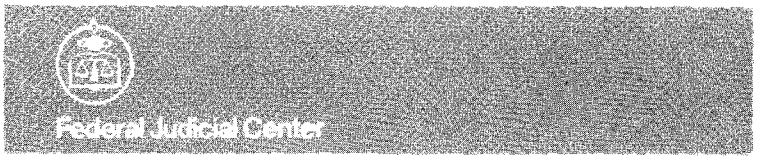
Deciding Cases Without Argument: An Examination of Four Courts of Appeals



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DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS

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EXECUTIVE SUMMARY

Some years ago the federal judiciary debated the wisdom of a new procedure that had been adopted by several of the appellate courts. This procedure, the selection of some cases for disposition without argument, was a clear departure from the tradition of appellate oral argument. At hearings held around the country during 1973 and 1974, the Commission on Revision of the Federal Court Appellate System (also known as the Hruska Commission) heard the views of judges, academics, and practicing attorneys. Although nearly all witnesses, especially the judges, agreed that some cases could be decided without argument, a significant number of judges and attorneys felt that denial of oral argument could seriously diminish the judges' ability to make sound decisions and would undermine the legitimacy of the courts.

In the end, the federal judiciary amended Federal Rule of Appellate Procedure 34 to permit the courts to decide cases without hearing argument. Today nearly every appellate court has a formal procedure for selecting and deciding cases for disposition on the briefs alone. These procedures, generally referred to as screening, have become so accepted that nearly half the cases decided on the merits are now decided without argument. Because of the pressure of increasing caseloads and the promise of significant time savings, the viability of screening programs seems assured.

However, despite the widespread acceptance of screening programs, many observers continue to raise questions about them. In 1985 the Board of the Federal Judicial Center authorized a study of screening practices to determine the kinds of cases decided without argument and the criteria and methods used to select these cases for nonargument disposition.

This report is the final product of that study. The report is based on an examination of administrative records and on interviews with the clerks, senior staff attorneys, and nearly all the judges in the Courts of Appeals for the Third, Fifth, Sixth, and Ninth Circuits. A description of the types of cases decided without argument is presented in chapter 2. Detailed descriptions of the screening procedures and criteria used by each of the four courts are presented in chapters 3 through 6. The views of the judges concerning the role of oral argument in the appellate process are explored in

chapter 7. The final chapter offers some conclusions about nonargument procedures and the difficulties courts face in deciding which of the values of the appellate process to emphasize. A summary of the findings and conclusions presented in the report follows.

Rate of Nonargument Disposition and Types of Cases Decided Without Argument. The rate of nonargument disposition has increased steadily in recent years, to the point that six federal appellate courts dispose of at least half their cases without argument. Data presented in this report show that the nonargument rate has increased as the number of cases filed has risen, suggesting that courts have used nonargument disposition as a method for handling the growing number of cases filed. In fact, in recent years a number of courts have modified their procedures so that more cases can be decided without argument.

Changes in the courts' practices explain only part of the increase in nonargument dispositions, however. The changing nature of the appellate caseload has also led to an increase in nonargument dispositions. Appeals in cases that have traditionally been decided without argument—most notably prisoner petitions—have grown at an especially rapid rate and now constitute a greater proportion of the federal appellate caseload. Projected increases in these cases suggest that the nonargument rate may continue to rise.

Criteria for Selecting Nonargument Cases. Cases decided without argument differ from argued cases in that they are much less difficult. The judges almost uniformly described the nonargument cases as those in which the issues are simple, the outcome is clear, and the precedent is strong. The judges also agreed that a considerable number of cases meet these criteria.

However, despite the similarity in the criteria listed by the judges, the nonargument rate varies considerably across the courts included in this study. This variation suggests that factors other than the stated criteria explain the rate of nonargument disposition. In fact, the judges vary in their views of the purposes served by oral argument. Some judges have a limited view, relying on oral argument primarily as a means of obtaining information concerning issues not fully addressed in the briefs. These judges typically are willing to decide a higher percentage of cases without hearing argument. Other judges believe oral argument serves a broader range of purposes, such as demonstrating to the parties that the panel has attended to the issues on appeal or providing an opportunity for the judges to confer and hear each other's views. Judges who emphasize these additional purposes are generally less willing to decide cases without hearing argument. Since the judges in a

particular court tend to agree on the purposes served by oral argument, oral argument is more common in some courts than others.

Judicial Attention to Nonargument Cases. Although this study did not investigate the amount of time judges spend considering the issues raised in cases disposed of without argument, judges were asked to describe their practices in selecting and deciding the nonargument cases. In general, the judges indicated that they spend varying amounts of time on these cases, giving each case the amount of attention needed to address the issues raised on appeal. The judges also freely remove cases from the nonargument calendar if they feel that argument would assist the court in considering the issues. On this matter, the judges emphasized the importance of rule 34 of the Federal Rules of Appellate Procedure, which provides that a single judge may object to disposition of a case without argument and have that case placed on an argument calendar. This rule ensures that each case receives the attention thought appropriate by the most cautious judge on the panel. In the courts included in this study, approximately 15 percent of the cases designated for disposition without argument are removed from the nonargument calendar after the briefs have been reviewed and are placed before the argument panels.

In addition, the judges have been willing to adapt the established procedures on an ad hoc basis to permit a case the attention and communication they feel is necessary. For example, in the Fifth Circuit, where the screening procedure is designed to permit panel members to decide the cases with minimal communication among themselves, the judges telephone each other on those occasions when they feel a nonargument case would benefit from a conference. In the Ninth Circuit, two distinct screening procedures have become more similar as judges who initially differed in their expectations concerning the need to confer on nonargument cases have found their needs to be similar. These findings suggest that, regardless of the design of the screening program, cases receive the degree of attention that individual judges find necessary. Thus, the critical feature of a screening program is the means by which a single judge can independently review each case and then, if necessary, remove it from the nonargument calendar.

Role of Staff Attorneys. The courts in this study vary in their use of staff attorneys. In the Third Circuit, for example, the staff attorneys' role is limited to preparation of appendixes for pro se appeals. In contrast, in the Ninth Circuit, the staff attorneys review the entire caseload, identify issues, and prepare lengthy memoranda for the cases they recommend for nonargument disposition. In each of the courts, the judges generally consider the materials

prepared by the staff attorneys to be effective in assisting them in their consideration of the nonargument cases.

Staff attorneys also appear to be effective in identifying the cases that meet the court's standards for disposition without argument. Although approximately 15 percent of the cases staff attorneys recommended for disposition without argument were later reclassified by the judges, these reclassifications appear to be the result of the preferences of the individual judges for argument in certain cases, rather than the failure of the staff attorneys to apply properly the standards established by the court.

Although this study's consideration of the functions of staff attorneys was limited to the role the staff attorneys' offices play in screening, those who were interviewed offered many additional comments about the growing demands being placed on staff attorneys. Recently both the number of motions and the number of cases suitable for nonargument disposition, the two areas in which staff attorneys have significant responsibilities, seem to have risen sharply. If such increases continue, courts will have to choose between increasing the number of staff attorneys and reallocating the duties of the staff attorneys to judges' staff or other court personnel.

Allocation of Resources and Competing Values. Rule 34 of the Federal Rules of Appellate Procedure permits each court substantial discretion in designing its nonargument procedures. This latitude permits each court to emphasize, either explicitly or implicitly, certain values of the appellate process when designing its screening procedure. Thus, in the Third Circuit, where the judges feel that screening is a judicial function, the staff attorneys have no role in the screening process. In contrast, in the Fifth Circuit, the staff attorneys play a significant role, in part because the judges value the time saved by the staff attorneys' participation in screening.

However, in choosing to emphasize certain values, each court must forgo other advantages. The judges in the Fifth Circuit, for example, rely heavily on staff attorneys for written material to be used in drafting the final disposition. Although this practice may raise questions about delegation to staff attorneys, it permits the judges to provide a written opinion that discusses the application of the law to the issues on appeal. The judges in the Third Circuit, in contrast, delegate almost no duties to the staff attorneys, but in over half the cases decided without argument, the judges also do not provide an opinion that includes the reasoning of the court.

The difficulty in striking a proper balance in the values of the appellate process was apparent in the judges' responses to a ques-

tion asking them to select a procedure that would enable the court to handle future increases in caseload. The judges were divided on the acceptability of further reductions in oral argument. In fact, there was no consensus among the judges about how to meet the demands of higher caseloads, suggesting that the federal court appellate system may soon be the subject of another extended debate.

I. INTRODUCTION

This report presents the findings of a study of the procedures used by four federal appellate courts to select a portion of their cases for disposition without argument. The practice of selecting cases for different kinds of decision-making procedures—often referred to as screening—is probably familiar in concept, if not detail, to most judges, attorneys, and court scholars. Generally, cases are sorted into two categories: (1) those to be disposed of using the briefs as the primary source of information for deciding the merits of a case and (2) those to be disposed of with the additional source of an oral argument from the attorneys for both parties.[1]

In the federal appellate courts, screening was first developed and adopted in the Court of Appeals for the Fifth Circuit. Because of the early leadership of the Fifth Circuit, screening has come to be thought of in the terms set by this court. Thus, in the typical screening procedure, staff attorneys make an initial selection of cases suitable for disposition on the briefs and prepare memoranda describing the facts and issues in the cases they select. Special judicial panels that do not convene then review the briefs and the materials provided by the staff attorneys, decide whether disposition without argument is appropriate, and, if so, decide the merits of the case.[2]

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1. In this report we use several terms to refer to cases disposed of on the briefs: submissions on the briefs, nonargument cases, cases disposed of without argument, and nonargument dispositions. In some courts screening may encompass a broader set of categories than only argument and nonargument dispositions. For example, some courts also select a portion of their cases for prebriefing conference programs. *See* A. Partridge & A. Lind, A Reevaluation of the Civil Appeals Management Plan (Federal Judicial Center 1983); J. Goldman, The Seventh Circuit Preappeal Program: An Evaluation (Federal Judicial Center 1982). Others have selected some cases for disposition without briefs. *See* Chapper & Hanson, *Expedited Procedures for Appellate Courts: Evidence from California's Third District Court of Appeal,* 42 Md. L. Rev. 696 (1983); J. Shapard, Appeals Without Briefs: Evaluation of an Appeals Expediting Program in the Ninth Circuit (Federal Judicial Center 1984).

2. Of course, not all courts use this procedure; some do not even use formal screening programs. For example, the Court of Appeals for the Second Circuit hears argument in all cases except those in which the attorneys have waived argument or the appellant is pro se and incarcerated. The Court of Appeals for the Third Circuit decides many cases on the briefs but without a formal screening program. *See* J. Cecil & D. Stienstra, Deciding Cases Without Argument: A Description of Procedures in the Courts of Appeals (Federal Judicial Center 1985).

Although oral argument has been the traditional method for disposing of cases in the federal appellate courts, some cases have always been decided without argument—even before the adoption of formal screening programs—if for no other reason than the inability of the parties to appear in court.[3] During the last decade, however, most federal appellate courts have formalized the practice of selecting some cases for nonargument disposition, and the proportion of cases decided without argument has increased substantially (see table 1).

TABLE 1
Percentage of Cases Disposed of Without Argument in the Federal Courts of Appeals (Selected Years)

Statistical Year[a]	Number of Cases Terminated on Merits[b]	Percentage Decided Without Argument[c]
1975	8,596	30.3
1976	8,660	29.5
1977	9,113	31.1
1978	8,895	32.5
1979	8,994	29.3
1980	10,598	28.6
1981	11,980	29.0
1982	12,327	30.2
1983	13,217	36.0
1984	14,327	36.8
1985	16,369	43.5
1986	18,199	45.6

SOURCE: Administrative Office of the United States Courts, 1975–1986 Annual Report[s] of the Director.

[a]The nonargument rate is reported for statistical years, which run from July 1 to June 30.

[b]Includes only lead and single cases terminated on the merits. See appendix A for definitions.

[c]Prior to statistical year (SY) 1984, there was some undercounting of the number of cases decided on the merits without argument. See appendix A for a full explanation. Also see chapter 2, section B, for a second explanation of the recent sharp increase in the percentage of cases decided without argument.

There are probably several reasons for the trend toward deciding more and more cases without argument. Caseload pressure is certainly one of them, as table 1 suggests. As the number of cases filed has increased, without an equivalent increase in the number of judgeships, the courts have looked for procedures that would enable the judges to dispose of their caseloads more efficiently. At the same time, as we show in chapter 2, the nature of caseloads

3. For example, parties may waive argument because of the cost of traveling to the court. Also, incarcerated pro se litigants are not permitted to appear in court. (Counsel are appointed if their cases require argument.)

has been changing, and there has been a greater increase in the types of cases that typically are decided without argument. Faced with increasing demands on limited resources and confronted with a wide variety of cases, the courts have sought methods by which cases could be differentiated and routed through specialized decision-making processes.

The procedures adopted by the courts have not always been enthusiastically received by practicing attorneys and court scholars—or by the members of the judicial community themselves. Many questions have been raised about the practice of deciding some cases without argument. Some critics have been concerned about the delegation of judicial decision making to staff attorneys and in-chambers law clerks. Others have worried that the cases of certain types of litigants, such as prisoners or the poor, will receive less attention than other cases, such as large commercial cases. Some have questioned whether the legitimacy of the courts will be damaged by a procedure that denies some parties their "day in court." Others have raised concerns about procedures in which the judges do not meet face-to-face to decide the cases, such as (1) Are the issues adequately addressed when the judges do not confer? and (2) Is the decision made by three judges or, in fact, by one?

A. Authority of the Courts of Appeals to Deny Oral Argument

The history of the development of rule 34(a) of the Federal Rules of Appellate Procedure, which provides for disposition on the briefs, reveals some of the debate that accompanied the adoption of screening programs. Rule 34(a) authorizes the courts of appeals to adopt local rules to permit an appeal to be decided on the merits without oral argument if (1) the appeal is frivolous, (2) the dispositive issue or set of issues has recently been authoritatively decided, or (3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.[4] The rule also specifies that the parties must be provided with an opportunity to file a statement setting forth reasons why argument should be heard, and that the decision to dispose of a case without argument must follow an examination of the briefs and record by a three-judge panel and must be unanimous.

4. Fed. R. App. P. 34(a). The practices followed by the courts of appeals in implementing this rule are described in J. Cecil & D. Stienstra, *supra* note 2.

Rule 34(a), adopted in 1979, is patterned after the recommendations in the Report of the Commission on Revision of the Federal Court Appellate System.[5] A review of the development of this rule suggests that the courts of appeals are expected to exercise considerable discretion in the development of procedures for deciding cases without oral argument. This review also suggests, however, that the proportion of appeals currently decided without argument in several of the courts of appeals is now approaching 60 percent, which caused the commission to register concern over the lack of opportunities for oral argument.

The Supreme Court determined long ago that the Constitution does not require oral argument in all cases; the need for oral argument is to be determined on a case-by-case basis after consideration of "the particular interests affected, circumstances involved, and procedures prescribed in Congress for dealing with them."[6] By the mid-1970s, most courts of appeals relied on this ruling to develop screening procedures intended to identify those cases suitable for disposition without argument.[7]

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5. Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change (Comm'n Print, 1975) [hereinafter Recommendations for Change].

6. Federal Communications Comm'n v. WJR, 337 U.S. 265, 272 (1949). ("[T]he right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations. Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or even substantial ones, are raised." *Id.* at 276.) More recently, summary disposition procedures involving claims of double jeopardy were approved by the Court in Abney v. United States, 431 U.S. 651, 662 n.8 (1977) (statement of Chief Justice Warren Burger) ("It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy").

7. *See, e.g.,* P. Carrington, D. Meador & M. Rosenberg, Justice on Appeal at 16–17 (1976) [hereinafter Justice on Appeal]. *See also* Commission on Revision of the Federal Court Appellate System, Hearings, First Phase, Aug.-Oct. 1973 (Comm'n Print, 1973) [hereinafter Hearings, First Phase] (statement of Irving Kaufman, Chief Judge, U.S. Court of Appeals for the Second Circuit, indicating that the Second Circuit is an exception to the trend and citing J. Langner & S. Flanders, Comparative Report on Internal Operating Procedures of the United States Courts of Appeals at 36 (Federal Judicial Center 1973)).

Commentary concerning the screening programs and argument practices of the courts of appeals has been particularly spirited. *See* Bright, *The Power of the Spoken Word,* 72 Iowa L. Rev. 35 (1986); Bright & Arnold, *Oral Argument? It May Be Crucial!,* 70 A.B.A. J. 68 (1984); Engle, *Oral Advocacy at the Appellate Level,* 12 U. Tol. L. Rev. 463 (1981); Feinberg, *Unique Customs and Practice of the Second Circuit,* 14 Hofstra L. Rev. 297 (1986); Godbold, *Improvements in Appellate Procedure: Better Use of Available Facilities,* 66 A.B.A. J. 863 (1980); Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom,* 72 Iowa L. Rev. 1 (1986); Rubin & Ganucheau, *Appellate Delay and Cost—An Ancient and Common Disease: Is It Intractable?,* 42 Md. L. Rev. 752 (1983).

In 1969, following adoption of its screening program, the Fifth Circuit was the first federal appellate court to address the due process questions raised by screening procedures. In *Huth v. Southern Pacific Co.*, the court concluded that its screening program met "both the literal demands and, more important, the underlying spirit" of the standard set by the Supreme Court.[8] In 1973, the Third Circuit also found that the old rule 34 did not require oral argument in every case, noting that "[s]uch a rigid requirement would be incompatible with the need of the judiciary to husband its time by limiting argument to those cases in which the court believes it will aid in the quality of the decision-making process."[9] That same year, the Tenth Circuit Court of Appeals was even more direct in rejecting the claim of a due process right to oral argument. The court wrote, "Oral argument serves only as an aid to the court and is not premised upon a statutory or constitutional right of the parties. The court, as it does in more than fifty percent of all cases considered, did not desire oral argument."[10]

While the issue was being addressed by the courts, a series of hearings gave others an opportunity to comment on the practice of deciding cases without argument. The diminishing role of oral argument was a primary concern of the Commission on Revision of the Federal Court Appellate System, also known as the Hruska Commission. Convened in 1973, the commission was created by Congress to study the procedures of the federal courts of appeals and to recommend changes "for the expeditious and effective disposition of the caseload of the Federal courts of appeal, consistent with fundamental concepts of fairness and due process."[11] Hearings before the commission concerning oral argument resulted in a spirited debate between those concerned with preserving oral argument as an integral part of the judicial process (primarily attorneys) and those who wished to restrict oral argument in cases in which it was not expected to be helpful (primarily judges).

Proponents of oral argument asserted that the benefits of oral argument outweighed any saving of judicial time that might result from its elimination. Oral argument, they contended, makes the facts and contentions in dispute easier to understand and permits

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8. 417 F.2d 526 (5th Cir. 1969).

9. NLRB v. Local No. 42, Int'l Ass'n of Heat & Frost Insulators, 476 F.2d 275, 276 (3d Cir. 1973).

10. United States v. Smith, 484 F.2d 8, 11 (10th Cir. 1973). *See also* United States v. Marines, 535 F.2d 552, 556 (10th Cir. 1976) ("Dispensing with oral argument clearly does not violate due process rights") (citing *WJR*, 337 U.S. 265).

11. Pub. L. No. 92-489, § 1(b), 86 Stat. 807 (1972), *amended by* Pub. L. No. 93-420, 88 Stat. 1153 (1974).

the parties to feel they have had their day in court.[12] The American Bar Association adopted a resolution strongly urging preservation of oral argument. The resolution stated the following:

> Be It Resolved That the American Bar Association expresses its opposition in an appropriate manner to the rules of certain United States Courts of Appeals which drastically curtail or entirely eliminate oral argument in a substantial number of nonfrivolous appeals, and, a fortiori, to the disposition of cases prior to the filing of the briefs.[13]

Advocates of restricting oral argument acknowledged its value in many cases, but they insisted as well that the courts do not require oral argument in all cases to be able to render a reasoned and principled decision. They contended that many more cases could be decided if the courts were free to decide at least some cases without oral argument.[14] For adherents of this position, the critical inquiry then became one of numerical limits: What degree of nonargument was authorized by the federal rules?

Although there was very little discussion of the precise percentage of an appellate court's caseload that could be decided without argument, even some advocates of restriction of oral argument expressed concern that some courts had already gone too far. These commentators felt that a tougher standard for dispensing with oral argument might be advisable.[15] Concern was expressed, in particular, about the practice of the Fifth Circuit, which at that time was deciding 57 percent of its cases without argument.[16] However, no direct discussion of the limits of appellate court discretion in structuring such procedures can be found in the record of the hearings.

The Commission ultimately recommended that the Federal Rules of Appellate Procedure be amended to establish a national stand-

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12. *See, e.g.,* Hearings, First Phase, *supra* note 7, at 65–68 (statement of Orison S. Marsden, Esq., American College of Trial Lawyers, arguing that oral argument be preserved).

13. Action of the House of Delegates, August 1974, *quoted in* Justice on Appeal, *supra* note 7, at 18 n.4.

14. *See, e.g.,* Hearings, First Phase, *supra* note 7, at 17 (statement of former Solicitor General Erwin N. Griswold) ("The Fifth Circuit would be five years behind if it allowed the old-time oral argument in every case"), 36–37 (statement of Chief Judge Collins Seitz, Third Circuit Court of Appeals), 449 (statement of Judge Griffin Bell, Fifth Circuit Court of Appeals).

15. *See* Hearings, First Phase, *supra* note 7, at 383 (statement of Judge John Godbold, Fifth Circuit Court of Appeals), 452–54 (statement of Judge Griffin Bell, Fifth Circuit Court of Appeals).

16. *See, e.g.,* Hearings, First Phase, *supra* note 7, at 452 (statement of Judge Griffin Bell, Fifth Circuit Court of Appeals), 18 (statement of former Solicitor General Erwin N. Griswold), 65 (statement of Orison S. Marsden, Esq., American College of Trial Lawyers), 375 (statement of Roland Nachman, President, Alabama State Bar Association), 383 (statement of Judge John Godbold, Fifth Circuit Court of Appeals).

ard that oral argument be allowed as a matter of right *except* when the appeal is frivolous, the dispositive issue or issues have been recently authoritatively decided, or "the facts are simple, the determination of the appeal rests on the application of settled rules of law, and no useful purpose could be served by oral argument."[17] The commission also supported the principle of giving the local courts of appeals discretion in determining the procedures for deciding cases without argument, stating, "The Commission recognizes that conditions vary substantially from circuit to circuit. Each court of appeals should therefore have the authority to establish its own standards, so long as the national minimum is satisfied, and to provide procedures for implementation which are particularly suited to local needs."[18]

With only one minor change, the report of the commission became the basis of the amended Federal Rule of Appellate Procedure 34. The phrase "no useful purpose could be served by oral argument" was changed to "would not be significantly aided by oral argument" to permit a more flexible and workable standard. Shortly thereafter, the American College of Trial Lawyers adopted a resolution condemning "the action of certain courts, both Federal and State, in curtailing or eliminating oral argument in non-frivolous matters."[19]

It is apparent that the commission and the drafters of the amendments to rule 34 intended to authorize the practices already in existence for deciding some cases without argument. Appellate judges were given considerable discretion in deciding when to deny oral argument. This discretion is reflected today in the great variation in local rules and practices across the courts of appeals. Nevertheless, although the commission and rule 34 set no specific standard, the history of the development of the rule suggests considerable concern when dispositions without argument reach 60 percent of the decisions on the merits. Moreover, the commission cautioned against routinely dispensing with oral argument:

> Oral argument is an essential part of the appellate process. It contributes to judicial accountability, it guards against undue reliance on staff work, and it promotes understanding in ways that cannot be matched by written communication. It assures the litigant that his case has been given consideration by those charged

17. Recommendations for Change, *supra* note 5, at 48. The original rule 34(a), adopted in 1968, simply stated, "The clerk shall advise all parties of the time and place at which oral argument will be heard." Fed. R. App. P. 34(a) (1979).

18. Recommendations for Change, *supra* note 5, at 48.

19. Resolution adopted by the Board of Regents of the American College of Trial Lawyers on March 9, 1979 (on file in the Information Services Office of the Federal Judicial Center).

> with deciding it. The hearing of argument takes a small proportion of any appellate court's time; the savings of time to be achieved by discouraging oral argument is too small to justify routinely dispensing with oral argument.[20]

B. Purpose and Design of the Study

Most of the federal appellate courts now have specialized procedures for selecting some cases for disposition without argument, and the debate about these procedures continues. The fundamental question at the center of the debate is whether cases decided without argument are receiving adequate attention from the appellate courts. There is no simple way to answer this question, but to the extent that the answer depends on a clear understanding of the procedures involved in selecting cases for nonargument disposition, this study can provide a partial answer.

We examined the screening procedures of four appellate courts with the hope of providing a clear, precise description of the procedures used by these courts to select and decide the cases disposed of without argument. We sought in particular to answer several specific questions about appellate screening:

1. How many and what kinds of cases are decided without argument?

2. What steps do judges follow when reviewing cases for nonargument disposition?

3. What written material do they rely on for this review?

4. What are the characteristics of cases they consider suitable for nonargument disposition?

5. How much and in what way do the judges communicate with each other while reviewing and deciding the nonargument cases?

6. What are the staff attorneys' and law clerks' responsibilities in selecting and preparing cases for disposition on the briefs?

7. What special safeguards have been adopted to ensure that cases disposed of on the briefs receive full judicial attention?

8. How do the courts respond to parties' attempts to influence the method by which their case is decided?

We took two approaches to answering these questions. First, we examined the data collected by the Administrative Office of the

20. Recommendations for Change, *supra* note 5, at 48.

United States Courts and developed a profile of the cases decided on the briefs. This profile highlights the differences between argued and nonargued cases on several dimensions: the nature of the cases, the elapsed time from briefing to judgment, the rate at which the cases are affirmed, the publication rate, and the types of dispositions (opinions, orders) used.

Our second approach was to interview those who participate in the process. It was beyond the scope of this study to conduct interviews in all thirteen appellate courts. However, our previous study on appellate screening practices provided a typology from which we could choose the courts for the current study. The earlier study, based on a survey of the thirteen courts' local rules and interviews with the clerks, identified three general procedures used by the courts for deciding cases on the merits without argument.[21] These procedures vary in two ways: (1) the extent to which the court staff are involved in the identification of cases for disposition without argument and (2) the structure of the judicial panels that consider such cases and the procedure the panels use to decide the cases. Eleven of the thirteen courts use one of these three procedures.[22] For the current study, we chose one court from each of the three categories. This method enabled us to highlight the courts' different approaches to screening.

The first, and most commonly used, screening procedure is one patterned after the practice first adopted by the Fifth Circuit. The court's central legal staff identifies cases suitable for disposition without argument and prepares memoranda describing the cases. Special panels of judges then review these designations, as well as the briefs and other case documents, and decide the cases without argument; in most courts these special panels do not convene.

In the second type of screening procedure, used by the Courts of Appeals for the Sixth and Federal Circuits, court staff attorneys review cases and identify those suitable for disposition without argument, but the cases are then decided by the courts' regular hearing panels (rather than special panels) at the time they convene to hear argument in the argued cases. Thus, the nonargument cases—

21. J. Cecil & D. Stienstra, *supra* note 2.

22. The Courts of Appeals for the Second and D.C. Circuits do not. The Second Circuit has a policy of permitting argument in all cases other than those involving incarcerated pro se litigants; thus, it has no procedures for selecting cases for nonargument disposition. We were not able to interview the clerk of the D.C. Circuit, but the court's local rules suggested that it had no screening procedure. Data for SY 1984, on which the first report was based, seemed to support that conclusion: Only 6 percent of the decisions on the merits were made without argument. (The thirteenth court included in the first study was the Court of Appeals for the Federal Circuit.)

like the argued cases—are decided by an in-person conference of the judges.

In the third type of screening procedure, used by the Third Circuit, all cases are initially listed on the argument calendars and sent directly to the judges. Without assistance from staff attorneys or special panels, the judges then select and decide more than half the cases without oral argument. In other words, screening is carried out completely by the hearing panels.

For the present study of appellate screening practices, we selected the Fifth Circuit from the category of courts that have both staff screening and special panels. This court—the first federal court to adopt screening—has influenced the choice of procedures in many other courts. From the second category of courts, those that use staff screening but no special panels, we selected the Sixth Circuit, for the simple reason that the other court in that category is a specialized court and its experience is thus less generalizable. The single court in the third category—the Third Circuit, which has developed no special screening procedures—is of course also included in the study. Finally, we selected one additional court, the Court of Appeals for the Ninth Circuit, because it has adopted an interesting variation on the practice of the Fifth Circuit.

For each court, we followed the same basic research procedure. We made an initial trip to the court to interview the clerk and the director of staff attorneys. At that time we also tried to collect several types of data from the court files. For example, the data provided by the Administrative Office do not reveal whether a party is pro se. Because we wanted to be able to determine how large a proportion of each court's nonargument caseload was filed pro se and therefore unlikely to be argued regardless of the type of screening procedure used (unless the case warranted appointment of counsel), we collected the docket numbers of the pro se cases.[23] We also tried to collect information about the number of cases in which the parties had requested argument or had waived argument and the number of cases in which the parties had objected to the nonargument disposition of their case. Because requests for argument or waivers of argument are usually made in the briefs, and because examination of the briefs was beyond the resources of this study, we were not able to determine for most courts how often such requests are made. Determining the number of objections

23. The courts were very helpful in providing the docket numbers of the pro se cases. We merged the docket numbers with data from the Administrative Office so that we could identify the characteristics of the pro se cases. Because our first trips to the court were in 1985 and because we collected the data for the most recently completed statistical year, our pro se data are for SY 1984.

filed would have been even more difficult. Therefore, for the number of attorney requests, waivers, and objections, we have for the most part relied on estimates by the court staff and the judges.

We returned to the courts for interviews with the judges in the spring of 1986. With only a few exceptions, all active judges in each of the four courts were interviewed, most in person and some by telephone. The interviews typically lasted forty-five to sixty minutes, although some were cut short because of the press of judicial business.[24]

In order to highlight the unique features of the individual courts, we tailored the interview questions to the practices of each court. For example, we asked the judges in the Ninth Circuit to discuss the differences between serial and parallel panels. We asked the Sixth Circuit appellate judges to comment on the significance of their practice of deciding all nonargument cases in a face-to-face conference. Although the interviews focused on the unique features of the courts, we also included questions that would enable us to collect, to the extent possible, similar information across the four courts.[25]

We found during the course of our study that some courts have adopted special procedures to ensure that the cases disposed of without argument receive the full attention of the judges. In the Fifth and Ninth Circuits, for example, the decision on the merits in a nonargument case must be unanimous when the parties have requested oral argument. For nonargument cases, both the Third and Fifth Circuits have recently moved away from the use of judgment orders, in which the reasons for the decision are not stated, to the use of memorandum opinions, in which they are stated. We highlight these safeguards in our discussion of the screening procedures of these courts.

C. Outline of the Report

To provide a context in which to place the procedures of the courts, in chapter 2 we present a statistical profile of the cases decided without argument in twelve of the thirteen appellate courts.[26] The data show that there is great variation across the

24. In order to interview as many judges as possible in person, we scheduled our trips during weeks in which the greatest number of judges would be at the court for argument. The trade-off, of course, was that during argument weeks, judges have many demands on their time, and thus some of the interviews were shortened.

25. See appendix B for copies of the interview protocols.

26. The Federal Circuit is not included in the profile because the Administrative Office data base does not include data about this court.

courts in the percentage of cases disposed of without argument. There is also great variation in the types of cases disposed of without argument, the rate of affirmance of such cases, and the publication rates of the nonargument cases.

In chapters 3 through 6 we describe in detail the procedures adopted by the four appellate courts included in this study. First, we discuss the Fifth Circuit, then, in order, the Ninth, Sixth, and Third Circuits. These four chapters are based on our interview data and provide not only a description of the courts' procedures but also a discussion of the judges' evaluations of their own court's procedures. To give the reader a sense of the size and productivity of each court, we begin each chapter with a profile of the court's caseload and its resources (number of judges, hearing schedule, number of staff attorneys, and so on). To present the caseload profile, we use the standard measures—terminations per active judge, median time to disposition, and so on.[27] These measures are provided only to give the reader a context for the discussion of each court and should not be used as an indicator of the efficiency of the courts' screening procedures.

In chapter 7 we address the role of oral argument. This chapter is based on the judges' responses to three more general questions:

1. Have their views about oral argument changed during the time they have been on the bench?

2. What means are available to convince parties that their cases are fully considered?

3. If the caseload were to increase by 20 percent, what procedures would they find acceptable for handling the increase?

The answers to these questions touch on some of the central issues in the debate about deciding cases without argument.

Finally, in chapter 8, we use the evidence provided in the preceding chapters to draw several conclusions about federal appellate screening procedures.

27. See appendix C for tables summarizing the courts' resources and caseloads.

II. STATISTICAL PROFILE OF NONARGUMENT CASES IN THE COURTS OF APPEALS

This chapter presents a series of tables that summarize the characteristics of appeals decided without oral argument. It examines the percentage of appeals decided without argument in statistical year (SY) 1986 in each of the courts of appeals, the types of cases decided without argument, the amount of time that elapses from filing the briefs to the disposition of the appeal, and other characteristics of the disposition in nonargued appeals.

There is striking variation in all of these measures across the courts of appeals. Most notable is the variation in the percentage of appeals disposed of without argument: Some courts hear argument in almost every appeal, whereas others decide more than half their appeals without argument. There is also variation in the characteristics of the disposition of appeals decided without oral argument. In examining these characteristics, one must keep in mind that the variation in a given characteristic is related to the extent to which the courts decide appeals without oral argument. For example, in those courts that decide most cases after argument, only the most simple, or even frivolous, cases are likely to be decided without argument. Nonargument dispositions in such courts are unlikely to be published and may be decided promptly without a lengthy opinion. In contrast, in courts that decide half or more of their appeals without argument, the nonargument portion of the caseload will contain a greater range of case types and more substantial cases. Therefore, there are likely to be more published dispositions for nonargued cases. However, in the final analysis, the differences across courts in the characteristics of the dispositions of cases decided without argument are overshadowed by the striking variation across courts in the overall percentage of cases decided without argument.

A. Percentage of Cases Decided Without Argument

Table 2 lists the percentage of appeals terminated on the merits without oral argument in each of the courts of appeals between July 1, 1985, and June 30, 1986.[28] Six of the twelve courts decide half or more of their submitted appeals without oral argument. The Fifth Circuit Court of Appeals decides the most appeals without argument—almost two-thirds of its cases.[29] The Second Circuit Court of Appeals decides the lowest percentage of appeals without argument—approximately one-fifth of its cases.

TABLE 2
Percentage and Number of Cases Disposed of Without Argument in Each Federal Court of Appeals (SY 1986)

Appellate Court	Total Number of Appeals	Number Without Argument	Percentage Without Argument
All	18,199	8,306	46
D.C. Circuit	707	309	44
First Circuit	565	201	36
Second Circuit	1,214	230	19
Third Circuit	1,284	717	56
Fourth Circuit	1,743	874	50
Fifth Circuit	2,092	1,330	64
Sixth Circuit	1,793	723	40
Seventh Circuit	1,236	391	32
Eighth Circuit	1,314	660	50
Ninth Circuit	2,636	976	37
Tenth Circuit	1,179	644	55
Eleventh Circuit	2,436	1,251	51

SOURCE: Administrative Office of the United States Courts, 1986 Annual Report of the Director, at table B-1, appendix I.

NOTE: Includes only lead and single cases decided on the merits. See appendix A for definitions of "terminations on the merits" and "lead and single cases."

Variation in the percentage of cases decided without oral argument is not directly related to the presence or absence of a screening program for identification of nonargument cases. The courts with screening programs do not necessarily dispose of a greater percentage of cases without argument than the courts with no pro-

28. All data presented in this chapter are based on lead and single cases decided on the merits (see definitions in appendix A). Pro se cases are included in the figures. Unless otherwise indicated, statistical data presented in this chapter are from analyses of records collected by the Administrative Office of the United States Courts.

29. See appendix A for an explanation of recent data reporting changes that may affect the interpretation of these figures.

gram do. For example, the Third Circuit Court of Appeals decides the second highest percentage of appeals without oral argument (56 percent), but it employs neither staff assistance to identify such cases nor special judicial panels to decide them. Similarly, the Seventh Circuit Court of Appeals has a screening program, but it decides the second lowest percentage of appeals without argument (32 percent).

The Second Circuit, which decides the lowest percentage of cases without argument, assigns cases to the argument calendar in much the same manner as the Third Circuit, employing neither staff assistance nor special judicial panels. However, the two courts differ greatly in their policy on oral argument. In the Second Circuit, all appeals other than those by incarcerated pro se litigants are argued unless the attorneys request that the case be submitted without argument and the presiding judge of the panel approves. By contrast, the Third Circuit initially places all appeals other than pro se appeals on the argument calendar, then the judges, after reviewing the briefs and other materials, remove up to 60 percent of the cases from the argument calendar and decide them on the briefs.

Most other courts use a screening procedure in which staff attorneys designate nonargument appeals and special panels of judges decide them. However, among these courts there is great variation in the percentage of appeals decided without argument. For example, the procedures for the Fifth and Ninth Circuit Courts of Appeals are similar in that staff attorneys identify cases suitable for disposition without argument and special panels of judges decide these cases, yet these two courts vary greatly in the percentage of cases disposed of without argument (64 percent and 37 percent, respectively).[30]

Thus, the method for selecting the nonargument cases does not appear to determine the proportion of the caseload decided without argument. Judicial philosophy regarding the role of and the need for oral argument appears to be a more important factor than the procedure used for identifying the nonargument cases.

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30. The figures in table 2 include all cases decided without argument, only a portion of which may have been identified through a screening program. For example, some cases are not argued because the parties waive argument. In addition, some cases are initially set for argument, but the hearing panel elects to decide them without argument.

B. Types of Cases Decided Without Argument

The criteria adopted by the courts for deciding appeals without oral argument focus on the difficulty of the legal issues raised in the appeal and the need for argument to clarify points raised in the briefs.[31] However, application of these criteria results in selection of greater numbers of certain types of cases for disposition without oral argument. Table 3 lists the percentage of civil appeals, criminal appeals, and administrative agency appeals decided without argument. Approximately one-half of all civil appeals are decided without argument. Since civil appeals constitute 66 percent of the caseload of the federal courts of appeals, it is not surprising that the percentages in table 3 for civil appeals are close to the percentages in table 2 for all appeals.

TABLE 3
Percentage and Number of Civil, Criminal, and Administrative Agency Cases Decided Without Argument (SY 1986)

	Civil		Criminal		Administrative Agency	
Appellate Court	%	No.	%	No.	%	No.
All	49	5,903	33	1,163	38	561
D.C. Circuit	52	219	44	17	23	52
First Circuit	39	157	10	10	27	7
Second Circuit	19	134	15	56	9	6
Third Circuit	56	505	56	134	55	48
Fourth Circuit	58	754	20	56	41	39
Fifth Circuit	62	957	64	182	62	71
Sixth Circuit	45	609	13	32	37	47
Seventh Circuit	34	280	20	44	33	34
Eighth Circuit	54	535	31	56	44	27
Ninth Circuit	40	553	26	146	40	160
Tenth Circuit	59	416	27	70	47	37
Eleventh Circuit	52	784	48	360	40	33

SOURCE: Computed from data provided by the Administrative Office of the United States Courts.

NOTE: No. indicates the number of lead or single cases decided without oral argument in each of the case types. These figures do not include appeals in bankruptcy cases, of which 32 percent (151 of 465 appeals) are decided without oral argument, or writs of mandamus, of which 94 percent (528 of 556 writs) are decided without oral argument.

One-third of all appeals from judgments or orders from district courts in criminal cases are decided without oral argument.[32] Although some courts of appeals decide a high percentage of criminal appeals without argument, other courts appear to prefer argument

31. J. Cecil & D. Stienstra, *supra* note 2.

32. Under the classification system employed by the Administrative Office of the United States Courts, a motion to vacate a sentence is considered a civil appeal.

in criminal appeals. These preferences do not appear to be linked to the courts' methods for disposing of civil appeals. For example, table 3 indicates that the First, Fourth, Sixth, and Tenth Circuit Courts of Appeals dispose of a much lower percentage of criminal cases without argument than they do civil cases. In contrast, the Third, Fifth, and Eleventh Circuit Courts of Appeals dispose of high percentages of criminal appeals without argument, percentages that are similar to the percentages of civil cases these courts dispose of without argument. Since the issues on appeal are likely to be similar across the courts, it appears that those courts that dispose of a much lower percentage of criminal appeals without argument than civil appeals emphasize the importance of providing a public forum in criminal cases.

Approximately 38 percent of appeals from actions by administrative agencies are decided without oral argument. Within this category, 58 percent of the appeals from rulings by the tax court and 48 percent of immigration appeals are decided without oral argument. The pattern among the courts generally follows the pattern for civil appeals, with the exception of the District of Columbia Circuit Court of Appeals. It is likely that for this court, the much lower percentage of administrative agency appeals decided without argument, relative to civil appeals, reflects the unique nature of administrative agency appeals filed in the District of Columbia Circuit.[33]

Table 4 lists for each of the courts the percentage of nonargument dispositions in six general areas of civil litigation.[34] As indicated by the table, 77 percent of the prisoner petitions are decided without argument. Among prisoner petitions, motions to vacate a sentence and appeals of civil rights cases are especially likely to be decided without argument (84 percent and 87 percent, respectively). Such appeals frequently raise simple or frivolous issues, making them likely candidates for nonargument disposition.[35]

Furthermore, in most of these cases the prisoner proceeds without representation by an attorney. Appeals from incarcerated pro se litigants are rarely argued. When such appeals raise difficult issues that may benefit from argument, most courts appoint counsel and hear argument. The practices of the Fourth Circuit, which

33. G. Bermant, P. A. Lombard, and C. Seron, The Cases of the United States Court of Appeals for the District of Columbia Circuit (Federal Judicial Center 1982).

34. These six types of cases constitute 87 percent of the civil case terminations. The remainder of the civil appeals fall into a number of miscellaneous categories and usually involve an action growing out of a specific federal statute.

35. Federal Judicial Center, Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts 9 (1980).

TABLE 4
Percentage and Number of Selected Types of Civil Cases Decided Without Argument (SY 1986)

Appellate Court	Contract Actions		Personal Injury		Antitrust or Securities		Civil Rights		Prisoner Petitions		Social Security	
	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.
All	31	445	35	429	23	73	44	1,085	77	2,578	60	466
D.C. Circuit	40	14	43	17	62	8	63	82	92	47	33	1
First Circuit	17	7	14	10	25	2	44	38	59	23	91	48
Second Circuit	9	8	14	5	12	4	18	27	41	63	24	5
Third Circuit	51	51	57	70	44	10	61	102	80	127	62	42
Fourth Circuit	15	17	16	19	0	0 (13)	43	95	92	556	32	29
Fifth Circuit	53	135	54	171	26	7	62	181	85	298	96	53
Sixth Circuit	10	10	16	14	0	0 (21)	29	76	71	340	55	89
Seventh Circuit	9	7	33	24	8	2	36	82	51	106	49	16
Eighth Circuit	32	32	34	20	23	5	38	66	80	308	57	40
Ninth Circuit	12	23	24	25	12	8	38	113	71	227	35	29
Tenth Circuit	41	45	39	23	63	15	60	92	86	152	88	30
Eleventh Circuit	40	96	24	31	32	12	45	131	79	331	79	84

SOURCE: Computed from data provided by the Administrative Office of the United States Courts.

NOTE: No. indicates the number of lead or single cases decided without oral argument in each of the case types. When no cases of a certain type are decided without argument (0 percent), the second number in the parentheses indicates the total number of lead and single appeals of that type decided on the merits.

decides 92 percent of these cases without argument, are notable, since prisoner petitions are especially common in that court. The Second Circuit decides only 41 percent of these cases without argument, the lowest percentage of all the courts of appeals.

Sixty percent of all Social Security appeals are decided without oral argument. This finding reflects the nature of appellate review in such cases. Typically, these are appeals from decisions by an administrative law judge to deny disability benefits, decisions that were affirmed by the lower court. Such cases rarely involve novel legal issues. Appellate review is limited to examination of a sometimes lengthy record to determine if the action by the administrative law judge is supported by substantial evidence.[36]

Since the portions of the record that are in dispute can be indicated in the briefs, few Social Security cases are likely to require oral argument. Yet, there is wide variation across the courts of appeals in the percentage of such cases decided without argument. The Second Circuit decided only five of its twenty-one Social Security cases without argument, whereas the First and Fifth Circuits decided almost all their Social Security appeals without argument.

Appeals involving contract actions and appeals arising under antitrust or securities laws are less likely to be decided without argument than are other types of civil appeals. Such cases frequently raise difficult legal questions, and oral argument may be necessary to clarify issues raised in the briefs. Nevertheless, the courts of appeals vary greatly in the percentage of these cases they decide without argument. For example, the Third and Fifth Circuits decide a high percentage of contract actions without argument, whereas the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits do not.[37]

These figures suggest that one should be cautious in drawing conclusions based on only the overall percentage of cases disposed of without argument, since the percentage varies greatly depending on the court and the type of case being considered. Similarly, caution should be exercised in considering increases over time in the percentage of cases decided without argument. Table 5 indicates the change in the percentage of nonargument dispositions from SY 1978 to SY 1986 for certain types of cases. It appears that some of the recent increase in the overall percentage of appeals disposed of

36. Haney, *Why the High Rate of Reversals in Social Security Disability Cases?*, 7 Hamline L. Rev. 1–17 (1984); L. Liebman, Disability Appeals in Social Security Programs (Federal Judicial Center 1985).

37. Dispositions of antitrust and securities cases are not specifically discussed here because the small numbers of these cases make it difficult to draw any conclusions on a court-by-court basis.

