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SCREENING AND SUMMARY PROCEDURES IN THE UNITED STATES COURTS OF APPEALS

CHARLES R. HAWORTH*

"If there are any courts that are surfeited, they are the courts of appeals."¹

The federal intermediate appellate system is on the verge of ceasing to function as an effective administrator of justice. Judges, commentators, and practitioners have sounded the warning for several years of the approaching crisis,² but Congress has done little more than add an occasional judge to courts already too large or add an additional law clerk

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1. *Tidewater Oil Co. v. United States*, 93 S. Ct. 408, 423 (1972) (Douglas, J., dissenting).

2. See *Peters v. Rutledge*, 397 F.2d 731 (5th Cir. 1968); *Bros Inc. v. W.E. Grace Mfg. Co.*, 351 F.2d 208, 209 n.1 (1965), *cert. denied*, 383 U.S. 936 (1966); Burdick, *Federal Courts of Appeals: Radical Surgery or Conservative Care*, 60 KY. L.J. 807 (1971); Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969); Lumbard, *Current Problems of the Federal Courts of Appeals*, 54 CORNELL L. REV. 29 (1968); Shafroth, *Survey of the United States Courts of Appeals*, 42 F.R.D. 243 (1968); Tamm, *Are Courts Going the Way of the Dinosaur?*, 57 A.B.A.J. 228 (1971); Wright, *The Federal Courts—A Century After Appomattox*, 52 A.B.A.J. 742 (1966) [hereinafter

even though he may have to do his own typing. Since most appeals to the courts of appeals are of right,³ the number of cases to be decided could not be readily reduced by the courts. The courts of appeals have therefore taken upon themselves the task of devising methods to speed the flow of cases. These methods, commonly termed screening and summary procedures, involve eliminating or limiting oral argument in selected cases and deciding cases without publishing a written opinion if the court concludes that an opinion would be without precedential value. Although the use of these new procedures in all circuits is considered, emphasis will be on the Fifth Circuit, which has extensively used screening and summary procedures. That circuit instituted its screening procedures in late 1968 and has kept detailed records that facilitate analysis of its experience. The purpose of this article is to show the need for and extensive use of these procedures and to explore several serious issues raised by their use. Those issues include possible limitations, both statutory and constitutional, on the right of the courts of appeals to eliminate oral argument by local rule, and a suggestion, based on the Fifth Circuit's experience, that the elimination of oral argument and written opinions may produce an undesirable side effect on the outcome of cases decided in the courts of appeals.

I. THE NEED FOR SCREENING AND SUMMARY PROCEDURES

It is a tale told more than twice that more cases are being appealed to the courts of appeals than can be handled quickly and efficiently. During 1971,⁴ a total of 12,788 cases were commenced in the courts of appeals.⁵ Although 12,368 cases were terminated, the backlog increased to a total of 9,232 cases,⁶ which represents nearly a full year's work even if no new cases were filed. The dramatic nature of 12,788 filings is especially apparent when compared to the filings in the 1960's. In

cited as Wright, *A Century After Appomattox*]; Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEXAS L. REV. 949 (1964) [hereinafter cited as Wright, *The Overloaded Fifth Circuit*].

3. Cf. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 104 (2d ed. 1970).

4. All references to years are to fiscal years unless otherwise indicated.

5. 1971 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 241, Table B1 [hereinafter cited as ANNUAL REPORT for the respective years]. This figure represents a 9.7 percent increase in filings over 1970. 1971 ANNUAL REPORT 99.

6. 1971 ANNUAL REPORT 99. This increase was the lowest percentage increase in backlog since 1961.

1962, only 4,823 cases were filed in the courts of appeals and the backlog was 3,031 cases.⁷ In only nine years, the number of filings has increased 165.1 percent and the backlog has increased 204.2 percent. During the same nine years, the number of authorized judgeships increased only 24.4 percent, from seventy-eight to ninety-seven.⁸ The 1960's was truly a time of "exploding dockets."⁹

More significantly for the circuit judges and for litigants whose cases are reviewed in the courts of appeals, the circuit judges each disposed of an average of 128 cases during 1971,¹⁰ compared to fifty-four in 1962.¹¹ Whether one judge can carefully consider and dispose of that number of cases in a year has been seriously questioned.¹² Clearly the screening and summary procedures considered in the remainder of this article have helped each individual judge's productivity and kept the backlog from being larger than it is,¹³ but the concern regarding the effectiveness of the review increases with production.

Almost as startling as the past is the future, which holds no promise of relief. One forecast¹⁴ now estimates that in 1981, only eight years

7. 1971 ANNUAL REPORT 99, Table 2.

8. At the same time, population in the United States was growing at the rate of only about 1.6 percent per annum. 1970 NEW YORK TIMES ENCYCLOPEDIA ALMANAC 205 (1969). The indications are that litigation increases almost exponentially to population, not in the same proportion. Cf. Carrington, *supra* note 2, at 543.

9. Brown, *Federal Special Verdicts: The Doubt Eliminator*, in *Proceedings of the Annual Judicial Conference Tenth Judicial Circuit of the United States*, 44 F.R.D. 245, 338 (1968).

10. 1971 ANNUAL REPORT 107.

11. 1971 ANNUAL REPORT 99, Table 2.

12. See Wright, *The Overloaded Fifth Circuit*, *supra* note 2, at 957, suggesting that eighty appeals per judge per year is the outside limit. See also Finley, *Judicial Administration: What Is This Thing Called Legal Reform?*, 65 COLUM. L. REV. 569, 585 (1965).

13. This increase in backlog from 1970 to 1971 was 4.8 percent, small indeed compared to the 12.3 percent increase from 1969 to 1970 and 18.7 percent from 1968 to 1969. 1970 ANNUAL REPORT 96; 1969 ANNUAL REPORT 104.

14. See Shafroth, *supra* note 2, at 263. Mr. Shafroth has usually erred on the conservative side in his estimates. For example, in 1967 Shafroth projected 1,464 cases would be filed in the Fifth Circuit for 1970. The actual number filed was 1,794. 1967 ANNUAL REPORT 182, Table B1. In his 1970 Re-Survey, see *NLRB v. Amalgamated Clothing Workers Local 990*, 430 F.2d 966, 968 (5th Cir. 1970), Mr. Shafroth projected 1,852 cases for the Fifth Circuit in 1971. The actual number was 2,077. 1971 ANNUAL REPORT 243, Table B1. Mr. Shafroth seems to have found the range with his 1971 revision, in which he predicted 2,596 filings in the Fifth Circuit in 1972. See *Hearing on S.J. Res. 122 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 62, Table 18 [hereinafter

from now, approximately 38,875 cases will be docketed annually in the courts of appeals.¹⁵ This projection, if realized, would bring the federal appellate system as we know it to a halt, for a workload of that magnitude would require thirty-eight nine-judge courts of appeals, each handling a caseload equal to that now handled by the District of Columbia Circuit.¹⁶ Will the proposed solutions for congestion be sufficient to handle the projected caseload? The outlook is extremely gloomy.

The traditional solution to docket congestion has been the appointment of more judges.¹⁷ For a time Congress resorted primarily to this solution, even overcoming in the process the bugaboo about a nine-judge court being the size limit of an effective judicial body.¹⁸ The number of circuit judges has now been increased to ninety-seven, but in the meantime the percentage increase in the number of cases has far exceeded the increase in judges.¹⁹ As a result, the judges have had to "run faster," not just to stay in the same place, but rather to avoid falling too far behind. As a matter of policy, increasing the size of the courts of appeals to 308 judges handling 126 cases each to cope with the 38,875 cases projected for 1981 is probably not a palatable solution. Most will agree that increasing the number of judges is not a permanent solution,²⁰ a fact recognized by the Fifth Circuit recently when it decided not to seek additional judgeships beyond the fifteen now au-

cited as S.J. Res. 122 Hearing]. The actual number filed was 2,451, an increase of 22.3 percent over 1971. 1972 CLERK'S ANNUAL REPORT—FIFTH CIRCUIT 1 [hereinafter cited as 1972 CLERK'S REPORT].

15. *S.J. Res. 122 Hearing* 48, Table 1.

16. The District of Columbia Circuit terminated 1,013 cases in 1971. 1971 ANNUAL REPORT 242, Table B1.

17. Wright, *The Overloaded Fifth Circuit*, *supra* note 2, at 968. Professor Wright recognized the many problems inherent in this solution, but felt that the stop-gap measure of more judges was the most practical immediate solution to a long-term problem.

18. Act of March 18, 1966, Pub. L. No. 89-372, 80 Stat. 75, increased the size of the Fifth Circuit to thirteen by adding four temporary judgeships to the nine permanent positions. Act of June 18, 1968, Pub. L. No. 90-347, 82 Stat. 184, made those four temporary judgeships permanent and added two positions for a total of fifteen authorized judgeships in the Fifth Circuit at the present time. That Act also increased the Ninth Circuit to thirteen judgeships. See 28 U.S.C. § 44 (1970). The Judicial Conference recently recommended the addition of ten new circuit judgeships. If enacted by Congress, the Second and Third Circuits would join the Fifth and Ninth as courts with more than nine judges. 1971 ANNUAL REPORT 81.

19. See note 13 *supra* and accompanying text.

20. See, e.g., Warren, *Administrative Problems of the Federal Judiciary*, 23 BUS. LAW. 7 (1967). Senator Burdick may be unconvinced—and he is chairman of the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary. See Burdick, *supra* note 2, at 808-10.

thorized.²¹

Another way to help keep appellate dockets current would be to limit the number of cases filed in the district courts.²² This solution has at least three drawbacks. First, as a practical matter, unless one counts the relatively minor adjustments made by increasing the jurisdictional amount in diversity cases, making corporations citizens of more than one state, and preventing the removal of workmen's compensation cases,²³ no major group of federal cases has recently been carved out to be litigated elsewhere. In fact, as any practicing attorney knows, access to federal court is easier now than before.²⁴ Secondly, even if a supposedly substantial number of federal cases, for example all diversity cases, were denied access to the federal district courts, this cutback would only reduce the caseload by 1,286 appeals, or ten percent of total filings.²⁵ Also, those cases have to go somewhere, and the state courts are generally in no shape to handle a sudden and dramatic increase in caseload.²⁶ Thirdly, the number of appeals is rising significantly faster than the number of cases filed in the district courts. From 1960 to 1970, appeals filed in the circuit courts increased 199.1 percent, but during that same time period the number of cases filed in the district courts increased only 47.3 percent.²⁷ Thus, a substantial number of cases would have to be eliminated from the district courts before the results trickled up to the circuit courts and significantly reduced their caseload.

21. 1971 ANNUAL REPORT 81-82; *S.J. Res. 122 Hearing* 13.

22. See Hazard, *After the Trial Court—The Realities of Appellate Review*, in *THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION* 60, 77 (H. Jones ed. 1965).

23. See 28 U.S.C. §§ 1331, 1332(c), 1445(c) (1970); Westover, *The Cause, Effect and Solution of Congestion in the Federal Courts*, 10 *HAST. L.J.* 384, 393 (1959).

24. Expansive interpretations of federal jurisdictional grounds, although possibly justified on other bases, do not help the congestion problem. See, e.g., *Illinois v. Milwaukee*, 406 U.S. 91, 98-101 (1972) (federal common law provides basis for federal jurisdiction).

25. 1971 ANNUAL REPORT 241, 253, Tables B1, B7.

26. See D. KARLEN, *JUDICIAL ADMINISTRATION—THE AMERICAN EXPERIENCE* 60 (1970); Desmond, *Current Problems of State Court Administration*, 65 *COLUM. L. REV.* 561, 568 (1965); Monroe, *The Urgent Case for American Law Reform: A Judge's Response to a Lawyer's Plea*, 19 *DEPAUL L. REV.* 466, 467 (1970); Tydings, *Improving Archaic Judicial Machinery*, 57 *A.B.A.J.* 154 (1971). Congestion in state courts has led to the establishment of the National Center for State Courts. See Burger, *The State of the Federal Judiciary—1971*, 57 *A.B.A.J.* 855, 856 (1971).

27. 1970 ANNUAL REPORT 96, 108, Tables 2 and 13. Another part of this problem is the steadily increasing percentage of cases terminated by the district courts and appealed to the courts of appeals. See note 293 *infra*.

The third approach to appellate congestion has been quite simply an oblique attack on the judges themselves. Suggestions that better judges are needed and that judges should work harder are often sounded.²⁸ Undoubtedly ninety-seven supermen on the circuit benches could probably produce more work and dispose of more cases than the current occupants of those positions, but statements from the judges themselves, as they have increased their output to over one hundred cases per year, suggest that forty to sixty full-blown opinions per year is the maximum that a conscientious, able judge can produce.²⁹ This significant overproduction, admittedly obtained through heavy use of per curiam decisions or decisions without written opinions, hardly suggests a judiciary that has time on its hands. Given the political nature of federal appointments and the general high quality of the appointments that are being and have been made to the circuit courts, any major change in the manner of selection of judges or significant improvement in the scholarship or dedication of those appointed is probably an illusory hope.

The remaining suggestions can really be grouped into one basic idea: devise a more efficient appellate process.³⁰ To the extent that the process can be made more efficient by the introduction of modern law office methods into judicial chambers, much has already been done,³¹ although secretarial help has traditionally been in short supply.³² One of the most widely adopted innovations in the appellate

28. See Monroe, *supra* note 26, at 480; Stuart, *Iowa Supreme Court Congestion: Can We Avert A Crisis?*, 55 IOWA L. REV. 594, 606-12 (1970).

29. See Edwards, *The Avoidance of Appellate Delay*, in *Improving Procedures in the Decisional Process*, 52 F.R.D. 51, 61, 62 (1971); Letter from Circuit (now Chief) Judge John R. Brown to Senator Joseph D. Tydings, December 21, 1966, in Shafroth, *supra* note 2, at 305. The 126 dispositions per judge currently achieved by the courts of appeals include cases dismissed by the parties, dismissed by the clerk, and disposed of without opinion or with a per curiam opinion. In 1970, for example, the courts of appeals disposed of 6,139 cases after oral hearing or submission on briefs. Of that total number, only 3,195 were decided by signed opinion, 2,179 were decided per curiam, and 765 had no opinion at all. Thus, only thirty-three signed opinions per authorized judgeship were produced. This production accords with the conclusion that even twenty-five to thirty opinions per year may be too many. See Finley, *supra* note 12.

30. Carrington, *supra* note 2, at 555; Westover, *supra* note 23, at 393.

31. One recent innovation is the authorization of the appointment of a circuit executive by the Judicial Council of each court of appeals to assist the clerk and the chief judge in handling the administrative matters of the circuit. See 28 U.S.C. § 332 (1970).

32. In 1965 there were 382 secretaries for 382 active judges and their 357 law clerks. 1966 ANNUAL REPORT 74. In 1970 the number of active judges had increased to 440 and law clerks had increased to 487, but the number of secretaries had in-

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process (besides the typewriter) is the introduction of law clerks. Just as no senior partner in any law firm would willingly terminate the employment of all his firm's young associates who, in most instances, carry the heavy burden of researching and the preliminary drafting of legal documents, it is doubtful that any judge who has a clerk would want to get along without him. The concept of judicial law clerks must have at first been frightening to the bar,³³ but as those clerks were subsequently employed by law offices and law schools and began to demonstrate the value of the clerking experience, coupled with the assurance, as one former clerk said, that "judges do not delegate to their clerks the function of deciding cases,"³⁴ the number and function of law clerks has constantly expanded.³⁵ But not every judge wants or can utilize more than one clerk, and those who do utilize them do so in a variety of ways, ranging from drafting memoranda on cases scheduled for argument and on points of law stated and assigned by the judge³⁶ to the initial drafting of proposed opinions.³⁷ For some judges additional clerks would materially aid the speedy disposition of cases, for others it would not.

A variation of the system of one or more law clerks hired by or assigned to one particular judge is the concept of staff attorney. A staff attorney, rather than working for one judge, works for the entire

creased only fifty-six, to 438. 1970 ANNUAL REPORT 89-90. See Shafroth, *supra* note 2, at 285.

33. See Wright, *The Overloaded Fifth Circuit*, *supra* note 2, at 961.

34. *Id.* See *S.J. Res. 122 Hearing* 33. There Chief Judge Seitz of the Third Circuit said that he tells his new clerks that "I am the one who took the oath of office and I want all of the help I can get from you but I will decide the case."

35. The story is often told in Texas that originally the Texas Supreme Court's clerks were called "law secretaries" and the court was unable to persuade the legislature to raise the clerk's pay since it was thought that the approximately \$250 per month being paid was sufficient for a secretary. The clerks' titles were changed to "briefing attorneys" and the raises went through.

