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The Perilous Focus Shift from the Rule of Law to Appellate Efficiency

ELIZABETH LEE THOMPSON

We should be wary of reforms that are attractive in terms of saving time but have unnoticed substantive effects. . . . The great end for which courts are created is not efficiency. It is justice.

Charles Alan Wright (1966)¹

Some of the most significant—and by some estimations the most controversial—transformations of the federal appellate system occurred in the late 1960s and 1970s. Many of the effects are still felt today, including the shift from oral argument for all appeals and the view that study and disposition of each appeal were exclusively judicial tasks, to the adoption of a tiered appellate system where the great majority of appeals receive no oral argument and instead receive summary disposition often involving staff attorneys. These transformative internal efficiency procedures have been the subject of intense debate. Proponents have praised their efficiency and ability to avoid a backlog while critics complain that the procedures created a bureaucratic appellate process—rather than one focused on justice—and instituted an inequitable multi-tiered process that particularly disadvantages novice and unrepresented litigants. This Article employs a previously unexplored approach to assess the merit of this transformed appellate structure. It argues that the foundation of circuit courts’ case management procedures—focusing on oral argument screening and reliance on staff attorneys—rests on an irrepliable and inapplicable model. The reforms arose in the unique context of a circuit defensively fending off a circuit split and that had shifted its focus to appellate efficiency instead of retaining its prior emphasis on rule-of-law enforcement.

This Article examines the formative first mover on these central efficiency reforms that had national ramifications: the Fifth Circuit, which was the largest and most docket-heavy circuit. The then six-state Fifth Circuit initiated screening of

¹ Charles Alan Wright, *The Federal Courts—A Century After Appomattox*, 52 A.B.A. J. 742, 747 (1966).

each appeal to determine if it merited oral argument, placing no-oral-argument cases on a summary calendar for disposition, issuing a one-word affirmance without an opinion, creating the position of staff attorney, and subsequently increasing reliance on staff attorneys for screening and dispositional tasks.

*This Article adds three previously unexamined or underexamined central facets to the debate concerning the use of these internal case processing procedures that continue to structure federal appeals: (1) recognizing the Fifth Circuit's influence as the initiator and selector of the reform structure adopted by circuit courts nationally, (2) contending that the Fifth Circuit structure of internal efficiency reforms was an incorrect model for replication based on its unique experience as the subject of an ongoing and divisive battle concerning a potential circuit split and fights over the court's judicial appointments, which shaped the internally focused, defensive, and narrow structure of its reforms, and (3) appreciating how Fifth Circuit judges' laudable approach and attitude towards procedural innovation in the 1950s to 1970s in civil rights jurisprudence to ensure compliance with *Brown v. Board of Education* informed how the Court shaped its internal efficiency reforms. The Article thus proposes a reconsideration of the foundational structure of the circuit courts' internal management processes, which relies on well-worn practices of broad screening and heavy use of staff attorneys. Instead, the Article encourages consideration of a broader array of reform possibilities with the primary aim of promoting justice instead of the lesser goal of judicial efficiency.*

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The Perilous Focus Shift from the Rule of Law to Appellate Efficiency

ELIZABETH LEE THOMPSON*

INTRODUCTION

An influential shift occurred in the federal appellate courts in the late 1960s and 1970s that ultimately had enormous consequences affecting the degree of attention each appeal receives and whether a litigant gets to voice arguments to the deciding appellate judges. Newly conceived internal operating procedures caused a transformation of the federal appellate system beginning in 1968.² No longer was the traditional appellate decisional process—which included oral argument for each appeal, judicial attention to the full record and briefing of each case, and a full judicial opinion written by the judge stating the reasoning and law governing the disposition—the governing paradigm.³ Instead, the federal circuit courts adopted the revolutionary approach that imparted different levels of attention to different appeals and often denied litigants oral argument or an explanation for the appellate decision.⁴ Central to this transformational approach were the screening of appeals to determine if they merited oral argument or could be decided on the briefs, the issuance of affirmances without an opinion, and the increased use of staff attorneys to screen for oral argument and otherwise further the disposition of appeals.⁵ These changes began in the old Fifth Circuit, which encompassed six Southern states stretching from Texas to Florida.⁶ The circuit had the largest caseload and was the first circuit to acutely suffer from the caseload crunch that grew in the 1960s.⁷ In a few

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² WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* xi-xii, 224–25 (2013) [hereinafter RICHMAN & REYNOLDS, *INJUSTICE ON APPEAL*].

³ *Id.* at 3; Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 NW. U.L. REV. 1137, 1148 (2022); Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913, 951 (1995) [hereinafter Baker, *Intramural Reforms*].

⁴ COMM'N ON STRUCTURAL ALTS. FOR THE FED. CTS. OF APPEALS, FINAL REPORT 21, 24–25 (1998).

⁵ *Id.* at 24–25.

⁶ HARVEY C. COUCH, *A HISTORY OF THE FIFTH CIRCUIT 1891–1981* 10, 192 (1984).

⁷ Charles R. Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, WASH. U. L.Q. 257, 264 (1973). See McAlister, *supra* note 3, at 1161 (citing Professor Haworth's

years, federal circuits nationally adopted the procedural reforms initiated by the Fifth Circuit as their case management procedures and continue to be governed by those structures over fifty years later.⁸

The transformative internal case management techniques proved controversial, engendering vigorous debates among judges, scholars, and attorneys since their adoption in the 1960s. Debates have included the legitimacy and strength of appellate justice in a “tiered” system that allocates judicial attention more extensively to certain appeals, and which studies showed results in particular detriment to traditionally disadvantaged groups with less complex cases and infrequent legal representation.⁹ Further, as a 1989 American Bar Association report warned, the procedures “have caused growing concern that the courts of appeals rely too heavily upon bureaucratic procedures instead of the attention of individual judges to individual cases.”¹⁰ While proponents of the reforms contend that the new practices saved the courts of appeals from implosion from an overwhelming caseload and accurately reflect that not every appeal merits oral argument,¹¹

accurate prediction that the Fifth Circuit’s new methodology would quickly become standard procedure in all appellate courts).

⁸ Haworth, *supra* note 7; McAlister, *supra* note 3.

⁹ Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 417 (2013) [hereinafter Levy, *Judicial Attention*] (recognizing that “[t]he largest category of [non-argued] cases is comprised of appeals brought by pro se litigants”); RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 2, at xiii (concluding that “the impact of the expediting devices is not class neutral” but rather “falls disproportionately on the poor and middle class, whose appeals are deemed less momentous than the ‘big’ cases brought by or against the government or major private economic actors”); McAlister, *supra* note 3, at 1143–44, 1164, 1175, 1187, 1195 (asserting that the “two-tiered” system results in an unintentional “disparate distribution of judicial time and attention” and “appears to impose a greater burden on our most vulnerable communities” both in terms of race and class); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1506, 1536 (2004) (concluding that pro se prison litigants, Social Security claimants, and civil rights appellants “are disproportionately ‘screened’ into the nonargument track” and such procedural practices compose “a barrier to frustrate the importunings of the least powerful of the citizens”); William M. Richman & William L. Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 U. MICH. J.L. REFORM 623, 642 (1988) (concluding that “[t]he appeal of right guaranteed by statute seems to guarantee only a review by staff working under judicial supervision,” while “[t]raditional appellate review is reserved for only a select portion of the entire caseload”). See also Merritt E. McAlister, *Bottom-Rung Appeals*, 91 FORDHAM L. REV. 1355, 1356 (2023) (describing the “two-tiered” federal appellate system in terms of “haves” and “have-nots”).

¹⁰ AM. BAR ASS’N STANDING COMM’N ON FED. JUD. IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH 8 (1989) [hereinafter AM. BAR ASS’N STANDING COMM’N]. See also COMM’N ON STRUCTURAL ALTS. FOR THE FED. CTS. OF APPEALS, *supra* note 4, at 24–25 (“The use of nonjudicial staff, nonargument decision-making procedures, summary orders or unelaborated dispositions, and other procedural accommodations to caseload volume have made the courts more efficient, but at some cost to the appearance of legitimacy of the appellate process, and at some risk to the quality of appellate justice.”).

¹¹ COMM’N ON STRUCTURAL ALTS. FOR THE FED. CTS. OF APPEALS, *supra* note 4, at 21 (concluding that both “adoption of differentiated decisional processes” and “the employment of central staff attorneys” have “proven to be—for part of the docket—more efficient ways to deliver appellate justice regardless of docket pressures”); Levy, *Judicial Attention*, *supra* note 9, at 404–05, 440 (arguing that “there are valid reasons for much of the current case management structure given the scarcity faced by the courts,” and that alternatives to relieve the courts of docket pressures—through “an increase in the

critics charge that the court of appeals' operations "ration justice on appeal" and result in "injustice on appeal."¹² Studies have included examination of court statistics to determine the procedures' effect on productivity,¹³ the specific case management practices of each circuit court,¹⁴ the impact of the procedures on the perception of the courts' legitimacy and role in rendering justice to all litigants,¹⁵ and whether the courts should stop employing these procedures given their effects and the recently lessened caseload pressures facing federal courts.¹⁶

This Article adds three distinctive and previously unexplored facets to the debate concerning the use of adopted internal efficiency procedures. First, unlike previous studies, this Article focuses on and recognizes the influence of the Fifth Circuit—including Chief Judge John Brown and other Fifth Circuit judges—in the particularized substance and approach of the reforms and how the structure shaped by the Fifth Circuit spread to circuits nationwide. Second, and crucially, the Article contends that the Fifth Circuit structure of internal efficiency reforms was an incorrect model for

number of judges or a decrease in the number of cases"—lack "political traction"); Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1491 (1995) ("defend[ing] the intramural measures that have been adopted insofar as they expedite decisions on routine cases").

¹² THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS ix (1994) [hereinafter BAKER, RATIONING JUSTICE]; Thomas E. Baker, *Proposed Intramural Reforms: What the U.S. Courts of Appeals Might Do to Help Themselves*, 25 ST. MARY'S L.J. 1321, 1358 n.142 (1994) (concluding that the devices imposed on the judicial system "more bureaucracy, less accountability, and a dramatic reduction in the visibility of justice"); RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 2, at xi–xii, 224–25 (referring to the new case management reforms as resulting in "a metamorphosis—actually, a deterioration—of one of the nation's great legal institutions, the United States Circuit Courts of Appeals"). Although unpublished opinions form the subject of other scholarship concerning summary procedures, this Article does not concentrate on unpublished opinions, as that practice was one central expediting device that did not originate in the Fifth Circuit. Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 322–24 (2011) [hereinafter Levy, *Mechanics of Federal Appeals*] (tracing origins of procedural devices, pointing to Fifth Circuit for screening and staff attorneys, and noting actions by the Judicial Conference of the United States spurred the practice of not publishing decisions). *See also* Pether, *supra* note 9, at 1483–84 (arguing unpublished opinions undermine the rule of law). Moreover, summary affirmances under Fifth Circuit Rule 21 and other circuits' rules (the other central device discussed here) were a controversial reform in the 1960s and 1970s and reflect the reform model instituted by the Fifth Circuit, but their use has been on the decline. *See* McAlister, *supra* note 3, at 1161–62 (discussing summary affirmances as on the decline); JOE S. CECIL & DONNA STIENSTRA, FED. JUD. CTR., DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS 17 (1987) (noting, in 1987, that the Fifth and Third Circuits had "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"). Nevertheless, as argued below, the employment of summary affirmances during the 1960s and 1970s formed an integral part of the structure of the internal efficiency procedures whose structure and approach remains the governing paradigm for federal court case management today.

¹³ Will Shafroth, *Survey of the United States Courts of Appeals*, 42 F.R.D. 243, 254 (1967).

¹⁴ Levy, *Mechanics of Federal Appeals*, *supra* note 12, at 323.

¹⁵ RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 2, at xiii; McAlister, *supra* note 3, at 1143–44, 1164, 1175, 1187, 1195; Pether, *supra* note 9, at 1506; BAKER, RATIONING JUSTICE, *supra* note 12, at ix.

¹⁶ McAlister, *supra* note 3, at 1170–71, 1142 (concluding that the current "two-tier" procedural system—"one of selective distribution of appellate resources—is no longer a needed response to a crisis," for the appellate caseload has fallen since its peak in 2005, and yet the use of the devices has increased).

nationwide replication. The specific way that the Fifth Circuit structured its reforms—as internally created and carried out, not requiring congressional approval, a change in jurisdiction, or additional judges, and reflecting that the Fifth Circuit was in control and operating effectively—was historically unique and shaped by ongoing, divisive disputes concerning Congress possibly splitting the giant circuit. As a result, present debates concerning whether and to what extent circuit courts of appeals should continue to operate with these procedures should also incorporate this fundamental point: the structure of the reforms circuits adopted nationally were not created in the context of considering what was the best reform regime to serve justice while alleviating docket pressure. A reassessment of the structure of case management procedures—still largely structured around the Fifth Circuit-initiated devices—is in order.

Third, and equally central, this Article recognizes how the attitude and approach to procedural innovations that the heroic Fifth Circuit judges employed to surmount Southerners' delay and obstruction of *Brown v. Board of Education's* mandate for desegregation informed the structure of the internal efficiency reforms. Significantly, and arguably detrimentally, this procedural cross-pollination displays the perils of shifting from employing procedures creatively to enforce the rule of law and justice to focusing on innovative procedures to protect an institution and judges' workloads. The irony of this shift was that the efficiency reforms ended up denying full appellate consideration primarily to the class of disadvantaged litigants that the same Fifth Circuit judges had courageously labored to ensure had their arguments fully heard and their rights fully vindicated in civil rights cases.

This study establishes these arguments in five parts. Part I concerns three developments that set the stage for the paradigm-shifting internal efficiency procedures adopted by the federal courts of appeals beginning in the late 1960s and the distinctive position of the Fifth Circuit. It explains (1) the Fifth Circuit's role as the nation's premier civil rights tribunal beginning in the 1950s, (2) how the large influx of cases on federal dockets beginning in the 1960s affected the circuit courts and their traditional decision-making approach of broadly hearing oral argument and of judges' full and usually sole contributions to the disposition, and (3) the threat of a circuit split for the large and unwieldy Fifth Circuit. Of particular import is how the Fifth Circuit's heroic role in civil rights cases makes the court's later response to the docket crisis appear counter-intuitive, as it restricted full appellate rights to disadvantaged litigants.

Part II presents the broad scope of reform proposals considered in the late 1960s and early 1970s as possible responses to alleviate the docket crisis. These included reform ideas to increase the number of federal judges; restructure the panel size or structure of judicial appointment, service, and retirement; narrow federal jurisdiction through means such as imposing a

jurisdictional amount and limiting diversity jurisdiction; and impose internal procedural reforms such as greater use of per curiam opinions, visiting and senior judges, and secretarial and law clerk help. Of significance is the breadth of reform choices available—and that the structure chosen by the Fifth Circuit (with national ramifications) was indeed a choice.

Part III presents the three internal efficiency procedures initiated by the Fifth Circuit. It also establishes how these procedures spread nationally to other circuits and have consequently shaped the structure of federal court case management procedures since the 1960s. The Fifth Circuit introduced: (1) screening procedures to determine if a case merited oral argument and an associated summary calendar for cases deemed non-oral-argument cases, (2) affirmances without opinions, which allowed for affirmance of a judgment or order with a one word “affirmed” or “enforced” without an explanation, and (3) the creation of staff attorney positions and subsequent expansion of staff attorney responsibilities in screening and work related to the dispositional aspects of appeals. Each of these reforms proved controversial, and their operations and effects were hotly debated by judges, scholars, and attorneys—but, ultimately, the Fifth Circuit structure came to govern circuit courts’ consideration of appeals nationally.