TABLE 5
Changes Over Time in Number of Cases Terminated, by Case Type, and Changes, for Each Type, in Percentage Decided Without Argument

Type of Appeal	1978	1981	1984	1986	Percentage Increase in Number of Terminated Appeals (SY 1978–SY 1986)
All	8,895	11,980	14,327	18,199	104
% Not argued	33	29	36	46	
All civil					
Total appeals	5,507	7,828	9,643	12,177	143
% Not argued	35	32	38	49	
Contract actions					
Total appeals	657	1,037	1,310	1,461	122
% Not argued	29	25	28	31	
Personal injury					
Total appeals	496	839	1,058	1,215	144
% Not argued	33	31	34	35	
Antitrust/securities					
Total appeals	273	344	344	315	15
% Not argued	10	13	16	23	
Civil rights					
Total appeals	924	1,510	1,902	2,458	166
% Not argued	31	30	36	44	
Prisoner petitions					
Total appeals	1,096	1,514	2,163	3,345	205
% Not argued	56	54	64	77	
Social Security					
Total appeals	274	504	741	780	184
% Not argued	61	44	50	60	

SOURCE: Computed from data provided by the Administrative Office of the United States Courts.

NOTE: Includes only lead and single cases terminated on the merits.

without argument is due to increases in appellate terminations of the types of cases that are especially likely to be decided without argument, and not to an overall increase in the use of nonargument dispositions. For example, prisoner petitions, civil rights appeals, and Social Security appeals have had a high rate of disposition without argument relative to other cases, and terminations of appeals in these types of cases have increased much faster than the overall rate of appellate terminations.[38] Not only have

38. It is likely that some of the increase in the nonargument rate for civil rights appeals and prisoner petitions in SY 1986 is due to a change in the manner in which the courts have counted "informal briefs." See appendix A for an explanation of this change. The informal briefing procedure was developed to accommodate pro se litigants. Many of these litigants are prisoners who are filing civil rights appeals.

these types of cases been terminated in greater numbers, but a larger proportion of these cases were disposed of without argument in SY 1986 than in SY 1981.[39] In contrast, the percentage of appeals decided without argument in contract and personal injury cases has remained relatively steady over time. Thus, it is apparent that the overall rate of increase in the percentage of cases decided without argument reflects, in part, increases in appellate terminations of the kinds of cases that have been previously decided without argument in most of the courts of appeals.

C. Elapsed Time to Disposition

Many advocates of screening programs have held that among the advantages of deciding appeals without argument is the opportunity for a more expeditious disposition. Although oral argument itself may require only fifteen or twenty minutes, according to this view, substantial time savings are realized in the preparation of the case because disposition without argument permits a judge to decide the case in one sitting, without a separate preparation for oral argument. Also, in courts that permit judges to decide nonargument cases without convening, the judges can study the cases and prepare the dispositions at a time convenient to each panel member individually rather than at a time convenient for the judges collectively. In addition, in courts in which the judges do not convene to decide the nonargument cases, substantial travel time is saved.

Unfortunately, the statistics collected by the Administrative Office do not include a number of the dates that are required to permit a precise comparison of the amount of time judges use to decide argued cases and the amount of time they use to decide nonargued cases. However, table 6 offers one relevant comparison, the median number of days that elapse from the date the last brief was filed to the date the judgment was entered. Of course, this time includes the period required for the cases to be prepared for presentation to the panel by the staff of the court, as well as any

39. Nonargument practice in cases other than Social Security appeals remained fairly stable from SY 1978 to SY 1981. However, the proportion of Social Security appeals decided without argument dropped from 61 percent in SY 1978 to 44 percent in SY 1981, then climbed back to 60 percent in SY 1986. The reason for the drop in the percentage of nonargument dispositions in Social Security cases is unclear, although analysis of the records of the Administrative Office reveals that this change corresponds to a decrease in cases involving claims for disability from black lung disease and an increase in other types of Social Security appeals.

TABLE 6
Median Number of Days Elapsed from Last Brief to Judgment
(SY 1986)

Appellate Court	Median Days from Last Brief to Judgment[a]
All	
Total appeals	161
Argued	193
Not argued	116
D.C. Circuit	
Total appeals	162
Argued	232
Not argued	66
First Circuit	
Total appeals	114
Argued	123
Not argued	85
Second Circuit	
Total appeals	62
Argued	65
Not argued	49
Third Circuit	
Total appeals	139
Argued	164
Not argued	126
Fourth Circuit	
Total appeals	167
Argued	172
Not argued	130[b]
Fifth Circuit	
Total appeals	130
Argued	215
Not argued	85[b]
Sixth Circuit	
Total appeals	238
Argued	234
Not argued	252[b]
Seventh Circuit	
Total appeals	196
Argued	215
Not argued	141
Eighth Circuit	
Total appeals	182
Argued	213
Not argued	101[b]
Ninth Circuit	
Total appeals	197
Argued	200
Not argued	190

(Continued)

TABLE 6 (Continued)

Appellate Court	Median Days from Last Brief to Judgment[a]
Tenth Circuit	
Total appeals	246
Argued	315
Not argued	205[b]
Eleventh Circuit	
Total appeals	125
Argued	201
Not argued	87

SOURCE: Computed from data provided by the Administrative Office of the United States Courts.

NOTE: Includes only lead and single cases decided on the merits.

[a]The calculation for median days from last brief to judgment in cases not argued includes only those cases in which a formal brief was filed.

[b]Median days from last brief to judgment in nonargued cases is based on less than two-thirds of the nonargued cases because of missing dates for filing the last brief in the remaining third of the cases. These missing dates most likely occur in cases in which an informal brief was used. This was an especially great problem in determining the figure for the Fourth Circuit, in which the brief date was available for only 108 of the 874 nonargued cases. See appendix A for an explanation of informal briefs and their impact on court statistics.

delay that occurs because of a backlog of cases. As the table shows, the median time from completion of briefing to judgment is much less for nonargued cases than for argued cases—less than four months for nonargued cases and more than six months for argued cases. Cases decided without argument require less time in all courts of appeals except the Sixth Circuit, in which nonargument cases require somewhat more time. It is possible that the greater time to disposition in nonargued appeals in the Sixth Circuit is due to the reported backlog of cases awaiting preparation of bench memoranda by the staff attorneys.[40] However, the data for the nonargument cases in the Sixth Circuit have a relatively high proportion of missing entries for date of filing of last brief, and this may distort the results. Likewise, the absence of brief dates for many nonargument cases in the Fourth, Fifth, Eighth, and Tenth Circuits may distort the median times for the submitted cases in those four courts.

40. See chapter 5, section C. As described in chapter 5, the Sixth Circuit has recently adopted new procedures that will enable the staff attorneys to prepare more cases for nonargument disposition.

In general, appeals that are not argued are decided more quickly than appeals that are argued. Of course, this time savings is not due solely to the elimination of argument. Cases decided without argument typically are easier than argued cases. It takes judges less time to review simpler cases and to draft the dispositions. Such dispositions are unlikely to require extensive revision, permitting judgment to be entered more promptly. It is the ease with which cases that do not require argument can be decided that permits courts to develop procedures for a more prompt disposition in such cases.

D. Characteristics of the Disposition

1. Affirmance rate. Appeals decided without oral argument usually are affirmed, and are affirmed at a greater rate than argued cases. As indicated in table 7, the Third Circuit has the highest rate of affirmance of nonargued appeals (91 percent) and the greatest difference between affirmance rates in argued and nonargued appeals (61 percent versus 91 percent). As described in chapter 6,

TABLE 7
Percentage of Argument and Nonargument Cases Affirmed (SY 1986)

Appellate Court	Argument	Nonargument
All	68	74
D.C. Circuit	60	45
First Circuit	70	65
Second Circuit	79	82
Third Circuit	61	91
Fourth Circuit	71	84
Fifth Circuit	53	68
Sixth Circuit	69	82
Seventh Circuit	70	81
Eighth Circuit	65	56
Ninth Circuit	69	77
Tenth Circuit	65	55
Eleventh Circuit	68	78

SOURCE: Computed from data provided by the Administrative Office of the United States Courts.

NOTE: Includes only lead and single cases terminated on the merits.

the judges of the Third Circuit decide, after examining all of the cases placed on the argument calendar, which ones require oral argument. The difference between the rate of affirmance in argued

cases and the rate in nonargued cases suggests that the likelihood of affirmance is an influential factor in determining that an appeal can be resolved without argument.

The D.C. Circuit is a notable exception to the general pattern, reversing or remanding the nonargument cases more often than affirming them. This court, along with the First, Eighth, and Tenth Circuits, is also an anomaly in that it affirms a greater proportion of its argument cases than of its nonargument cases.

TABLE 8
Percentage of Argument and Nonargument Cases Decided with a Published Decision (SY 1986)

Appellate Court	Argument	Nonargument
All	61	14
D.C. Circuit	69	10
First Circuit	83	15
Second Circuit	48	17
Third Circuit	54	11
Fourth Circuit	44	1
Fifth Circuit	82	22
Sixth Circuit	41	5
Seventh Circuit	83	19
Eighth Circuit	80	20
Ninth Circuit	51	15
Tenth Circuit	67	13
Eleventh Circuit	65	17

SOURCE: Computed from data provided by the Administrative Office of the United States Courts.

NOTE: Includes only lead and single cases terminated on the merits.

2. Publication practices. Policies concerning publication of opinions vary greatly across the courts of appeals.[41] As indicated in table 8, however, relatively few of the nonargued cases are published. The practices of the Fourth and Sixth Circuits are most striking: In the Fourth Circuit, only 1 percent of the nonargued cases are published and in the Sixth Circuit, only 5 percent. In contrast, the Fifth Circuit publishes 22 percent of its nonargument cases. The explanation for this variation in publication of opinions probably lies in the courts' different overall approaches to screening cases for nonargument disposition. The Fifth Circuit decides almost two-thirds of its cases without argument, whereas the Sixth Circuit decides only one-third of its cases in this manner. In other words, the Fifth Circuit screens more deeply than does the Sixth

41. D. Stienstra, Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals (Federal Judicial Center 1985).

Circuit, most likely placing somewhat more demanding cases in the nonargument pool. Therefore, the nonargument pool in the Fifth Circuit is likely to include more publishable cases than the nonargument pool in the Sixth Circuit.

3. Type of decision. In the absence of oral argument, a court may demonstrate that it has attended to the issues raised by the appeal by preparing a disposition that discusses the law in relation to the specific facts of the case and that details the reasons upon which the judges based their opinion. However, a written discussion of the reasoning of the court may be unnecessary in some dispositions. For example, appeals in which the basis of the court's decision can be deduced from specific rules of the court or a citation to cases that are directly determinative of the issue raised on appeal may be disposed of by a brief order that indicates the decision of the panel and includes the citations supporting the decision. For convenience, such dispositions will be referred to in this report as judgment orders.[42]

Table 9 indicates the percentage of argument and nonargument cases that were decided by a judgment order. Again, courts vary greatly in their willingness to dispose of cases by judgment order. A number of courts rarely rely on such dispositions (e.g., the First, Second, Fourth, Fifth, and Sixth Circuits). According to table 9, two courts of appeals, the District of Columbia and Third Circuits, decide over half their nonargument cases by judgment order. Discussions with a staff member of the D.C. Circuit indicated that the way this court reports the data may differ from the way other courts do, and therefore we draw no conclusions from the data.[43] For the Third Circuit, however, the data suggest that half the litigants in nonargument cases do not have the opportunity to observe the court attending to the issues raised on appeal during oral argument, nor do they receive an opinion discussing the law in relation to the facts of the case.

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42. We use the term *judgment order* to refer to "any written court decision used solely to state the decision of the court which does *not* contain the legal or factual elements or judgment rationale and where a verbal court decision has not been announced directly from the bench" (Court of Appeals Instructions, Statistical Analysis Manual, Guide to Judiciary Policies and Procedures, Transmittal 70, vol. 11, tit. 10, at X-23 (November 13, 1985)).

43. The problem seems to lie in the meaning of the phrase "legal or factual elements or judgment rationale." The D.C. Circuit appears to have been reporting many decisions that provide a one- or two-page written reason as decisions that "do not contain the legal or factual elements or judgment rationale" on the grounds that, although a written reason is given, this reason does not necessarily set out a legal rationale. It is likely that these decisions should have been reported differently.

TABLE 9
Percentage of Argument and Nonargument Cases Decided by Judgment Order (SY 1986)

Appellate Court	Argument	Nonargument
All	6	19
D.C. Circuit	16	79[a]
First Circuit	0	1
Second Circuit	0	0
Third Circuit	31	54
Fourth Circuit	0	0
Fifth Circuit	5	2
Sixth Circuit	1	1
Seventh Circuit	0	5
Eighth Circuit	1	35
Ninth Circuit	1	6
Tenth Circuit	3	27
Eleventh Circuit	21	33

SOURCE: Computed from data provided by the Administrative Office of the United States Courts.

NOTE: Includes only lead and single cases terminated on the merits. See *supra* note 42 in text for a definition of judgment order.

[a]This number appears to be a result of data reporting problems in the District of Columbia Circuit. See *supra* note 43 in text.

The 54 percent of the nonargument cases decided by judgment order in the Third Circuit is discussed in detail in chapter 6. We found during our interviews with the judges that the Third Circuit has recently modified its practices and is moving away from dispositions by judgment order and toward using unpublished memoranda to dispose of nonargument cases. The percentage of nonargued appeals disposed of by a judgment order has dropped somewhat in recent years.

E. Conclusion

The tables demonstrate a pattern of great variation in nonargument practice across the courts of appeals. Contrary to our expectation, the presence or absence of a screening program and the characteristics of the screening program are not strongly related to the percentage of cases the courts decide without argument. The practices of both the Fifth Circuit, in which there is a screening program and a high percentage of cases are not argued, and the Second Circuit, in which there is no screening program and a

low percentage of cases are not argued, follow the expected pattern. However, the departures from this pattern are almost as dramatic. Moreover, even within case types, which probably present similar issues from court to court, the percentage of cases not argued varies greatly. It appears that some courts simply are more willing, or find it necessary, to dispose of a significant number of cases without argument. This impression is confirmed by our interview data, which show that such factors as the preference of individual judges for argument and the traditions and customs of the individual courts are more important determinants of the extent of nonargument disposition than are the particular procedures the courts have adopted for selecting these cases.

III. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

A. Introduction

In December 1968, the Court of Appeals for the Fifth Circuit became the first federal appellate court to establish a program for screening some cases for disposition on the briefs. At that time, it was the largest federal appellate court, with fifteen judgeships, and it, like other courts, faced a growing backlog of pending cases resulting from a sharp increase in filings.[44] The number of appeals filed in the court increased from 582 in statistical year (SY) 1960 to 1,378 in SY 1968, and the number of appeals pending at the end of the year tripled during the same period, reaching 1,127 cases in SY 1968. In SY 1968, the filings per judgeship in the Fifth Circuit were 33 percent higher than the national average. Delays in approving new judgeships and filling vacancies resulted in especially heavy burdens for the active judges.[45]

For several years the court relied on visiting judges to accommodate the growing caseload, a practice that increased to the point that a visiting judge served on almost every hearing panel.[46] Dissatisfaction with such reliance on visiting judges and the growing caseload led the court to consider procedures that would permit the active judges to decide more cases, which in turn led to development of the screening program.[47]

Under the direction of the Fifth Circuit Council, the court adopted a procedure that would permit the active judges to decide

44. The procedure described here was developed by the "old" Fifth Circuit, which stretched from Texas to Florida. By 1981, at the time of the division of the circuit, the court had twenty-six active judges sitting in thirteen cities. After the division, the new Fifth Circuit had fourteen active judges, and both the Fifth Circuit and the Eleventh Circuit Courts of Appeals continued to use the same basic screening procedure.

45. Unless otherwise noted, all statistical data cited in this section are taken from Administrative Office of the United States Courts, Annual Report[s] of the Director.

46. G. Ganucheau, Federal Appellate Practice—Fifth Circuit Rules and Procedures 18 (Office of the Clerk, Court of Appeals, Fifth Circuit, 1984).

47. A number of state appellate courts were also developing screening programs in the late 1960s. *See* D. Meador, Appellate Courts: Staff and Process in the Crisis of Volume 9-12 (1974).

cases on the briefs without oral argument and without convening.[48] This program began modestly: Only 30 percent of the cases were referred to the screening calendar in the first four months of the program.[49] The proportion of cases referred to the screening calendar increased steadily, reaching 59 percent in SY 1972, remaining over 50 percent for most succeeding years, and reaching 64 percent in SY 1986.[50] The number of cases decided on the merits increased by 86 percent within two years of the adoption of the screening program—from 180 cases per panel in the year before adoption of the program to 334 cases two years after its adoption.[51] The median time from filing a complete record to disposition also improved, dropping from almost nine months in 1967 to just over six months in 1970. The use of visiting judges was almost eliminated, decreasing from 29 percent of case participations (the number of cases heard by a judge while sitting on an appellate panel) in SY 1969 to 3 percent in SY 1972.[52] Thus, the screening program appeared to have the desired effect on the caseload. However, for many cases, the program restricted the opportunity for oral argument and an in-person conference of the panel members.[53]

The procedure begun nearly twenty years ago is still in operation. Its two basic components—screening by staff attorneys and review and decision by special panels that do not convene—remain the essential features of the program. Five other federal appellate courts have adopted screening procedures similar to that of the Fifth Circuit.[54] Because the practices of this court have been so

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48. In the early years of the program there was no staff attorney's office to assist the judges in the screening function. Since the development of the staff attorney's office in the early 1970s, a portion of the screening task has been carried out by the staff attorneys.

49. *See* Murphy v. Houma Well Serv., 409 F.2d 804, 807 (5th Cir. 1969).

50. See appendix A for an explanation of data reporting changes that may affect the SY 1986 statistics.

51. Rubin & Ganucheau, *supra* note 7.

52. Administrative Office of the United States Courts, Federal Court Management Statistics (1974).

53. Several bar associations opposed the procedure, and, as noted in chapter 1, the screening program was an important topic at the hearings of the Commission on Revision of the Federal Court Appellate System (the Hruska Commission). However, a survey conducted for the commission and funded by the Federal Judicial Center revealed that the screening program was well accepted by those members of the bar who were familiar with it. T. Drury, L. Goodman & W. Stevenson, Attorney Attitudes Toward Limitation of Oral Argument and Written Opinions in Three U.S. Courts of Appeals (report prepared for the Commission on Revision of the Federal Court Appellate System (1974)).

54. Thus, seven federal appellate courts—including the Eleventh Circuit Court of Appeals, which continued the practice of the Fifth Circuit—now use staff attorney offices to screen cases for nonargument disposition and special panels to decide those cases. *See* J. Cecil & D. Stienstra, *supra* note 2.

central to the development of screening programs in the federal appellate system, we describe these practices in some detail.

Our discussion is based primarily on interviews with the staff and judges of the court. In late summer of 1985, we interviewed the clerk of court and the director and assistant director of the staff attorney's office. Our questions focused on the procedures used in the clerk's and staff attorney's offices to select the cases to be decided on the briefs. In early spring of 1986, we interviewed fourteen of the fifteen active judges. (One judge was ill.) Our questions to the judges covered a range of topics, but their purpose was always to gain an understanding of how the screening panels carry out their task of reviewing all cases and deciding the cases designated for nonargument disposition.[55]

We begin our review of the screening procedures in the Fifth Circuit with a brief description of the court's resources and caseload. We then present a description of the functions of the staff attorney's office and a discussion of the role of the special panels. We conclude the chapter with a discussion of the judges' evaluations of the court's screening program.

B. Judge, Staff Attorney, and Caseload Profiles[56]

At the time we conducted interviews in the Fifth Circuit, the court had sixteen judgeships, one of which was vacant. The fifteen active judges resided in eight cities throughout the circuit: five in Austin; two each in Houston, Jackson, and Dallas; and one each in New Orleans, Baton Rouge, Shreveport, and Lafayette. Most court sessions are held in New Orleans; occasionally, sessions are held in Jackson, Mississippi, or Fort Worth, Texas.

The judges sit on two types of panels: argument panels and special panels; the latter are usually referred to as screening panels. Argument panels are scheduled during all twelve months of the year; two panels meet the first week of each month, and two panels meet the second week of each month. Each judge sits four days a week for seven weeks each year, or twenty-eight days a year, and hears a maximum of five cases each day. The judges sit with the same panel members throughout the hearing week. The screening panels, in contrast, are year-long panels established each July. These panels, which do not convene, decide the nonargument cases

55. See appendix B for a copy of the interview protocol.

56. See appendix C for tables summarizing the information presented in this section.

and motions. Only active judges (no seniors or visitors) serve on the screening panels.

At the time of our interviews, the court employed fifteen staff attorneys, including a director and two assistant directors.[57] In addition, the office of staff attorneys employs an attorney specializing in computer-assisted research, seven paralegals and clerical assistants, and several interns. There is little specialization in the office: all staff attorneys work on both screening cases and motions. The director and assistant directors supervise the staff and perform all staff functions as well. In addition, the director drafts proposed procedural rules and amendments as instructed by the court, develops statistical reports concerning the performance of the office, and serves as a representative of the court on bar and other committees. The director and assistant directors review briefs to identify cases that should be retained by the staff attorney's office, review pro se mandamus petitions, review motions, and instruct and supervise new staff attorneys. Approximately half of the staff attorneys serve at the pleasure of the court for an indefinite term, and half serve two-year terms.

The Fifth Circuit has one of the largest caseloads of the federal appellate courts.[58] The number of cases filed has risen somewhat in the last few years, but not as sharply as it has in the past. In SY 1986, 3,837 cases were filed (240 per judgeship), and 3,904 were terminated (244 per judgeship). The Fifth Circuit ranks near the top of the federal appellate courts in the number of cases terminated on the merits per active judge; in SY 1986, each active judge disposed of 414 cases—a significant increase over the number of dispositions per judge in SY 1984.

A substantial proportion—of the cases decided on the merits in the Fifth Circuit are decided without argument, and recently there has been a significant increase in this proportion (from approximately 52 percent (884 cases) in SY 1984 to almost 64 percent (1,330 cases) in SY 1986). The figure for SY 1986 is especially noteworthy because it is the highest proportion of cases any court has decided on the briefs since screening was first adopted. As in most federal appellate courts, pro se cases are generally decided without argument in the Fifth Circuit. However, the pro se cases by no means represent all the cases decided without argument. Nearly half the

57. At the time of our interviews, there was only one assistant director in the staff attorney's office. In this report, statements attributed to the assistant director are from this individual.

58. See appendix C for detailed information concerning the statistical profile of the court and sources for the data presented here. See appendix A for an explanation of data reporting changes that may affect the SY 1986 data.

decisions on the merits (49 percent) are decided without argument even when the pro se cases are excluded from the computation.

In conformity with the original goal of the screening procedure, the Fifth Circuit has been able to keep its use of visiting judges to a minimum. In SY 1986, only approximately 2 percent of the case participations were by visiting judges. The court has consistently used fewer visitors than any of the other federal appellate courts. The court ranks only fifth, however, in median time from filing the notice of appeal to disposition, although the court reduced this time somewhat from SY 1984 to SY 1986 (from 9.9 months to 9.1 months). Finally, although the number of its pending cases has declined somewhat in the past few years, the court ranks, again, at about the mid-point of the federal courts in the number of cases pending in SY 1986—152 per judgeship, or sixth.

Thus, during the past several years, the Fifth Circuit has experienced an increase in the number of cases filed. At the same time, the court has increased the number of cases decided on the merits per active judge, increased the proportion of cases decided without argument, reduced the median time to disposition, and reduced the number of appeals pending per judgeship. Although these changes are undoubtedly due to several factors, the increase in dispositions on the briefs is probably one explanation for the increase in decisions per judge and the reduction in both median time to disposition and number of pending cases. If this is true, the screening program continues to serve the purpose for which it was first established, the expeditious handling of a very large and still growing caseload.

C. Role of the Staff Attorneys in Selecting Cases for Nonargument Disposition

1. Overview of staff attorney responsibilities. The staff attorneys have a variety of duties. Motions make up about 40 percent of their work, the staff director estimated, and include such matters as applications for certificates of probable cause, applications to proceed in forma pauperis, motions for release on bond or reduction of bond pending appeal, applications for interlocutory appeal, motions for appointment or withdrawal of counsel, and jurisdictional problems on the court's motion and those forwarded by the clerk's office.[59]

59. In a recent telephone conversation, the staff director said the number of motions filed has gone up "dramatically" in the past year, and motions now make up at least 50 percent of the workload in the staff attorney's office. Because of this in-

The staff attorneys prepare a memorandum and proposed order for every motion and send these materials to the screening panels. According to statistics compiled by the staff director, in SY 1985 the staff attorneys reviewed and prepared memoranda for 626 motions. All motions work is reviewed by the director or assistant directors of the staff attorney's office. The staff attorneys also on occasion draft opinions at the specific direction of the court, and they prepare various indexes and digests to aid the court in maintaining consistency of decisions. At times the staff attorneys provide special assistance to judges who request their help.

The staff attorneys' first responsibility, however, is to assist the court in screening cases for nonargument disposition. But, unlike the staff attorneys in the Ninth and, until recently, Sixth Circuit appellate courts (the other two courts in our study that have screening programs), staff attorneys in the Fifth Circuit do not review all cases that are filed. Over the years the court has found that certain types of cases generally require argument. Furthermore, experience has shown that these types of cases can adequately be reviewed by the judges without materials prepared by the staff attorneys. Finally, limits on resources in the staff attorney's office prevent the staff attorneys from reviewing all cases. Thus, after the briefs have been filed, an initial sorting is done by two screening clerks in the clerk's office.

The screening clerks send to the staff attorney's office the types of cases the judges have found, from past experience, generally benefit from a staff attorney's memorandum: direct criminal appeals, habeas corpus cases, prisoner cases challenging conditions of confinement, all federal question cases, civil rights cases except title VII, and Social Security cases. Thus, the staff attorney's office is not restricted to review of pro se cases, as it is in some courts. In fact, the staff director said the court is "sensitive not to go the route of using staff attorneys as a pro se shop" because it is difficult to achieve staff attorney satisfaction if the office handles only pro se cases. However, most pro se appeals are sent to the staff attorney's office because most of these cases fall into the categories designated for staff attorney attention. Pro se appeals in categories other than those sent to the staff are routed directly to the screening panels.[60] Generally, the judges do not hear argument in pro se

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crease, the staff attorneys are sending more cases to the screening panels without screening memoranda. See subsection 2 of this section.

60. In SY 1984, the screening clerks sent only eight pro se cases directly to the screening panels—5 percent of the total number of pro se cases decided on the merits. In other words, the staff attorneys screened 95 percent of the pro se cases decided on the merits. (This information is based on data provided by the court and the Administrative Office of the United States Courts.)

cases and, as is true for all federal appellate courts, do not allow incarcerated pro se litigants to argue their cases. When argument is necessary for such cases, the court appoints counsel.

The screening clerks send directly to the screening panels all the cases not sent to the staff attorney's office. These include cases based on diversity jurisdiction, title VII claims, tax court and bankruptcy appeals, and agency review proceedings.[61] No cases are sent directly to the argument panels; that is, every case received by the argument panels has first been reviewed by a screening panel.

Occasionally there may be a shift in the type of cases the staff attorneys screen. If there is a backlog in the staff attorney's office, some of the cases that would usually be reviewed by the staff may be returned to the clerk's office, which sends them to the screening panels without staff memoranda.[62] If the staff attorney's office needs more work, some of the cases ordinarily sent directly to the judges are instead sent to the staff attorneys for review and preparation of memoranda. In all, the staff attorneys review about 50 percent of the fully briefed cases; the remainder are sent directly to the screening panels.[63]

2. Screening process. Cases are sent to the staff attorney's office when briefing has been completed. The briefs and record for each case are reviewed by either the director or an assistant director, who makes an initial determination about the proper method of disposition. If the reviewer thinks a case clearly should be argued, he or she returns it to the clerk's office, which sends it to a screening panel for further review. If the reviewer thinks disposition on the briefs is appropriate, he or she assigns the case to a staff attorney. Cases in the staff attorney's office are ranked by age, and—with the exception of bail, direct criminal appeals, and jurisdictional problems—the oldest cases are assigned first. The staff attorneys have forty-five days to review and prepare a case for the screening panels (thirty days for direct criminal appeals).

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61. The screening clerks attach a routing slip to all cases, both those sent to staff and those sent to panels. Yellow slips are used for direct criminal appeals, which are expedited, and white slips are used for all other appeals.

62. See subsection 2 of this section for a description of the types of cases forwarded without staff review.

63. In SY 1984, the staff attorneys reviewed and made recommendations in 852 (50 percent) of the cases decided on the merits; approximately half of these (430 cases) were argued and half (422 cases) were not. (See table 13 and accompanying text for a discussion of the rate of agreement between staff attorneys' recommendations and judges' final method of disposition.) Of the 850 cases the staff attorneys did not review, 55 percent (or 464 cases) were decided on the briefs and 45 percent (386 cases) were decided after oral argument. (This information is based on data provided by the court and the Administrative Office of the United States Courts.)

Each case is examined for jurisdictional defects during the supervisor's initial review. Cases with such defects are sent directly to the screening panels for disposition before any additional work is done on them. Tougher jurisdictional questions in cases assigned to the staff are reviewed by the staff attorneys during their preparation of the cases. Although the staff attorneys do not routinely examine jurisdiction in cases the clerk's office sends directly to the screening panels, the clerk's case managers have been trained to recognize jurisdictional problems, and they send cases with such problems to the staff attorney's office for review. Thus, in effect, the staff attorneys review most cases for jurisdiction at an early stage in the case.

For each case reviewed, whether designated for argument or nonargument disposition, the staff attorney prepares a routing slip. On this slip the staff attorney checks whether the case is a class II, III, or IV case. Class II cases are recommended for nonargument disposition, class III cases are recommended for twenty minutes of argument, and class IV cases are recommended for thirty minutes of argument.[64] All cases reviewed by the staff attorneys, including those they recommend for argument, are reviewed by a screening panel; no cases are sent directly to the hearing panels.

For cases they think clearly require argument, the staff attorneys simply check the appropriate box on the routing slip and send the case to the clerk for routing to a screening panel. Some cases are less clear. For these cases, the staff attorneys generally recommend argument but also prepare a short memorandum explaining how the decision will be aided by argument and listing the issues to explore during argument. The point, the staff director said, is to get the case onto the calendar quickly.

For the cases recommended for nonargument disposition, the staff attorneys prepare extensive memoranda, equivalent to bench memoranda.[65] In these memoranda, the staff attorneys include all the arguments and counterarguments raised by the parties, describe the procedural history and issues, analyze the record and authorities, set out the facts with citations to the record, and explain the recommendation for disposition without argument. During their first few months at the court, new staff attorneys work directly with the assistant staff directors to learn the proper method

64. Class I cases are discussed *infra* at note 70.

65. All memoranda prepared by the staff attorneys—both those for motions and those for screening cases—are printed on green paper, which alerts the judges immediately that they have received material from the staff attorney's office. The judges are expected to complete their work on a screening case within forty-five days.

for preparing these memoranda. After the new staff attorneys have some experience, their memoranda are reviewed by their peers.[66]

According to the staff director, it is very important to set forth very carefully in the memorandum the facts of the case, because the judges must have this material to decide the case. In addition, a well-prepared memorandum, he said, provides the judges with material that can be used in the written decision. However, the staff attorneys do not prepare proposed orders or opinions for the nonargument cases, because, the staff director said, "The point is not to resolve the issues, but to package the case."

Shortly before we met with the staff director, he had compiled a summary of the staff attorneys' screening work in SY 1985. During that year, the staff attorneys reviewed 947 cases. Disposition on the briefs was recommended and memoranda were prepared for 53 percent (or 506) of these cases. An additional 33 percent (or 307 cases) were recommended for argument without an accompanying memorandum. In 8 percent (or 74) of the cases, the staff attorneys recommended argument and wrote brief memoranda stating why argument would be helpful. Finally, 6 percent (or 60) of the cases were returned to the clerk's office unscreened. Each staff attorney prepared four to six screening memoranda each month.[67]

In a recent telephone conversation, the staff director said the number of cases screened by the staff attorney's office rose substantially in SY 1986. This increase was due primarily to an increase in filings in the kinds of cases generally assigned to the staff attorney's office—prisoner pro se cases, in particular. This increase, coupled with the increase in motions, has changed somewhat the method by which the staff attorney's office sends cases to the screening panels. More cases are now sent to the panels without memoranda, although a recommendation concerning argument is made in all cases reviewed by the staff. In particular, class II cases that might need a little more than the usual amount of work are now sent without memoranda. Along with the nonargument recommendation in such a case, the staff attorney may include a note explaining that a brief discussion between the judge and his law clerk

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66. As is explained in section C(4) of this chapter, the staff attorneys are assigned to year-long teams made up of one first-year, one second-year, and one long-term staff attorney. Memoranda are reviewed by team members.

67. Altogether, the staff attorneys prepared about one hundred memoranda a month (including both motions and screening memoranda). The long-term staff attorneys prepared about ten memoranda a month, and the staff attorneys who serve for only two years prepared about eight memoranda per month.

could resolve the case more quickly than review by a staff attorney.[68]

Although more cases are now sent to the screening panels without memoranda, the staff director said, the staff attorneys are preparing more memoranda than ever before. In other words, the overall productivity of the staff attorney's office is, as he put it, "way up." For example, in SY 1984, the staff attorneys prepared 100 memoranda per month; in SY 1986, they prepared 106 per month; and in the first four months of SY 1987, they prepared 124 per month. So far, the staff director said, the new approach to the caseload increase is "working fine," although the judges generally prefer memoranda in all cases recommended for nonargument disposition. However, because of the nature of the filings, the staff director himself is now more concerned that the staff attorney's office could become a "pro se shop" despite the court's best efforts to prevent it.

3. Screening criteria. The staff attorneys screen cases in accord with criteria set forth in a paper prepared by the director of staff attorneys.[69] After explaining that screening "is the appellate procedure whereby each case is examined briefly for the purpose of routing it through one of two or more different types of decisional processes," the paper discusses the criteria for arranging the cases into classes II, III, and IV.[70] Class II is the summary calendar and is made up primarily of cases in which

> the judges decide that oral argument will be neither required nor helpful. . . . [U]sually the dispositive issue or set of issues has been recently authoritatively decided or the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.[71]

According to the staff director, "quite a few" of the cases designated for nonargument disposition, especially prisoner cases, either

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68. In this report when we refer to the judges, we use the pronouns *he, him,* and *his.* This is not only a convenience but also a useful method for protecting the confidentiality of the five women judges we interviewed.

69. Steven A. Felsenthal, The Role of the Staff Attorneys in the Fifth Circuit (unpublished paper used by the staff attorney's office, Fifth Circuit Court of Appeals).

70. *Id.* at 2. There is also a class I, which "involves cases so lacking in merit as to be frivolous and subject to dismissal or affirmance under Fed. R. App. P. 34(a)(1) and Local Rule 47.6" (the court's summary affirmance rule). *Id.* at 2. The class I designation has not been used in recent years, and use of the summary affirmance rule is declining (as we discuss in section D(8)).

71. *Id.* at 3. These criteria are basically a paraphrase of Fed. R. App. P. 34(a)(2), (3).

are frivolous or involve issues that have recently been decided. Of the remaining cases designated for disposition on the briefs, he said, the largest group contains those cases in which "the decisional process would not be aided by argument." These cases have one or more of the following characteristics:

1. The evidence is sufficient and the record is clear.

2. The case involves well-settled law applied to a recurrent fact situation.

3. There is a well-defined appellate standard of review that can be applied to the facts of the particular case.

4. The question is straightforward, needs only a yes or no answer, and everything has been said in the briefs.

For hard-to-classify or borderline cases, it is more efficient, the staff director said, to recommend argument. In many of these cases, he explained, somebody first has to figure out what the question is, a task that would consume too much of the staff attorneys' resources. Such cases involve some of the following problems: (1) complex facts, (2) competing policy considerations, (3) a long record, and (4) complex issues.

The staff director said that to some extent the pro se cases receive special treatment from the staff attorneys. Not only are all the documents carefully reviewed, as in all cases, but the staff attorneys, under the Supreme Court guidelines in *Haines v. Kerner*,[72] construe the documents in favor of the pro se petitioner. The staff attorney's office takes special care not to give the pro se cases cursory review, which is often suspected in these cases.

The staff attorneys also give close attention to attorney waivers of argument. In almost all cases in which both parties state that they do not desire argument, the staff attorneys recommend disposition on the briefs. However, on occasion a staff attorney reviews a case in which both parties have waived argument but it is clear to the staff attorney that the case would benefit from at least an in-person conference of the judges.[73] For example, the parties may

72. 404 U.S. 519, 92 S. Ct. 594 (1972).

73. In discussing these cases, the assistant staff director pointed out a distinction he makes when reviewing cases for nonargument disposition: "The important distinction between argument and nonargument cases is not argument per se, but conferencing the case. In cases recommended for nonargument, the staff doesn't see a need for conference in the case." As is shown later in this report, a number of judges, in discussing the value of oral argument, also said the value lies in the conference of three judges, not in the argument itself.

have waived argument for economic reasons, which, the assistant staff director said, "must be taken seriously," but the staff attorney reviewing the case may feel the issues or record are sufficiently complex to require preparation by three separate chambers and an in-person conference. For these cases, the staff attorney's office recommends to the court that the case be listed on the argument calendar for conferencing without hearing.[74]

Finally, the staff attorney's office follows a special procedure for direct criminal appeals. To expedite these cases, the staff attorneys examine the appellants' briefs as soon as they are filed and do not wait for the government's briefs. When a brief raises issues that appear to require argument, the staff attorneys return the case to the clerk's office and it is scheduled for oral argument, bypassing review by a screening panel. A judge on the oral argument calendar will decide, after the government's brief is filed, whether the case should remain on the argument calendar or be transferred to a screening panel. The staff sends about 20 percent of the direct criminal appeals to argument before briefing in these cases has been completed. The other 80 percent are retained in the staff attorney's office and reviewed after all the briefs have been filed.[75]

4. Communication between staff attorneys and judges. Although the staff attorney's office appears to be functioning quite smoothly, for the past two years the staff director has been conducting an experiment in which he is pairing the staff attorneys with the screening panels. He assigns three staff attorneys—a first-year, a second-year, and a long-term staff attorney—to work together for a year, and then he pairs each staff attorney team with a screening panel. The staff attorneys know the identity of the judges for whom they are preparing memoranda, and the judges know which staff attorneys are working on cases for them.

The staff director adopted this arrangement in order to increase contact between the staff attorneys and the judges, hoping that both would find such contact beneficial. He reasoned that if the judges knew which staff attorneys they should call, they would call them more readily. Over time, he hoped, the judges would become more familiar with the staff attorneys' skills and would feel more comfortable calling on them for additional assistance. He also felt the staff attorneys would benefit from more contact with the

74. The judges' evaluations of this practice are discussed in chapter 7. The question of the costs of argument to counsel has been addressed in a law review article written by a judge and the clerk of the Fifth Circuit: Rubin & Ganucheau, *supra* note 7, at 761-62.

75. According to data provided by the director of staff attorneys, in SY 1984, 49 percent of the direct criminal appeals were decided without argument.

judges. In the past, the staff attorneys have seldom known what happened to the cases they prepared or how the judges evaluated their memoranda. The staff director felt that pairing the staff attorneys with judges would increase the amount of feedback the staff attorneys received from the judges.

As we discuss in section D(4), the judges generally did not report calling the staff attorneys with greater frequency since the experiment was started. However, the staff director feels the experiment has been successful in at least one sense. He said the pairing method has made the staff attorney's office more productive. Because the staff attorneys develop an identification with a particular panel, they work hard to keep that panel current. In addition, structuring the office into teams has in itself increased the efficiency and productivity of the staff attorneys.

The pairing procedure has also provided the foundation for another, more recent, innovation the staff director has instituted. He suggested to the judges that instead of writing memoranda for all motions, the staff attorneys should be allowed to present some motions orally to the judges. The experiment began with three judges and has now expanded to eight. According to the staff director, the judges' response has been universally positive. For most motions assigned to these judges, the staff attorneys present the issues and suggested resolution over the telephone and then send the order electronically. Although the staff attorneys no longer have the benefit of peer review of a written memorandum, the staff director said they quickly came to like the new procedure. It not only saves them time, but also increases their contact with the judges. Finally, the staff director finds the innovation valuable because it saves the court time; he estimates that motions dispositions have increased by twelve to fifteen each month.[76]

In addition to adopting these new procedural changes for enhancing communication between the judges and staff attorneys, the court has recently instituted, at the suggestion of the staff director and the judge who serves as liaison to the staff attorney's office, regular meetings between the judges and staff attorneys. Each time the court convenes for oral argument, one judge meets informally with the staff attorneys. The judges have addressed many topics, including (1) the way in which the judges use the staff attorneys' memoranda; (2) other responsibilities the judges may have, such as assignment to a Judicial Conference committee; and (3) issues, both legal and nonlegal, pending in the court. The staff director reports

76. The staff director anticipated that there might be objections to the new procedure because without a memorandum, there is no longer a "paper trail" for each motion. To compensate for this, he said, the order is somewhat more detailed.

that the judges have been very receptive when asked to talk with the staff attorneys, and the discussions have always been lively.

While increases in dispositions are an obvious beneficial result of the recent innovations, there appear to have been some other less tangible benefits as well. First, several judges have hired law clerks from the staff attorney's office. Second, increased contact with the judges probably enhances the career prospects of the short-term staff attorneys, who may be able to use the judges as references. Third, the long-term staff attorneys benefit, too, by feeling more a part of the court. Finally, as word has spread that the staff attorney's role in the Fifth Circuit is diverse and includes substantial contact with the judges, the staff director has been able to recruit very highly qualified and motivated staff members.

D. Role of the Judges in Selecting and Deciding Cases Without Argument

1. Screening process. As noted in section A of this chapter, each July the judges are assigned to yearlong standing panels (usually called screening panels). These panels have three functions: (1) to review all cases for the proper method of disposition, (2) to decide the merits of cases the panel concludes can be disposed of without argument, and (3) to dispose of all motions that require a judicial decision.[77] The panels do not convene, but conduct all their business by telephone and mail.

The screening panels use what may be called a serial method for reviewing and disposing of the cases.[78] All case materials are sent to only one judge, the initiating judge.[79] This judge reviews the material and, if he decides the case can be disposed of without argument, prepares a draft disposition. The case materials and draft disposition are then sent to the second judge, who, if he agrees with the first judge, sends the case on to the third judge. If the third judge agrees with the first two judges about both the method of disposition and the decision on the merits, the case is returned to the clerk's office and the disposition is issued. Any one judge, as pro-

77. The role of the screening panels in disposing of motions is not a subject of this report.

78. In the Ninth Circuit, panels using a procedure similar to that of the Fifth Circuit are labeled "serial panels" to distinguish them from "parallel panels," which use a different procedure. These two types of panels are discussed in chapter 4.

79. When a panel is first designated on July 1, the most senior judge is assigned the first screening case. After the initial assignment, all cases are assigned in rotation by seniority.

vided in Federal Rule of Appellate Procedure 34(a), may decide that argument is necessary and may return the case to the clerk's office for placement on an argument calendar. Each judge has forty-five days to complete his work on the case.[80]

2. Use of law clerks in screening. One of the first decisions a judge has to make about the in-chambers handling of the screening function is whether he is going to involve his law clerks in the review of cases for disposition on the briefs. We found that twelve of the fourteen judges involve their law clerks in some aspect of the screening task, but the degree to which the judges use their law clerks for this task varies substantially (see table 10). In table 10, we have divided the judges' responses into two general categories: (1) Do they have their law clerks assist in the initial screening (selection) of nonargument cases? and (2) Do they have their clerks prepare draft dispositions for the nonargument cases?

TABLE 10
Law Clerks' Role in Screening (N = 14)

Law clerks do not participate in screening	2
Law clerks do participate in screening	12
In selection of nonargument cases?	
No—judge selects	10
Yes—clerks screen, judge reviews	1
Yes—judge screens cases recommended for argument, clerks screen others	1
In drafting the decision for nonargument cases?	
No—clerks do not draft decisions	4
Yes—initial drafts by clerks	4
Yes—initial draft is sometimes by judge, sometimes by clerks	4

We should note at the outset that two judges do not use their law clerks for any part of the screening process. Of the twelve judges who do, three give their law clerks a very limited role: One asks his clerks only to do additional research on occasion, and two ask their clerks only to edit the decisions the judges themselves draft. The remaining nine judges use their law clerks somewhat more extensively in the screening function.

Only two of the judges, however, ask their law clerks to make the initial selection of the cases to be disposed of without argument. One judge screens the cases recommended for argument and has the law clerks screen the remaining cases, which the judge then reviews. The other judge assigns all cases to his law clerks for

80. Court policy requires that judges handle the screening cases first, then opinions (for which they have ninety days from submission), and then motions.

the initial decision about whether argument is necessary. After their review, the law clerks discuss the cases with the judge, and he tells them which steps to take next. The remaining ten judges who use their law clerks in the screening process do not use them in the selection stage. These judges read the case materials themselves and determine the proper method of disposition for the cases.

The judges are more inclined to have their law clerks draft dispositions. Four judges have their law clerks prepare an initial draft in nearly all cases selected for nonargument disposition, and the judges then review the drafts and make changes as necessary. This group includes the two judges who have their law clerks make the initial screening decision. Four other judges have their law clerks draft some of the decisions for the nonargument cases and prepare the remainder themselves. The usual practice of these judges is to have their law clerks, following their instructions, draft the decisions in the more difficult nonargument cases, and to prepare the easier decisions themselves, which can be written or dictated very quickly (especially if there is a staff memorandum). The judges have adopted this practice as a way to conserve their time: If the law clerks draft an initial decision for the more difficult nonargument cases, the judges are free to concentrate on the decisions in the argued cases. Four judges write their own decisions in nonargument cases.[81] One of these judges feels, on principle, that judges should write all their own decisions. Another said he is simply "faster" than his law clerks, and therefore it is more efficient for him to prepare the dispositions.

These data show, then, that twelve judges use some portion of their law clerks' time for the screening process; three of these judges, however, make very limited use of their law clerks' time for screening. Of the remaining nine judges, two have their clerks both screen cases and prepare draft dispositions. Six others have their clerks draft at least some of the decisions for the nonargument cases, and two judges (including one who has his clerks draft dispositions) have their clerks prepare memoranda for nearly all the cases the judges designate for nonargument disposition. In general, the judges assign writing, rather than screening, duties to their law clerks.