36. Edwards, *supra* note 29, at 68.

37. Letter from Judge John R. Brown to Senator Joseph Tydings, in Shafroth, *supra* note 2, at 306. While I was in private practice I often compared the use of associates in a law firm to the use Judge Brown made of his clerks. He places great responsibility on them and they generally respond with increased production. Just as any senior partner will always scrutinize any young associate's efforts, the drafts of law clerks are seldom included in an opinion in a form recognizable from the original effort. But most clerks see some of their language and research being incorporated in a small way into the body of the law, and it is an exhilarating experience. My own belief is that judges who use their clerks mostly for research are overlooking an untapped resource of increased production.

court.³⁸ In Michigan, for example, the new intermediate courts pool all attorneys beyond one per judge into a central unit to do the basic screening of cases to identify which are appropriate for summary disposition.³⁹ The conviction that these assistants have contributed greatly to the increase in the production of appellate courts has led Chief Judge Brown of the Fifth Circuit to call upon Congress to provide that court on an experimental basis with a Chief Staff Attorney, five additional staff attorneys,⁴⁰ and adequate support personnel to assist in screening cases and drafting proposed opinions.⁴¹

Support personnel may indeed be the only salvation for the Fifth Circuit, which has now decided to face the coming deluge without any additional judges.⁴² It is, after all, the last short-term alternative available unless one is prepared to accept the "scandalous"⁴³ backlog that is otherwise certain to occur.

But in its search for an interim method to handle its ever increasing dockets, the Fifth Circuit may have uncovered and demonstrated the effectiveness of a judicial tool that nobody really thought would be of any benefit whatsoever. That tool is the comprehensive pre-decision screening procedure established by that circuit under the authority assertedly granted it by the Federal Rules of Appellate Procedure. Although it has proved to be an effective method in expediting the disposition of cases, it has worked without additional personnel, and its use, in one form or another, has now spread to every circuit court and some state courts.⁴⁴ Simultaneously, the Fifth Circuit's experience has confirmed the time-saving potential inherent in disposing of cases without written opinions. These dramatic innovations—dramatic when one considers the traditional approach to appeals—may be the standard procedure for all appeals in both the state and federal systems within the next five years. It is therefore imperative to understand their operation, virtues, and possible drawbacks.

38. See Shafroth, *supra* note 2, at 282.

39. Christian, *Using Pre-hearing Procedures to Increase Productivity*, in *Improving Procedures in the Decisional Process*, 52 F.R.D. 55, 59 (1971).

40. For a total of eight, counting the three presently employed.

41. *S.J. Res. 122 Hearing* 67.

42. See note 21 *supra* and accompanying text.

43. *S.J. Res. 122 Hearing* 63.

44. See Christian, *supra* note 39, at 58-60, reviewing screening procedures in Michigan and California.

II. PRE-DECISION SCREENING AND SUMMARY PROCEDURES

A. *The Local Circuit Rules*

Under Federal Rule of Appellate Procedure 47,⁴⁵ all eleven circuit courts of appeals have either instituted or authorized some method of short-circuiting the normally leisurely pace of appellate review.⁴⁶ These methods limit or dispense with oral argument and include deciding cases without rendering a written opinion. The use of these methods varies greatly within the circuits, and some analysis of the various circuit rules is helpful to understand the extent these summary procedures have been incorporated into the appellate process.

1. *Limiting Oral Argument*

Apparently, only the Second Circuit does not have a local rule enabling it to dispose of any regularly docketed case without some oral argument.⁴⁷ Under local rule, the Fourth,⁴⁸ Sixth,⁴⁹ and Seventh⁵⁰ Circuits

45. Rule 47 provides:

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules

46. *See* Bell, *Toward a More Efficient Federal Appeals System*, 54 J. AM. JUD. Soc'y 237, 244 (1971).

47. The pertinent part of 2D CIR. R. 34 provides only that:

(d) The judge scheduled to preside over the panel will pass on requests for time for argument additional to the 30 minutes generally allowed by Rule 34(b). Upon the basis of a review of the briefs, he may also fix a time for argument less than 30 minutes if he concludes that a smaller amount of time will be adequate. The clerk will notify counsel of all such rulings.

This rule apparently does not contemplate the absolute denial of oral argument.

48. The pertinent part of 4TH CIR. R. 7(b) provides:

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

49. The Sixth Circuit Rules, in pertinent part, provide:

6TH CIR. R. 7(e):

Summary Calendar. Whenever the court, sua sponte or on a suggestion of a party, concludes that a case is of such character as not to justify extended oral argument, the case may be placed on the summary calendar.

In all such cases, except on special order, each side will be permitted only fifteen minutes for the argument, and only one counsel will be heard on the same side. No separate summary calendar will be maintained. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court, and such cases may or may not be heard on days set for oral

dispense with oral argument if the appeal is frivolous or the court is without jurisdiction. The remaining circuits—District of Columbia,⁵¹ First,⁵² Third,⁵³ Fifth,⁵⁴ Eighth,⁵⁵ Ninth,⁵⁶ and Tenth⁵⁷—now have

argument of cases not on the summary calendar.
6TH CIR. R. 8(b):

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

6TH CIR. R. 9:

If upon the hearing of any interlocutory motion or as a result of a review under Rule 3(e), it shall appear to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed.

Whenever a panel of this Court reviewing an appeal under procedures initiated under Rules 3, 8 or 9 concludes that clear error requires reversal or vacation of a judgment or order of the District Court or remand for additional proceedings in the District Court the panel may enter an appropriate order to accomplish this result.

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

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

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

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

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

At any time, on such notice as the court may order, on motion of appellee or *sua sponte*, the court may dismiss the appeal or other request for relief or affirm and enforce the judgment or order below if the court lacks jurisdiction, or if it shall clearly appear that no substantial question is presented. In cases of manifest error the court may, similarly, reverse. . . .

If the court concludes, after adequate opportunity for briefing, that even though there may be a substantial question, oral argument would not assist it, the Clerk will so advise counsel. . . .

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

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

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

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

54. 5TH CIR. R. 18:

Rule 18. Summary Calendar

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

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

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

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

Classes of cases to be submitted without oral argument, or with limited argument. Pursuant to Rule 34(b), Federal Rules of Appellate Procedure, there is hereby established a class of cases to be submitted without oral argument except as provided below. There may be placed in this class any appeal, petition for original writ, or petition for review or enforcement of an administrative order in which (a) one party is appearing in forma pauperis and in propria persona and will not be present to participate personally in the argument, or (b) the questions raised on appeal are, in the unanimous opinion of a panel of the court, of such a nature that oral argument would not be of assistance to the court.

When a case has been classified for submission without oral argument, the Clerk shall give the parties notice in writing of such action. Oral argument will be had in all other cases, as provided in the following paragraphs of this rule, except where the parties stipulate to submission without argument or where the court otherwise orders.

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

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

sidered wasted by listening to argument on a case in which the outcome is certain. But the rules in courts dispensing with oral argument in any case so designated by the court are not limited to frivolous or unsubstantial questions. The broad authority granted the courts by the local rules evidences a belief by the judges that almost any case may be properly decided without oral argument. This assumption, as will be shown later, may be without merit.⁵⁸

The manner in which cases are screened by the courts, either to eliminate frivolous and unsubstantial appeals or to identify those cases in which the court determines that oral argument would not be helpful, varies greatly. The least extensive procedure is that of the Second Circuit, where the presiding judge of a three-judge panel may make the determination prior to oral argument that a particular case does not need the full thirty minutes per side.⁵⁹ In the next category are the First,⁶⁰ Third,⁶¹ and District of Columbia⁶² Circuits, where the determination regarding oral argument is made by the panel that is to hear the case. In the final group are those courts that have established rather elaborate pre-hearing screening procedures. In the Fourth,⁶³ Fifth,⁶⁴ Sixth,⁶⁵ and Eighth⁶⁶ Circuits, the Chief Judges are authorized by local rule to appoint panels of judges to screen the pending appeals. In the Ninth Circuit,⁶⁷ law clerks do the initial screening but the final determination is made by a three-judge panel that rotates weekly.⁶⁸ In the Tenth Circuit the Chief Judge, on the basis of a docketing statement filed by the appellant, makes the initial determination whether the case is to be argued for fifteen or thirty minutes. A special panel then reviews his

58. See Part III D *infra*.

59. 2D CIR. R. 34(d). See note 47 *supra*.

60. 1ST CIR. R. 12. See note 52 *supra*.

61. 3D CIR. R. 12(6). See note 53 *supra*.

62. D.C. CIR. R. 11(e), (f). See note 51 *supra*.

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

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

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

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

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

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

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

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

2. *Motions to Dismiss or Affirm*

By rule, four circuit courts attempt to bring counsel for the appellee into the screening procedure by providing for pre-argument motions to dismiss or affirm. In the First,⁷⁴ Sixth,⁷⁵ Eighth,⁷⁶ and Tenth⁷⁷ Cir-

69. 10TH CIR. R. 9(b), (c).

70. 2D CIR. R. 34. See note 47 *supra* and accompanying text.

71. The First Circuit has only three judges and thus can always hear any case ready for argument. In the Third Circuit, all judges except one judge who lives in Pittsburgh can reach Philadelphia the morning of argument. *S.J. Res. 122 Hearing* 38. All District of Columbia judges of course are in or close to the District.

72. See text accompanying notes 152-59 *infra*.

73. See Shafroth, *supra* note 2, at 284.

74. 1ST CIR. R. 12. See note 52 *supra*.

75. 6TH CIR. R. 8:

Within fifteen days after the appeal has been docketed in this court, the appellee may file a motion to dismiss or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss. The fifteen day provision may be waived by the court on proper showing of reasonable excuse for delay in filing a motion to dismiss or affirm, upon such terms and conditions as the court may prescribe, or such waiver may be granted sua sponte on the part of the court.

(a) The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court.

(b) The court will receive a motion to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the de-

cuits, the motion may be made on the basis that the court lacks jurisdiction of the appeal or that the case presents unsubstantial issues.⁷⁸ The Fifth Circuit originally promulgated a similar rule, but rescinded it within a year and a half, concluding that the motions tended to delay the disposition of cases.⁷⁹ With the exception of the Tenth Circuit and possibly the First, these rules clearly prohibit any attempt by counsel for appellee to gain additional time for filing his main brief by filing a motion to dismiss or affirm.⁸⁰

It is not clear what time-saving these motions contribute to a comprehensive screening procedure.⁸¹ An initial determination by the court on the issue of oral argument, as is contemplated in all four circuits with provisions for motions to dismiss or affirm, will surely reveal frivolous or unsubstantial cases. Perhaps a suggestion of lack of jurisdiction may be helpful since that issue will not have been presented to the dis-

cision of the cause depends are so unsubstantial as not to need further argument.

The motion to dismiss or affirm shall be filed with the clerk in conformity with Rule 27 of the Federal Rules of Appellate Procedure.

The appellant shall have seven days from the date of receipt of the motion to dismiss or affirm within which to file a response opposing the motion. Such response may be typewritten and four copies, with proof of service, shall be filed with the clerk. Upon the filing of such response, or the expiration of the time allowed therefor, or express waiver of the right to file, the record on appeal, motion and response shall be distributed by the clerk to the court for its consideration.

After consideration of the papers distributed pursuant to the foregoing paragraph, or on its own motion when it is apparent from the record that the appeal is not within the jurisdiction of the court or that it is manifest that the questions on which decision of the court depends are so unsubstantial as not to need further argument, the court will enter an appropriate order.

The time for filing briefs pursuant to Rule 31 of the Federal Rules of Appellate Procedure shall not be tolled or extended by the filing of a motion to dismiss or affirm.

76. 8TH CIR. R. 8 is substantially identical to 6TH CIR. R. 8, quoted in note 75 *supra*.

77. 10TH CIR. R. 8 is substantially identical to 6TH CIR. R. 8, quoted in note 75 *supra*.

78. The First Circuit rule also provides for a motion to reverse. *See* note 52 *supra*.

79. *See* NLRB v. Amalgamated Clothing Workers Local 990, 430 F.2d 966 (5th Cir. 1970).

80. The rules for the Sixth and Eighth Circuits specifically so provide. The First Circuit rule is silent. The Tenth Circuit originally prohibited any time extension, but now 10TH CIR. R. 8(c) provides that "the time for filing briefs shall be tolled pending the disposition of the motion to dismiss or affirm."

81. Obviously an early determination in favor of the appellee may result in saving substantial effort by the parties.

strict court, but this possibility, at least theoretically, does not appear to outweigh the added time necessary to decide another motion.⁸² The courts should re-examine their initial determinations regarding the efficacy of providing for motions to dismiss or affirm by local rule. It may be that providing explicitly for the motion may actually invite the filing of additional motions.⁸³ Instead, the courts could, as has the Fifth Circuit, simply rely upon the power granted by Rule 2 of the Appellate Rules to handle on motion the occasional case that calls for more expeditious treatment.⁸⁴

3. *Decisions Without Written Opinions*

In addition to limitations on oral argument and motions to dismiss or affirm, the local rules for the District of Columbia,⁸⁵ First,⁸⁶ Fifth,⁸⁷ Eighth⁸⁸ and Tenth⁸⁹ Circuits now provide for affirmances without opinion.⁹⁰ The Fifth Circuit's Rule 21 is relatively explicit:

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as

82. The courts already entertain a significant number of motions. In 1972, for example, 1,567 motions were filed in the Fifth Circuit. 1972 CLERK'S REPORT, Table XI.

83. The new 10TH CIR. R. 8(c), *see* note 80 *supra*, seems to encourage the motion by providing for tolling of the briefing time limits.

84. *See* note 170 *infra* and accompanying text.

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

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

87. 5TH CIR. R. 21.

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

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

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

a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

The value of Rule 21 in expediting the disposition of cases should be obvious. A one line disposition of the entire case, as is contemplated by Fifth Circuit Rule 21, is even quicker than the traditional per curiam opinion. Furthermore, per curiam opinions, if not handled carefully, have a nasty habit of coming back to haunt a court, for enough has to be said to explain why the case is so easily decided. If that is done, then the court has revealed at least a tiny facet of its reasoning process.⁹¹ This aperture into the court's reasoning and logic then enables commentators and lawyers either to invoke the case as authority or to criticize the court for its result or lack of explanation for the reasons behind the decision.⁹² On the other hand, the notation "Affirmed. See Local Rule 21" safely protects the court (and in one way the jurisprudence) from hasty or ill-considered decisions that will have to be explained later. Its use, in appropriate cases, also alleviates to some degree the growing problem of reporter systems filled with lengthy opinions important only to the individual litigants. But the use of affirmances without opinions is certainly not to be encouraged in other than clearly deserving cases. That disposition fails to leave its track in the law and leaves litigants with the impression that no one really heard their appeal.⁹³ An erroneous result, although reached more quickly under the Rule, is still an intensely important matter for the litigants. That the error is safely hidden would be small consolation for them. The rule is also subject to abuse. An unexplained affirmance, reached through valid processes and indeed within one of the four criteria of Rule 21, is probably inconsequential. But any decision made under Rule 21 because the court was unwilling to expose itself to criticism for an erroneous or unjust re-

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

92. See Wright, *The Overloaded Fifth Circuit*, *supra* note 2, at 960-61, noting examples of per curiam decisions in which the law was misstated or a rule of doubtful validity was applied without discussion.

93. See Carrington, *supra* note 2, at 559.

sult clearly constitutes an abuse of the court's power, subordinates justice to speed, and subverts needed improvements to illegitimate ends. In times of growing distrust of governmental authority, the courts perhaps ask too much when, by a one line disposition, they ask lawyers, litigants, and scholars to accept their uncriticizable result. More importantly, in their use of this tool a circuit court, performing its function in the federal system, should guard against the criticism that has been leveled at the Appellate Division of the Supreme Court of New York. Professor Hazard alleges that the courts of the Appellate Division "ceased long ago to write extended thoughtful opinions, except on rare occasions, and have become what they are in name, virtually a branch of the trial court rather than an intermediate tribunal for plenary review."⁹⁴

Although not directly concerned with the Fifth Circuit's Rule 21, the recent Supreme Court decision in *Taylor v. McKeithen*⁹⁵ causes some concern about the Court's approach to lower court decisions rendered without opinion. In *Taylor* the Fifth Circuit had reversed without opinion the choice by the district judge of a legislative apportionment plan and had ordered the adoption of an alternative plan proposed by the attorney general of Louisiana. Vacating the judgment of the Fifth Circuit, the Supreme Court remanded the case to the circuit court for further proceedings. The Court was effectively ordering the circuit court to write an opinion explaining the reasons for the summary reversal. In so doing, the Court recognized the wide discretion vested in the courts of appeals to determine whether and how to write opinions. The Court felt, however, that one possible reason for the Fifth Circuit's reversal of the district judge "would present an important federal question," but that this basis should not be imputed to that court if the "actual ground of decision was of more limited importance."⁹⁶ Dissenting Justice Rehnquist characterized this action by the Court as requiring the Fifth Circuit to write an amicus curiae opinion to aid the Court.⁹⁷

This decision should not affect the use of Rule 21 by the Fifth Circuit or the use of similar rules by other circuits, but it dramatically displays the limited utility of opinionless decisions. It must be remembered that the Fifth Circuit reversed, not affirmed, without opinion—an action not within the scope of Rule 21. The court's reasons for reversing may be-

94. Hazard, *supra* note 22, at 81.

95. 407 U.S. 191 (1972), *vacating* 457 F.2d 796 (5th Cir. 1971), *rev'g* 333 F. Supp. 452 (E.D. La. 1971).

