

ANALYSIS OF THE FIFTH CIRCUIT

A. Number of Authorized Judges and Current Request for Additional Judges

In 1978, the number of judges on the then Fifth Circuit was expanded from 15 to 26 judgeships. In 1981, that court was split into the “new” Fifth Circuit with 14 judges, and the Eleventh Circuit with 12 judges. The Fifth Circuit currently is allocated 17 judgeships. There is one vacancy which arose within the past year when an active judge took senior status. The majority of judges on the Fifth Circuit believe that the court is adequately staffed. However, Chief Judge Henry Politz has argued that the court’s increase in caseload warrants the creation of an additional judgeship and a request for an additional judgeship was forwarded to Congress. This request has since been withdrawn.

B. Discussion of Fifth Circuit Caseload

Case filings in the Fifth Circuit have increased in recent years. In 1987, 4291 appeals were filed. This figure increased from 5985 appeals in 1991 to 7592 appeals in 1996 and 7615 in 1997. Likewise, the number of participations per active judge in opinions increased from 434 in 1987, to 567 in 1991, to 679 in 1996.

While the Fifth Circuit’s caseload is heavy, Judge Patrick Higginbotham testified that 32% of the circuit’s appeals are dismissed, withdrawn or consolidated, and thus never proceed beyond the office of the clerk. In addition, he indicated that prisoner appeals have primarily accounted for the increase in filings, and often they can be quickly addressed by staff attorneys. In 1991, prisoner appeals accounted for 26% of the court’s filings, while 51% were civil and administrative appeals. In 1996, prisoner appeals increased to 40%, while civil and administrative appeals decreased to 38% of the docket. In 1997, prisoner appeals amounted to 43% of the court’s filings, with civil and administrative appeals decreasing to 37% of the Fifth Circuit’s caseload.

According to Judge Edith Jones, there has been a national decline in the proportion of more complex civil and administrative appeals, and this trend is evident in the Fifth Circuit. In fact, the number of civil and administrative appeals for the Fifth Circuit decreased from almost 3500 in 1993, to approximately 2800 in 1996. Judge Higginbotham agreed that the nature of the Fifth Circuit caseload, such as that of many other circuits, has experienced a decline in terms of complexity and substance. He indicated that during the period from 1993 to 1996, total civil appeals increased from about 6600 cases to 7153 through 1996. But if prisoner habeas corpus petitions are factored out, there actually has been a decline in the number of civil appeals from 4452 cases in 1993 to 2865 in 1996. While the court’s overall caseload has fluctuated, the Fifth Circuit’s median disposition time has remained constant at about 9 months.

Judge Jones also pointed out that the nature of the federal appellate docket has changed in recent years. According to Judge Jones, as the law on many federal statutory causes of action becomes more settled, the court is appropriately disposing of more litigation in summary fashion and, consequently, the number of cases requiring oral argument is decreasing.

Moreover, Judge Jones suggested that alternative dispute resolution significantly reduces the amount of difficult and time-consuming work for the Fifth Circuit because many cases are being settled through the work of an attorney-mediator. She believed that a substantial amount of commercial litigation is going directly to mediation, thereby entirely bypassing the federal judiciary.

C. Fifth Circuit Case Management

In many respects, the Fifth Circuit is a model of efficiency and innovation in terms of maximizing judicial resources. The Fifth Circuit handles over two-thirds of its fully briefed cases on the record and briefs, without oral argument. Each judge usually sits on 7 oral argument calendars per year. Each panel spans 4 days and usually includes 20 cases. As a result, most judges hear an average of 140 cases per year. Simple prisoner cases are first reviewed by staff attorneys, who draft extensive memoranda for a 3-judge panel. The panel has the option of sending a prisoner case to oral argument, non-argument disposition by argument calendar, or disposing of the case in chambers.

According to Judge Jones, the number of participations per active judge in opinions is another way to measure an increase in workload. In 1987, Fifth Circuit judges participated in approximately 434 opinions each. Over the past decade this number increased by 50%, resulting in an average participation in 679 cases per Fifth Circuit judge. The national average is still below 500 cases per judge.