Several of the judges who prepare the initial draft decision themselves described the "cut and paste" procedure they use for cases

81. One of these judges, however, has his law clerks prepare bench memoranda for nearly all the cases he designates for nonargument disposition. Only two judges reported that they routinely ask their law clerks to prepare bench memoranda for the cases designated for disposition on the briefs.

screened by the staff attorneys. Because the staff attorneys' memoranda generally provide an excellent summary of the facts and issues in the cases, these judges said, they are able to extract substantial pieces from the memoranda for the dispositions. Three judges said they usually have a photocopy made of the memorandum and then edit that copy to prepare the final disposition. Another judge said he frequently uses a memorandum "verbatim" in an opinion. Several judges said they also instruct their law clerks to rely on the staff attorneys' memoranda when drafting the dispositions. These judges feel it is a waste of time and resources to have the law clerks duplicate the staff attorneys' work. One judge, however, prefers using the law clerks for an independent review, instructing them to complete their work on a case, including preparation of a draft disposition, before looking at the staff attorneys' memoranda. This judge does not want the law clerks to be biased at the outset by the staff attorneys' positions.

The judges who give their law clerks a limited role or no role at all in screening cases for disposition on the briefs gave several reasons for this practice. Two judges feel it is a waste of resources to have law clerks read cases and draft dispositions for routine cases. The law clerks, they said, can more productively be used for research assistance in the difficult cases. Two other judges said the law clerks are too slow to be useful in screening; the judges said they can screen and write much faster than their law clerks can. In addition, one judge said the screening function is already being performed very well by the staff attorneys. The judges, he said, should trust them and not have their law clerks go over the same ground.

According to the judges, the screening process generally does not take very long. The court has emphasized the need to move the cases along quickly, and most judges try to complete their review and the disposition within a week or so of receiving a case. The judges are especially conscious of the need to return cases they designate for argument to the clerk's office as soon as possible so that these cases can be calendared for argument. The judges who have their law clerks review the cases have instructed the clerks to return any case they think may need argument to the judge for immediate transfer to the clerk.

3. Materials reviewed during the screening process. Whether the initial screening is performed by the judges or their law clerks, the task begins with a reading of the case documents. The initiating judge on a screening panel generally receives a full set of documents for each case: the record; the district judge's written decision, if there was one; the appellant's and appellee's briefs; the

staff attorney's recommendation and memorandum (for staff-screened cases, which make up about 50 percent of the cases); and requests from counsel for argument or waiver of argument (which are included in the briefs).

We asked the judges how they review these materials when they are the initiating judge on a panel. Although most judges read most of the documents, some judges tailor their review of these materials to the needs of the case, reviewing more deeply for some cases than for others. The judges reported that the nature of the review is not determined by which route the case took to the judge's chambers. Cases from the staff attorney's office and from the clerk's office, they said, receive the same treatment, differing only in that there is more material to rely on in cases from the staff attorneys.

In table 11 we report the judges' use of the materials they receive. The staff attorneys' memoranda are read by all the judges. The briefs, however, are read somewhat more selectively, although most judges reported that they read them. Eleven judges said they routinely read the appellants' briefs. One judge reads these briefs when reviewing a case in which there is not a staff memorandum. Another judge reads them for that portion of the caseload he screens; his law clerks read the appellants' briefs for the cases they screen. The appellees' briefs are also read selectively. Nine judges routinely read them. Three judges read the appellees' briefs only in certain circumstances: one judge when a reversal is recommended, one when there is no staff memorandum, and one for the portion of the caseload he screens. The last judge has his law clerks read the appellees' briefs when they are reviewing the judge's written dispositions. Nine judges reported that they routinely read other case documents, usually the district court decision; only two said they usually read the complete record, although several others read the record excerpts.

These responses for the most part support the judges' statements that they use the same procedures to review both the cases sent directly from the clerk's office and those that come with a staff attorney memorandum. However, the judge who reported that he reads the briefs and record only in cases that do not have a staff memorandum obviously is making a distinction between the two categories of cases. So, too, is the judge who has his law clerks review the cases recommended for nonargument disposition—in other words, the cases that have an extensive staff attorney memorandum. In the first instance, at least, the judge appears to be relying on the staff memorandum to the exclusion of other case materials.

TABLE 11
Materials Relied on by the Judges to Review Cases (N = 13)

Routinely read staff attorney's memorandum	13
Appellant's brief	
Routinely read	11
Read when there is no staff memorandum	1
Read for that portion of the caseload the judge screens himself; law clerk reads for others	1
Appellee's brief	
Routinely read	9
Read if reversal is recommended	1
Read when there is no staff memorandum	1
Have law clerks read when reviewing judge's draft disposition	1
Read for that portion of the caseload the judge screens himself; law clerk reads for others	1
Routinely read other case materials (usually district court opionion)	9

NOTE: We could not determine how extensively the case materials are reviewed by the judge who has his law clerks both screen the cases initially and prepare the draft dispositions. Therefore, we did not include him in this table.

4. Usefulness of staff attorneys' written materials. About 50 percent of the cases received by the screening panels have staff memoranda, and all the judges report that they read these memoranda when reviewing cases for nonargument disposition. We asked the judges whether the memoranda, which provide summaries of the cases, and the recommendations made by the staff attorneys concerning argument are equally useful. Nearly all the judges found the memoranda very helpful. The recommendations were generally considered less important.

The judges were almost unanimous in their praise of the staff attorneys' memoranda (see table 12). In fact, both the staff attorneys and the judges reported that many judges would like to have a staff memorandum in every case. Limits on the resources of the staff attorney's office have prevented adoption of such a practice. (In fact, these limits led to the initial reduction in the types of cases screened by the staff attorney's office.)

The judges gave a number of reasons why they find the memoranda helpful. For most of them, the memorandum in a case provides the structure for the written decision. Some judges frequently use parts of the memorandum verbatim in the final decision, whereas others rely more generally on the statement of facts, the citations to cases, or the summary of issues. For most of the judges, the memorandum also provides a guide to the record, issues, and

TABLE 12
Usefulness of Staff Attorneys' Materials

Memoranda (N = 13)[a]	
Provide structure for the written decision	11
Provide guide to record, summarize case	9
Alert judge to central issues, points, or cases	8
Provide expertise in habeas corpus cases	4
Save judge and law clerk time	2
Provide another pair of eyes	1
Recommendations (N = 11)	
Not all that important	8
Are useful	2
Tell judge where to route case	1[b]

[a]There may be more than one response per judge.

[b]This judge has his law clerks screen all the cases recommended for nonargument disposition, and he reviews only the cases recommended for argument. Thus, the staff recommendation is important because it tells him whether a case should go to his law clerks or be retained for his own review.

precedents of the case. Four judges said they rely on the staff attorneys for their expertise in habeas corpus cases. Only two judges specifically mentioned that the memoranda save time for both them and their law clerks, although we assume that using these materials in preparing the disposition must provide considerable time savings in chambers.[82] The judges generally spoke of the staff attorneys' memoranda with appreciation, if not a sense of relief. Six judges, in fact, described the memoranda as indispensable. One said, "I would be lost without them." Another said the memoranda are "lifesavers." These evaluations appear to arise in particular from the contribution the memoranda make through their summary of the often voluminous records involved in the types of cases screened by the staff attorneys.

In contrast to their assessment of the staff attorneys' memoranda, most judges said they do not find the staff attorneys' recommendations concerning argument particularly helpful. Eight judges expressed this view. Only two said they give the recommendation close attention; one of these judges, in fact, said he begins with a presumption that the staff attorney's recommendation is correct. The other judge said he depends on the recommendation, because he has his law clerks review all cases designated by the staff attorneys for nonargument disposition and therefore uses the recom-

82. In the conclusion to this chapter, where we discuss the judges' overall evaluation of the court's screening program, we return to the issue of time savings.

mendation to sort out the cases to be routed to his clerks. It appears, however, that most judges depend on the staff attorneys more for the information they provide about a case than for their view about the proper method for disposing of the case.

However, although the judges said they make little use of the staff attorneys' recommendations concerning the proper method of disposition for a case, data we collected from the court suggest that the method used by the judges for disposing of the staff-reviewed cases does not very often differ from the method recommended by the staff attorneys. Or, to put it another way, the staff attorneys appear to be fairly successful in anticipating the method of disposition the judges will use (see table 13). Disagreement between the judges and staff attorneys was most frequent (at least in terms of percentages) when the staff attorneys recommended argument for pro se cases. In 16 percent of these cases, the judges disposed of the case without argument; however, this category comprised only four cases. The judges differed with the staff attorneys' recommendations with about the same frequency when the staff attorneys recommended argument in counseled cases. In 15 percent of these cases, the judges did not hear argument; this category, however, involved substantially more cases (sixty-five cases). The rate of disagreement was only slightly lower when the staff attorneys recommended nonargument disposition in counseled cases. The judges decided in 13 percent of those cases (or thirty-five cases) to hear argument. The staff attorneys were most successful in meeting the judges' expectations when they recommended pro se cases for disposition on the briefs. In only 6 percent (that is, eight) of these cases did the judges decide instead to hear argument. Thus, it appears that the amount of disagreement about the proper method of disposition is fairly consistent across all categories, except pro se cases staff attorneys recommend for nonargument disposition; for this category, the judges' disagreement with the staff recommendation is substantially less.

These data indicate that the staff attorneys recommend oral argument in a substantial number of cases (sixty-nine cases) in which the judges find argument is not necessary. This finding suggests that the staff attorneys tend to resolve any doubts they have about the proper method of disposition by recommending argument. In other words, they are cautious in their recommendations.

We asked the judges whether, when they disagree with the staff attorneys' recommendations concerning argument, there is a pattern to this disagreement. For example, do they find themselves disagreeing with the staff attorneys more often in cases of a certain type? Approximately half the judges said there is no pattern to the

TABLE 13
Frequency of Judges' Disagreement with Staff Attorneys' Recommendations Concerning Argument (SY 1984)

Staff Attorney's Recommendation	Final Method of Disposition: Percentage (and No.) Argued		Final Method of Disposition: Percentage (and No.) Not Argued	
	Pro Se	Counseled	Pro Se	Counseled
For argument			16.0 (4)	15.0 (65)
For nonargument	6.0 (8)	13.0 (35)		

NOTE: The court identified for us the cases in which the staff attorneys had made a recommendation and the nature of the recommendation. We merged these data with disposition data from the Administrative Office and thereby determined the number of cases in which the staff attorney's recommendation differed from the final method of disposition.

disagreement (see table 14). Most of the judges did, however, describe certain ways in which they have differed with the staff attorneys' recommendations, but it should be noted that the judges did not perceive these differences to be significant problems. For example, three judges feel that the staff attorneys are more cautious than the judges are about withholding argument, and two judges said the staff attorneys are more generous with pro se pleadings. The judges feel, however, that it is proper that the staff attorneys be conservative in their recommendations.

TABLE 14
Nature of Judges' Disagreement with Staff Attorneys' Recommendations (N = 12)

No pattern to the disagreement	7
Staff attorneys more cautious than judges (grant more argument)	3
Staff attorneys more generous with pro se pleadings	2
Differences in interpretation of the law	1
More disagreement in areas outside the staff attorneys' expertise	1
Agree more often if work routinely with staff attorneys	1
Staff attorneys tend to think more papers mean greater difficulty	1
Disagree more on cases recommended for argument than on those recommended for nonargument	1

NOTE: There may be more than one response per judge.

We also asked the judges whether they turn to the staff attorneys when they find that a case screened by the staff attorneys requires additional research. The judges reported that they seldom turn to the staff attorneys for this work. Several judges gave specific reasons for not asking the staff attorneys to do additional work on cases they have screened:

1. It wastes time.

2. It is inefficient.

3. It puts an additional burden on an already busy office.

4. It is easier to debate a point about a case with the law clerk, who is right there in chambers.

Three judges said that although they do not request additional research from the staff attorneys, they do from time to time talk to them on the telephone to discuss some aspect of the cases they have worked on. One of these judges pointed out that this practice is important for boosting staff morale.

These responses suggest that the staff director's experiment of pairing staff attorneys and screening panels has not led to substantial communication between the judges and staff attorneys. The purpose behind the experiment, as we noted earlier, was to encourage judges to call on the staff attorneys for additional assistance in cases the staff attorneys had prepared. Yet the judges reported that they infrequently call on the staff attorneys for additional research. At the same time, we found that nearly half the judges think the idea of pairing staff and judges is a good one. In fact, several judges said it has encouraged them to call on the staff attorneys more frequently than before. Another said it helps the judges become accustomed to the staff attorneys' views and capabilities. A third judge said he has become more comfortable with sending cases back for more research because he does not worry now that it will be "a terrible affront" to the staff attorneys to question their work.

One judge noted that although the pairing procedure is a very good idea, it is difficult to implement. He said that he has not contacted the staff attorneys with whom he is paired because of "administrative" problems, such as shifting cases back and forth by mail, making additional phone calls, and holding additional conferences. He added that his first obligation is to his law clerks. At the same time, he said, he feels "guilty" about not having more contact with the staff attorneys. He said that the judges barely know who the staff attorneys are and would not recognize them, despite the court's responsibility to "teach" them. Several other judges, too,

voiced concern about the distance between the judges and the staff attorneys. One of these judges said that instead of the pairing procedure, the judges should meet regularly with the staff attorneys, both informally (e.g., at receptions) and formally (e.g., for discussions of current legal issues).[83] Thus, a number of judges appear to favor the idea of more contact between judges and staff attorneys, but the pairing procedure seems not to have accomplished that goal yet.

5. Staff attorneys' most important functions. We asked the judges one final set of questions about the staff attorney's office. First, we asked them which of the tasks performed by the office they considered to be the most important. We then asked them which additional tasks they would assign to the staff attorney's office if there were extra capacity in that office. The judges' responses are presented in table 15. Six judges said the work on motions is the staff attorneys' most important function, four judges ranked as most important the memoranda prepared by staff for cases to be disposed of without argument (in habeas corpus cases in particular, said two judges), and three judges said both screening and motions are important. Although nearly all the judges were able to rank one function over others, seven judges went on to mention other duties they also find important. Thus, five judges who gave motions first rank said they also value the staff attorneys' memoranda in screening cases, in habeas corpus cases in particular. In addition, three judges who chose screening as the staff attorneys' most important function also find their work on motions important.

TABLE 15
Judges' Ranking of Staff Attorneys' Most Important Functions

Most important staff function (N = 13)	
Draft orders on motions	6
Memos in screening cases	4
Both screening and motions	3
Next most important staff function (N = 7)	
Memos in screening cases, particularly habeas corpus	5
Draft orders on motions	3
Additional desirable tasks (N = 7)	
Screening memos for all or more types of cases	4
No other tasks; shift resources to own office in form of more law clerks	3

83. This practice, as we have noted, has recently been adopted, apparently with promising results.

Whichever function the judges ranked first, the reason given was almost always the same: The staff attorneys' memoranda provide a reliable and time-saving guide to the records in these cases. This view was expressed over and over again. Said one judge, "These memoranda are helpful because they provide an index to the record, which is a great time saver." Another explained, "You don't have to start at the beginning, because the memo points you to the pertinent parts of the record." Referring to habeas corpus cases, a judge said the staff memoranda are important because they "go through the record and ferret out the issues." This function is especially important in criminal cases, said two judges, because of the necessity for speedy dispositions. Referring to the staff memoranda on motions, a judge said they "sort out the gobbledygook." Other judges said the staff memoranda are "a tremendous assistance," "invariably helpful," and "can't be beat." Several described the staff attorneys as additional law clerks. In the words of one judge: "Having staff attorneys is like having another law clerk, except that the staff expertise is in a few areas of the law. Staff attorneys expand the capacity of the judge's chambers." Another said, "In effect, you get law clerk participation in a selected portion of the caseload."

There is, of course, one significant difference between the staff attorneys and the law clerks, and that is their proximity to the judges. This difference was pointed out by two judges in response to the question about extra capacity in the staff attorney's office. If there were an excess of resources, these judges said, they would prefer to transfer the resources to their own chambers. One judge spoke of the need for accountability and said he would rather shift extra capacity to his own office because his office "should be responsible and take the blame when there are problems." The other described the benefits of closer proximity in terms of efficiency, for example, the ease of communicating with law clerks as compared with staff attorneys who are in a different city.

In contrast, several other judges said they would welcome more help from the staff attorney's office. One said, "The court would be well served by more staff attorneys." He said he would like to have the staff screen more cases "because it's much easier for a judge to screen a case that has a memo in which he has confidence."

Although the judges focused primarily on the value of the memoranda, several judges did point to other reasons they value the staff attorneys' work. Regarding motions, one judge pointed out that the staff attorney's office functions as the "memory of the court" because there is no written record or opinion for motions. He said it is very important to the court as an institution that each genera-

tion of staff attorneys pass on its knowledge to the next generation. Another judge described the importance of the staff attorneys in the disposition of habeas corpus cases. "To be perfectly honest about it," he said, "the staff attorneys give these cases more attention than some judges would."

6. Characteristics of cases decided with and without argument. When reviewing cases for disposition on the briefs, the judges in the Fifth Circuit use guidelines set out in local rule 34.2, which reiterates the screening criteria set forth in Federal Rule of Appellate Procedure 34(a). We asked the judges to describe the characteristics they look at in a case when deciding whether to dispose of it with or without argument. This open-ended question led to a wide range of responses.

The argued cases were described as complex, on the edge of the law, or time-consuming (see table 16). Complexity was the most frequently mentioned characteristic, but nearly half the judges also noted a more pragmatic concern—the time required by the case. If a case will take a substantial amount of research and writing time, according to these judges, it should be handled by an argument panel. The task of the screening panels, they pointed out, is supposed to be a summary procedure. Other cases that at least a few screening judges pass on to the argument panels are those involving a large amount of money, cases that are important to the public, cases in which both parties request argument, cases that involve conflict in circuit law, and cases in which the judge finds the issues confusing or unfamiliar. In general, the judges described the argument cases in terms of their substantive legal characteristics.

In contrast, a pragmatic concern dominated the responses to our question about the characteristics of cases disposed of on the briefs (see table 17). Half the judges reported that they retain a case for nonargument disposition when they are confident the other panel members will agree on the outcome of the case. It is, in their view, a waste of time to prepare a disposition one is quite sure the panel will not accept. Another sizable group of judges described the nonargument cases as those that have a clear outcome and in which the correctness of the decision is obvious. Thus, two characteristics dominate the descriptions of the nonargument cases: The outcome of the case itself is clear to the judge, and he is confident the other panel members will agree with his view of the case.

Rarely did the judges describe either the argument or nonargument cases in terms of case type. Only one judge said he requests argument for administrative agency cases, and one said he designates prisoner cases for nonargument disposition. The judges also did not generally describe the cases in terms of the types of

TABLE 16
Characteristics of Argument Cases (N = 14)

Complexity	7
Complex facts	5
Legally complex	3
Generally complex	2
Procedurally complex	1
Case will require several days of research and writing	6
No clear precedent, on the edge of the law	6
Case involves a lot of money	3
Judge personally not comfortable with the area of the law	3
Both parties request argument	3
Judge confused about the issues	3
Case is important to the public	2
Party should have his or her day in court	2
Argument will produce a more sound decision	2
Issue not settled in the circuit	2
Appears that district judge erred	1
Administrative agency case	1
Any difficulty at all in the case	1
Dispute about what the record reveals	1
Dispute over sufficiency of the evidence and record is long	1
Likely to be a reversal	1
Government or appellee requests argument	1
Judge thinks the lawyers will be helpful	1
Judge is personally at variance with the rest of the court in the area of the law involved in the case	1

NOTE: There is more than one response per judge.

TABLE 17
Characteristics of Nonargument Cases (N = 14)

Judge is confident other panel members will agree on the outcome of the case	7
Judge knows the decision is right, has easy feeling about it, clear outcome	5
Neither side wants argument	2
Case is simple and law is clear	2
Bad briefs	2
Case involves sufficiency of the evidence, and the record is not complex	1
No substantive legal argument	1
Fact-based issue	1
Prisoner case	1

NOTE: There is more than one response per judge.

parties or the quality of the briefs, although two judges said poor briefs generally indicate that the case should be decided without argument. They reasoned that a poor brief indicates a poor lawyer, who would be unable to assist the court in argument.

Court policy requires that when selecting cases for nonargument disposition, the judges must give close attention to requests from counsel for argument or for waiver of argument because these requests may trigger the kind of decision-making procedure to be used in the case. Local rule 28.2.4 instructs appellants and appellees to include in their briefs "a short statement of the reasons why oral argument would be helpful" or a statement that oral argument is waived. According to the court's internal operating procedures,

> [i]f any party requests oral argument, all panel judges must concur not only that the case does not warrant oral argument, but also in the panel opinion as a proper disposition without any special concurrence or dissent. . . . However, absent a party's request for oral argument, summary disposition may include a concurrence or a dissent by panel members.[84]

Nearly all the judges said that because of the court's stated policy, they carefully examine attorney requests in cases considered eligible for disposition without argument. In fact, the judges consider the court's policy requiring unanimous decisions in nonargument cases in which there has been a request for argument an important safeguard for the cases decided on the briefs. For cases in which the judges are uncertain about the proper method of disposition, they are likely to be persuaded by attorney requests for argument when both attorneys request argument and when the requests are not "boilerplate," that is, when the requests provide reasons for hearing argument.

The policy requiring unanimous decisions on the merits when the parties have not waived argument obviously requires the judges to give some consideration to the desires of counsel. This policy has another interesting outcome, however. It encourages the judges to be alert to the legal and philosophical positions of their fellow panel members. Because a decision on the merits that is rejected by another panel member requires that the case be argued, most judges will try to predict whether rejection is likely so that they will not waste their time drafting a decision.

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84. Rules of the U.S. Court of Appeals for the Fifth Circuit (July 1, 1983, as revised to June 1985). Local rule 28.2.4 is on page 73, and the internal operating procedure concerning unanimous decisions on the merits in screening cases is on page 91.

7. Interaction among panel members. In general, we found the judges in the Fifth Circuit to be quite aware of their colleagues' views. This finding was most apparent in their responses to our questions about panel interaction. We asked the judges to describe what they do when they are not the initiating judge and they receive a disposition with which they disagree. (Recall that the initiating judge drafts the disposition.) The judges said disagreement is rare. Eight judges spoke of knowing the views of their colleagues and said that as initiating judges they write, in the words of one, "only what will fly." If they expect that another panel member will reject either the designation for nonargument or the proposed decision, they send the case to the argument calendar.

When the judges do disagree with the initiating judge about a disposition, they usually contact the judge and try to work out an agreement about the decision. Rarely do the second and third judges send a case back for argument without first discussing it with panel members who have already reviewed the case. When the issue is minor, the judges generally telephone each other. If they have more in-depth comments, they write a memorandum.[85] These procedures, the judges said, are simply matters of courtesy, which appear to be observed by nearly all the judges. Only three judges said they sometimes send a case back to the argument calendar without first consulting the initiating judge, but only if they are convinced they cannot persuade the first judge to change the decision. Even then, they usually notify the initiating judge (and the second judge, when they are the third judge) that they have sent the case to the clerk's office for assignment to an argument calendar. Overall, there appears to be a fair amount of conversation among the judges regarding the disposition of the nonargument cases. Certainly, if discussion is needed, the judges do not hesitate to contact each other.

After the panel members have come to agreement about the disposition of the case, it is returned to the clerk's office. The attorneys in the case learn that the case was disposed of without argument when they receive the decision on the merits. Parties may object to the method of disposition through a petition for rehearing, but according to the assistant staff director, who reviews these petitions, there have been no rehearing petitions specifically objecting to the form of disposition. On rare occasions, however, a rehearing petition in a nonargument case raises an important issue, he said,

85. If the case ultimately is returned to the argument calendar, these memoranda between judges are sent back to the clerk's office along with the case file so that the hearing panel judges can use them.

and the screening panel may withdraw its decision and send the case to an argument panel for a new decision on the merits.

8. **Adequacy of attention to nonargument cases.** During our interviews with the judges, we learned of a recent change the court has made in the type of disposition used for nonargument cases. Until a few years ago, the Fifth Circuit made extensive use of local rule 47.6, the summary affirmance rule. This rule provides that the court may "in its discretion enter either of the following orders: 'AFFIRMED. See local rule 47.6' or 'ENFORCED. See local rule 47.6'" and lists the criteria for this type of disposition.[86] The judges have come to feel, however, that the court has a duty to give parties an explanation for the decision, especially in cases in which the parties have not had an opportunity to appear before the judges to present oral argument. Therefore, the court now uses memorandum decisions for the kinds of cases that would previously have received a one-line order.

Most of the judges feel explanations ought to be written not only to demonstrate to the parties that the correct decision has been reached but also to show them that the court has attended to their case. The judges feel that a careful statement of the reasons behind the decision will show the parties that the judges are familiar with their case and have carefully considered its merits. The memorandum decision is seen, then, as an opportunity to demonstrate to the parties that the case has had a thorough review.[87]

Although we did not systematically ask the judges whether they think the nonargument cases receive adequate attention, a number of judges voluntarily commented on this issue. First, nearly every judge said that disposition on the briefs is an appropriate method for handling some cases. Several judges went on to say that they find their court's particular procedure especially satisfactory. One judge pointed to the safeguard built in by the requirement for

86. The court may use a summary affirmance or enforcement when it finds:

> (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous, (2) that the evidence in support of a jury verdict is not insufficient, (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole, or (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant, and the Court also determines that no error of law appears and an opinion would have no precedential value. . . .

Rules of the U.S. Court of Appeals for the Fifth Circuit 126 (July 1, 1983, as revised to June 1985). (The cite is from the amended version of June 17, 1986.)

87. The Court of Appeals for the Third Circuit, as discussed in chapter 6, has made the same change in the type of disposition used for nonargument cases and for much the same reason. In comparison with the Third Circuit, however, the Fifth Circuit has used the one-line order for a smaller proportion of its caseload.

unanimous decisions on the merits in cases in which the parties have requested argument. Another said the emphasis on a quick turnaround in screening cases guarantees that cases needing argument will in fact be argued. He explained that if a case requires more than a half hour to review (which is a "pretty good indicator" that there are significant issues in the case), the screening judge will usually send it to an argument panel if for no other reason than the desire not to spend any more time on it.

A third judge said he has "a high degree of confidence" in the procedure because if the judges have any doubt about disposing of a case on the briefs, they send it to an argument panel. He is confident, he said, that the same decision is reached on the briefs as would be reached if the case were argued. At the same time, this judge said, argument remains the "ideal," not because it changes the outcome in the case but because collegial discussion leads to a better understanding of the case and thus a better opinion. Some reservation about disposition on the briefs was expressed as well by two other judges, who focused on the greater attention an argument case receives because, as one said, "three judges read and think about everything." Yet, all three of these judges added that disposition on the briefs is an adequate procedure for those cases that are decided that way. Different types of procedures are appropriate, they feel, for different kinds of cases. As one said, "Judges should be candid. A screening case doesn't get the attention of an argued case, but many cases don't need that kind of attention."

E. Conclusion

The judges in the Fifth Circuit are committed to the screening procedure they now have in place. Few judges objected to the procedure on either practical or philosophical grounds. We heard no criticisms of the day-to-day operation of the program. For example, the judges did not mention having any difficulties with mail service or paper flow through the court. They feel they have excellent support from both the clerk's office and the staff attorney's office.

A few judges expressed some concern about the general idea of disposing of cases without argument, saying they would prefer to hear argument in more cases. Even these judges, however, agreed with the others that disposition on the briefs is not only an efficient procedure but also an appropriate method of disposition for a large portion of the caseload.

Every judge, in fact, spoke of the time saved by the screening procedure (see table 18). Half of the judges pointed specifically to

the staff attorneys' memoranda as the mechanism that enables them to save time. Several noted that the yearlong standing panels, too, can be seen as a time-saving device because they enable the judges to become familiar with each other's views, which in turn enables the judges to select for nonargument disposition only those cases for which the panel members will agree that disposition on the briefs is appropriate.

TABLE 18
Advantages of Screening (N = 14)

Saves time	14
Memo from staff attorneys provides guide to record, helps structure opinion, provides habeas corpus expertise	7
Special panels enable judges to know colleagues' views and screen only cases all agree should be screened	4
Judge can work at odd hours, do less travel	3
Judge has more assistance: staff attorneys' function is like having additional law clerks	3
General savings of time (judge did not specify)	5
Provides a way to deal with the many cases that do not require argument	7
Speeds disposition time for argument and nonargument cases	2
Provides a way to deal with caseload pressure	2
Saves litigant costs	1

NOTE: There is more than one response per judge.

The judges value the screening program for more reasons than just the savings in time, however. Eleven judges said there are many cases that simply do not require argument. Some of these cases are frivolous, and in some the result is so clear that argument and conferencing will add nothing. For these cases, the judges said, the court's screening procedure provides a thorough, quick, and just decision.

IV. THE COURT OF APPEALS FOR THE NINTH CIRCUIT

A. Introduction

In January 1982, the Ninth Circuit Court of Appeals adopted a number of procedures intended to increase its productivity. These procedures, collectively referred to as the Innovations Project, included the development of a screening program to increase the number of cases decided without oral argument.[88]

The screening program was the most controversial of the new procedures adopted in 1982.[89] The program was patterned after the procedures used by the Fifth Circuit Court of Appeals: The staff attorneys identified cases suitable for disposition without argument, and special panels of judges reviewed the staff attorney designations and decided the cases. The original proposal anticipated that the judges on the special panels would use a serial method to review the case materials and the bench memoranda prepared by the staff attorneys; that is, the first judge who received the materials would draft a disposition, and the other two panel members would review the draft disposition and case materials in turn. It was expected by those who proposed the program that the cases submitted to the special panels would present such simple issues and have such clear results that there would be little need for communication among panel members. However, some members of the court were concerned that such a procedure would not permit an adequate opportunity for members of the screening panels to confer. To address this concern, an optional procedure was developed to permit members of the screening panels to confer by tele-

88. The screening program is formally called the "Submission-Without-Argument Program." The Innovations Project also included development of a prebriefing conference program, modifications of the calendaring procedure to permit an increase in the number of oral arguments, and other changes undertaken by the court. A description of the Innovations Project is provided in J. Cecil, Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project (Federal Judicial Center 1985). Much of the description in this chapter is taken from that report.

89. In 1975, a more limited screening program was abandoned when the court modified its calendaring processes to permit oral arguments of less than thirty minutes.

phone when considering the cases sent to the screening panels. In our discussion of the screening practices of the Ninth Circuit, we describe in some detail the two types of screening panels adopted by the court. This examination permits a comparison of two means of structuring the communication among the members of special panels that decide cases without convening for argument.

Our discussion is based primarily on interviews with members of the court. In late 1985, we met with the director and deputy director of staff attorneys and discussed with them the structure and responsibilities of the staff attorney's office. We interviewed two other staff attorneys as well, asking them questions concerning the criteria they use when designating cases for disposition without argument. In addition, we sat in on a weekly meeting of one of the divisions that designates cases for disposition without argument. In early 1986, we interviewed twenty-six of the twenty-eight active judges of the Ninth Circuit. Since the Ninth Circuit is the only court that employs two alternative procedures for circulation of materials to the judges, our interviews focused on the relative merits of these two procedures and the extent of communication among panel members under each procedure. For this reason, the interviews with the judges of the Ninth Circuit did not touch on some issues that were addressed by judges of other circuits.[90]

B. Judge, Staff Attorney, and Caseload Profiles[91]

The Ninth Circuit is the largest appellate court in the federal system. At the time of the interviews, the court had twenty-eight active judges, residing in ten locations. The judges hear appeals from fifteen federal districts. Typically, the judges hear argument for five consecutive days, once a month for nine months of the year, for a total of forty-five days of oral argument per judge. The court hears argument in three cities each month, and each judge sits in each city and with each other judge an approximately equal number of times.

A single special panel of three judges decides all substantive motions except those filed in calendared cases, which are decided by the assigned hearing panel. Each of the active judges serves in turn for three weeks on the motions panel. The three judges rotate their positions as lead, second, or third judge over the three-week period. The motions panel usually conducts its business by mail and tele-

90. See appendix B for a copy of the interview protocol.

91. See appendix C for tables summarizing the information presented in this section.

phone rather than by convening. In addition to hearing and motions panels, the judges are assigned to special screening panels to decide cases that do not require argument or an in-person conference of the panel.

The court employs thirty staff attorneys, more than any other federal appellate court. Up to nine law-student externs also work with the central legal staff. The office is administered by the director and deputy director of staff attorneys. The central legal staff is divided into five divisions: one division handles civil motions as well as the prebriefing conferences (nine staff attorneys), one division handles criminal motions (four staff attorneys), and three "multiple specialty" divisions screen cases for nonargument disposition (five staff attorneys each).[92]

Staff attorneys in the multiple-specialty divisions are primarily responsible for the inventory of all appeals and preparation of materials for the appeals submitted through the screening program. Each of the multiple-specialty divisions consists of a division chief, typically a second-year staff attorney; four first-year staff attorneys; and two or three law-student externs. Various areas of federal law have been allocated among the three divisions to permit each division to develop a degree of specialization while maintaining an interesting mix of cases.

Staff attorneys are assigned to the multiple-specialty divisions upon arrival. During the first three weeks, the new staff attorneys work closely with the division chief and other staff attorneys in the division, learning to prepare the inventory materials and bench memoranda. Typically, guidance is offered before the new staff attorney begins the research on a case. The inventory materials and bench memorandum prepared by the new staff attorney are reviewed personally by the division chief and in weekly divisional meetings. These weekly meetings and review of completed materials by the division chief serve as an ongoing means of supervision throughout the period of service. After six months, the staff attorneys move to a second division to gain exposure to additional areas of the law. Staff attorneys from the multiple-specialty divisions may also provide temporary assistance to the civil and criminal motions divisions when a backlog of motions develops. During their second year, staff attorneys may be assigned to supervising roles or to the civil or criminal motions division.

All staff attorneys serve a limited tenure with the court. The director of staff attorneys serves a term of two years, with a possible

92. The court distinguishes between "motions attorneys," the more senior staff attorneys who work in the divisions handling civil and criminal motions, and "court law clerks," who work in the multiple-specialty divisions.

extension of one year. The position of director of staff attorneys is usually filled by a person on leave from a law school. The deputy staff director and several motions attorneys recently have served much longer terms, but the general expectation is that they will serve up to five years. Other staff attorneys serve a term of two years. Most staff attorneys are hired upon completion of law school. However, more experienced staff attorneys are recruited to serve in the prebriefing conference program.

The Ninth Circuit has the largest caseload in the federal system. In statistical year (SY) 1986, over five thousand appeals were filed, over five thousand were terminated, and over five thousand were pending at the end of the year.[93] However, when the Ninth Circuit's caseload is divided by its twenty-eight judgeships, its workload appears well within the standards of other courts. In SY 1986, the court ranked eleventh among the courts of appeals in filings per judgeship, tenth in terminations per judgeship, and ninth in pending cases per judgeship. The performance of the court improved considerably following implementation of the Innovations Project in 1982. The screening program resulted in a sharp increase in the number of cases terminated after submission on the briefs.[94] However, the court ranks low relative to other federal courts of appeals in most measures of performance. In SY 1986, the active judges of the Ninth Circuit decided an average of 261 cases per judge, ranking tenth among the courts of appeals. Typically, more than a year passes from the filing of the notice of appeal to final disposition in a case. Although this time is longer than that required by most other courts of appeals, it represents considerable improvement over the twenty months from notice of appeal to disposition required in SY 1981. In SY 1986, the court decided 37 percent of its cases without oral argument.

C. Staff Attorneys' Role in the Selection and Preparation of Nonargument Cases

1. Screening process. When the briefs and other necessary papers have been filed in the clerk's office, all case materials are sent to the staff attorney's office. Approximately forty-five cases

93. Detailed information concerning the statistical profile of the court and sources for the data presented are provided in appendix C and Administrative Office of the United States Courts, Federal Court Management Statistics (1981).

94. Following the introduction of the screening program, the number of cases submitted on the briefs increased from 380 in 1981 to 624 in 1982. J. Cecil, *supra* note 88, at 63.

are forwarded each week, though the number may vary from thirty to sixty cases. The cases are distributed among the three multiple-specialty divisions based on the area of law addressed by the appeal. The cases are then assigned to the individual staff attorneys by the division chief of the multiple-specialty division.

The staff attorney begins by reviewing the case for jurisdictional defects. If the staff attorney finds jurisdictional defects, he or she immediately refers the case to the appropriate motions unit, which prepares a memorandum for the judges sitting on the motions panel. All the remaining cases are then "inventoried," a process that involves review and classification by the staff attorneys of the issues raised by the appeal.

The issues raised by the appeal are classified using an elaborate system of codes to indicate the areas of law addressed in the appeal. As many as ten such issues may be coded. In addition, the staff attorney assigns a "weight" to each case to indicate the relative amount of judge time required to resolve the case. The court uses six weights—1, 3L, 3, 5, 7, and 10; the higher weights indicate more judge time. There is a presumption that civil and administrative agency cases are "5 weight" cases and criminal and habeas corpus cases are "3 weight" cases; and individual cases are adjusted up or down to account for factors resulting in greater difficulty or simplicity. Cases likely to serve as precedents are assigned greater weights.

The case weights also indicate the staff attorneys' assessments of the need for oral argument. Cases assigned the lowest weight, 1, are never argued and are routinely submitted to the screening panels. Cases assigned a weight of 3L are usually submitted to the screening panels, but may be placed on the argument calendar when all available higher-weight cases have been placed on the argument calendar and spaces remain. Cases with weights of 3 and higher are routinely assigned to the oral argument calendar. The criteria for assigning these weights and placing cases on the screening track are discussed in subsection 2 of this section.

After classifying the issues and assigning weights, the staff attorney prepares a brief narrative description of the issues presented by the parties. The purpose of this narrative is to facilitate recognition of the unusual characteristics of a case. The issue codes, weights, and other administrative information about the case are then entered into a computer data base maintained in the clerk's office. This information is used in the calendaring process to maintain equivalent workloads for each of the panels and to place cases raising similar issues before the same panel.

Cases the staff attorneys have designated for the argument calendar are returned to the clerk's office, and, when the calendar permits, these cases are assigned to argument panels.[95] The staff attorneys retain the cases they have designated for disposition without argument, which constitute 20 to 25 percent of the cases they review. For these cases, they prepare bench memoranda. The bench memoranda are typically six to ten double-spaced pages and are structured to permit the panel members to review the case materials and to decide the case in a brief period of time. Each memorandum provides an overview of the case; its procedural posture; a discussion of the facts; a statement of the issue raised on appeal, along with an analysis of the issue that includes citation to authority; and a recommendation concerning the disposition of the merits of the appeal. The bench memorandum prepared for a screening case frequently contains more information on the facts and authorities than a bench memorandum for an oral argument case, since the judges will not have an opportunity to question counsel at oral argument. The staff attorneys do not routinely prepare draft dispositions for screening cases, although a few judges frequently ask the staff attorney who prepared the bench memorandum to prepare a draft disposition consistent with the determination of the panel. Portions of the bench memorandum are frequently incorporated into the disposition prepared by the judges.

A staff attorney usually takes three or four days to review the case materials, complete the inventory forms, prepare the bench memorandum, and provide whatever further support the panel requires in each nonargument case. Each staff attorney is responsible for developing bench memoranda for four or five nonargument cases per month. The staff attorneys working in the multiple-specialty divisions typically prepare a total of thirty to forty cases per month.

In addition to the bench memoranda for nonargument cases, each staff attorney may prepare a memorandum for at least one additional case each month that has not been designated for the nonargument panels, thereby assisting a senior judge, a visiting judge, or an active judge who has a particularly demanding argument schedule. These more complex cases are assigned to those staff attorneys who have completed work on the nonargument cases. As we found in other courts, the lack of opportunity to work on the more challenging cases has been identified as a source of

95. Of course, the argument panels may then decide that cases on their calendar can be decided without argument. Even after the screening program was functioning, 10 percent of the cases referred to the argument panels were decided without argument. J. Cecil, *supra* note 88, at 63.

discontent among the staff attorneys. To enrich the staff attorneys' experience and to aid judges who require temporary assistance, the court developed this practice of permitting staff attorneys to work on some complex cases.

Each bench memorandum is reviewed by the division chief of the multiple-specialty division and, during the new staff attorney's orientation period, by the deputy director of staff attorneys. In addition, peer review is provided at weekly division staff meetings, ensuring some consistency in case assignment and weighting. During these meetings, each staff attorney presents a description of the case or cases he or she inventoried, including the factual circumstances, the issues on appeal, other complicating factors (e.g., lengthy record), and the case weight that was assigned. The group then discusses the case and other factors that may influence the weight. Often one of the staff attorneys can offer advice from an earlier similar case. These division meetings also serve to inform staff attorneys of new developments in the subject matter of the division, focusing on recent Supreme Court and Ninth Circuit opinions.

2. Screening criteria. The Ninth Circuit has developed an explicit set of instructions for the staff attorneys concerning the characteristics of cases to be placed on the screening calendar. Of course, cases sent to the screening panels must meet the general standard for submission without oral argument, which is set forth in rule 34(a) of the Federal Rules of Appellate Procedure and is repeated in local rule 3. In addition, cases referred to the screening panels must be sufficiently simple and straightforward to permit a judge to read the briefs and bench memoranda in a relatively short time and reach a disposition with confidence. According to the handbook that instructs the staff attorneys concerning their duties, cases are placed on the screening track if they satisfy one or more of the following standards:

> 1. *The result is clear.* Some cases present issues that have been recently authoritatively decided by this court or the Supreme Court. Otherwise, your brief review of the materials may suggest that the issues raised are wholly frivolous or that reasonable people would not disagree on the result.
>
> 2. *The legal standard is established and undisputed.* Even where the result is not clear, the case may be suitable for submission to a screening panel if the legal standard to be applied is clear and undisputed and the result is not likely to be precedential. For example, an appeal may raise the issue whether police officers had probable cause to search a closet. Even if the outcome is close, the probable cause issue is straightforward, unlikely to be precedential, and might suitably be decided without oral argu-

ment. On the other hand, an appeal raising the novel question whether police have probable cause to search a particular computerized memory file would be unsuitable for the screening program, not because the legal standard is complex, but because the disposition might well be precedential.

3. *The appellant or petitioner is proceeding pro se (and may be incarcerated).* Most appeals filed by incarcerated pro se litigants satisfy one of the first two standards for submission to a screening panel. You may encounter some appeals filed pro se, however, that raise issues of greater complexity, perhaps novel, where the result is not clear. Several factors should influence your tracking decision. First, you may select a case for the argument track even if it cannot be argued. A case is properly assigned to an argument calendar even if it will not in fact be argued where the case: (1) would benefit from closer scrutiny in chambers; (2) would benefit from a face-to-face conference of the three judges who will decide the case; or (3) is likely to be disposed of by a published opinion.

Second, incarcerated pro se litigants would rarely be released from custody for the purpose of appearing for oral argument. If the appeal presents important issues, you should consider whether the court should appoint counsel to argue (and perhaps rebrief) the appeal. In appropriate cases, consult your Division Chief concerning whether you should draft a suggestion for the sua sponte appointment of counsel. Our office retains a list of counsel who have volunteered to serve pro bono.[96]

Some types of cases easily meet these standards. Cases involving withholding of income tax as a means of protest, simple habeas corpus cases, and civil rights cases with no apparent merit usually meet these standards. Other cases may be more difficult to classify. Social Security cases may involve difficult facts and a lengthy record, even though the legal issues are straightforward. Immigration appeals pose particular problems, since recent changes in immigration law have made many immigration appeals unsuitable for disposition without argument. Again, consistency in the designation of cases for disposition without argument is accomplished through both the weekly meeting of the multiple-specialty divisions and the review provided by the division directors. Descriptions of the issues raised by cases placed on one of the monthly screening calendars are presented in appendix D.

3. Competing demands on staff attorney resources. The central role of the staff attorneys in identifying the nonargument cases

96. Ninth Circuit Court of Appeals, Handbook for Court Law Clerks, ch. 7, at 5–7 (August 1984). The handbook also recommends that the case pass the "bus trip test": that the case be sufficiently simple that a judge can review the relevant materials on a bus-ride commute and decide both that the case is suitable for submission without argument and what the result should be. This is not considered part of the screening criteria.

and preparing bench memoranda in all cases submitted to the screening panels has marked advantages and disadvantages. On the one hand, review by the staff attorneys of all cases has resulted in the consistent application of standards for the selection of cases for nonargument disposition. On the other hand, this same reliance on the work of the staff attorneys has limited the screening program to a smaller role than was initially envisioned. Originally it was expected that sixty cases per month would be referred to the screening panels. This number would have enabled the screening panels to dispose of approximately 25 percent of the cases decided on the merits. The screening program consistently has fallen short of this goal. During the first two years of the screening program (1982 and 1983), the staff attorneys referred an average of forty cases to the screening panels each month. During some periods of more recent years, the referral rate has been lower.

In most instances this reduced rate has been due to competing demands on the time of the staff attorneys.[97] Since bench memoranda must be prepared for all cases placed on the screening calendar, the number of staff attorneys available to prepare bench memoranda places a limit on the number of cases referred to the screening panels. On those occasions when staff attorneys from the multiple-specialty divisions have been asked to assist in the preparation of motions, the number of cases placed on the screening track has dropped proportionately. During one brief period when a number of staff attorneys were reassigned to assist in the disposition of a growing backlog of motions, the number of cases submitted to the screening panels dropped sharply. Staff attorneys also have had increased responsibilities in assisting judges who are short-staffed.[98] The resignation of several staff attorneys so that they could accept positions as in-chambers clerks to recently appointed judges has also left the staff attorney's office shorthanded for critical periods.

Recently, the court concentrated the efforts of the multiple-specialty divisions on the preparation of screening materials and succeeded in forwarding sixty cases each month to the screening

97. Toward the end of 1983, when the court had overcome its backlog and there were no cases waiting to be calendared, some of the cases that customarily would have been sent to the screening panels were used to fill available space on the oral argument calendar. Although this practice provided oral argument to as many litigants as possible, it also restricted the number of cases submitted to the screening panels for several months.

98. Staff attorneys assist judges in chambers when one of the judge's own in-chambers clerk positions is vacant or when the judge has taken on a heavier than normal caseload or a burdensome administrative project. On occasion, some judges have exchanged law clerks with the staff attorney's office for brief periods of time.

panels. However, during this period these staff attorneys were not able to assist in the preparation of motions, and the backlog of motions increased. The court has considered, and rejected, the alternative of sending some cases to the screening panels without bench memoranda, as do the staff attorneys in the Fifth Circuit when they are overburdened. The judges of the Ninth Circuit have indicated that they believe that preparation of bench memoranda by the staff attorneys is the best means of ensuring that the cases receive adequate attention and are properly prepared for consideration by the screening panels. However, such reliance on the staff attorneys for review and preparation of all cases submitted to the screening panels places a ceiling on the number of cases disposed of by the screening panels.

