all 1-weight cases for submission to the screening panels. Court staff currently expect these new positions to be authorized for the fiscal year beginning October 1, 1991, and to be filled by (approximately) January 1, 1992.

100. The number of counseled 1-weight cases has increased dramatically since the effectiveness of the federal sentencing guidelines authorized by the Sentencing Reform Act of 1984. The Act permits appeal of sentences that are not in conformity with the guidelines. 18 U.S.C. §§ 3742(a)-(b) (Supp. IV 1982). *See* Mistretta v. United States, 488 U.S. 361, 368 (1989). This has given rise to the new phenomenon of many counseled appeals taken after entry of guilty pleas. As the construction of the sentencing guidelines has become increasingly settled, the percentage of such appeals suitable for assignment to the screening docket has steadily increased.

101. On February 13, 1991, the court experimentally raised the daily case-weight total for its April, 1991, calendars from 21 to 26. This action was taken to allow additional civil appeals to be considered. The priority of criminal appeals was causing severe delays in assignment of civil cases to the oral argument panels.

weight cases to these calendars. The 1-weight cases sent to the oral argument panels are not necessarily orally argued. Most are "informally screened" by the argument panels themselves for decision without oral argument.[102] Because the oral argument panels assemble anyway to hear their oral argument calendar, the non-argued cases are decided after face-to-face conferencing, but without any central staff processing.[103]

Most of the sixty to seventy cases submitted monthly to special screening panels after central staff processing are now decided after both face-to-face conferencing and oral staff presentations. Two oral screening panels meet each month in San Francisco, the location of the Office of Staff Attorneys, and each disposes of between twenty and thirty cases in one day of face-to-face conferencing aided by oral staff presentations. In Fourth Circuit fashion, staff attorneys do not prepare explanatory memoranda in these cases. Instead, they orally present the key facts and issues to the special screening panels and respond to questions by the panel judges.

About ten to fifteen cases a month remain as the balance of

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102. *See supra* text accompanying notes 11-12.

103. This mode of screening resembles, but is distinct from, both the Sixth Circuit model and the Third Circuit model of screening. *See supra* text accompanying notes 20-25. The Sixth Circuit makes no use of special screening panels, but otherwise processes screened cases conventionally. When the Sixth Circuit submits a screened case for decision by a regular argument panel at the face-to-face conference held in the aftermath of a panel's daily calendar of orally argued cases, the screened case is accompanied by a staff attorney memorandum and proposed decision. *See* CECIL & STIENSTRA II, *supra* note 3, at 92, 96. The Third Circuit makes no use of either special screening panels or staff processing of screened cases. The entire case flow is indiscriminately forwarded to the court's regular argument panels, which, without any staff assistance, select cases for disposition without oral argument. Some argument panels proceed to decide these screened cases without any face-to-face conferencing, relying instead on telephonic conferencing and the circulation of drafts by mail. *See id.* at 125-26. The Third Circuit decides a high proportion of screened cases by judgment order that gives no account of the reasoning for the court's decision. *See supra* note 12.

The Ninth Circuit's direction of 1-weight cases to oral argument panels most closely resembles the current practice of the Federal Circuit, *supra* note 21, in that the case is flagged for the argument panel as a potential "screener" by the 1-weight designation but receives no further staff processing or analysis before being referred to an argument panel. Although no data is available on the rate of publication of decisions in recent "informally screened" cases decided without oral argument by regular Ninth Circuit argument panels, another investigator analyzing the Ninth Circuit's docketing database has found that during the study period (January 1, 1982 through June 15, 1988) approximately 20% of screening-weight cases routed to regular argument panels resulted in published opinions. *See* Goldman, *supra* note 26, at 153, Table 5.3. Thus, the Ninth Circuit historically has not followed the Federal Circuit's convention of never publishing cases decided by regular argument panels without oral argument.

the sixty to seventy processed by the central staff and the fifty or sixty disposed of in the two conferences of the oral screening panels. These remaining screened cases are sent to two screening panels that continue to operate in the manner of the study period screening panels. These holdover screening panels are composed primarily of senior judges who find it too burdensome to travel to San Francisco to sit on the oral screening panels. Cases submitted to the holdover screening panels are accompanied by conventional staff material—written memoranda as well as proposed dispositions. There is an effort to route to these panels cases with fairly simple issues but detailed facts and complicated records. This is the profile of cases found least suitable for efficient presentation to the oral screening panels.