96. 407 U.S. 191, 194 n.4 (1972).

97. *Id.* at 195, 196.

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

B. *Description and Application of the Fifth Circuit's Screening and Summary Procedures*

Pursuant to its Local Rules 17,¹⁰⁰ 18,¹⁰¹ 20,¹⁰² and 21,¹⁰³ the Fifth

98. As the district judge had done in this case. *Id.* at 193. See 333 F. Supp. 452 (E.D. La. 1971).

99. *Lego v. Twomey*, 404 U.S. 477, 482 n.6 (1972). See also Burger, *Report on Problems of the Judiciary*, 93 Sup. Ct. No. 1, (Nov. 1, 1972) (advance sheet), where the Chief Justice applauds screening and summary procedures in the courts of appeals and compares their use to the Supreme Court's own procedures.

100. 5TH CIR. R. 17:

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

101. See note 54 *supra*.

102. 5TH CIR. R. 20:

If upon the hearing of any interlocutory motion or as a result of a review under Rule 17, it shall appear to the court that the appeal is frivolous and en-

Circuit has established the most far-reaching screening and summary procedures of any circuit. Borrowing liberally from the Sixth and Tenth Circuits, the Fifth Circuit instituted its screening procedures on December 13, 1968.¹⁰⁴ By denying oral argument in selected appeals, the plan was designed to handle more rapidly not only the frivolous or unsubstantial case, but also the case presenting difficult issues.¹⁰⁵ In determining whether a case is to be argued orally, the sole criterion is whether the court would consider oral argument helpful in resolving the issues presented.¹⁰⁶ To facilitate this determination, the Fifth Circuit has recognized four classes of cases: Class I—frivolous appeals;¹⁰⁷ Class II—appeals that may or may not present substantial questions, but are judicially determined not to require oral argument; Class III—cases in which the court concludes only fifteen minutes oral argument per side would be helpful; and Class IV—cases that receive the full thirty minutes argument per side contemplated by Federal Rule of Appellate Procedure 34.¹⁰⁸ The screening procedure classifies each case. To arrive at this determination, the Fifth Circuit maintains five standing panels of three judges each.¹⁰⁹ As soon as all briefs are filed in each case or the time for filing briefs under the Federal Rules of Appellate Procedure has passed, the case is assigned randomly but by rotation to a

tirely without merit, the appeal will be dismissed without the notice contemplated in Rule 18.

103. See note 87 *supra* and accompanying text.

104. Bell, *supra* note 46, at 242. The Fourth Circuit, in 1962, had also instituted a procedure for handling pro se and post-conviction appeals that contained several elements similar to the procedures later instituted in the Fifth Circuit. See *Jones v. Superintendent*, 465 F.2d 1091 (4th Cir. 1972).

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

106. *S.J. Res. 122 Hearing* 89.

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

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

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

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

110. *Huth v. Southern Pac. Co.*, 417 F.2d 526, 527 (5th Cir. 1969); Bell, *supra* note 46, at 241.

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

112. Bell, *supra* note 46, at 241.

113. *Murphy v. Houma Well Serv.*, 409 F.2d 804, 806 (5th Cir. 1969).

114. *Id.*

115. Bell, *supra* note 46, at 241.

116. *S.J. Res. 122 Hearing 104*. Initially, the Ninth Circuit permitted an attorney to have his case restored for oral argument even if the court had considered argument unnecessary, but that provision has been eliminated. Letter from The Honorable Frederick G. Hamley, Circuit Judge, to the author, Oct. 18, 1972.

117. *Murphy v. Houma Well Serv.*, 409 F.2d 804, 806 (5th Cir. 1969); Bell, *supra* note 46, at 241. From December 31, 1968, to September 9, 1969, only thirty-one

https://openscholarship.wustl.edu/law_lawreview/vol1973/iss2/1

that a three-fold safeguard exists against a party being improperly denied oral argument or having his case erroneously decided: first, every step in the process is a judicial determination, not one made by law clerks, staff attorneys, or the court clerk; secondly, the decision to transfer the case to the summary calendar must be a unanimous determination of the standing panel; and thirdly, the final decision of the court on the merits must be unanimous.¹¹⁸

Although Chief Judge Brown admits that the last word on summary procedures is not yet in,¹¹⁹ the statistics for the variety of cases that fall into Class II (no oral argument) are impressive. As seen in Table I, a

TABLE I
CLASSIFICATION OF DOCKET—CASES FULLY
BRIEFED AND SUBMITTED¹²⁰

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

cases were reclassified from Class II to Class III or IV. *Huth v. Southern Pac. Co.*, 417 F.2d 526, 530 n.11 (5th Cir. 1969). For a case in which the court came perilously close to violating its own rule, see *Greco v. Seaboard Coast Line R.R.*, 464 F.2d 496 (5th Cir. 1972) (Brown, C.J., concurring in result but noting doubt as to validity of controlling decision).

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

119. *Huth v. Southern Pac. Co.*, 417 F.2d 526, 528 (5th Cir. 1969).

120. 1972 CLERK'S REPORT 36, Table S-5(a).

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

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

TABLE II
CLASSIFICATION BREAKDOWN¹²¹

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

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

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

121. 1972 CLERK'S REPORT 32, Table S-1. The percentage of Class II cases for 1972 is probably unrepresentatively high because of the experiment with permanent panels during the first half of the year. See note 111 *supra*. For the last half of 1972, Class II cases comprised only 55.1 percent of the cases. 1972 CLERK'S REPORT 32, Table S-1.

122. See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148 (1970).

TABLE III
SUMMARY OF CLASS II CASES¹²³

Type	Fiscal Year 1969 (Dec. 1968-June 1969)		Fiscal Year 1970		Fiscal Year 1971		Fiscal Year 1972	
	No.	Percentage	No.	Percentage	No.	Percentage	No.	Percentage
Habeas & \$2255	56	25.7	141	31.2	230	35.5	338	32.3
Crim.	58	26.8	131	29.0	177	25.8	282	26.9
Civil	104	47.5	180	39.8	341	52.7	428	40.8
Total	218	100.0	452	100.0	648	100.0	1048	100.0
Further Breakdown:								
	1969		1970		1971		1972	
	Total	Class II	Total	Class II	Total	Class II	Total	Class II
		to		to		to		to
		Total		Total		Total		Total
Criminal	177	58	270	131	345	177	435	282
		32.7		48.5		51.3		64.8
Civil	63	39	158	93	224	167	306	250
		61.9		58.9		74.6		81.7
Habeas	22	17	58	48	75	63	94	88
		77.2		82.8		84.0		93.6
\$2255	209	54	391	94	423	126	443	207
		25.8		24.0		29.8		46.7
Priv. Civil	68	20	93	23	110	40	109	40
		29.4		30.1		36.3		36.7
U.S. Civil	29	5	65	18	80	17	88	38
		17.2		27.7		21.3		43.2
Tax	10	5	24	8	22	7	27	16
		50.0		33.3		31.2		59.3
Bankruptcy	44	10	57	13	50	20	69	34
		22.7		22.8		40.0		49.3
NLRB	4	0	9	3	13	4	20	7
		—		33.3		30.8		35.0
Other Agency	25	4	32	5	74	21	124	42
		16		15.6		28.4		33.9
Civil Rights	16	6	30	11	12	6	45	30
		37.5		36.7		50.0		66.7
Admiralty	*	*	*	*	*	*	17	14
		—		—		—		19.7
Soc. Sec.								
* not available								

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

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

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

TABLE IV
CASES DISPOSED OF AFTER ORAL HEARING OR
SUBMISSION ON BRIEFS¹²⁷

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

The use of Rule 21 is more extensive than anticipated, and has been widespread across the docket of the Fifth Circuit. For example, con-

124. Confirming this assertion is the fact that in 1972, 18.5 percent of the decisions in Class II cases were by signed opinion, indicating at least a new point or arguable position. 1972 CLERK'S REPORT 26, Table VII(c). See, e.g., *Imperial Homes Corp. v. Lamont*, 458 F.2d 895 (5th Cir. 1972), a summary calendar case with complete opinion that apparently rejects a decision of the Sixth Circuit and thus creates an inter-circuit conflict.

125. During 1972, 174 of 365 Rule 21 decisions, or 47.7 percent, involved civil cases. 1972 CLERK'S REPORT 26, Table VII(c).

126. *NLRB v. Amalgamated Clothing Workers Local 990*, 430 F.2d 966, 972 (5th Cir. 1970).

127. 1972 CLERK'S REPORT 6 (for 1971 and 1972 figures); 1970 ANNUAL REPORT 106, Table 6; 1969 ANNUAL REPORT 113; 1968 ANNUAL REPORT 103.

trary to what might be expected, only 20.9 percent of the criminal cases decided in the Fifth Circuit during 1972 were decided under Rule 21.¹²⁸ Similarly, only 29.3 percent of habeas corpus cases without counsel and 20.0 percent of those cases in which the petitioner was represented by counsel were decided under Rule 21.¹²⁹ More surprisingly, 35.9 percent of the private civil diversity cases and 44.4 percent of the admiralty cases were decided under Rule 21.¹³⁰ These figures convincingly demonstrate that Rule 21, although perhaps being over-used, is not confined to the criminal area or cases in which one party is not represented by counsel.

C. *The Benefits of Summary Procedures*

The stated purpose of denying oral argument in 59.1 percent of the cases on the Fifth Circuit's docket and of disposing of 26.8 percent of submitted cases without written opinions was to increase the capacity of the judges to dispose of cases.¹³¹ Thus, one measure of success of the procedures should be the increased productivity of the court as a whole determined by the output of cases and the productivity of the active judges. Table V shows a very remarkable increase in those important areas. In the column "Opinions Per Active Judge," the figures include only the opinions of regular active judges of the Fifth Circuit and not the opinions produced by senior circuit judges or visiting judges.

TABLE V
PRODUCTIVITY OF THE FIFTH CIRCUIT¹³²

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

The Fifth Circuit has thus increased its output per active judge 90.1 percent since 1968, the last year in which no cases were screened; total

128. 1972 CLERK'S REPORT 24, Table VII(a).

129. *Id.*

130. *Id.*

131. See *Murphy v. Houma Well Serv.*, 409 F.2d 804, 805 (5th Cir. 1969); Tables II and IV, *supra* at notes 121 and 127.

132. 1972 CLERK'S REPORT 10.

closed cases have increased 85.9 percent in that same period; and the production for all judges has increased 91.5 percent.

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

TABLE VI
HEARINGS IN THE FIFTH CIRCUIT¹³³

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

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

More importantly, however, for the administrative manageability of the Fifth Circuit and its ability to function as a cohesive court, and not as a collection of visiting judges from every circuit and district court in the country, is the number 738—total hearings for 1970. That year was the first full year of operation of the screening procedures. The figure 738, if all cases had been argued orally (instead of some being assigned to the summary calendar), would have been 1190 with the addition of the 452 cases decided on the briefs. A hearing load of 1190 cases would have required almost sixty actual court weeks of sittings (one three-judge panel hearing twenty cases during one week), rather than the thirty-eight actual court weeks that were required.¹³⁴ Additionally, since 738 hearings amount to an average of 148 cases per

133. 1971 ANNUAL REPORT 109.

134. *Isbell Enterprises, Inc. v. Citizens Cas. Co.*, 431 F.2d 409, 413 n.17 (5th Cir. 1970).

judge, the number of weeks that each judge had to sit (hearing usually twenty cases per week) was reduced from the traditional nine weeks per year to seven weeks per year per judge.¹³⁵ Without screening, weekly sittings per judge would have increased, unless additional but unattainable outside judges were used,¹³⁶ from the nine week per year maximum that the Fifth Circuit had administratively imposed¹³⁷ to almost twelve weeks per year.¹³⁸ The figures for 1971 are even more impressive. Although the total number of hearings increased to 848, or forty-three actual court weeks,¹³⁹ the number of Summary II cases increased to 648. Thus each judge was able to participate in 299 cases, rather than 180 under the old nine-week approach, for an increase in hearing capacity of 66.1 percent.¹⁴⁰ To civil and especially criminal litigants, the most heartening figure is the significant decrease in appellate delays. From a high in 1967 of 12.2 months for the median time interval, in cases terminated after hearing, from the time of filing the complete record to final disposition,¹⁴¹ the median time was reduced to 6.5 months in 1971.¹⁴² Likewise, the median time interval from hearing or submission to final disposition was down from a high in 1969 of 1.7 months¹⁴³ to 1.1 months for 1971.¹⁴⁴

D. *Why Do Screening Procedures Work?*

1. *Oral Argument*

Professor Paul Carrington, in his comprehensive work on the courts of appeals, asserts that "the time of the appellate judges that is actually

135. Bell, *supra* note 46, at 242.

136. The Fifth Circuit over the years had increasingly relied on visiting judges to stem the flood of cases. Thus in 1969, the court used forty-one visiting judges. The next year, the first full year of screening, only one visiting judge was used. *S.J. Res. 122 Hearing 55*, Table 7.

137. *See* Bell, *supra* note 46, at 242.

138. 1190 cases were docketed. At twenty cases per week per judge with each of the fifteen active judges hearing 238 cases, almost twelve weeks would have been required.

139. 1972 CLERK'S REPORT 19, Table II.

140. Although the actual number of hearings in 1972 was not reported in the Clerk's Report, only thirty-four actual court weeks of sittings were required that year, or about seven weeks per judge. 1972 CLERK'S REPORT 19, Table II. Thus, each judge's hearing capacity increased to about 346 cases, or 97.8 percent more than under the old procedure.

141. 1967 ANNUAL REPORT 190, Table B4.

142. 1971 ANNUAL REPORT 251, Table B4.

143. 1969 ANNUAL REPORT 194, Table B4.

144. 1971 ANNUAL REPORT 251, Table B4.

spent in hearing argument is too small a fraction of their total effort to make its compression an effective means of significantly increasing the rate of decision making."¹⁴⁵ In fact, he asserts, this judicial function extracts only about 200 hours per year in each judge's time.¹⁴⁶ Why, then, do the figures for the Fifth Circuit evidently show a rather remarkable increase in productivity with the institution of screening? To help reach an answer, one must consider fiscal year 1968, the last year before any screening, and 1970, the first full year of screening. This approach isolates the figures from the effects of Rule 21.¹⁴⁷ Between 1968 and 1970, the opinion production of the active judges increased 34.4 percent.¹⁴⁸ Why this substantial increase?

The answer to Professor Carrington's assertion and the success of screening in moving cases involves several procedures in the Fifth Circuit and the geographical setting of the court. First, the significant expenditure of judicial time devoted to cases orally argued occurs in preparing for argument rather than listening to it. In the Fifth Circuit, all judges have read at least the briefs prior to oral argument. Additionally, each law clerk for the judges on the panel for the week has prepared pre-argument memoranda on one-third of the calendared cases for the week. These memoranda vary greatly from clerk to clerk, generally depending upon the value the clerk's judge places on them. They range from extensively researched papers to brief synopses of the contentions of the parties, the main legal authorities cited, and a recommended resolution, which are then used chiefly as a night-before-argument refresher on the case.¹⁴⁹ Even before screening procedures were introduced, many man-hours went into a case even before it was argued orally. Since only one issue is under consideration at the screening stage—the necessity of oral argument, not whether the case is to be reversed or affirmed—its determination, even by all three judges, takes less time than the memos.¹⁵⁰ Also, under the old system there was no

145. Carrington, *supra* note 2, at 558. See also *Jones v. Superintendent*, 465 F.2d 1091 (4th Cir. 1972).

146. Carrington, *supra* note 2, at 558 n.74.

147. Rule 21 became effective July 1, 1970, the first day of fiscal year 1971.

148. See note 132 *supra* and accompanying Table V.

149. This is also the procedure in the Sixth Circuit. See *Edwards, supra* note 29, at 65.

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

guarantee that the clerk and judge who prepared the pre-argument memorandum on a case would eventually write the court's opinion. In fact, the origin of the memorandum and the origin of the opinion, as a result of the designation by the presiding judge of the panel, rarely coincided. This practice resulted in duplication of effort, since a judge and his clerk, although having the benefit of the memo, did not do the research on the case. This practice of not matching memo-writer with opinion-writer must have wasted some judicial time. Conversely, under the Fifth Circuit screening procedures, the initiating judge, if a case by unanimous vote of the screening panel is placed in Class II and thus on the summary calendar, writes the draft opinion that is distributed to other members of the panel. Under that procedure, the judge and law clerk who have done the initial spadework on a case to determine if it is appropriate for the summary calendar are also the ones who do the initial draft opinion.¹⁵¹

Coupled with the geography of the Fifth Circuit, a more significant reason for the apparent success of summary procedures was the sharp decline, rather than the anticipated increase, in the number of actual court weeks needed to handle the cases orally argued. In 1967 the Fifth Circuit was literally at the end of its rope in holding the line at nine weeks of sittings per judge, even with the substantial use of visiting judges.¹⁵² The court was able, after the institution of screening procedures, to reduce the number of weeks each judge sat from nine to seven.¹⁵³ On the surface, this savings appears to amount to only about forty hours of judicial time, figuring four hours of argument per day for a five day week. But the Fifth Circuit is geographically dispersed with judges residing in six southern states.¹⁵⁴ To compound

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

152. *S.J. Res. 122 Hearing* 55. In 1969, the year screening was instituted, the Fifth Circuit utilized forty-one visiting judges. In 1970, one judge visited. *Id.*, Table 7.