D. Role of the Special Panels in Deciding the Nonargument Cases

Ten three-judge panels consider the cases designated by the staff attorneys for nonargument disposition.[99] Judges are selected at random to serve on the screening panels, and the panels are changed once every twelve months, unlike the argument panels, which are changed every month. Each screening panel selects either the "serial" or the "parallel" procedure for considering the cases and maintains this procedure throughout the year. These two methods for deciding the nonargument cases have undergone some evolution since the time they were originally implemented. We will describe these procedures as they were originally implemented, then describe how each has evolved.

The serial procedure, in which the judges receive the case material in turn, was patterned after the practices of the screening program of the Fifth Circuit.[100] The clerk's office sends the case materials and the bench memorandum prepared by the staff attorney to one of the three judges on the screening panel. Each panel member serves as the initial judge on approximately one-third of the cases. The initial judge then either (1) decides the case is suitable for the screening program, drafts a proposed disposition, and sends the draft disposition, case materials, and bench memorandum to the

99. At the time of the interviews and during most of the screening program, the court functioned with twenty-six judges serving on ten screening panels, and senior judges serving to fill out the panels as necessary. In 1987, the number of three-judge panels was expanded to eleven.

100. However, unlike the procedures of the Fifth Circuit, in the Ninth Circuit, judges do not review the cases designated for the argument calendar.

next judge, or (2) rejects the case from the screening program and returns the case to the clerk's office for placement on the next available oral argument calendar.[101] If the first judge does not reject the case, the second judge on the panel receives the materials and either concurs in the proposed disposition and forwards the case to the third judge, or rejects the case from the screening program and returns it to the clerk's office. The third judge follows the same procedure and forwards the case to the clerk's office. The advantage of the serial procedure is that it permits considerable savings of time that would be spent in attempting to coordinate consultation among the members of the panel for those cases in which the panel is in agreement. However, for those cases in which there is a difference of views, the serial procedure may result in a case being rejected by the second or third judge and, thus, a wasted effort by the initial judge in drafting a disposition for a case that will be returned to the clerk's office for placement on the oral argument calendar.[102]

In contrast, in the parallel procedure, all three judges receive the case materials simultaneously from the clerk's office. The members of the parallel panels confer once by telephone concerning the appropriateness of the case for the screening program and indicate any difficulties or special issues that may need to be addressed in the case. Typically, they confer within one week of receiving the case. Because of the simple nature of the cases, such issues arise infrequently. However, it is this opportunity for a conference that is valued by those panels that choose the parallel system. The most senior judge of the panel then assigns the case to one of the members, who prepares a written disposition that is circulated for approval. This process offers the added advantage of eliminating cases unsuitable for the screening program prior to the drafting of an initial disposition, though greater coordination of activity of panel members is necessary in order to reach this decision.

At the inception of the screening program, the court was evenly split: Half the screening panels followed the serial procedure and half followed the parallel procedure. Supporters of the serial procedure cited its efficiency in permitting disposition of a case through a single viewing of the case by each judge and its flexibility in permitting consideration of the screening cases at a convenient time

101. If a replacement case is available, the clerk's office sends it to the screening panel upon return of a rejected case.

102. When this occurs, the draft disposition is sent with other case materials to the argument panels. Cases that are rejected suffer considerable delay in being heard, even though they are placed on the next available argument calendar. Cases are placed on the argument calendar approximately eleven weeks prior to argument.

rather than structuring consideration of cases around a conference call with other panel members. Several of the supporters of the serial procedure acknowledged that effort was wasted when a case was rejected after an initial disposition was drafted, but they also indicated that this loss was offset by the procedure's advantages. Supporters of the parallel procedure all placed great value on the opportunity for conferencing. They also cited the advantage of an opportunity to reject inappropriate cases before drafting a disposition. The panels using the parallel procedure also were somewhat faster, requiring a median of forty-four days per case from submission to disposition, compared with forty-eight days for the panels using the serial procedure.[103]

More recently the distinctions between the serial and parallel panel procedures have become blurred; more communication occurs among members of the serial panels and less communication occurs among members of the parallel panels. Although a majority of the judges who stated a preference in the interviews indicated they preferred the serial procedure, a number of judges mentioned that they now occasionally communicate with the other members of their serial panels.[104] Usually this is done by electronic mail, a system that was only recently installed in the court.[105] Telephone conversations are rare; only one judge who preferred the serial procedure mentioned that members of the serial panels occasionally communicate by telephone.

The parallel procedure has undergone even greater changes. A few judges continue to prefer the parallel procedure as it was originally designed, with an initial telephone conference to discuss the suitability of each case for disposition without argument. However, most proponents of the parallel procedure indicate a preference for a "modified" parallel procedure, in which there is little communication other than an electronic mail message identifying those cases that should be argued rather than decided on the briefs. In addition, as in the past, all three members of the parallel panels receive the case materials simultaneously and examine the cases independently to identify those that should be argued. They review

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103. These figures are based on the first two years of operation of the screening program. J. Cecil, *supra* note 88, at 62. These disposition times take into account only the time that passes from submission to the panel of judges to judgment. The longer disposition times presented in table 6 of chapter 2 of this report take into account the time that passes from filing of the last brief to judgment.

104. Two of the judges who did not indicate a preference pointed out that the two systems now function in a similar manner.

105. Of course, the other members of the serial panel will not have the briefs and case records, since under the serial procedure only one copy is sent to the lead judge.

the cases and identify those to be returned to the clerk for placement on the argument calendar within the first week of receipt of the materials. This procedure avoids the effort that would otherwise be wasted in preparing dispositions for cases that are returned to the argument calendar. The remaining nonargument cases are divided among the judges, who prepare dispositions and circulate them simultaneously to other members of the panel. Thus, the original conference among members of the parallel screening panels, which was designed to enable the judges to consider the issues raised in the cases, has evolved into a mail message indicating that a case is unsuitable for nonargument disposition.

In the interviews, the judges mentioned the difficulty of arranging a mutually convenient time for the telephone conference under the original parallel procedure and noted that such conferences were rarely productive. It is notable that many of the judges who were most concerned about protecting the opportunity for a collegial conference on the merits of these cases, and who were proponents of the optional procedure permitting such a conference to take place, have found the conference unnecessary for most cases placed on the screening track. This does not mean that their preference for other aspects of the parallel procedure has diminished. A number of judges mentioned the need for an "independent look at the case" and the importance of avoiding the "tendency to concur" that arises once a disposition has been drafted.[106] However, with the modified parallel procedure, the judges now have the advantage of being able to consider the disposition of the nonargument cases at a personally convenient time rather than at a scheduled telephone conference.

In summary, as a result of recent modifications in the serial and parallel procedures, the two procedures now appear to function in a similar fashion with regard to communication among panel members. On the one hand, most members of the serial panels communicate to the limited extent necessary to make slight modifications in a disposition that has already been prepared. On the other hand, most members of parallel panels no longer confer regularly concerning the merits of every case and usually simply identify

106. One judge mentioned that the judges' consideration of the suitability of a case for the screening track is not completely independent under the parallel procedure, since the judges notify each other through electronic mail, rather than notifying the clerk of the court, that a case is to be rejected. If a judge has doubts about the suitability of a case for disposition without argument, but the other two panel members have not included the case in their lists of rejected cases, the judge may be reluctant to reject it from the screening calendar. However, this situation is quite different from rejecting a case for which another judge has prepared a disposition, as can occur in the serial procedure.

through electronic mail those cases to be rejected from the screening calendar.

Despite the evolution toward a common practice of communication among panel members, the judges remain divided in their preferences (see table 19). However, these preferences appear to be related more to the perceived efficiency of the two procedures and, for advocates of the parallel procedure, a preference for having the case materials at hand for ease of reference if communication should become necessary. Adherents of the two procedures are no longer strongly divided concerning the amount of communication required to assess the merits of the individual cases referred to the screening panels.

TABLE 19
Judges' Preference for Screening Procedure (N = 24)

Serial procedure	12
Parallel procedure	9[a]
No preference	3

[a]Includes six judges who prefer the modified parallel procedure.

E. In-Chambers Review of Cases on the Screening Calendar

We asked the judges to describe the manner in which they review the materials in cases assigned to the screening panel, the extent of involvement of their own law clerks in the screening cases, and the criteria they use to determine whether placement on the screening calendar is appropriate.

1. Review of case materials. For each case sent to the screening panels, the judges receive excerpts of the case record, the briefs of the parties, and the bench memorandum prepared by the staff attorney. All of the judges indicated that they read the bench memorandum and the briefs of the parties. One judge first reviews the lower court order, then reviews the bench memorandum and the briefs. Only one judge mentioned reviewing the record routinely, although several judges volunteered that they review the case record if the briefs or the staff attorney memorandum indicates a specific problem with the record. A number of the judges indicated that if a draft disposition has been prepared by another judge, they review the draft disposition first.

2. Assistance of law clerks. The judges differ in the amount of assistance they require from their own law clerks in reviewing the case materials: Some request only occasional assistance, and others routinely seek help from their law clerks (see table 20). Most of the judges review the case information themselves, without routine assistance from their law clerks. One judge indicated that his "clerks never see these cases." Those judges who do not require the involvement of their law clerks described the screening cases as being sufficiently simple that such assistance is unnecessary. Most also expressed general satisfaction with the bench memoranda prepared by the staff attorneys.

TABLE 20
Law Clerk Assistance in Review of Screening Cases (*N* = 22)

Judge reviews case materials	9
Law clerk reviews case materials only when necessary to address a specific problem	5
Law clerk routinely reviews materials and prepares draft of disposition	8

A number of judges indicated that they require the assistance of their in-chambers law clerks only occasionally, for proofreading, for cite checking, or in rare instances, for additional research. For example, one judge indicated that if the case seems difficult, he may ask the law clerk to review it before he rejects the case from the screening calendar. Another judge, who indicated that he occasionally asks law clerks to review the record, expressed concern about using in-chambers staff to assist with screening cases, indicating that the preparation of screening cases by the central legal staff is "one of the ways that the staff attorneys' work increases the capacity of the judges to work in chambers."

A minority of the judges routinely involve their in-chambers staff in the consideration of screening cases. Law clerks typically review the case material upon its arrival in chambers. The judge then reviews the materials and discusses the case with the law clerk, who then drafts a disposition. One judge indicated that his in-chambers legal staff review these cases in the same manner as they do cases submitted on the oral argument calendar: They review the staff attorney's bench memorandum, along with the briefs and other case material. Another judge routinely involves his clerks only when he is the lead judge and must draft a disposition. One judge asks his law-student extern, as well as a law clerk, to review these materials upon receipt; the extern then prepares a draft disposition under the guidance of the judge and the law clerk.

3. Panel review of staff attorney recommendation. The judges indicated that they rarely, if ever, ask the staff attorneys to do additional research on a case placed on the screening calendar.[107] A few judges said they have telephoned a staff attorney for clarification of a point raised in the bench memorandum. However, most judges indicated that they never communicate with the staff attorneys concerning screening cases; if difficulties arise, the necessary work is done by one of the judge's own clerks or the case is rejected and placed on the argument calendar.

The screening program of the Ninth Circuit is notable in that the rate of rejection of the cases the staff attorneys place on the screening calendar has dropped in recent years. During the first two years of the program, 18 percent of the cases placed on the screening calendar were rejected and moved to the argument calendar. There was great variation among the judges in the proportion of cases they rejected: The proportion ranged from 3 to 34 percent.[108] After some immigration cases, which had a particularly high rate of rejection, were removed from the screening program, the rate of rejection dropped to 11 percent in 1986.[109]

We asked the judges the basis of their rejection when they do not follow the staff attorney's recommendation for nonargument disposition. We expected to hear a number of suggestions for sharpening or changing the criteria used by the staff attorneys in assigning cases to the screening program, and perhaps some criticism of the accuracy of the staff attorneys' assessments. Our questioning elicited no criticism of the staff attorneys' recommendations. Most frequently the judges indicated that there was no pattern to their rejection of cases from the screening calendar. A number of judges indicated that the cases are rejected for reasons that are apparent only to an experienced judge. Several judges mentioned that "only

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107. However, at least two judges frequently instruct the staff attorneys to revise their bench memoranda into draft dispositions, offering guidance to the staff attorneys concerning the development of the draft dispositions.

108. There was also a slightly higher rejection rate by the serial panels than the parallel panels (20 percent and 13 percent, respectively). J. Cecil, *supra* note 88, at 71-73.

109. Third Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeship Act of 1978 and Other Measures to Improve the Administration of Justice in the Ninth Circuit (July 1986). Placement of immigration cases on the screening calendar has been particularly controversial. Although many of these cases meet the objective standards for the screening program, the judges differ in the degree to which they believe these cases require a public hearing. More recently, uncertainty in the development of law in this area has resulted in fewer such cases meeting the standards for placement on the screening calendar. Furthermore, placement of some higher-weight (3L) cases normally destined for the screening calendar on the oral argument calendar as space became available may have removed from the screening calendar cases that were more likely to be rejected.

a judge could recognize the need for argument" in rejected cases or that rejection was based on the "judge's individual experience."

A number of judges acknowledged that despite the court's adoption of the screening criteria, the judges themselves do not agree on the proper standards for determining the need for oral argument. The comments in response to this question indicated recognition of the variation among the judges. "The judges themselves disagree on screening standards, so it is not possible for staff attorneys to come up with an interpretation that results in no rejected cases," said one judge. Another said, "Rejections express differences in judgment concerning the values of oral argument." A third judge pointed out, "Rejections typically occur in cases that are close calls, and it is frequently a matter of judgment and difference of opinion that exists among the judges." Referring to the high rejection rate for immigration cases, one judge said, "Immigration cases cause particular problems because of the need for visibility and the advantage to the appellant of delay. The court is divided on these cases, and staff attorneys should not be accountable when a case is rejected from the screening calendar." Thus, the reason for rejections appears to be less a problem of the criteria used by the staff attorneys, or their application of the criteria, than it is a difference among the judges concerning how criteria should be interpreted.

One judge expressed concern that the cases that ended up on the screening calendar involve "persons who are in prison, persons who are disabled, and persons who are denied access to this country." This judge expressed concern that such cases involving the rights of individuals are not given the same degree of attention as commercial cases, but he acknowledged that the selection of these cases for the screening program was due to the application of the objective standards described earlier. Another judge took issue with the assumption that the rejection rate should be lower, mentioning that a high rejection rate is an indication of the "close scrutiny by the court" and that a lower rejection rate would be reason for concern.

These differences in views among the members of the court set a limit on the efficient operation of the program. Despite the staff attorneys' apparently faithful adherence to the established criteria of the program, it appears that from 10 to 20 percent of the cases placed on the screening calendar will be rejected from the screening calendar. Although the materials prepared by the staff attorneys may be forwarded to the argument panel, the effort of the staff attorneys in preparing the bench memorandum in rejected cases is otherwise lost.

4. Characteristics of nonargument cases. Despite their disagreement about interpretation of the screening criteria, the judges were able to identify the important characteristics of cases suitable for disposition by the screening program (see table 21). The most common characteristic was clear precedent in the law of the circuit, mentioned by twenty-four of the twenty-six judges. A number of judges raised this issue by indicating that the disposition of the case should have no precedential value or that the decision must be controlled by recent authority. The second most frequently mentioned characteristic was simplicity of both the issues and facts of the case. The third most common description of suitable cases was that the case should have a "clear result," a description related to both the simplicity of the issues and the existence of a clearly controlling precedent.

TABLE 21
Characteristics of Cases Suitable for Disposition by the Screening Program (N = 26)

Clear precedent, no conflict in circuit law	24
Simple issues and facts	16
Clear result	10
No need for a public viewing	2
No need for publication of disposition	2
Unanimous decision	1
Disposed of quickly	1

NOTE: Some judges mentioned more than one characteristic.

5. Role of counsel. Objections raised by counsel to placement of cases on the screening calendar appear to play only a minor role in the judges' determination of the need for argument. The clerk's office notifies counsel for both parties that the court is considering submission without argument and gives counsel ten days from the receipt of the notice to present a statement setting forth the reasons why oral argument should be heard. Objections raised by counsel are forwarded, with the case materials, to the judges on the screening panel for their consideration. An earlier evaluation of the Ninth Circuit's screening program determined that in 22 percent of the cases, at least one of the attorneys objected to the submission of the case without argument.[110]

A majority of judges indicated that an objection by an attorney plays little or no role in their determination of the need for oral

110. J. Cecil, *supra* note 88, at 77.

argument.[111] Those who acknowledged that an attorney's objection may play a role emphasized that the weight given the objection is related to the reasons offered for the need for argument, and not merely to the fact that the attorney objected. "An attorney's objection will be influential in a close case if the attorney gives reasons for the objection," said one judge. Another said, "Objection is important if it identifies issues that will benefit from public visibility. If the facts are clear and precedents are strong, then the objection plays no role." "The objection receives careful consideration if the attorney gives a substantive reason rather than simply states a personal preference," said another. Only five judges indicated that the presence of an attorney's objection alone, without regard to the reasons presented, justifies a more careful review of the suitability of the case for disposition without argument.

F. Summary of the Ninth Circuit Procedure

The Ninth Circuit has established a procedure for deciding cases without argument that is more elaborate, and more dependent on the work of the staff attorneys, than the procedure of any other court examined. Staff attorneys identify the cases suitable for disposition without argument and then prepare materials to assist the judges in considering these cases. The program is also designed to permit the judges to select from two alternative procedures for deciding the nonargument cases. This design accommodates the court's large number of judges, who have varying needs for communication and varying standards for permitting disposition without argument.

Since the program's inception in 1982, the two procedures for considering nonargument cases have changed somewhat, becoming more similar over time. There has been more communication than anticipated among members of the serial panels and less communication than anticipated among members of the parallel panels. These changes are undoubtedly due in part to the introduction of electronic mail in the court, which makes it easier for judges to communicate without scheduling a telephone conference. However, these changes also seem to reflect an accommodation to the nature of the cases placed on the screening calendar; some, but not all, of the cases require a limited amount of communication. The serial procedure has been modified to permit such communication if nec-

111. When an attorney objects, under the rules adopted by the court, all three judges must agree on the disposition of the case or the case is returned automatically to the clerk's office for placement on the next oral argument calendar.

essary, and the parallel procedure has been modified so that communication takes place only when necessary.

The screening program of the Ninth Circuit is notable also in that the rate at which cases are rejected from the screening program and returned to the argument calendar has varied from 10 to 20 percent. Interviews with the judges indicated that rejections from the screening program are due to differences among the judges concerning the suitability of individual cases for disposition without argument rather than an inability of the staff attorneys to apply properly the selection criteria approved by the court. Since the judges were rarely able to specify common characteristics of cases they reject, it seems unlikely that the staff attorneys will be able to remove only those cases from the screening track. Therefore, rejection of a proportion of the screened cases is likely to continue.

The screening program of the Ninth Circuit has rarely functioned at the level that was intended when the program was designed. Although reliance on the staff attorneys has resulted in consistent application of standards for the selection of cases for nonargument disposition, heavy reliance on the staff attorneys' work has also limited the number of cases that have been placed on the screening calendar.

V. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

A. Introduction

Unlike the Fifth and Ninth Circuit Courts of Appeals, the Court of Appeals for the Sixth Circuit does not use special screening panels to identify and decide the nonargument cases. Instead, the judges review and dispose of the nonargument cases when they convene to decide the argued cases. In other words, all cases are decided in a face-to-face conference of the panel members. In this chapter we describe the procedures the judges use to decide the nonargument cases, and we highlight the importance they place on the opportunity to decide all cases in conference.

Although the judges do not use special panels to decide the nonargument cases, they do rely on staff attorney assistance in identifying the cases to be decided without argument. As in the other two courts we have discussed, the staff attorneys screen cases for nonargument disposition and prepare written materials for the judges' use. However, because the panels decide these cases at the time they convene, there is a limit to the number of cases they can decide at that time. In addition, the court has traditionally been committed to allowing argument in as many cases as possible. Therefore, there has been a limit to the number and types of cases the staff attorneys are expected to prepare. We will describe how this situation affects the work in the staff attorney's office and why the court has recently changed its expectations regarding the staff attorneys' responsibilities.

Our discussion is based primarily on interviews with members of the court. In late 1985, we met in Cincinnati with the director and assistant director of staff attorneys and discussed with them the responsibilities of the staff attorney's office. To get a broader picture of the screening criteria used by the office, we also talked with two additional staff attorneys, one with substantial experience at the court and one new staff attorney. During this visit to the court, we also met with the clerk and members of his staff, and we collected data from the court's records. Because the court made some changes in its screening procedures in the fall of 1986, we have had

several additional recent conversations with the director of staff attorneys and the clerk. In the late spring of 1986, we interviewed all the active judges and three senior judges.[112]

As we did with the Fifth and Ninth Circuits, we begin our discussion of the Sixth Circuit with a description of the court's resources, caseload, and past performance. We then describe the evolution of the screening procedures used in this court. This discussion highlights the court's efforts to find a procedure by which to decide more cases without argument while maintaining its commitment to deciding those cases in a face-to-face conference. Next, we describe the actual procedures used in the staff attorney's office for identifying cases to be decided without argument. Then we discuss the judges' role in reviewing the cases identified by the staff attorneys for nonargument disposition and in reaching a decision on the merits. The judges' views on the importance of face-to-face decision making are discussed in the conclusion.

B. Judge, Staff Attorney, and Caseload Profiles[113]

Several new judges had been appointed to the Sixth Circuit just before we conducted our interviews there, bringing the total to fifteen active judges. These judges reside in many cities throughout the circuit: four in Detroit, two in Cincinnati, and one each in Danville, Kentucky; Grand Rapids, Michigan; Nashville; Louisville; Akron; Cleveland; Memphis; Chattanooga; and Washington, D.C.[114] Cases are heard primarily in Cincinnati and only rarely in other cities.

The court uses only hearing panels; there are no special panels to decide either motions or nonargument cases. All matters are decided by the judges at the time they convene. The judges sit two weeks at a time, four days a week, six times a year (or forty-eight days each year). Panels are scheduled during all twelve months. The judges sit with the same panel members for one week at a time, hearing cases on Monday, Tuesday, Thursday, and Friday. The nonargument cases are decided at the time the judges convene to hear the argument cases. Each panel sets its own time—fre-

112. See appendix B for a copy of the interview protocol.

113. See appendix C for tables summarizing the information presented in this section. Other data presented in the text are from Administrative Office of the United States Courts, 1985 Annual Report of the Director, and data provided by the court.

114. The judge in Washington, D.C., was a newly appointed judge, temporarily residing in Washington while waiting for chambers to be prepared in a city within the geographical boundaries of the Sixth Circuit. The judges' locations are those that pertained at the time of the interviews. There have been some changes recently.

quently on Wednesday—to decide motions. Because senior and visiting judges serve on the hearing panels, these judges, like the active judges, are assigned nonargument cases and motions.

The court employs fifteen staff attorneys, including the director and assistant director of the staff attorney's office. All the staff attorneys have had legal experience prior to joining the central legal staff. Some have practiced law; others have clerked for a judge or have served as a staff attorney in another court. There is no limit on the term they serve; several have been with the court for five years or more. To some extent the staff attorneys specialize in the kinds of cases they work on or the types of tasks performed. Some staff attorneys work primarily on motions, and some concentrate on screening cases for disposition on the briefs. At times a staff attorney has specialized in a particular type of case when the court has had a surge of filings of that type of case. However, all the staff attorneys participate in reviewing cases for jurisdictional defects. The staff attorneys are assisted by five secretaries and, occasionally, an intern.[115]

The caseload of the Sixth Circuit is among the highest of the federal appellate courts, and in the past several years it has increased significantly. In statistical year (SY) 1986, 3,618 cases were filed in this court—approximately 241 filings per judgeship.[116] The court terminated 3,339 cases—approximately 223 per judgeship—of which approximately 57 percent were decided on the merits. Until recently, the Sixth Circuit heard oral argument in a greater proportion of its cases than most federal appellate courts did in theirs. Of the cases decided on the merits in SY 1984, almost 70 percent were decided after oral argument. Only three federal appellate courts decided fewer cases without argument that year. In SY 1985, the percentage decided without argument increased slightly, to 33 percent of the cases decided on the merits. Recently there has been a more significant change. In SY 1986, the Sixth Circuit decided approximately 40 percent of the merits cases without argument, placing the court only a little below the average (46 percent) for the courts of appeals.[117]

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115. Although at one time one staff attorney was on loan to the court's prebriefing conferencing program, that is no longer the case. The conferencing program in the Sixth Circuit is operated by a separate office, unlike, for example, the conferencing program in the Ninth Circuit, which is handled by a subgroup within the staff attorney's office.

116. Detailed information concerning the statistical profile of the court and sources for the data cited here are provided in appendix C. See appendix A for an explanation of data reporting changes that may affect the SY 1986 data.

117. During the period from SY 1984 to SY 1986, the court operated under the minimum requirement of two cases per panel per argument day. It may be surprising, then, that the nonargument rate increased over this period. There are several

Like the other federal appellate courts, the Sixth Circuit decides most pro se cases without argument. In fact, the pro se cases accounted for more than half the cases decided without argument in SY 1984. Moreover, when the pro se cases are subtracted from the total number of cases decided on the merits, we find that the court decided only 13 percent of the remaining merits cases without argument—a lower percentage than that of most of the appellate courts.

Despite the rising caseload, the court has been able to increase the number of cases disposed of on the merits per active judge. However, the Sixth Circuit remains one of the slower appellate courts. In SY 1986, the median time from filing the notice of appeal to disposition was thirteen months; only two other courts had longer disposition times. The court also has one of the highest pending caseloads of the appellate courts. To assist the judges with the large caseload and sizable backlog, the court continues to rely on a substantial number of visiting judges.

C. Evolution of the Court's Screening Procedure

The Sixth Circuit's search for special procedures for selecting and deciding nonargument cases began in the mid-seventies, prompted by concerns about a growing backlog of cases. Under the first procedure adopted, nonargument cases were handled by special panels that met in Cincinnati to decide the cases. This procedure was begun by three judges who took on the task of spending an extra day at the court during hearing week to go through cases together, selecting some (about thirteen a day) for nonargument disposition and then deciding the merits of these cases.

Around the same time, the court was beginning to hire staff attorneys for assistance with motions. The three screening judges felt they could dispose of significantly more cases without argument if the staff attorneys assisted them with the selection of the cases. After enlisting the staff attorneys to sort the cases for them, the judges were able to increase to about twenty-five the number of

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possible explanations for this increase. First, as we describe later, the court recently decided not to hear argument in Social Security cases unless argument is requested by the parties. In light of the large number of Social Security filings in this circuit in recent years, this policy change may explain part of the recent jump in the proportion of cases decided on the briefs. Second, data reporting changes adopted by the federal appellate courts in June 1984 may affect the nonargument rate (see appendix A). Third, the court may have received more attorney waivers of argument in SY 1986, or the judges themselves may have removed more cases from the argument calendar in SY 1986 than they had in the past.

cases they could decide in a day. After a time, however, the three judges found they could not handle all the cases the staff attorneys screened. They also began to feel it was unfair that they carry this burden alone, so they convinced the other judges to participate.

For a short time, several three-judge special panels continued the practice of meeting in Cincinnati to decide the nonargument cases, but as the number of judgeships increased and hearing schedules were changed, fewer judges were in Cincinnati at the same time. The only way the judges could have continued the special panel procedure would have been to decide the cases by mail or to travel to the court more often. The judges did not want to travel more, nor did they want to use the mail, in part because they considered the mail service unreliable, but primarily because they had a strong preference for face-to-face conferences. Therefore, the judges decided to dispose of the nonargument cases at the time they convened to discuss the argued cases. They also decided to continue the practice of having the staff attorney's office make an initial selection of the cases to be disposed of without argument.

The new procedure had several advantages. Most important, it accommodated the court's commitment to face-to-face conferences. However, it also established a regular schedule for staff attorney preparation of the cases. Instead of the intermittent schedule previously used by the judges, the staff attorney's office could rely on a fixed schedule and thus could produce the nonargument cases at a steady rate. The judges, too, could plan on a certain number of nonargument cases each month, in contrast to the previous pattern of an occasional and sudden deluge of cases.

When we asked the judges why the Sixth Circuit chose the specific number of two nonargument cases per day per argument panel, they gave two reasons: (1) The staff attorneys could not prepare memoranda for more cases and at the same time meet their responsibilities for motions; and (2) the judges themselves could not handle more than seven cases (two nonargument and five argument cases) each argument day. One judge, noting that disposition on the briefs was adopted because of the court's backlog, said the judges chose the limit of two cases per day because they "couldn't get the judges to do any more and couldn't safely do any less."

Several judges, in fact, said they find it very difficult to handle seven cases each hearing day even though two are nonargument—and therefore supposedly "easy"—cases. One judge, who said the cases become "jumbled" in his head, said he would prefer to spread his thinking out over more time. Because the nonargument cases are conferenced, he said, and because the judges meet for two weeks in a row, a large number of cases are concentrated in a short

time span. The advantage of special panels that do not convene, he noted, is that they spread the work out. Another judge, responding to a question about whether the judges could decide more nonargument cases, said, "We have all we can say grace over now."

The staff attorneys, too, have found that two cases per panel per day is the maximum they can prepare. The staff attorney director said that to identify and prepare memoranda for more cases, he would need more staff attorneys. Even if more staff attorneys were hired, however, the staff attorneys would not be able to prepare a great many more cases. For example, twice as many staff attorneys would not be able to prepare twice as many nonargument cases, the staff attorney director said, because the staff attorneys would then be working on more complex cases, which would take longer to prepare. At the time of the interviews, the staff attorney's office had a substantial reservoir of nonargument cases awaiting preparation.

According to the director of staff attorneys, there was one primary reason for the limited amount of time the staff attorneys had for nonargument cases: the time required by motions. Motions practice has increased in the Sixth Circuit in both volume and difficulty and now places substantial demands on the court's central legal staff. In SY 1985, the staff attorneys reviewed about 1,100 substantive and jurisdictional motions. For each of these, they prepared a research memorandum and a draft order.[118] Two of the chief judge's law clerks assisted the staff attorney's office with the motions work.

Despite the seeming consensus at the time of our interviews that the standard of two cases per panel per day was the upper limit the judges could handle and that the staff attorneys could prepare, there were some indications that more cases were eligible for disposition on the briefs than were currently being identified and prepared by the staff attorneys. First, thirteen out of eighteen judges answered yes when asked if more cases were suitable for nonargument disposition than were currently being decided that way. Only two judges said no. Second, a substantial number of cases are decided from the bench; that is, the judges hear argument from the appellant, ask the appellee not to present argument, and then announce a decision from the bench. This procedure is used

118. Procedural motions are handled by the staff attorney's office only if the motion is intertwined with a substantive or jurisdictional motion. Most procedural motions are handled by the clerk's office. The clerk estimated that several thousand procedural motions are handled by his office each year. The motions deputy in each of the three docketing teams handles these motions initially, then refers them to the clerk and the chief deputy clerk.

when a panel feels a case that has been calendared for argument is more suitable for disposition without argument.[119] Third, several dozen cases each year are decided on the briefs even though counsel have not waived argument and the staff attorneys, because of time constraints, have not recommended the cases for this method of disposition. These cases are listed on the argument calendars but, because most are filed by pro se incarcerated litigants, are not argued.

Recent changes made by the court suggest that the judges have decided to develop procedures that will permit identification and preparation of more of the cases suitable for nonargument disposition. In December 1986, each panel began taking three, instead of two, nonargument cases. This change, of course, places greater demands on the staff attorney's office. To enable the staff attorneys to prepare 50 percent more nonargument cases, the court has shifted motions work to a team in the clerk's office. The court has also changed the type of cases the staff attorneys will review. In the past the staff attorneys reviewed all cases that were filed, but because the majority of the cases they recommended for nonargument disposition were pro se cases, the staff attorneys will now concentrate their screening efforts on pro se cases and counsel-represented prisoner cases. However, even though there has been a change in the type of cases the staff attorneys will now review, the procedures they have used in the past will continue. A greater change has occurred in the clerk's office, which will now have responsibility for motions and for screening most counseled cases. In the following section we describe the procedures used by these two offices.

D. Identification of the Nonargument Cases: Role of the Staff Attorneys and the Clerk's Office

Prior to December 1986, all newly filed cases were sent to the staff attorney's office for review. The staff attorneys examined each case for jurisdictional defects and evaluated its suitability for disposition without argument. When a staff attorney recommended a case for disposition on the briefs, he or she prepared a memorandum and proposed order for the panel's use. In addition, the staff

119. This procedure is described in more detail in section E(5). The court issued 68 decisions from the bench in SY 1984 and 102 in SY 1986. (This information is computed from data provided by the Administrative Office of the United States Courts.)

attorneys reviewed all substantive motions and prepared draft orders for them.

As noted earlier, the needs of the argument panels and the demands of the motions docket determined the number of cases the staff attorneys prepared for nonargument disposition. In SY 1985, the staff attorneys prepared memoranda and draft dispositions for about 430 cases recommended for nonargument disposition. This procedure typically generated about thirty-five cases per month, or one to two cases a week for the staff attorneys assigned to screening. At times the staff attorneys were unable to prepare the appropriate number of cases for each argument panel; when this occurred, rather than sending cases to the panel without memoranda, they sent fewer than the required number of cases.[120]

Recently, to increase the number of nonargument cases referred to the panels and to accelerate preparation of motions, the court has limited the staff attorneys' responsibilities to review of the pro se cases and counsel-represented prisoner cases, and preparation of memoranda and proposed orders for an additional small group of cases recommended for nonargument disposition by the clerk's office. For the pro se and counsel-represented prisoner cases, the staff attorneys are responsible for the jurisdictional review, all substantive motions, and the review for nonargument disposition.

A new unit has been created in the clerk's office to review all other cases. This unit, composed of a lawyer, two law clerks, and support staff from the clerk's office, handles all motions, jurisdictional issues, and the screening for nonargument disposition in these other cases. This unit's screening responsibilities differ in one important way, however, from those of the staff attorneys. When a member of the clerk's screening unit determines that a case can be decided without argument, he or she refers it to the staff attorney's office for a more thorough review and for preparation of the memorandum and draft disposition, rather than preparing these materials himself or herself.[121] In other words, the staff attorneys continue to prepare all the memoranda and orders used by the judges. Thus, the effect of the new division of labor is a shift of most of the substantive motions from the staff attorney's office to the clerk's office.

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120. Cases are not sent without memoranda because of the court's belief that a memorandum is an additional guarantee that a nonargument case has received adequate attention.

121. The court's past experience suggests that few cases will be referred by this unit for nonargument disposition. In SY 1986, the staff attorneys recommended only 74 counseled cases for disposition on the briefs (out of 506 cases recommended for nonargument disposition). (These data were provided by the clerk of court.)

1. Screening procedure. When the staff attorneys and the clerk's screening division review a case for nonargument disposition, they use a screening procedure developed a number of years ago by the staff attorney's office. Screening in the Sixth Circuit is a two-stage procedure. First, every case is reviewed for jurisdictional defects when it is filed. If a case appears to have a defect, a sua sponte motion for dismissal is prepared and is sent to a panel.[122] During this initial review, the case may be identified as a likely candidate for nonargument disposition. If so, it is added to a list of such cases and reviewed again when the briefs are filed. If a case is found unsuitable for disposition without argument, it is sent to the calendaring clerk with a cover sheet (or "screener") indicating that it should be calendared for argument. In the past, about one-third of the cases thought eligible for a decision on the merits were listed on this roster of prospective nonargument cases; many of these were pro se cases. The other two-thirds of the merits cases were returned to the clerk's office for placement on an argument calendar.

The second stage of the screening process, which involves only the cases initially flagged as potential nonargument cases, begins when the briefs are filed. The staff attorneys have exclusive responsibility for this stage of the procedure. Both the cases they have listed for nonargument disposition and the cases identified by the clerk's screening unit for decision on the briefs are reviewed again, and a final decision is made about the appropriate method of disposition. If the second, more thorough review suggests that a case should be argued, the staff attorney prepares a screener for use by the clerk's office in placing the case on the argument calendar. On the screener, the staff attorney recommends an amount of time for argument, lists related cases, and reports the jurisdictional issues already decided. Then the screener and any other legal material, such as a memorandum on a substantive motion previously considered by the court, are sent to the clerk. In the past, about one out of ten cases initially identified as nonargument cases were reclassified as argument cases after the second review.

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122. Motions that are ready for a panel's decision are sent to a panel during the week prior to the one in which it will be meeting for argument. Formerly, motions were sent to the judges as they were prepared, but the court found, as one staff attorney put it, that the motions "got moss on them." To prevent delays, the court decided to assign motions to special panels that would meet during argument week. Even more recently, the court has decided to assign motions to the hearing panels. During our interviews, one judge said he would like to return to the practice of sending motions out as they are prepared, rather than waiting for panels to convene. He was concerned about delay, saying that cases cannot be decided until the motion is disposed of.

For the cases in which the second review indicates that disposition without argument is appropriate, the staff attorneys prepare memoranda and proposed orders for the panel's use. The memoranda, which are usually about two to four pages in length, set out the legal issues and facts in the cases. The proposed orders, which are typically one or two pages long, provide the panels with a draft decision and reasons for that decision. According to the director of staff attorneys, although the amount of time a staff attorney spends on a case depends in part on the complexity of the case and the length of the record, the second review and the preparation of the memorandum and draft order generally require two or three days of a staff attorney's time. All the written materials are reviewed by the assistant director of staff attorneys. The nonargument cases are then sent directly to the argument panels.

Under the screening procedure used by the Sixth Circuit, a case can be reviewed several times. For example, if a case has no jurisdictional defects and is initially identified as a potential nonargument case, it will be reviewed at least twice. There will be two reviews, as well, for a case in which a substantive motion is filed subsequent to the staff attorney's initial review. The director of staff attorneys reported, however, that the majority of cases are reviewed only once.

2. Screening criteria. At the time of the first-stage review, the only materials available to the staff attorneys and clerk's screening staff are the materials that have been placed in the case file at docketing: the district court docket sheet, the district court decision, and the notice of appeal. The staff attorneys have developed several informal criteria that make use of the limited information provided by these documents. The staff attorneys have found that if the decision is a long and complex opinion, the case is likely to be argued and therefore should be sent to the clerk for scheduling on an argument calendar. Direct criminal appeals and cases that appear to involve a question about the prejudicial effect of erroneous jury instructions are also very likely eligible for argument and should be returned for calendaring. Thus, these cases should not be reviewed again by the staff attorney or the clerk's office when briefs are filed. The staff attorneys have found that for cases in which the file contains only an order, there is not enough material on which to base a decision about whether the case should be argued. These are the cases that should be listed provisionally as nonargument cases and reviewed more carefully when briefs are filed.

For the second-stage review, the staff attorneys follow the guidelines of the court's local rule 9(b), hence the court's designation of

nonargument cases as "rule 9 cases." Both the pro se cases and the counseled prisoner cases, as well as the counseled cases referred from the clerk's office, are subject to the standards set forth in this rule. At the time we interviewed the staff attorneys, this rule simply restated the criteria listed in Federal Rule of Appellate Procedure 34(a): (1) the case is frivolous; (2) the dispositive issue has been recently authoritatively decided; and (3) the facts and legal arguments are adequately stated in the briefs and record, and argument would not significantly aid the decisional process.[123] In practice, according to the staff attorneys, they have usually recommended certain types of cases for nonargument disposition: habeas corpus cases, cases involving questions about the statute of limitations, section 1983 civil rights cases, tax protest cases, and cases in which an intervening Supreme Court or Sixth Circuit decision disposes of the issue. There are, as well, certain types of cases that the staff attorneys are unlikely to recommend for submission on the briefs: Civil Justice Act cases, school desegregation cases, and title VII cases. Direct criminal appeals also are not recommended for submission on the briefs.

The staff attorneys have not, however, used case type as the only—or even primary—selection criterion. They also weigh the amount of time, both judges' and staff attorneys' time, that will be needed to review a case. Judges should not have to spend much time on these cases, the staff attorneys said; the issues and facts should be so straightforward that only a quick review will be necessary. Likewise, the staff attorneys should be able to prepare a case, including research, writing, and preparation of attachments, in two or three days. If they predict that their review will take longer than this, they send the case to the clerk for scheduling on an argument calendar, with the expectation that the judges' law clerks will prepare memoranda or oral presentations for these cases. One staff attorney explained that, although this sounds as if the staff attorneys "push cases off on the law clerks," there is a very practical consideration behind the decision. The law clerks, he said, can respond to questions from the judges and thus resolve in a brief face-to-face discussion or narrowly focused memorandum an issue it would take a staff attorney two or three days to address adequately on paper.

The staff attorneys mentioned a number of other criteria for selection of the nonargument cases. Oral argument is recommended

123. A recent revision of the court's local rules broadened rule 9; that is, more types of issues and cases are now likely to meet the requirements for disposition on the briefs. *See* United States Court of Appeals for the Sixth Circuit, Local Rules 6–7 (February 1987).

for cases that are complex or raise novel issues, whereas disposition without argument is recommended for those in which the issues and law are clear. One staff attorney mentioned that cases terminated by summary judgment frequently are suitable for disposition without argument. If the staff attorneys think there is a high probability that at least one judge will send the case to the clerk's office for assignment to an argument calendar, they do not designate it for disposition on the briefs.[124] To do so, they said, would only waste the time they have spent in reviewing the case and writing the memorandum and proposed order, as well as delay the movement of the case.

When selecting the cases for nonargument disposition, the staff attorneys do not take into account parties' requests for argument or their waivers of argument. All requests for argument and waivers of argument are decided by the judges. However, the staff attorneys continue to be subject to the demands of the argument calendars, preparing three cases for each panel for each argument day.

According to the director of staff attorneys, the judges have accepted the staff attorney's recommendation for nonargument disposition in the great majority (95 percent) of cases. The judges have been somewhat less likely to accept the proposed order, however; the director estimated that the judges ask for changes in about 15 percent of the proposed orders. He said he tries to give the judges all the materials they need to make a decision. Recognizing that judges will have different needs, he said his goal is to prepare a "neutral, objective" package. Another staff attorney said he prepares the material "for the judge who wants to know the most about the case." He noted that other staff attorneys may, however, have a different view of their task and may write for the judges who feel the nonargument cases do not need much attention and who therefore do not want much material.

After the staff attorney's office has referred the nonargument cases to the argument panels, the office maintains responsibility for the cases until the signed orders or opinions disposing of the cases are received from the panels. During the time the panels are reviewing the cases, the staff attorneys may receive telephone calls from the judges requesting additional research or revisions to the

124. Although the identity of the panel members is not known, the staff attorneys' experience indicates that a significant number of judges will not vote for nonargument disposition in certain types of cases. For example, at one time several judges wanted argument for all Social Security cases. Although a given case might warrant disposition on the briefs, the staff attorneys would seriously consider routing it to the argument calendar because there was a good chance the case would eventually be sent there by a judge anyway.

proposed orders. In the next section, we describe the judges' use of the staff attorneys' materials.

E. Judges' Role in Selecting and Deciding the Nonargument Cases

We asked the judges a number of questions designed to elicit information about their in-chambers procedures for reviewing the cases designated by the staff attorneys for nonargument disposition. The questions covered such topics as the types of materials relied on by the judges, their use of law clerks for review of nonargument cases, the criteria they use to evaluate whether submission on the briefs is the appropriate method of disposition, and the extent to which the panels confer on the nonargument cases. We also asked the judges why the court has chosen to conference the nonargument cases rather than deciding them through special panels that do not convene.

1. Use of law clerks in review of nonargument cases. Approximately seven weeks prior to a hearing week, the judges receive a calendar for that week. Five cases designated for argument are listed on this calendar. Two to three weeks before the hearing week, the judges receive three cases designated by the staff attorneys for nonargument disposition. The judges decide the nonargument cases at the same time they meet to decide the argued cases. Because the nonargument cases are sent to the panels shortly before they convene, there is no lag between preparation of the cases and their consideration by the court, resulting in up-to-date research in these cases.

For each of the nonargument cases, the judges receive two types of materials: (1) the case file, which contains the district and appellate docket sheets, the district court opinion, the record, the briefs of the parties, and motions and the orders they have generated; and (2) the materials prepared by the staff attorneys, which include a memorandum and a proposed order. When the package of materials arrives, either the judges or their law clerks must review it. We found that most of the judges read the case materials themselves rather than having their law clerks review them first (see table 22). Five judges, however, have their law clerks read the case materials first. Three of these judges limit their clerks' role to a check of cites and cases, but two judges have their law clerks routinely prepare bench memoranda for the nonargument cases. These memoranda may be brief, because, as one judge said, these cases do not need much research; nonetheless, these judges ask their law clerks

to handle the nonargument cases much as they handle the cases designated for argument. The judges then use the law clerks' bench memoranda as their guide to the nonargument cases.

TABLE 22
Law Clerk's Review of Nonargument Cases (*N* = 17)

Judge reviews case materials	12
Law clerk reviews case materials first, then judge reviews clerk's work and case materials	5
Clerk checks cites and cases, brings problems to judge's attention	3
Clerk prepares bench memorandum and may revise proposed order	2

NOTE: Because one judge's procedure is so different from that of the other judges, we describe it separately later in text.

Generally, however, the judges consider law clerk participation in nonargument cases "counterproductive" because it duplicates the work of the staff attorneys. One judge said, "The staff attorneys do law clerk work, so why have the law clerks redo other law clerks' work?" Another judge said the staff attorneys can prepare the nonargument cases more efficiently than the law clerks can because the staff attorneys have developed a special expertise in the kinds of cases that typically are not argued. Thus, most judges do not use their law clerks for review of the nonargument cases because they consider this practice a waste of resources.