C. *Appraisal of the Ninth Circuit's Innovations and Recommendations of Further Enhancements*

A number of the points previously made in evaluating the study period data are implicated by the Ninth Circuit's new procedures.

1. *Advantages of parallel screening panel deliberation*

The study period research has shown that parallel rather than serial deliberation by screening panels is the preferred method in terms both of efficiency (lower rejection rate) and accuracy (higher percentage of genuine "needles" among cases rejected by parallel panels than among cases rejected by serial panels).[104] Since face-to-face conferencing is an inherently "parallel" rather than "serial" form of deliberation, it can be expected to secure the advantages found to accrue to the parallel method of conventional screening panel operation.[105]

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104. *See supra* text accompanying notes 80-81; *see also* Goldman, *supra* note 26, at 157. Goldman declares that his evidence "offers support (but only weak support) for the group decision-making theorists. Parallel panels seem to provide more opportunities for contact and interaction than serial panels. This contact may generate more lively exchanges or provoke more thought and involvement." *Id.*

105. Although hard data are not yet available, it is the perception of court staff that the advent of face-to-face conferencing and oral staff presentations has lowered the rate at which judges of the special screening panels vote to reject screened cases from the screening docket. Although Federal Rule of Appellate Procedure 34(a) continues to make it the prerogative of any one among the three oral screening panel judges to insist that a screened case be redocketed for oral argument before a regular argument panel, it appears that in present conditions rejection of a case is made less attractive to a skeptical judge by the opportunity to air his or her concerns in front of screening panel colleagues.

2. Advantages of modified means for staff attorneys to communicate with screening panels

In the first of five recommendations inspired by the Study Group data, I proposed that staff attorney memoranda more clearly draw the attention of screening panels to the presence of discretion-sensitive issues that are usually routine but may prove problematic in ways especially hard to capture in writing by reference to some quoted part of the documentary record.[106] The advent of oral staff presentations is responsive to this concern, since an informal mode of presentation is better suited to invite judges to exercise their "know-it-when-I-see-it" sense of whether the record reveals an abuse of discretion or some other fuzzy form of potential trial court error. Oral presentations can alert judges to this kind of problem case more efficiently and concisely than can written memoranda, because the suggestion of error can be left dangling if the judges indicate no interest without consuming paper, wasting the staff attorneys' time, and trying the judges' patience.[107]

3. Dangers of further encroachment on the adversary system: A recommendation for creating a short-argument calendar

The second and third of my previous recommendations dealt with improving the role of the adversary system as a constructive component of the adjudication of screened cases. I have proposed that counsel should be allowed to review the staff attorney memorandum upon which a court relies in deciding a case without oral argument[108] and that staff attorneys should be given clearer guidance on when a *pro se* case that *cannot* be ar-

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On the one hand, the colleagues may convince the doubter that the concerns are unjustified. On the other hand, if the concerns are shared by at least one screening panel colleague, an immediate majority may exist to decide the case forthwith in a way acceptable to a judge who would otherwise have delayed and lost control of the decision by rejecting the case from the screening docket.

106. *See supra* text accompanying note 84.

107. What is required is a nod in the direction of the problematic area of the record, together with the oral equivalent of a raised eyebrow or a shrugged shoulder. A hypothetical example follows. Question to staff attorney by a screening panel judge: "Is there any reason why we should not summarily affirm on the basis of *United States v. Badfella*?" Answer: "It is possible that the court might be concerned by. . . ." As the staff attorney proceeds to identify a possible instance of fuzzy error, the screening panel can quickly cut off this area of inquiry or expand its scope to invite a full briefing of the panel on the elements of the record supporting the claim of error.

108. *See supra* text accompanying note 85.

gued for lack of counsel is one that *should not* be argued because appointment of counsel is unwarranted.[109] Underlying both recommendations is the conviction that the adversary system is the best method yet devised by the legal mind to make sure that decisionmakers act upon accurate information.[110]

There is little in screening's innovations for the nineties to encourage proponents of the adversary system. The trend seems entirely away from reliance on counsel as an aid to decision. Courts appear intent to substitute collegial discourse with deferential staff attorneys for the more raucous discourse of adversarially minded attorneys beholden to the litigants. But, although the threat to the adversary system is real, the appearance of an outright substitution of staff counsel for adversary counsel is misleading.