153. Bell, *supra* note 46, at 242.

154. The Fifth Circuit judges in regular active service and their respective residences are: Chief Judge John R. Brown (Houston, Tex.); Homer Thornberry (Austin, Tex.); Irving L. Goldberg (Dallas, Tex.); Joe Ingraham (Houston, Tex.); John M. Wisdom (New Orleans, La.); Robert Ainsworth (New Orleans, La.); James P. Coleman (Ackerman, Miss.); Charles Clark (Jackson, Miss.); Walter P. Gewin (Tuscaloosa, Ala.);

the problem, the court is only authorized to hold sessions in six cities.¹⁵⁵ Furthermore, the clerk of the court and his staff reside in New Orleans, while the Chief Judge of the circuit resides in Houston. In adopting its screening procedures, the Ninth Circuit suggested, as a possible reason for the Fifth Circuit's success with screening, that the geography of the Fifth Circuit, like that of the Ninth Circuit, made it difficult for the judges to communicate with each other.¹⁵⁶ In these days of WATS lines and a federal communications system that enables Judge Brown in Houston to talk to Judge Dyer in Miami or Judge Bell in Atlanta to iron out the troublesome language in an opinion, it is submitted that the Ninth Circuit's explanation, although of some possible validity since it is easier to work out problems when one's fellow judges are just down the hall, does not help explain any significant increase in judicial productivity.¹⁵⁷

Perhaps the real reason does, however, have something to do with the location of the judges. It is approximately 1200 air-miles from Miami to Austin, Texas, and the judges of the Fifth Circuit must literally "ride the circuit" to hold court. For a judiciary that is to the point of going anywhere to learn how to save five minutes,¹⁵⁸ perhaps the best advice is to stay home more. A moment's reflection will reveal that assembling a three-judge panel, law clerks, and staff, even in a metropolitan center, is time-consuming and significantly disrupts a court's normally reflective atmosphere. Add to this disruption the normal expenditures of time necessary for anyone to travel—arranging personal and court affairs for at least a week's absence, mailing original records in pauper cases to the site of the hearing, the final preparation of pre-argument memoranda, selection of work for "free" hours, and a dozen other de-

John C. Godbold (Montgomery, Ala.); Griffin B. Bell (Atlanta, Ga.); Lewis R. Morgan (Newman, Ga.); David W. Dyer (Miami, Fla.); Bryan Simpson (Jacksonville, Fla.); and Paul H. Roney (St. Petersburg, Fla.). The senior circuit judges and residences are: Richard T. Rives (Montgomery, Ala.); Elbert P. Tuttle (Atlanta, Ga.); and Warren L. Jones (Jacksonville, Fla.).

155. 28 U.S.C. § 48 (1970).

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

157. In fact it may lead to some increase in judicial harmony, since the judges do not see each other as frequently. Since the end of the civil rights problems of the early 1960's, the Fifth Circuit has been a relatively harmonious court, in contrast to some other circuits. For an example of the stronger feelings of an earlier time, see *Armstrong v. Board of Educ.*, 323 F.2d 333, 352-61 (5th Cir. 1963) (Cameron, J., dissenting from denial of rehearing en banc), *cert. denied sub nom.* *Gibson v. Harris*, 376 U.S. 908 (1964).

158. Edwards, *supra* note 29, at 63.

tails—and the time wasted in traveling is apparent. To these expenditures of time must be added conference time for the judges every afternoon to try to reach at least a tentative decision in the cases argued. Also, either the clerk of the court or one of his deputies is present at each court session. This use of personnel that is always in short supply reduces the work-product of that office, which is vital to the smooth operation of the court.

Taken together, these normal and necessary interruptions in the smooth functioning of the judicial process undoubtedly take time that could be used to better advantage in writing opinions and disposing of cases. The Fifth Circuit may have realized this, for it now plans to hear all cases in New Orleans for the 1972-73 term.¹⁵⁹ New Orleans is the residence of two judges and the clerk and it is centrally located within the circuit. Also, this analysis might suggest that the screening procedures that work well in the Fifth Circuit might not work as well in the Sixth Circuit, for example, where the court holds five regular three-week sessions each year in Cincinnati.¹⁶⁰ The same would be true for state courts that traditionally sit in one location. Those courts should study the possible detriments in denying or limiting oral argument and may well then conclude that the burdens outweigh the possible benefits.

2. *Affirmances Without Opinion*

In 1971, the productivity of the Fifth Circuit increased significantly. The per-judge disposition of cases briefed and submitted increased 30.5 percent from 1970 to 1971 and the increase from 1971 to 1972 totaled another 8.4 percent.¹⁶¹ This increase can probably be partially attributed to the increased use of per curiam opinions and Rule 21 affirm-

159. *S.J. Res. 122 Hearing* 106. In this report, Judge Seitz of the Third Circuit also mentioned travel as a possible problem. *Id.* at 38.

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

161. See note 132 *supra* and accompanying Table V.

ances without opinion.¹⁶² From 1970 to 1971 the percentage of cases disposed of by per curiam opinions rose only from 46.1 to 46.6 percent of total cases, but the number of cases affirmed without opinion increased from 2.6 percent to 12.6 percent. At the same time the percentage of signed opinions declined from 51.2 percent to 40.7 percent of decided cases. From 1971 to 1972, Rule 21 opinions rose to 26.8 percent of the opinions, but signed opinions declined to 34 percent and per curiam opinions declined to 39.2 percent.¹⁶³

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

162. 1972 CLERK'S REPORT 6.

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

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

165. See Table II, *supra* at note 121.

Whether the same procedures will help other courts is not as clear and may depend on the reasons for the Fifth Circuit's success. But simply showing an increase in production does not dispose of all objections to the procedures. The three basic objections that may be raised are that denying oral argument violates due process and exceeds the authority granted the courts of appeals, and that the procedures have adverse side-effects that may outweigh the benefits derived.

III. OBJECTIONS TO SCREENING AND SUMMARY PROCEDURES

A. *Denial of Due Process*

Even before the Fifth Circuit promulgated its local rules establishing its screening procedures and summary calendar, the court met a constitutional challenge to its power to dispose of an appeal of right without oral argument.¹⁶⁶ In *Groendyke Transport, Inc. v. Davis*,¹⁶⁷ the NLRB moved that the Fifth Circuit summarily reverse an order of the district judge enjoining enforcement of the Board's order that Groendyke, the employer, furnish to a Regional Director a list of all employees in units eligible to participate in an election ordered by the Board.¹⁶⁸ Although it is not clearly indicated in the opinion that the employer raised the due process problem, Chief Judge Brown, probably with his eye on the screening procedures that had been adopted shortly before the opinion was released,¹⁶⁹ took the occasion to lay the groundwork for disposing of any due process objections to those summary procedures.¹⁷⁰ Judge Brown held that in at least two circumstances, both

166. The Board's motion was filed with the Fifth Circuit on October 9, 1968, more than two months before 5TH CIR. R. 17 to 20 were adopted. The employer undoubtedly responded immediately.

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

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

169. 5TH CIR. R. 17 to 20 were adopted on December 24, 1968, and the opinion in *Groendyke* was released in January 2, 1969.

170. The only issue stated in the opinion as raised by the employer was that FED. R. APP. P. 2 did not authorize the court to dispose of the appeal summarily. Rule 2 provides that:

In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

The court easily rejected this contention by noting that the Rule clearly indicates that special cases may be subjected to special handling. 406 F.2d at 1161.

present in *Groendyke*, summary procedures in the courts of appeals are proper: cases in which time, either because of important public policy reasons or possible prejudice to the parties, is truly of the essence; and cases in which the outcome is certain or the appeal is frivolous.¹⁷¹ Recognizing that parties are usually assured a "hearing,"¹⁷² Judge Brown held that written briefs would suffice since "[o]ral argument, as such, is rarely, if ever, so essential to elemental fairness as to orbit to a constitutional apogee."¹⁷³ On the basis of this power to deny oral argument, the court summarily reversed the district court.¹⁷⁴

This decision did not, of course, answer all potential objections to the Fifth Circuit's summary procedures, for, as noted earlier,¹⁷⁵ Class II cases (decided without oral argument) are not solely frivolous or unsubstantial appeals or appeals in which time is of the essence. Thus, in *Huth v. Southern Pacific Co.*,¹⁷⁶ Judge Brown, again writing for the court, suggested that the screening process and the denial of oral argument in particular cases after full consideration of the need for oral argument and the unanimous judicial determination that it was not needed, met the demands of due process.¹⁷⁷ To reach this conclusion, the judge relied almost exclusively on the Supreme Court's opinion in *FCC v. WJR, The Goodwill Station*.¹⁷⁸ In that case the FCC had denied without oral argument a motion by WJR for reconsideration and hearing on the granting by the FCC of a license to another radio station whose signal allegedly would interfere with WJR's present signal and with WJR's signal if clear channel broadcasting were approved by the FCC in the future. On appeal, the District of Columbia Circuit Court held that procedural due process under the fifth amendment required oral argument

on every question of law raised before a judicial or quasi-judicial tribunal, including questions raised by demurrer or as if on demurrer, except such questions of law as may be involved in interlocutory orders

171. *Id.* at 1162.

172. The opinion seems to indicate that a "hearing" is assured by due process. *Id.*

173. *Id.*

174. *Id.*

175. See note 105 *supra* and accompanying text.

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

177. *Id.* at 529-30. The opinion does not suggest that the appellant in *Huth* had suggested to or urged upon the court the constitutional problem.

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

such as orders for the stay of proceedings *pendente lite*, for temporary injunctions and the like.¹⁷⁹

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

Earlier Supreme Court decisions provide little guidance in resolving the question of when oral argument is required. *Londoner v. Denver*,¹⁸⁶ noted in *WJR* as a case holding oral argument necessary to satisfy the due process clause, concerned a Denver City Council ordinance apportioning costs of paving a street among abutting property owners. In the proceedings leading to the enactment of the ordinance, the property owners were given the opportunity to file written complaints and objections, but "were not afforded an opportunity to be heard upon

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

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

181. 337 U.S. at 267.

182. Compare *Londoner v. Denver*, 210 U.S. 373 (1908), with *Morgan v. United States*, 298 U.S. 468 (1936).

183. 337 U.S. at 276 (emphasis added).

184. *Id.* at 277.

185. The basis of the Court's decision was primarily that the issues presented by *WJR*'s application were questions of law, not fact, and Congress had empowered the FCC to dispose of those issues in a manner conducive to the commission's business and the ends of justice, which may or may not require oral argument.

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

them."¹⁸⁷ The Court first observed that in proceedings of this nature many requirements of a strictly judicial proceeding may be dispensed with, but then held that "even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."¹⁸⁸ Because written objections and complaints had apparently been allowed, the decision seems to support the right to oral argument. The Court may have been merely distinguishing, however, between the right to object and the right to argue the objection, and the decision may stand for no more than the proposition that due process requires an argument, either written or oral. But only seven years later in *Bi-Metallic Investment Co. v. State Board of Equalization*,¹⁸⁹ the Court held that in a suit to enjoin state officers from increasing the valuation of all taxable property in Denver by forty percent an individual property owner did not have the right to be heard, even in writing. These two cases may be easily reconciled, at least on the point of whether any hearing must be held, since *Londoner* involved essentially adjudicative facts that differed with each individual landowner's factual situation, but *Bi-Metallic* dealt with a legislative decision—should the valuation be raised across-the-board—that adversely affected all equally.¹⁹⁰

The distinction, however, between legislative, quasi-judicial, or judicial decisions is not easily discernible, as shown by the Supreme Court's decision in *Morgan v. United States*,¹⁹¹ also cited in *WJR*. In *Morgan*, the problem was whether to enforce an order of the Secretary of Agriculture fixing maximum future rates for stockyard services. The Court was also confronted by a long line of precedents holding that establishing future rates was a legislative act and thus no hearing was required.¹⁹² Aware that the determination of the rates depended upon finding facts and making determinations on the basis of those facts, the Court held that a hearing was required, no technical requirements had

187. *Id.* at 385.

188. *Id.* at 386.

189. 239 U.S. 441 (1915).

190. See K. DAVIS, *supra* note 180, at 421; cf. *Fitzgerald v. Hampton*, 467 F.2d 755, 764 (D.C. Cir. 1972): "... the Supreme Court's decisions have consistently distinguished the due process requirements in administrative proceedings of a quasi-judicial character from the due process requirements in proceedings which are purely investigative and fact-finding." Compare *Morgan v. United States*, 304 U.S. 1 (1938), with *Hannah v. Larche*, 363 U.S. 420 (1960).

191. 298 U.S. 468 (1936).

192. See, e.g., *The Assigned Car Cases*, 274 U.S. 564 (1926).

to be met, and that the "argument may be oral or written."¹⁹³

The Supreme Court cases discussed thus far have involved administrative agency denials of oral argument or a hearing, not the right to oral argument in the appellate courts. Although the reasons have not been clearly articulated, no case has ever held that due process requires oral argument before an appellate court. The best evidence that oral argument is not required, at least before the courts of appeals recently began to deny oral argument in selected cases and to write opinions to justify the practice, was the Supreme Court's practice of denying oral argument in some cases.¹⁹⁴ These cases do not discuss the issue, however, and dicta from several criminal cases, although supportive of the denial of oral argument, are not conclusive. For example, in *Price v. Johnston*,¹⁹⁵ the Court was presented with the issue whether the court of appeals had the power to order the production of a prisoner for oral argument of his habeas corpus appeal. The Court noted in passing that oral argument was "not indispensable" and "not an essential ingredient of due process."¹⁹⁶ Other criminal cases go no further than to support the proposition that a frivolous appeal may be summarily dismissed and that all appellate cases, paid or non-paid, civil or criminal, must be handled with an even hand.¹⁹⁷

193. 298 U.S. at 482. The recent decision in *United States v. Florida East Coast Ry.*, 93 S. Ct. 810 (1973), involving the hearing requirement of § 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a), is simply an application of the distinction made between judicial and legislative decisions. The Court held that the ICC acted within its authority in making rules regarding per diem boxcar rates without holding an oral hearing complete with oral testimony, cross-examination, and oral argument. The Court in effect concluded that the case was more like *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), than *Londoner v. Denver*, 210 U.S. 373 (1908).

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

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

196. *Id.* at 280, 286.

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

Surprisingly, no historical basis exists for the contention that due process protects the right to oral argument in appellate courts, although the issue was little discussed until recently. In times when litigation proceeded at a more leisurely pace than it does even today,¹⁹⁸ oral argument was highly valued, extensively used, and was not denied except in rare circumstances. One of the earliest cases discussing the legal implications of a remarkably modern screening procedure was *Schmidt v. Boyle*, decided in 1898.¹⁹⁹ Although dealing with a state constitutional provision, the Nebraska Supreme Court found no conflict between the requirement of an appellate "hearing" and summary affirmance of a case wholly without merit and appealed solely for delay.²⁰⁰ Before the decisions involving screening procedures, the issue had appeared in a civil rights action for deprivation of constitutional rights²⁰¹ and a section 2255 motion for post-conviction relief.²⁰² The denial of oral argument in both situations was not found to be a violation of any constitutional right. Finally, in addition to the Fifth Circuit in the opinions by Chief Judge Brown discussed earlier, other circuit courts have considered the due process problem in screening procedures and have concluded that oral argument is discretionary.²⁰³

Although the decisions appear confusing, the older cases may be grouped into a fairly coherent pattern to determine when oral argument is necessary. The initial issue is whether any type of hearing is required. Evidently no case has ever held that due process requires a hearing of any kind for rule-making if adjudicative facts are not in dispute.²⁰⁴ But a

198. Daniel Webster argued the Dartmouth College case before the Supreme Court for two days. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 551 (1819). Cf. Bell, *supra* note 2, at 237.