Part IV argues that the Fifth Circuit’s reform procedures were ill-suited for adoption by the other circuits because its reform structure reflected the unique circumstances of the Fifth Circuit—including the recent and repeated addition of judges and, significantly, the ongoing threat of Congress splitting the circuit. This Part explores three aspects that contributed to the Fifth Circuit’s unique posture and resulting reform structure: (1) the Fifth Circuit judges who structured the reforms—including the incongruous intersection of the judges’ championing civil rights and their institution of procedural efficiency reforms that disproportionately negatively affected disadvantaged litigants, (2) how the continuing circuit split debate encircling the Fifth Circuit and the circuit’s recent judicial appointments shaped the influential Fifth Circuit reforms, and (3) how the Fifth Circuit’s use of innovative procedures in civil rights cases influenced the substance of its internal efficiency reforms.

Lastly, Part V builds off these conclusions to propose a reconsideration of the foundation of the federal courts of appeals’ internal efficiency procedures. Practices such as screening large portions of the appellate docket and reliance on staff attorneys for screening and often dispositional tasks continue to dominate the treatment of federal appeals—which in large part sprung from the Fifth Circuit’s choices in the 1960s and 1970s. The Article advocates reconceiving what constitutes the most effective internal appellate processes from a clean slate without giving preference to well-entrenched screening, summary calendar, and staff attorney practices—as these sprung from the Fifth Circuit’s circumscribed idea of what reforms were possible in its unique position fending off a circuit split and as the largest and recently

expanded court. This Part also cautions against what the Fifth Circuit shifted into: focusing on appellate efficiency to serve the institution or judges' benefit instead of its prior concentrated focus on rule-of-law enforcement. In sum, the Article warns against exalting the goal of efficiency over justice.

I. CIVIL RIGHTS HEROES, THE DOCKET CRISIS, AND A THREATENED CIRCUIT SPLIT

On December 6, 1979—within days of relinquishing his twelve-year position as Chief Judge of the Fifth Circuit Court of Appeals—the Honorable John R. Brown was awarded a Doctor of Law degree from the Tulane University School of Law.¹⁷ The President of the Tulane Senate Committee on Honors described Chief Judge John Brown as the leader of a court that has been “recognized nationally as an exceptional court” that had “great[] impact on the lives of the people” in the Gulf South “from commerce to civil rights.”¹⁸ Tulane President Francis Sheldon Hackney praised Brown as a jurist, administrator, and scholar.¹⁹ Hackney toasted Chief Judge Brown as a jurist who, when dealing with various subjects, including civil rights, “gave sensitive consideration to human factors” in his statutory and constitutional interpretation.²⁰ Hackney further expanded,

You have not looked at law merely as law, but you have examined the impact of law on the individual. In determining the scope of the fourteenth amendment and the Civil Rights Acts, an area in which the Fifth Circuit has played a critical role, you were one of the leaders who adopted a broad interpretation. In your opinions you have striven to uphold human rights and dignity.²¹

President Hackney also recognized that, in addition to Brown’s “judicial accomplishments,” he presided over the largest federal circuit court both in number of judges and geographical area.²² Judge Brown’s leadership and skill had enabled the court “to overcome logistical and administrative problems and to function both efficiently and effectively.”²³

Yet, notwithstanding President Hackney’s praise of Chief Judge Brown’s role in civil rights jurisprudence, Brown’s acceptance remarks did not mention civil rights (other than in passing about his predecessor), much less give “sensitive consideration to human factors” involved in

¹⁷ Board of Student Editors of the Tulane University School of Law, *Proceedings of the Degree Ceremony: The Honorable John R. Brown, Doctor of Laws*, 54 TUL. L. REV. 263, 263–64 (1979).

¹⁸ *Id.* at 264.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Board of Student Editors, *supra* note 17, at 265.

²³ *Id.*

jurisprudence.²⁴ Nor did Chief Judge Brown refer to his central role as one of the four Fifth Circuit justices who heroically—and often using procedural creativity—spurred compliance by intransigent Southerners with the Supreme Court’s school desegregation mandate in *Brown v. Board of Education*.²⁵ Instead, after briefly mentioning his education in civil law while on the bench, he concentrated his entire acceptance speech on the “growth” in court business and number of judges during his chief judgeship, and the corresponding “growth in the resources to meet that demand.”²⁶ Brown boasted that, along with “an explosive growth in new business . . . there was an even more explosive increase in the court’s productivity.”²⁷ Brown contended that the fifteen Fifth Circuit judges disproved “skeptical writers, commissions, and pundits who insisted that a court of more than nine could not survive”—a clear reference to the ongoing threat to split the large and docket-heavy Fifth Circuit.²⁸ Chief Judge Brown asserted that, of the “156.9%” increase in opinion output, “100% was due to the increase in output by active judges through the use of [a newly enacted] Summary Calendar” and accompanying screening program to determine which appeals merited oral argument.²⁹ He also pointed to the recent enactment of Rule 21, which allowed for affirmance without an opinion.³⁰ He described the growing number of people serving the court including in the Staff Attorney’s Office.³¹ Assuring that the court’s quality of work “remains high,” Brown concluded that all of the expediting procedures resulted in Fifth Circuit judges “generating a productive output that exceeds that of all other appellate courts in the United States, federal or state.”³²

As Chief Judge Brown’s speech exemplifies, in his mind, the focal point and the praiseworthy aspects of his work as chief judge solely revolved around his Court’s ability to weather and surmount the case docket crisis. His outstanding and influential stand to enforce the Supreme Court’s desegregation mandate in *Brown* in the hostile South did not merit discussion in 1979. Instead, the innovative internal efficiency reforms that the Fifth Circuit developed to deal with the heavy caseload deserved praise.

Chief Judge Brown’s speech encapsulates a momentous shift emphasizing efficiency in case management that occurred at the Fifth Circuit Court of Appeals and spread to Circuit Courts of Appeals nationally during the 1960s and 1970s. To appreciate the transformative effect of the internal efficiency procedures that the Fifth Circuit and, ultimately, federal circuits

²⁴ *Id.* at 264–70.

²⁵ Elizabeth Lee Thompson, *Procedural Innovation, the Rule of Law, and Civil Rights Justice*, 14 U.C. IRVINE L. REV. (forthcoming 2024).

²⁶ Board of Student Editors, *supra* note 17, at 265–70.

²⁷ *Id.* at 268.

²⁸ *Id.*

²⁹ *Id.* at 268–69.

³⁰ *Id.*

³¹ *Id.* at 268.

³² *Id.* at 268–70.

nationally adopted beginning in the late 1960s, and the unique position of the Fifth Circuit as the first-mover, it is essential to appreciate three background developments: first, the Fifth Circuit judges' role as civil rights heroes based in substantial part on their creative use of procedure to enforce justice, second, how the docket crisis beginning in the 1960s affected courts and the traditional appellate decision-making process, and, third, the looming congressional threat to split the large and reputedly cumbersome Fifth Circuit in the 1960s and 1970s. As this study makes clear, all three of these forces are intertwined. The Fifth Circuit's procedural ingenuity in civil rights cases shaped the structure of its internal efficiency reforms meant to quell the effects of the docket crisis, while Fifth Circuit proponents pointed to the efficiency reforms as establishing the lack of need for a circuit split.

A. *The "Nation's Greatest Civil Rights Tribunal"*³³

From 1954 through the 1970s, Southerners' resistance to the Supreme Court's decree in *Brown v. Board of Education*—declaring separate schools for Black and White students unconstitutional and mandating desegregation—was prevalent and intense.³⁴ For decades following the 1954 decision, anti-desegregation Southerners sought to obstruct *Brown*'s mandate through various means: “massive resistance,” the “doctrine of interposition,” and sophisticated evasion through private discrimination.³⁵ Delay constituted one of the resisters' principal weapons, as time allowed for the invention of creative legislation, ongoing evasion of *Brown*'s dictates and continued status-quo segregation, and the possibility of diminished interest in desegregation in the country.³⁶ As then-Chief Judge Elbert Tuttle of the Fifth Circuit recognized, “politicians would fight for a delay of another year, and they wouldn't comply with the law unless they themselves were compelled by a court order.”³⁷ Sympathetic district court judges buttressed the resisters' efforts, delaying hearings and orders and crafting rulings that failed to follow *Brown*'s mandate for racial equality.³⁸

³³ FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 596 (1978).

³⁴ 347 U.S. 483, 487 (1954) [hereinafter *Brown I*]. See also *Brown v. Board of Educ.*, 349 U.S. 294, 300–01 (1955) [hereinafter *Brown II*] (finding that school authorities are to “make a prompt and reasonable start toward full compliance” with *Brown I*'s ruling).

³⁵ Arthur H. Dean, *A Tribute to Chief Judge Elbert P. Tuttle*, 53 CORNELL L. REV. 1, 11 (1967); Joel Wm. Friedman, *Desegregating the South: John Minor Wisdom's Role in Enforcing Brown's Mandate*, 78 TUL. L. REV. 2207, 2226–27 (2004).

³⁶ Anne S. Emanuel, *Turning the Tide in the Civil Rights Revolution: Elbert Tuttle and the Desegregation of the University of Georgia*, 5 MICH. J. RACE & L. 1, 14 (1999); JACK BASS, UNLIKELY HEROES 213 (1981).

³⁷ Clifford M. Kuhn, *Creating “A Peaceful Revolution in Race Relations”: An Oral History Interview with Judge Elbert Parr Tuttle*, 2 GA. J.S. LEGAL HIST. 149, 160 (1993).

³⁸ Note, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90, 99 (1963); Frank T. Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Educ.*, 39 L. & CONTEMP. PROBS. 7, 14, 18 (1975); BASS, *supra* note 36, at 97, 214; READ & MCGOUGH, *supra* note 33, at 191.

During this era of intentional roadblocks, high tensions, and threats to the rule of law, the Fifth Circuit Court of Appeals acted as a hero, crucially demanding prompt and uncompromising compliance with the Supreme Court and Fifth Circuit mandates for racial equality.³⁹ The Circuit stretched from Florida to Texas and included the Deep South States of Georgia, Alabama, Mississippi, and Louisiana, central flashpoints for resistance to *Brown*.⁴⁰ In this obstructionist environment, the Fifth Circuit fulfilled, as Judge John Minor Wisdom described, “the federal courts’ destined role of bringing local policy in line with national policy.”⁴¹ Centrally, then-Chief Judge Tuttle, and Judges Richard T. Rives, John Minor Wisdom, and John R. Brown, who were derisively labeled “The Four,” consistently ruled together in Civil Rights cases.⁴² In the 1960s, The Four employed procedure in unprecedented ways to accelerate the provision of civil rights justice and tame obstructionist civilians and judges into compliance.⁴³ Their unwavering stance called for courage and often made them subject to public contempt.⁴⁴ A former Assistant Attorney General for the Civil Rights Division observed, “Those four judges . . . made as much of an imprint on American society and American law as any four judges below the Supreme Court have ever done on any court.”⁴⁵

With this track record, the shape of the Fifth Circuit’s response to another pivotal crisis during this era—the momentous increase in appellate filings—appears counter-intuitive. For the Fifth Circuit judges had determinedly and courageously recognized the civil rights of citizens whose lack of legal and material means had traditionally barred recognition of their legal rights in federal court. And yet, the Fifth Circuit’s newly chosen

³⁹ Frank T. Read, *The Bloodless Revolution: The Role of the Fifth Circuit in the Integration of the Deep South*, 32 MERCER L. REV. 1149, 1152 (1981) [hereinafter Read, *The Bloodless Revolution*]; JOHN M. SPIVACK, RACE, CIVIL RIGHTS AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT 170–71 (1990); Thompson, *supra* note 25, at 6, 11–12; BASS, *supra* note 36, at 16–17.

⁴⁰ COUCH, *supra* note 6, at 10, 192 (describing the six Fifth Circuit states and the Circuit’s split into the Fifth and Eleventh Circuits in 1981).

⁴¹ John Minor Wisdom, *The Frictionmaking, Exacerbating Political Role of Federal Courts*, 21 SW. L. J. 411, 411 (1967).

⁴² *Armstrong v. Bd. of Educ.*, 323 F.2d 333, 353 n.1, 356 (5th Cir. 1963) (Cameron, J., dissenting).

⁴³ Thompson, *supra* note 25, at 7, 13 (presenting the Fifth Circuit as an exemplar of replicable methods of employing courageous and innovative procedural mechanisms to foil delay and overcome obstruction of the rule of law); SPIVACK, *supra* note 39, at 170–71; BASS, *supra* note 36, at 22, 24, 213; Jerome I. Chapman, *Expediting Equitable Relief in the Courts of Appeals*, 53 CORNELL L. REV. 12, 12 (1968). See DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 55 (1988) (highlighting Chief Judge Tuttle’s “extraordinary procedural maneuvers” and the Fifth Circuit’s political tension); COUCH, *supra* note 6, at 122 (explaining that the Fifth Circuit “procedures for hastening appeals” represented “a creative response to a crisis”); Read, *The Bloodless Revolution*, *supra* note 39, at 1154–55 (noting that Brown, Rives, Tuttle, and Wisdom “were destined to become giants in the integration battles”).

⁴⁴ READ & MCGOUGH, *supra* note 33, at 182 (Chief Justice Earl Warren describing Chief Judge Tuttle’s great personal courage and wisdom); BASS, *supra* note 36, at 79 (discussing abuse suffered by Judge Rives after the Montgomery bus boycott decision, including an “avalanche of hate mail, abusive telephone calls, and threats” and the desecration of his son’s grave).

⁴⁵ Will Garwood, *A Tribute to Judge John R. Brown*, 34 S. TEX. L. REV. 359, 360 (1993); BASS, *supra* note 36, at 17.

procedures, which would soon have national consequence, closed full appellate consideration and treatment to many legally unsophisticated, traditionally disfavored litigants.⁴⁶

B. *The Docket Crisis and Its Effect on Shaping Procedural Reform*

Beginning in the 1960s, the federal courts—particularly the federal courts of appeals—experienced a dramatic increase in the number of cases they received. Commentators described this trend as “exploding dockets,” a “crisis of volume,” and a “caseload monster.”⁴⁷ In 1966, the Administrative Office of the United States Courts reported that filings in the Courts of Appeals increased from 3,700 filings for sixty-eight judges in 1957 (for an average of fifty-four per judge) to 7,183 filings in 1966 (for an average—with twenty additional judges—of eighty-one cases per judge).⁴⁸ While the number of district court cases commenced increased by eleven percent and the district court backlog increased by forty percent between 1960 and 1965, the number of federal appeals commenced increased seventy-three percent and the backlog by one-hundred-fifteen percent during the same five-year period.⁴⁹

Docket increases in the Fifth Circuit alone were likewise remarkable. Between 1961–1969, the number of appeals increased by one-hundred-sixty-eight percent, compared to a district court increase of seventy-eight percent.⁵⁰ In 1960, 577 appeals commenced in the Fifth Circuit, by 1965, the projected increase was over 1,100.⁵¹ The number of cases commenced per judge was eighty-two for the seven Fifth Circuit judges in 1960; that number increased to one-hundred-fifteen for the nine Fifth Circuit judges in 1964.⁵² Moreover, Chief Judge Brown forewarned in 1970 that the future for both the Fifth Circuit and the federal courts generally was “portentous” with

⁴⁶ See RICHMAN & REYNOLDS, *INJUSTICE ON APPEAL*, *supra* note 2, at 116 (discussing the negative effect of procedural reforms on the “disfavored in our country—prisoners, the poor, immigrants”); McAlister, *supra* note 3, at 1144 n.33 (recognizing that the Fifth Circuit judges “were hailed as heroes in the post-*Brown* Civil Rights Era,” and yet “that court also innovated summary procedures for many criminal and habeas corpus claims”).

⁴⁷ Haworth, *supra* note 7, at 258–59 (“exploding dockets”); Thomas E. Baker and Denis J. Hauptly, *Taking Another Measure of the “Crisis of Volume” in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97, 97 (1994) (“crisis of volume”); Robert S. Want, *The Caseload Monster in the Federal Courts*, 69 A.B.A. J. 612, 615 (1983) (“[caseload] monster”).

⁴⁸ Shafroth, *supra* note 13, at 307 (Ex. 1) (excerpt from letter of Fifth Circuit Chief Judge John R. Brown). See *id.* at 254 (stating that the number of cases per judge from 1954 to 1960 ranged from fifty-four to fifty-seven, but by 1967 (even accounting for new judgeships) the case load was about a third higher at seventy-four per judge).