Court Schedule and Recess Period: On average, each Fifth Circuit judge sits for approximately 40 days of oral argument sessions per year. The Fifth Circuit does not have a recess period, panels sit in all 12 months. However, judges are allowed a two-week period each year known as a “respite period” where they are not assigned new cases. Judges usually spend this relatively undisturbed time in chambers to complete written opinions or take vacation. If vacations are taken during respite periods, work assignments continue to flow to their chambers. Judges in the Fifth Circuit, with some exceptions, generally take about two weeks of vacation per year.

Use of Staff Attorneys: The Fifth Circuit on the average employs between 40 and 50 staff attorneys. Staff attorneys in the Fifth Circuit spend a majority of their time sorting prisoner appeals, and they do not decide cases.

Use of Visiting Judges: The Fifth Circuit does not make use of visiting judges because of concerns with maintaining consistency in circuit law and court collegiality.

Use of Senior Judges: There are currently 5 senior judges serving the Fifth Circuit.

Use of Mediation Programs: The Fifth Circuit employs an attorney-mediator who selects cases appropriate for settlement and encourages litigants to settle pending appeals.

D. Fifth Circuit Use of Other Court Efficiencies

All of the opinions of the Fifth Circuit are available electronically, and computer-based legal research is widely used within the circuit. The court is also in the process of studying all judiciary-occupied space in the circuit, and has identified and released unneeded space at the district and the court of appeals levels.

E. Conclusion

Based upon the hearing testimony and responses to the 1996 Judicial Questionnaire, there is a difference of opinion among the judges as to the need for additional judgeships for the Fifth Circuit. At the time of the Subcommittee hearing, the position of the majority of judges in the court, shared by both Judge Jones and Judge Higginbotham, was that the Fifth Circuit requires no additional judgeships. On the other hand, Judge Politz was of the opinion that the Fifth Circuit's increased workload suggests that an additional judgeship position should be approved. Nevertheless, Judge Politz acknowledged that his view is in the minority.

Since the Subcommittee's June 1997 hearing on the Fifth Circuit, one active judge has taken senior status, thus creating a judicial vacancy. It is too early to tell whether the switch from active to senior status of one judge will have a detrimental effect on the efficiency of the court. Consequently, at present, the vacancy which exists on the Fifth Circuit does not warrant immediate action by Congress. This assessment may be reevaluated if it becomes apparent that the vacancy has hurt judicial efficiency. In addition, based on the Fifth Circuit's current needs and caseload and in accordance with the position taken by the majority of the Fifth Circuit's judges, no additional judgeships should be created.

Shown below is statistical information reflecting first the total number of appeals, and then by subcategory of selected types. Second, we have shown the total number of procedural terminations by the clerk's office, and by the judges for Conference, Audean, Summary and Oral Argument Calendars. Where available, we have shown the subcategories by certain case types.

Year	1993	1994	1995	1996	1997 ¹ (year to date)
TOTAL APPEALS	6695	6205	6489	7153	6993
BY SELECTED TYPE					
§1983 CIV RTS	454	983	1228	1533	1628
§2254 HABEAS	374	571	633	825	793
§2255 HABEAS	142	206	276	379	441
DIR CRIM	1273	1193	1170	1551	1486
TOTAL CIVIL APPEALS	4452	3252	3182	2865	2645
TERMINATIONS:	6283	6396	6840	6679	6306 ²
CLERK'S OFFICE TOT.	1061 ³	1146	1345	1415	1929
BY SELECTED TYPE					
§1983 CIV RTS		210	317	354	672
§2254 HABEAS		74	89	117	126
§2255 HABEAS		59	54	84	107
DIR CRIM		161	218	214	226
OTHER		642	667	646	798
BY JUDGES					
CONFERENCE CAL TOT.	502	516	639	560	410
BY SELECTED TYPE					
§1983 CIV RTS		218	78	279	158
§2254 HABEAS		63	28	31	17
§2255 HABEAS		43	55	38	15
DIR CRIM		181	185	146	146
OTHER		11	293	66	74

¹ To show the most current data we have included information for court year 1997. Except as otherwise noted, the information includes data from July 1, 1996 through May 31, 1997.