Screening programs are, by definition, dedicated to reducing the incidence of oral argument. As such they are necessarily antagonistic to the adversary system. But the antagonism need not be plenary—there is room for common ground in pursuit of common values. Oral staff presentations and face-to-face conferencing are innovations that when used conjunctively make screening programs work as well as possible given the conditions that make screening imperative. As such screening programs can help preserve part of the court's docket for adversary argument and can seek to minimize the compromise to the values of appeal within that part of the docket from which adversary argument is excluded.

This point is most clearly made in the context of *pro se* cases, especially those involving incarcerated petitioners or appellants. Absent a formal screening program, judges and their personal staffs of "elbow" clerks and externs[111] would themselves have to sift through the scant or scarcely comprehensible supporting materials in a *pro se* case in search of potential merit. In the modern world of intermediate appellate justice, there would be no time to sift thoroughly. Gideon's trumpet would not likely be heard.[112] It would be drowned out amid the clamor of the dim, the demented, and the damned.

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109. *See supra* text accompanying note 86.

110. *See* Thompson & Oakley, *supra* note 27, at 36-38.

111. *See* J. OAKLEY & R. THOMPSON, *supra* note 3, at 18-22, 27-29.

112. *See* Gideon v. Wainwright, 372 U.S. 335, 337-38 & n.1 (1963) (Gideon was proceeding *pro se* and *in forma pauperis*). *See generally* A. LEWIS, *supra* note 54, at 32-48 (recounting process by which, in the far different conditions of a court of discretionary

The development of staff attorney programs to look more closely at screening-level cases has brought to many *pro se* litigants the closest approximation of counsel their cases will ever receive. To the extent that staff time to cull through *pro se* case materials is increased by allowing staff attorneys to report orally on the generally hopeless prospects of such cases, the innovation of oral staff presentations at a face-to-face conference of screening panel judges does not conflict with the adversary system and may well serve a similar role in achieving the values of appeal.[113]

More troubling is the Ninth Circuit's use of oral presentations in a substantial number of counseled cases (unlike the Fourth Circuit[114]) and its use in these cases of oral presentations as a substitute for, rather than a supplement to, written staff memoranda[115] (unlike the Tenth Circuit[116] and the District of Columbia Circuit[117]). Although the Ninth Circuit intends, when additional staff attorneys are available, to discontinue assign-

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jurisdiction, Clarence Earl Gideon's *pro se* petition for certiorari was granted and counsel appointed).

113. The director of the Fourth Circuit's central staff observed that within the Fourth Circuit's jurisdiction is a large population of prisoners. In his view, the court has a conscious policy of sensitivity to the plight of the confined, and he characterized his staff's probing for merit in the *pro se* docket as comparable to a legal services program. Interview with Arlen Coyle, *supra* note 96.

114. As previously discussed, *pro se* cases make up the great bulk of the Fourth Circuit's "oral submission" program. *See supra* text accompanying notes 95-96.

115. The use of oral staff presentations in lieu of written staff memoranda is also the practice of the Seventh Circuit, but the Seventh Circuit remedies this in part by requiring that a staff attorney's draft disposition include a statement of the reasons for the proposed decision. *See supra* text accompanying note 93. Overall, the Seventh Circuit makes even more cautious use of screening than the Ninth Circuit. The most recent figures show that the Seventh Circuit decides roughly 30% of its cases without oral argument. The comparative figures for the Ninth Circuit are roughly 40% and for the Second Circuit roughly 20%. *See supra* note 92. Since the Second Circuit has no formal screening program, the 20% figure represents a baseline of cases that must be disposed of without oral argument for lack of counsel, absent a total ban on waiver of counsel and appointment of counsel in every *pro se* case. *See supra* text accompanying notes 9-10 (describing the Second Circuit's "null" model of screening). Thus, the 40% rate of formal and informal screening in the Ninth Circuit signifies that the Ninth Circuit decides, without oral argument, roughly 20% of its caseload beyond the bare minimum that must, for lack of any feasible alternative, be decided without oral argument. The comparable figure in the Seventh Circuit, *i.e.*, percentage of caseload screened beyond the bare minimum, is only 10%. The stronger preference for oral argument at the Seventh Circuit vis-à-vis the Ninth Circuit makes it likely that the flow of cases to the Seventh Circuit's screening panels contains fewer "needles" than is true at the Ninth Circuit. Thus, the Seventh Circuit practice of substituting oral staff presentations for conventional written memoranda affects primarily *pro se* cases, rather than counseled cases.