2. Materials used in the review process. Once the judges have in hand the case file, the staff attorneys' materials, and the law clerks' suggestions, they can begin their review of the cases designated for nonargument disposition. Table 23 shows that when making their decisions about the proper disposition of the nonargument cases, the judges rely primarily on two documents: the staff attorneys' memoranda and the briefs. However, the judges are selective in their use of these documents; three prefer the staff attorneys' proposed orders to their memoranda, and seven read the briefs only if the staff attorneys' memoranda indicate a problem, the case appears to be complex, or, as one judge put it, the staff attorney's memorandum suggests "something intriguing" about the case.[125] Less than half the judges mentioned other items from the

125. We should note that a portion of the nonargument cases, especially the pro se cases, come to the judges with no briefs or only "informal briefs" (forms provided by the court for pro se litigants). In these cases, the judges must rely on only the record, memorandum, and proposed order.

case file (e.g., the appendix, the record) in their descriptions of the materials they use to review and decide the nonargument cases. Finally, two judges said they use memoranda prepared by their law clerks. Several judges noted that they review the nonargument cases with special care when they are the duty judge.[126]

TABLE 23
Materials Used by the Judges to Review the Nonargument Cases (N = 17)

Staff attorney materials	
Memo and order	14
Order only	3
Case materials	
Briefs, routinely	10
Briefs, if memo or order suggests difficulties or case appears to be complex	7
Additional documents	
Other items (e.g., record) in the case file	7
Memo from law clerks	2

NOTE: Only seventeen of the eighteen respondents are included in this table. Because one judge's procedure for reviewing the nonargument cases is so different from that of the other judges, we describe it separately later in text.

3. Reliance on staff attorneys. Most of the judges who do not have their law clerks initiate the review of the nonargument cases begin the review by reading the staff attorney's memorandum. The judges said they find the memorandum helpful because it provides, as one judge phrased it, "a guide to the case." The memorandum states the background of the case, discusses the issues, and explains why disposition on the briefs is appropriate. For some cases, however, the judges may find they need additional research or clarification of a point. Six judges said they ask their law clerks for this kind of assistance, and six said they turn to the staff attorneys for help with additional research. The other judges either do the work themselves or, more typically, send the case back to the clerk's office for placement on an argument calendar. As one judge explained, these cases are supposed to be the straightforward cases; if they need additional research, he sends them back for placement on the argument calendar because they should not have been designated for nonargument in the first place.

Although a number of the judges do from time to time turn to the staff attorneys for additional research, the judges are more

126. The duty judge, who is neither a senior judge nor the presiding judge, is responsible for preparing the proposed order. This practice is described more fully later in text.

likely to ask the staff attorneys for help with revisions of the proposed order. During their review of a case, the judges not only decide whether the case can appropriately be decided on the briefs but also make a tentative decision about the merits of the case. For their statement of this decision, many judges adopt the proposed order prepared by the staff attorneys, but they frequently want to revise this order, if only to make sure it states the decision in their own, rather than the staff attorneys', style. For these revisions, most of the judges turn to the staff attorneys, although several make the revisions themselves. The proposed orders are typically only a page or two in length, and therefore revisions usually do not require a great deal of time.

One judge has developed a procedure for reviewing the nonargument cases that uses the staff attorneys in a way that is quite different from the way the other Sixth Circuit judges use them. In fact, no other judge we interviewed for this study uses staff attorneys in this way.[127] Although this judge, like the others, receives memoranda and proposed orders from the staff attorneys, he waits until the morning of argument to review the cases. At that time he has the staff attorneys present their case summaries and analyses orally and in person. While the staff attorneys are, in effect, briefing him on the nonargument cases to be decided that day, he looks over the orders, and the briefs if necessary. If he wants changes made in the proposed orders, the staff attorneys revise them while he is in court. The judge said he adopted this procedure a few years ago because of morale problems in the staff attorney's office. He felt that if the staff attorneys had more contact with the judges and more feedback about their work, these problems might be resolved. The procedure has helped "a little," he said. He also said he recognizes that this procedure could not become the routine practice of the court because of constraints on the staff attorneys' time.[128]

Nearly all the judges find the staff attorneys' memoranda and proposed orders helpful, primarily because these documents summarize the facts and issues in the nonargument cases. One judge described the staff attorneys as "excellent," and another said "he wouldn't know what to do without them." However, about half the

127. The judges and staff attorneys in the Court of Appeals for the Seventh Circuit, a court not included in our study, may use a procedure similar to the one described here.

128. With its recent changes in procedure, the court has reduced the opportunities for the staff attorneys to meet with the judges. In the past, the staff attorneys often met with the motions panels and presented motions orally. Because much of the motions work will be done by the clerk's office now, the staff attorneys' contact with the judges will be diminished.

judges said they have some difficulties with the staff attorneys' materials. These judges find either that the memorandum and draft order duplicate each other or that the order frequently has to be changed. These judges said, however, that although the staff attorneys are sometimes in error about the legal issues or pertinent cases, they are almost always correct in their designation of a case for nonargument disposition.

Those judges who had some reservations about the staff attorneys' work offered several explanations for the problems they perceive. According to one judge, there have been several recent losses of experienced staff attorneys; another said that, as a whole, the staff attorneys are young and as yet untrained. Two judges said the problem is structural rather than individual. According to these judges, the staff attorneys are very isolated from the judges; they have no regular contact, and there are no procedures for giving the staff attorneys feedback about the judges' expectations.

Although the staff attorneys' work products may present problems for some of the judges, it appears that the judges' expectations of the staff attorneys differ substantially. This point is illustrated by the comments two judges made about the frequency with which they make changes in the proposed orders. One said he changes the staff attorneys' proposed orders "infrequently": about 25 percent of the time. The other said the orders "very often" have to be revised: about 10 percent to 15 percent of the time. If the judges are asked to review the same material, the first judge is likely to identify many more problems than is the second judge, yet is likely to consider this less problematic.

As noted earlier, the judges said that although they may disagree with the staff attorneys' analyses of the issues in the cases, they generally agree with their recommendations for disposition on the briefs. We collected data that would enable us to compare the staff attorneys' recommendation with the final method of disposition in a case.[129] This comparison is meaningful for only a limited portion of the caseload, however. Because there is a limit on the number of cases the staff attorneys can select for nonargument disposition, they necessarily designate many cases for placement on the argument calendar. These designations cannot accurately be called recommendations for argument. In addition, because the court does not hear argument in pro se cases, the staff attorneys have to

129. The director of staff attorneys identified the SY 1984 cases in which the staff attorneys had made a recommendation for nonargument disposition. We merged these data with disposition data from the Administrative Office and thereby determined the number of cases in which the staff attorney's recommendation differed from the final method of disposition.

assume that nearly all these appeals will be decided on the briefs. Thus, their recommendation of these cases for nonargument disposition is not really a matter of discretion on their part. Only when the staff attorneys select counseled cases for disposition on the briefs are they making a decision in which they have to apply the court's nonargument criteria and predict how the judges would handle the case. They predict accurately nearly 81 percent of the time. That is, in four out of five recommendations that involve a staff attorney's discretion, the judges agree with the staff attorney that the case can be disposed of on the briefs.[130]

4. Staff attorneys' most important functions. We asked the judges two final questions about the staff attorney's office: (1) Which function of the staff attorney's office is the most important one for the court? and (2) What additional duties should the staff attorneys be assigned if there were extra capacity in that office? The judges were reluctant to rank one staff function above others (see table 24). For example, five judges said all the staff attorneys' functions are important, and five judges mentioned two duties as most important, declining to name one duty as most important. Four judges said the staff attorneys' preparation of materials for the nonargument cases is their most significant contribution to the court, and two said motions work is the most important. Despite the range of responses, there appears to be a clear consensus that two of the staff attorneys' duties are especially useful. Altogether, thirteen judges mentioned the importance of the staff attorneys' preparation of cases for nonargument disposition, and eleven judges mentioned their work on motions; jurisdictional screening, by comparison, was mentioned by only seven judges.[131]

In favoring the staff attorneys' work on nonargument cases over their work on motions, one judge noted that the staff attorneys have specialized expertise in the kinds of cases that are screened for nonargument. In contrast, he said, because motions are more diverse, the staff attorneys' expertise in this area is not much greater than that available in his own office. He would divide the motions between the staff attorneys and the law clerks. Another judge said the staff attorneys' work on nonargument cases has been a "godsend" in helping the court deal with its backlog because it has given the judges two extra cases to decide each hearing day.

130. In SY 1984, the staff attorneys recommended disposition without argument for eighty-three counseled cases. Of these, sixty-seven cases (80.7 percent) were disposed of without argument.

131. In computing these numbers, we assumed that the judges who said all the staff attorneys' functions are important had in mind the three main functions they perform: (1) screening for jurisdiction, (2) screening for nonargument disposition, and (3) preparation of motions.

TABLE 24
Judges' Ranking of the Staff Attorneys' Most Important Functions

Most important staff attorney function (N = 17)	
All functions are important	5
Preparation of nonargument cases	4
Nonargument cases and motions	3
Motions	2
Nonargument cases and jurisdictional screening	1
Motions and jurisdictional screening	1
Staff attorneys should do no tasks	1
Additional desirable tasks (N = 11)[a]	
Preparation of more nonargument cases	4
Judge can't foresee any extra capacity	4
No additional functions	3
Identification of issues	2
Faster screening for jurisdiction	1
More time on motions	1
Faster review of applications for certificates of probable cause	1
Give extra capacity to judges in the form of additional law clerks	1

[a]There is more than one response for some judges.

Regarding motions, a judge said the staff attorneys' role here is "critical" because a case cannot move ahead until the motion is decided. Another judge noted that the court is getting an increasing number of motions, some of which are emergency motions and have to be dealt with immediately. He values the staff attorneys' assistance in deciphering the record in these motions. A third judge, in favoring motions work over screening, described the increase in motions as an "absolute avalanche" and said the volume alone requires assistance from staff attorneys.

When we asked the judges what additional tasks they would want performed by the staff attorney's office if it had unused resources, four judges said they could not foresee a time when there would be excess capacity. If there were, however, four judges would ask the staff attorneys to screen more cases for nonargument disposition, two would like to have the staff attorneys identify issues in the cases, two would have them perform some of their current duties more quickly, and one would have them do more work on motions. One judge said he would prefer to have the extra resources transferred to his own office, and three judges said they would not want the staff attorneys to be given any additional functions. The recent changes made in the court's procedures for handling nonargument cases and motions appear to reflect the judges'

desire to have more nonargument cases prepared by the staff attorneys.

5. Characteristics of cases decided with and without argument. When we asked the judges to describe the nonargument cases, the judges in the Sixth Circuit mentioned fewer characteristics than the judges in the other courts did. Several judges said simply that the nonargument cases are "the least demanding cases" or the "frivolous" cases. One judge said the decision about nonargument disposition is "not a major decision," and several seemed puzzled by the question, saying they do not really make a decision about the nonargument cases. One of these judges explained that the court "restricts the category of cases the staff attorneys have to attend to," so there is not a great deal of discretion involved. Another said judges have "nothing to do with which cases will be decided without argument," and a third said, "the staff attorneys must use some sort of checklist, but I'm not sure what it is." The criteria in this court are probably less elaborate than those in, for example, the Fifth Circuit appellate court because the screening function is quite different in these two courts. Whereas the Fifth Circuit judges examine the entire range of cases, the judges in the Sixth Circuit make decisions about a very narrow range of cases—mostly pro se and prisoner cases. More precise criteria are needed when screening is deeper.

Most of the judges did, however, provide a profile of the argued and nonargued cases. The most frequently mentioned characteristic of an argued case was that it is a direct criminal appeal; the court appears to have an informal policy of not deciding these cases on the briefs (see table 25). Cases that have any difficulties, such as unknown facts, a close question, unresolved law, or a possible conflict with the law of another circuit, also are argued. The problem of bad briefs was also mentioned and, as in the Third and Fifth Circuit appellate courts, the judges pointed out the dilemma created by bad briefs: Bad briefs may signify that argument should be heard because this is the only way the judges will get a full understanding of the case, or they may indicate that the attorneys are poorly qualified and therefore argument would be useless.

As mentioned earlier, the Sixth Circuit adopted a policy recently of not hearing argument in Social Security cases unless the parties request it. When the idea was proposed, several judges objected, saying the policy would discriminate against the poor. They accepted as a compromise the rule that argument would be allowed if requested by the attorneys. According to one of the judges, eleven Social Security cases were submitted for the session being held at the time we conducted our interviews; the attorneys in only two of

TABLE 25
Characteristics of Argument Cases (N = 18)

Direct criminal appeal	4
Unknown facts or unusual fact pattern	2
Bad briefs	2
Complex case	2
Any basis at all for the claim	2
Judge not confident of the facts or law	1
Close question	1
Unresolved law	1
The judges may differ	1
Intercircuit conflict	1
Requires subjective decision, value judgment	1
Agency case, because facts are complex	1

these cases had asked for argument. This judge now hopes the practice will be expanded to all cases in which only the facts are in dispute and there is an accepted standard to apply.[132]

The other category of cases for which the court usually does not hear argument is the pro se cases; most of these cases are filed by prisoners, who are not allowed to come to the court for argument (see table 26). Generally, however, nonargument cases were not described in terms of case types. The most frequently mentioned characteristic of nonargument cases was that the outcome is clearly determined by well-established precedent. In addition, many judges described the nonargued cases, in the words of one judge, as those in which the resolution is "pretty obvious"—that is, they are frivolous; involve clear facts, issues, or law; or require an objective decision involving only a yes or no answer. A practical consideration—that is, the amount of study time required—was mentioned by several judges. In their view, a nonargument case should be amenable to a quick decision; if substantial study time would be required, the case should be placed on the argument calendar.

One final criterion guides the judges' selection of nonargument cases. If a case has been referred by the staff attorneys for nonargument disposition, the panel's decision on the merits must

132. Several staff attorneys also mentioned the change in the procedure for reviewing Social Security cases. Typically, a great deal of time was required to review a lengthy record to determine if substantial evidence existed to support the decision below. The time consumed by these cases made it difficult for the staff attorneys to keep up with their other work. Now the judges' own clerks review these cases.

TABLE 26
Characteristics of Nonargument Cases (N = 18)

Well-established precedent	4
Will take too long to study the case	3
Pro se or habeas corpus case	3
Frivolous case	3
Clear facts	3
Clear law	2
Clear issues	2
Bad briefs	1
Obvious outcome	1
Requires objective decision: yes or no	1
Jurisdictional problems	1
May be complex case as long as law is clear	1

be unanimous. This policy provides a safeguard for those cases reviewed by the staff attorneys.

Although the judges appeared to accept, in most cases, the staff attorneys' designation for nonargument disposition, we asked them whether they were influenced by requests from counsel for argument.[133] Again, we found the judges somewhat perplexed by the question. The assumption of the judges in the Sixth Circuit is that there will be argument in as many cases as possible. Thus, attorneys seldom have occasion to request argument. In fact, several judges said the court receives few requests, and one judge said, "We don't do that here." When the court does receive a request for argument, as in the Social Security cases, the request is usually granted if both parties have filed it. Although requests for argument are infrequently filed, requests for waiver of argument appear to be much more common and are rarely denied, except in direct criminal appeals or when there is an opposing motion.[134]

6. Panel interaction. After reviewing the work of the staff attorneys and making an initial decision about the disposition of the cases designated for submission on the briefs, the judges must communicate their decisions to their panel members. We asked the judges several questions about their interaction with each other.

133. Local rule 9(c) states, "Any party's brief may include at the conclusion of the argument section, a statement setting forth the reasons why oral argument should be heard." United States Court of Appeals for the Sixth Circuit, Local Rules 7 (February 1987).

134. Data we collected from court files indicate that about 98 percent of the requests for waiver of argument in SY 1984 were granted. Local rule 9(d) provides that "[o]ral argument may be waived upon written stipulation of the parties, but only with the specific consent of the court." *See id.*

First, we asked them to describe the procedures they use to reclassify a case from nonargument to argument and vice versa, and then we asked them to describe how the decision on the merits is made and when the writing task is assigned.

For each day of argument, one judge, who is neither the presiding judge nor a senior judge, is designated the duty judge. This judge is responsible for the management of the nonargument cases submitted for that day. This responsibility includes preparation of a proposed order, which is brought to the conference by the duty judge.

Few of the judges discuss the nonargument cases with each other prior to convening (see table 27). Only one judge said he frequently talks with the other judges, usually by telephone, and two said they occasionally telephone or write a note to their panel members. One judge communicates with the others only if he has panel duty, and another said he does so if he has looked at the cases far enough in advance. Four judges, in fact, said they do not read the cases designated for nonargument disposition until a day or two before argument, which obviously gives them little time to discuss the cases with panel members.

TABLE 27
Judges' Communication with Panel Members Prior to Convening (N = 13)

None; cases are discussed at conference	8
Occasionally writes or calls panel members	2
Frequently calls panel members	1
Calls panel members only if duty judge	1
Calls panel members if he has looked at cases ahead of time	1

Since most of the judges do not discuss the cases with each other prior to convening, they do not have a procedure for alerting each other to nonargument cases they think ought to be reclassified as argument cases. The judges generally hold these cases until they convene and then tell the panel members why they think the case ought to be argued. If the other panel members cannot ease the judge's concerns, the case is sent to the clerk to be calendared for argument. Only two judges said they usually try to settle this question before convening; three others said they may on occasion contact the panel ahead of time. Although postponement of recalendaring introduces a delay of seven or eight weeks into these cases, the procedure obviously saves the judges the time they would otherwise have to spend communicating with each other beforehand by either telephone or letter. The judges also noted that few

cases actually are sent back for argument; one judge estimated that only one out of eight or nine cases is recalendared.

We also asked the judges what they do when they think a case scheduled for argument does not need to be argued. The response was unanimous: Once a case is set for argument, it is argued. As one judge said, "It's pretty far down the road by this time, so the court doesn't want to send it to nonargument status." Another judge described the court's handling of these cases as "a flaw in the system," because he feels a procedure should be adopted that would allow earlier reclassification of these cases. In the meantime, the court uses local rule 19 to dispose of the cases that should not have been argued. This rule permits the court to announce a decision from the bench. Sometimes this is done after the appellant has argued, sometimes after both parties have argued. Recently several of the judges have adopted the practice of sending a memorandum ahead of time to the panel members to alert them of their desire that a case be disposed of in this way.[135]

The cases that were initially designated for nonargument disposition and that remain classified as nonargument cases are discussed immediately after the judges have heard the argument cases. Several judges noted that discussion is not extensive because the cases are simple and engender little debate. Nevertheless, one judge said the cases "get a fair shake" and attention appropriate to the demands of the cases. After deciding the case, the panel makes whatever changes are necessary in the proposed order, and then the duty judge makes sure the final typing and editing are completed and circulates the order to the panel members.

Because the judges do not know until they convene whether a case will be decided with or without argument, the court cannot inform counsel ahead of time, and therefore counsel have no opportunity to file an objection to the nonargument disposition before it is made.[136] Counsel are informed that the case has been decided without argument at the time they receive the decision in the case. According to the staff attorneys, the only procedure by which counsel can object to the nonargument method of disposition is through a petition for rehearing. All petitions for rehearing in nonargument cases are routed through the staff attorney's office for preparation of a memorandum. The staff attorneys said they

135. The court issued 68 decisions from the bench in SY 1984 and 102 in SY 1986. (This information was computed from data provided by the Administrative Office of the United States Courts.)

136. Counsel do have an opportunity to state in the briefs why they think argument is necessary. *See supra* note 133.

have never seen a petition that requested rehearing on the grounds that the case was improperly decided without argument.[137]

F. Conclusion

According to the judges, two principles have guided their choice of procedures over the years. The first is a strong commitment to argument in as many cases as possible. In fact, according to the judges, screening cases for nonargument disposition was adopted reluctantly and only in the face of a large and growing backlog.

The second principle has been a commitment to face-to-face decision making. The Sixth Circuit is one of only a few courts that convenes to decide the nonargument cases. The judges said there are two reasons for this practice: (1) face-to-face conferencing is more principled, and (2) face-to-face conferencing is more efficient (see table 28). Only one judge said there are no advantages to convening to decide the nonargument cases.

TABLE 28
Advantages of Convening to Decide the Nonargument Cases (N = 16)

Conferenced cases receive more and better attention	13
It's more efficient	5
It gives the court credibility	1
There are no advantages	1

NOTE: The responses total to more than 16 because a number of judges gave more than one reason.

On the matter of principle, the judges favor in-person conferences because, as one judge said, it is a "strong protective device" that the court "owes to the litigants." This judge also said that conferencing ensures that cases will receive the attention of all three judges, because "if they have to face their colleagues, they'll do the work they need to do to articulate a position." Another judge said, "Conferencing is good discipline; my preparation is more thorough if I have to sit face-to-face and defend my point." A third judge referred to conferencing as a "safety device" and said the court's screening procedure is "basically designed this way because judges have a lot to do and are human beings. This way, you're less likely to make a mistake." Several judges spoke also of the importance of

137. Docket sheets do not indicate the reason for the rehearing petition; therefore, we must rely on the statements of the staff attorneys.

the "interchange" itself, identifying a number of reasons why it is important: (1) During discussion, points sometimes emerge that no judge had thought of on his own; (2) the judges can ask each other questions; and (3) each judge can learn the significance of his own comments and questions.

On a more pragmatic level, several judges said it is easier to talk than to write to each other, especially if a judge is trying to articulate an unusual theory. Several judges pointed out, too, that judges work at different paces; if they had to exchange material through the mail, they said, they might become unfamiliar with the case before they received a response from the other panel members. Finally, the judges feel that by conferencing the nonargument cases, the court is more efficient because it avoids, as one judge described it, "the horrendous paper shuffling" of other courts.

Over the past dozen years, the Sixth Circuit has tried to maintain these principles in the face of a large and growing caseload. It has adopted a series of procedures designed to expedite case dispositions while maintaining the traditional forms of appellate decision making—oral argument and collegial, face-to-face conferencing in all cases. Our study found the court in transition, seeking a new, more streamlined procedure for dealing with its large caseload. Recognizing that more cases could be decided without argument than were currently being decided that way, the judges adopted measures that would permit identification and preparation of more cases for disposition on the briefs. Although the caseload seems to require this step, the question remains whether the court can continue to increase the number of nonargument cases and at the same time retain the practice of convening to decide these cases. Or, to put this another way, how long can this court balance its commitment to traditional practices with the realities of a contemporary caseload?

VI. THE COURT OF APPEALS FOR THE THIRD CIRCUIT

A. Introduction

The Court of Appeals for the Third Circuit disposes of a greater proportion of its caseload without argument than almost all the other federal appellate courts. Moreover, the court disposes of half its counseled cases without argument—again, a greater proportion than that of the other courts. What makes this figure noteworthy is that the court achieves this result without the usual components of a screening program; that is, the court uses neither staff attorneys nor specially designated judicial panels to screen cases for nonargument disposition. All counseled cases are sent to the judges on argument calendars. The judges then review these cases and remove 50 percent of them from the argument calendars. In this chapter, we focus in particular on the procedures used by the judges to screen the counseled nonargument cases.[138]

We address a number of questions:

1. How does a court with no formal screening procedure designate half its counseled cases for disposition on the briefs?

2. With no staff attorney involvement and in the absence of special panels, how are the nonargument cases selected, researched, and decided?

3. Are the law clerks involved in screening counseled cases for nonargument disposition?

4. If the staff attorney's office has no responsibilities for screening counseled cases, what is its function?

5. Does the clerk's office carry out duties that would otherwise be performed by the staff attorneys?

Our discussion is based on interviews with the court's staff and judges. In late 1985, we conducted in-person interviews in Philadel-

138. Like other federal appellate courts, the Third Circuit generally does not hear argument in pro se cases. These cases are sent to special pro se panels. We briefly describe the handling of the pro se cases, but our main interest is in the counseled cases.

phia with the clerk and chief deputy clerk, several members of the clerk's staff, and the legal coordinator (a staff attorney on loan to the clerk's office). During this visit to the court, we also met with the senior staff attorney and discussed with him the functions of the central legal staff. In early 1986, we interviewed eleven of the twelve active Third Circuit judges. (One judge declined to be interviewed.) These interviews focused on the procedures the judges use in chambers to review the counseled cases.[139]

We begin this chapter with a brief description of the structure of the court, its caseload, and its past performance. Then we describe, in three separate sections, the duties of the clerk's office, the in-chambers procedures of the judges, and the responsibilities of the staff attorney's office. In the conclusion, we offer an explanation for why the court has been able to decide so many counseled cases on the briefs without the assistance of staff attorneys.

B. Judge, Staff Attorney, and Caseload Profiles[140]

At the time of our interviews, the Third Circuit had twelve judgeships, all of which were filled. The judges reside in five cities throughout the circuit: four in Philadelphia, three in Pittsburgh, two in Wilmington, two in Newark, and one in Camden. They hear cases primarily in Philadelphia, twice each year in the Virgin Islands, and occasionally in Pittsburgh.

Thirty-one argument panels are scheduled each year, with at least one panel sitting each month. Each panel sits for one week at a time, hearing four to five cases on Monday, Tuesday, Thursday, and Friday; Wednesday is reserved for study, meetings, and motions. The judges sit with the same panel members throughout the hearing week, and each judge sits seven weeks, or twenty-eight days, per year. In addition to sitting on hearing panels, the judges are assigned to motions panels and to pro se panels. Both the motions and pro se panels are yearlong standing panels; the motions panels are made up of only the active judges (thus, there are three panels), and the pro se panels are made up of both active and senior judges (resulting in four panels). Although the motions panels occasionally convene to hear arguments on motions, the motions and pro se panels generally do not convene.

The court employs ten staff attorneys, including the senior staff attorney, a supervisory staff attorney, six regular staff attorneys,

139. See appendix B for a copy of the interview protocol.

140. See appendix C for tables summarizing the information presented in this section.

one staff attorney on loan to the clerk's office, and one on loan to the circuit executive's office. The staff attorneys are generally hired for a two-year period and are recruited out of law school or from another clerkship. Three secretaries and an occasional intern assist the staff attorneys.

In terms of caseload, the Third Circuit falls in the middle range of the federal appeals courts.[141] In statistical year (SY) 1984, when there were ten active judges, 2,506 cases were filed in this court, or approximately 251 filings per judgeship. The filings have dropped some since SY 1984, to 2,468 (206 per judgeship), but the Third Circuit is still about average in both filings and terminations. The proportion of appeals decided on the merits has also declined somewhat, from 58 percent in SY 1984 to 55 percent in SY 1986.

Of the cases decided on the merits in SY 1984, 61 percent were decided without argument. In that year, the Third Circuit decided a greater proportion of its caseload without argument than any other federal court of appeals. By SY 1986, this proportion had dropped somewhat—to 56 percent—and the court had moved to second place among the appellate courts in the percentage of cases decided without argument. Like almost all the federal appellate courts, the Third Circuit decides most pro se cases without argument. However, even when the pro se cases are removed from the calculation, the Third Circuit still decides a greater proportion of cases without argument than do the other appellate courts: 50 percent in SY 1984.

In SY 1984, the Third Circuit ranked fifth in the number of cases disposed of on the merits per active judge—309 cases. By SY 1986, both the absolute number of cases disposed of on the merits per active judge and the court's ranking had dropped substantially (to 274 cases per judge and ninth rank). Of course, during that three-year period, two judgeships were added to the court and the filings dropped somewhat, which may explain in part the decrease in the number of cases disposed of per active judge. Throughout this period, the court maintained its relatively fast median time from filing the notice of appeal to disposition: 8.8 months, or third rank, in SY 1984 and 8.6 months, or fourth rank, in SY 1986. The court was also able to decrease the number of pending cases, from 146 per judgeship in SY 1984 to 108 per judgeship in SY 1986 (moving from fifth to second rank on this measure). Most of this decrease appears to have occurred in SY 1985, when the court had already

141. See appendix C for detailed information concerning the statistical profile of the court and sources for the data cited here. Data not given in appendix C can be found in Administrative Office of the United States Courts, Federal Court Management Statistics (1985 & 1986).

received two new judges and was still using many visiting judges. By SY 1986, the court had curtailed substantially its use of visiting judges, decreasing the visiting judge case participations from 17 percent in SY 1984 to 10 percent in SY 1986 and therefore changing from nearly the greatest user of visiting judges to an average user.

Thus, the Third Circuit can be described as a court that has recently received some additional resources, has reduced its dependence on outside assistance, and has had a slight decline in its caseload. As might be expected from the reduction in filings and the increase in judgeships, the number of cases disposed of on the merits per active judge has decreased. Yet it appears that this decline has been somewhat greater than might be expected from the decrease in filings; while overall filings declined by only about forty cases from SY 1984 to SY 1986, the cases disposed of on the merits per active judge declined by thirty-five cases during the three-year period. Some of this decline may be due to recent changes in the court's method of disposing of the nonargument cases, as we discuss in the final section of this chapter.

C. Role of the Clerk's Office in Preparing Cases for Judicial Consideration

Because we knew the staff attorneys had no responsibilities for preparing the counseled cases for the judges, we were particularly interested in the duties the clerk's office performs in this regard. Thus, in our interviews with the clerk's staff, we focused on the procedures they follow to prepare these cases for decision by the judges. We asked the deputy clerks how they review and route the cases, what they do about jurisdictional defects, and whether they play a role in the handling of motions. We also asked them to describe the types of panels to which they send the cases and the schedules of these panels.

Upon filing, the cases are sent to one of the court's three docketing team leaders, who examine each case to determine the appropriate routing for it. Pro se appeals involving motions or jurisdictional problems are sent to the staff attorney's office for preparation of memoranda for the motions panels; the remaining pro se cases are sent to the staff attorney's office after the briefs are filed. Direct criminal appeals are examined for jurisdictional problems and given expedited briefing schedules; when the briefs have been filed, the direct criminal appeals are sent to the calendaring clerk

for placement on the list of cases ready for assignment to an argument calendar.

The remaining cases constitute the category to be divided by the judges into argument and nonargument cases. The docketing team leaders first check that all the necessary papers for these cases have arrived, and then they examine the cases for jurisdictional problems, such as timeliness and finality.[142] They then fill out a form for each case in which they have found a possible jurisdictional defect and refer the case to the legal coordinator.

After reviewing the jurisdictional problem, the legal coordinator instructs the team leader to send a letter to the parties, alerting them to the defect and asking for a response. Cases in which the parties fail to respond are submitted to a motions panel for possible dismissal; in some cases, the motions panel refers the motion back to the clerk for assignment to a merits panel after the case has been fully briefed. If the parties do respond and the answer appears to satisfy the jurisdictional question, the case proceeds to briefing; when the answer fails to resolve the jurisdictional question, the matter is sent to a motions panel.

Weights are assigned to civil cases after they are briefed. The legal coordinator assesses the difficulty of the cases and assigns them a weight of easy, medium, or hard. In assigning the weight, he considers the following: Is the issue novel or complex? How developed is the law in the area? How extensive are the facts? What is the quality of the briefs and the state of the record? After evaluating the case, he places it on the list of cases ready for assignment to an argument calendar, jotting a one-line description and the weight next to it. Although this weight is conveyed to the judges in the transmittal letter that accompanies the calendar, it is used primarily by the clerk's office to balance the calendars for difficulty.

According to the clerk's office, approximately five thousand motions are filed each year, about half procedural and half substantive. A case manager is responsible for reviewing the motions and routing the procedural motions (both pro se and counseled) to the clerk and the counseled substantive motions to the motions panels. The staff attorneys' responsibility for motions is confined to pro se cases; they handle all substantive motions in pro se cases and the

142. The clerk's office initiated a program to have the docketing team leaders screen cases for jurisdictional problems. The clerk was assisted by the director of staff attorneys and the legal coordinator, who together wrote a brief procedural manual and provided instruction for the team leaders. They started by looking for the simpler problems, such as timeliness, and proceeded to *Griggs* problems (premature appeal), questions of finality, and nonappealable orders. This preliminary jurisdictional screening does not identify all jurisdictional problems; some are not identified until after full briefing and submission of a case to a merits panel.

procedural motions when these are part of a substantive motion. Each Friday, all substantive motions, together with responses, are sent to one of the three standing motions panels; orders on these motions are generally received by the clerk's office the following Wednesday.

The efforts of the docketing team leaders and the legal coordinator produce a pool of ready cases, that is, cases in which the motions have been decided, the jurisdictional questions that do not need the attention of a hearing panel have been resolved, and the briefs have been filed. From this pool, the calendar clerk makes up a calendar of about thirty-nine cases for each scheduled hearing panel. These cases, with all their relevant materials, such as briefs, appendixes (which include the lower court decision), and any motions referred to the merits panel by a motions panel, are sent to the merits panels two months before the argument date. This period allows the judges sufficient time to study all the materials in the cases and to determine which cases will require argument. From this point on, the cases are managed within chambers.

The clerk's office has one final duty in processing the calendared cases, notifying counsel of the date the case is listed for disposition and the method of disposition. Approximately six weeks prior to the disposition date, counsel are notified of the date on which their case is scheduled for disposition on the merits. Ten days before this date, the panels give the clerk a list of cases that will not be argued, the amount of time allotted for those that will be argued, and a final schedule for the argument cases.[143] The clerk then notifies the parties that their case will be submitted on the briefs pursuant to local rule 12(6) or informs them of the amount of time they have been given for argument.

D. Selection of Cases for Disposition on the Briefs: The Judges' Role

1. Evolution of the court's method for selecting cases for nonargument disposition. Although the Third Circuit has not created a special procedure for selection of the cases that will be decided on the briefs, the court did at one time consider other methods for handling the nonargument cases. A time study done in 1973 suggested that by minimizing the number of sittings, the judges

143. Because only twenty or so cases might remain on the argument calendar, the judges may decide to shift them around and collapse them into only three hearing days.

could save substantial time being spent on travel.[144] The court adopted a new hearing schedule that included fewer sittings, but the judges realized that fewer sittings would mean more cases per panel at each sitting. They also realized that they could not hear argument in all the cases that would be placed on the argument calendar, and thus they began a search for procedures that would enable them to decide more cases without argument.

The judges looked in particular at the Fifth Circuit appellate court's practice of using staff attorneys and special panels to screen out the nonargument cases, but they ultimately decided not to adopt that procedure for two reasons. First, the judges felt the procedure required substantial "paper shuffling"; because the Third Circuit was at that time short on staff in the clerk's office, more paper handling was deemed not feasible. Second, the judges felt that if screening panels reviewed all cases, then passed some of these cases on to the argument panels, a substantial portion of the caseload would be reviewed by two sets of judges, which would be a poor use of judicial resources. Thus, the court decided that all cases—both argued and nonargued—should be handled by the same panels.[145] As in the past, then, nonargument cases are selected and decided by the regular hearing panels, though in greater numbers than they were in the past. Of course, this practice means that senior and visiting judges also participate in the selection and disposition of the nonargument cases.

2. In-chambers procedures for selecting nonargument cases. Each panel member receives a full set of documents for the counseled cases set before his panel; that is, each receives a copy of the briefs, the appellate docket sheets, motions referred to the merits panel, and the appendix, which contains the district court docket entries and district court decision. Because the staff attorneys do not review the cases before they are sent to the judges, the package of case materials contains no memoranda, recommendations on the appropriate method of disposition, or proposed orders. Only one type of evaluation of the cases is included in the case materials: the legal coordinator's difficulty rating. In our interviews, the judges said the difficulty ratings play no role in their selection of the

144. 1973 Third Circuit Time Study (on file in the Information Services Office of the Federal Judicial Center).

145. When the court began to decide more cases without argument, it alerted the bar to this change, using the court's published internal operating procedures and bar journals. Although there was resistance from the bar initially, according to the clerk's staff, this eased after some experience with nonargument disposition. Recently, however, the Pennsylvania Bar Association passed a resolution urging the court to hear argument in more cases. The court, through its circuit executive's office, responded that it would continue with the present practices.

nonargument cases. Thus, the judges themselves are the first individuals to decide which type of procedure—argument or submission on the briefs—should be used to decide each case.

All the judges begin the process of selecting nonargument cases with a reading of the case materials. Every judge said he reads the briefs first, and nearly all the judges emphasized the importance of reading the case materials themselves rather than having their law clerks first read and condense the information. Only one judge said he involves his law clerk in the initial reading of cases. In other words, the law clerks, like the staff attorneys, play no role in screening cases for nonargument disposition. Screening, the judges feel, is a judicial function that should not be delegated to staff. In addition, several judges said it would be a waste of their law clerks' time to have them screen cases. One judge said he can screen faster than his clerks can. Another described his clerks as his "most precious resource," which he allocates to only the most difficult cases. The judges noted the great burden of reading all the case materials themselves, describing the many extra hours they spend in their offices and the limited amount of time available to see each other informally, but they also reiterated their support of the principle that judges should not delegate this function.[146]

3. Characteristics of cases decided with and without argument. While reading the case materials the judges usually make preliminary decisions about the research required for a case and the case's likely argument status, creating in effect two categories: (1) those they assign to their law clerks for additional research and a bench memorandum and (2) those they can decide without much additional work. The cases in the first category are likely to be designated for argument, although subsequent research by the law clerks may alter the judge's evaluation of the case. The cases in the second category most likely will not be argued. In fact, a number of the judges finish their work on these cases in one reading, dictating a brief disposition immediately upon completing their review of the case materials. They usually do not require much assistance with these cases, although from time to time the judges ask their law clerks to check a cite or to review the disposition; the judges also on occasion ask the staff attorneys to prepare bench memoranda for cases in which the attorneys have special expertise. In effect, then, the judges sort the cases into two groups: (1) those for

146. Several judges noted the negative effect the workload has had on collegiality, which is dependent at least to some degree on seeing each other frequently. Informal lunches and meetings seldom occur anymore, said one judge, because everybody works all the time.

which substantial work will have to be done to arrive at a decision and (2) those in which the decision is clear.

We asked the judges to describe the case characteristics they look at when deciding whether a case should be argued. We found that many judges described the argued cases in terms of their complexity: a difficult, unclear, or new legal issue; a complex record or a generally complex case; or uncertainty about the result (see table 29). A majority of the judges also said they desire argument when a case involves an issue of great public importance.

TABLE 29
Characteristics of Argument Cases (N = 11)

Important public issue	7
Difficult or unclear issue	5
Poor briefs	5
Complex record or questions about the record	3
New legal issue	3
Direct criminal appeal	3
Complex case	2
District court decision may be reversed	2
Judge uncertain of result	2
Judge wants to ask questions the other judges should hear the answers to	2
Important to satisfy emotions of parties and demonstrate that "justice has been done"	2
Any government appeal	1
Jurisdictional issue	1
Conflict among circuits	1
Intervening event or change in the law that counsel should address	1
Appeal is from summary judgment	1
No reply from appellant to questions raised by appellee	1

NOTE: All judges responded to the question. Each mentioned several characteristics.

Both these criteria for argument—complexity and public importance—are included in the court's published internal operating procedures (IOPs), which list five instances in which "experience discloses that judges usually vote for oral argument:"

1. Where the appeal presents a substantial and novel legal issue.
2. Where the appeal presents one or more issues, the resolution of which will be of institutional or precedential value.
3. Where a judge has questions to ask counsel, the answers to which will clarify an important legal, factual, or procedural point.
4. Where a decision, legislation, or event subsequent to the filing of the last brief may significantly bear on the case.

5. Where an important public interest may be affected.[147]

One other characteristic from this list was mentioned by one judge: An intervening event or decision that may bear on the case, he said, usually indicates a need for argument. The judges did not mention the other two criteria for argument listed in the IOPs, an appeal whose resolution would be of institutional or precedential value or a case in which the judges need to question counsel to clarify a point.[148]

The judges did, however, mention several characteristics not included in the published list. For example, two judges said they request argument when they think the district court decision will be reversed (but one of these judges added that this criterion is not generally agreed upon by the members of the court), and three judges said they desire argument in direct criminal appeals.

Generally the judges did not discuss the characteristics of argument cases in terms of substantive areas of the law, such as title VII or contracts cases. Only one substantive area, that is, direct criminal appeals, was given as a selection criterion. The judges also tended to discuss the argument cases in terms of the issues in a case rather than in pragmatic terms; that is, they focused more on such matters as whether a case involves new law or unclear issues than on questions of cost, efficiency, speedy disposition, or the desires of the parties.

Several judges did, however, point to characteristics other than legal issues. Two judges, for example, said they request argument when they want to ask questions whose answers they think other judges should hear. These responses indicate a sensitivity to other judges' views; as one judge said, "If I think the ideological bent of the panel is such that the case might get short shrift, I'll ask for argument." Two judges indicated a sensitivity to other actors in the case—the parties. As one said, sometimes it is important to "satisfy the emotions" of the parties, particularly the loser, and to demonstrate that "justice has been done."

The judges used both types of characteristics—legal issues and pragmatic considerations—to describe the nonargument cases as well (see table 30). On the one hand, the judges described these cases as having no new issues, no merit, clear results, a narrow scope of review, a straightforward question of substantiality of the evidence, and narrow issues with good briefs. These are the "easy" cases, or those for which the judges are, as two judges phrased it,

147. Third Circuit Internal Operating Procedures, ch. 2(D) (1985).

148. In addition to the more detailed criteria listed in the IOPs, the court has a local rule, rule 12(6), that repeats verbatim Federal Rule of Appellate Procedure 34.

"utterly convinced of the result." On the other hand, several judges also weigh the cost to the parties of traveling to Philadelphia. If this cost would be high and the issue is clear or the amount of money in dispute is small, these judges usually vote for nonargument disposition.

TABLE 30
Characteristics of Nonargument Cases (N = 11)

No new issues; clear law	4
No merit	4
Poor briefs	3
Issues clear or money amount small, and cost to litigants would be high	3
Judge utterly convinced of result	2
Narrow issue and good briefs	2
Little money involved in the case	1
Only issue is substantiality of the evidence	1
Narrow scope of review	1
No error below	1

NOTE: All the judges responded to the question, and most mentioned several characteristics.

The characteristics the judges use to select the nonargument cases generally conform to the criteria listed in the IOPs, which state "that judges usually vote to eliminate oral argument":

> 1. Where the issue is tightly constrained, not novel, and the briefs adequately cover the arguments.
> 2. Where the outcome of the appeal is clearly controlled by a decision of the Supreme Court or this court.
> 3. When the state of the record will determine the outcome and when the sole issue is either sufficiency of the evidence, the adequacy of jury instructions, or rulings as to admissibility of the evidence and the briefs adequately refer to the record.[149]

The nonargument criteria listed in the IOPs contain two references to adequacy of the briefs, stating that when the briefs are clear and the issues are narrow, nonargument is an appropriate method of disposition. Most of the judges mentioned the briefs when describing the characteristics of argument and nonargument cases, but they focused on poor, rather than adequate, briefs. Five judges said poor briefs indicate a need for argument (as the IOPs seem to suggest); these judges want the attorneys to appear be-

149. Third Circuit Internal Operating Procedures, ch. 2(D) (1985).

cause the judges hope the attorneys will be able to tell them what the case is about. Three judges, however, said poor briefs indicate just the opposite—that the attorneys are poorly qualified and unlikely to be helpful in argument. These judges, therefore, usually request nonargument disposition when they encounter poor briefs. Thus, in the Third Circuit, poor briefs "cut both ways," as one judge said.

The judges are nearly unanimous, however, on the impact of attorney requests for argument.[150] These requests have almost no influence on the judges. Only one judge said he generally tries to accommodate the request, and one said he considers it more seriously if the caseload is light. The judges' responses closely parallel those of the clerk's staff, who said attorney requests for argument are infrequent and are rarely granted.

Counsel may also request a waiver of argument. At the time of our visit, the clerk's office had just completed a count of waiver requests in SY 1984. There were four such requests.

4. Panel interaction. After they have read the case materials, studied any memoranda they have requested from their law clerks or the staff attorneys, and made their independent decisions about the argument status and likely disposition of the cases, the judges must communicate their decisions about the appropriate method of disposition to the other panel members. They communicate their decisions by electronic mail at least ten days before argument. The most senior judge of the panel initiates the procedure with his suggestions of the cases that should be argued and a request that the other panel members record their choices. When a case is left off the argument list by all three panel members, the clerk notifies the parties not to appear. After the judges' votes are recorded, about five cases per day (or twenty for the argument week) remain on the calendar. According to the judges, there is seldom disagreement over which cases can be decided without argument, even though the judges have generally not discussed the cases with each other at this point. One judge described disagreement about whether a case is to be orally argued or submitted as "very rare, even though the judges often disagree on substantive matters," and

150. Local rule 12(6) states that "[a]ny party to the appeal shall have the right to file a statement with the court setting forth the reasons why, in his opinion, oral argument should be heard." Requests for argument are generally made in a letter, which is forwarded to the argument panel, or in the briefs. Because of the difficulty of retrieving this material, we did not count the number of requests made during SY 1984 and are dependent on estimates made by the judges and clerk's staff (reported later in the text).

another estimated that disagreement about the method of disposition occurs in only one out of forty cases.[151]

The panels discuss the nonargument cases at the time they convene to decide the argued cases. A draft disposition, which may be either a judgment order or a memorandum decision, is usually brought to the conference by the judge who has been designated lead judge for that day.[152] This disposition is discussed, changed if necessary, and then signed by the panel members. The decision is filed in the clerk's office as soon as the judges have made any necessary changes in the order and is issued to the parties on the day it is filed.

In contrast to the procedure for the nonargument cases, the writing assignment for argued cases is made, as in most appellate courts, when the panel convenes. One judge apparently has at times brought a prepared opinion to the conference (which can be done only when he is the presiding judge, since he would make the writing assignments). This is considered a risky practice, if only because there is a good chance the draft disposition will have to be thrown away. In fact, one judge noted that the same risk is taken by the judge who brings a draft disposition for nonargument cases. These cases, he said, are as vigorously discussed as the argued cases, and the disposition frequently has to be changed. Another judge, stating that his is the minority view, said he would prefer a policy of making all writing assignments at the time of the conference. His concern is about collegiality. "This," he said, "is what the taxpayer is buying, the security of knowing the judges act together."

Compared with courts in which the nonargument cases are decided by exchange of mail and telephone calls, the Third Circuit, in which all cases are decided in a face-to-face conference, seems to enable the judges to act very much together. However, although the current practice for selecting and deciding nonargument cases has widespread support, a new procedure, in which face-to-face discussion of the cases selected for nonargument disposition is more limited, appears to be emerging. A number of judges, most of whom

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151. Counsel may object to the nonargument designation by writing a letter to the court. The clerk's office reported that such letters are sent directly to the panels upon receipt in the clerk's office; therefore, the clerk had no reliable estimate of the number received. However, because of their role in notifying the parties when to appear, the clerk's staff does receive notification from the judges when a case is changed from nonargument status to argument status; they report that the judges rarely ask them to notify parties that the argument status has been changed.