² These figures are available only through April 30, 1997.

³ The 1993 figures are not available by individual casetypes.

AUGEAN CAL TOT.		357	331	363	466
BY SELECTED TYPE					
§1983		126	139	193	261
§2254		52	50	57	69
§2255		8	10	11	16
DIR CRIM		30	27	17	24
OTHER		141	105	85	96
SUMMARY CALENDAR	2110	1647	1763	1769	1593
ORAL ARG CAL	1076	1073	1158	995	852
OTHER ⁴	1534	1657	1604	1577	1056
REOPENED CASES	59	169	292	230	252

⁴ This includes such procedural terminations by judges as CPC/COA denied, cases dismissed, etc.

1. The Fifth Circuit has, throughout my twelve years on the appellate bench, experienced one of the highest -- and steadily growing -- levels of annual filings.

	New Appeals Filed		
	<u>1987</u> *	<u>1991</u> **	<u>1996</u> **
Fifth Circuit	4,291	5,952	7,546
Ninth Circuit		7,257	8,502
National Total		43,027	51,991

Number of participations per Active Judge in opinions has steadily increased:

	<u>1987</u>	<u>1991</u>	<u>1996</u>
Fifth Circuit	434	567	679
Ninth Circuit		356	433
U.S. Average		391	435

Percentage of appeals terminated on the merits by Active Judges:

	<u>1987</u>	<u>1991</u>	<u>1996</u>
Fifth Circuit	91.2	89.4	93.2
U.S. Average		81.5	80

More than in most federal appellate courts, the work of our court is accomplished by active judges.

Through much of the past decade, there have been only 13-14 active judges on the Fifth Circuit, although we were authorized 16 judges in 1984 and a 17th spot later. Only from about 1994-96 did the court function with a full complement of 17 active judges. As of January 1997, we are working -- with no noticeable hardship -- with 16 active judges.

2. The caseload of the Fifth Circuit has grown larger principally because of prisoner cases, § 1983 and habeas, and direct criminal appeals.

	<u>1987</u>	<u>1991</u>	<u>1996</u>
<u>Fifth Circuit</u>			
Prisoner %	28	26	40
Direct Criminal %	12	23	22
Other Civil & Admin. %	60	51	38
<u>U.S. Average</u>			
Prisoner %		25	33
Direct Criminal %		24	21
Other Civil & Admin %		51	46

* Source of 1987 data - Fifth Circuit Clerk's Office Reports.

** Source of 1991, 1996 data - 1996 Federal Court Management Statistics, Administrative Office of U.S. Courts.

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PERCENTAGES OF TERMINATIONS BY JUDGES

	1993	1994	1995	1996	1997 (thru May 31)
TOTAL JUDGE TERMINATIONS	5222	5250	5495	5264	4377
SUMMARY CALENDAR	40.4%	31.4%	32.1%	33.6%	36.4%
ORAL ARGUMENT	20.6%	20.4%	21.1%	18.9%	19.5%
CONFERENCE CALENDAR	9.6%	9.8%	11.6%	10.6%	9.4%
AUGEAN CALENDAR	*	6.8%	6.0%	6.9%	10.6%
OTHER	29.4%	31.6%	29.2%	30.0%	24.1%
TOTAL %	100.0%	100.0%	100.0%	100.0%	100.0%

PERCENTAGES OF TOTAL TERMINATIONS

	1993	1994	1995	1996	1997
TOTAL TERMINATIONS	6283	6396	6840	6679	6306
% OF JUDGE TERMINATIONS	83.1%	82.1%	80.3%	78.8%	69.4%
% OF CLERK'S TERMINATIONS	16.9%	17.9%	19.7%	21.2%	30.6%
TOTAL %	100.0%	100.0%	100.0%	100.0%	100.0%

*Augean total is not available for 1993.