⁴⁹ Wright, *supra* note 1, at 743.

⁵⁰ Nat’l Lab. Rels. Bd. v. Amalgamated Clothing Workers of Am., 430 F.2d 966, 970 (5th Cir. 1970).

⁵¹ Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 949–50 (1964).

⁵² *Id.* at 950.

“spectacular” increases of projected filings.⁵³ Chief Judge Brown advised that “[w]ithin but a year—tomorrow—we will have 2,000 cases and a couple of years more—day after tomorrow—we will have 2,500 cases.”⁵⁴ Moreover, the Fifth Circuit was a giant, docket-heavy circuit—in 1973, the Fifth Circuit had the largest number of appeals filed of any circuit.⁵⁵

Multiple factors contributed to the explosion of federal filings.⁵⁶ Population and economic growth fueled increased litigation.⁵⁷ The Warren Court’s constitutional law revolutions in the 1950s and 1960s resulted in striking legal changes concerning criminal procedure in federal and state courts and in civil rights law, and the lower federal courts were responsible for the implementation of these rights.⁵⁸ One commentator described that the federal courts had become the “dumping ground for unsolved social problems.”⁵⁹ Protecting civil rights, the lower courts assumed supervisory authority over state schools, mental hospitals, and federal and state prisons.⁶⁰ In addition, Congress continually expanded federal legislation and regulation, which further complicated the circuit courts’ “enhanced law-giving role” and made opinion writing an “increasingly burdensome task.”⁶¹

The resulting pressing need to relieve the courts was clear. But the traditional appellate approach did not prioritize efficiency, nor did it allow for an immediate expansion of capacity. This long-standing appellate tradition involved hearing oral argument in almost every case, judges focused attention on each appeal and on judges writing the opinion in each case themselves.⁶² Court staff—if any—had very little influence and no role

⁵³ *Nat’l Lab. Rel. Bd.*, 430 F.2d at 968. See Haworth, *supra* note 7, at 259–60 (cautioning that one forecast estimated approximately 38,875 appeals would be docketed in 1981).

⁵⁴ *Nat’l Lab. Rel. Bd.*, 430 F.2d at 970.

⁵⁵ Notes, *Screening of Criminal Cases in the Federal Courts of Appeals: Practice and Proposals*, 73 COLUM. L. REV. 77, 88 (1973) [hereinafter *Screening of Criminal Cases*].

⁵⁶ COUCH, *supra* note 6, at 161 (stating various factors leading to an increased number of federal cases); Wright, *supra* note 1, at 742–43 (same).

⁵⁷ RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 2, at 3–4; COUCH, *supra* note 6, at 161.

⁵⁸ RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 2, at 4. See Michael Vitiello, *The Appellate Lawyer’s Role in the Caseload Crisis*, 58 MISS. L.J. 437, 438 (1988) (stating the “liberal Warren Court doctrine unquestionably contributed to the dramatic increase in the volume of litigation in the 1960s”); Paul D. Carrington, *Crowded Dockets and Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 544 (1969) (recognizing various explanations for the “higher rate of appellate litigation” including a “marked increase” in civil rights litigation, litigation under the Labor-Management Reporting and Disclosure Act of 1959, larger number of criminal appeals, and a larger number of civil appeals). See also *Screening of Criminal Cases*, *supra* note 55, at 78 (describing greater involvement of federal courts in criminal process and in widescale social programs).

⁵⁹ *Screening of Criminal Cases*, *supra* note 55, at 78 (quoting D. KARLAN, JUDICIAL ADMINISTRATION: THE AMERICAN EXPERIENCE 61 (1970)).

⁶⁰ RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 2, at 4.

⁶¹ *Id.* at 4–5.

⁶² *Id.* at 3; McAlister, *supra* note 3, at 1148; Baker, *Intramural Reforms*, *supra* note 3, at 952.

in the disposition of an appeal.⁶³ Article III judges did the work with no or very little help and directed attention to each case, including writing the reasoning for the appeal's disposition.⁶⁴

But the docket explosion placed this traditional system under stress. In 1966, constitutional lawyer Charles Alan Wright warned that "the system is already being stretched to, if not beyond, its limits and [] disaster looms not far ahead."⁶⁵ In 1967, the Administrative Office of the United States Courts and the Statistics Committee of the Judicial Conference of the United States similarly noted that the appellate business increase called for measures to avoid "disastrous docket congestion and delays."⁶⁶ The inundated Fifth Circuit was under "constant pressure" and was "rapidly falling behind in keeping up with the cases commenced."⁶⁷ Charles Alan Wright pressed that "[s]ome relief must be provided for the beleaguered Fifth Circuit."⁶⁸ As Wright recognized, the structure of the reforms that the Fifth Circuit adopted would have implications on other circuits that would soon feel similar intense docket pressures.⁶⁹ As a result, the reform structure raised "important questions as to efficient judicial administration and the proper role of the federal courts of appeals."⁷⁰

C. *The Threatened Split of the Fifth Circuit*

By the time the Fifth Circuit began instituting its expedited summary procedures in December 1968, the problems of the court's size and caseload—and the resulting possibility of it being split into two circuits—had been a subject of study and debate for over five years.⁷¹ The debate over the Circuit's structure and the prospect of its division continued from 1963 until the Fifth Circuit's ultimate split into the Fifth and Eleventh Circuits in 1981.⁷² Central to this study is how the threat of division and ongoing related debates concerning the Fifth Circuit's structure informed the shape,

⁶³ McAlister, *supra* note 3, at 1148. See BAKER, RATIONING JUSTICE, *supra* note 12, at 13–14 (noting that the received tradition of the idealized appellate court reflects the operation of the Second Circuit in the 1940s during the tenure of Judge Learned Hand).

⁶⁴ McAlister, *supra* note 3, at 1148; Baker, *Intramural Reforms*, *supra* note 62, at 951.

⁶⁵ Wright, *supra* note 1, at 743. See *Hearings Before the Commission on Revision of the Federal Court Appellate System, First Phase*, Aug.–Oct. 1973, at 531 [hereinafter *Hearings, First Phase*] (noting the statement of Fifth Circuit Chief Judge Brown that "cases are simply getting more and more difficult, [and] the problems are more vexing").

⁶⁶ Shafroth, *supra* note 13, at 249. See Carrington, *supra* note 58, at 542, 543, 617 (cautioning that the "existing framework [wa]s being strained by the rapidly increasing number of appeals in the federal system" and "[d]ecisions must be made now" while advocating for "purposeful reform that will adapt our judicial institutions").

⁶⁷ Shafroth, *supra* note 13, at 272; Wright, *supra* note 51, at 953.

⁶⁸ Wright, *supra* note 51, at 953.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Lewis R. Morgan, *The Fifth Circuit: Expand or Divide?*, 29 MERCER L. REV. 885, 885 (1978).

⁷² *Id.* at 885 n.2.

implementation, and ultimate defense of the Fifth Circuit-initiated summary procedures.

Beginning in September 1963, the Judicial Conference of the United States reported that its Committees of Judicial Statistics and Court Administration agreed that the Fifth Circuit needed additional judges to help meet its caseload demands, but the committees were divided as to how to accomplish the increase.⁷³ Seven months later in March 1964, a Special Committee of the Judicial Council recommended dividing the Fifth Circuit, putting Alabama, Florida, Georgia, and Mississippi in a new Fifth Circuit and Louisiana, Texas, and the Panama Canal Zone in a newly created Eleventh Circuit.⁷⁴ Integral to the proposed circuit split was its anticipated effect on civil rights justice in the South.⁷⁵ Mississippi Senator Jim Eastland, the powerful Chair of the Senate Judiciary Committee, let it be known that he would support a circuit split with Mississippi joining the Fifth Circuit states to the east, and that placed Texas and Louisiana in a western division.⁷⁶ A longtime opponent of the Fifth Circuit's unwavering commitment to enforcing *Brown*'s mandate of desegregation, Eastland viewed the circuit split as an opportunity to split up The Four.⁷⁷ Moreover, his proposed split would mean that Judges Brown and Wisdom—whom he particularly disliked due to their strong civil rights opinions that affected Mississippians—no longer had authority over his home state of Mississippi.⁷⁸

Judges Wisdom and Rives mounted an aggressive campaign to defeat the 1964 circuit split proposal.⁷⁹ As scholars Deborah Barrow and Thomas Walker recognize, “[t]he flare sent up by the Wisdom/Rives campaign was a clear warning that civil rights progress in the South was seriously threatened by the move to split the Deep South circuit.”⁸⁰ Judges Wisdom and Rives ultimately were successful, with the Judicial Conference tabling its recommendation for a circuit split and instead recommending that Congress create four additional judges on a temporary basis for the Fifth Circuit.⁸¹

⁷³ REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 65 (1963). See Morgan, *supra* note 71, at 885.

⁷⁴ REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 14–15 (1964) (report of the Biggs Committee). See Morgan, *supra* note 71, at 885–86 n.2.

⁷⁵ Wright, *supra* note 51, at 955. See Carrington, *supra* note 58, at 586 n.197 (stating that “[s]ome were quick to find in the” Judicial Conference committee report “a threat to the civil rights movement” given its focus on the Fifth Circuit, “a court very actively engaged in civil rights litigation”).

⁷⁶ BARROW & WALKER, *supra* note 43, at 70.

⁷⁷ Wright, *supra* note 51, at 955 n.18.

⁷⁸ BARROW & WALKER, *supra* note 43, at 70–71.

⁷⁹ *Id.* at 75–120 (discussing Judges Wisdom's and Rives' multi-pronged efforts). Professor Charles Alan Wright's article, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, *supra* note 51, formed one weapon that Wisdom and Rives employed in their efforts to convince Conference and Congress members of the perils of circuit splitting. *Id.* at 103–04.

⁸⁰ BARROW & WALKER, *supra* note 43, at 121.

⁸¹ *Id.* at 117 (tabling of circuit split proposal and recommending instead temporary Fifth Circuit judgeships).

From 1965 to 1970, although public debates concerning the Fifth Circuit potential split quelled, the issue of the Court's swelling caseload and encumbered structure simmered.⁸² And in the 1970s, the Fifth Circuit's expanding docket, growing number of judges, and—significantly for this study—“internal administrative reforms” eventually brought the circuit splitting issue back into public political debate.⁸³

Ultimately, the Fifth Circuit could no longer put off the circuit split by using internal expediting procedures, among other means. In 1978, Congress authorized eleven additional Fifth Circuit judges, and two years later Congress divided the Circuit into the Fifth Circuit—comprised of Louisiana, Mississippi, and Texas—and the Eleventh Circuit—composed of Alabama, Georgia, and Florida.⁸⁴ Yet the circuit split effective October 1, 1981 did nothing to abate the Fifth or the new Eleventh Circuit (or circuits nationally) from employing the expediting procedures.⁸⁵

II. THE BROAD SCOPE OF PROPOSED REFORMS

As Wright predicted, the form that the Fifth Circuit's reforms took in the late 1960s and 1970s ultimately spread throughout the federal appellate system. But the particular structure and operation of the chosen reforms— involving screening, oral argument for only certain appeals, and heavy involvement of staff attorneys—were not predetermined or the only reform options. Instead, during the 1960s and early 1970s, academics, judges, and attorneys proposed numerous other reform measures.⁸⁶ Broadly speaking, these fall into three spheres: judicial appointments or assignments, jurisdictional adjustment, and internal procedural reform—often proposed in combination.

A. *Increase Number of and Creatively Assign Federal Judges*

Primary among reform proposals in the 1960s and early 1970s was the request for more judges.⁸⁷ Increasing the judiciary became the traditional solution to docket congestion.⁸⁸ Congress expanded the judiciary repeatedly

⁸² *Id.* at 121–22.

⁸³ *Id.*

⁸⁴ *U.S. Court of Appeals for the Fifth Circuit – Legislative History*, U.S. CT. OF APPEALS FOR THE FIFTH CIRCUIT, <https://www.ca5.uscourts.gov/about-the-court/circuit-history/circuit-history> (last visited Feb. 18, 2024); Larry M. Roth & George K. Rahdert, *Practice Before the Fifth Circuit: Revisited*, 14 TEX. TECH L. REV. 17, 18–20 (1983) (footnotes omitted) (noting that by 1979, “the Fifth Circuit had become an unwieldy giant consisting of twenty-six active judges”).

⁸⁵ Roth & Rahdert, *supra* note 84, at 20.

⁸⁶ See *infra* text accompanying notes 87–120.

⁸⁷ Wright, *supra* note 51, at 969 (noting that “more judges are needed immediately”). See Carrington, *supra* note 58, at 580 (concluding that “the increase in the caseload which has exceeded the rise in dispositions per judgeship should lead to appointment of a greater number of circuit judges”); Wright, *supra* note 51, at 949 (arguing that the solution for an overburdened court of appeals is not more courts of appeals but appointment of additional judges).

⁸⁸ Haworth, *supra* note 7, at 260.

during the two decades prior to the late 1960s, when the Fifth Circuit (and later wider courts of appeals) initiated the reform measures at issue here.⁸⁹ In 1949, Congress created six circuit judgeships, two in the District of Columbia and one each in the Third, Seventh, and Tenth Circuits.⁹⁰ In 1954, Congress added two additional circuit judgeships, one in the Ninth Circuit and one in the Fifth.⁹¹ Seven years later, Congress created ten more new circuit judgeships in 1961, and then ten circuit judges in 1966, four of which were temporary but later were made permanent.⁹²

There were numerous, strongly felt criticisms of expanding the judiciary, although there were sound responses to the critics. In answer to concerns by Justice Frankfurter that expansion of the judiciary would “depreciate” its “quality,” scholars such as Charles Alan Wright assured that “outstandingly qualified” candidates would fill these positions.⁹³ An even more common and stubborn critique concerned the Rule of Nine—the view that the maximum size of an effective appellate court was nine judges. A Special Committee on the Geographical Organization of the Courts of the Judicial Conference of the United States concluded in 1964 that “nine is the maximum number of active judgeship positions which can be allotted to a court of appeals without impairing the efficiency of its operation and its unity as a judicial institution.”⁹⁴ Likewise, Judge J. Edward Lumbard of the Second Circuit could not “emphasize too strongly the importance of operating” a court of appeals with not more than nine judges as problems of administration and supervision “compound[] geometrically” as a circuit grows.⁹⁵ As a result, Lumbard asserted that any court that cannot operate with nine judges, fully staffed with support personnel, should split into more than one circuit.⁹⁶

But others doubted the wisdom of confining the circuit courts to nine judges. Charles Alan Wright argued for more judgeships to maintain the court of appeals’ regional nature, and applauded the addition of four additional judgeships for the Fifth Circuit in 1966, bringing the Circuit to thirteen judges as a “heartening sign that nine will no longer be considered

⁸⁹ Shafroth, *supra* note 13, at 253 n.1; Haworth, *supra* note 7, at 260 n.18.

⁹⁰ Shafroth, *supra* note 13, at 248.

⁹¹ *Id.* at 248–49.

⁹² *Id.* at 249; Haworth, *supra* note 7, at 260 n.18.

⁹³ Wright, *supra* note 1, at 743.

⁹⁴ PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 14–15 (1964). *See* Carrington, *supra* note 58, at 584 (quoting and discussing the report and concluding, it “seems reasonable” that a court with more than nine judges “is likely to be more unstable than a healthy legal system should tolerate” because of concerns of disunity and fidelity to the law of the circuit); Wright, *supra* note 51, at 953 (discussing and quoting the report).

⁹⁵ Shafroth, *supra* note 13, at 266–67 (quoting letter of November 18, 1966 from Judge J. Edward Lumbard to Shafroth citing the need for “constant communication” between the chief judge and other circuit judges as they handled increased supervision of the district courts and additional responsibilities, including under the Criminal Justice Act).