152. The most senior judge on the panel is the lead judge for the first day, the next most senior is the lead judge for the second day, and the least senior is the lead judge for the third day. The judges split the cases for the fourth day.

do not reside in Philadelphia, have begun to hold telephone conferences for the nonargument cases and to circulate draft dispositions prior to convening, in effect deciding the nonargument cases by mail and telephone rather than by face-to-face discussion. This practice was mentioned by five judges, one of whom simply noted its existence and four of whom briefly discussed its merits and shortcomings.[153]

Two of the judges who offered an evaluation of the new method prefer face-to-face discussion of the decision at the time of convening because, they feel, conferencing is more collegial and truer to the ideal of group decision making. These judges also consider the circulation of a draft disposition a problem because it could influence the decision of a judge who has not yet made up his mind about the case. One judge said as well that prior communication increases the risk that a case will receive inadequate attention; the judge who indicates prior to a conference that a case should be affirmed, he said, may discourage other judges from making a full investment of time in the case.

The other two judges who commented on the merits of the new practice were not alarmed by it. They noted that the procedure eases the burdens of out-of-town judges because it shortens the calendar and thus enables the judges to return home sooner. They also addressed the question of judicial independence, saying they do not object to prior circulation of the draft disposition because, in the words of one of them, "the judges on this court are uninfluenceable and can't be swayed by another judge."

The question of judicial independence arose in another context as well. Several judges expressed concern about the voting procedure generally used for selecting nonargument cases. They noted that when the second and third judges respond to the electronic mail message of the lead judge, they may be swayed by the votes of the first judge, which are readily visible on the computer screen. In other words, the selection procedure is not entirely blind. However, again, a number of judges dismissed this concern; one judge described the Third Circuit appellate judges as "fiercely independent." Another judge noted that when the other panel members vote for argument in a case he had considered suitable for nonargument disposition, he will take a closer, second look at the case, thinking he might have missed an important issue. From this perspective,

153. We were well into our interviews before a judge mentioned this procedure, which we had been unaware of and thus had not included in our interview protocol. Therefore we do not have courtwide data on reactions to this method for deciding nonargument cases.

the voting procedure can be seen as a safeguard that encourages a more careful second look at some cases.

This concern about undue influence and the need to guard judicial independence is evident not only in the responses to our questions about the judges' interactions with each other prior to the postargument conference, but also in the responses to our questions about the role of staff attorneys. It also helps explain the very limited role played by the central legal staff in this court.

E. Role of the Staff Attorneys

The judges in the Third Circuit do not use staff attorneys for screening out the nonargument cases because they feel this is an inappropriate role for staff attorneys. Screening is, the judges say, a judicial function. They spoke of their reluctance to delegate authority to staff attorneys and their fear that doing so would decrease judicial control over the cases. One judge described the screening decision as "so personal and case-specific, so dependent on the judge's background and how he perceives the issues" that no one can make the decision for him. Another feared that if cases came to the judges designated as nonargument cases, there would be a tendency to affirm the lower court decision without giving the case adequate review; in other words, staff screening could lead to automatic affirmances. A third judge described the court's limited use of staff attorneys as "more principled" than that of other appellate courts, arguing that the screening decision deals with the substance of a case and thus should never be made by staff.

In our discussion with the senior staff attorney, we found him in agreement with these views. He prefers the current procedure, in which the judges turn to the staff attorney's office for assistance with special projects or specific cases, rather than for overall screening assistance. He suggested that if judges want staff attorneys to play a role in the disposition of nonargument cases, the judges should first agree among themselves on the proper disposition of a case and then turn to the staff attorneys for assistance in drafting the disposition.

Several judges also said that staff attorney screening would be inefficient and costly for the court. One judge explained that the judges can screen a case themselves as quickly as they can review one screened by a staff attorney. Why then, he asked, waste time and money by having a staff attorney screen it first? Another questioned why judges, who have to read the briefs anyway, would ask someone else to do it first.

For these reasons, the staff attorneys' role is limited to special projects assigned by the judges and to preparation of the pro se cases (which make up about 25 percent of the court's caseload).[154] The staff attorneys' responsibility for the pro se cases, however, is not to review them for the purpose of making a recommendation concerning argument. Rather, the staff attorneys "package" the cases for the judges' review, making certain that all preliminary matters have been decided and that all the papers are in order. Thus, the staff attorneys handle (1) the substantive motions, for which they prepare bench memoranda; (2) the procedural motions when these are related to a substantive question; (3) all questions of jurisdictional defects; (4) all letters concerning the cases (about three thousand to four thousand letters a year); and (5) preparation of appendixes. The staff attorney's office prepares about fifteen to twenty cases (or five per pro se panel) for a decision on the merits each month, doing whatever is necessary to get the cases into shape for the judges.

According to the director of staff attorneys, about 30 percent to 40 percent of the pro se cases have motions, for which memoranda are almost always prepared. Included in this workload are in forma pauperis petitions, requests for certificates of probable cause, mandamus petitions, and requests for stays. These motions are substantive matters, requiring analysis and research in the staff attorney's office. We did not ask the judges specifically to comment on the staff attorneys' memoranda on motions, but several judges volunteered that these are very helpful to their understanding and disposition of the case. One judge noted the great assistance he feels the staff attorneys provide by sorting out the record in these cases.

Unlike the practice of preparing memoranda for nearly all pro se motions, the staff attorneys do not routinely prepare memoranda for the underlying issues in the pro se cases. In the past they did, but the court came to see this practice as a waste of time, in part because most of the cases did not require extensive analysis when a good record was provided and in part because the judges preferred that the staff attorneys have more time to work on the substantive motions. Now the staff attorneys prepare memoranda only when asked by a judge to write one for a specific case, which happens in about 25 percent of the cases, according to the staff director.

In our interviews with the judges, we found that they are more likely to turn to their own law clerks than to the staff attorneys for memoranda in the pro se cases. One judge explained that he pre-

154. In a recent telephone conversation, the senior staff attorney said the court's pro se filings reached 32 percent at one point in 1986. The filings have dropped back down to around 28 percent.

fers to use his law clerks because of the opportunity for "interchange." The judges' reluctance was certainly not due to any questions they might have had about the quality of the staff attorneys' work. There is agreement that the staff attorneys' work is of very high quality, and one judge described it as "invaluable." However, the judges are content with the fairly circumscribed staff attorney role. We found that nearly all the judges approve of the current procedure of having the staff attorneys prepare only appendixes for the pro se cases and memoranda or draft opinions upon request for other cases; only two said they would like to return to the practice of receiving bench memoranda for all pro se cases.

The appendix, which is the staff attorneys' sole responsibility in preparing cases for nonargument disposition, is a straightforward compilation of the relevant portions of the record and any other materials the judges will need to decide the pro se cases. We asked the judges to comment on the value of the appendix. They find it not only helpful but sufficient for the great majority of the cases. As noted earlier, when the judges find they need additional research on a case, they ask either a staff attorney or a law clerk for such assistance. They also, on occasion, ask the staff attorneys to draft an opinion in a case the staff member has previously prepared. The director of staff attorneys estimates that the attorneys prepare twenty to thirty such opinions each year.

During their review of the pro se cases, the staff attorneys occasionally encounter a request for counsel or, less frequently, find a case in which they feel counsel should be appointed. They send such cases to the pro se panel with a recommendation that argument be considered. If the judges decide to hear argument, they notify the team leaders in the clerk's office, who appoint counsel from a list the clerk maintains.

The court recently has been experimenting with assigning to the staff attorneys Social Security cases involving review of the evidence. The judges have found these cases to be labor intensive, and they feel the staff attorneys can develop the expertise needed to sort out the long records in these cases and to write bench memoranda. The court has not yet had enough experience with this procedure to determine its usefulness. In addition, the judges send about three or four counseled cases each week to the staff attorney's office for bench memoranda, either because the judges are short staffed or because they think the staff attorneys have special expertise in the cases. The staff attorneys also assist the court from time to time with reviews of local rules, and the senior staff attorney monitors death penalty cases. The senior staff attorney and his assistant review all the work done by the other staff members. The

director also holds seminars to go over problems in particular cases or to go over legal topics that may cause difficulties in the staff attorney's office, such as mandamus petitions. Staff attorney training is done by "the big buddy system," as the staff director described it; that is, more experienced staff attorneys train the new staff attorneys.

As this description shows, the staff attorney role in preparation of cases for nonargument disposition is fairly circumscribed. The director of staff attorneys recognizes that a staff attorney might find the duties somewhat limited if the position were a long-term one. Thus, he feels it is important that the tenure of the staff attorneys be kept at two years. He also welcomes the new problems and issues that have been introduced by the Social Security cases. The court, too, seems to have recognized the importance of diversifying the staff attorneys' experience and thus has started a program of rotating each staff attorney into a judge's chambers for a ten- to twelve-week stint as a law clerk. Apparently the staff attorneys welcome this program, as do the judges. The senior staff attorney noted that the program has "boosted morale" in the staff attorney's office, and one of the judges enthusiastically endorsed the program, saying he benefits from it as much as the staff attorneys do.

In general our questions to the judges about the staff attorneys elicited few strong responses. The judges are aware of the staff attorneys' role, both historically and presently. Few judges want to return to the former practice of having the staff attorneys prepare memoranda for all pro se cases; most prefer the appendixes the staff attorneys currently prepare. Likewise, the judges are content with the present practice of not using the staff attorney's office to screen cases for nonargument disposition.

F. Conclusion

When the Third Circuit adopted its current procedures in the mid-seventies, it did so under the pressure of rising caseloads. Committed to fewer sittings and thus less travel, the court had to increase the number of cases it decided without argument. Because of an equally firm commitment to judicial, rather than staff, screening and to face-to-face, rather than telephone or written, discussion of the cases, the judges chose not to use staff attorneys or special panels to screen out the nonargument cases. Yet today, even without these methods, the Third Circuit decides a greater proportion

of its caseload without argument than all but one other federal appellate court.

We have described the procedures the court follows to select and decide the nonargument cases, but this description does not fully explain how the court decides such a large portion of the caseload without argument. We offer one explanation.

First, in choosing to have the judges sit less often to hear argument, the court committed itself to deciding a portion of the caseload without argument. We have seen that this is a substantial portion of the caseload. Our question then becomes, How do the judges dispose of such a substantial number of cases on the briefs without assistance from staff attorneys or law clerks? We think the answer lies in the type of written decision the judges have used to dispose of the nonargument cases.

In most other federal appellate courts, both those with high rates of nonargument disposition and those with low rates, the staff attorneys participate in screening cases for nonargument disposition. Their principal role in these cases is preparation of a bench memorandum, which in many instances, as we saw in our description of the appellate courts in the Fifth and Ninth Circuits, is used by the judges to draft the disposition. In some courts, as in the Sixth Circuit appellate court, the staff attorneys prepare not only a memorandum but also a draft disposition for the judges' use.

The judges in the Third Circuit have decided not to seek this kind of assistance from the staff attorneys. They also do not use their law clerks to prepare memoranda or to draft decisions for the nonargument cases. Instead, the judges prepare all decisions themselves. They have been able to do this, we suggest, because until recently the majority of the nonargument cases decided on the merits (60 percent in SY 1984) were disposed of with a simple judgment order, from which the facts and the reasoning behind the decision were generally omitted. By comparison, the other three courts of appeals in our study disposed of few of their nonargument cases by this method: 4 percent in the Fifth, 2 percent in the Sixth, and 6 percent in the Ninth in SY 1984. Overall, the Third Circuit disposed of 51 percent (691 cases) of all merits cases, both argued and nonargued, by judgment order in SY 1984. The comparable figures for the other three courts are 4 percent in the Fifth, 6 percent in the Sixth, and 16 percent in the Ninth.[155]

155. This information was computed from data provided by the Administrative Office of the United States Courts.

Undoubtedly the use of judgment orders has saved substantial time and has enabled the court to dispose of a large number of cases without staff attorney assistance while maintaining a short median time to disposition. Thus, parties have been assured of both prompt attention to and judicial, rather than staff attorney, review of their cases. However, the price of this attention has been that many cases have been decided without either argument or a disposition explaining the court's reasons for its decision.

A few years ago, the judges became concerned about their extensive use of judgment orders and decided to adopt an informal policy of using memorandum opinions in place of judgment orders. These opinions, which range in length from several paragraphs to several pages, are unpublished, as were the judgment orders, but they set forth the reasons behind the judges' decision. The judges say they are particularly careful to use this type of disposition for cases that are disposed of without argument. They feel that in the absence of argument, it is particularly important to state the reasons for the decision as a way of assuring the parties that the case has received their full attention. Data collected by the Administrative Office demonstrate that there has been some shift in the type of disposition used. From SY 1984 to SY 1986, the proportion of the nonargument cases decided without a reasoned disposition dropped from 60 percent to 54 percent (or from 497 to 390 cases), and the proportion of all cases decided on the merits without a reasoned disposition fell from 51 percent to 44 percent (or from 691 to 564 cases) (see table 9).

As we noted at the beginning of this chapter, however, a price is paid for the new procedure, too: The number of cases decided per active judge has decreased. The judges noted that preparation of the memorandum decisions is significantly more time-consuming than preparation of judgment orders. In the words of one judge, "Clarity is hard work and takes time. You don't expose yourself with a judgment order like you do with a memorandum opinion, so you have to take a lot of time with the memorandum decisions." Thus, although the judges have adopted memorandum decisions in part as a way to reassure the parties that their cases are carefully considered, the judges now appear to be able to give this close attention to fewer cases than they did in the past.

VII. THE ROLE OF ORAL ARGUMENT

Frequently during the interviews, the judges departed from their responses to specific questions or their descriptions of their practices to speak in more general terms about the role of oral argument in the appellate process. Some offered a vigorous defense of oral argument, describing it as a "fundamental right of the litigants." One judge cautioned, "It is better to increase the disposition time than to adopt unsound procedures." Other judges took issue with this position, arguing with equal vigor that oral argument should be restricted to cases in which it is necessary to inform the deliberations of the court. Providing argument when it is unnecessary, they contended, limits the amount of time that can be devoted to the more difficult cases. These judges typically expressed concern over the increasing caseloads of the courts and the increasing time from filing to disposition. One judge, after describing oral argument as the ideal, said, "I'll be frank about it, it is not possible with this caseload to practice the ideal." Another indicated, "You can't operate a 1986 court with 1956 methods."

Although the judges tended to share the views of fellow members of their courts regarding oral argument, within each of the courts a range of views were represented. We attempted to gain a better understanding of the judges' views of the role of oral argument by asking three questions:

1. Have your views concerning the role of oral argument changed during your time on the bench?

2. What steps should your court take if filings increase by 20 percent?

3. What means are available to assure the public that cases decided without argument are receiving full consideration?

A. Changing Views of Oral Argument

Almost all appellate judges practiced law before being appointed to the bench and presumably can appreciate the concerns of the attorneys who object to restrictions on oral argument. We asked the

judges if their views of the importance of oral argument changed during their time on the bench. The responses of the judges of the four circuits are summarized in table 31.

TABLE 31
Judges' Views of Oral Argument

	Circuit			
	3rd	5th	6th	9th
Oral argument is as or more important than when they came on the bench	3	4	12	10
Oral argument is less important than when they came on the bench	6	8	3	12

According to their responses, the judges are divided into two groups: those whose commitment to oral argument has remained the same or has become even stronger during their time on the bench, and those whose commitment to oral argument has diminished. As indicated by the table, the changing views of the judges generally correspond to the procedures followed by their courts. In the Third and Fifth Circuit Courts of Appeals, in which almost half of the cases are decided without oral argument, a clear majority of the judges indicated that their commitment to the role of oral argument has diminished over the years. In contrast, almost all the judges of the Sixth Circuit Court of Appeals, a court that decides a lesser proportion of cases without argument, indicated that their commitment to oral argument is as strong or stronger than when they were appointed to the bench. A number of the judges mentioned with pride the tradition in the Sixth Circuit of permitting argument in as many cases as possible. The three judges who became less committed to oral argument over time questioned the need for argument in cases in which it is not likely to aid the court's deliberation.

The judges of the Ninth Circuit Court of Appeals, another court that decides a lower proportion of cases without argument, were almost evenly divided in their responses. Although a few judges indicated that their views toward the screening program had changed since its adoption (some to favor the program and others to oppose the program), this division is approximately the same as that when the court decided to implement the screening program. Many of the judges who professed a continuing commitment to the role of oral argument indicated a tolerance for the screening program as a means of accommodating a large backlog of cases awaiting argument.

In their comments, all of the judges of all four courts appeared to acknowledge that oral argument is important in some cases; no judge favored dispensing with argument entirely. However, almost all agreed that oral argument is not desirable in some small portion of the cases, such as pro se appeals from incarcerated prisoners. Within these extremes, there are sharp differences of opinion. Generally, those judges across all of the courts who indicated that their commitment to oral argument has diminished explained that they have come to realize that argument is not helpful to the court in deciding certain kinds of cases. One judge mentioned that when he was a trial attorney, he believed that argument was essential in every case. After some time on the bench, he now believes that "there are many cases in which argument doesn't make a tinker's damn of difference." Another indicated that he arrived on the bench feeling that the oral argument could "make or break a case," but learned that many cases can have only one outcome.

Increasing experience as a judge may also cause some judges to de-emphasize the role of oral argument. Several judges mentioned that they were more excited about participating in oral argument when they arrived on the bench, but with passing years their enthusiasm dimmed. One mentioned that as the burdens of the work increased, he became "more selective in perceiving the need for oral argument." Another indicated that "as judges become more experienced they are less likely to grant oral argument. They can quickly learn to identify those cases in which argument will be useless." Another indicated that over time, he became more confident of his judgment and "more comfortable in deciding some cases without argument." This judge also emphasized that participating in oral argument and the subsequent conference is "an important part of the orientation process of new judges."

Many of the judges who indicated less commitment to oral argument stressed the simple or frivolous nature of many of the appeals that are filed. A judge who had recently been appointed to the bench indicated that he was "amazed at the cases that make it to argument. Some of the claims are so without merit, that it is surprising that an attorney was found to write the brief." Another indicated that his experience in private practice did not prepare him for the number of cases that "have very little chance of success" and expressed surprise at the number of appeals that are filed "apparently only to gain the advantage of delay while the appeal is under consideration." This judge also expressed surprise at the frivolous nature of many pro se appeals. Another judge, who mentioned the opposition of the local bar association to restrictions on oral argument, stated, "The bar doesn't realize how many frivo-

lous cases there are." Another judge, who said that as an attorney he "begged for argument in every case," acknowledged that as an attorney, he would be unlikely to accept the kinds of cases decided without argument in his court. Two judges, one from the Fifth Circuit and one from the Ninth Circuit, indicated that even if there were no backlog of cases, there would still be a role for the screening programs in dealing with cases of little merit. One judge, who indicated that initially he had viewed the program as a "necessary evil," said that even if the court were current, he would urge continuation of the screening program to deal with "cases that do not benefit from argument." Another judge stated that "even if there were no caseload pressures, there would still be a place for the [screening program] to get the junk out of the system."

The judges who have retained a strong belief in the role of oral argument, including three judges who indicated that their preference for oral argument became even stronger after their years on the bench, generally admitted that there are many cases in which oral argument does not influence the disposition. However, these judges defend oral argument either as a fundamental part of the appellate system or as a superior means of learning about the issues raised on appeal. Many of these judges indicated a preference for argument as a means of learning more about the case. One judge mentioned that he "learns as much about the case after listening to the attorneys talk about the case as by reading the briefs." Others favor oral argument as a means of clarifying issues addressed inadequately by the briefs. One judge remarked that oral argument "helps in understanding the issues. Many lawyers can't write; their briefs are too unfocused. Argument gives you a chance to focus on the issues." Another judge said, "Lots of questions are not answered by the briefs. It's easier to ask questions in person than to review a long record. Argument reveals weaknesses that the briefs hide." Another would hear argument in all cases, if possible, to "make sure that no mistakes were made."

Many of these judges emphasized the importance of permitting the litigants an opportunity to have their cases heard in an open forum. One judge mentioned that oral argument "legitimates the result"; another mentioned the "therapeutic effect" of giving the litigants an open hearing. Several judges said they would prefer a procedure similar to that of the Second Circuit Court of Appeals, in which the attorneys are permitted oral argument unless they choose otherwise. Oral argument is also valued as a means of affirming the responsibility of the judges for the decision. One judge said that oral argument "increases confidence in the judiciary." Another said that after oral argument, "the bar then knows they

have looked the judge in the eye and that the clerks aren't making the decision."

Different oral argument practices in the state appellate courts may account for some of the change in judges' opinions. Prior to their appointment to the federal bench, many judges had impressions of oral argument that were based on their experiences in state appellate courts. In contrast to the practices of most federal courts of appeals, in many state appellate courts, it is not customary for the judges to read the briefs prior to the argument. A judge who acknowledged that he now feels that the role of oral argument is less important said, "There is a huge difference in my perception of the role of argument now compared to when I was a litigator. When arguing before the state courts, argument was to inform the judges because they hadn't read the briefs." Since he and the other judges in his court prepare for argument by reading the briefs, this judge now feels that oral argument can be restricted to those cases in which the judges have questions concerning the issues raised in the briefs. A different state court practice also may lead to a greater commitment to oral argument. A judge who described himself as "a strong advocate of oral argument," indicated that "as a practitioner in a state where the court seldom granted argument, I never saw the judges. It was a mystery how the court operated. Part of the court's function is to be seen and heard."

Frequently, the judges distinguished between the importance of the argument itself and the importance of the conference of the judges that usually follows oral argument. The judges of the Third and Sixth Circuits, who decide the nonargument cases when they convene to hear the argued cases, repeatedly noted the importance of convening for a conference of panel members, even in the absence of argument. Only by convening, they contended, can the parties have the benefit of the deliberations of all the panel members. One judge mentioned that he values the discussion with his colleagues far more than the argument by the attorneys. Another judge mentioned that the panel members bring different strengths to the analysis of the case, and the conference is the best way to guard against "one-judge decision making."

Some of the judges of the Fifth and Ninth Circuits, courts that decide some nonargument cases without an in-person conference of panel members, also expressed concern about the loss of the opportunity for the conference. These judges indicated that they are likely to object to the disposition without argument and place the case on an argument calendar when they feel a conference would be beneficial. In both of these courts, the staff attorneys will occasionally recommend that a case not be argued, but be placed on the

argument calendar for the sole purpose of conferencing. We asked the judges of the Fifth Circuit if they thought conferencing without argument was beneficial. All but one judge endorsed the practice, although most of these judges added that the procedure should be used only for selected cases. For example, six judges said conferencing should be used when a case is complex enough to require discussion but it is also clear that questioning the attorneys will not be any help. One judge said that conferencing without argument is used "when you don't want to make the decision alone," and two judges pointed out that the procedure is beneficial because "everybody prepares the case."

The question remains whether the cases placed on the screening track and decided without argument or conference receive proper consideration. Recently, the judges of the Ninth Circuit have had an opportunity to evaluate the nature of the deliberation accorded "screening" cases when these cases are placed on the argument calendar. For a brief period, when the court had no backlog of cases awaiting argument, some of the cases that normally would have been sent to the screening panels were instead sent to the argument panels to fill out the calendars. Only the "higher weight," or the more difficult, screening cases were placed on the argument calendars. As it turned out, the panels found it necessary to request argument in few of the cases. Nevertheless, these cases received the benefit of an in-person conference of the judges concerning the issues raised in the cases. We asked fifteen judges if these cases received more consideration by the argument panels than they would have received if decided by the screening panels.[156]

Nine of the fifteen judges indicated that these cases had received the same consideration they would have received if referred to the screening panels; the placement of these cases before the argument panels, they said, did not result in a discussion of the issues among the panel members. Little discussion was required, according to the judges, since the issues and outcome of these cases were straightforward. One judge remarked, "None of the screening cases were conferenced when placed on the argument calendar. The panel members asked, 'Does anyone have a problem with this case?'" Another judge echoed this view and mentioned that in the rare instance in which the judges did confer, the conference verified "the initial impression that there were few issues that merited the full degree of consideration." Another judge acknowledged the general benefit of conferring, but indicated that "the screening cases are a

156. We learned about the court's practice of diverting some screening cases to the oral argument panels after we began the interviews in the Ninth Circuit and were not able to ask this question of all of the judges.

poor vehicle to achieve these purposes. In general, there is no discussion of such cases because they are so simple."

Five of the fifteen judges indicated that the cases did receive more thorough consideration when placed before the argument panels. By and large, these were the same judges who indicated a continuing commitment to the role of oral argument. In general, these judges emphasized that the opportunity for a conference among the panel members, rather than the opportunity for oral argument, was the greatest benefit of the argument designation. One judge remarked that when the judges convene, each judge gives the case "independent consideration." This judge expressed concern that the "serial procedure" tends to limit independent consideration. Another judge mentioned that he spent time reviewing such cases with his in-chambers law clerks, adding a degree of assurance that was missing when the judge relied on a bench memorandum prepared by a staff attorney.

Finally, one judge suggested that the degree of consideration given such cases depends on the nature of the panel members rather than on the procedure the panel uses in considering the cases. This judge observed, "Judges who prefer the serial procedure are unlikely to give a screening case much more attention if they encounter it on the argument calendar. Similarly, parallel procedure judges will give more consideration to such a case on an argument panel."[157] This comment articulates an impression we developed during the course of the interviews. It seemed from the comments of the judges in all of the courts that each judge finds a way to ensure that a case is given the level of consideration that he feels is appropriate in order to render a correct decision. If the briefs raise questions that require an answer, the judge will place the case on the argument calendar. If a conference of judges is needed in courts in which the panels do not convene, the judge will contact the other members of the panel, by either letter or telephone, or will reject the case from the screening program and place it on the argument calendar. In general, it was our impression that the judges do not let the specific procedures employed by their courts determine the level of consideration appropriate for a case. It is the judge's own views that determine if a case receives oral argument or a conference of panel members, and the judges appear to find a way to achieve this level of consideration within the specific procedures of their courts.

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157. No relation could be found between preferences for a screening procedure and extent of consideration of screening cases. It is possible that such a relation once existed but now is obscured by the number of judges who express a preference for the "modified" parallel procedure. See chapter 4, section D.

B. Judges' Reactions to Alternatives to Restrictions on Oral Argument

Restrictions on oral argument, as well as other limitations on traditional appellate advocacy, have been adopted by the courts with great reluctance and only as an effort to accommodate the growing burdens placed on the judges by increased filings of appeals. Most judges agree that such restrictions are not desirable, but, in the past, have preferred restrictions on oral argument to the other alternatives available to the court. As indicated in the preceding chapters, the judges in each of the courts are generally content with the current practices of their court, which made it difficult to inquire about the relation between oral argument and other alternatives that may have been considered. However, we believed that we could obtain some indication of the value of oral argument relative to that of other procedures for expedited review of appeals by asking the judges which actions should be taken in the event of a future sharp increase in the filings of appeals. Each judge in each court was asked the following question:

> Increases in case filings force courts to make difficult choices. If the number of submitted cases per judge should increase by an additional 20 percent, the court would have to decide how to handle that larger caseload.
>
> A. Which of the following options would be the most desirable response to the caseload increase?
>
> _____ Hear oral argument in fewer cases.
>
> _____ Publish fewer opinions.
>
> _____ Prepare more decisions without reasons stated.
>
> _____ Encourage settlement by preappeal conferences conducted by nonjudicial personnel.
>
> _____ Rely more heavily on visiting judges.
>
> _____ Permit the time to disposition to increase.
>
> _____ Other _____.
>
> B. Which option would be the least desirable response?

We attempted to include the options most likely to be considered by the court, many of which had been adopted during previous difficult times. We included only options that would be within the control of the court; we did not list such possibilities as increasing the number of judgeships and restricting appellate jurisdiction. Nevertheless, we recorded these options as "other" responses when they were mentioned by the judges.

Several of the options deserve some explanation. Preparing decisions without stating the reasons refers to the practice of issuing a very brief disposition, perhaps only a single line, that indicates the decision of the court without indicating the reasoning of the court. These dispositions are sometimes referred to as judgment orders, summary affirmances, or some other term indicating that the authority for the decision is not discussed in the context of the facts of the case, although a citation to authority may be included. Publishing fewer opinions was included as an option because some judges contend that much time can be saved by not "polishing" opinions destined for publication. Permitting the time to disposition to increase was included as a "default" option, to permit judges to select this option should they find all the other alternatives to be unacceptable.

The option of encouraging settlement by preappeal conferences conducted by nonjudicial personnel was the only option presented that concerned actions taken by court staff rather than judges. Although there have been a number of suggestions for preappeal conference programs staffed by judges, the difficulty of finding judges who have the time to undertake such activities has thwarted the development of such programs. Where prebriefing conference programs have been developed, the conferences have been conducted by nonjudicial personnel, usually a senior staff attorney. This was the option described in the question. The preappeal conference programs vary greatly in their purposes and techniques.[158] In presenting this option, we did not attempt to identify which of the variations was to be considered, but inquired generally about the acceptability of such programs in dealing with sharp increases in filings.

During in-person interviews, the judges were presented with a sheet listing the options; in the telephone interviews, the list was read aloud before the judge responded. The judges were asked to

158. Descriptions of the preappeal conference program in the Second Circuit Court of Appeals can be found in J. Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration (Federal Judicial Center 1977); A. Partridge & A. Lind, A Reevaluation of the Civil Appeals Management Plan (Federal Judicial Center 1983); and Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan,* 95 Yale L.J. 755 (1986). The conference program in the Seventh Circuit is described in J. Goldman, The Seventh Circuit Preappeal Program: An Evaluation (Federal Judicial Center 1982). The Eighth Circuit has a limited conference program, which is described in Lay, *A Blueprint for Judicial Management,* 17 Creighton L. Rev. 1047 (1984); and Martin, *Eighth Circuit Court of Appeals Pre-argument Conference Program,* 40 J. Mo. B. 251 (1984). A description of the preappeal conference program in the Sixth Circuit is provided in Rack, *Preargument Conference in the Sixth Circuit Court of Appeals,* 15 U. Tol. L. Rev. 921 (1984).

comment on all of the alternatives and to indicate which was most acceptable and which was least acceptable. This question was asked toward the end of the interviews and was asked only if time permitted. It was the least popular question in the interview. A hypothetical increase of 20 percent seemed intolerable to some judges. One indicated that he would seriously consider resignation. Several others said that there are no appellate procedures available to the courts to deal with such an increase, and others said the system would collapse. However, one judge indicated that a 20 percent increase in case filings would not require a change in procedure "if the judges are doing their work," and another "questioned the premise" that a 20 percent increase in filings would be a burden. Nevertheless, they all examined the list and indicated their choices. Extensive quotations are provided to give a sense of the intensity of the judges' reactions to this question.

Tables 32 through 35 present the responses of the judges in each of the four courts of appeals to the question regarding options for dealing with a sharp increase in case filings. Next to each option is the number of judges who found the option acceptable and, in parentheses, the number of those who found the option the most acceptable option on the list. This is followed by the number who found the option unacceptable and, in parentheses, the number who found the option the most unacceptable. We interpret these tables by comparing the number of judges who found an option acceptable with the number who found the option unacceptable, then checking the numbers in parentheses for an indication of the strength of the support for or opposition to the option.

1. The Court of Appeals for the Third Circuit. As indicated by table 32, the judges of the Third Circuit prefer to deal with a sharp increase in case filings by preparing more decisions that do not state the reasons. This would mean disposing of more cases by judgment orders, a practice the court has recently moved away from in favor of longer, more thorough explanations in the form of memoranda decisions. Seven of the eleven judges responding to this question indicated that fewer reasoned dispositions would be an acceptable alternative, and four of these judges indicated that this would be the most acceptable of all of the options. Only one judge disapproved of greater reliance on judgment orders, identifying this as the most objectionable alternative on the list. As indicated in chapter 6, the Third Circuit only recently decided to move away from its earlier reliance on judgment orders and to prepare more memoranda dispositions that state the reasons for the holding.[159]

159. See the discussion in chapter 6, sections E and F.

The judges' responses to this question indicate that support for the memoranda decisions may be weak, at least if the court is confronted with an increase in caseload.[160]

TABLE 32
Reactions to Options in Appellate Procedure by Judges of the Third Circuit ($N = 11$)

Option	Acceptable[a]	Unacceptable[b]
Hear oral argument in fewer cases	3 (1)	5 (2)
Publish fewer opinions	3 (1)	2
Prepare more decisions without reasons stated	7 (4)	1 (1)
Encourage settlement by preappeal conferences conducted by nonjudicial personnel	6 (1)	4 (3)
Rely more heavily on visiting judges	3 (2)	5 (1)
Permit the time to disposition to increase	4	3 (3)
Other (volunteered by the judges)		
Write shorter opinions	1 (1)	
Change appellate jurisdiction	2	
Increase number of judges	2	1

[a]Number in parentheses indicates the number of judges who found the option the most acceptable on the list.

[b]Number in parentheses indicates the number of judges who found the option the most unacceptable on the list.

The judges of the Third Circuit were generally split on the acceptability of the other options. The judges tended to reject the option of hearing oral argument in fewer cases, some mentioning the current high percentage of cases decided without argument. One judge said that the cases argued are "just about at the irreducible minimum." Another said, "If a case warrants argument, it warrants argument." The one judge who endorsed this option above all others indicated that it would have the "least deleterious effect on the justice system." The judges also tended to condemn the greater use of visiting judges, although two judges identified this as the most acceptable of the alternatives. Those who found relying more on visiting judges to be unacceptable expressed concern that there would be too many cases in which the visiting judge would cast the deciding vote, and one judge noted, "there is lots of uproar from the bar when this happens."

The judges were divided on the desirability of encouraging settlement of appeals through prebriefing conference programs conducted by nonjudicial staff. Even those who found this to be a de-

160. In reaction to the question discussed in section C of this chapter, several judges of the Third Circuit who indicated that preparing fewer reasoned dispositions was the most desirable alternative also stressed the need for a reasoned disposition in the absence of oral argument.

sirable alternative expressed doubts about the extent to which such a program would be successful in settling appeals. Two judges suggested that it would only be successful in "money cases"; another said that settlement conferences in most cases would be useless. Several judges indicated that they would not support a settlement program that relied on nonjudicial personnel and described a previous failed effort in which the court attempted to use judges to encourage settlement.

The court was also split on the desirability of simply permitting the time to disposition to increase. Those judges who found this option to be preferable expressed concern about distorting the appellate process to speed case disposition. One judge remarked, "There would not be terrible consequences if the time to disposition were to increase by two or more months. The court should be more concerned about the procedures used to decide cases and less concerned about the expeditious nature of the review." Another judge said that an increase in the time to disposition may deter the filing of some appeals, noting that he has watched cases "shift back and forth between the state and federal courts, depending on where the backlog is." One judge who found a longer disposition time to be the least acceptable alternative said, "If a court can't decide a case promptly, the case has less effect on the law and the court is diminished in the eyes of the bar."

Few judges chose to comment on the option of publishing fewer opinions. The one judge who favored this option strongly said, "The court publishes too many long opinions. Nobody wants to read them, neither the public nor the bar."

Several alternatives not on the list were offered by the judges. Two indicated that additional judgeships would be desirable; one of these judges said, "The nostalgia about small collegial courts is nonsense." Two judges also suggested changes in appellate jurisdiction to reduce case filings. Finally, one judge suggested shorter opinions that would still provide a reasoned disposition.

In summary, it appears that the Third Circuit would deal with a sharp increase in case filings by returning to greater use of dispositions that do not state the reasons. The court appears to be split on the advisability of other options; the judges expressed strong feelings both favoring and opposing the other alternatives.

2. The Court of Appeals for the Fifth Circuit. As is indicated in table 33, the judges of the Fifth Circuit agree on little, other than their opposition to preparing more dispositions that do not state the reasons. As was mentioned in chapter 3, several years ago the Fifth Circuit made extensive use of a summary affirmance rule, in which the disposition was limited to a one-line order. A few years

ago, the court moved away from this practice and now uses such dispositions only in obviously frivolous cases. One judge mentioned that summary affirmance should be used "only to give a message to an irresponsible attorney." Other judges emphasized the importance of providing an explanation in the nonargument cases. One said that summary affirmance should never be used in a case decided by the screening panels. Another said that the attorneys appreciate a reasoned disposition more in a case decided without argument.

TABLE 33
Reactions to Options in Appellate Procedure by Judges of the Fifth Circuit (N = 14)

Option	Acceptable[a]	Unacceptable[b]
Hear oral argument in fewer cases	6 (3)	7 (1)
Publish fewer opinions	6 (3)	3
Prepare more decisions without reasons stated	2	10 (6)
Encourage settlement by preappeal conferences conducted by nonjudicial personnel	4	10
Rely more heavily on visiting judges	5	7 (2)
Permit the time to disposition to increase	4	6 (2)
Other (volunteered by the judges)		
Increase number of judges	2	1 (1)
Decrease extrajudicial duties	1 (1)	
Write shorter reasoned opinions	2	1
Give opinions from bench	1	
Write fewer dissents	1	

[a]Number in parentheses indicates the number of judges who found the option the most acceptable on the list.

[b]Number in parentheses indicates the number of judges who found the option the most unacceptable on the list.

As did the judges in the Third Circuit, the judges in the Fifth Circuit indicated a lack of faith in settlement by preappeal conferences conducted by nonjudicial staff. One judge indicated that the mere presence of a preappeal conference program would be detrimental because such a program would encourage appeals by persons who seek only leverage in negotiating settlement. Although some judges doubted the effectiveness of encouraging settlement at the appellate level, much of the criticism of this option was aimed at having nonjudicial personnel conduct the conferences. The court has established a small pilot program, in which senior judges hold such preappeal conferences, and is waiting for an assessment of the program's effectiveness. Some doubted that settlement would be brought about even with the assistance of a conference with a senior judge; one judge said, "If people aren't smart enough to

settle their own cases, a senior judge isn't going to help." However, many of those who indicated that this was an unacceptable option remained open-minded about the success of a program staffed by judicial personnel who "have the respect of the bar."

The Fifth Circuit appellate judges indicated a general preference for publication of fewer opinions. One judge said that the court spends too much time "writing scholarly opinions" that are not necessary to legitimate the function of the court. He believed that changes in this practice would save two hours of combined judge and law clerk time per opinion. Another judge indicated that as a litigator, he "wanted everything published," but now has grown tired of the proliferation of similar opinions. Those judges who found restrictions on publication of opinions to be unacceptable suggested that little benefit would result from changes in publication practice. Two judges indicated that they write the same way for the published and unpublished opinions, making changes in this area irrelevant to dealing with caseload pressures. Another judge suggested that the court should be more selective in determining what goes into the published opinion, leaving out lengthy descriptions of the factual circumstances.

The judges were split on the advisability of hearing argument in fewer cases. Those judges who found this to be an acceptable option emphasized the need to decide the appeals, even if it meant further restrictions on the opportunity for oral argument. One of the advocates of further reductions in oral argument suggested that the "public importance" cases would be the first category of cases to be restricted. All of the judges who favored hearing argument in fewer cases indicated that it is important to provide a reasoned disposition in such cases. The judges who objected to this option indicated that argument is now being heard only in the "hard" cases and that there is "not a whole lot of room to decrease argument."

The judges were also split on the advisability of greater reliance on visiting judges. As indicated in chapter 3, the Fifth Circuit has made little use of visiting judges since adopting the screening program. Even those who indicated that this would be an acceptable option showed little enthusiasm for it. Those who opposed greater use of visiting judges expressed strong concerns. Some expressed concern about maintaining a coherent body of circuit law, fearing that extensive use of visitors would make the development of law in the circuit "more capricious and uncertain." Another indicated that, "if a visitor tips a panel, the case is likely to go en banc." Others indicated that visiting judges are spared the more difficult writing assignments, thereby limiting their usefulness. The num-

bers in table 33 do not reflect the strength of the judges' opposition to the use of visiting judges.

Those judges who indicated that it would be acceptable to permit the time to disposition to increase tended to suggest that this would be the inevitable consequence of a sharp increase in filings. Those who found this option to be unacceptable suggested that cases become harder if they are not decided promptly. One judge mentioned that as a litigator, he had been greatly frustrated by the lengthy disposition time in some courts and now feels great pride in being on a court that hears cases as soon as they are ready.

The judges made a number of other suggestions for dealing with a 20 percent increase in filings. Two judges indicated the acceptability of added judgeships, but one judge strongly objected, saying this "cheapens the currency." Two judges recommended writing shorter opinions, with the restrictions that reasons for the disposition would still be given and the publication practice would not be changed. One judge advocated decreasing the judges' extrajudicial duties. In addition, one judge urged that more opinions be announced from the bench, and another suggested that fewer dissents be written.

In summary, the judges of the Fifth Circuit are united only in their opposition to preparing fewer reasoned dispositions, especially in nonargued cases, and in their skepticism concerning settlement through preappeal conferences conducted by nonjudicial staff. Most judges remain open-minded concerning the likelihood of settlement through conferences conducted by senior judges, however. The judges of the Fifth Circuit also oppose greater use of visiting judges. It is difficult to predict what actions would be taken by the court in the event of a sharp increase in case filings. There is modest support for publishing fewer opinions; however, a few judges expressed considerable doubt that changes in publication practice would save time.

3. The Court of Appeals for the Sixth Circuit. As table 34 indicates, the judges of the Sixth Circuit agree on those options that would be unacceptable in the event of a sharp increase in filings, but do not agree on acceptable options. The option of permitting the disposition time to increase raised the greatest number of objections. The judges indicated that they were aware that the current time to disposition of cases in their court is among the longest of the courts of appeals, and they wanted to avoid any further increase. Two judges said that permitting disposition time to increase would only encourage more filings, suggesting that the incentive to file an appeal in order to gain an advantage in delay would be even greater. "The best way to cut down on appeals," according to one

judge, "is to decide them quickly; those filing for delay will then have no incentive." Those who indicated that this would be an acceptable alternative seemed resigned to increases in disposition time as an unavoidable consequence of a sharp increase in case filings. One judge described "a natural tendency to let the time to disposition increase, so with more cases the court gets a bigger backlog." Another judge who seemed resigned to longer disposition times said, "There are only so many tricks the court can play."

TABLE 34
Reactions to Options in Appellate Procedure by Judges of the Sixth Circuit (N = 18)

Option	Acceptable[a]	Unacceptable[b]
Hear oral argument in fewer cases	8 (5)	10 (1)
Publish fewer opinions	5	10 (1)
Prepare more decisions without reasons stated	8 (2)	8 (4)
Encourage settlement by preappeal conferences conducted by nonjudicial personnel	8 (4)	8 (1)
Rely more heavily on visiting judges	7 (2)	10 (2)
Permit the time to disposition to increase	7	13 (5)
Other (volunteered by the judges)		
Write shorter reasoned dispositions	6 (4)	
Change appellate jurisdiction	3	
Impose sanctions for frivolous appeals	1	
Ensure more efficient hearing schedule	1 (1)	
Ensure better identification of issues	1	
Increase number of law clerks	1	
Increase number of judges	2	

[a]Number in parentheses indicates the number of judges who found the option the most acceptable on the list.

[b]Number in parentheses indicates the number of judges who found the option the most unacceptable on the list.

The judges of the Sixth Circuit also would be reluctant to publish fewer opinions, an option slightly favored by the judges of the Fifth Circuit. Several judges expressed skepticism that changes in publication practice would save time. One judge indicated that too many decisions are being published, just increasing the expense to everyone. Two of the judges who selected this option expressed a general preference for reducing the time given to "the writing function," as opposed to changing the way judges go about considering the merits of the case. Both judges were very protective of the time they spent considering the issues raised on appeal and were willing to take a number of steps, such as writing simple orders or ruling from the bench, if necessary to protect time spent "at the front end of the case."

Overall, table 34 suggests that the judges were split on the desirability of hearing argument in fewer cases and the desirability of preparing more dispositions that do not state the reasons. However, their discussion of the options indicated strong opposition to both of these alternatives. Even those who indicated that disposition without argument would be an acceptable alternative suggested that it would be appropriate in only a slightly higher percentage of cases. A number of judges mentioned the tradition of the Sixth Circuit of permitting oral argument in as many cases as possible and urged that this tradition be continued. Two judges indicated that increases in dispositions without argument would be appropriate only if the attorneys retained the option of having argument when requested. Similarly, even those who endorsed preparing fewer reasoned dispositions seemed to have some reservations. One judge who indicated that this was the most desirable alternative on the list remarked, "but the court could dispose of a case in two or three sentences and cite a case for it." Another judge, noting that the court currently gives reasons in all cases, indicated that the litigants are entitled to nothing less.

The court was evenly divided over the advisability of encouraging settlement through preappeal conferences conducted by nonjudicial staff. Such a program is currently in place in the Sixth Circuit, and an evaluation of it is under way. It should be noted that the judges were not asked to evaluate the existing prebriefing conference program; they were asked about employing prebriefing conference programs in general to accommodate a 20 percent increase in filings. Four judges indicated that this was the most acceptable option on the list; one mentioned it would be particularly appropriate in cases involving money judgments. Others said, however, that settlement prospects even in these cases are minimal. Several judges expressed skepticism about the usefulness of prebriefing conference programs but were waiting for the results of the evaluation of their own program before deciding on the general utility of this option. A few judges have already decided that this would be an ineffective alternative. One judge, for example, expressed doubt that a prebriefing conference program would be effective if the attorneys are distributed across a wide geographical area and have to travel to the court for the conferences. Another judge said that such programs simply increase the costs of litigation in cases that are likely to settle anyway. The rate of settlement without the conference program is one of the issues being examined in the current evaluation.

The Sixth Circuit has made frequent use of visiting judges. The judges expressed a slight preference for avoiding increases in the

use of visiting judges. In general, doubts were expressed concerning the extent to which visiting judges are able to assist the court. One judge commented that "the main function of a visitor is to fill a chair so the court can spread out its judges." This judge noted that it is unreasonable to expect visiting judges to assume a full share of the writing burden because of their other obligations. However, another judge indicated that the use of visiting judges is an acceptable option, mentioning that the court "has had good luck relying on [district court judges] from the Sixth Circuit."

The judges suggested a number of other options for dealing with a sharp increase in filings. Six of the judges stated or implied a preference for shorter dispositions that state the reasons. "Write less; the orders are too long now," said one judge. This judge also recommended publishing less and preparing fewer reasoned dispositions. Three judges suggested changes in appellate jurisdiction. One judge described this option as "altering the intake of cases" and recommended tightening the standards for standing and requiring exhaustion of state remedies in section 1983 civil rights cases. One judge each called for more effective sanctions for frivolous appeals, a more efficient hearing schedule, and more law clerks. Two judges opposed authorizing new judgeships.