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

200. The basis of decision was that the guarantee of a "hearing" in the state supreme court did not assure an oral presentation, but only consideration of the briefs.

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

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

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

204. *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915);

hearing, at least on written argument, is required if the rule-making or judicial decision involves a trial-type hearing for the resolution of disputed adjudicative facts²⁰⁵ or if deprivation of an interest protected by the fifth or fourteenth amendment is involved.²⁰⁶ Written submission will suffice if the issue is purely a question of law.²⁰⁷ The recent case of *Goldberg v. Kelly*²⁰⁸ suggests that whether oral argument is also required will be determined by the nature of the proceedings, the parties involved, the probable efficacy of written arguments only, the existence of factual problems, and the probability that the parties will be represented by counsel.²⁰⁹ These distinctions reconcile the positions taken

Sun Oil Co. v. FPC, 256 F.2d 233 (5th Cir.), *cert. denied*, 358 U.S. 872 (1958); K. DAVIS, *supra* note 180, at 436.

205. *Morgan v. United States*, 298 U.S. 468 (1936); *cf. Gonzales v. United States*, 364 U.S. 59 (1960); *Connecticut State Dep't of Pub. Welf. v. HEW*, 448 F.2d 209 (2d Cir. 1971). *Contra*, *ABC v. FCC*, 179 F.2d 437 (D.C. Cir. 1949), *criticized in* K. DAVIS, *supra* note 180, at 435-36 n.16.

206. *Board of Regents v. Roth*, 408 U.S. 564, 570 n.7 (1972); *Fuentes v. Shevin*, 407 U.S. 67, 84 (1972). Or as said by Justice Brennan, "The right to be heard in some way at some time extends to all proceedings entertained by courts." *Boddie v. Connecticut*, 401 U.S. 371, 386, 387-88 (1971) (concurring opinion).

207. *FCC v. WJR, The Goodwill Station*, 337 U.S. 265 (1949); *NLRB v. Sun Drug Co.*, 359 F.2d 408, 415 (3d Cir. 1966); *Virginia Elec. & Power Co. v. FPC*, 351 F.2d 408, 410 (4th Cir. 1965); *Pan Am. Petroleum Corp. v. FPC*, 322 F.2d 999, 1004-05 (D.C. Cir. 1963); *Mississippi River Fuel Corp. v. FPC*, 281 F.2d 919, 927 (D.C. Cir. 1960) (Burger, J.), *cert. denied*, 365 U.S. 827 (1961); *Dyestuffs & Chemicals, Inc. v. Flemming*, 279 F.2d 281, 287 (8th Cir. 1959), *cert. denied*, 362 U.S. 911 (1960); *Sun Oil Co. v. FPC*, 256 F.2d 233, 240-41 (5th Cir. 1958).

208. 397 U.S. 254 (1970). The issue in *Goldberg* was whether procedural due process required that a state provide an opportunity for an evidentiary hearing to a welfare recipient before termination of those benefits. In holding that the opportunity must be provided the Court also required "an effective opportunity [for the recipient] to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Id.* at 268.

209. *See Cogan v. Schnyler*, 464 F.2d 747 (D.C. Cir. 1972); *cf. Richardson v. Perales*, 402 U.S. 389 (1971). *See also Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (emphasis in original): "[T]he Court has held that due process tolerates variances in the form of a hearing 'appropriate to the nature of the case'"

The Court in *Goldberg* apparently recognized the possible overbroad implications of requiring oral argument in light of *FCC v. WJR* by noting that the case before it "presents no question requiring our determination whether due process requires only an opportunity for written submission or an opportunity both for written submission and oral argument, where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues." 397 U.S. at 268 n.15.

The failure to make the distinction between oral and written argument leads to decisions that leave the parties unclear as to what will be required at the hearing. *See Mothers' & Children's Rights Org. v. Sterrett*, 467 F.2d 797 (7th Cir. 1972) ("argument" on point of law required).

by the Supreme Court in *Londoner* and *Goldberg*, in which the Court required an opportunity for oral argument, with *Morgan*, in which written submission was deemed sufficient. Both *Londoner* and *Goldberg* involved individual litigation with a governmental agency involving small monetary claims that would neither justify retaining counsel nor, in the case of welfare recipients, be within the reasonable financial abilities of the parties and involving parties whose oral skills would usually exceed their written ones.²¹⁰ But in *Morgan*, a large-scale dispute between stockyard brokers and the federal government, it was reasonable to expect that each party was well-represented by counsel and that counsel's written arguments would probably equal his oral skills.

Although the cases discussed thus far may be construed as dispositive of any right to oral argument on appeal, the judicial analysis on the more precise issue of what type of "hearing" is required in the appellate courts has probably proceeded on a different theory and a now discredited premise. The latest suggestions from the Supreme Court that oral argument may not be part of due process on appeal are *Price v. Johnston*,²¹¹ decided in 1948, and *FCC v. WJR*,²¹² decided in 1949. At that time in developing notions of what is required by due process and what that process protects, two distinct, but for our purposes related, doctrines were controlling. The first and still viable proposition is that due process does not guarantee an appeal from a final judgment of the trial court.²¹³ The second, but now discredited, proposition was that due process protected "rights" not "privileges."²¹⁴ Given these two premises, the courts may have reasoned that since the entire appellate process was nothing more than a "privilege" or "act of grace" granted a litigant by the sovereign, the litigant had no right to insist

210. Cf. *Merritt v. Village of Portchester*, 8 Hun. 40 (N.Y. 1876); *State ex rel. Arnold v. Milwaukee*, 157 Wis. 505, 147 N.W. 50 (1914). But see *Erie R. Co. v. Mayor & Aldermen of City of Paterson*, 79 N.J.L. 512, 76 A. 1065 (1910) (railroad entitled to written and oral objections).

211. 334 U.S. 266 (1948).

212. 337 U.S. 265 (1949).

213. See, e.g., *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 43 (1954); *Andrews v. Swartz*, 156 U.S. 272, 275 (1895) (Harlan, J.). The suggestion in *Fins*, *Is the Right of Appeal Protected by the Fourteenth Amendment?*, 54 J. AM. JUD. SOC'Y 296 (1971), that the right is so protected is persuasive only as an equal protection argument. Mr. Fins does not seem to suggest that the state and federal courts could not abolish appeals entirely.

214. Compare *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 918 (1951), with *Board of Regents v. Roth*, 408 U.S. 564 (1972).

upon a particular form of process on appeal.²¹⁵ But the proper test of the protective scope of due process now appears to be whether the individual will be "condemned to suffer grievous loss" of an interest protected by the fifth or fourteenth amendment.²¹⁶ Recent decisions of the Supreme Court make it quite clear, for example, that if one claims his eligibility to retain benefits conferred upon a defined class of which he is allegedly a member, then he has a right to a hearing to determine his eligibility.²¹⁷ Thus it is no longer relevant that a litigant does not have a constitutional right to appeal and that the existence of an available appellate forum is simply a privilege granted by the sovereign. Since the federal government has granted its litigants, civil and criminal alike, an almost unlimited right to appeal, which until recently included an opportunity for oral argument for a reasonable time, may it thus be argued that before the courts of appeals can deny oral argument they must provide notice and a hearing on that issue before the final decision? Perhaps the Fifth Circuit had this problem in mind when Judge Bell noted that all litigants assigned to the summary calendar were notified of that fact and given an opportunity to object.²¹⁸

Several considerations seem to militate against a conclusion that notice and hearing are required. First, due process protects liberty and property. Although these concepts are broad and ill-defined, it is difficult to argue that oral argument on appeal is a liberty or property interest to which a litigant may show himself to be entitled. To be sure, by oral argument a litigant is usually seeking to protect a liberty or property interest that is the subject matter of the litigation, but oral argument itself is not that interest. Secondly, the rules of the courts of appeals create for all litigants appealing to that court after the promulgation of the rules only a mere expectancy that oral argument may be granted, but no interest in it or legitimate claim to it.²¹⁹

215. *Cf.* Luckenbach S.S. Co. v. United States, 272 U.S. 533, 536 (1926); *Hovey v. Elliott*, 167 U.S. 409, 443 (1897).

216. *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972); *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972), quoting from *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

217. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *cf.* *Richardson v. Perales*, 402 U.S. 389, 406-07 (1971).

218. *Bell*, *supra* note 46, at 241. Chief Judge Brown in his statement to the Senate Subcommittee on Improvements in Judicial Machinery further confirms that the Fifth Circuit feared that notice and a hearing had to be provided before oral argument could be denied. *S.J. Res. 122 Hearing* 104.

219. *Cf.* *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (untenured professor did not have a sufficient "property interest" in being rehired to require hearing).

Even if this analysis is incorrect, and a protected interest in the right to appeal and oral argument is created by federal statute, this does not guarantee a litigant an absolute right to an oral hearing. The form that due process may take is very flexible,²²⁰ and it seems that the procedures established by the courts, which give each litigant whose case is assigned to the summary calendar the right to object to that classification, would be sufficient to satisfy the demands of due process. If due process applies, however, it would probably be incumbent upon the courts of appeals to establish guidelines for Class II type cases and to give some reason why the case is being assigned to the summary calendar.²²¹ This slight adjustment would not seem to work any great difficulty on the court and would assure litigants that a valid reason exists for the denial of oral argument in his particular case.

Although the Supreme Court has not yet reviewed a case challenging screening procedures in the courts of appeals, if it ever decides the issue it will probably hold that oral argument on appeal is not so essential to a just determination of the case that it should become an ingredient of procedural due process.²²² This is as it should be. The problems of the lower federal courts are of a nature that do not allow easy solution, and the first few years of experimentation is not the time for the Court to cast a requirement of oral argument in every case in a rigid constitutional mold. The constitutional right to due process of law, which involves the right to be heard, is satisfied by assuring parties the right to full and fair hearings, including oral argument in most instances, at the initial stage of the proceedings.²²³ Due process only requires one hear-

220. *See id.* at 570; *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972).

221. *Cf. Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926), *discussed in Board of Regents v. Roth*, 408 U.S. 564, 576 n.15 (1972). *See also Hornsby v. Allen*, 326 F.2d 605, 610 (5th Cir. 1964).

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

223. Under Federal Rule of Civil Procedure 78, the district courts "may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition." The district courts thus dispose regularly of motions presenting questions of law without oral argument. *See Morrow v. Topping*, 437 F.2d 1155 (9th Cir. 1971); *Goodpasture*

ing, not two.²²⁴ Also, appellate hearings primarily involve only questions of law. The necessity for a party to mold his contentions and testimony as the issues develop is not present as it is in the court of first instance. Thus, until more is known of screening and summary procedures and their effects on appellate decisions, the courts should be free from constitutional restraints to make the judicial determination that

v. TVA, 434 F.2d 760 (6th Cir. 1970); *United States Fid. & Guar. Co. v. Lawrenson*, 334 F.2d 464 (4th Cir.), *cert. denied*, 379 U.S. 869 (1964); *Sarelas v. Porikos*, 320 F.2d 827 (7th Cir. 1963), *cert. denied*, 375 U.S. 985 (1964); *Skolnick v. Martin*, 317 F.2d 855 (7th Cir.), *cert. denied*, 375 U.S. 908 (1963). But the Ninth Circuit has held that this discretion should not be quite as unbridled as Rule 78 would suggest. In *Dredge Corp. v. Penny*, 338 F.2d 456 (9th Cir. 1964), the court held that Federal Rules of Civil Procedure 56(c) (suggesting a hearing), 78 and 83 (local rules must not be inconsistent with federal rules), read together, authorized the district court to provide by rule that a party must request oral argument, if desired, on a motion for summary judgment or oral argument would be waived, but that a request, if made by a party opposing the motion, had to be granted unless the motion for summary judgment was denied. *Id.* at 462. The court declined to decide whether its holding was required by due process, but did not disclaim it as a basis. *Id.* at 462 n.14. Although the court noted that due process does not require oral argument on questions of law, the court seemed to imply that a motion for summary judgment was not strictly a question of law. Clearly the test for when summary judgment should be granted is a question of law, and well settled, *see* FED. R. CIV. P. 56(c), but perhaps that issue is so mixed with the facts that at the trial court level the traditional values of oral argument should be preserved to collate the facts for the judge. *Cf. Goldberg v. Kelly*, 397 U.S. 254, 268 n.15 (1970). *See also* *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970). The result reached by the Ninth Circuit in *Dredge Corp. v. Penny* was rejected by the Eighth Circuit in *Parish v. Howard*, 459 F.2d 616 (8th Cir. 1972). In that case the court held that, despite requests by both parties for oral argument on a motion for summary judgment, the trial court did not commit reversible error in denying the requests. The court stressed that the facts were relatively uncomplicated and the legal arguments of the parties were adequately set forth in memoranda of law. The court also relied on the district court's local rule, which required the parties to show cause why oral argument should be allowed. *See* N.D. IOWA R. 19. The appellate court then found that no cause was shown. It is submitted that only rarely can a litigant state objectively why oral argument is necessary in a particular case and that a requirement to show cause is unreasonable. The Eighth Circuit's decision also raises the specter of an entire lawsuit being litigated from complaint to Supreme Court decision with the lawyers never meeting each other or a judge. On the merits of the split between the Eighth and Ninth Circuits, the Eighth Circuit's decision may be further supported by the use in Rule 78 of the phrase "oral hearing." Obviously the drafters of the Rules knew when to distinguish between hearings that required oral argument and those that required only written submission, but failed to make that distinction in Rule 56(c). Perhaps a hard and fast rule on oral argument would be unwise, with the determination left to the discretion of the trial judge to be exercised on the basis of the facts of the individual case.

224. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

oral argument may be eliminated in a particular case.²²⁵ If in the future it is shown that screening and summary procedures produce undesirable effects not apparent or certain at this time, court rules, not the Constitution, can and should be adjusted to take those new factors into account.²²⁶

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

Two paragraphs of section 46 of the Judicial Code²²⁷ refer to the composition of the courts of appeals as they normally decide cases. Under section 46(b): "In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs." In the next paragraph, section 46(c) directs that "[c]ases and controversies shall be heard and determined by a court or division of not more than three judges. . . ." The critical words are "hearing and determination" and "hear" in section 46(b) and "heard and determined" in section 46(c).

The contention could be, and indeed has been, made that these provisions require the courts of appeals literally to "hear" the oral arguments of counsel.²²⁸ The statutory history of section 46 and earlier in-

225. Professor Carrington has suggested that a determination to dispense with oral argument made by anyone other than the judges themselves might involve an unconstitutional delegation of authority. See Carrington, *supra* note 2, at 573.

226. Perhaps one further word should be added about constitutional problems with denying oral argument before the statutory problems are considered. As noted earlier, *see* note 110 *supra* and accompanying text, the Fifth Circuit assigns all cases equally and randomly to its standing panels. If the case is placed on the summary calendar, both parties are denied oral argument. Even if this plan was in part designed to avoid charges of favoritism or "stacking" the panel for a certain type of case, the procedure may be in part constitutionally required. Language in several Supreme Court decisions suggests that pauper criminal cases cannot be screened on a different basis than paid cases, *Coppedge v. United States*, 369 U.S. 438, 448 (1962), and the most elemental notions of fair hearing prevent a court from granting argument to one side, but not the other. *See Price v. Johnston*, 334 U.S. 266, 280 (1948). *Cf. Paccione v. Heritage*, 371 U.S. 17 (1962); *Elchuk v. United States*, 370 U.S. 722 (1962). *But see McDowell v. United States*, 336 F.2d 435 (6th Cir. 1964), *cert. denied*, 379 U.S. 980 (1965). These concepts would surely extend to any attempt by the courts to handle criminal appeals that present a substantial question for review in any significantly different manner than civil appeals.

227. 28 U.S.C. § 46 (1970).

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

interpretations of the meanings of these basic phrases do not support that interpretation of either section 46(b) or (c).

Section 46, as enacted in 1948 as part of the general revision of the Judicial Code, was, according to the Reviser's Notes, derived in part from section 117 of the Judicial Code of 1911.²²⁹ An inspection of section 117 reveals that section 46 of the 1948 Code bears little resemblance to its predecessor, which does little more than establish the circuit courts of appeals with three judges to a court.²³⁰ In neither that earlier section nor any other section of the 1911 Act was any reference made to any discretion or duty to hear or determine any appeals. But the report of Senator Wiley from the Committee on the Judiciary, in explaining the need for the 1948 codification and the reasons for certain changes, stated that "many noncontroversial improvements have been effected which, while individually small in themselves, add up to a very substantial improvement in and modernization of the law relating to the Federal judiciary. At the same time great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval."²³¹ Had, however, a substantial change been incorporated into the Act through the addition of the phrases quoted above? Probably not.