116. *See supra* note 91.

117. *See supra* text accompanying note 94.

ment of screened cases to oral argument panels for decision without any central staff processing,[118] this anticipated change in procedure would not affect the manner in which the staff review and analysis of a screened case is presented to the screening panel.

The principal attraction of oral staff presentations to the Ninth Circuit appears to be their time-saving quality, as viewed by staff and judges alike. This poses the risk, especially as additional staff are added, that the Ninth Circuit might travel the path of the Tenth Circuit. That circuit began using oral presentations in order to improve the quality of its decisionmaking in screened cases that were primarily *pro se* cases and waiver-of-argument cases. Ironically, the success of the Tenth Circuit in upgrading its screening program through oral presentations became the rationale for increasing the number of cases screened.[119] The satisfaction of the court with oral staff presentations to a face-to-face conference of screening panel judges ended up increasing the number of screened cases in which willing and able counsel were told, quite simply, that the court did not wish to take the time to hear them. A repeat of this progression from *improving* screening to *expanding* screening would certainly bring the Ninth Circuit's innovations for the nineties into conflict with the adversary system, and I hope that such a regrettable development can be avoided.

It should be noted that both the Tenth Circuit and the District of Columbia Circuit not only have introduced innovative and expansive screening programs but also have introduced innovations in the way in which oral argument is conducted. Both circuits provide for oral argument to be heard under strict time limitations and issue constraints.[120] This gives the screening authority an additional option intermediate between disposition on the screening docket without any oral argument and disposition on the regular docket after full-blown oral argument. The creation of a new category of cases with truncated oral argument is already authorized by the Federal Rules of Appellate Proce-

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118. *See supra* note 99.

119. *See supra* note 90.

120. *See supra* text accompanying note 24 (District of Columbia Circuit's procedure whereby a "screening" judge on the oral argument panel reviews the oral argument calendar and sets the time to be allowed for oral argument); note 90 (Tenth Circuit's "short-argument" calendar).

dure[121] but should be systematically implemented. I recommend that the Ninth Circuit create a "short-argument" docket to which low-weight counseled cases could be referred by screening panels or supervisory staff attorneys as an alternative to the present options of assignment either to the screening track or to the conventional oral argument track.

4. Bringing screening out of the closet: A recommendation for creating circuit court commissioners

The final two recommendations I advanced on the basis of my study period research were for greater publicity of the screening process,[122] and for elevation of senior staff responsible for the screening program to the status of appellate magistrates or commissioners.[123] Reflection on the recent innovations in screening and consideration of the 1990 report of the Federal Courts Study Committee lead me to address both concerns in a single revised proposal. Congress should enact a system of circuit court commissioners responsible for (1) deciding motions incident to appeal and (2) screening cases suitable for disposition without oral argument.

The creation of appellate magistrates in accordance with my previous recommendation would formally add an additional tier of decisionmaking to the appellate process. The benefit of that additional tier would be to allow oral argument as of right in every counseled case, albeit argument before an appellate commissioner rather than an Article III circuit or other designated judge. But the new tier would complicate the process and might appear to diminish the authority or at least the prestige of Article III judges. Any real or apparent impact on the way in which Article III judges perform or conceive of their duties has constitutional implications and is good reason for caution.

For like reasons the Federal Courts Study Committee advocated restraint in expanding the duties of magistrates. In the context of trial court magistrates, at least, the Committee made clear that creation of an additional tier of judicial authority would be undesirable.

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121. "The clerk shall advise all parties whether oral argument is to be heard, and if so, of the time and place therefor, and *the time to be allowed each side*." FED. R. APP. P. 34(b) (emphasis added).