⁹⁶ *Id.* (quoting November 18, 1966 letter of Judge Lumbard to Shafroth).

a magic number.”⁹⁷ Dean Paul Carrington, although viewing the rule as “reasonable,” noted that the “rule of nine was apparently dispatched for all time in 1967” when the Judicial Conference recommended enlarging the Ninth Circuit to thirteen judges and permanently enlarging the Fifth Circuit to fifteen.⁹⁸ Likewise, Chief Judge Brown recognized how the rule of nine would require an unworkable enlargement in the number of courts to meet the caseload, and advised abandoning “reverence for nine.”⁹⁹

Even without strict adherence to the rule of nine, the growth in case volume far outstripped the increase in the number of judges (ninety-seven judges by 1973) and supported the conclusion that—as former Director of the United States Courts Administrative Office Will Shafroth concluded in 1966—“the number of judges could not be increased indefinitely.”¹⁰⁰ That same year, Chief Justice Warren warned: “We cannot afford to go on pyramiding judgeships periodically without making our judicial system responsive to and part of the times in which we live.”¹⁰¹

Yet judicial reform proposals did not just concern adding judges; many also reflected creativity to break from the past. Ideas included: (1) single or two-judge panels instead of three judges with a third judge added in the event of a disagreement,¹⁰² (2) floating judges subject to assignment by the Supreme Court Chief Justice to any circuit in the country that needs support,¹⁰³ (3) improvements in the judicial appointment process by eliminating delay in Presidential action and Senate consideration,¹⁰⁴ (4) restructure of judicial retirement to make it compulsory in order to add judicial manpower to the federal judiciary,¹⁰⁵ and (5) abolishing three-judge courts composed of two district judges and one circuit judge as “a great drain of judicial manpower.”¹⁰⁶

⁹⁷ Wright, *supra* note 1, at 744–45.

⁹⁸ Carrington, *supra* note 58, at 584 n.189, 585 (also noting that determining a circuit’s maximum size “is not an easy matter”).

⁹⁹ *Hearings, First Phase, supra* note 65, at 532. *See also id.* at 527 (Brown’s statement that “there is neither margin in the number nor any solution to our problems in the choice”).

¹⁰⁰ Shafroth, *supra* note 13, at 252; Haworth, *supra* note 7, at 260.

¹⁰¹ Wright, *supra* note 1, at 743 (quoting 42 A.L.I. PROC. 24 (1966)).

¹⁰² Shafroth, *supra* note 13, at 313 (quoting letter from Judge Carl McGowan, District of Columbia Circuit, July 15, 1966 to Paul D. Carrington, stating the structure “would add considerably to our existing judicial manpower because a large number of cases would certainly be disposed of without the need of the intervention of a third judge”).

¹⁰³ *Id.* at 312 (stating Judge McGowan’s conclusion that “[i]f fifteen or twenty posts of this character were created tomorrow, the Chief Justice could put them all to work to good purpose around the country”). *See* Wright, *supra* note 1, at 745 (stating that opposition to a similar plan in 1921 “could be afforded in 1921” but not in 1966).

¹⁰⁴ Shafroth, *supra* note 13, at 312 (quoting letter from Judge Carl McGowan, District of Columbia Circuit, July 15, 1966 to Paul D. Carrington).

¹⁰⁵ *Id.* at 311–12.

¹⁰⁶ Wright, *supra* note 1, at 748; Michael E. Solimine & James L. Walker, *The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954-76*, 72 CASE W. RES. L. REV. 909, 913 (2022) (stating that Congress limited the courts’ jurisdiction in 1976).

B. *Narrow Federal Court Jurisdiction*

A second central suggested reform to alleviate docket pressures involved decreasing federal court jurisdiction.¹⁰⁷ Proposals included: (1) adopting a system of “Optional Jurisdiction” for the courts of appeals in certain doctrinal areas, such as negligence cases under diversity jurisdiction,¹⁰⁸ (2) limiting diversity jurisdiction,¹⁰⁹ (3) establishing “a jurisdictional amount for appeal as of right, with discretionary leave to appeal in cases involving less than the requisite amount,” and with some cases exempt from the amount in controversy requirement (such as criminal convictions, habeas corpus cases, and civil rights litigation),¹¹⁰ (4) creating specialized courts for certain litigation areas, including reviewing administrative agency decisions,¹¹¹ and (5) repeal of the Interlocutory Appeals Act of 1958, which allows appeal of orders prior to a final judgment.¹¹²

Yet critics charged that markedly reducing jurisdiction was unlikely. As Fifth Circuit Judge Brown argued in 1966, reduced jurisdiction was “hardly an answer at a time when each session of the Congress produces more and more federal regulatory legislation with both civil and criminal sanctions.”¹¹³ Likewise, Judge Carl McGowan of the District of Columbia Circuit thought it unlikely that federal courts would relinquish their jurisdiction on a large scale and “[w]hat Congress may take away will doubtlessly be matched roughly by what Congress and the Supreme Court add.”¹¹⁴ Yet, in answer to such doubts, Wright proposed that “[t]his is a time for experimentation, rather than for final answers” and “we will not know, for example, the effect of requiring a jurisdictional amount for appeal as of right until we have tried it.”¹¹⁵

¹⁰⁷ Shafroth, *supra* note 13, at 305 (citing a letter from Fifth Circuit Judge John R. Brown to Senator Joseph D. Tydings on December 21, 1966).

¹⁰⁸ *Id.* at 289.

¹⁰⁹ Wright, *supra* note 51, at 962–63 (discussing ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Tent. Draft No. 2, 1964), tentatively approving cutting the number of diversity cases, which accounted for twenty-two percent of federal court caseload, in half).

¹¹⁰ Wright, *supra* note 51, at 964–65. Congress subsequently imposed an amount in controversy requirement, which today is \$75,000. 28 U.S.C. § 1332. See Wright, *supra* note 51, at 965 (recognizing that a jurisdictional amount requirement applied from “the earliest days of the republic” but was not a requirement in 1964).

¹¹¹ Wright, *supra* note 51, at 965–66, 977.

¹¹² 28 U.S.C. § 1292(b). See Wright, *supra* note 51, at 965 (noting the Fifth Circuit’s “expansive view” of permissible interlocutory appeals and resulting greater number of interlocutory appeal filings than other circuits—although still only sixteen applications and seven interlocutory appeals were allowed in the Fifth Circuit in 1963).

¹¹³ Shafroth, *supra* note 13, at 305 (Letter from Fifth Circuit Judge John R. Brown to Senator Joseph D. Tydings on December 21, 1966).

¹¹⁴ *Id.* at 310 (quoting letter from District of Columbia Circuit Judge Carl McGowan to Paul D. Carrington dated July 15, 1966). See also Wright, *supra* note 51, at 963 (noting growth in federal jurisdiction from statutes including the Civil Rights Act of 1964 would soon fill up any void, and breathing room, left by curtailing diversity jurisdiction).

¹¹⁵ Wright, *supra* note 51, at 977.

C. Reform Internal Procedures

A third area of proposed reform focused on improving courts' internal operations and procedures. In May 1965, Chief Justice Earl Warren promoted "prob[ing] more deeply and with more inventiveness into the diagnosis of the problems of judicial administration."¹¹⁶ Likewise, focusing on judicial operations, Fifth Circuit Judge Brown proposed in 1966 that "the only real[] solution" was "to make the Judges more efficient in the creative work of judging."¹¹⁷ Although the Fifth Circuit—and ultimately the entire federal appellate court system—adopted particular internal procedures centered on optimizing efficiency, these were not the only internal procedural reform options proposed to meet the docket crisis. Instead, suggested court procedural reforms included: (1) increased use of per curiam opinions (already a practice in the Fifth Circuit in the late 1960s) in order to increase judges' time to hear cases and decrease the time needed for writing opinions,¹¹⁸ (2) increased use of visiting and senior judges,¹¹⁹ and (3) more secretarial and law clerk help for judges as a "wholly wise step" to increase the output of judges.¹²⁰

Yet although some of these proposed reforms to augment the judiciary, alter the court's jurisdiction, or implement the internal reforms went into effect, they did not—alone or in combination—form the heart of the reforms that the federal appellate courts adopted in the 1960s and 1970s to meet the caseload crisis. Instead, the circuit courts chose to adopt a differentiating system among filed appeals by screening to determine if an appeal merits oral argument, short or nonexistent opinions, and heavy reliance on central staff for various aspects of the decisional process. The choice to adopt this approach by the court that initiated this reform regime—the Fifth Circuit—was indeed a choice, and one that affected the trajectory of circuit courts' operations and litigants' rights on appeal since.

III. THE CHOICE OF INTERNAL EXPEDITING PROCEDURES THAT SHAPED HOW THE FEDERAL APPELLATE COURTS CONSIDER CASES

In 1970, Chief Judge Brown declared, "we can see it is our duty to exercise imaginative, inventive resourcefulness in fashioning new methods and in adapting or modifying older ones, to enable us to at least stay abreast

¹¹⁶ Wright, *supra* note 1, at 743.

¹¹⁷ Shafroth, *supra* note 13, at 306 (Letter from Fifth Circuit Judge John R. Brown to Senator Joseph D. Tydings on December 21, 1966).

¹¹⁸ Wright, *supra* note 51, at 959–60; Shafroth, *supra* note 13, at 307 (Letter from Fifth Circuit Judge John R. Brown to Senator Joseph D. Tydings on December 21, 1966).

¹¹⁹ Wright, *supra* note 1, at 744–45.

¹²⁰ Wright, *supra* note 51, at 961. See Shafroth, *supra* note 13, at 311 (Letter from District of Columbia Circuit Judge Carl McGowan to Paul D. Carrington dated July 15, 1966, concluding that "a second clerk [wa]s essential" "[w]ith the volume we now have" and assessing he could "get the opinions written [him]self if [he could] be sure that all the bases have been touched that should be").

of this flood tide.”¹²¹ At the center of the Fifth Circuit’s approach was the idea that the Court, and its members, “must increase output.”¹²² As Brown later explained to a Congressional Commission in 1973, “we were in 1968 doing what the Chief Justice says in 1973 what must be done ‘[i]f we want to improve the administration of justice in this country, we must try some things that some lawyers and judges may not find convenient or agreeable.’”¹²³ Brown assessed that the changes “did follow his prediction that . . . ‘the judges in the Federal System are not going to sit by complacently and continue to do things the same old ways simply because that is the way we have always done it.’”¹²⁴

Despite the numerous other available reforms described in the previous Section—many of which (alone or together) would have promoted efficiency—the Fifth Circuit adopted none of them. Instead, its focus on increasing judicial efficiency and on internally generated reforms which reflected self-sufficiency and good management led to three central internal case management procedures.

A. *Screening and Summary Disposition*

In December 1968, the Fifth Circuit implemented the Summary Calendar procedure, which Chief Judge Brown described as a “remarkable judicial tool.”¹²⁵ The Summary Calendar was implemented as an approach to address the increasing number of cases on the court’s docket which exceeded the court’s capacity even with an increased number of judges.¹²⁶ The procedure involved pre-submission consideration of each appeal for preliminary classification.¹²⁷ Governed by Fifth Circuit Court Rule 18, the screening procedure classified appeals into four categories: appeals (1) that are frivolous and subject to dismissal, (2) deemed not requiring oral

¹²¹ Nat’l Lab. Rels. Bd. v. Amalgamated Clothing Workers of Am., 430 F.2d 966, 970 (5th Cir. 1970).

¹²² *Id.* at 970–71.

¹²³ *Hearings, First Phase*, *supra* note 65, at 509 (Statement of Honorable John R. Brown, Chief Judge, U.S. Court of Appeals, Fifth Circuit).

¹²⁴ *Id.*

¹²⁵ *Isbell Enters., Inc. v. Citizens Cas. Co.*, 431 F.2d 409, 410 n.6 (5th Cir. 1970) (citing *Murphy v. Houma Well Serv.*, 409 F.2d 804 (5th Cir. 1969)). *See also* *Huth v. S. Pac. Co.*, 417 F.2d 526, 527–30 (5th Cir. 1969) (discussing the operation and effects of summary calendar); Griffin B. Bell, *Toward a More Efficient Federal Appeals System*, 54 JUDICATURE 237, 239 (1971) (characterizing screening as “[t]he most innovative feature yet devised among the circuits”); Levy, *Mechanics of Federal Appeals*, *supra* note 12, at 322 (detailing the Fifth Circuit’s process that determines whether cases require oral arguments); COUCH, *supra* note 6, at 144 (explaining how cases are categorized during the screening process); DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 10 (1974) (describing the start of the Fifth Circuit’s screening procedures); *Screening of Criminal Cases*, *supra* note 55, at 88–89 (describing the creation and structure of the Summary Calendar Procedure in the Fifth Circuit); John B. Oakley, *The Screening of Appeals: The Ninth Circuit’s Experience in the Eighties and Innovations for the Nineties*, 1991 BYU L. REV. 859, 865–66 (1991) (noting that “[t]he Fifth Circuit model is the oldest and the most common of the formal screening models”).

¹²⁶ *Murphy*, 409 F.2d at 805. *See Isbell*, 431 F.2d at 410–11 (discussing the increased judicial efficiency following the implementation of the Summary Calendar Procedure).

¹²⁷ *Murphy*, 409 F.2d at 806.

argument, which go on the summary calendar for disposition based on the briefs and record (Summary II cases), (3) for which the court would hear limited (fifteen minutes per side) oral argument, and (4) for which the court would hear full (thirty minutes per side) oral argument.¹²⁸ Judge Griffin Bell, one of the architects of the Fifth Circuit's screening process, explained that it was intended to "eliminate oral argument in many substantial cases" and decrease the number of frivolous cases from the court's docket.¹²⁹

This substantial shift in the Fifth Circuit from the traditional appellate process in which federal appellate judges heard appellate argument on each appeal had an immense impact in federal appellate courts nationally.¹³⁰ A 1987 report from the Federal Judicial Center recognized that "[b]ecause of the early leadership of the Fifth Circuit, screening has come to be thought of in the terms set by [the Fifth Circuit]."¹³¹ It further concluded that the Fifth Circuit—"the first federal court to adopt screening—has influenced the choice of procedures in many other courts."¹³² By 1973, the First, Second, Sixth, Ninth, and District of Columbia Circuits employed screening.¹³³ The First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits ultimately based

¹²⁸ *Id.*; COUCH, *supra* note 6, at 144; *Screening of Criminal Cases*, *supra* note 55, at 88–89. See Roth & Rahdert, *supra* note 84, at 26–27 (describing summary calendar classification system). Fifth Circuit Court Rules 17, 18, and 20 governed the screening and summary calendar process. The rules read:

Rule 17. Docket Control.

In the interest of docket control, the chief judge may from time to time, in his discretion, appoint a panel or panels to review pending cases for appropriate assignment or disposition under Rules 18, 19 or 20 or any other rule of this court.

Rule 18. Summary Calendar.

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

...

Rule 20. Frivolous and Unmeritorious Appeals.

If upon the hearing of any interlocutory motion or as a result of a review under Rule 17, it shall appear to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed without the notice contemplated in Rules 18 and 19 [concerning motions to dismiss or affirm].

Murphy, 409 F.2d at 812.

¹²⁹ Bell, *supra* note 125, at 240.

¹³⁰ See MEADOR, *supra* note 125, at 10 (discussing traditional approach of oral argument for each appeal); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 315 (1996) (describing the "[t]raditional appellate process" by which "federal appellate judges heard oral argument, conferred with each other, and gave reasons (oral or written) for their decisions").

¹³¹ CECIL & STIENSTRA, *supra* note 12, at 7. The report further states that "the practices of" the Fifth Circuit "have been so central to the development of screening programs." *Id.* at 36–37.

¹³² *Id.* at 16.