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

229. Reviser's Notes to 28 U.S.C. § 46 (1970); H.R. REP. NO. 308, 80th Cong., 1st Sess. (1947).

230. Act of March 3, 1911, c. 231, § 117, 36 Stat. 1131:

There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, with appellate jurisdiction as hereinafter limited and established.

231. S. REP. NO. 1559, 80th Cong., 2d Sess. 2 (1948).

232. Reviser's Notes to 28 U.S.C. § 46 (1970).

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

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

had been unanimous in its determination that all five judges (the court en banc) "were authorized to *hear and decide* the case."²³⁵ Secondly, the Justice said that it could not be inferred from section 117 that "the provision for three judges is a limitation only on the number who may *hear and decide* a case."²³⁶ Thus, it seems likely that Douglas's opinion was the source of the new language in the revised section 46.

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

The "heard and determined" clause on which the Court relies appears in a sentence whose purposes were simply to codify the doctrine that a Court of Appeals had power to sit en banc, *Textile Mills Corp. v. Commissioner*, 314 U.S. 326, while making clear that the usual procedure was to be decision by a three-judge panel. It is not an unknown phenomenon in federal adjudication that a case, though heard by less than the entire tribunal, may be decided according to the majority vote of all. Cf. I.R.C. § 7460; see 2 Casey, *Federal Tax Practice*, 274-280. The traditional term, "heard and determined," in my view was designed to do no more than reflect the obvious inappropriateness of such a procedure to the deliberations of the Court of Appeals²³⁸

The genesis of Justice Douglas's phrase "hear and decide" may be traced directly to the opinion of the Third Circuit in *Textile Mills*. There the court reprinted its relevant local rules, which used the phrases "heard and decided" and "heard and determined."²³⁹ In the text of the

235. 314 U.S. at 327 (emphasis added) (footnote omitted).

236. *Id.* at 332 (emphasis added).

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

238. *Id.* at 692 (footnote omitted). Under INT. REV. CODE OF 1954, § 7460, the decisions of that court are made by divisions whose decisions become the opinion of the Tax Court unless within thirty days of the panel's decision the Chief Judge directs that it be reviewed by the entire court.

The decision in *American-Foreign*, that cases could be heard and determined en banc by a court of appeals consisting only of judges in active service, occasioned the 1963 amendment to § 46(c) to provide that senior circuit judges were competent to sit as a member of the en banc court if he participated in the original hearing of the case. Act of Nov. 13, 1963, Pub. L. No. 88-176, 77 Stat. 331.

239. *Commissioner v. Textile Mills Sec. Corp.*, 117 F.2d 62, 67 n.4 (3d Cir. 1940). 3D CIR. R. 5, in pertinent part, provided that:

2. Cases to Be Heard by Judges So Assigned. All matters pending in the court, except further proceedings in appeals and petitions previously heard on the merits and matters directed to be heard by the court en banc, shall be heard and decided by the judges who have thus been assigned to sit in the court at the time of hearing, if practicable.

opinion of the court the term "hear and decide" was used in connection with a discussion of a possible construction of section 117 of the Judicial Code. But nowhere in either the Supreme Court's or Third Circuit's opinion is any indication given of the content and scope of what Justice Harlan referred to as a "traditional term."²⁴⁰

The roots of the phrase "hear and determine" are deep in English legal history. The phrase evidently derives from the English commission of Oyer and Terminer, which translated literally means "to hear and determine." The first mention of the commission in the English statutes was in a 1285 act limiting the use of the commission.²⁴¹ The phrase was also contained in the commission of Trailbaston (1304), which was a general commission to hear and determine certain crimes and trespasses.²⁴² It also appeared in a 1344 statute authorizing the established justices of the peace to hear and determine felonies and trespasses done against the peace.²⁴³ Blackstone, in discussing the courts with criminal jurisdiction,²⁴⁴ mentions the local courts of Oyer and Terminer whose judges sat at the assizes by virtue of the commission of Oyer and Terminer, which directed the judges "to enquire, hear, and determine" all treasons, felonies, and misdemeanors.²⁴⁵ Thus, it may be seen that the earliest uses of the phrase were in connection with trial court

3. Exception. Further proceedings in appeals and petitions previously heard on the merits, except petitions for rehearing, shall be heard and determined by the judges who heard the original appeal or petition, if practicable, and may be heard at any time when the court is not otherwise in session

240. See note 238 *supra* and accompanying text.

241. 1 J. STEPHEN, *THE HISTORY OF THE CRIMINAL LAW OF ENGLAND* 106 (1883). The critical words of the statute are "audiendum & terminandum." Statute of Westminster, 13 Edw. 1, c. 29 (1285).

242. 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 273 (7th ed. 1966).

243. Justice of the Peace Act, 18 Edw. 3, c. 2 (1344). The translated statute in full provided that:

Item, that two or three of the best of reputation in the counties shall be assigned keepers of the peace by the King's commission, and at what time need shall be, the same, with other wise and learned in the law, shall be assigned by the King's commission to hear and determine [doier and terminer] felonies and trespasses done against the peace in the same counties, and to inflict punishment reasonably according to law and reason, and the manner of the deed.

The justices of the peace had first been provided for by the Justice of the Peace Act, 1 Edw. 3, s. 2, c. 16 (1327), which entrusted them with preserving the peace. In 1361, the powers of the justices were expanded, and they acquired their present titles at about that time. See Justice of the Peace Act, 34 Edw. 3, c. 1 (1361); 1 W. HOLDSWORTH, *supra* note 242, at 288.

244. 4 W. BLACKSTONE, *COMMENTARIES* *255 *et seq.*

245. *Id.* at *266-67. Holdsworth quotes the words of the writ as "eaque omnia audiendum et terminandum." 1 W. HOLDSWORTH, *supra* note 242, at 274.

proceedings, where one would expect most of the proceedings to be oral.²⁴⁶ But the obvious use of the phrase was to grant power to the judges of the early English courts, not to distinguish between oral and written proceedings. Probably because of continued heavy reliance on oral argument,²⁴⁷ English precedents construing the exact meaning of the traditional term are not plentiful. Those authorities, however, support a narrow interpretation of "hear and determine" that requires only briefs and not an oral argument before a reviewing tribunal.²⁴⁸

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

246. 3 W. BLACKSTONE, COMMENTARIES *293; H. STEPHEN, THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 149 (Tyler ed. 1882).

247. D. KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND 93 (1963).

248. See *Local Gov't Bd. v. Arlidge*, [1915] A.C. 120 (1914), holding that the petitioner, who argued that the Board had not heard and determined his appeal, had no right to oral argument before an appeal board if he had had a full hearing in the fact-finding tribunal. *Accord*, *The King v. Tribunal of Appeal Under the Housing Act*, [1920] 3 K.B. 334 (oral hearing not required before administrative board).

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

250. *NLRB v. Local 1212, Electrical Workers*, 364 U.S. 573, 579 (1961); *Sandahl v. Des Moines*, 227 Iowa 1310, 290 N.W. 697 (1940); *Applegate v. Portland*, 53 Ore. 552, 99 P. 890 (1909); *Commonwealth v. Simpson*, 2 Grant 438 (Pa. 1854).

251. *State ex rel. Arnold v. Milwaukee*, 157 Wis. 505, 147 N.W. 50 (1914). The cases cited in the court's opinion in *Arnold* in support of the assertion that oral argument is required by the word "hearing" simply do not so hold. For example, one case so cited, *Miller v. Tobin*, 18 F. 609 (C.C.D. Ore. 1883), said only that "hearing" refers to "argument and consideration of a case. . . ." *Id.* at 616. The court made no distinction between written and oral "argument."

mean with the ears.²⁵²

These interpretations of the traditional terms used in section 46 support the Supreme Court's view of the meaning and intent of the drafters of that section. In *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*,²⁵³ the Court dealt with an assertion that a litigant was granted the right by section 46(c) to have an application for hearing or rehearing en banc determined by all the members of the court of appeals. In rejecting this contention, the Court stated that ". . . § 46 (c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power."²⁵⁴ This language is consistent with one legislative purpose in codifying the Court's earlier decision in *Textile Mills*,²⁵⁵ that the circuit courts had the power to sit en banc. The other legislative purpose behind section 46 was to continue the tradition of the three-judge appellate court,²⁵⁶ and section 46(b) authorizes "hearing and determination" by divisions. Arguably, this section should be read consistently with section 46(c) as only a grant of power to a three-judge panel, not as a regulation of the manner that the panels, in their discretion, exercise that power.²⁵⁷

These constructions of section 46 would undoubtedly leave the determination regarding oral argument, at least under that section, to the individual courts of appeals, in much the same manner as the Supreme Court left the determination of the meaning of the word "majority" in section 46(c) to the individual courts of appeals.²⁵⁸ To have done

252. *Southern Garment Mfg. Ass'n v. Fleming*, 122 F.2d 622 (D.C. Cir. 1941); *International Banding Mach. Co. v. Commissioner*, 37 F.2d 660 (2d Cir. 1930); *Miller v. Tobin*, 18 F. 609 (C.C.D. Ore. 1883); *Jergens v. Gallop*, 40 So. 2d 775 (Fla. 1949); *Ohio v. Orris*, 26 Ohio App. 2d 87, 269 N.E.2d 623 (1971).

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

254. *Id.* at 250.

255. See Revisers' Notes to 28 U.S.C. § 46 (1970). The Court also noted that, since § 46(c) was a grant of power and nothing more, the courts of appeals had wide discretion in exercising that power. 345 U.S. at 259.

256. Revisers' Notes to 28 U.S.C. § 46 (1970).

257. See *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1309-10 (2d Cir. 1971), where the court, although dealing with the word "heard" in § 46(c), found no statutory or constitutional barrier to deciding cases en banc on the written briefs only. The court did, however, note that whether the original "hearing" required oral argument was not at issue, and the court expressly disclaimed any inference that it was holding that oral argument was not required at that stage of the appellate proceedings. *Id.* at 1310 n.10.

258. *Shenker v. Baltimore & O.R.R.*, 374 U.S. 1 (1963). In that case the Court deferred to the rules of the Third Circuit that required an affirmative vote of an absolute Washington University Open Scholarship

otherwise, said the Court, would have involved the Court unnecessarily in the "internal administration of the Courts of Appeals."²⁵⁰ In any further construction of the meaning of the language of section 46 the Court will probably permit each circuit to interpret whether "hear and determine" requires an oral presentation.

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

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

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

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

majority of active judges to set a case for decision en banc. See also *FED. R. APP. P.* 35(a).

259. 374 U.S. at 5. See also, for a non-technical view of "hearing" in the last sentence of § 46(c), *Allen v. Johnson*, 391 F.2d 527 (5th Cir. 1968) (en banc), which did not require a decision on the merits by a panel containing one senior circuit judge for that judge to be eligible to rehear the case en banc with the active judges.

260. A hint of this argument may be found in the Petition for Certiorari filed in *Moveable Offshore, Inc. v. Hall*, 455 F.2d 633 (5th Cir.), cert. denied, 409 U.S. 850 (1972), in which the discretion of the Fifth Circuit to decide a case summarily is alleged to have been abused. Petitioner's Brief for Certiorari at 9. The same assertion could as easily be made under 28 U.S.C. § 46 (1970).

261. *FED. R. APP. P.* 47.

262. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Federal Rules of Appellate Procedure*, 43 F.R.D. 61, 152 (1963).

The criterion used by the courts of appeals, as stated in all local rules giving the circuits the power to dispose of cases without oral argument, is that oral argument would not be of assistance to the court.²⁶³ The Ninth Circuit, in adopting its rules governing screening procedures, evidently appreciated the problem presented, and although not addressing it directly or at length, strongly suggested that a judicial determination that oral argument would not be helpful to the court and was not essential to a fair hearing was sufficient designation of a "class of cases" to pass muster under Rule 34.²⁶⁴

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

The rule, as enacted, provides a much narrower range for the individual circuit's discretion, in that any change in the thirty minute time limit must be either "for all cases or for classes of cases."²⁶⁸ When the phrase "classes of cases" was introduced in Rule 34, it was also introduced into Rule 30, which deals with the appendix to the briefs. Rule 30(f) provides that "a court of appeals may by rule applicable to all cases, or to *classes of cases*, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require."²⁶⁹ This provision was purportedly inserted at

263. See notes 51-57 *supra*.

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

265. See notes 51-57 *supra*.

266. See 34 F.R.D. 263, 309 (1964).

267. *Id.* at 310.

268. FED. R. APP. P. 34(b).

269. FED. R. APP. P. 30(f) (emphasis added).

the insistence of the bench and bar of the Ninth Circuit, who wanted to retain the use of unprinted records.²⁷⁰ Thus, the Ninth Circuit local rule now provides for appeals on the original and two copies of the record.²⁷¹ Clearly this rule is within the "all cases" provision of Rule 30. But what of rules not applicable to all cases? The Reporter for the Advisory Committee on Amendments to Rules noted in connection with Rule 30 that the courts "may adopt this practice [under Rule 30(f)] for all cases, for particular descriptions of cases (e.g., criminal cases; cases in which the record is relatively brief), or by order in any case."²⁷² Pursuant to this grant, several circuits have dispensed with the appendix in "classes of cases" such as appeals under the Criminal Justice Act, appeals in forma pauperis, appeals under section 2255, and social security appeals.²⁷³ The probable intent of the Advisory Committee was that the "classes of cases" established under Rule 34 would be similar to those contemplated by Rule 30. If this is true, then the drafters of Rule 34(b) probably had in mind a "class of cases" determined by the type of case involved, not by whether the case was thought by the court not to need oral argument.²⁷⁴ Thus, none of the local rules authorizing the courts to deny oral argument properly defines a class of cases and all are invalid under Rule 47.

Even if the introductory phrase in Rule 34(b) is not construed as disabling the courts of appeals from establishing classes of cases on the present nebulous basis, the only reasonable interpretation that can be given Rule 34, in light of the conditions existing in the courts of appeals at the time of the initial draft, is that the drafters thought that thirty minutes was enough time for each side, but if a particular circuit wanted to continue the former practice of allowing forty-five minutes

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

271. 9TH CIR. R. 4.

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

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

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

or more to a side, then that determination should be made by the individual circuits. This interpretation accords with the Advisory Committee's Notes indicating that the "spirit of the rule [is] that a reasonable time should be allowed for argument."²⁷⁵

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

D. *Do Screening Procedures Affect the Result on Appeal?*

We have been warned to be "wary of reforms that are attractive in terms of saving time but have unnoticed substantive effects."²⁷⁷ The results of the Chicago Jury Project, showing that the bifurcation of a trial into separate liability and damage hearings increased the chances of success for the defendant, might contain a warning about screening and summary procedures in the courts of appeals.²⁷⁸ One might suspect that the denial of oral argument and deciding cases without a written opinion has some relation to the outcome of appeals in the Fifth Circuit. More particularly, screening and summary procedures might in-

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

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

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

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

crease the proportion of affirmances to total caseload.

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

Thus, the contention is that a relationship exists between the condition of the screening procedures restricting the use of oral argument in the Fifth Circuit and the condition of having the decision of the lower tribunal affirmed. That the relation might exist between these two conditions does *not* necessarily mean that one condition is the cause of the other. If one condition were the cause of the other, the test would not be able to determine which was the cause and which was the effect. For example, it is frequently conjectured that a relation exists in the population of the United States between the condition of being a tobacco smoker and the condition of having lung cancer. This proposed

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

280. See E. SPITZNAGEL, *supra* note 279, at 217.

281. A significance level of .05 is a popular one, the other level commonly used being .01. The level .05 is the less conservative of the two, but guards against rejecting a null hypothesis that is actually true. E. SPITZNAGEL, *supra* note 279, at 208. That level means that a rejection of a true null hypothesis could occur less than five times in 100. See Nagel, *supra* note 279, at 373.

282. E. SPITZNAGEL, *supra* note 279, at 213.

relation is statistical in nature; not every tobacco smoker has lung cancer, nor is every person with lung cancer a tobacco smoker. But from the mass of statistical data available, it has been possible to reject the null hypothesis (that tobacco smoking and lung cancer are unrelated) and conclude that there is a relation between the two conditions.²⁸³

Once the null hypothesis is formulated, the next step in the test is to set up contingency tables.²⁸⁴ Such tables were computed for four classifications of cases: criminal; United States civil; private civil; and total cases affirmed or reversed. Criminal cases were chosen because of the possible constitutional problems if the predicated relationship were supported. Because of the large number of civil cases, they were chosen to increase the accuracy of the test. The total case classification was chosen to determine if the relationship of the parts held true for the relationship to the whole. All boxes in Table VII labeled A and B are cases decided in the period 1965-68.²⁸⁵ All boxes labeled C and D indicate cases decided in 1970 and 1971.²⁸⁶ Boxes A and C indicate cases affirmed; Boxes B and D indicate cases reversed. 1969 was omitted since screening procedures were instituted in the middle of that fiscal year.²⁸⁷

TABLE VII
FIFTH CIRCUIT CONTINGENCY TABLES

	Aff'd	Rev'd	
CRIMINAL	A 451	B 113	Before 1969
	C 569	D 113	After 1969
PRIVATE CIVIL	A 971	B 423	Before 1969
	C 1056	D 390	After 1969

283. *Id.* at 217-18.