122. *See supra* text accompanying note 87.

123. *See supra* text accompanying note 88.

> United States magistrates play a vital role in the work of the district courts. Each federal court employs magistrates in different ways, but their efforts help keep the system afloat. Magistrates' duties include initial proceedings in criminal cases, pretrial matters referred by judges, trials of misdemeanors and petty offenses, and the trial of civil cases upon the consent of the parties and the reference of the judge.
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> The committee received many proposals about the role that magistrates should perform. Some magistrates, believing that they are under-utilized, desire more diversity in the work they are assigned by the district court (sometimes little more than Social Security and prisoner cases). To this end, some magistrates propose statutory changes that would bestow more judicial duties on them and, in effect, make them an autonomous class of judicial officers.
>
> The committee encourages the adoption of procedures that will make efficient and appropriate utilization of magistrates as auxiliary officers of the district court. However, as the Administrative Office of the United States Courts stated in a report on this subject, we must also recognize the need to "safeguard against undermining the institutional 'supplementary' role of magistrates [and the] unintentional creation of a lower-tiered judicial office with separate and distinct responsibilities." The district courts clearly need the assistance of the magistrates in order for the judges to focus on those matters that require Article III attention. If the position of magistrate becomes an autonomous judicial office, magistrates will no longer be able to assist the district court judges.[124]

The Committee touched twice on the related issue of the potential role of magistrates or similar parajudicial officers at appellate courts. Although the Committee's treatment of the subject was not extensive, its views are significant.

First, the Committee ringingly approved the Ninth Circuit's pioneering use of Bankruptcy Appellate Panels (BAPs) in which magistrate-level officers—federal bankruptcy judges—are constituted into appellate panels with reviewing authority (concurrent with the district courts) of trial-level decisions by federal bankruptcy judges.[125] Calling for future BAPs to have jurisdiction over all appeals from trial-level bankruptcy judges' decisions, unless the parties expressly opt for review by the relevant

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124. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, PART II, *supra* note 35, at 79.

125. *Id.* at 74.

United States district court,[126] and for limiting further review of BAP judgments by the relevant United States court of appeals to constitutional issues and issues of law,[127] the Committee expressly endorsed the use of magistrate-level personnel to perform appellate duties (albeit duties limited to review of decisions by subordinate magistrate-level personnel).

> The Ninth Circuit BAPs disposed of 902 appeals in 1987 and 664 in 1988, reducing the workload of both district and appellate courts, and have received favorable reviews from both bench and bar. They foster expertise, and increase the morale, of bankruptcy judges, in part by offering them an opportunity for appellate work. (In fact, it may eventually be best to have bankruptcy judges serve on BAPs on a full-time basis.)[128]

Second, in calling for study of further measures that might increase the per-judge productivity of the courts of appeals through "case management innovations," the Committee cited the "Washington Supreme Court's appellate commissioners program" as "one of several innovations worthy of careful analysis."[129]

I have been unable to find the references upon which the Federal Court Study Committee relied for its recommendation of this particular appellate magistrate concept for study.[130] An

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126. *Id.* at 74 (Recommendation 4.B.1.a).

127. *Id.* at 75.

128. *Id.* at 74-75. BAPs are authorized by 28 U.S.C. § 158 (1988). For background information pertinent to the Federal Courts Study Committee's recommendations regarding BAPs, see Carlson, *The Case for Bankruptcy Appellate Panels*, 1990 B.Y.U. L. REV. 545; *see also* Berch, *The Bankruptcy Appellate Panel and Its Implications for Adoption of Specialist Panels in the Courts of Appeals*, in RESTRUCTURING JUSTICE, *supra* note 1, at 165.

129. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, PART II, *supra* note 35 at 115-16 (commentary on Recommendation 6.B.1.b). The other two suggested case-management innovations specified by the Committee as worthy of careful analysis were "[e]xperimentation with two judge panels" and "[t]he Ninth Circuit's program to develop a computerized system of classifying the issues in each case as the cases are briefed." *Id.* at 116. Under my proposal for assigning responsibility for central staff screening of cases to an appellate commissioner modeled on the Washington Supreme Court system, two of the three suggested innovations would be linked. The Ninth Circuit system of case inventorying is part of the screening function, and would, under my proposal, fall within the responsibility of the newly created office of the court's appellate commissioner.