¹³³ *Screening of Criminal Cases*, *supra* note 55, at 88; Bell, *supra* note 125, at 243 (explaining that in 1971, the District of Columbia, First, Eighth, and Ninth Circuits were beginning to implement screening procedures and the Fourth Circuit was studying a screening plan).

their screening “on the pattern begun in the Fifth Circuit.”¹³⁴ Screening in various forms spread to every circuit court and some state courts, and became further entrenched by passage of Federal Rule of Appellate Procedure 34 in 1979.¹³⁵ Amended Rule 34 adopted a summary calendar procedure for all circuit courts of appeals similar to the Fifth Circuit’s rule.¹³⁶ Rule 34 provided for oral argument “in all cases” unless, under a local rule, a three-judge panel agrees unanimously that oral argument is not needed, after examining the briefs and record.¹³⁷

Brown emphasized that screening, when instituted in 1968, was a judicial function: three active judges composed the screening panels and the judges had to be unanimous both in the screening decision and in the outcome of the appeal.¹³⁸ After the court docketed an appeal, the appeal was assigned to one judge sitting on one of five three-judge screening panels, which served together for a year and then rotated.¹³⁹ That judge screened the merits of the appeal to determine whether the appeal warranted oral argument or not.¹⁴⁰ If the initiating judge decided that oral argument was not in order, he informed the other two panel judges.¹⁴¹ If one of the other screening panel judges disagreed, the case automatically went on the oral argument calendar.¹⁴² By 1975, the judges on screening panels had not had

¹³⁴ *Screening of Criminal Cases*, *supra* note 55, at 88; Oakley, *supra* note 125, at 865–66, 866 n.19; CECIL & STIENSTRA, *supra* note 12, at 15–16 (recognizing that “[t]he first, and most commonly used, screening procedure is one patterned after the practice first adopted by the Fifth Circuit” and, in addition, the Ninth Circuit had “adopted an interesting variation on the practice of the Fifth Circuit”).

¹³⁵ BAKER, RATIONING JUSTICE, *supra* note 12, at 108 (discussing amendment of Federal Rule of Appellate Procedure 34); Haworth, *supra* note 7, at 264–65 (recognizing the use of pre-decision screening in all federal circuit courts and some state courts and that “all eleven circuits courts of appeals ha[d] either instituted or authorized some method of short-circuiting the normally leisurely pace of appellate review” which included limiting or omitting oral argument and disposing of litigation without a written opinion); Jon O. Newman, *The Second Circuit’s Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 BROOK. L. REV. 429, 432 (2009). See McAlister, *supra* note 3, at 1159 & n.142 (noting that most circuits performed an initial screening review); Levy, *Mechanics of Federal Appeals*, *supra* note 12, at 333–34 (discussing case screening procedures across circuits).

¹³⁶ BAKER, RATIONING JUSTICE, *supra* note 12, at 108 & n.5.

¹³⁷ *Id.* at 108 (quoting and paraphrasing Federal Rule of Appellate Procedure 34 as amended in 1979). See FED. R. APP. P. 34 (containing similar provisions to 1979 version, with some differences such as deleted reference to local rules).

¹³⁸ *Murphy v. Houma Well Serv.*, 409 F.2d 804, 806 (5th Cir. 1969). See Roth & Rahdert, *supra* note 84, at 24–25 (deciding ultimately on a judicial decision and screening requirement of unanimity); *Screening of Criminal Cases*, *supra* note 55, at 89 (explaining that the judicial decision must be unanimous); Haworth, *supra* note 7, at 276–77 (discussing unanimity safeguards); Bell, *supra* note 125, at 241–42 (discussing safeguards of judicial determination and unanimity requirements).

¹³⁹ READ & MCGOUGH, *supra* note 33, at 466; *Hearings, First Phase*, *supra* note 65, at 144–45 (testimony of C. J. Brown). See CECIL & STIENSTRA, *supra* note 12, at 37 (stating judges sit on two types of panels: argument panels and screening panels).

¹⁴⁰ READ & MCGOUGH, *supra* note 33, at 466. See Haworth, *supra* note 7, at 276 (describing screening panel procedure); Bell, *supra* note 125, at 241 (“A case is transmitted to a single circuit judge, selected by rotation, for screening immediately following receipt of all briefs.”).

¹⁴¹ *Hearings, First Phase*, *supra* note 65, at 144–45 (Chief Judge Brown testimony).

¹⁴² *Id.* at 145.

an “eyeball-to-eyeball conference” in about ninety-five percent of cases.¹⁴³ Instead, the process was a “round robin,” where one judge would write the opinion, forward it to the next judge, who then sent it to the third judge, who ultimately sent it back to the initial judge.¹⁴⁴

As Chief Judge Brown admitted, the standard for making the critical oral argument decision was not clear-cut. When testifying before a congressional commission in 1975, he said he “ha[d] difficulty again in trying to articulate the standards on which oral argument is to be denied. It finally comes back almost to kind of an intuitive judgment based upon a great deal of experience.”¹⁴⁵

The Court—particularly summary procedure adherents Judges Brown and Bell—trumpeted the “across-the-board-even-handedness” of the Circuit’s screening mechanisms.¹⁴⁶ As Bell noted, the summary disposition (Summary II) cases included the spectrum of filed cases—habeas corpus, direct appeal criminal cases, civil cases including private and United States civil, tax, bankruptcy, civil rights, and admiralty.¹⁴⁷ Brown asserted that the Fifth Circuit gave all appeals, no matter whether criminal or civil, or the subject-matter of the case, the “same treatment,” and that differentiating between different types of appeals, such as treating those filed by indigent criminal defendants differently, would be the “height of inequality” and “improper.”¹⁴⁸

In 1973, Judge Bell described the original intent behind this major departure from the traditional appellate approach of oral argument for each appeal:

The screening system was designed to remove some 30 percent of the cases of the court from the oral argument calendar. At the time the system was developed, our study of the caseload had convinced us that 30 percent was the approximate percentage of appeals in the court which had little or no arguable merit, and which met the two-fold test of (1) the answer to the question presented was “open and shut,” and (2) in the unanimous judgment of three judges, oral argument

¹⁴³ *Hearings Before the Commission on Revision of the Federal Court Appellate System, Second Phase, 1974-1975, Volume II*, 94th Cong. 876 (1975) [hereinafter *Hearings, Second Phase*].

¹⁴⁴ *Id.* at 876; J. WOODFORD HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS* 247 (1981) (discussing the role of initiating judges); CECIL & STIENSTRA, *supra* note 12, at 48 (describing that screening panels “do not convene, but conduct all their business by telephone and mail,” and use “a serial method for reviewing and disposing of the cases”).

¹⁴⁵ *Hearings, Second Phase, supra* note 143, at 868.

¹⁴⁶ *Isbell Enter., Inc. v. Citizens Cas. Co.*, 431 F.2d 409, 412 (5th Cir. 1970).

¹⁴⁷ Bell, *supra* note 125, at 242.

¹⁴⁸ *Hearings, First Phase, supra* note 65, at 149.

would be of no help in deciding the question or questions presented.¹⁴⁹

Yet, notwithstanding the aspiration to assign thirty percent of cases to the summary calendar, in short order, the Fifth Circuit began denying oral argument to a much higher percentage of the docket. As Chief Judge Brown reported—seemingly without indicating that the percentage was too high—between 1969 and 1975, the percentage of summary cases increased from 32.7% to a high of 59.1%, for an average of 50%.¹⁵⁰ By 1986 and 1987, the percentage reached 64%.¹⁵¹ This sixty-four percent level in 1987 was higher than any other circuit, and the average of the circuits was 49%.¹⁵² By 1991, the Fifth Circuit decided nearly two-thirds of cases on the briefs.¹⁵³

Adherents and converts to the screening process and summary calendar praised their benefits, which were primarily efficiency in deciding appeals and avoiding a logjam from the large number of case filings.¹⁵⁴ One 1978 assessment claimed that the screening procedures “enabl[ed] the Circuit to stay abreast of its case load in all categories of appeals” while a scholar in 1985 recognized that screening produced an “obvious economizing of judicial time.”¹⁵⁵ Chief Judge Brown claimed that, by 1970, screening proved that it was “a workable, fair method which would markedly increase our output and enable us to at least keep abreast of this flood tide.”¹⁵⁶ By 1971, the productivity per judge had increased to 233 cases per year versus 180 under the former system.¹⁵⁷ Likewise, the amount of time between notice of appeal and final disposition of a Fifth Circuit appeal decreased from 14.4 months for criminal cases and 14.1 months for civil cases in 1967 to 10.5 months for both types of cases in 1969.¹⁵⁸ Moreover, between 1968 and 1973, the time from filing the last brief until final disposition decreased by fifty percent.¹⁵⁹ By 1973, Chief Judge Brown trumpeted that the time from filing the complete appellate record to the disposition of the appeal had

¹⁴⁹ *Id.* at 452.

¹⁵⁰ JOHN R. BROWN, THE STATE OF THE FEDERAL JUDICIARY IN THE FIFTH CIRCUIT 16–17 (May 24, 1976) (unpublished report to the 1976 Fifth Circuit Judicial Conference on file in Loyola Law School Library). See *Isbell*, 431 F.2d at 411 (stating 32.7% for fiscal year 1969 and 38.1% for fiscal year 1970); MEADOR, *supra* note 125, at 11 (noting that, for the first full year of screening, fiscal 1970, the percentage of cases disposed of without oral argument was 38% of all Fifth Circuit appeals).

¹⁵¹ CECIL & STIENSTRA, *supra* note 12, at 36; MEADOR, *supra* note 125, at 11.

¹⁵² Oakley, *supra* note 125, at 881.

¹⁵³ *Id.* See CECIL & STIENSTRA, *supra* note 12, at 36 (stating two-thirds figure for 1987).

¹⁵⁴ Bell, *supra* note 125, at 243 (statement of Fifth Circuit J. Bell) (praising screening as “offer[ing] much hope to the busy court in need of maximum efficiency”).

¹⁵⁵ READ & MCGOUGH, *supra* note 33, at 466; COUCH, *supra* note 6, at 145.

¹⁵⁶ *Isbell Enters., Inc. v. Citizens Cas. Co.*, 431 F.2d 409, 413 (5th Cir. 1970). See *Nat’l Lab. Bd. v. Amalgamated Clothing Workers of Am.*, 430 F.2d 966, 968 (5th Cir. 1970) (showing Brown again praising the “fairness and workability” of the court’s judicial screening).

¹⁵⁷ Bell, *supra* note 125, at 242.

¹⁵⁸ *Id.* at 237.

¹⁵⁹ *Screening of Criminal Cases*, *supra* note 55, at 91 (noting that, during that same period, the Fifth Circuit decided more cases than cases filed each preceding year, notwithstanding the large increase in number of cases).

decreased from 8.8 months in 1968 to 5.3 in 1973, which made the Fifth Circuit the third best in the nation on that measure.¹⁶⁰

Supporters of screening also praised its effect on certain types of cases. Criminal cases had increased from 31.1% of the Fifth Circuit's docket in fiscal year 1965 to 47.3% in 1973.¹⁶¹ Chief Judge Brown emphasized how screening helped "in achieving finality *now* in criminal-type cases," which were affirmed eighty percent of the time—and this expedited finality served "the interest of society and of the individual prisoner-petitioner concerned."¹⁶² Screening also allowed civil appeals to avoid being at the end of a large backlog, as the process allowed the court to more quickly resolve cases that Congress or the court had given priority.¹⁶³

But critics of screening were just as vocal.¹⁶⁴ At hearings in 1973 and 1974, the Commission on Revision of the Federal Court Appellate System, known as the Hruska Commission, heard testimony from judges, attorneys, and academics concerning the wisdom of screening procedures.¹⁶⁵ Nearly all witnesses (particularly judges) agreed that some cases did not require oral argument, but numerous attorneys and judges testified that denial of oral argument could diminish judges' capacity to make correct decisions and undermine the courts' legitimacy.¹⁶⁶ The Commission ultimately warned against routinely declining oral argument:

In the light of the[] data and of extensive testimony before the Commission, the Commission recognizes the importance of safeguarding the right to oral argument in all cases where it is appropriate. Oral argument is an essential part of the appellate process. It contributes to judicial accountability, it guards against undue reliance upon staff work, and it promotes understanding in ways that cannot be matched by written

¹⁶⁰ *Hearings, First Phase*, *supra* note 65, at 146 (testimony of C.J. Brown). See HOWARD, JR. *supra* note 144, at 277 (acknowledging other touted benefits including reduced number of court sittings and resulting decreased travel and expense for litigants).

¹⁶¹ *Hearings, First Phase*, *supra* note 65, at 513.

¹⁶² *Id.* at 517 (statement of C.J. Brown). See also *id.* at 513 (statement of C.J. Brown) (describing a similar conclusion); *Hearings, Second Phase*, *supra* note 143, at 871, 876 (testimony of C.J. Brown) (describing that "[i]t's not at all uncommon in a criminal case to get an opinion in the clerk's hands within 15 days from the date of the filing of the last brief" and that he did not "think there's anything more laudable than that, provided you give this man his just dues" for "we ought to do everything to achieve finality at an earlier state").

¹⁶³ GEORGE K. RAHDERT & LARRY M. ROTH, *APPEALS TO THE FIFTH CIRCUIT MANUAL* 13–14 (Butterworth Legal Publishers, 1985).

¹⁶⁴ See CECIL & STIENSTRA, *supra* note 12, at 1 (noting "many observers continue to raise questions" about screening programs).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* See also *Hearings, First Phase*, *supra* note 65, at 383 (statement of Fifth Circuit J. John Godbold) (stating that he would like to see more oral argument, but that there is a lack of consistent standards governing when oral argument is required), 452–54 (statement of Fifth Circuit J. Griffin Bell) (noting that he believes that courts should have a screening procedure that only allows for the denial of oral argument under a very strict standard). Ultimately, at the Commission's recommendation, Federal Rule of Appellate Procedure 34 was amended, as described above. *Id.*

communication. It assures the litigant that his case has been given consideration by those charged with deciding it. The hearing of argument takes a small proportion of any appellate court's time; the saving of time to be achieved by discouraging argument is too small to justify routinely dispensing with oral argument.¹⁶⁷

The Commission recommended that Congress set a minimum standard applicable to each court of appeals that an opportunity for oral argument should be the norm.¹⁶⁸ Amended Federal Rule of Appellate Procedure 34 resulted from the Commission's recommendation—and discussions leading to its enactment reflected unease with the denial of oral argument in up to sixty percent of decided cases, with the Fifth Circuit of particular concern.¹⁶⁹

Further, critics charged that there was a correlation between a precipitous decline in the reversal rate in the Fifth Circuit during the years immediately after screening commenced and the screening program and concluded that these changes could have overlooked substantive consequences.¹⁷⁰ Detractors recognized that not all appeals merited oral argument, but instead contended that the proportionally high percentages of denial of oral argument “severely and profoundly and possibly irretrievably” compromised the appellate system.¹⁷¹ Moreover, it appeared screening lost value when scarce and valuable judicial time was devoted to classifying appeals.¹⁷²

¹⁶⁷ U.S. COMM'N ON REVISION OF THE FED. CT. APP. SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 48 (1975) [hereinafter COMM'N ON REVISION]; CECIL & STIENSTRA, *supra* note 12, at 13–14 (stating judges' conclusions against overly restricting oral argument). See RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 2, at 85 (stating benefits of oral argument); BAKER, RATIONING JUSTICE, *supra* note 12, at 116 (stating detriments of deciding appeal without oral argument); Haworth, *supra* note 7, at 317 (contending that oral argument, “except perhaps in the most frivolous appeal, is essential to reaching the best possible decision”).

¹⁶⁸ COMM'N ON REVISION, *supra* note 167, at 48.

¹⁶⁹ CECIL & STIENSTRA, *supra* note 12, at 13. See COMM'N ON REVISION, *supra* note 167, at 48 (stating concerns arising from the “extent to which the opportunity to present oral argument is denied litigants in a number of the circuits”). See, e.g., *Hearings, First Phase*, *supra* note 65, at 18 (statement of Former Solicitor General Erwin N. Griswold) (noting that the high percentage of cases denied oral argument in the Fifth Circuit was troubling and took the Circuit's goal of docket management too far). *Id.* at 65 (statement of Orison S. Marsden, Esq., American College of Trial Lawyers) (highlighting that the trend towards downgrading oral advocacy has been met with dissatisfaction among practicing attorneys except in the case of frivolous appeals). *Id.* at 375 (statement of Roland Nachman, President, Alabama State Bar Association) (stating that the screening process would be more effective if judges, rather than staff members or law clerks, participated in the process). *Id.* at 383 (statement of J. John Godbold, Fifth Circuit Court of Appeals) (emphasizing that a stricter screening standard should be implemented to preserve the opportunity for oral argument in the Fifth Circuit). *Id.* at 452 (statement of J. Griffin Bell, Fifth Circuit Court of Appeals) (observing that the screening procedure used by the Fifth Circuit has faced considerable objection and may have been overextended to manage caseload).