U.S. COURT OF APPEALS - JUDICIAL CASELOAD PROFILE

FIFTH CIRCUIT

TWELVE MONTH PERIOD ENDED SEPTEMBER 30

		1996	1995	1994	1993	1992	1991		
A P P E A L S	Total	7,546	6,513	6,264	6,657	6,382	5,952		
	Prisoner	3,027	2,258	1,834	1,759	1,750	1,540		
	Other	2,623	2,533	2,578	3,066	2,828	2,795		
	Criminal	1,647	1,453	1,499	1,461	1,497	1,363		
	Administrative	249	269	353	371	307	254		
	Percent Change In Total Filings Current Year	Over Last Year... 15.9		Over Earlier Years... 20.5	13.4	18.2	26.8		
OVERALL CASELOAD STATISTICS	T E R M I N A T E D	Total	7,010	6,466	6,757	6,308	5,855	5,123	
		Consolidations & Cross Appeals	154	246	811	788	797	659	
	O N T H E M E R I T S	Procedural	2,818	2,414	2,288	2,161	2,038	1,772	
		D O N T H E M E R I T S	Total	4,038	3,806	3,658	3,359	3,020	2,692
			Prisoner	1,236	1,067	1,031	864	703	678
			Other	1,561	1,594	1,472	1,417	1,389	1,170
			Criminal	1,062	1,004	965	906	823	747
			Administrative	179	141	190	172	105	97
	Percent by Active Judges	93.2	91.3	90.3	89.7	88.1	89.4		
	PENDING APPEALS		4,858	4,505	4,432	4,900	4,524	3,989	
A C T I O N S P E R A C T I V E J U D G E	Terminations on the Merits	679	664	739	698	643	567		
	Procedural Terminations	145	129	143	159	151	122		
	W R I T T E N D E C I S I O N S	Total	223	216	247	231	212	185	
		Signed	52	53	55	63	67	62	
		Unsigned	166	155	186	163	138	118	
Without Comment		5	8	6	5	7	5		

¹Includes only judges active during the entire 12 month period.

U.S. COURT OF APPEALS - JUDICIAL CASELOAD PROFILE

FIFTH CIRCUIT		TWELVE MONTH PERIOD ENDED SEPTEMBER 30						1996 NUMERICAL STANDING		
		1996	1995	1994	1993	1992	1991			
		Number of Judgeships/ Number of Panels	17/5.7	17/5.7	17/5.7	17/5.7	17/5.7			
		Number of Sitting Senior Judges	5	6	6	8	8	9		
		Number of Vacant Judgeship Months	0.0	12.0	35.2	48.0	38.3	42.9		
ACTIONS PER PANEL	A P P E L E D	Total	1,332	1,149	1,105	1,175	1,126	1,050	[2]	
		Prisoner	534	398	324	310	309	272	[1]	
		Other	463	448	454	542	499	492	[3]	
		Criminal	291	256	265	258	264	241	[2]	
		Administrative	44	47	62	65	54	45	[4]	
ACTIONS PER PANEL	T E R M I N A T E D	Total	1,237	1,141	1,192	1,113	1,033	904	[2]	
		Consolidations & Cross Appeals	27	43	142	139	140	116	[11]	
		Procedural	497	426	404	381	360	313	[2]	
		ON THE M E R I T S	Total	713	672	646	593	533	475	[2]
			Prisoner	218	188	182	152	124	120	[2]
			Other	276	282	260	251	245	206	[2]
			Criminal	187	177	170	160	145	132	[2]
			Administrative	32	25	34	30	19	17	[3]
PENDING APPEALS		857	795	782	865	798	704	[2]		
MEDIAN TIME	Median Time From Filing Notice of Appeal To Disposition	8.8	9.3	9.7	9.4	9.4	8.9	[6]		
OTHER CASELOAD PER JUDGESHIP	Applications for Interlocutory Appeals	3	2	1	1	2	2	[1]		
	Pro Se Mandamus Petitions	14	11	11	7	10	11	[1]		
	Petitions for Rehearing	42	37	49	54	51	38	[6]		