130. Volume 2 of the working papers of the Committee is a mysteriously paginated "Appendix of the Subcommittee on Administration, Management, and Structure." *See* 2 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, PART III, *supra* note 35. In Part III of this Appendix, entitled "Appellate Structure Issues," there is a memorandum by the Subcommittee Chair, Chief Judge Levin H. Campbell, and the Subcommittee Reporter,

outline of the Washington program can be gleaned, however, from Rule 15 of the State of Washington's Supreme Court Administrative Rules (SAR).[131] Moreover, the history and decision-

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Denis J. Hauptly, entitled "A Preliminary View of the Problems that have Led to Proposals for Structural Changes." At pages 10-11 of Part II of the Preliminary Draft of the Memorandum, designated "Rev. 4" and dated June 1, 1989, there is a discussion roughly approximating the language of the Committee's final report calling for innovations in case management which might include appellate magistrates or commissioners, but this discussion makes no reference specifically to the Washington Supreme Court's program. Included among the other separately paginated or unpaginated documents in Part III of the Appendix is an unpaginated memorandum on "Alternative Mechanisms" which on its second page, under the heading "Part A. Motions Practice," declares: "The strongest argument that can be made for appellate magistrates is in motions practice." In Part IV of the Appendix, entitled "Administrative and Management Issues," there is a report dated June 27, 1989, by the Judicial Conference's Committee on the Administration of the Federal Magistrates System. At pages 2 and 13-14 this report disapproves of the establishment of "a new tier of 'appellate magistrates'" charged with "prepar[ing] reports and recommended dispositions in frivolous appeals" and "enter[ing] orders on the consolidation of appeals, the establishment of schedules, and pre-argument conferences." The Magistrates Committee "declined to endorse the concept" of appellate magistrates for three reasons: (1) such changes might "open the possibility that Congress would make undesired changes in the existing magistrates system"; (2) an appellate magistrate as a subordinate judicial officer might be placed in the position of reviewing the work of an Article III district judge; and (3) "[a]s a practical matter, the functions of the 'appellate magistrates' described above are being performed at present by the central legal staffs (staff attorneys) of the circuits and by the conference attorney programs that exist in at least five circuits. To a large extent, therefore, the establishment of appellate magistrates might be duplicative of existing resources."

131. The SAR may be found in WASH. CT. R.: ST. 253. The parallel Court of Appeals Administrative Rules (CAR) are published in the same volume. *Id.* at 265. Each division of the Washington Court of Appeals is authorized by CAR 16(c) to "appoint one or more commissioners of the court" empowered to decide motions, conduct screening, and support the business of the court in other enumerated ways patterned closely on the provisions of SAR 15. *Id.* at 268. The complete text of SAR 15 is as follows:

> RULE 15. COMMISSIONER OF THE SUPREME COURT
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> (A) APPOINTMENT. To promote the effective administration of justice, the Justices of the Supreme Court will appoint a commissioner of the court. The salary of the commissioner will be fixed by the court. The commissioner may be removed at the pleasure of the Supreme Court.
>
> (B) DECIDING MOTIONS. The commissioner will hear and decide those motions authorized by the rules of appellate procedure and any additional motions that may be assigned to the commissioner by the court.
>
> (C) SCREENING FOR THE COURT. The commissioner will screen petitions for review and direct appeals to the Supreme Court and recommend whether Supreme Court review should be granted. Except for motions to modify a ruling of the commissioner, the commissioner will also screen motions which are to be decided by the Justices and recommend to the court an appropriate disposition for each motion. When necessary, screening memoranda will contain an evaluation sufficiently comprehensive to assist each Justice in independently deciding the matter being screened.
>
> (D) ASSISTING CHIEF JUSTICE. The commissioner will assist the Chief Justice in determining whether cases certified by the Court of Appeals to the Supreme

making structure of the Washington Supreme Court has been analyzed in some depth.[132] The use of a commissioner by the Washington Supreme Court dates to December, 1975, when the court exercised its rule-making authority to issue SAR 15.[133] There is a genuine "sharing of duties" by the supreme court and the commissioner,[134] who is essentially the director of the central staff with broad responsibilities for screening appeals and, as delegated by the supreme court, for deciding motions.