¹⁷⁰ Haworth, *supra* note 7, at 317.

¹⁷¹ BAKER, RATIONING JUSTICE, *supra* note 12, at 114. See also Baker, *Intramural Reforms*, *supra* note 3, at 918 (stating oral argument not needed in all cases but in more than the rate granted).

¹⁷² Baker, *Intramural Reforms*, *supra* note 3, at 1330. See McAlister, *supra* note 3, at 1153–154 (recognizing that decline in oral argument resulted in “a more efficient but more paper-driven bureaucratic process of appellate decision-making”) (citation omitted).

The decline in oral argument proved precipitous nationally: in the 1970s, appeals routinely involved thirty-minute arguments per side, by the 1980s, two-thirds of appeals received oral argument, which dropped to one-quarter by 2011 and to less than twenty percent by 2020.¹⁷³ The trend led to critiques that “the denial rate seems to have outgrown the announced justification for denial” and an inverse proportion had developed between the growth in the nonargument calendar and the reversal rate.¹⁷⁴

Recognizing the critics, in 1977, Chief Judge Brown admitted that “[i]n an idyllic state, the judges would prefer oral argument in many more cases,” but “screening has been the means of survival, not for the judges but for litigants, by avoiding until just this past year, [1976], the prospect of backlogs requiring years and years for disposition.”¹⁷⁵ Yet his colleague, Fifth Circuit Judge Griffin Bell, acknowledged that it was “undoubtedly true . . . that some of the increase in the summary calendar” served the interests of the judges, as “perhaps as much as 10 percent, has been caused by the desire of the members of our court to stay abreast of the caseload.”¹⁷⁶ Thus, according to Bell, judges not only designated appeals as Summary II cases because oral argument was not helpful or necessary in deciding the appeal, but also as a release-valve mechanism to relieve them of some cases in their burdensome caseload. Because appeals with no oral argument received less attention, designating cases that substantively merited oral argument to the summary calendar served the interests of a docket-burdened judge rather than the substantive goal of justice.

B. *Affirmances Without Opinions*

The second Fifth Circuit innovation that broke from traditional appellate procedure that was adopted by other circuits was affirmance without opinion.¹⁷⁷ Traditionally, each appeal received a full opinion, which served the important interests of revealing the factors and law influencing the decision, and making clear the legal principles and values that would apply to future decisions.¹⁷⁸ Chief Judge Brown explained that this major shift away from delivering an opinion with each appeal was “another response of this Court to the ever-growing explosive increase in the amount of its judicial business.”¹⁷⁹ The Court became convinced that for a number of cases

¹⁷³ McAlister, *supra* note 3, at 1153.

¹⁷⁴ BAKER, RATIONING JUSTICE, *supra* note 12, at 113.

¹⁷⁵ John R. Brown, *Tribute: Griffin Bell*, 28 MERCER L. REV. 767, 770 (1977) [hereinafter Brown, *Griffin Bell*].

¹⁷⁶ *Hearings, First Phase*, *supra* note 65, at 453 (J. Griffin Bell statement).

¹⁷⁷ Roth & Rahdert, *supra* note 84, at 28; BAKER, RATIONING JUSTICE, *supra* note 12, at 121–22. Although Rule 21 affirmance without opinion is recognized as a “Fifth Circuit ‘innovation,’” the Fifth Circuit found inspiration for its rule in another circuit—the District of Columbia’s local rule that provided for “Order Form of Decision.” *Id.* at 121; Bell, *supra* note 125, at 243.

¹⁷⁸ Carrington, *supra* note 58, at 558–59.

¹⁷⁹ *Nat’l Lab. Rels. Bd. v. Amalgamated Clothing Workers of Am.*, 430 F.2d 966, 968 (5th Cir. 1970).

in the Summary II, Summary III, and Summary IV categories, “there is no real need for an opinion at all” and “no good would be served by an opinion.”¹⁸⁰ Brown concluded that “[w]here in a given case that is the considered judgment of three Judges comprising a panel, then it is perfectly obvious that the now limited and precious judicial resources can be husbanded by a procedure which eliminates that unnecessary opinion.”¹⁸¹

Rule 21 provided that “a judgment or order may be affirmed or enforced without opinion” if either (1) the District Court judgment was based on findings of fact that are not clearly erroneous, (2) the evidence supporting a jury verdict is not insufficient, (3) the order of an administrative agency is supported by substantial evidence on the record, or (4) no error of law appears, and the Court determined that an opinion would have no precedential value.¹⁸²

Chief Judge Brown explained that Rule 21 applies to cases “that ha[ve] been judicially reviewed on the full briefs through the screening system or oral argument” and he defended that “it is an opinion and represents careful judicial consideration.”¹⁸³ Among the justifications that Chief Judge Brown offered for instituting Rule 21 were that it was a helpful tool for a geographically scattered court (like the Fifth Circuit) and that affirming without opinion paralleled the Second Circuit’s practice of oral dismissal from the bench.¹⁸⁴ Moreover, disposition under Rule 21 must be a unanimous decision by the judges on the screening panel.¹⁸⁵

The value of affirming without opinion in terms of efficiency is clear, as a court can quickly dispose of a case through a one-line opinion with more celerity than even a per curiam opinion.¹⁸⁶ In addition, supporters of Rule 21 touted that it protected the court (and jurisprudence) from swift or poorly considered decisions that required a later explanation from the court.¹⁸⁷

Other circuits soon realized the benefits of affirming without an explanation. By 1969, courts of appeals more frequently adopted the practice

¹⁸⁰ *Id.* at 971; *Hearings, First Phase, supra* note 65, at 519 (C.J. John R. Brown statement).

¹⁸¹ *Nat’l Lab. Rels. Bd.*, 430 F.2d at 971.

¹⁸² *Id.* at 971–72. *See* Haworth, *supra* note 7 at 280 (laying out years when Rule 21 cases were decided). Rule 21 reads:

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

Id. at 271–72. *See also* 5th Cir. R. 47.6 (current rule encompassing former Rule 21, providing for affirmance without opinion).

¹⁸³ *Hearings, First Phase, supra* note 65, at 145 (testimony of J. Brown).

¹⁸⁴ *Id.* at 519 (statement of J. Brown).

¹⁸⁵ Roth & Rahdert, *supra* note 84, at 29.

¹⁸⁶ Haworth, *supra* note 7, at 272.

¹⁸⁷ *Id.*

of omitting an opinion when deciding cases.¹⁸⁸ By 1973, in addition to the Fifth Circuit, the local rules of the District of Columbia, First, Eighth, and Tenth Circuits provided for affirmances without opinion.¹⁸⁹ The Eighth and Tenth Circuit rules were identical or almost identical to Fifth Circuit Rule 21.¹⁹⁰

Yet even the biggest proponents of affirming without opinion recognized that the process could be abused. Chief Judge Brown demanded that the court “must—the word is must—never” apply Rule 21 to avoid making a difficult decision or to conceal disturbing or divisive issues.¹⁹¹ Brown cautioned that, “while Rule 21 should make a real contribution toward the goal of avoiding delays which can often amount to a denial of justice, it must be sparingly used.”¹⁹²

Fifth Circuit Judge Griffin Bell did not anticipate that “the order form of decision will receive undue use.”¹⁹³ But within the year following Rule 21’s effectiveness, the Court employed affirmances without opinions extensively—increasing from thirty-eight Rule 21 decisions in 1970 to 210 in 1971, and jumping substantially again to 488 in 1972.¹⁹⁴ Cases affirmed without opinion increased from 2.6% to 12.6% of total cases from 1970 to 1971, and then rose substantially again to 26.8% of total dispositions in 1972.¹⁹⁵

The Fifth Circuit’s increased productivity was marked: between 1970 and 1971, the per-judge disposition of cases briefed and submitted increased 30.5% and during the following year from 1971 to 1972, the per-judge disposition increased another 8.4%.¹⁹⁶ Scholars of screening and summary procedures conclude that the increase was at least partially attributable to the increased use of Rule 21 affirmances without opinion.¹⁹⁷

By 1975, the Fifth Circuit positively assessed that Local Rule 21 “allows us to dispose of approximately one-third of our caseload without oral argument and without written opinion.”¹⁹⁸ In a somewhat defensive further explanation, the Court asserted that the Rule 21-decided cases “are, nevertheless, fully and actually adjudicated and our decision is an affirmance

¹⁸⁸ Carrington, *supra* note 58, at 559. Carrington recognized that courts of appeals more frequently decided cases without opinion. *Id.*

¹⁸⁹ Haworth, *supra* note 7, at 271.

¹⁹⁰ *Id.* at n.88–89.

¹⁹¹ Nat’l Lab. Rels. Bd. v. Amalgamated Clothing Workers of Am., 430 F.2d 966, 972 (5th Cir. 1970).

¹⁹² *Id.*

¹⁹³ Bell, *supra* note 125, at 244.

¹⁹⁴ Haworth, *supra* note 7, at 280.

¹⁹⁵ *Id.* at 280, 287–88; see *Hearings, First Phase, supra* note 65, at 519 (statement of C.J. Brown) (noting that Rule 21 decisions composed 31.3% of all Fifth Circuit per curiam decisions in 1973); READ & MCGOUGH, *supra* note 33, at 468–69 (noting that Fifth Circuit used Rule 21 procedures extensively in 1974).

¹⁹⁶ Haworth, *supra* note 7, at 287.

¹⁹⁷ *Id.* at 287–88; *Screening of Criminal Cases, supra* note 55, at 91–92.

¹⁹⁸ *Howell v. Jones*, 516 F.2d 53, 57 (5th Cir. 1975).

on the merits of the issues raised on appeal.”¹⁹⁹ By 1983, Fifth Circuit practitioners Larry Roth and George Rahdert assessed that Rule 21 had become an engrained practice in the Fifth Circuit.²⁰⁰

Yet notwithstanding increases in productivity through the Rule 21 procedure, criticism of the Rule and deciding appeals without an opinion was strong and multi-pronged. Attorneys argued that Rule 21 was “a ruse which allow[ed] the Fifth Circuit to avoid its homework” and instead the Fifth Circuit should be required to explain the rationale for its decisions in every case.²⁰¹ Critics charged that, where the decision contains no explanation, one cannot determine the basis on which the court affirmed or enforced the decision, particularly where the case contained numerous issues on appeal.²⁰²

Detractors of the practice in the courts of appeals nationally were likewise pointed.²⁰³ Affirming without opinion “fails to leave its track in the law and leaves litigants with the impression that no one really heard their appeal.”²⁰⁴ Further, the practice of rendering judgment without an opinion is antithetical to appellate tradition and ideals.²⁰⁵ In 1975, the Hruska Commission likewise recognized “the need for reasoned decision and for a record of the reasoning which impelled the decision.”²⁰⁶ The Commission recommended “that the Federal Rules of Appellate Procedure require that in every case there be some record, however brief, and whatever the form, of the reasoning which impelled the decision.”²⁰⁷

By the late 1980s and 1990s, the Fifth Circuit judges indicated a shift. Interviews reflected that judges had come to conclude 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.”²⁰⁸ The court shifted to using memorandum opinions in cases that would before “have received a one-line order.”²⁰⁹ Yet the Fifth Circuit innovation of affirming appeals without opinions that began twenty to thirty years earlier played a significant role in the Court’s jurisprudence and spread nationally. The result was further emphasis on the priorities reflected in screening—some appeals are more deserving of attention than

¹⁹⁹ *Id.*

²⁰⁰ Roth & Rahdert, *supra* note 84, at 30.

²⁰¹ READ & MCGOUGH, *supra* note 33, at 468.

²⁰² Roth & Rahdert, *supra* note 84, at 29.

²⁰³ Haworth, *supra* note 7, at 271–73.

²⁰⁴ *Id.* at 272.

²⁰⁵ BAKER, RATIONING JUSTICE, *supra* note 12, at 121.

²⁰⁶ COMM’N ON REVISION, *supra* note 167, at 50.

²⁰⁷ *Id.*

²⁰⁸ CECIL & STIENSTRA, *supra* note 12, at 64. *See* BAKER, RATIONING JUSTICE, *supra* note 12, at 121–22 (noting “the number of affirmance-without-opinion dispositions has decreased over the years, and the judges now seem to use the technique differently” for “cases in which oral argument confirms that no issue is in doubt”).

²⁰⁹ CECIL & STIENSTRA, *supra* note 12, at 64.

others and efficient disposition overshadowed the interest in enunciating the reasoning for a decision to litigants.

C. *Reliance on Staff Attorneys*

In 1973, a third major transformative aspect of case processing in the nation's courts of appeals began in the Fifth Circuit—the court became the first circuit to receive dedicated funding to hire staff law clerks.²¹⁰ Chief Judge Brown initiated the idea of central staff attorneys to assist with the court's growing caseload.²¹¹ Brown asked Congress to provide the Fifth Circuit “on an experimental basis” with a Chief Staff Attorney, five staff attorneys, and support personnel to assist with “screening cases and drafting proposed opinions.”²¹²

In 1974, the Ninth Circuit hired staff attorneys, and by 1980, 117 staff attorneys worked across the nation's appellate courts.²¹³ Brown ultimately convinced the United States Judicial Council, and thus Congress, to create a staff attorneys office, which conducted the initial screening of briefs and records in the majority of appeals.²¹⁴ In 1982, Congress approved creation of staff attorney offices in the courts of appeals for the specific purpose of reviewing pro se prisoner cases.²¹⁵ By 2004, the number of staff attorneys had grown to more than 380.²¹⁶ Ultimately, all twelve regional appellate courts created staff attorney offices and the scope of staff attorney duties expanded as the number and complexity of their caseload expanded over time.²¹⁷ The staff attorney influx contributed to a pronounced expansion of the role of nonjudicial staff, which scholars conclude was “[t]he most startling development in appellate courts in the past quarter century.”²¹⁸

Staff attorneys are distinct from law clerks, who are chosen and work under the supervision of a particular judge. In contrast, staff attorneys are not assigned to a judge but rather work for the court as part of “central legal

²¹⁰ *Staff Attorney Offices Help Manage Rising Caseloads*, FED. CT. MGMT. REP. (Admin. Office of the U.S. Courts, Wash., D.C.), Feb. 2004, at 3.

²¹¹ Will Garwood, *Tribute to Judge John R. Brown*, 34 HOUS. L. REV. 1526, 1528 (1998).

²¹² Haworth, *supra* note 7, at 264.

²¹³ *Staff Attorney Offices Help Manage Rising Caseloads*, *supra* note 210, at 3.

²¹⁴ Senior Judge Sam D. Johnson, *John R. Brown: Waters of Justice*, 14 MISS. COLL. L. REV. 9, 12 (1993).

²¹⁵ Federal Courts Improvement Act of 1982, codified at 28 U.S.C. § 715 (19822024); Levy, *Mechanics of Federal Appeals*, *supra* note 12, at 323. See COMM'N ON STRUCTURAL ALTS. FOR THE FED. CTS. OF APPEALS, *supra* note 4, at 23 (noting central staff attorneys originally employed to help process appeals filed by unrepresented prisoners); See RICHMAN & REYNOLDS, *INJUSTICE ON APPEAL*, *supra* note 2, at 111 (same).

²¹⁶ *Staff Attorney Offices Help Manage Rising Caseloads*, *supra* note 210, at 3.

²¹⁷ *Id.* at 3; Levy, *supra* note 12, at 323 & n.37.