284. W. DIXON & F. MASSEY, *supra* note 279, at 241.

285. 1968 ANNUAL REPORT 175, Table B1; 1967 ANNUAL REPORT 182, Table B1; 1966 ANNUAL REPORT 151, Table B1; 1965 ANNUAL REPORT 159, Table B1.

286. 1971 ANNUAL REPORT 243, Table B1; 1970 ANNUAL REPORT 211, Table B1.

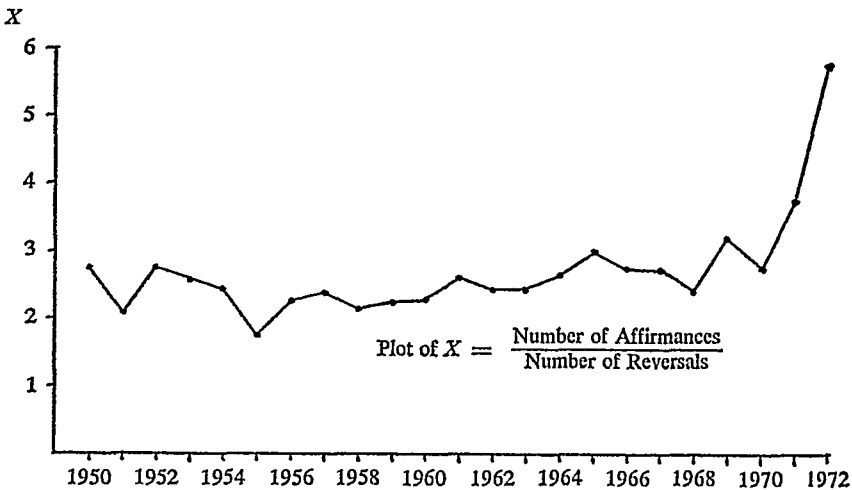
287. *See* note 104 *supra* and accompanying text.

U.S. CIVIL	A 445	B 200	Before 1969
	C 406	D 157	After 1969
TOTAL	A 2207	B 819	Before 1969
	C 2317	D 709	After 1969

On the face of the tables it may be seen that the predicted positive relationship exists among the sample groups; cases decided after screening procedures were instituted have a higher proportion of affirmances than do those cases decided before the procedures were implemented.²⁸⁸ This relationship is most apparent in the criminal cases since the number of reversals was exactly the same, although the number of affirmances had increased from 451 to 569.

The third step of the test is to determine if the difference in proportion²⁸⁹ could have occurred by chance if the predicted relation between

288. The same relationship is portrayed by the following graph, showing the relation of affirmances to reversals for 1950-1972 in the Fifth Circuit. All figures used in computing the graph were taken from the Annual Report for the respective years, Table B1.



289. That is, that B/A ($\frac{113}{451}$ in criminal cases) is larger than D/C ($\frac{113}{569}$).

screening and affirmances does *not* in fact exist. This determination was reached by computing a test statistic X^2 . The formula is:

$$X^2 = \frac{N(BC-AD)^2}{(A+B)(C+D)(A+C)(B+D)}$$

where $N = A+B+C+D$.²⁹⁰

The smaller X^2 is, the truer the null hypothesis; the larger X^2 is, the more support for the theory, the less support for the null.²⁹¹ Since the chosen significance level was .05, the null hypothesis could be rejected when X^2 was equal to or greater than 3.84.²⁹²

Computations using Table VII and the formula stated above show X^2 to be as follows:

- (1) Criminal: 2.498
- (2) U.S. Civil: 1.407
- (3) Private Civil: 3.953
- (4) Total Cases: 10.593

Thus for private civil cases and for total cases the theory that a relationship exists between the condition of the screening procedure restricting the use of oral argument and the condition of having a lower court decision affirmed is supported. Although X^2 for United States civil and criminal cases was not significant enough to reject the null hypothesis, this may be a result of the small sample size in both groups, not because the null hypothesis is true. This analysis is supported by the apparent proportional relations indicated by the contingency tables and the extremely significant value of X^2 for total cases. Also, it should be noted that the size of the sample for both United States civil and criminal cases is almost identical. Since the value of X^2 for total cases means that the chances are only 2 out of 1000 that the indicated relationship between screening procedures and affirmances arose by chance, the significance of that value becomes readily apparent.²⁹³

290. Cf. W. DIXON & F. MASSEY, *supra* note 279, at 242.

291. *Id.* at 241.

292. 3.84 is simply a number derived from a standard mathematics table showing the probabilities of obtaining values of X^2 . For a value of 3.84, the probability is .05, the chosen significant level.

293. Cf. E. SPITZNAGEL, *supra* note 279, at 310-11, Table A. One explanation for the existence of the predicted relationship that is not negated by the test is the existence of a significant increase in the circuit caseload so great that the proportion of meritorious appeals decreased, thus increasing the number of Class I and II cases and the number of affirmances within those classes. The possibility is strengthened by the actual figures, demonstrated by the following graph, which show that in the Fifth Circuit the

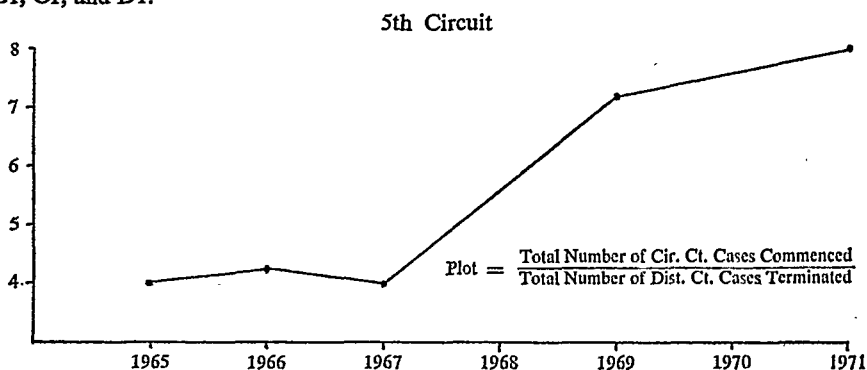
Although the relationship in the Fifth Circuit between screening and affirmances is statistically significant, it was desirable to test the validity of that relationship against a control group. Since no two cases or judges are exactly alike, no completely controlled test group existed. If one assumes, however, that all variables are held constant, the Third Circuit provides a control since that circuit did not have a docket control device of any sort during the test period.²⁹⁴

Using the same sampling categories and chi-square statistical testing procedures as for the Fifth Circuit, the following contingency tables were computed:

TABLE VIII
THIRD CIRCUIT CONTINGENCY TABLES²⁹⁵

	Aff'd	Rev'd	
CRIMINAL	A 116	B 28	Before 1969 ^a
	C 88	D 30	After 1969

proportion of appeals to cases terminated in the district courts has been increasing since 1967. The figures were derived from Annual Reports for the respective years, Tables B1, C1, and D1.



294. *S.J. Res. 122 Hearing 37*; Letter from The Honorable Thomas F. Quinn, Clerk of the Third Circuit, to the author, October 10, 1972. Although screening was authorized by 3D CIR. R. 12(6), note 53 *supra*, the procedures were not used until 1972.

295. As in the contingency tables for the Fifth Circuit, Boxes A and B indicate cases decided in 1965-1968. Boxes C and D indicate cases decided after 1969. All figures are from Table B1 of the Annual Report for the respective years. 1971 ANNUAL REPORT 242; 1970 ANNUAL REPORT 211; 1968 ANNUAL REPORT 175; 1967 ANNUAL REPORT 181; 1966 ANNUAL REPORT 150; 1965 ANNUAL REPORT 159.

PRIVATE CIVIL	A 450	B 205	Before 1969
	C 248	D 114	After 1969
U.S. CIVIL	A 133	B 48	Before 1969
	C 76	D 40	After 1969
TOTAL	A 893	B 312	Before 1969
	C 475	D 204	After 1969

Contrary to the trend in the Fifth Circuit, the contingency tables for the Third Circuit show a slight decrease in the proportion of affirmances. Using the same procedures and formula as for the Fifth Circuit, the values of X^2 were computed as:

- (1) Criminal: 1.345
- (2) U.S. Civil: 0.004
- (3) Private Civil: 2.150
- (4) Total Cases: 3.765

Thus the results for the Third Circuit are neutral, since none of the values of X^2 exceeds 3.84, and lend some support to the proposition that a relationship exists in the Fifth Circuit between screening and summary procedures and the decline in the rate of reversal.²⁹⁶

296. A similar test was run on the Seventh Circuit, which also did not have docket control during the test period. See note 50 *supra*. The contingency tables for the Seventh Circuit were as follows:

	Aff'd	Rev'd	
CRIMINAL	A 215	B 45	Before 1969
	C 171	D 54	After 1969
PRIVATE CIVIL	A 436	B 134	Before 1969
	C 243	D 103	After 1969

At the risk of being repetitious, it should be made perfectly clear that these tests should not lead one to fall into the *post hoc propter hoc*

U.S. CIVIL	A 170	B 51	Before 1969
	C 115	D 38	After 1969
TOTAL CASES	A 1012	B 276	Before 1969
	C 610	D 224	After 1969

All figures were taken from Table B1 of the Annual Report for the respective years 1965-1971. As with prior tables, Boxes A and B indicate cases decided in 1965-1968; Boxes C and D indicate cases decided in 1970-1971. 1969 was omitted.

These contingency tables for the Seventh Circuit, instead of showing a decrease in the proportion of reversals to affirmances, as in the Fifth Circuit, show a substantial increase in the proportion of reversals to affirmances. The computed values of chi-square were 3.325 for criminal cases, 4.399 for private civil cases, 0.154 for U.S. civil cases, and 8.287 for total cases. Thus at least for the test categories of private civil and total cases, this relationship very probably did not occur by chance.

For the control test to be significant, the results should have been neutral, that is, the chi-square results should have been less than 3.84. Thus in the Seventh Circuit an additional unidentifiable factor appears to be influencing the relationship of reversals to affirmances. This additional factor, although permitting a result favorable to the hypothesis, puts a bias into the test for the Seventh Circuit that weakened the use of the Seventh Circuit as a control group.

Since all remaining circuits had some docket control device and, therefore, no other circuit could be used confidently as a control group, another alternative was to test the internal control of the statistics for the Fifth Circuit by computing the chi-square test on the random (arbitrary) pairing at ten-year intervals of total affirmances and reversals for the years 1950-1958 and 1960-1968, with 1969 and its paired year 1959 again being eliminated. For this internal check to operate as a control for the Fifth Circuit, the chi-square computations should produce neutral results for the years 1950-1968. The total affirmances and reversals for 1960-1968 compared to the total affirmances and reversals for 1970-1972 should show a significant chi-square computation, meaning that the apparent relationship in the 1960-1968 and 1970-1972 contingency table, decreasing reversals, has a high probability of not being by chance.

The results of this internal control check were as anticipated. The years 1950-1968 showed a neutral result, while the comparison of the totals for 1960-1968 to the totals for 1970-1972 was greatly significant.

	Aff'd	Rev'd	
Total 1960-1968	A 3998	B 1589	chi-square = 87.423
Total 1970-1972	C 4040	D 1011	

fallacy. The thesis of the statistical tests was simply to determine if a relation existed between screening and summary procedures and affirmances of the lower court decision. The test showed that the relation apparently exists, but is not proof that the screening procedures were the cause of the relation. In dealing with a subject as nebulous as the myriad cases and the diverse judges of an appellate court, the cause and effect may not be determinable.

But to reject outright the theory that screening procedures may indeed be a cause of the extreme drop in the percentage of reversals in the Fifth Circuit over the last three fiscal years would be equally unwise. Analysis of the appellate process lends support to the contention that oral argument, except perhaps in the most frivolous appeal, is essential to reaching the best possible decision. This thought was expressed most succinctly by Justice Brennan:

[O]ral argument is the absolutely indispensable ingredient of appellate advocacy. . . . [O]ften my whole notion of what a case is about crystallizes at oral argument. This happens even though I read all the briefs before oral argument²⁹⁷

Others are more blunt about the value of oral argument. "The brutal, hard fact is that some cases are won and lost on oral argument."²⁹⁸ This idea is not surprising. Many are aware that arguments and positions in law suits often become clear only after extensive oral sessions with partners, associates, and almost anyone else who is willing to listen. Also, most teachers will agree that the oral discussion of cases and concepts in the classroom gives extra dimension to the materials read by the students—and occasionally an additional insight is imparted to the instructor by the oral responses of the class.²⁹⁹ The intellectual benefit of oral argument, as seen by Llewellyn, is in "finding and pointing the significant issues, by gathering and focusing the crucial authorities, making the fact-picture clear and vivid, illumining the

Since no significant change in the relationship of affirmances to reversals occurred in the period 1950-1968, but a comparison of 1960-1968 to 1970-1972 showed a significant change in the relationship of affirmances to reversals toward a decrease in the proportion of reversals, it may be concluded that a relationship exists between screening and summary procedures and affirmances in the Fifth Circuit, and the direction of that relationship is to decrease the proportion of reversals.

297. Brennan, Harvard Law School Occasional Pamphlet No. 9, at 22-23 (1967), quoted in Fitzgerald & Harnett, *Effective Oral Argument*, 18 PRAC. LAW. 51 (1972).

298. Wiener, *Oral Advocacy*, 62 HARV. L. REV. 56 (1948).

299. Kelso, *Teaching Teachers: A Reminiscence of the 1971 AALS Law Teachers Clinic and A Tribute to Harry W. Jones*, 24 J. LEG. ED. 606, 608 (1972).

probable consequences of the divergent decision contended for, and by phrasing with power the most appealing of the divers possible solving rules."³⁰⁰

These functions of argument are simply too important and diverse to be left to a mere brief. It is suspected, hopefully incorrectly, that the judges in the circuit courts with screening procedures that extend to cases other than the most frivolous are betting that the briefs are adequate to explain the facts and law. That assumption is questionable. Appellate briefs are notoriously poor pieces of legal writing.³⁰¹ This is not an indictment of either attorneys or briefwriting instructors, but a fact of litigation. Time pressures, poor research facilities, misconception of possible strong points, and lack of writing skill all contribute to the problem. But to think that time-pressured courts do a much better job is also often an unrealistic view of the depth of appellate research. In most cases oral argument, when the judges meet the lawyers face to face to engage in a two-sided discussion of the case, is the occasion for final development verbally of the kernel of decision.

These views of appellate advocacy are of course advanced in the context of an imagined ideal situation, rarely duplicated in practice: the briefs are excellent and the lawyers and judges have done their homework. It would seem that given the realistic situation involving basically poor briefs and poorly prepared oral argument,³⁰² the situation deteriorates rather than improves if one tool or the other is removed.

Some would say it is a good thing that the rate of reversals in the Fifth Circuit is dropping rapidly. Perhaps it displays a conscious effort by appellate judges to stem the tide of appeals by ignoring all but the grossest errors.³⁰³ Or perhaps the decisions being made are indeed the proper ones, and oral argument in the past has merely contributed to results influenced by improper appellate considerations, such as sympathy or overreaction to especially persuasive oral advocacy. These imponderables may not be demonstrable, but before other appellate courts act to eliminate oral argument in all but the most serious case,

300. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 30 (1960).

301. *Id.*

302. It has been suggested that poor quality oral argument is one reason for the proliferation of summary procedures. C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 104, at 470 (2d ed. 1970).

303. *Cf.* Wright, *The Overloaded Fifth Circuit*, *supra* note 2, at 967; Wright, *The Doubtful Omniscience of Appellate Courts*, 41 *MINN. L. REV.* 751 (1957).