Adapting this model for use in the federal courts of appeals would avoid the addition of a new tier of on-the-merits decisionmakers to the federal appellate process. I propose that Con-

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Court should be accepted for review. The commissioner will also assist the Chief Justice with motions to file amicus curiae briefs.

(E) JUDICIAL LAW CLERKS. The commissioner will assist the Justices of the Supreme Court with the selection of judicial law clerks, as desired by each Justice. The commissioner will present an annual orientation for the new law clerks. The commissioner will prepare and periodically revise a manual for use by the judicial law clerks.

(F) IMPROVING ADMINISTRATION OF JUSTICE. The commissioner will make recommendations to the court regarding procedures. The commissioner will serve on court committees when appointed thereto by the Chief Justice.

(G) CENTRAL STAFF. The commissioner will employ and train staff attorneys and other personnel to assist the commissioner in carrying out the duties of the commissioner's office. These employees shall serve at the pleasure of the commissioner. To the extent appropriations permit, the court will authorize the commissioner to employ sufficient staff to assist the court in expeditiously fulfilling its duties to promptly fulfill the duties of the office.

(H) DUTIES TO BENEFIT FULL COURT. All duties performed by the commissioner are for the benefit of the court as a whole. The court may alter or add to the duties of the commissioner. In the performance of these duties the commissioner is responsible to the Chief Justice as executive officer of the court under SAR 8.

(I) QUALIFICATIONS. The commissioner must be a graduate of an accredited law school and a member in good standing of the Washington State Bar Association and, prior to appointment, have at least 5 years of experience in the practice of law or in a judicially related field.

(J) OATH OF OFFICE. Before entering upon the duties of the office, the commissioner will take and file an oath of office in the form prescribed by order of the Supreme Court. The oath will include a requirement that the commissioner adhere to the Code of Judicial Conduct.

(K) PROHIBITION FROM PRACTICE OF LAW. The commissioner is prohibited, during term of office, from acting as an attorney or having a partner who acts as an attorney.

Id. at 256-57.

132. C. SHELDON, A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT (1988); Sheldon, *The Evolution of Law Clerking with the Washington Supreme Court: From "Elbow Clerks" to "Puisne Judges,"* 24 GONZ. L. REV. 45 (1988-89).

133. *See* C. SHELDON, *supra* note 132, at 229.

134. *See* Sheldon, *supra* note 132, at 82.

gress authorize the appointment of circuit court commissioners with parajudicial status and prerogatives comparable to district court magistrates.[135] The duties of these commissioners, following the State of Washington's model, would be twofold: (1) to decide non-merits motions relating to time, manner, and place of appeal, including jurisdictional issues, (2) and to operate the screening program. Exclusive authority for decisions on the merits and final authority to decide whether a case meets Rule 34(a)'s criteria for decision without oral argument[136] should remain exclusively with a circuit court's Article III judges.

So structured, the establishment of a system of circuit court commissioners meets the objection that an additional decisionmaking tier has been added to the federal judiciary. The duties of the commissioner in deciding incidental motions would be to facilitate merits decisions by Article III personnel, not to displace that power of decision. Similarly, the duties of the commissioner to administer the court's screening program would facilitate but not supplant decisionmaking on the merits by Article III judges.

Other arguments advanced against giving formal parajudicial status to the officer performing such duties are unpersuasive.[137] There is no sound reason to abstain from propos-

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135. By the authority of § 321 of Title III of the Judicial Improvements Act of 1990, Act of Dec. 1, 1990, Pub.L. 101-650, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 5089, United States magistrates are now to be known as "magistrate judges." Although Title III of the Judicial Improvements Act of 1990 is independently titled the "Federal Courts Study Committee Implementation Act of 1990," the Committee pointedly did not endorse the titular elevation of magistrates to "magistrate judges," choosing instead to recommend against any drift toward allowing the position of magistrate to "become an autonomous judicial office." REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, PART II, *supra* note 35, at 79 (previously quoted *supra* text accompanying note 124); *see also* 2 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, PART III, *supra* note 35, at 5-6 (analyzing arguments pro and con). Whatever the merits of the informal practice of referring to magistrates in the courtroom as "judge," I share the Federal Court Study Committee's judgment that there was no compelling reason formally to redesignate magistrates as magistrate judges. The fact that bankruptcy referees, claims court commissioners, and administrative hearing examiners had earlier won such redesignation establishes to my mind no more than the slipperiness of the slope upon which Congress has embarked in confusing the distinction between Article III judges, their supporting personnel, and the myriad adjudicatory officials within the administrative apparatus of the modern bureaucratic state. I do not recommend calling circuit court commissioners any variant of "judge."