In summary, the appellate judges of the Sixth Circuit generally agree that the time to disposition should not be permitted to increase and that the court should not publish fewer opinions. However, there is no consensus on the acceptability of any of the alternatives.

4. The Court of Appeals for the Ninth Circuit. The judges of the Ninth Circuit agreed that the best option would be to publish fewer opinions (see table 35). Sixteen of the twenty-six judges identified this as an acceptable alternative; only four judges objected to it. Although the judges did not anticipate great savings of time from such a change, several judges mentioned that they and others seem to publish opinions that are "at the margins of precedential value." One judge suggested that the court should no longer publish opinions in diversity cases. Another mentioned that new judges tend to prepare more publishable opinions when they arrive on the bench, then become more restrictive in publication as they become more comfortable in identifying cases without precedential value. Those judges who opposed publishing fewer opinions indicated that the standards for publication are "inflexible," and if a case has precedential value, it should be published, without regard to the nature of the caseload.

Settlement by preappeal conferences also was endorsed generally by the judges of the Ninth Circuit, although almost every judge

TABLE 35
Reactions to Options in Appellate Procedure by Judges of the Ninth Circuit ($N = 26$)

Option	Acceptable[a]	Unacceptable[b]
Hear oral argument in fewer cases	10 (3)	10 (5)
Publish fewer opinions	16 (6)	4
Prepare more decisions without reasons stated	11 (4)	9 (2)
Encourage settlement by preappeal conferences conducted by nonjudicial personnel	12 (3)	4
Rely more heavily on visiting judges	5 (2)	13 (4)
Permit the time to disposition to increase	3 (1)	7 (5)
Other (volunteered by the judges)		
Increase number of judges	4	1
Increase number of cases argued	4	
Change appellate jurisdiction	2	
Increase dispositions on motions	1	
Reduce length of briefs	1	

[a]Number in parentheses indicates the number of judges who found the option the most acceptable on the list.

[b]Number in parentheses indicates the number of judges who found the option the most unacceptable on the list.

who indicated support for this option expressed skepticism concerning the ability of staff attorneys to settle appeals.[161] This skepticism was also the basis for many of the objections to the option. However, one judge indicated that he was opposed to preappeal conferences that attempt to induce settlement, since this may give the attorneys the message that the court is urging settlement even in appeals that are of merit. Again, it should be noted that the judges were not asked to evaluate the existing prebriefing conference program; they were asked about employing prebriefing conference programs in general to accommodate a 20 percent increase in filings.

The court was united in its opposition to the increased use of visiting judges. In recent years the court has diminished its reliance on visiting judges, a fact mentioned with pride by a number of

161. Preappeal conferences in the Ninth Circuit are conducted by the staff attorneys, but settlement of the appeals is not a goal of the conference. This program is currently being evaluated by the court, with the assistance of the Federal Judicial Center. The court also has implemented a pilot program in which experienced attorneys, acting on behalf of the court, hold a conference to determine if the appeal can be settled before submission. Third Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeship Act of 1978 and Other Measures to Improve the Administration of Justice in the Ninth Circuit (July 1986) (on file in the Information Services Office of the Federal Judicial Center).

judges. One judge who supported this option said that he had always found visiting judges to be "helpful and well prepared," but acknowledged that most judges on the court disagree with him. Most judges questioned the extent to which visiting judges are able to participate fully in disposing of the cases. Several judges mentioned that panel members are reluctant to give visiting judges a proportionate share of the writing responsibilities, thereby increasing the work of the other two judges by as much as one-half. Other judges expressed concern about visiting judges casting deciding votes and causing conflicts of law within the circuit. Finally, one judge mentioned that the use of visiting judges reduces the frequency with which the active judges sit together, limiting the opportunities for collegiality.

The judges were divided on the advisability of hearing oral argument in fewer cases and preparing more dispositions that do not state the reasons. Those who opposed restricting oral argument were most insistent. Again, two judges described the standards for oral argument as "inflexible"; one said that it "should not be within the discretion of the court to restrict oral argument in response to an increase in caseload." One judge said that the court is now hearing argument in those cases in which it is helpful and that it should not restrict further the right to oral argument. Two of the judges objected to this option and proposed instead that the court increase the opportunity for oral argument to accommodate more cases. Several of those who objected to preparing fewer reasoned dispositions also indicated that the standard for disposition on the briefs was inflexible and questioned whether this would ever be appropriate in all but the most frivolous appeals.

Most judges also condemned permitting the time to disposition to increase. The three judges who indicated that this would be an acceptable option all did so for different reasons. One judge suspected that such an increase would be unavoidable regardless of the actions of the court; he felt that procedural changes would be overwhelmed by a 20 percent increase in case filings. Another judge selected this as the most desirable option, indicating that the procedures of the court of appeals should not be tinkered with to accommodate increased case filings. Finally, one judge questioned whether deciding more cases would, in fact, reduce the disposition time. He noted that the opportunity for an appellate decision has a "demand curve, like any other resource," and speculated that deciding cases more quickly would make appeal more attractive, leading to further increases in filings and a return to lengthy disposition times.

The judges suggested a number of other options. Four judges indicated a preference for more judgeships; one said that such an increase in case filings "is a problem for Congress. Judges have to stop trying to invent ways to solve problems that are not our problems." He indicated that all the other options "diminish the appellate process." One judge objected to increasing the number of judgeships, indicating that with twenty-eight judges, "the court is at its limit." Four judges indicated a preference for increasing the number of cases argued; one suggested that the opinions then be announced from the bench. Two judges suggested restrictions on appellate jurisdiction. One judge each suggested increasing dispositions on motions and reducing the length of the briefs.

In summary, it appears that the judges of the Ninth Circuit, if faced with a sharp increase in the number of cases filed, would attempt to decide more cases by limiting the time spent preparing opinions for publication and encouraging settlement of appeals through preappeal conferences. The judges would be most reluctant to use visiting judges and to permit the time to disposition to increase.

5. Comparisons of the four courts of appeals. Comparing the responses of the judges across all four of the courts, it is clear that there is little agreement in any of the courts concerning the measures that should be taken in the event of a sharp increase in appellate case filings. The most common pattern is for the judges to be divided in assessing the acceptability of almost all of the options presented. For example, the judges in each of the four courts were split almost evenly concerning the acceptability of further reductions in oral argument.

To the extent that the judges in one court were able to agree, their recommendation often was in conflict with the preferences of judges in the other courts. The judges of the Third Circuit agreed only that in the event of a sharp increase in case filings, the court should prepare fewer reasoned dispositions. Yet, opposition to dispositions without stated reasons was one of the few things the judges of the Fifth Circuit agreed upon. The judges of the Ninth Circuit expressed a strong preference for publishing fewer opinions, an option rejected by most of the judges of the Sixth Circuit. The judges of the Ninth Circuit also expressed a preference for increased efforts at settlement through preappeal conferences, an option generally disfavored by the judges of the Fifth Circuit. The responses of almost all of the judges to the option of preappeal settlement conferences, both those favoring the conferences and those opposing them, however, indicated great skepticism concerning the

effectiveness of members of the court staff in bringing about settlement.

Although all four courts agreed on none of the alternatives, the Fifth and Ninth Circuits agreed that there should be no greater reliance on visiting judges, and the Sixth and Ninth Circuits agreed that the time to disposition should not increase. However, no courts agreed on an acceptable response in the event of a sharp increase in case filings. The absence of a consistent pattern of responses across the four courts indicates the difficulty the courts will face in reaching a consensus on modifications in appellate procedure in the event of a sharp increase in case filings.

C. Visibility of the Judicial Process

At the end of the interview, if time permitted, the judges were asked what might be done to ensure that the use of abbreviated judicial procedures, such as deciding cases without argument or deciding cases without a reasoned disposition, does not undermine the confidence of the public and the bar in the decisions rendered by the judiciary. The question was asked a number of different ways, usually in reference to remarks made by the judge in responding to some of the options discussed earlier or in relation to specific procedures adopted by the judge's own court.

The overwhelming consensus across all courts is that the parties should be given either an opportunity to argue their case before the court or a written disposition of the case that addresses the issues raised on appeal and cites the authority for the court's decision. Thirty-seven of the fifty-eight judges responding to this question, including a majority of the judges in each of the four courts, mentioned or implied that either argument or a reasoned decision should be offered as a means of maintaining confidence in the judiciary.[162]

In their comments, many of the judges appeared to accept that some cases would not be argued and stressed the importance of providing a reasoned disposition in such cases. A judge from the Third Circuit said, "Not providing oral argument results in the appearance of inadequate attention, which can be overcome by providing

162. In general, the following question was asked: "With the adoption of submission on the briefs and decisions without reasons stated, the courts risk becoming less visible. What means are available to assure the bar and the public that the cases are receiving full consideration?" Some judges indicated that there are no other means. We interpreted this response as an endorsement of a practice that permits either argument or a written disposition.

written decisions. The appearance, however, will always give rise to questions about the manner in which the issues were considered by the judges." A judge from the Fifth Circuit focused on the need to provide assurances to attorneys who rarely argue before the federal court, saying, "The infrequent players have no feel for the court. . . . To legitimize the court, you have to write *something* for the litigants to show you carefully considered the arguments." Several judges mentioned that the written disposition need not be lengthy, as long as it provides an indication of the basis of the court's decision. "The facts don't have to be rehearsed," said one judge, "as long as the disposition gives the parties an idea of the court's thinking." Another judge said that at a minimum, the disposition should cite the authority for the decision and how it relates to the issues. However, most of the judges who recommended a reasoned disposition appeared to have a more lengthy disposition in mind. One judge from the Ninth Circuit remarked, "The screening program is somewhat counterproductive in that the advantage that is gained in saving time from argument is lost in preparing such an extensive disposition."

Several judges indicated that a reasoned disposition is not an adequate substitute for oral argument in maintaining confidence in the judiciary. A judge from the Ninth Circuit indicated that only by hearing argument in a case can the court convince the attorneys that the panel members have looked at the case; the judge said, "In a case in which argument has not occurred, it is very difficult to give the litigants the assurance that the court has considered the issues. Even a lengthy disposition raises questions about who authored the disposition and whether, in fact, a judge, as opposed to a staff member, considered the issues in the case." Another judge commented, "The parties can't be convinced the issues they raised were addressed by the judges when there is neither argument nor a reasoned disposition. I prefer argument. When the parties see that the judges are prepared and ask informed questions, they'll be assured that the issues are addressed." Some of the burdens of oral argument may be offset, then, by a diminished need for a lengthy decision. As another judge who favored argument said, "You can get away with a short decision if you convince [the lawyers] you're on top of the case." However, another judge took issue with this point, saying, "Attempting to convince the attorneys that the judges are considering the issues raised on appeal through argument distorts the argument and is inappropriate."

Eleven judges recommended closer relations with the bar as a means of ensuring confidence in the authority of the court. Several suggested that the judges should be more willing to speak at bar

association meetings, describing the practices of the court and assuring the attorneys that the issues raised are not slighted even if there is no argument. A few judges discussed contacts with the bar in terms of improving "public relations," although their comments suggested that these efforts should be directed at the bar rather than at the public itself.

A range of other suggestions were offered. Five judges suggested that changes in publication procedures could reinforce the court's credibility. Four judges said that the courts should publish more of their dispositions, and another judge suggested that the court make available a list of or index to the unpublished cases. Another judge urged writing more opinions, saying, "If the bar wants to find me, they can look at my opinions from last year." Another held that greater attention to the quality of the opinions would guard against a lack of confidence in the courts. One judge suggested making greater use of law interns, permitting the interns to learn about the procedures of the court and trusting them to inform other members of the bar of the integrity of the court's practices. Another judge suggested wider distribution of the internal operating procedures of the court.

Six of the judges were pessimistic that the courts could convince members of the bar of the integrity of the court's practices without offering the full range of procedures. One judge who strongly favored the opportunity for argument in all cases indicated that the cases "are not receiving full consideration. When cases do not receive full consideration, the quality of the judicial product is not as good." Other judges who were pessimistic were critical of the bar. One judge who had spoken before a number of bar associations concerning his court's practices indicated that he has "almost given up on the bar." He mentioned the beneficial role of the court's advisory committee, composed of leaders of the bar, in structuring the court's procedures, but said, "they are already convinced. It's the skeptics that need the exposure." Two judges indicated that efforts to assure the bar that cases are receiving full consideration would be misguided and would divert the court from more important tasks. One of these judges, who acknowledged that the court's visibility to the bar is a "tremendous concern," opposed the suggestion of longer reasoned opinions, saying, "We're not here to write opinions, we're here to enter judgments. We would be in more trouble with the bar if the cases took four years." Another judge said, "Visibility is not worth the price of argument where argument is not warranted and the cost to the litigant is high. Limitations on argument and publication are not done to save time, but only because they are warranted."

Finally, five judges doubted that the use of less than the complete range of appellate procedures raises a problem. In general, these judges suggested that the nature of the cases decided by such procedures are such that the issue of the court's credibility does not arise. One judge said, "The cases [submitted to the screening panels] involved such outrageous and meritless claims, that there was no issue concerning adequacy of attention." Another judge, who acknowledged that a lack of visibility is the price the courts pay for using truncated procedures, indicated, "I have no easy answers, but I am at least confident that the cases receiving truncated procedures deserve this treatment. . . . No [reasoned disposition] is needed in the very frivolous case." Another judge, who endorsed greater use of reasoned opinions, said, "In some kinds of cases, such as tax protester cases and immigration cases, where the purpose is delay, the parties will never be satisfied with any procedure that expedites disposition of the appeal." Asked to comment on the court's credibility in using truncated procedures, one judge simply said, "This doesn't concern or bother me."

In summary, the judges of the four courts of appeals generally favored providing a reasoned disposition in cases that are not argued, as a means of demonstrating to the parties that the issues raised on appeal were addressed by the court. Some judges found this to be an inadequate alternative, and some judges felt that the members of the bar would never be satisfied with the court's attention to the issues unless the full range of appellate procedures were always used in their cases. Although a number of other approaches may be attempted, such as improving relations with local bar associations, it appears that for most judges, the court's credibility in all but the most frivolous of appeals requires oral argument or a reasoned disposition.

D. Individual Discretion in Determining the Need for Argument

Judges generally agree that there are many cases in which oral argument will not inform the disposition of a case. However, they are not of one mind concerning the relevance of this fact in determining the need for oral argument. For many judges, a belief that argument will not aid the disposition is sufficient to justify deciding the case on the briefs alone. For these judges, offering oral argument when it is not needed to aid the deliberations of the panel diverts the court from more demanding cases, thereby limiting the court's ability to dispose of its caseload.

For other judges, the standard for determining the need for oral argument is more complex. These judges' attitudes toward the role of oral argument are not easily separated from their more fundamental concerns regarding the need for collegial interaction and the obligation of the courts to consider cases in a public forum. These judges look beyond the information needed to prepare a disposition of the issues and would permit oral argument as a means of demonstrating to the parties and the public that the members of the panel have given due consideration to the issues raised on appeal.

Of course, a range of opinions exist between these two extremes, and judges are rarely dogmatic in their adherence to these positions. However, given the range of preferences, it was somewhat surprising that there were so few indications of general dissatisfaction by the judges for the particular practices of their own court; differences in views of the role of oral argument seemed to exist in harmony under four very different procedures. Certainly, the traditions established by the courts concerning the opportunity for oral argument encourage such harmony. However, the interviews indicated that a second important factor is the opportunity for a judge to obtain oral argument in those cases in which he feels it is required. Although we did not question the judges directly concerning the degree to which they felt free to reject a nonargument designation and place a case on an argument calendar, their comments indicated that this is a highly valued right and one that is exercised independently according to the standards of the individual judge. Furthermore, there appeared to be acceptance of the right of an individual judge to exercise this authority according to the dictates of his or her own conscience. Judges who tended to favor nonargument disposition would occasionally mention their surprise at finding certain cases placed before the argument panels on which they served. But there was never any suggestion that this reaction reflected more than a difference of opinion among colleagues who are obligated by their position to exercise their independent judgment. In short, it appears that the opportunity for a single judge, exercising individual discretion, to place a case before an argument panel is a primary reason that conflicting opinions concerning the role of oral argument continue to exist in harmony.

VIII. CONCLUSIONS

A number of courts of appeals are now approaching the rate of nonargument dispositions that caused the Commission on Revision of the Federal Court Appellate System to register concern; several have moved beyond this rate. At the same time, a number of other courts continue to hear argument in most of the cases decided on the merits. This study has found that under the flexible standards of rule 34 of the Federal Rules of Appellate Procedure, the courts are able to fashion procedures that reflect the range of judicial opinion concerning the role of oral argument and that permit the judges to hear oral argument in those cases in which they feel it is necessary. This study also highlights the balancing of values the courts must undertake as they allocate limited resources among pressing demands. In this chapter, we address some of the issues raised by our research.

A. Judges' Attitudes Toward Oral Argument

The judges we interviewed agreed that a considerable number of cases exist that meet the criteria for nonargument disposition under rule 34 of the Federal Rules of Appellate Procedure. In general, these appeals were described as those in which the issues are simple, the precedent is clear, and the members of the panels are likely to agree on the merits of the decision. Statistical analyses revealed that appeals decided without argument are likely to arise out of civil rights cases, prisoner petitions, Social Security appeals, and pro se appeals in general. However, although the articulated characteristics of nonargued appeals are very similar across the courts, the great variation in the rate of nonargued dispositions suggests that the extent of oral argument evolves from factors in addition to the stated criteria. In fact, our interview data reveal great variation among judges in identifying the purposes served by oral argument. Although oral argument may be thought of primarily as a method for obtaining information about a case, this is only a threshold purpose for many judges. Judges also rely on oral argument to demonstrate to the parties that the members of the panel have attended to the issues raised on appeal, to permit interaction

with members of the bar, to provide a forum for the presentation of issues of public concern, to acknowledge the court's responsibility for resolving such disputes, and to provide an opportunity for the judges to confer and hear each other's views. Each judge differs in the weights he gives to these purposes, resulting in a broad range of opinions among judges concerning the need for oral argument.

Despite the variety of opinions, however, in some courts in this study there is substantial uniformity of opinions regarding the importance of oral argument. Most of the judges of the Sixth Circuit Court of Appeals, for example, are committed to hearing argument in as many cases as they can. In the interviews, the judges of this court emphasized the importance of oral argument in meeting a wide range of needs beyond obtaining the information necessary to decide the case. When asked how their views toward oral argument have changed during their time on the bench, most of the judges in the Sixth Circuit said their experience on the bench has convinced them of the importance of oral argument. In contrast, the judges of the Third and Fifth Circuit Courts of Appeals emphasized the role of oral argument in gathering the information needed to decide the appeal, and most said the longer they are on the bench, the more convinced they are that argument is not necessary in a large number of appeals.

B. Ensuring Independent Judicial Review

The beliefs of the judges concerning the proper role of oral argument appear to override the particular features of the screening programs. We found no direct correspondence between the procedures and the rate of argument. For example, the Courts of Appeals for the Fifth and Ninth Circuits have similar nonargument procedures, yet the Fifth Circuit decides a far greater percentage of appeals without argument. Both the Third and Sixth Circuits decide appeals without argument only after the panel members confer in person; yet the Third Circuit decides a far greater percentage of appeals without argument and does so without relying on the assistance of materials prepared by staff attorneys.

We found evidence as well that the appellate procedure under which a case is submitted does not govern the degree of attention the case receives. Interviews with the judges indicated that they provide the degree of attention they feel is necessary to resolve the issues raised by the case; they quite freely reject cases from the nonargument calendar when they determine oral argument is appropriate. (This issue is addressed in greater detail later.) Simi-

larly, placement of simple cases on the argument calendar offers no assurance that such cases will receive more thorough consideration. In the Ninth Circuit, many judges indicated that cases normally destined for the screening panels received no greater attention when rerouted to the oral argument calendars; argument was rarely sought, and there was little discussion among panel members concerning the merits of the disposition.

Finally, the influence of the formal procedures is diminished by the judges' willingness to adapt the established nonargument procedures on an ad hoc basis to permit a case the attention and communication they feel is appropriate. In the Ninth Circuit, for example, judges have transformed screening procedures to permit or limit communication among panel members in accord with their interpretation of the needs of the cases. It appears that two screening procedures that were once quite distinct, the serial and parallel procedures, are becoming more similar. Likewise, in the Third Circuit, some judges have initiated telephone discussions of very simple cases prior to the time the panel convenes, whereas previously they did not confer before the formal conference. These findings suggest that the formal procedures adopted by a court are not the most important factor in determining the degree of attention that is devoted to a case.

What is important in determining the degree of attention a case receives, including whether the case is argued, is the assessment of the needs of the case by individual judges. The critical feature of a nonargument process is the means by which a single judge can reject a case from the nonargument calendar and have it placed before a panel of judges for oral argument. It is the rejection process that ensures that each case receives the attention thought appropriate by the most cautious judge on the panel. It appears that each of the four courts has fashioned a procedure under the flexible standards of rule 34 that permits individual judges to exercise discretion in determining the need for oral argument in a particular case. Despite the range of opinions about the need for oral argument, the judges of each of the courts indicated that the procedures permit them to exercise their independent judgment concerning the suitability of a case for disposition without argument. In fact, around 15 percent of all cases initially designated for disposition without argument are reclassified and sent to argument panels.

However, the interviews did reveal one way in which the procedure for nonargument disposition may hinder the opportunity for a judge to make an independent determination regarding the suitability of a case for disposition without argument. Several judges expressed concern that awareness of the preferences of other panel

members for nonargument in a case may cause their colleagues to become reluctant to state a preference for argument. This potential problem may be avoided by routing the notice of objection to nonargument disposition of specific cases through the clerk's office. The clerk may then inform the panel members of the cases that remain for disposition without argument. In the Third and Sixth Circuits, this procedure would require only a slight variation in current practice. In the Fifth and Ninth Circuits, the serial procedure for circulation of materials would have to be modified. However, the adoption of the "modified" parallel procedure for disseminating and considering case materials would permit an independent assessment, as well as permit communication among the panel members when it is necessary. Although this notification practice imposes a greater burden on the clerk of the court, it also ensures that each case remaining on the nonargument calendar is a case that each judge independently found suitable for nonargument disposition.

C. Addressing the Concerns of Parties

Despite judges' assertions that the issues in nonargued cases are carefully studied and decided, parties are often concerned that their case has not been thoroughly reviewed. To alleviate this concern, the judges agreed that some effort should be made in nonargued appeals to assure the parties that the court considered the issues. In cases that are not argued, all four of the courts attempt to provide a written disposition that includes the reasons for the holding and a citation to the authority for the decision. Providing such a disposition will not lay to rest all concerns that arise when cases are decided without argument, but this practice appears to be a minimum requirement for nonfrivolous appeals disposed of without argument.

Parties' concerns might also be eased if a more meaningful way could be structured for them to tell the court why they think argument is necessary. Currently party expressions of preference do not play an influential role in the courts' determination of the need for oral argument.[163] Under rule 34, parties are permitted to file a

163. These statements are of some consequence in the Fifth and Ninth Circuits, since an appeal in which a party has expressed a preference for argument may be decided without argument only if all members of the panel join in the disposition on the merits of the appeal; dissenting and concurring opinions are not permitted in cases in which the parties have requested argument.

statement setting forth the reasons why oral argument should be heard. Some courts require that this statement be included as part of the briefs, whereas others permit an opportunity to file the statement as an objection after the case is calendared for a nonargument disposition. The judges indicated that they give these statements little weight because they typically include nothing more than a suggestion that argument be heard. In the briefs we examined, few of the requests for oral argument or objections to nonargument designation indicated the specific reasons that oral argument would aid the court in deciding the appeal. The judges indicated that greater consideration is given to expressions of preference when they include the reasons argument would benefit the deliberations of the court. Expressions of preference that are framed within the standards expressed in rule 34 are particularly influential. Parties should be encouraged to state with specificity the manner in which oral argument will benefit the deliberations of the court.

D. Role of Staff Attorneys in Nonargument Dispositions

Staff attorneys participate in the nonargument process to varying degrees in the courts we examined. The role of the staff attorneys is most restricted in the Third Circuit, where they perform no screening function and prepare only an appendix to aid the judges in considering pro se appeals. In the other three courts, staff attorneys review at least some portion of the appeals to identify cases suitable for disposition without argument and prepare bench memoranda. Of these three courts, the staff attorneys of the Sixth Circuit have the most circumscribed role. As a result of recent changes in the court's screening procedures, the staff attorneys' primary screening responsibility is in pro se cases and counsel-represented prisoner cases, for which they prepare bench memoranda and draft dispositions. In the Fifth Circuit, staff attorneys review approximately half of the cases, identifying those that are appropriate for nonargument disposition and preparing bench memoranda. The role of staff attorneys is most extensive in the Ninth Circuit, where they review all cases filed, estimate the difficulty of the cases, designate a portion of the cases for disposition without argument by special screening panels, and prepare bench memoranda for each case submitted to the screening panels.

Staff attorneys appear to be effective in identifying cases that meet the courts' standards for disposition without argument. We

encountered little criticism of the manner in which the staff attorneys implement the criteria established by the court for the selection of cases for disposition without argument. At first glance, the fact that approximately 15 percent of the cases staff attorneys recommended for disposition without argument were later reclassified by the judges suggests some failing on the part of the staff attorneys. However, this rate of reclassification appears to be the result of the preference of individual judges for argument in certain cases, rather than the failure of the staff attorneys to apply properly the standards established by the court. Although there is some inefficiency in a process that results in the reclassification of so many cases, the differences among judges concerning the need for argument in individual cases make it difficult to develop more precise standards. This inefficiency might be overcome if the judges, rather than the staff attorneys, undertake the initial screening, then give the cases designated for disposition without argument to the staff attorneys. However, this procedure would require judges to devote considerably more time to screening.

Generally, the materials prepared by staff attorneys are effective in assisting the judges in their consideration of nonargument cases. Judges use the materials prepared by the staff attorneys to familiarize themselves with the cases and to prepare the written dispositions. Usually, judges use the staff materials in conjunction with other case materials, but our interview data indicate that some judges may occasionally rely too heavily on the materials prepared by the staff attorneys, referring to other case materials only if the staff attorney memoranda raise questions that require additional material for resolution. The comments of the judges suggested that sole reliance on staff attorney materials tended to occur in pro se cases. Regardless of the type of case or the nature of the issues, such reliance on staff attorneys' materials is inconsistent with the standards of rule 34.

This study considered only one of many areas in which staff attorneys assist the court. During our interviews and visits to the courts, we heard many comments about the growing demands placed on staff attorneys' offices. Recently, both the number of motions and the number of cases suitable for nonargument disposition, the two areas in which staff attorneys have significant responsibilities, seem to have risen sharply. If such increases continue, courts will have to choose between increasing the number of staff attorneys and reallocating the duties of the staff attorneys to judges' chambers or other court personnel. Our own limited examination of staff attorneys' offices suggests that a more focused study of the current duties and practices of the staff attorneys would ben-

efit the courts of appeals in responding to these common problems. Such a study might consider some of the following questions:

1. What can be done to avoid "burning out" staff attorneys with a steady stream of pro se or simple cases?

2. What is the proper term of service for staff attorneys?

3. To what extent should the staff attorneys communicate with the judges directly?

4. Should staff attorneys be paired with judicial panels?

5. To what extent should the staff attorneys become specialized in specific areas of the law?

Such a study could also consider a number of alterations in the role of staff attorneys so far not attempted in the federal courts. One possibility would be to permit parties access to the memoranda prepared by staff attorneys. Unlike in-chambers law clerks, the staff attorneys prepare these memoranda without the direct supervision of an individual judge. Therefore, the staff attorneys' memoranda may not need the same confidentiality as those of the law clerks. Access to materials prepared by staff attorneys, perhaps along with the opportunity to file a response, might alleviate some of the concerns about the delegation of authority to the staff attorneys.

E. Judicial Productivity and Relation Among Appellate Procedures

Nonargument procedures are generally adopted when a court is in crisis and searching for a way to solve its problems. Both the Fifth and Ninth Circuits, for example, developed screening programs at a time when their caseloads and backlogs were growing rapidly. The goal was to dispose of more cases without an increase in resources. To achieve this goal, both courts recognized that less time would have to be spent on each case or on some category of cases. Thus, screening was adopted as a device for saving time.[164]

Advocates of screening have long argued that the procedure does, in fact, save time. The improvement in productivity in the Fifth

164. It is important to distinguish between elapsed time and judge time. The issue under discussion here is whether the time a judge spends on a case is decreased by his deciding the case on the briefs instead of by argument. If it is, the judge has more time to spend on other cases. (We report the elapsed time for argued and nonargued cases in table 6, in chapter 2.)

and Ninth Circuits after adoption of screening seems to provide evidence to support this assertion.[165] Critics, however, have argued that the twenty minutes not spent on the bench is too little savings to warrant the denial of counsel's opportunity to address the court. In response, those who support nonargument dispositions maintain that the procedure saves more than twenty minutes per case because judges realize substantial savings of time through the flexibility the procedure allows. For example, a judge can review a nonargument case and dictate a draft decision in one sitting, rather than having to pick up the case a second time to review it before convening and a third time to prepare the disposition. In addition, advocates of screening argue, if all cases were heard, the judges would have to convene more often, requiring substantially more travel time. Procedures for deciding cases on the briefs permit judges to stay home, disrupting their work less frequently and saving them the travel time that argument would require.

In this study, we did not attempt to measure the time saved by procedures for deciding cases without argument. We do, however, have some evidence that suggests why participants in screening programs feel that these procedures save judge time. When we asked the judges in the Fifth Circuit to describe the benefits of their screening procedure, every one said it saved time. Several judges noted the reduced travel time and the flexibility of scheduling permitted by screening, but most focused on the time savings provided by the assistance of the staff attorneys. Their memoranda guide the judges to the important parts of the record and provide material for the written decision. This assistance is similar to that provided by law clerks for argued cases; in fact, several judges specifically pointed out that the staff attorneys function as additional law clerks. Thus, the savings in time appears to derive substantially from the additional resources provided by the staff attorney's office. Were this resource not available, the judges would have to assign additional cases to their law clerks or would have to use their own time to review the cases.[166]

The judges of the Third Circuit provide a contrast to those of the Fifth Circuit. Despite the absence of staff attorney assistance, the Third Circuit has fewer pending cases and a slightly faster disposition time than the Fifth Circuit. Other evidence, however, suggests that the judges' allocation of their time is in fact affected by the

165. *See* chapter 3, section A, and chapter 4, section B.

166. Although the judges in the Sixth and Ninth Circuits did not comment as extensively on the savings in time resulting from their screening procedures, many of these judges also commented on the time saved by the staff attorneys' memoranda, which provide summaries of the facts and issues in the nonargument cases.

court's decision not to use staff attorneys for preparation of nonargument cases. The judges of the Third Circuit regard the preparation of a case for disposition as an important judicial function and do not want to delegate this duty to staff attorneys. Without staff attorney assistance, the judges in the Third Circuit do not receive any written materials summarizing the cases or providing relevant citations or arguments. Whereas the Fifth Circuit judges can turn to the statements of facts and citations provided by the staff attorneys in preparing the written disposition, the Third Circuit judges must formulate the written decision from the more voluminous briefs and records. As the judges themselves testified, the writing task is very time-consuming. Faced with both review of the case and preparation of the decision, the judges of the Third Circuit have chosen not to prepare a decision stating the reasons in nearly half the cases decided on the merits. It appears that without the assistance of staff attorneys, the judges do not have time for the longer forms of written decisions.

The evidence from these two courts suggests that the savings of time realized from screening programs derives largely from the additional resources provided by staff attorneys and not from the method (argument or no argument) used to decide a case. Given concerns about delegation of judicial functions to staff attorneys, some might ask, Why not disband these offices and give the judges more law clerks, who would be more accountable because of their presence in chambers? Our interview data suggest that few judges in courts in which staff attorneys participate in screening would welcome such a change. In the Fifth Circuit, for example, the judges said they value the expertise the staff attorney's office has developed in certain types of cases, particularly habeas corpus cases.

Some might also ask, Given some evidence that nonargument per se is not a critical factor in saving judge time, why not have argument in all cases? Many judges would answer that there are a significant number of cases in which the outcome is so clear that there is no need for argument; the twenty minutes on the bench, although not a great savings, simply should not be used in that way. Some would also answer that more argument would require changes in hearing schedules—changes that might, as in the Sixth Circuit, require the judges to stay at the court for two weeks at a time, handling a very large number of cases in a concentrated period of time.

This comparison of the Third and Fifth Circuits raises questions about the extent to which judges rely on staff attorney materials. Although this is an important issue, it cannot be separated from

the larger issue of the courts' efforts to weigh important values in the context of limited resources and growing caseload demands. Clearly, the Fifth Circuit judges do rely on staff attorneys in preparing the written disposition, and the Third Circuit judges do not. However, most parties who file their cases in the Fifth Circuit receive an explanation of the court's decision, whereas nearly half the parties who file in the Third Circuit do not.

Other courts that are generous in providing the opportunity for oral argument are forced to trade off other values. For example, the Second Circuit Court of Appeals permits oral argument in all cases in which the attorneys request it. It is able to do this, however, because relatively few cases reach a decision on the merits and because it receives more assistance from senior judges and visiting judges than do any other federal courts of appeals.[167] The appellate procedure of the Second Circuit is exemplary in many ways; the court has developed a number of innovative procedures and has consistently decided appeals soon after they are filed. However, other courts may prefer to decide more cases on the merits, rather than on procedural grounds, and may not have available the resources of senior judges.

The judges' responses to the interview question concerning the steps to be taken in response to a sharp increase in the caseload provides an indication of the difficulty that arises in attempting to balance these competing interests. There exists no consensus across the courts, and little agreement within the four courts, concerning the steps that should be taken if there is a sharp increase in case filings. The judges of all four courts are divided concerning the advisability of deciding a greater percentage of cases without oral argument. Few of the other options were enthusiastically endorsed. If these responses are characteristic of opinions in the other federal courts of appeals, no consensus exists concerning the steps to take if the courts of appeals continue to encounter sharp increases in case filings.

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167. In statistical year (SY) 1986, more than one-half of the appeals of the Second Circuit were disposed of on procedural grounds without the judges having to reach a decision on the merits of the case, a rate that is significantly higher than that of any other court of appeals. In SY 1986, the active judges of the Second Circuit filled only 72 percent of the panel positions in appeals decided on the merits—the lowest percentage of all the courts of appeals, but a substantial increase from the 60 percent of SY 1982. Resident senior circuit judges filled 20 percent of the panel positions in SY 1986, the highest proportion of all the courts of appeals; and visiting judges filled 7 percent of the panel positions, slightly less than the average proportion. Administrative Office of the United States Courts, Federal Court Management Statistics (1986).

APPENDIX A
Statistical Appendix

STATISTICAL APPENDIX

In writing this report, we have relied heavily on data collected by the Administrative Office of the United States Courts as part of its routine functioning as the federal courts' administrative unit. Each filed and terminated case is reported to the Administrative Office. Reported on the form filed for each case are a number of characteristics of the case, including the nature of the case (e.g., contracts or civil rights), the stage at which the case was terminated (e.g., settlement or argument), the method used to decide the case (e.g., argument or submission on briefs), and the filing, submission, argument, and final judgment dates.

Federal court data are collected for statistical, rather than calendar, years; the statistical year (SY) runs from July 1 to June 30. Each year the cumulative data are reported in two principal publications: the Federal Court Management Statistics and the Annual Report of the Director of the Administrative Office. The data we cite at the beginning of chapters 3 through 6 were taken from these two publications. In addition, the Administrative Office compiles a case-by-case set of data on computer tape. We relied on these more detailed data for our analysis of the characteristics of cases submitted on the briefs (chapter 2).

The statistical reporting system of the Administrative Office attempts to capture a complex set of activities. Since the reporting system is constantly evolving, care must be taken in interpreting the numbers. This is especially true for recent federal appellate court data, because in July 1984, significant changes were made in the way some of the data are reported. Thus, in some instances in which the data appear to suggest that a change in court practice over time has occurred, the apparent change may be due simply to new ways of reporting the cases. The purpose of this appendix is twofold: (1) to define the measures of court activity used in this report and (2) to alert the reader to data reporting changes that may affect the interpretation of data we cite.

Measures of Court Activity

The tables and discussion in this report are based on standard measures of court activity. In this section we define several of these measures.

1. **Terminations on the merits.** About half the appeals filed in the federal courts are decided on the merits. The other half, generally referred to as procedural terminations, end before the judges reach the merits; included in this category are cases terminated on the basis of jurisdictional defects, voluntary or summary dismissal, settlement, default, or denial of a certificate of probable cause. In this report, we are concerned only with the cases decided on the merits. According to the Administrative Office, "For an appeal to be considered 'terminated on the merits,' the disposition must have been before a full panel and based on the merits of the case after oral argument, submission of Rule 28, F.R.A.P. briefs, or some other written form such as informal briefs."*

2. **Informal briefs.** An informal brief typically is a one- or two-page form sent by the court to pro se litigants. The litigants' answers to the questions on the form provide the written information (or "brief") used by the court in deciding the case.

3. **Lead and single cases.** Cases arising from the same action or raising the same issues may be joined or consolidated for consideration before the same panel. If, say, five cases are consolidated and argued as one case, the burden on the court is quite different than it is if all five cases are handled separately. Therefore, we have used only single cases and the lead case of a set of joined or consolidated cases to construct the tables in this report.

4. **Terminations per active judge.** This is one of the most meaningful measures of court productivity because the participations by senior and visiting judges, as well as vacancies, are excluded from the calculation. In other words, only the work of the court's active judges is counted.

The Significance of Data Reporting Changes Adopted in 1984

On July 1, 1984 (the beginning of SY 1985), a number of data reporting changes took effect. One of these changes, the method for counting cases decided on informal briefs, is significant for this

*Administrative Office of the United States Courts, Federal Court Management Statistics 29 (1986).

report. Prior to July 1, 1984, some courts did not count as decisions on the merits the cases decided on informal briefs—even when the decision was based on the merits of the case. After that date, the courts must count these cases as merits terminations, a change that obviously increases the number of these terminations.

The change, however, is not uniform across the caseload. Informal briefs are generally used by pro se, not counseled, litigants. In addition, pro se cases, which more often than not are filed by incarcerated litigants, are usually decided without oral argument. Thus, the data reporting changes are likely to have disproportionately increased the number of cases decided without argument. Therefore, some of the increase in the nonargument rate between SY 1984 and SY 1986 is very likely due to reporting changes rather than to other causes, such as changes in the courts' practices. We make this point cautiously, since we have no measure of the change that has occurred. The clerk of one of the courts in this study estimated that the reporting change accounts for about 10 percent of the increase in the nonargument rate.

We should note, too, that the new reporting requirement has had a greater affect on some courts than on others. Two of the four courts in this report were affected by the change: the Courts of Appeals for the Fifth and Sixth Circuits. Both reported cases based on informal briefs as procedural terminations prior to SY 1985.

APPENDIX B
Interview Protocols

INTERVIEW PROTOCOLS

This appendix presents the protocols used in the interviews with judges of the four courts of appeals. The interviews themselves were less structured than the interview protocols suggest. Generally, the judges showed considerable interest in the topic and tended to direct the conversation toward those issues that were of greatest concern to them. Although an effort was made to address every issue presented in the following questionnaires, the order and form of the questions varied from interview to interview. Some of the interviews were interrupted by the judge's other obligations, leaving some of the issues unexplored.

Judge Interview Protocol
Court of Appeals for the Third Circuit

Introductory Question

The Court of Appeals for the Third Circuit was chosen for our study because it *does not* have a screening program. Instead, the judges (rather than staff attorneys) select the cases that will not be argued. Will you comment on what you see as the advantages or disadvantages of this procedure?

Topic 1: Identification of Cases Suitable for Disposition Without Argument

1. The staff attorneys' role is limited primarily to the pro se cases, for which they usually prepare an appendix rather than write a bench memorandum.
   A. Is this amount of preparation adequate for these cases?
   B. If you need additional research on a pro se case, do you then have your law clerk prepare a bench memo? Or do you request a memo from the staff attorney?
2. What procedure is used to select the cases to be decided without argument?
   A. What material do you rely on to make the nonargument decision?
   B. What is the role of the weights assigned by the legal coordinator?
   C. Do your law clerks play a role in the selection of the nonargument cases?
3. What characteristics of a case are important in determining that the case can be decided without argument?
4. How does an attorney's request for oral argument or waiver of argument influence your determination of the need for argument?

Topic 2: Panel Practice and Interaction in Nonargument Cases

5. Do the panel members interact before the conference regarding disposition of a case submitted on the briefs?

Topic 3: Proper Role of Nonargument Dispositions

6. Have your views regarding the role of oral argument changed since you came on the bench?

7. Increases in case filings have forced courts to make difficult choices. If the number of submitted cases per judge should increase by an additional 20 percent, the court would have to make some additional choices about how to use its resources.

   A. Which one of the following options would be the most desirable response to a caseload increase?

   ___Hear oral argument in fewer cases.

   ___Publish fewer opinions.

   ___Prepare more dispositions without reasons stated.

   ___Encourage settlement by preappeal conferences conducted by nonjudicial personnel.

   ___Rely more heavily on visiting judges.

   ___Permit the time to disposition to increase.

   ___Other _____.

   B. Which of these options would be the least desirable response?

8. As courts find it necessary to move to time-saving procedures, such as argument in fewer cases, judgment orders, and limited publication, they risk becoming less visible to the bar. What other means are available to assure the bar that cases are receiving full consideration?

Judge Interview Protocol
Court of Appeals for the Fifth Circuit

Introductory Question

The Court of Appeals for the Fifth Circuit was chosen for our study of screening procedures because the court uses *staff attorneys* and *special panels* to screen cases for nonargument disposition. What are the advantages of this practice? What are the disadvantages?

Topic 1: Role of the Staff Attorneys in Identification and Preparation of Nonargument Cases

1. Cases arrive in your chambers by two routes: from the staff attorneys or directly from the clerk's office. The cases reviewed by staff attorneys may be recommended for either argument or submission on the briefs. The cases from the clerk's office have no recommendation.
   A. What steps do you use to review and decide each of these categories of cases?
   B. What material do you use for the review? Are both the recommendation and the memorandum from the staff attorneys helpful?
   C. Do the law clerks assist in the review of cases for nonargument disposition?
   D. Do you ever ask staff attorneys for additional work on a case?
2. When you do not follow the staff's recommendation or you disagree with their analysis of the case, what is the basis for the difference of opinion? How frequently do you disagree?
3. Recently the court adopted a procedure whereby individual staff attorneys are paired with specific screening panels. Has this procedure been helpful?
4. Staff attorneys currently review a portion of the caseload, write memos, write recommendations, and prepare motions.
   A. Which of these staff functions do you consider most important?
   B. If there were excess capacity in the staff attorney's office, which additional tasks would you like that office to perform?

Topic 2: Identification of Cases Suitable for Disposition Without Argument

5. What characteristics of a case do you look at in deciding whether the case should or should not be argued?

6. How does an attorney's waiver of argument or request for argument affect your decision?

Topic 3: Panel Practice and Communication in Nonargument Cases

7. If you disagree with the disposition prepared by the initiating judge, do you communicate with that judge? Is disagreement frequent?

8. Staff attorneys may recommend that a case not be argued, but that it be placed on the argument calendar for conferencing. Is this a useful practice?

Topic 4: Proper Role of Nonargument Dispositions

9. Have your views regarding the role of oral argument changed during the time you've been on the bench?

10. Increases in case filings force courts to make difficult choices. If the number of submitted cases per judge were to increase by 20 percent, this court would have to decide how to handle that larger caseload.

    A. Which of the following options would be the most desirable response to the caseload increase?

    ___Hear oral argument in fewer cases.

    ___Publish fewer dispositions.

    ___Prepare more dispositions without reasons stated.

    ___Encourage settlement by preappeal conferences conducted by nonjudicial personnel.

    ___Rely more heavily on visiting judges.

    ___Permit the time to disposition to increase.

    ___Other _____.

    B. Which option would be the least desirable response?

11. With adoption of submission on briefs and decisions without reasons stated, courts risk becoming less visible to the bar. What means are available to assure the bar that their cases are receiving full consideration?

Judge Interview Protocol
Court of Appeals for the Sixth Circuit

Introductory Question

The Court of Appeals for the Sixth Circuit was chosen because of its use of staff and *hearing panels* to review and decide the nonargument cases. What are the benefits of this procedure?

Topic 1: Role of Staff Attorneys in Identification and Preparation of Nonargument Cases

1. When you receive an argument calendar, two of the cases on the calendar will have been designated by the staff attorneys for nonargument disposition. These two cases will have bench memoranda and proposed dispositions attached.
   A. What steps do you use to review and decide the cases recommended for nonargument?
   B. Do your law clerks assist in this review?
   C. What material do you use for this review? Are both the bench memoranda and the proposed dispositions helpful?
   D. Do you ever send cases back to the staff attorneys for additional work?
   E. What steps do you follow if you think a case recommended for nonargument should be argued?
2. In addition to the nonargument cases, you receive cases for argument. What steps do you follow if you think a case set for argument does not need to be argued?
3. Staff bench memoranda and proposed dispositions:
   A. When you find the staff bench memorandum is not helpful, what is the basis for the inadequacy of the memo? How frequently does this occur?
   B. When you disagree with the proposed disposition, what is the basis for the difference of opinion? How frequently do you disagree?
4. Staff attorneys currently review all cases for jurisdictional defects and for argument/nonargument designation; they write memos for the nonargument cases; and they prepare draft dispositions for these cases.
   A. Which of these tasks do you consider the most important?

B. If there were excess capacity in the staff attorney's office, which additional tasks would you request?

Topic 2: Characteristics of Cases Suitable for Disposition Without Argument

5. What characteristics of a case do you look at in deciding whether the case should or should not be argued?

6. How does an attorney's waiver of argument or request for oral argument influence your determination of the need for argument?

Topic 3: Panel Practice and Communication in Nonargument Cases

7. To what extent do you communicate with other panel members, prior to convening, about the disposition of cases submitted on the briefs?

8. Is the writing assignment for the nonargument cases made at the conference, as in the argument cases?

9. Several years ago the court stopped using special panels and began submitting nonargument cases to the hearing panels.
   A. What were the disadvantages of special panels?
   B. What are the advantages of convening to decide the nonargument cases?