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

Another explanation for the cause of the decreased reversal rate in the Fifth Circuit may be the tremendous increase in the last two years in the number of cases decided without opinion under Rule 21. Surely every judge has had the experience of uncovering uncited authority, discovering an undeveloped basis of decision, or changing his vote on the merits after seeing a draft opinion prepared by another member of the panel.³⁰⁴ Furthermore, another benefit derived from writing opinions is that the conscientious mental discipline required to put the judicial analysis into words is conducive to reaching a well-considered result. These benefits of opinion-writing are now entirely absent in 26.8 percent of the Fifth Circuit's "opinions."³⁰⁵ Support for this theory may also be found in the fact that the reversal rate of 19.9 percent for 1971,³⁰⁶ the first year of extensive use of Rule 21, was the lowest since at least 1945, and the drop continued in 1972 to 14.9 percent.³⁰⁷ In those twenty-eight fiscal years, the median reversal percentage was between 27.4 percent and 27.1 percent,³⁰⁸ and if the percentages are ranked from highest to lowest reversal rates, the three lowest rates are all years (1969, 1971, and 1972) in which screening procedures were in effect.³⁰⁹

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

IV. CONCLUSION

The irony of this article is that it has been devoted to procedures that were not adopted with enthusiasm, but with determination and

304. See, e.g., *Marks v. Bettendorf's, Inc.*, 337 S.W.2d 585 (Mo. App. 1960).

305. 1972 CLERK'S REPORT 1.

306. 1972 CLERK'S REPORT 18, Table II; 1971 ANNUAL REPORT 243, Table B1.

307. 1972 CLERK'S REPORT 17, Table I.

308. See Table B1 of the Annual Report for the respective years.

309. 1970, with a rate of 25.2 percent, was 22d out of 28.

resignation—determination to do something to keep the courts abreast of their work and resignation that the process necessitates drastic measures. Probably no appellate judge believes that sixty percent of the cases on his court's docket can be decided without oral argument without some mistakes being made, but the courts are now apparently willing to make that sacrifice for the greater good of trying to keep current with the ever-increasing number of filings. Also, most judges would probably prefer to spend the extra time for oral argument to gain the benefit of the give and take with counsel than examine briefs and records to determine whether a case needs oral argument.

This is not the time for governmental bodies to close off avenues of communication, but to open them.³¹⁰ Surely the attorney who receives notice from the clerk of the court that his case has been assigned to the summary calendar to be decided without oral argument feels a twinge of anxiety about the result. If he loses, that anxiety grows into resentment of an unseen, unhearing, and unavailable body of judges known collectively as the courts of appeals.³¹¹ That one attorney is at the same time delighted does not appear to mitigate the problem.

But that resentment is, of course, misdirected. Lest I advocate that yet another group storm the halls of ivy protesting the lack of palatable solutions being promulgated, I will instead suggest that some of the ire be directed toward Congress. Federal court congestion is nothing new. Professor Wright was describing in detail the crisis condition of the Fifth Circuit as early as 1964.³¹² Money does not solve every problem, but the niggardly attitude of Congress toward the federal judiciary in general has done little to alleviate the problem. More help, not more judges, has been the most consistent plea from the Gulf South.³¹³ More clerks, more law clerks, more staff attorneys, more secretaries, and more modern machinery would have helped avoid the present situation.

310. See Carrington, *The Dangers of Judicial Delegation: Concluding Remarks, in Improving Procedures in the Decisional Process*, 52 F.R.D. 51, 76, 77-78 (1971).

311. No organized reaction of the bar has appeared. Certainly the fact that one lawyer is always pleased by the result makes the whole procedure more palatable. Cf. *S.J. Res. 122 Hearing* 104.

312. See Wright, *The Overloaded Fifth Circuit*, *supra* note 2. As early as 1950, one author was advocating the creation of an Eleventh Circuit by splitting the Fifth Circuit. Wahl, *The Case for an 11th Court of Appeals*, 24 FLA. L.J. 233 (1950).

313. Letter from Judge John R. Brown to Senator Joseph Tydings, Shafroth, *supra* note 2, at 305.

Perhaps this attitude is changing. The recent act establishing the Commission on Revision of the Federal Court Appellate System is certainly a step in the right direction.³¹⁴ Hopefully the commission will see what Professor Wright saw years ago—"when the entire system is overworked, shuffling the pieces about is not even an effective palliative, much less a cure."³¹⁵ What cure if any the commission may decide upon is still open,³¹⁶ and to avoid the charge that I am eager to destroy but less eager to build, I offer these suggestions. First, funds for all personnel necessary to assist the circuit judges in disposing of frivolous or unsubstantial appeals should be furnished the courts. This would include staff attorneys and secretaries for those attorneys, any additional law clerks that a judge reasonably thinks he can keep busy plus secretarial help for those clerks, and additional personnel for the office of the clerk of the court. These palliatives should at least help with the short-term crisis.³¹⁷

But the major problem is the long-term crisis, and simply adding personnel will not enable the present number of circuit judges to handle the 38,000 cases projected for 1981. Thus, a basic decision must be made about the nature of the circuit court system. Those courts should be preserved in their present form of multi-state courts composed of a manageable number of judges from those several states, so that the federalizing and nationalizing influence of those courts and the prevention of parochial decisions will be preserved in a unit of reasonable size.³¹⁸ To accomplish that objective but at the same time alleviate the congestion there, I would introduce a new level of federal appellate courts into the system between the trial courts and the present circuit

314. P.L. 92-489, 92d Cong., approved Oct. 13, 1972. The Commission is to study and recommend changes in the present geographical boundaries of the circuit courts and to study and recommend changes in the structure and internal procedures in the appellate system, § 1(a), (b).

315. Wright, *The Overloaded Fifth Circuit*, *supra* note 2, at 969. See S. REP. NO. 92-930, 92d Cong., 2d Sess. (1972), in which the Judiciary Committee recommended the passage of Senate Joint Resolution 122, which would establish a commission to make a broad-based study of the problems of the courts of appeals and the possible solutions for those problems. The gist of the Resolution was incorporated into Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807.

316. The Commission, to be comprised of sixteen members, must report on its long-range proposals within fifteen months after the appointment of its ninth member. § 6(2).

317. *S.J. Res. 122 Hearing* 67-69.

318. Some see these attributes of the courts of appeals as among the most important to preserve in any new system. See Carrington, *supra* note 2, at 612; Wright, *The Overloaded Fifth Circuit*, *supra* note 2, at 974-75; *S.J. Res. 122 Hearing* 23, 108.

courts of appeals, thus expanding the courts vertically rather than horizontally.³¹⁹ On an experimental basis in the states of Texas, New York, and California, an appellate division for those states would be established.³²⁰ Taking Texas as an example, the system would work in this manner. Nine new federal judges would be appointed in Texas to form the court.³²¹ All appeals presently filed in the Fifth Circuit because of a Texas contact would instead be first filed in the appellate division.³²² All appeals from other states presently constituting the Fifth Circuit, in which the caseload production is not as heavy,³²³ and all original proceedings would continue to be filed in and reviewed by the Fifth Circuit. Decisions of the appellate division for Texas would be reviewed in the Fifth Circuit only on discretionary writ of error that would issue by vote of two judges on a three-judge panel for any case presenting a substantial question or an apparently erroneous decision of the appellate division. Review of either the Fifth Circuit's decision or denial of the writ could then be sought, as now, in the United States Supreme Court. If the experimental system works, then it could be gradually expanded to other states as the caseload justified the addition of an appellate division.

The caseload figures for 1972 in the Fifth Circuit show that this system would have an extremely helpful effect on the caseload of that court. In that year 2,541 cases were docketed in the Fifth Circuit.³²⁴ Of that number, 749 were identified as Texas appeals, or 29.5 percent of the total caseload.³²⁵ The immediate effect of establishing an appellate division would be to reduce the caseload of the circuit to 1,792 cases. Under the plan, however, the court would have writ of error

319. See Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 910 (1971).

320. Those three states were chosen because of the large number of cases produced there in circuits that are overburdened. See 1971 ANNUAL REPORT 247-50, Table B3.

321. A court of nine should be able, at least for a few years, to handle all appeals from Texas, which produced 749 appeals in 1972. 1972 CLERK'S REPORT 21, Table IV.

322. These filings would include not only appeals from district courts but also appeals from, for example, the NLRB if the appeal could have otherwise been filed in the Fifth Circuit because the employer did business in that state. 29 U.S.C. § 160(e), (f) (1964).

323. This is barely true of Florida, which produced 661 appeals to the Fifth Circuit in 1972, but Texas yielded 749 appeals. The other states in the Fifth Circuit and the Canal Zone together contributed only another 1,131 cases. 1972 CLERK'S REPORT 21, Table IV.

324. 1972 CLERK'S REPORT 17, Table I.

325. *Id.* at 21, Table IV.

jurisdiction over cases in the Texas appellate division, thus some percentage of cases would then have to be re-added to the total caseload. Since only 24.5 percent of the total cases filed in the Fifth Circuit in 1972 were disposed of by signed opinion,³²⁶ it may be assumed for our purposes that at least no more than that percentage of cases would be reviewed by the Fifth Circuit, although this is probably an exceedingly liberal estimate.³²⁷ Thus 184 cases must be added, for a total of 1,976 cases that would have been filed in the Fifth Circuit for 1972. Of more importance, perhaps, would be the effect on the individual workload of the judges. Each judge on the average disposed of 116 cases by opinion in 1972.³²⁸ A 29.5 percent reduction in caseload would reduce the number to 82 per judge, with eight more cases then added for the review of Texas decisions, or a total of ninety opinions per year—still too high, but a decrease of twenty-six cases.

If Florida were also given an appellate division, the Fifth Circuit's burden would almost disappear. Texas and Florida in 1972 produced 1,410 appeals, or 55.5 percent of the total caseload of the court.³²⁹ A decrease by that percentage in the number of cases disposed of by opinion in the Fifth Circuit would bring the per-judge average down to sixty-eight cases per year, including sixteen added for review of Texas and Florida cases. With Texas and Florida cases substantially out of the picture, all appeals could be accorded oral argument with only nine court weeks per judge, assuming that habeas and section 2255 cases without counsel are not orally argued, as they traditionally have not been.³³⁰ If a modified form of screening is retained, such as one directed solely toward frivolous appeals, this number would be even lower.

Most proposals to add an additional level of review to the federal system suggest one or more national or regional courts to handle discretionary writs from decisions of the courts of appeals.³³¹ These sug-

326. *Id.* at 5, 21, Table IV (622 of 2,541 cases).

327. It is doubtful that every case receiving a signed opinion today in the Fifth Circuit was thought to present a substantial issue.

328. 1972 CLERK'S REPORT 10.

329. *Id.* at 21, Table IV.

330. *See* note 274 *supra* and accompanying text. There were 259 habeas corpus and § 2255 cases screened in 1972. Eliminating these cases from the total of 1,777 screened cases, deducting 55.5 percent of the cases for Texas and Florida, and adding 24.5 percent of Texas and Florida cases for review by writ yields 882 cases that would have been heard in 1972, or forty-four court weeks or nine weeks per judge.

331. FEDERAL JUDICIAL CENTER REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972) [hereinafter cited as FEDERAL JUDICIAL CENTER REPORT]; Washington University Open Scholarship

gestions were designed not so much to relieve congestion in the courts of appeals as to achieve uniformity of decision and relieve the pressure on the Supreme Court. Admittedly the creation of an appellate division does nothing directly to assist the solution of those problems,³³² but neither does the creation of a "supercircuit court" materially aid the problem of congestion in the courts of appeals.³³³

The benefits of an appellate division would be that all litigants in the experimental states would be guaranteed at least one complete re-

Carrington, *supra* note 2, at 612-17; Wiener, *Federal Regional Courts: Solution for the Certiorari Dilemma*, 49 A.B.A.J. 1169 (1963); *Creation of New National Court of Appeals is Proposed by Blue-Ribbon Study Group*, 59 A.B.A.J. 139 (1973). *But see* Hufstедler, *supra* note 319, suggesting the concept of an appellate court closely tied to trial courts in a four-tier system. *See also* Editorial, *The Case for a Two-Level Court System*, 50 J. AM. JUD. Soc'y 185 (1967) (two-level system in state courts).

332. Evidently Chief Justice Burger feels that the Supreme Court's main problem at the moment is appeals from decisions of three-judge district courts. *See* 93 S. Ct. No. 1, *supra* note 97, reporting the Chief Justice's speech at the 1972 A.B.A. annual meeting in San Francisco, in which he called for the elimination of three-judge district courts. *See also* FEDERAL JUDICIAL CENTER REPORT, *supra* note 331, at 25 *et seq.*

333. The FEDERAL JUDICIAL CENTER REPORT, *supra* note 331, was concerned solely with the workload of the Supreme Court. Its recommendation was that a National Court of Appeals be established. The proposed court, to be comprised of seven circuit judges on a rotating basis, would be the "screening panel" for the Supreme Court: all petitions for review now filed in the Supreme Court would first have to be filed in the National Court. Denial of review by that court would be final and preclude access to the Supreme Court. In addition to deciding cases, principally those presenting a conflict in the circuits, the National Court of Appeals would certify "worthy" cases to the Supreme Court for decision, and only those cases would make up the Court's docket. Perhaps this suggestion, coupled with a tremendous expansion in the number of circuit courts of appeals, would cure the congestion while preserving many benefits of the present system. This encroachment on the power of the Court was immediately denounced, and the merits of the original proposal may be lost because of the proposal's politically unpalatable nature. *See, e.g.,* Bickel, *The Overworked Court*, THE NEW REPUBLIC, Feb. 17, 1973, at 17; Goldberg, *One Supreme Court*, THE NEW REPUBLIC, Feb. 10, 1973, at 14. It even appears that Justice Douglas has entered the controversy indirectly by suggesting in *Tidewater Oil Co. v. United States*, 93 S. Ct. 408, 421 (dissenting opinion), which was released at about the same time as was the Center's report (December 1972), that the conception of an overworked Supreme Court is a "myth." 93 S. Ct. at 421. Douglas noted that although the number of petitions filed has increased tremendously, the number of cases actually decided by the Court was about the same as in 1939. 93 S. Ct. at 421. Also, he argued that screening the petitions was "in many respects the most important . . . of all our functions." 93 S. Ct. at 422. In a fairly obvious reference to the Center's report, Douglas said that "[n]either taking that jurisdiction [to screen] from us nor the device of reducing our jurisdiction is necessary for the performance of our duties." 93 S. Ct. at 423. The Justice then added that "[i]f there are any courts that are surfeited, they are the courts of appeals." 93 S. Ct. at 423. The report has been defended by Committee Chairman Paul A. Freund in informal interviews. *See* HARVARD LAW RECORD, Jan. 26, 1973, at 1.

view of their case, narrow parochialism would be avoided in the decisions of the appellate divisions through review by the Fifth Circuit, travel by judges and lawyers would be kept to a minimum, and the burden on the courts of appeals would be effectively lessened. If the concept is successful, the Fifth Circuit would then be able to devote more time to appeals from other states in the circuit, thus compensating those litigants for the increased review in the appellate division for appeals from Texas. Finally, this system would strengthen control of the trial judge and assure litigants and lawyers that each case has received full-blown appellate review for correctness. The principal objections to the proposal would be: it fails to relieve the pressure on the Supreme Court; an entirely new court would be a major expense; additional delay and expense to the litigants is introduced into the system; and it is either unfair or unconstitutional to provide different systems of review for litigants living in different states. The responses to these objections would be: the Supreme Court in most instances is able to control at least the number of cases to be decided;³³⁴ the government expenditure will come eventually in one form or another, either through an additional level of courts or additional circuit judges and personnel; the additional delay and expense would be slight since the great bulk of time on appeal is spent in briefing the case and preparing the record; and since there is no constitutional right to appeal, equal treatment for those similarly situated, as the plan envisions, would meet any constitutional objection.³³⁵ One further problem is what to do with judges appointed for life if the experiment fails. If necessary, these judges could be integrated into the trial courts or the courts of appeals on either a temporary basis or as replacements for vacancies in existing courts.³³⁶

Although most lawyers practicing in the federal courts will object to the institution of a writ system into the courts of appeals, a realistic evaluation of the Fifth Circuit procedures reveals a court that already has implemented a certiorari-type review and expends its major efforts only on cases considered deserving of the full treatment of oral argument and signed opinion. It may be that for the moment the bulk of

334. See note 332 *supra*.

335. A very different type review is now accorded litigants, depending on the court of appeals in which the case is docketed. For example, oral argument is apparently not denied any case in the Second Circuit, but the Fifth Circuit hears argument in only about 40 percent of its cases. See notes 47 and 121 *supra* and accompanying text.

336. As were the judges of the old circuit courts. See *Commissioner v. Textile Mills Sec. Corp.*, 117 F.2d 62, 69-70 (3d Cir. 1940).

cases appealed to the circuit courts are frivolous and unsubstantial, as reflected by the huge number of per curiam opinions and affirmances without opinion. If so, then concern for those litigants is certainly misplaced. But by tomorrow the number of substantial appeals will triple and the system will probably not have changed.³³⁷ Can we afford to wait until then?

337. The system needs more substantial change than mere intensification of staff work on memoranda for the judges. *Cf.* Comment, *supra* note 105, at 102-03.