136. FED. R. APP. P. 34(a).

137. The three arguments against appellate magistrates advanced by the Judicial Conference's Magistrates Committee, in its report to the Federal Courts Study Committee, are summarized *supra* note 130.

ing the creation of appellate commissioners because Congress might in the process re-evaluate the trial court magistrate system.[138] The proposed commissioners would not have any greater powers to pass on the decisions of Article III trial court judges than is currently exercised by central staff attorneys, but unlike this "hidden judiciary,"[139] the proposed circuit court commissioner would occupy an office intended to have public visibility and public responsibility commensurate with its important administrative authority. As a way of giving face to the faceless institution of the central staff, as a way of affirming and legitimating the role of screening in modern appellate administration, as a way of designating publicly the person charged by the court with improving the bar's perceptions of the operation and safeguards of screening, the concept of circuit court commissioners deserves the serious attention that the Federal Courts Study Committee recommended it receive.

D. Conclusion

On balance the Ninth Circuit's recent changes in the operation of its screening program appear to be constructive and sound reactions to unremitting caseload pressure. Continued operation of the Ninth Circuit's screening program according to the procedures employed during the study period, however desireable that might have been in light of my Study Group data, could not be sustained. Further efficiency measures had to be adopted.

Such measures necessarily threaten the adversary system and may increase the risk of leaving needles in the haystack of the screening docket. But the innovations have some countervailing positive attributes. Allowing judges to communicate directly with staff attorneys and to ask questions that focus staff attorney knowledge on those issues of most concern to the court has proven extremely popular with the Ninth Circuit's judges. Allowing staff attorneys to communicate orally with judges has reduced the strain of writing unnecessarily labored memoranda on points that judges may quickly dismiss. The quantitative ad-

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138. The trial court magistrate system received a strong vote of confidence from the Congress when it enacted §§ 308 and 321 of Title III of the Judicial Improvements Act of 1990, Act of Dec. 1, 1990, Pub.L. 101-650, 104 Stat. 5089, redesignating magistrates as "magistrate judges" and increasing their powers to advise parties of their option to consent to trials by magistrates; *see also supra* note 135.

139. *See* D. STEINSTRA & J. CECIL, *supra* note 12, at 6 n.12.

vantages of face-to-face conferencing in terms of cases decided per screening panel have been accompanied by the qualitative benefits of parallel operation of the screening panels.

Despite the beneficial aspects of the innovations in screening that the Ninth Circuit has adopted for the nineties, there is a need for caution before the new screening model is allowed to become the dominant method for deciding cases on appeal. Courts should keep firmly in mind that the assignment of a case to the screening docket consigns that case ever more frankly to an inquisitorial rather than an adversarial process of decision. If this perception properly influences the initial screening decision so that appeals featuring the kinds of claims and litigants best suited to inquisitorial disposition are just the ones diverted to the screening docket, the screening of appeals can make a qualitative contribution to justice on appeal.

Recognizing that modern screening operates in an increasingly inquisitorial rather than adversarial fashion—with the court's internal resources substituting for the conventional role of counsel in assuring that accurate information reaches the judges charged with decision—I have recommended that a short-argument calendar be systematically instituted to allow limited oral argument in marginal, counseled cases that would otherwise be consigned to the screening docket. I have also recommended renewed consideration of the benefits of formal parajudicial supervision of the screening process and related non-dispositive motions. Modifying my own prior recommendation for appellate magistrates to hear and decide screened cases subject to review by Article III judges, I have proposed instead the creation of circuit court commissioners with more modest duties and powers. The visible public commitment to fairness and equity in screening represented by the appointment of such commissioners offers our best hope for maintaining the values of appeal while the crisis of volume continues to compound.