Topic 4: Proper Role of Nonargument Dispositions

10. The Sixth Circuit Court of Appeals has established a practice of setting only two nonargument cases per panel per argument day.
    A. Why has the court adopted this practice of setting two nonargument cases per panel?
    B. Could more cases be decided without argument than are currently disposed of this way?

11. Have your views regarding the role of oral argument changed since you became a judge?

12. Increases in case filings force courts to make difficult choices about how to use their resources. If there were a 20 percent increase in case filings, the court would have to decide how to handle its larger caseload.

A. Which of the following options would be the most desirable response to a caseload increase?

___ Hear oral argument in fewer cases.

___ Publish fewer dispositions.

___ Prepare more dispositions without reasons stated.

___ Encourage settlement by preappeal conferences conducted by nonjudicial personnel.

___ Rely more heavily on visiting judges.

___ Permit the time to disposition to increase.

___ Other _____.

B. Which would be the least desirable response?

13. With adoption of submission on briefs and decisions without reasons stated, courts risk becoming less visible to the bar. What other means are available to assure the bar that their cases are receiving full consideration?

Judge Interview Protocol
Court of Appeals for the Ninth Circuit

Introductory Question

The Court of Appeals for the Ninth Circuit was chosen for our study of screening procedures because the court uses *staff attorneys* and *special panels* to screen cases for nonargument disposition. What are the advantages of this practice? What are the disadvantages?

Topic 1: Role of the Staff Attorneys in Identification and Preparation of Nonargument Cases

1. Cases arrive in your chambers after screening by the staff attorneys with a recommendation for submission on the briefs.
   A. What steps do you take in reviewing and deciding these cases?
   B. What material do you consider in reviewing these cases?
   C. Do your law clerks assist in the review of cases for nonargument disposition?
   D. Do you ever ask staff attorneys for additional work on a case?
2. When you do not follow the staff recommendation that a case can be decided without argument, what is the basis for the difference of opinion? How frequently do you disagree?
3. Recently some cases that would normally be decided by the screening panels have been placed before the argument panels as space became available. Do such cases receive more attention from the judges when placed on the argument calendar?
4. Certain kinds of cases are more likely to be placed on the screening calendar—civil rights appeals, Social Security appeals, prisoner appeals. Should a procedure that permits disposition of such cases without argument raise concern?

Topic 2: Identification of Cases Suitable for Disposition Without Argument

5. What characteristics of a case do you look at in deciding whether the case should or should not be argued?

6. How does an attorney's objection to disposition without argument affect your decision?

Topic 3: Panel Practice and Communication in Nonargument Cases

7. Have you served on both serial and parallel panels? Which do you prefer? Why?

8. To what extent do the members of parallel panels communicate during the consideration of a screening case? When does this communication take place? How is this accomplished? Does the benefit of conferring outweigh the difficulty of scheduling a conference?

9. To what extent do the members of serial panels communicate during the consideration of a screening case? When does this communication take place? How is this accomplished? Does the ease with which cases are decided outweigh the wasted effort that results when a case is rejected after a disposition is drafted?

Topic 4: Proper Role of Nonargument Dispositions

10. Have your views regarding the role of oral argument changed during the time you've been on the bench?

11. Increases in case filings force courts to make difficult choices. If the number of submitted cases per judge were to increase by 20 percent, this court would have to decide how to handle that larger caseload.

    A. Which of the following options would be the most desirable response to the caseload increase?

    ___Hear oral argument in fewer cases.

    ___Publish fewer dispositions.

    ___Prepare more dispositions without reasons stated.

    ___Encourage settlement by preappeal conferences conducted by nonjudicial personnel.

    ___Rely more heavily on visiting judges.

    ___Permit the time to disposition to increase.

    ___Other _____.

    B. Which option would be the least desirable response?

12. With adoption of submission on briefs and decisions without reasons stated, courts risk becoming less visible to the bar. What means are available to assure the bar that their cases are receiving full consideration?

APPENDIX C
Profile of Courts' Resources and Caseloads

PROFILE OF COURTS' RESOURCES AND CASELOADS

In the tables in this appendix we present data for statistical year (SY) 1984 and SY 1986. The SY 1984 figures are presented to permit comparisons between the overall court caseload measurements and data we collected from the courts' files, such as the number of cases prepared by staff attorneys. The SY 1986 figures are presented because they are the most recent measures of court activity.

When looking at the differences between SY 1984 and SY 1986, the reader should keep in mind the data reporting changes that took effect in July 1984 (see appendix A). The reader should also keep in mind that from SY 1984 to SY 1986, twenty-four judgeships were added to the appellate courts.* These additional judgeships affect the per judgeship figures. The four appellate courts in this study each received additional judgeships: the Third Circuit received two; the Fifth Circuit, two; the Sixth Circuit, four; and the Ninth Circuit, five.

*Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

TABLE 36
Number of Appeals Filed and Terminated
(SY 1984 and SY 1986)

Court	SY 1984 Number	SY 1984 Per Judgeship	SY 1984 Court's Rank[a]	SY 1986 Number	SY 1986 Per Judgeship	SY 1986 Court's Rank[a]
Appeals Filed						
Third Circuit	2,506	251	6	2,468	206	7
Fifth Circuit	3,612	258	5	3,837	240	4
Sixth Circuit	2,995	272	2	3,618	241	3
Ninth Circuit	5,204	226	10	5,291	189	11
Average, all federal appellate courts		239			220	
Range		122–291			156–327	
Appeals Terminated						
Third Circuit	2,555	256	4	2,506	209	7
Fifth Circuit	3,551	254	6	3,904	244	3
Sixth Circuit	2,755	250	7	3,339	223	5
Ninth Circuit	4,754	207	10	5,112	183	10
Average, all federal appellate courts		236			217	
Range		138–300			137–350	

SOURCE: Administrative Office of the United States Courts, Federal Court Management Statistics (1984 & 1986).

[a]For appeals filed, court's rank is the court's ranking on the number of appeals filed per judgeship. First rank = the highest number of appeals filed per judgeship. For appeals terminated, court's rank is the court's ranking on the number of appeals terminated per judgeship. First rank = the highest number of appeals terminated per judgeship.

TABLE 37
Appeals Terminated on the Merits
(SY 1984 and SY 1986)

Court	SY 1984 %	SY 1984 Court's Rank[a]	SY 1986 %	SY 1986 Court's Rank[a]
Appeals Terminated on the Merits				
Third Circuit	57.9	2	54.5	11
Fifth Circuit	55.1	5	62.2	4
Sixth Circuit	60.0	1	57.4	7
Ninth Circuit	49.4	9	56.1	9
Average, all federal appellate courts	52.6		58.8	
Range	41.1–60.0		44.7–71.5	
Appeals Terminated Without Argument				
Third Circuit	60.5	1	55.8	2
Fifth Circuit	52.1	4	63.6	1
Sixth Circuit	30.2	8	40.3	7
Ninth Circuit	31.0	7	37.0	8
Average, all federal appellate courts	41.4[b]		45.6	
Range	5.5–60.5		18.9–63.6	
Non-Pro Se Cases Terminated Without Argument[c]				
Third Circuit	50.0	1		
Fifth Circuit	49.0	2		
Sixth Circuit	13.0	9		
Ninth Circuit	19.0	6		
Range	11.1–50.0			

SOURCES: Administrative Office of the United States Courts, 1984 and 1986 Annual Report[s] of the Director; Administration Office of the United States Courts, Federal Court Management Statistics (1984 & 1986); and court files (for pro se data).

NOTE: See appendix A for an explanation of data reporting changes that may affect the interpretation of the SY 1986 data.

[a]For appeals terminated on the merits, first rank = highest percentage terminated on the merits. For appeals terminated without argument, first rank = highest percentage terminated without argument. The ranking in SY 1984 for appeals terminated without argument does not include the Tenth Circuit Court of Appeals, whose figures do not include pro se cases and therefore are not comparable to those of the other appellate courts. For non-pro se cases terminated without argument, first rank = highest percentage terminated without argument. The ranking for non-pro se cases does not include the Eleventh and D.C. Circuits because data for the pro se cases were not available from these two courts.

[b]The average does not include the Tenth Circuit Court of Appeals. See footnote a.

[c]The figures reported in this section of the table are based on data we collected from the courts. We did not collect data for SY 1986.

TABLE 38
Number of Terminations on the Merits Per Active Judge
(SY 1984 and SY 1986)

Court	SY 1984 Number per Active Judge	SY 1984 Court's Rank[a]	SY 1986 Number per Active Judge	SY 1986 Court's Rank[a]
Third Circuit	309	5	274	9
Fifth Circuit	358	2	414	2
Sixth Circuit	294	6	331	6
Ninth Circuit	236	10	261	10
Average, all federal appellate courts	276		330	
Range	111–364		186–524	

SOURCE: Administrative Office of the United States Courts, Federal Court Management Statistics (1984 & 1986).

[a]First rank = highest number of terminations on the merits per active judge.

TABLE 39
Case Participations by Visiting Judges
(SY 1984 and SY 1986)

Court	SY 1984 %[a]	SY 1984 Court's Rank[b]	SY 1986 %[a]	SY 1986 Court's Rank[b]
Third Circuit	17.0	11	9.9	7
Fifth Circuit	2.8	1	1.8	1
Sixth Circuit	12.6	9	11.8	10
Ninth Circuit	11.0	7	8.7	6
Average, all federal appellate courts	10.1		8.5	
Range	2.8–23.3		1.8–13.8	

SOURCE: Administrative Office of the United States Courts, Federal Court Management Statistics (1984 & 1986).

[a]As a percentage of all case participations.

[b]First rank = fewest participations by visitors.

TABLE 40
Median Time from Filing Notice of Appeal to Disposition (SY 1984 and SY 1986)

Court	SY 1984		SY 1986	
	Months	Court's Rank[a]	Months	Court's Rank[a]
Third Circuit	8.8	3	8.6	4
Fifth Circuit	9.9	5	9.1	5
Sixth Circuit	13.3	11	13.0	10
Ninth Circuit	12.1	9	13.6	11
Average, all federal appellate courts	10.8		10.3	
Range	6.4–16.3		6.0–14.5	

SOURCE: Administrative Office of the United States Courts, Federal Court Management Statistics (1984 & 1986).

[a]First rank = lowest disposition time.

TABLE 41
Number of Pending Cases per Judgeship (SY 1984 and SY 1986)

Court	SY 1984		SY 1986	
	Number per Judgeship	Court's Rank[a]	Number per Judgeship	Court's Rank[a]
Third Circuit	146	5	108	2
Fifth Circuit	176	7	152	6
Sixth Circuit	245	12	198	10
Ninth Circuit	191	8	191	9
Average, all federal appellate courts	173		162	
Range	87–245		63–219	

SOURCE: Administrative Office of the United States Courts, Federal Court Management Statistics (1984 & 1986).

[a]First rank = fewest pending cases per judgeship.

TABLE 42
Profile of Staff Attorneys' Offices

Circuit	Number of Staff Attorneys[a]	Term in Office	Specialization Within Office	Primary Duties	Material Prepared for Nonargument Cases	Number of Cases Prepared per Month[b]
Third	8	2 years	No	Pro se cases: jurisdictional review, motions, preparation of appendixes Recently: screening of Social Security cases	NA	15–20
Fifth	15	Approximately half: 2 years Approximately half: indefinite	No	For about half the caseload: motions, screening for nonargument Most jurisdictional review	Recommendation concerning argument Memorandum	50–60
Sixth	15[c]	Indefinite	Some	Jurisdictional review, motions, screening for nonargument[d]	Memorandum Proposed disposition	35
Ninth	30[c]	2 years[e]	Yes	All cases: jurisdictional review, inventory/issues identification, motions, screening for nonargument	Memorandum	30–40

NOTE: NA = not applicable. Data are from the time of our interviews, summer and fall 1985.

[a]These figures include the directors and assistant directors, as well as the regular staff attorneys. The figure for the Third Circuit does not include the two staff attorneys who are on loan to other offices in the court.

[b]For the Third Circuit, this is the number of pro se cases for which appendixes are prepared for the judges' consideration. For the other three courts, this is the number of nonargument cases for which memoranda are prepared for the judges' consideration.

[c]In the Sixth and Ninth Circuits, in which there is some specialization of duties in the staff attorney's office, about half the staff attorneys were involved in screening cases for nonargument disposition.

[d]Recently restricted primarily to pro se and prisoner cases.

[e]Staff attorneys assigned to the motions divisions serve longer terms.

TABLE 43
Number of Judges, Types of Panels, and Hearing Schedules

Circuit	Number of Active Judges	Number of Places of Residence	Types of Panels	Number of Sitting Days per Judge	Number of Cases Heard per Day	Special Panels Convene?	Seniors Handle Nonargument Cases?	Visitors Handle Nonargument Cases?
Third	12	5	Argument Pro Se Motions	28	4–5	NA	Yes	Yes[a]
Fifth	15	8	Argument Screening	28	5	No	No	No
Sixth	15	12	Argument	48	5[b]	NA	Yes	Yes
Ninth	28	10	Argument Screening Motions	45	5	No	Yes	No

NOTE: NA = not applicable. Data are from the time of our interviews, spring 1986.

[a]Visitors do not handle pro se cases.

[b]Three (recently changed from two) nonargument cases are also decided by the argument panels each argument day.

APPENDIX D
Screening Calendar of the Court of Appeals for the Ninth Circuit, March 1987

SCREENING CALENDAR OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT, March 1987

This appendix presents descriptions of fifty-eight cases submitted on the screening calendar of the Ninth Circuit Court of Appeals in March of 1987. These brief descriptions were prepared by staff attorneys to permit easy identification of the general nature of the cases. These descriptions do not necessarily address the reasons the case was placed on the screening calendar. Some of the cases listed here were rejected by the screening panels and returned to the clerk for placement on the oral argument calendar. This fact is noted where it was known. Not all rejected cases are noted, since some cases were under consideration when this appendix was compiled and may have been rejected at some later time.

1. _____ appeals his conviction of conspiracy to import marijuana (21 U.S.C. § 963), conspiracy to possess marijuana with intent to distribute (21 U.S.C. § 846), distribution of marijuana (21 U.S.C. § 841(a)(1)), and three telephone counts (21 U.S.C. § 843(b)).

   ISSUE: Did the conduct of undercover DEA agent _____ in the various transactions constitute outrageous governmental conduct?

2. _____ appeals pro se and in forma pauperis the district court's dismissal of his civil rights complaint. _____ brought suit, apparently alleging that Sgt. _____ tampered with his mail. The district court recommended that the complaint be dismissed under 28 U.S.C. § 1915(d), with leave to amend. _____ filed a motion for reconsideration, essentially repeating what he had presented in the first complaint. The court construed _____'s motion as an amended complaint, but could not find any new factual allegations sufficient to state a claim. Hence, the court dismissed the complaint.

ISSUE: Did the court err in dismissing _____'s complaint as frivolous under 28 U.S.C. § 1915(d)?

NOTE: This court issued an unpublished disposition on Sept. 30, 1986 in No. ____, affirming the dismissal of a similar complaint by _____. That appeal may be res judicata.

3. _____ appeals her conviction for conspiracy to distribute and distribution of cocaine. _____ contends that the "taste test" testimony of the government informant should not have been admitted to prove that the substance was cocaine. Defense counsel filed an *Andera* brief.

ISSUE: Was the "taste test" testimony admissible to establish the identity of a controlled substance?

4. _____ appeals pro se his conviction by a jury of willful failure to file income tax returns.

ISSUES: 1. Was the district court required to exclude all government witnesses and exhibits under local rules 10 and 11?

2. Was _____'s prosecution outside the statute of limitations?

3. Did the district court lack jurisdiction?

5. _____ appeals pro se and in forma pauperis the district court's summary dismissal of his motion pursuant to 28 U.S.C. § 2255. _____ was convicted upon a plea of guilty under 18 U.S.C. §§ 1153, 113(f) for assault in Indian County resulting in serious bodily injury. _____'s actions had previously been the subject of a tribal court prosecution in which _____ was sentenced to six months imprisonment and a $300 fine.

ISSUES: 1. Did _____'s conviction in federal court violate the prohibition on double jeopardy because the Sioux nation was not sovereign by reason of its defeat in the 1862 uprising and because its tribal court therefore operated as an agency created by the federal government?

2. Does the entry of a guilty plea in tribal court without knowledge that it may be used in a later federal proceeding render involuntary a plea of guilty in federal court?

3. Was tribal counsel's failure to inform _____ of the consequences of a guilty plea ineffective assistance?

4. Was it error for either the district court not to order sua sponte a competency hearing or for counsel not to move for such a hearing in light of _____'s criminal record?

5. Was _____ denied effective assistance of counsel by counsel's failure to investigate the possibility of an insanity defense?

NOTE: _____ has requested oral argument.

6. _____ appeals the district court's dismissal of his fourth amended complaint with prejudice for failure to state a claim on which relief can be granted. Alleging that his microcomputer lacked the capabilities promised by manufacturer, _____ Corp., _____ sued _____ for fraud, breach of the implied covenant of good faith, and intentional misrepresentation.

ISSUES: 1. Does _____'s complaint allege sufficient facts for a fraud claim?

2. Can _____ Corp. recover its costs and attorney's fees on appeal on the ground of frivolous appeal?

NOTE: _____ has appeared pro se both in the proceedings below and on appeal.

7. _____ appeals pro se from the district court's grant of summary judgment to _____ Inc. _____ brought this action contending that _____ had brought a previous action alleging the same thing in state court; that case was dismissed with prejudice because _____ failed to comply with a court order to arbitrate the matter.

The district court dismissed _____'s action, stating that the state judgment was res judicata. Judgment was entered on June 5, 1985. (According to the district court clerk's office, the motion was mailed to _____ on July 5, 1985. See Fed. R. Civ. P. 59.) The court apparently treated the new trial motion as a Rule 60 motion and denied it on August 6, 1985. _____ then filed a notice of appeal on August 6, 1985. The notice of appeal is untimely as to the underlying judgment but is timely as to the post-judgment motion.

ISSUE: Did the district court err in denying _____'s motion for a new trial?

NOTE: _____ fails to brief this issue. (He is probably unaware of the fact that the notice is untimely as to the underlying judgment.) _____ also fails to address the

issue directly; it simply argues that the appeal is untimely and that in any case the district court's decision as to the underlying judgment is correct. Therefore, additional briefing may be necessary.

8. _____ appeals his conviction following a jury trial of twelve counts of mail fraud (18 U.S.C. § 1341), and two counts of causing delivery of fraudulent matter (18 U.S.C. § 1341). At trial, it was alleged that _____ and his wife, _____, engaged in a scheme in which businesses were sent phony invoices seeking payment for advertising in nonexistent publications.

   ISSUE: Did the district court err in denying _____'s motion for substitution of counsel?

9. _____ was denied disability benefits and supplemental Social Security income when the administrative law judge found that she was not disabled. The appeals council affirmed and the district court granted summary judgment to the Secretary.

   ISSUE: Did the administrative law judge err when he decided that _____ was not prevented from performing her past relevant work and therefore denied her benefits even though the work he referred to was not substantial gainful activity?

10. _____, a member of the _____ Church, appeals pro se the dismissal of her action against the FCC. _____ sued the FCC, its commissioners, employees, investigators, and ALJs, and four former employees of the Church, claiming that the FCC's investigation of the Church violated her first amendment rights. The district court dismissed the federal defendants when _____ failed to timely respond to a motion to dismiss. The other defendants were subsequently granted summary judgment.

    ISSUE: Did the district court abuse its discretion in dismissing _____'s complaint as to the federal defendants after she failed to file a timely response to the FCC's motion to dismiss?

11. _____ appeals pro se from a denial of his motion to correct an illegal sentence pursuant to Fed. R. Crim. P. 35(a). He maintains that the 15-year sentence he received for violating 21 U.S.C. §§ 846 and 841(a)(1) (conspiring to manufacture and

distribute methamphetamine) was in excess of the maximum penalty authorized for the offense at the time of commission.

ISSUE: Was _____ properly sentenced to an increased prison term pursuant to legislation that changed the maximum penalties and that was enacted during the existence of the conspiracy to which _____ pleaded guilty?

12. _____ appeals his conviction and sentence of being a felon in possession of a firearm. The trial court did not give the defendant an opportunity to make his presentencing statement. The government agrees that the case should be remanded for resentencing.

ISSUES: 1. Did the trial court commit procedural error at the sentencing that requires a remand for resentencing or a reversal of conviction?

2. Did the district court err in denying _____ leave to withdraw his guilty plea?

13. _____, a Black male, was fired from his position as a mail carrier. He filed a complaint with the Merit System Protection Board, alleging that he was fired because of his race. The MSPB upheld his discharge on the ground that he had made fraudulent official written statements. _____ appealed to the district court. The defendants moved for summary judgment. _____ filed his opposition to the summary judgment and made a motion for leave to permit late response to requests for admissions. After a hearing, the court denied _____'s motion for leave to permit late response to requests for admissions, and granted the defendants' motion for summary judgment. _____ contends that the district court abused its discretion in granting the motion for summary judgment because he was entitled to trial de novo, the record does not support summary judgment, and because he should have been granted leave to file late responses to requests for admissions.

ISSUES: 1. Did the district court err in granting summary judgment in favor of the U.S. Postal Service?

2. Did the district court err in denying _____'s motion for leave to file late response to requests for admissions?

14. _____ appeals the district court's order dismissing his action under the Privacy Act and the Freedom of Information

Act. _____ sought IRS expungement of all references to him in IRS records as a "tax protester." He also sought damages, attorney fees, and expenses. The district court held that 5 U.S.C. § 552a(e)(7), which prohibits agencies from maintaining records describing how an individual exercises first amendment rights, did not prohibit use of the term "tax protester."

ISSUES: 1. Did the district court err by dismissing the action without allowing _____ to discover all documents the IRS code could be required to produce under either Act noted above?

2. Did the district court err by denying attorney fees to _____, a pro se litigant?

NOTE: The government notes the following related cases: England v. Commissioner, No. 85-2071; Foss v. Commissioner, No. 85-2543.

15. _____, a California corporation, sued _____ (____), a New York corporation, on a breach of contract and warranty claim. _____ filed its complaint in the Northern District of California on October 31, 1985, and summons was served on ____ by Rule 4e on December 16, 1985. When ____ failed to respond, default was entered against it on January 17, 1986. On February 28, 1986, ____ moved to set aside the default judgment, set aside entry of default, and vacate the default judgment under Rules 55(c) and 60(b) on grounds of mistake, inadvertence, and excusable neglect. The court denied this motion as well as ____'s motion to amend the default judgment.

ISSUE: Did the district court properly deny the motion to vacate a default judgment pursuant to Fed. R. Civ. P. 60(b)?

16. _____ appeals pro se the denial of his motion to vacate judgment. _____'s civil rights action was dismissed sua sponte by the district court for failure to state a claim. _____ brought the action for declaratory judgment after his forester's license was revoked by the State of California.

ISSUE: Did the district court abuse its discretion in refusing to set aside its order dismissing _____'s action?

NOTE: This appeal is timely only as to the denial of _____'s post-judgment motion to set aside the dismissal, which was filed more than ten days after judgment.

See Fed. R. App. P. 4(a)(4); Fed. R. Civ. P. 59; Fed. R. Civ. P. 60(b).

17. _____ appeals pro se the denial of his motion for a remand and the grant of summary judgment for the government in this tax protestor case. _____, a _____ employee, challenged the withholding of his federal income taxes pursuant to the IRS's directive to _____. _____ originally brought this case in Santa Clara County Superior Court; it was later removed to federal court.

ISSUES: 1. Did the lower court rule prematurely on _____'s motion to remand by finding that _____'s complaint raised an issue of federal jurisdiction?

2. Did the district court err in denying _____'s motion for a remand and in granting _____'s motion for summary judgment without granting _____ an evidentiary hearing, and if so, was that denial the result of a conspiracy with _____?

a. May an employer withhold taxes?

b. Does the Anti-Injunction Act bar this suit?

c. Was the sixteenth amendment properly ratified?

3. Should attorneys' fees and double costs be granted?

18. _____ appeals the district court's § 1915(d) dismissal of his class action *Bivens* claim and class action petition for habeas relief. _____ contends that he and his fellow prisoners at the _____ Correctional Center in _____ were deprived of property without due process of law when _____ officials confiscated, pursuant to prison regulations, all radios having an AC electrical cord. In _____'s particular case, the prison authorities confiscated a GE portable "Super Radio II" which _____ had purchased at the commissary of another federal prison, and had brought to _____.

ISSUE: Did the district court err in dismissing the class actions under 28 U.S.C. § 1915(d)?

19. The defendants appeal from the denial of their motion for attorney's fees under the Equal Access to Justice Act. The 28 U.S.C. § 2412 case was settled and dismissed. Following the dismissal of the case, the defendants moved for an award of attorney's fees to punish the government for pursuing a case not substantially justified by law.

ISSUE: Did the trial court abuse its discretion in declining to award EAJA attorney's fees?

20. _____ and _____ appeal from the district court's order dismissing their claims against the Internal Revenue Service (IRS) and two IRS officials. The complaint, which sought a writ of mandamus directing the IRS to grant an administrative appeals conference, was dismissed by the district court without discussion of the underlying grounds.

ISSUES: 1. Did the district court err in dismissing _____'s complaint for lack of jurisdiction and for failure to state a claim upon which relief could be granted?
2. Should this court impose sanctions against _____ for bringing a frivolous appeal?

21. _____ appeals the dismissal of his "complaint in the nature of mandamus," which he brought to compel the IRS to grant him an administrative hearing pertaining to his tax deficiency for 1981. _____ claims that the basis for the improper assessment against him is the sixteenth amendment and that that amendment is a fraud.

ISSUES: 1. Did the district court properly dismiss _____'s complaint?
2. Should sanctions be imposed upon appeal?

NOTE: The _____s appear to have two other appeals pending before the court. See Docket Nos. ____ and ____.

NOTE: The court recently decided a similar sixteenth amendment claim. See United States v. Stahl, 792 F.2d 1438 (9th Cir. 1986). If *Stahl* is controlling, this appeal is meritless.

22. _____ appeals the district court's denial of his rule 60 motion to reconsider its judgment dismissing his 42 U.S.C. § 1983 action for failure to state a claim. _____ was convicted in a California court of first degree murder and sentenced to death. Pursuant to state law, the trial court prepared a copy of the trial court records and proceedings, and mailed them to _____'s court-appointed appellate attorney. The record was not mailed to _____ or his trial attorney. _____ filed a section 1983 complaint alleging that the failure to provide copies of the trial record to _____ and his trial attorney violated due process. The district court dismissed for failure to state a claim. Judgment was entered on 11/25/85. On 2/5/86, _____ filed a Rule 60(b) motion

to reconsider. The district court denied this motion on 4/11/86. _____ filed a motion of appeal on 5/1/86.

ISSUE: Did the district court err in denying _____'s Rule 60(b) motion to reconsider the district court's dismissal of his section 1983 action for failure to state a claim?

23. _____ appeals the district court's dismissal of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. _____ contends that his plea was involuntary because his plea agreement erroneously stated that the maximum sentence was twenty years when in actuality it was fifteen. _____ also contends that his counsel rendered ineffective assistance of counsel by advising him to plead guilty to a maximum penalty for repeat dangerous offenders when his prior convictions were not dangerous felonies. The district court granted the state's motion to dismiss.

ISSUES: 1. Did the district court err in determining that _____'s plea was not involuntary because a twenty-year sentence was within the range of sentence provided by Ariz. Rev. Stat. § 13-604(D)?

2. Did the district court err in determining that _____'s counsel was not ineffective because it concluded that a state court determination, after an evidentiary hearing, that _____ was provided effective assistance was entitled to a presumption of correctness?

24. _____ appeals pro se two district court judgments dismissing three actions in district court. _____ filed suit in district court against his dental assistant, the United States, and many dental societies alleging a conspiracy by the defendants to interfere with his business and violate his constitutional and civil rights.

ISSUES: 1. Did the district court err by dismissing _____'s actions for failure to state a claim?

2. Did the court err by dismissing _____'s actions for lack of subject matter jurisdiction?

25. _____ appeals pro se the district court's dismissal of his age discrimination action for failure to prosecute because he did not appear at two status conferences.

ISSUES: 1. Did the district court err in dismissing _____'s age discrimination action for failure to prosecute and for failure to comply with an order of the court?

2. Did the district judge err in denying _____'s motion to disqualify her?

3. Did the court err in denying _____'s motion for an interlocutory award of damages?

26. _____ appeals the district court's grant of summary judgment in favor of the defendants, and dismissal of the action. _____ filed the complaint pursuant to 42 U.S.C. § 1983 alleging that _____ and the other defendants were inflicting cruel and unusual punishment by failing to provide necessary medical treatment. The district court dismissed the action under Fed. R. Civ. P. 37 after _____ refused to allow the defendants to take his deposition.

ISSUES: 1. Did the district court err in refusing to appoint counsel for _____?

2. Did the district court err in failing to order _____ and the defendants to produce _____'s address?

3. Did the district court err in dismissing the action for _____'s failure to comply with the court's order requiring him to give a deposition?

NOTE: This case was submitted to a screening panel. The first judge rejected the case from the screening calendar, upweighted it, and reassigned it to the oral argument calendar. A bench memorandum will be sent to the oral argument panel.

27. _____ appeals the district court's order denying his section 2254 habeas petition. The district court denied the petition after ordering the State of California to show cause why the petition should not be granted.

A jury convicted _____ of first degree murder and unlawful possession of a firearm by a felon. The court sentenced _____ to 25 years to life for the murder, and two years for the unlawful possession. The convictions were affirmed on appeal.

_____ alleges that his counsel was ineffective for failing to request a continuance to compel the attendance of a subpoenaed witness, _____. _____ also maintains that his felony murder conviction, which was obtained after the underlying robbery charge had been dismissed before trial, deprived him of due process. _____ also asserts that his sentence is disproportionate to his crime and therefore violates the eighth amendment.

ISSUES: 1. Did the district court err in finding that _____ was not denied effective assistance of counsel at his state trial?

2. Did the district court err in finding that _____ was not denied due process by the state's failure to prosecute the underlying felony in support of his felony murder conviction?

3. Did the district court err in finding that _____ was not subjected to cruel and unusual punishment?

28. _____, an Arizona state prisoner, appeals the District of Arizona's dismissal of his 42 U.S.C. § 1983 action against the City of _____, the _____ Police Department, and _____ city officials. _____ asserts that the city unconstitutionally destroyed three partial latent fingerprint lifts that should have been disclosed during his trial. The District of Arizona determined that the action constituted a challenge to the constitutionality of _____'s conviction and that the claim would have to be brought in a habeas corpus petition. Because _____'s appeal was still pending before the state court, the district court dismissed for failure to exhaust state remedies.

ISSUES: 1. May a prisoner who has not exhausted state judicial remedies maintain an action for damages under 42 U.S.C. § 1983 on grounds that the conviction for which he was confined was unconstitutionally obtained?

2. If so, did destruction of the fingerprint lifts violate _____'s constitutional rights as set forth in Brady v. Maryland, 373 U.S. 83 (1963)?

29. _____ appeals pro se from the adverse summary judgment against him. _____ (___) received an IRS notice of levy on wages of _____, then an employee of ___. It complied with the levy. ___ subsequently terminated _____'s employment. _____ filed this suit alleging that ___ had violated his constitutional rights by withholding wages pursuant to the notice of levy.

ISSUES: 1. Did the district court err in finding that no genuine issues of material fact exist concerning whether ___ violated _____'s civil rights by complying with the IRS levy?

2. Did the district court improperly deny _____ discovery?

NOTE: The other issues posed by _____ do not appear to be properly before this court.

30. _____ appeals the district court's dismissal of his habeas corpus petition as moot. _____ was arrested for failure to file tax returns. The magistrate initially denied bail and ordered that _____ be detained pending trial. _____ filed the habeas petition in district court, alleging that his arrest was illegal and that he was illegally denied bail. The magistrate eventually set bail at $50,000. _____ posted bail and was released. The district court dismissed the habeas petition as moot.

    ISSUE: Did the district court err in dismissing the case as moot?

    NOTE: _____ has now been convicted, but has not yet been incarcerated. It is not clear whether he has posted bail pending appeal. The docket number for the appeal in this court is _____.

31. _____ appeals pro se the district court's dismissal of his 42 U.S.C. § 1983 action for failure to prosecute. _____, an Oregon state prisoner, contends his civil rights were violated because prison officials denied him access to the prison law library, and harassed him for filing grievances against the prison staff.

    ISSUE: Did the district court err in dismissing for failure to prosecute?

32. _____ appeals pro se the denial of his motion to proceed in forma pauperis by the district court. _____'s complaint alleges fraud and RICO violations against _____. _____ originally sued _____ and several corporations controlled by him for attempting to defraud the bank. _____ failed to respond and a default judgment was entered against him. _____ then responded by filing suit. The district court denied _____'s motion for forma pauperis status because his complaint is an attempt to relitigate matters already decided against him.

    ISSUE: Did the district court err in denying _____'s motion to proceed in forma pauperis?

33. _____ appeals pro se and in forma pauperis the district court's grant of summary judgment for _____ in his 42 U.S.C. § 1983 action.

_____ maintains that his personal privacy rights and other constitutional rights were violated when members of the opposite gender were present during his use of the shower and toilet, and during strip searches while he was an inmate at the _____ State Penitentiary.

ISSUES: 1. Did the district court err in granting a summary judgment?

2. Did the district court err in denying _____'s motion to join additional defendants?

3. Did the district court err in refusing to grant injunctive relief to prevent a proposed transfer?

NOTE: Some similar issues were addressed by this court in Gummett v. Rushen, 779 F.2d 491 (9th Cir. 1986).

34. _____ appeals the denial of his petition for a writ of habeas corpus. _____ was arrested for robbery. At the time of his arrest he made some statements suggesting that he knew about the robbery, and that he wanted to make a deal with the police. He explicitly noted his desire to see a lawyer after making these statements.

ISSUE: Did the district court err in dismissing the writ because the statements admitted at trial were uttered before the explicit call for legal representation?

35. _____ appeals the partial summary judgment entered against him by the district court. _____ had sued _____, claiming age discrimination in _____'s forced early retirement of _____, and the district court held that his cause of action accrued on the date that _____ was terminated, instead of the date he last was paid by _____, and then found out that the complaint was filed outside the period of limitations.

ISSUE: Did the district court err in granting partial summary judgment based on the finding that _____'s complaint was not filed within the applicable period of limitations?

36. _____ appeals pro se and in forma pauperis the district court's dismissal of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. _____ pleaded guilty to negligent homicide after he collided with a motorcycle at a speed in excess of fifty miles an hour while he was driving with a blood alcohol content of 0.28. _____ contends: (1) that his counsel was ineffective; (2) that he was not informed

of the consequences of his plea because he was not told that his plea would classify him as a persistent felony offender, affecting his parole eligibility; (3) that his designation as a persistent felon was improper because the state had failed to provide three days' notice, as required by statute; and (4) that counsel's withdrawal, during the pendency of _____'s appeal to the Montana Supreme Court on the ground that the appeal was meritless, denied his effective assistance of counsel. The magistrate's findings and recommendations were adopted by the district court.

ISSUE: Did the district court err in dismissing _____'s petition?

37. _____ appeals the district court's grant of the Army's motion to dismiss. _____ sought review in district court of several personnel decisions made by the Army. The Army moved to dismiss for failure to state a claim and for lack of subject matter jurisdiction. _____ did not oppose the motion but made a motion to amend his complaint. The court granted the Army's motion.

ISSUE: Did the court err in granting the Army's unopposed motion to dismiss?

38. _____ was convicted by a jury for conspiracy, illegal transportation of aliens, and illegally harboring aliens.

ISSUES: 1. Did the court err in refusing to instruct the jury on the issue of mere presence at the scene of the crime?

2. Did the trial judge improperly enhance the sentence of the defendant for proceeding to trial rather than pleading guilty?

39. _____ appeals his conviction for importation of marijuana (21 U.S.C. §§ 952, 960, and 963), and for possession of marijuana with intent to distribute (21 U.S.C. § 841(a)(1)). _____ contended that he did not know that the car he drove across the border contained marijuana.

ISSUES: 1. Did the district court err in giving a *Jewell* instruction?

2. Did the district court err in failing to grant a mistrial due to prosecutorial misconduct during closing argument?

NOTE: This case was originally submitted to a screening panel. The panel rejected the case from the screening calendar, upweighted it, and reassigned it to the oral argument calendar. A staff bench memorandum will be sent to the oral argument panel.

40. _____ appeals his conviction of two counts of bank robbery (18 U.S.C. § 2113). _____ pleaded guilty to one count of bank robbery in state court, allegedly believing that one of the federal counts would not subsequently be charged. The federal indictment, though, did include the charge. In the meantime, _____'s chief alibi witness died, and _____ now claims that the preindictment delay prevented him from adequately putting forth this defense.

ISSUE: Did the district court err in denying _____'s motion to dismiss the indictment for preindictment delay where an alibi witness had died during the period of delay?

NOTE: This case was submitted to a screening panel. The panel rejected the case from the screening calendar, upweighted it, and reassigned it to the oral argument calendar. A bench memorandum will be sent to the oral argument panel.

41. _____ sued the Navy, alleging that he was fired as a result of racial discrimination. The district court found that he was fired as a direct result of an incident in which he hit his supervisor and verbally insulted her.

ISSUE: Did the district court clearly err in finding that _____ was not removed from his position as a civil employee of the U.S. Navy because of racial discrimination?

42. _____ appeals pro se the district court's dismissal of her civil rights action against the County of _____ and twenty county employees (_____ was named in the original, but not the amended, complaint, so it is unclear whether it remains a party).

After _____ was discharged from her civil service job with the County of _____, she brought the instant lawsuit. The district court dismissed for failure to state a claim and for failure to comply with the requirements of Fed. R. Civ. P. 8 to provide a short and plain statement of the claim.

ISSUES: 1. Did the district court properly rule that _____ had failed to state a section 1983 claim for deprivation of a property interest?

2. Did the district court improperly deny _____ the right to amend her complaint to include _____ Co. as defendant?

3. Is suit against defendant _____ barred by judicial immunity?

43. _____, a California state prisoner, appeals pro se the district court's dismissal of his petition for a writ of habeas corpus. He contends that the state trial court erred in denying his motion for a continuance to represent himself at trial, that the evidence presented at trial was insufficient to establish intent to commit burglary, and that the state trial court erroneously refused to disclose the "tip" information that led to his arrest.

ISSUES: 1. Did _____ request a continuance at trial to represent himself, and, if so, was the request timely?

2. Was the evidence of intent sufficient to convict _____ of burglary?

3. Did the state trial court err in prohibiting _____ from discovering evidence of the police "tip"?

44. _____ appeals the district court's order denying him leave to extend the time of filing a notice of appeal. _____ filed a civil rights complaint pro se against _____, a special investigator for the _____, and several physicians for allegedly conspiring to deprive him of his medical license. _____ moved to dismiss in August 1985. _____ procured counsel in December 1985. On January 24, 1986, the court signed defendant's motion to dismiss. _____ filed a motion to extend the time for filing notice of appeal on March 24, 1986, which the court denied.

ISSUE: Did the district court abuse its discretion in denying _____ leave to extend the time of filing a notice of appeal?

45. _____ appeals the district court's grant of summary judgment in favor of _____. _____ alleged that _____ destroyed his medical practice by stealing patients and that he was part of a conspiracy to drive _____ out of business. (_____'s license to practice medicine had

been revoked.) The district court granted summary judgment in favor of _____ on the grounds that the allegations of _____'s complaint were meritless and the statute of limitations had run.

ISSUE: Did the district court err in granting summary judgment for _____?

a. Had the applicable statute of limitations run as to _____'s claim against _____?

46. _____ and _____, husband and wife, appeal pro se from a determination of the Tax Court disallowing deductions and assessing penalties. The _____ allege that they made contributions to the _____ Church, Inc., a tax exempt entity. To substantiate their deductions, the _____ proffered individual and annual receipts, U.S. postal money-order receipts, and certified letters from _____, which specify the claimed contributed amounts.

ISSUES: 1. Did the Tax Court err in refusing to admit the receipts and letters on the ground that they constituted inadmissible hearsay?

2. Did the Tax Court err in denying the _____' request for a jury trial?

3. Did the Tax Court err in applying a presumption of correctness to the Commissioner's determinations?

47. The _____ appeal from the Tax Court finding of deficiencies in their 1980 and 1981 tax returns. Mr. _____ is the president and a minister of the _____ Church. His two sons were the secretary and treasurer of the church. The taxpayers transferred much of their property to that church. Those contributions were used to purchase, inter alia, a new car for one son, flight lessons for Mr. _____, travel expenses for both taxpayers, and eyeglasses.

ISSUES: 1. Did the Tax Court disallow the claimed deductions for charitable contributions made to the _____ Church?

2. Did the Tax Court correctly find the _____ liable for additions to their taxes due to negligence and disregard of rules and regulations?

3. Should this court impose sanctions on the _____ for taking a frivolous appeal?

48. _____ appeals the decision of the Tax Court upholding the Commissioner's determination of a deficiency in her 1981

income taxes. _____ was employed by _____ in 1981. She earned $12,568 but failed to file a federal income tax return.

ISSUES: 1. Did the Tax Court correctly hold that the funds received by _____ in exchange for services to _____ constitute taxable income?

2. Should sanctions be imposed on _____ for bringing a frivolous appeal?

49. _____ (the Union) expelled from the Union two members for crossing a picket line of another union to work for a neutral employer. The NLRB found that this violated section 8(b)(1)(A) of the _____ because it was designed to effectuate a secondary boycott. The Union maintains that it was only enforcing an internal rule.

ISSUE: Did the NLRB err in finding that the enforcement of an internal Union rule violated section 8(b)(1)(A)?

50. _____ seeks review of a BIA order dismissing an appeal from an immigration judge's (IJ's) denial of suspension of deportation based on a finding that neither _____ nor his United States citizen child would suffer extreme hardship if deported.

ISSUES: 1. Did the BIA fail to consider evidence submitted by _____ on the extent of economic hardship his deportation would cause him and his child?

2. Did the BIA's affirmance of the order of the IJ limiting testimony on the prospects of education for _____'s child deprive _____ of a fair hearing?

51. _____, proceeding pro se, appeal the Tax Court's dismissal of their petition for redetermination of tax deficiencies and the imposition of a $5,000 damage award. The _____ failed to properly file income tax returns for the years 1979–1982. The _____' petition was dismissed by the Tax Court for failure to stipulate to facts and documents under Rule 91(a), and damages were assessed accordingly.

ISSUES: 1. Did the Tax Court abuse its discretion in dismissing the _____' petition for failure to prosecute?

2. Did the Tax Court abuse its discretion in awarding damages under I.R.C. § 6673?

3. Should this court impose sanctions for maintaining a frivolous appeal?

52. _____ appeals the determination of the Tax Court upholding a tax deficiency imposed by the Commissioner. _____ had filed for the redetermination on the grounds that: (1) "property" he received for his labor did not constitute income; (2) filing of tax returns is voluntary, so he should not be subjected to failure-to-file penalties.

ISSUES: 1. Did the Tax Court err by upholding the Commissioner's determination of a tax deficiency?

a. Are wages income?

2. Did the Tax Court abuse its discretion by awarding damages pursuant to 26 U.S.C. § 6673?

3. Should sanctions be imposed upon appeal?

53. _____ petitions for review of the decision of the BIA denying him suspension of deportation. The BIA found that _____ did not establish that deportation to _____ would cause him "extreme hardship" under 8 U.S.C. § 1254(a)(1).

ISSUE: May this court review any of the issues _____ raises in his petition, where none of these issues were presented to the BIA and all concern whether errors were made at the deportation hearing?

54. _____ appeals a decision of the Tax Court finding that he owed deficiencies in his income taxes for 1980 and 1981 and awarding the United States $2,500 damages. _____ did not file income tax returns for 1980 and 1981, believing that his pension was not taxable income. _____ believed that his pension was a gift from the State of Alaska.

ISSUES: 1. Did _____ owe taxes on monies he received from his government pension?

2. Were _____'s rights to due process and a fair hearing denied when the Tax Court assessed him $2,500 damages?

55. _____ appeals the Commodity Futures Trading Commission's decision dismissing its appeal as untimely. At issue are the mailing to counsel of the initial decision by an Administrative Judge, _____' pro se status, and whether the delay in filing the late notice of appeal was the result of mistake or excusable neglect.

ISSUE: Should _____ have been allowed to file a late notice of appeal from the CFTC decision?

NOTE: Two recent cases concern timeliness of CFTC appeals. Clayton Brokerage Co. v. Bunzel, No. 85-7563 (argued Dec. 2, 1986 before Wallace, Sneed, & Schroeder, JJ); Chicago Commodities v. CFTC, No. 86-7096 (argued Jan. 8, 1987 before Wright, Farris, & Beezer, JJ). Those previous cases, however, appear to have been primarily concerned with what effect the failure to file a timely bond has on appellate jurisdiction.

56. _____ appeal pro se the Tax Court's decision to uphold the Commissioner's deficiency and additions-to-tax determinations. The _____ failed to file income tax returns for 1979 and 1980, and insisted that wages were not income for income tax purposes. The Commissioner determined deficiencies for the _____ and the _____ petitioned the Tax Court for the redetermination of the deficiencies. The Tax Court sustained the deficiencies and awarded $5,000 in damages to the United States.

ISSUES: 1. Did the Tax Court err in sustaining the deficiencies and additions to tax determined by the Commissioner?

2. Does the _____' appeal warrant sanctions?

57. _____ appeals the Tax Court's decision dismissing his petition for failure to state a claim and imposing $3,000 in sanctions.

ISSUES: 1. Is the sixteenth amendment valid?

2. Did the Tax Court abuse its discretion in imposing sanctions?

3. Should sanctions be imposed on appeal?

NOTE: See Cook v. Spillman, No. 86-1642 (9th Cir. Dec. 22, 1986) and United States v. Stahl, 792 F.2d 1438 (9th Cir. 1986). These cases concern the sixteenth amendment and sanctions issues raised here.

58. _____ seeks review of the BIA's affirmance of the Immigration Judge's (IJ) denial of _____'s motion to terminate deportation proceedings and suppress evidence. _____ alleges that he was illegally stopped and questioned by the Border Patrol because of his Mexican heritage.

ISSUE: Did the BIA err in upholding the IJ's denial of _____'s motion to terminate deportation proceedings and suppress statements leading to his arrest?

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