²¹⁸ RICHMAN & REYNOLDS, *INJUSTICE ON APPEAL*, *supra* note 2, at 97. See *id.* at 34 (concluding that the hiring of central staff as “screeners/decision makers” was the “most important development in the push for processing efficiency”).

staff.”²¹⁹ Their workload is also distinct. Law clerks usually work with their judge on particular cases (usually those orally argued), while staff attorneys’ primary responsibility is to review and screen cases for appellate review.²²⁰

A year after establishing staff attorneys at the Fifth Circuit, Chief Judge Brown reported to a congressional commission that “[i]t has been of great success the first year with a limited staff,” as the court had not yet filled all nine staff attorney positions.²²¹ He noted that the court was “200 opinions ahead of last year” and “we can’t attribute it to anything other than the fact we had this help of the central staff.”²²² Brown testified that the staff attorneys screened “a certain group of cases, approximately 60% of the makeup of the docket”²²³ The cases they screened were “by [specific] subject matter—criminal cases, diversity cases, some tax cases, and . . . a couple others.”²²⁴ Displaying the newly-established staff attorneys’ role in the screening process, Brown explained that the staff attorneys “have the power; they have the duty of deciding whether the case ought to be orally argued. If they say it ought to be orally argued, it goes on a tentative calendar.”²²⁵ To answer any concern about this “power” and “duty,” Brown further explained:

But to be sure nobody is getting an unfair sort of deal out of this, when the tentative calendar is made up, the presiding judge of that panel reviews each of those classifications for oral argument to see whether they have been misclassified. If he disagrees, he reclassifies it and sends it back to the regular screening panel and they handle it routinely.²²⁶

As Brown’s testimony made clear, for sixty percent of cases, the initial ideal of “screening panels” as a judicial decision, which ensured that Article III judges made the screening decision, became watered down. Instead, whether an appeal is assigned to the non-argument calendar usually commences with a predecisional screening by staff attorneys.²²⁷ As a Federal Judicial Report recognized, the Fifth Circuit staff attorneys possess this significant screening role in part because the judges appreciate the time staff attorney screening saves.²²⁸

²¹⁹ Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1446 (1983). See *Staff Attorney Offices Help Manage Rising Caseloads*, *supra* note 210, at 1, 3; Fiss, *supra* (describing differences between staff attorneys and law clerks); Levy, *supra* note 12, at 323, 323 n.34.

²²⁰ Fiss, *supra* note 219; Levy, *supra* note 12, at 323, 323 n.34.

²²¹ *Hearings, Second Phase*, *supra* note 143, at 877 (testimony of C.J. Brown).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Roth & Rahdert, *supra* note 84, at 24.

²²⁸ CECIL & STIENSTRA, *supra* note 12, at 64–65.

By 1983, a staff attorney in the Fifth Circuit reviewed the case record and briefs, and—if they determined that oral argument was not necessary—prepared an extensive memorandum to support the conclusion and may have also prepared a proposed draft opinion.²²⁹ The memorandum and proposed opinion were then sent by the clerk's office to a judge on the screening panel.²³⁰ If the judge agreed with the staff attorney's conclusion, the judge forwarded the briefs and other case materials to the two other judges on the panel.²³¹ Until the Fifth Circuit split into the Fifth and Eleventh Circuits in 1981, if the staff attorney believed that the appeal merited oral argument, the staff attorney returned the case to the clerk's office to place it on the oral argument calendar.²³²

Further, by 1987, the types of cases that staff attorneys screened—which were “the types of cases the judges have found, from past experience, generally benefit from a staff attorney's memorandum”—included habeas corpus cases, direct criminal appeals, prisoner cases challenging confinement conditions, federal question cases, Social Security cases, and civil rights cases except Title VII.²³³ Although not all pro se cases went to the staff attorney's office, the types of cases assigned to the staff attorneys largely encompassed all pro se cases.²³⁴

The extent of staff attorney involvement in screening differed among the appellate courts, and variation among the circuits today continues concerning which attorneys screen cases, and which types of cases they screen.²³⁵ But by 1998, most courts of appeals employed a similar staff attorney process as the Fifth Circuit.²³⁶ Staff attorneys undertook screening and recommended cases for oral argument or not, reviewed briefs and records and prepared memoranda to assist the judges, and sometimes also made recommendations concerning disposition and drafted proposed opinions, usually in cases without oral argument.²³⁷

Since the inception of the staff attorney system in the 1970s, supporters of staff attorneys' role have had to defend against charges of over-delegation by judges and that the attorneys' role in screening is too extensive.²³⁸ In April 1975, the Congressional Hruska Commission recognized that “the use of central staff offers a significant potential for advantage, so long as it is

²²⁹ Roth & Rahdert, *supra* note 84, at 24; Cecil & Stienstra, *supra* note 12, at 64–65.

²³⁰ Roth & Rahdert, *supra* note 84, at 24.

²³¹ *Id.*

²³² *Id.* at 25–26 (after 1981, the screening judge needed to approve the decision to place the appeal on the oral argument calendar).

²³³ CECIL & STIENSTRA, *supra* note 12, at 40. See *Staff Attorney Offices Help Manage Rising Caseloads*, *supra* note 210, at 3 (similar listing of types of cases reviewed by staff attorneys).

²³⁴ CECIL & STIENSTRA, *supra* note 12, at 40.

²³⁵ JAMES E. LANGNER & STEVEN FLANDERS, COMPAR. REP. ON INTERNAL OPERATING PROCS. OF U.S. CTS. OF APPEALS 8–9 (1973); RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 2, at 104–05.

²³⁶ COMM'N ON STRUCTURAL ALTS. FOR THE FED. CTS. OF APPEALS, *supra* note 4, at 23–24.

²³⁷ *Id.* at 23.

²³⁸ BAKER, RATIONING JUSTICE, *supra* note 12, at 145.

utilized in a manner which involves no delegation of the judicial function” and maintains the confidence of the bar and public in the judicial system’s integrity.²³⁹ In a more unqualified endorsement, Professor Robert Lefler concluded in an American Bar Foundation publication that clearly supported judges having staff assistance with decisional work, “[t]here is no point in their spending time on work that can be done just as well, and perhaps more efficiently, by less expensive staff members.”²⁴⁰ Decades later, Fifth Circuit Judge Edith H. Jones contended that “[j]ustice may be enhanced by thorough staff review of these appeals, which acts as an institutional insurer of consistency and integrity in the decisions.”²⁴¹

But criticisms were intense. The Hruska Commission concluded that it “recognize[d] that limiting the functions of central staff will serve to limit the gains in productivity to be anticipated, but surely productivity is not the sole, nor even the primary, criterion by which to measure their utility.”²⁴² The Commission cautioned: although it recommended the courts use central staff for appropriate tasks to aid the decisional process, “there is some risk of undue delegation of judicial authority, and perhaps a greater risk of the appearance of undue delegation.”²⁴³ A 1981 survey of Fifth Circuit judges reflected some judges’ delegation of much judicial responsibility in connection with case classification and per curiam opinions and judges increasingly spending time supervising others’ decision-making, including staff attorneys’, rather than on their own decisions.²⁴⁴ A 1989 American Bar Foundation report warned that screening devices involving staff “threaten to replace the decisions of Article III judges with the decisions of staff assistants.”²⁴⁵ More recent assessments are equally critical: scholars Richman and Reynolds advise that the “exponential growth” in staff attorney’s numbers and role has resulted in “inappropriate delegation of quintessentially judicial tasks,”²⁴⁶ while law professor Penelope Pether decries the delegation to staff attorneys as contributing to judges not reading the record for an appeal and then signing off on an opinion written by a staff attorney.²⁴⁷

²³⁹ COMM’N ON REVISION OF THE FED. CT. APP. SYS., STRUCTURE AND INTERNAL PROCS.: RECOMMENDATIONS FOR CHANGE, A PRELIMINARY REPORT 82 (1975).

²⁴⁰ ROBERT A. LEFLAR, INTERNAL OPERATING PROCS. OF APP. CTS. 79–80 (1976). *See id.* at 93–94 (asserting that, for an “affirm[ance] under existing law” or many per curiam opinions, “it makes no difference who writes it” for “the routine writing of which can be done as well by a staff member as by a judge”).

²⁴¹ Jones, *supra* note 11, at 1493–94 (also concluding, in many per curiam, unpublished decisions, “staff attorneys have contributed significantly to the final product and have reviewed the records individually and carefully”).

²⁴² COMM’N ON REVISION, *supra* note 167, at 54.

²⁴³ *Id.*

²⁴⁴ HOWARD, JR. *supra* note 144, at 268–70, 279.

²⁴⁵ AM. BAR ASS’N STANDING COMM’N, *supra* note 10, at 36.

²⁴⁶ RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 2, at 97.

²⁴⁷ Pether, *supra* note 9, at 1492. *See also* RICHMAN & REYNOLDS, INJUSTICE ON APPEAL, *supra* note 2, at 109 (noting attorneys’ concerns regarding staff attorneys centered on undue delegation and insufficient transparency).

But notwithstanding these criticisms and defenses, the practice of extensive staff attorney involvement in the internal case management in the United States circuits courts remains central—as do the screening and summary procedures also initiated by the Fifth Circuit.

IV. THE IRREPLICABLE CIRCUMSTANCES THAT SHAPED THE REPLICATED FIFTH CIRCUIT INTERNAL PROCEDURES

Although scholars have investigated in depth the benefits and drawbacks of each of the internal efficiency procedures begun in the 1960s and 1970s and whether courts should continue using them, the focus differs here. Instead, this Article asserts that the circuits adopted a reform structure that was uniquely suited to the Fifth Circuit—with its recent additional judges, resistance by Congress to future judicial growth, and threats of a Fifth Circuit split—and therefore was ill-suited for national replication. The Fifth Circuit unfortunately bypassed other possible reform approaches in the interest of defensively appearing self-sufficient and well-managed to avoid what many judges—including Chief Judge Brown—feared: a split of their beloved court. This conclusion, therefore, promotes a rethinking of the basic framework of the circuits' case management processes—to consider whether other reforms or a combination of reforms other than those chosen by the distinctive first mover would better serve justice and also address docket demands.

Three aspects contributed to the unique posture and reform results in the Fifth Circuit: the judges who structured the reforms (including the ironic intersection of their delivering civil rights justice alongside efficiency procedures that negatively affected many disadvantaged litigants), the interrelation of the structure of internal reforms with the ongoing circuit-split debate and recent judicial appointments to the Fifth Circuit, and the impact of innovative procedures in civil rights cases on the shape of internal efficiency reforms.

A. *Innovative Judges and the Ironic Intersection of Civil Rights Justice and Efficiency Procedures*

Prominent among the foundational reasons for the Fifth Circuit's unique and leading role in structuring internal efficiency reforms were the personality and predilections of its judges, primarily Chief Judge Brown and reform innovator Judge Bell. In Jacksonville, Florida on September 5, 1973, Fifth Circuit Chief Judge Brown included a section in his written statement to the Congressional Hruska Commission entitled: "Fifth Circuit's Innovations Have Permanent Value."²⁴⁸ He dismissed the idea that, once the

²⁴⁸ *Hearings, First Phase, supra* note 65, at 533. See READ & MCGOUGH, *supra* note 33, at 589 (stating several Fifth Circuit judges testified at Hruska Commission hearing "that the screening and Rule 21 procedures would be of permanent value to the appellate structure").

caseload crisis was resolved, there would be no more need for innovative procedures “such as screening, Rule 21, and the like.”²⁴⁹ He proposed instead that “the practices and their offspring that were the response to the emergency may well have been some sort of undisclosed, unuttered answer to a prayer.”²⁵⁰ He advocated that “[f]ar from being the subject of so much negative comment, the Fifth Circuit’s efforts ought to be a model of things which judges ought to be *encouraged*, not discouraged, to do.”²⁵¹ And the Fifth Circuit’s summary procedures indeed did serve as a model for circuits throughout the country.²⁵² Professor Charles Haworth forecasted in 1973 that the Fifth Circuit’s “dramatic innovations” of screening and summary procedures “may be the standard procedure for all appeals in both the state and federal systems within the next five years.”²⁵³ As Professor Merritt McAlister recognizes, “[h]e was basically right.”²⁵⁴

In no person did the Fifth Circuit’s roles as the country’s premier civil rights tribunal and (at times contradictory role) as the premier innovative court coexist more than in Chief Judge Brown. Repeatedly, descriptions of his contributions featured two main areas: his role as a civil rights pioneer and as a giant in court administration.²⁵⁵ To both areas, Brown brought “a gargantuan reservoir of energy and resourcefulness” and an “almost compulsive desire ‘to get the job done.’”²⁵⁶ Moreover, his “love for the court took the form of near reverence”²⁵⁷

Brown was thrown into the contentious civil rights battles before the court soon after his 1955 appointment. Within a year, Judge Brown sat on the first Fifth Circuit panel to decide a major desegregation case, and then proceeded to write more than a dozen opinions directly affecting school desegregation in the South and sit on more than fifty panels that decided school desegregation cases.²⁵⁸ Fellow Judge John Minor Wisdom—who along with Brown was one of The Four who resolutely enforced the *Brown*

²⁴⁹ *Hearings, First Phase*, *supra* note 65, at 533.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 534.

²⁵² See Gus A. Schill, Jr., *John R. Brown (1910-1993): The Judge Who Charted the Course*, 25 HOUS. J. INT’L L. 241, 242 (2003) (discussing Judge Brown’s innovative organizational and administrative solutions and their adoption by the entire federal court system).

²⁵³ Haworth, *supra* note 7, at 264. See McAlister, *supra* note 3, at 1161 (noting Haworth’s observation).

²⁵⁴ McAlister, *supra* note 3, at 1161.

²⁵⁵ See Johnson, *supra* note 214, at 9–12 (describing Brown’s contributions in civil rights cases and judicial administration); Collyn A. Peddie, *Lessons from the Master—The Legacy of Judge John R. Brown*, 25 HOUS. J. INT’L L. 247, 251 (2003) (describing Brown as a “civil rights pioneer” and “the man who brought court administration into the modern age”).

²⁵⁶ READ & MCGOUGH, *supra* note 33, at 451, 465; John Minor Wisdom, *One of a Kind*, 71 TEX. L. REV. 913, 913 (1993) (“John R. Brown was *sui generis*. He had an unexcelled zest for justice. He had a vigorous zest for life.”).

²⁵⁷ Charles Clark, *Chief Judge John R. Brown—One of a Kind*, 14 MISS. COLL. L. REV. 15, 15 (1993).

²⁵⁸ *Salute to the Honorable John R. Brown*, 743 F.2d LXVII, LXVII–LXVIII (1984) (year of appointment); Johnson, *supra* note 214, at 9–10 (describing Judge Brown’s role as judge on school desegregation cases).

v. *Board of Education* desegregation mandate in the South—noted his and Brown’s realization that, among Southerners, resisting the landmark case’s dictates for racial equality at “all deliberate speed” was “an excuse for delay by legislatures, school boards, and certain foot-dragging district judges.”²⁵⁹ Brown consistently addressed this delay and obstruction, and called for prompt application of equal rights. He believed that his most significant opinion was the 1959 voting rights case *Gomillion v. Lightfoot*, in which Black residents of Tuskegee, Alabama challenged the legislative redrafting of the city limits to form a narrow all-White community.²⁶⁰ Judge Brown’s powerful dissent, later adopted by the Supreme Court, became widely recognized as the basis for modern redistricting and voting laws.²⁶¹

Judge Brown’s courage in furthering civil rights was, according to Judge Wisdom, “an inspiration to all.”²⁶² Brown signed the 1962 Order demanding that the then all-White University of Mississippi enroll James Meredith as a student, in opposition to Governor Ross Barnett.²⁶³ A former law clerk for Judge Brown assessed that Brown was particularly aware that, “in the Fifties and Sixties, the federal courts, and the Court of Appeals for the Fifth Circuit in particular, were truly the courts of last resort—the only place where his disadvantaged and dispossessed brethren could seek redress of legitimate grievances and have any hope of obtaining it.”²⁶⁴ As former Chief Judge Tuttle recognized, Brown played “a major and highly significant role in the peaceful revolution that took place in the six states of the Fifth Circuit following his appointment.”²⁶⁵

The second area of John Brown’s prowess as an administrator came into full relief during his time as Fifth Circuit Chief Judge from 1967 to 1979.²⁶⁶ In December 1968, shortly after Brown became Chief Judge, he caused the Fifth Circuit Judicial Council to commence significant changes in case processing and management—the Fifth Circuit’s screening process and summary calendar.²⁶⁷ Indeed, as colleague Judge Sam Johnson recognized, Brown “designed and implemented summary calendar procedures” which allowed for the disposition of appeals without oral argument, he “introduced” Rule 21 allowing for affirmance without opinion, and persuaded the United States Judicial Council, and thereby Congress, to

²⁵⁹ Wisdom, *supra* note 256, at 918. See Thompson, *supra* note 25, at 11–14 (discussing obstructionist Southerners’ use of delay and Fifth Circuit’s procedural mechanisms to foil delay and obstruction to attain adherence to the rule of law under *Brown*).

²⁶⁰ *Salute*, 743 F.2d at LXVIII (salute by C.J. Tuttle); Schill, *supra* note 252, at 242; Johnson, *supra* note 214, at 10–11. See *Gomillion v. Lightfoot*, 270 F.2d 594, 599–611 (5th Cir. 1959) (Brown J., dissenting), *rev’d*, 364 U.S. 339 (1960).

²⁶¹ Schill, *supra* note 252, at 242; Wisdom, *supra* note 256, at 918 (stating Brown’s dissent in *Gomillion* had a “prompt and decisive effect on reapportionment and the right to vote generally”).

²⁶² Wisdom, *supra* note 256, at 916 n.9.

²⁶³ Schill, *supra* note 252, at 242–43.

²⁶⁴ Peddie, *supra* note 255, at 247.

²⁶⁵ *Salute*, 743 F.2d at LXVIII (salute by C.J. Tuttle).

²⁶⁶ Wisdom, *supra* note 256, at 915–16; *Salute*, 743 F.2d at LXVII (salute by C. J. Tuttle).

²⁶⁷ *Salute*, 743 F.2d at LXXIII (salute by C.J. Tuttle).

create a staff attorneys' office.²⁶⁸ Brown then wrote a series of opinions and made public appearances to convince the Bar and others of the need for these internal reforms.²⁶⁹ Former Chief Judge Tuttle concluded that, "[o]bservers of the federal appellate structure consider John R. Brown to be the premier judicial administrator of this century."²⁷⁰

In 1968, Chief Judge Brown appointed Judge Griffin Bell, as Chairman, and Judges Robert Ainsworth and David Dyer to the Circuit's Judicial Council Committee to "devise new methods for disposition of the ever-growing docket of cases."²⁷¹ "A vigorous and politically sensitive man," Judge Bell later served as United States Attorney General under President Jimmy Carter after resigning from the Fifth Circuit in 1976.²⁷² Throughout his governmental service, he held an ongoing interest in efficient judicial administration.²⁷³ Bell looked upon each federal appellate court as a "laboratory" to "develop[] new and different procedures and for instituting modern management systems."²⁷⁴ He concluded that the federal procedural rules allowed for "needless leisure" in the "time profile of federal appeal" and that the "present system [wa]s capable of substantially increased productivity."²⁷⁵

Judge Bell and his Committee colleagues designed what Chief Judge Brown described as a "remarkably simple device" to have judges "screen cases" to determine if they merit oral argument.²⁷⁶ The committee also recommended that the court adopt Rule 21, as discussed above, allowing for affirmance or enforcement without opinion.²⁷⁷

The precise source of Chief Judge Brown's and Judge Bell's conception to initiate a screening procedure is unclear. But attorneys, scholars, and courts had suggested the benefits of "screening," although not in the detail

²⁶⁸ Johnson, *supra* note 214, at 12. *See also Salute*, 743 F.2d at LXXII (salute by C.J. Tuttle) (recognizing Chief Judge Brown's impact on Judicial Conference of the United States, including his successful efforts for the conference to adopt a formula for allotting clerk deputies, increase staff for the judges, including a second and third law clerk and second secretary, and approve central staff law clerks).

²⁶⁹ *Salute*, 743 F.2d at LXXIII (salute by C.J. Tuttle).

²⁷⁰ *Id.*; *see* COUCH, *supra* note 6, at 183 (recognizing that Brown "advocated the use of new procedures to make the Court more efficient" and "by the force of his personality, joined with boundless energy, the cases were moved, and Brown earned a well deserved recognition as a judicial administrator").

²⁷¹ Brown, *Griffin Bell*, *supra* note 175, at 769–70; READ & MCGOUGH, *supra* note 33, at 465.

²⁷² READ & MCGOUGH, *supra* note 33, at 595. *See* Brown, *Griffin Bell*, *supra* note 175, at 768–70 (Brown's description of Bell's "vigor, his imagination, his resourcefulness").

²⁷³ Brown, *Griffin Bell*, *supra* note 175 (noting Bell's service on Federal Judicial Center's Committee on Innovation and Development and the American Bar Association Division of Judicial Administration and Commission on Standards of Judicial Administration); Baker & Hauptly, *supra* note 47, at 100 (discussing Bell's establishing new unit called the "Office for Improvements in the Administration of Justice," within the Justice Department while serving as Attorney General); RICHMAN & REYNOLDS, *INJUSTICE ON APPEAL*, *supra* note 2, at 141 (same).

²⁷⁴ Bell, *supra* note 125, at 244.

²⁷⁵ *Id.* at 237, 244. *See id.* at 238 (stating Bell's position that "[t]he efficiency of the appeals system can be substantially improved, even assuming no change in the rules" as a result of "changes in attitude and through innovation").

²⁷⁶ Brown, *Griffin Bell*, *supra* note 175, at 770.

²⁷⁷ *Id.*

and structure enacted by the Fifth Circuit. In 1966, Charles Alan Wright called for “better methods to screen” prisoners’ applications, including for habeas corpus and motions to vacate sentences, which “threaten[ed] to engulf the courts”—and pointed to examples of this practice in district courts.²⁷⁸

Will Shafroth’s 1967 *Survey of the United States Courts of Appeals* recognized that in most circuits, criminal habeas corpus petitions and motions to vacate a sentence were “screened by a panel or sometimes by a judge,” and only docketed if the review revealed that the appeal merited the court’s attention.²⁷⁹ Shafroth noted that the distinctive procedure in the Fourth Circuit involved screening of each application by a three-judge panel while the Tenth Circuit docketed and heard the petitions without screening.²⁸⁰ Shafroth recommended that, “[t]he key to more production in the courts of appeals may well be a better screening of the cases on the docket in advance of argument,” so “that more time will be available for the more difficult cases and there may be a more summary disposition of frivolous appeals.”²⁸¹

Similarly, in 1966 and 1967 statements by Fourth, District of Columbia, and Fifth Circuit Judges advocated screening. Fourth Circuit Judge Albert Bryan promoted screening cases to disclose appeals that “melt when the records are open to the light of day” and contended “[a]n order of affirmance or a brief per curiam would suffice” for such cases.²⁸² Judge Carl McGowan of the District of Columbia Circuit likewise contended, “[i]f we are not to have a lot more judges on our courts, then we must [move] emphatically in the direction of separating the wheat from the chaff and treating each accordingly.”²⁸³ Moreover, a year before becoming Chief Judge, Brown revealed his concerns that appeals “of practically no merit” did not “come to light as soon as [they] should.”²⁸⁴ Brown proposed that, “either by changes in rules or practices, to make a pre-submission judicial appraisal of the case” with “added law clerks” to “determine whether, and to what extent, oral argument is warranted” and to “enable the Court to dispose summarily of cases immediately upon submission.”²⁸⁵ So, Judge Brown had the

²⁷⁸ Wright, *supra* note 1, at 747–48.

²⁷⁹ Shafroth, *supra* note 13, at 254. See also RICHMAN & REYNOLDS, *INJUSTICE ON APPEAL*, *supra* note 2, at 130–32 (discussing and quoting Paul D. Carrington, American Bar Foundation, *Accommodating the Workload of the United States Courts of Appeals: Report of Recommendations* (1968), recommending that courts implement a sorting procedure to enable courts to allocate effort and time to cases “according to their difficulty and significance”).

²⁸⁰ Shafroth, *supra* note 13, at 254.

²⁸¹ *Id.* at 273.

²⁸² *Id.* at 314–15 (Letter of Fourth Circuit Judge Albert V. Bryan to Will Shafroth dated January 19, 1967).

²⁸³ *Id.* at 313 (Letter of District of Columbia Circuit Judge Carl McGowan to Paul D. Carrington dated July 16, 1966).

²⁸⁴ *Id.* at 306 (Letter of Fifth Circuit Judge John R. Brown to Joseph D. Tydings dated December 21, 1966).

²⁸⁵ *Id.*

components and workings of the Circuit's ultimate screening system developed in his mind years prior to becoming Chief Judge and appointing Judge Bell and his committee.

The Fifth Circuit ultimately “established the most far-reaching screening and summary procedures of any circuit”—a model that circuits nationally adopted.²⁸⁶ The architects of the system, Chief Judge Brown and Judge Bell, promoted the Fifth Circuit's procedures as having merit beyond quelling the caseload crisis, and urged their adoption in other circuits.²⁸⁷ Yet undergirding the specific structure and operation of the Fifth Circuit's influential procedures lay a unique, pressured history particular only to the Fifth Circuit.²⁸⁸ This uniqueness calls into question whether the Fifth Circuit procedures posed a beneficially replicable structure for the other circuits. Instead, it raises whether the reforms' adoption nationally represented an ill-advised acceptance of a first mover's blueprint, forged in unique circumstances, that sought to preserve a court through its court-focused (instead of litigant-centered) reforms.

B. *Civil Rights Procedural Innovation Adapted to Serve Courts' Efficiency Interests*

Among the most significant—but previously underappreciated—aspects of the Fifth Circuit's implementation of internal expediting procedures to address the docket crisis is the extent that the court's creative procedural innovation in civil rights cases in the 1950s and 1960s to prod compliance with *Brown*, informed how Fifth Circuit jurists structured the new expediting procedures in the late 1960s and early 1970s. Numerous scholars—including the present author—have praised the Fifth Circuit's courage and ingenuity in employing local rules, rules of civil procedure, and statutes in expansive and empowering ways to implement the rule of law and racial equality.²⁸⁹ But beginning in the late 1960s, the judges applied the lessons they learned from procedural innovation in furthering the rule of law and justice to the purpose of ushering cases through with greater efficiency.²⁹⁰ As a result, the

²⁸⁶ Haworth, *supra* note 7, at 274–75.

²⁸⁷ *Hearings, First Phase*, *supra* note 65, at 533; READ & MCGOUGH, *supra* note 33, at 465, 595.

²⁸⁸ See discussion at Section I.C *supra* (discussing the effects of the threatened split of the Fifth Circuit on internal administrative reforms).

²⁸⁹ See e.g., Thompson, *supra* note 25 (commending the administrative innovations of the Fifth Circuit judges in dealing with desegregation cases); SPIVACK, *supra* note 39, at 170–71 (same); BASS, *supra* note 36, at 22, 24, 213–14 (praising the Fifth Circuit's role in moving desegregation cases forward in the absence of Supreme Court leadership); Chapman, *supra* note 43 (discussing the accomplishments of the Fifth Circuit under Chief Judge Tuttle and the invaluable techniques the court developed); COUCH, *supra* note 6, at 122 (praising the actions of the Fifth Circuit in providing equity through procedurally implemented injunctions); Read, *The Bloodless Revolution*, *supra* note 39, at 1154–55 (discussing appellate decisions in the years following *Brown II* and how the Fifth Circuit judges became instrumental in the battles for desegregation).

²⁹⁰ See *infra* text accompanying notes 9–12. See also READ & MCGOUGH, *supra* note 33, at 465–69 (discussing the procedures implemented by the Fifth Circuit and their effectiveness in expediting cases and delivering justice).

procedural mechanisms that the Fifth Circuit employed to ensure equal justice and to hear and enforce the legal rights of those whose legal rights were previously denied were now turned on their head to serve internal procedures that denied full appellate review, particularly to the same class of disadvantaged litigants that the Fifth Circuit had heroically defended in civil rights cases.²⁹¹

The argument in this Section differs in substance from the last Section: the contention is that the Fifth Circuit judges employed these empowering, rights-enforcing mechanisms in ways that instead stripped litigants of rights (such as the right to orally present appellate arguments, the right to a judge's full consideration of one's appeal, and the right to know the reasons for the appellate court's decision through an opinion). As such, it shows the danger of shifting focus from enforcing the rule of law and dispensing justice to the goal of judicial efficiency.

Chief Judge Brown stood at the center of these developments. Brown, along with former Chief Judge Tuttle and Judges Wisdom and Rives, did not tolerate delay and obstruction in Southerners' implementation of *Brown*.²⁹² This impatience led them to innovate procedurally in order to accelerate the application of racial justice.²⁹³ Consistently an innovator, Brown was one of the first on the Fifth Circuit to recognize that traditional remedies would not be sufficient to integrate the schools; he instead suggested extraordinary procedures to cut through segregationists' delay and obstruction tactics.²⁹⁴

During the era of Chief Judge Tuttle's court, the Fifth Circuit employed innovations on a case-by-case basis to ensure enforcement of civil rights. The court endured protracted *en banc* disputes concerning civil rights versus states' rights and the propriety of employing the innovative procedures.²⁹⁵ In contrast, the court from 1967 forward under Chief Judge Brown entered the era of "streamlined judicial decision-making."²⁹⁶

In his role as Chief Judge, Brown "expand[ed] upon the innovative experimentation begun by his predecessor," Chief Judge Tuttle, with particular frequency and breadth to both meet the demands in school desegregation cases *and* to become the most efficient federal appellate court.²⁹⁷ As scholars Read and McGough recognize, in both desegregation

²⁹¹ See *infra* text accompanying notes 9–12. See also READ & MCGOUGH, *supra* note 33, at 465–69 (discussing the Fifth Circuit's procedures and the controversy that arose by expedited scheduling of appellate review).

²⁹² SPIVACK, *supra* note 39, at 170. See Garwood, *supra* note 211, at 361–62 (stating Judge Brown "was not to be overwhelmed by either his overcrowded dockets or the new Supreme Court integration mandates").

²⁹³ SPIVACK, *supra* note 39, at 170.

²⁹⁴ *Id.* at 171.

²⁹⁵ READ & MCGOUGH, *supra* note 33, at 470.

²⁹⁶ *Id.*

²⁹⁷ *Id.*; see *id.* at 465 (stating how the Fifth Circuit became a "beacon to all courts with over-crowded dockets").

cases and efforts to tame the docket, the Fifth Circuit “evolved into a matrix of new expediting procedures.”²⁹⁸

On December 1, 1969, the Fifth Circuit Court of Appeals declared that the Supreme Court one month prior had “sent the doctrine of deliberate speed” for school desegregation “to its final resting place.”²⁹⁹ The Supreme Court instructed the Fifth Circuit to act immediately—even mid-school year—to establish unitary school districts throughout the South.³⁰⁰ Over the next ten months, the Fifth Circuit accomplished what Chief Judge Brown described as marching orders to “ride roughshod” to complete school desegregation in the Deep South.³⁰¹ From December 1969 to September 1970, the Fifth Circuit issued 166 opinion orders mandating desegregation in eighty-nine school districts, resulting in massive steps towards Southerners’ compliance with the rule of law mandated by *Brown*.³⁰² The circuit with the next-heaviest school desegregation docket—the Fourth Circuit—handled only eighteen cases during the same ten-month period.³⁰³

To accomplish swift action in school desegregation cases, Chief Judge Brown instituted a procedure with notable similarities to the screening and summary calendar procedures that he instituted for the docket as a whole: the fifteen-judge court was divided into five standing panels of three judges each to handle school desegregation cases.³⁰⁴ The Fifth Circuit clerk kept a separate roster of the school cases, from which school cases were assigned to the three-judge panels.³⁰⁵ The panels would maintain authority over an assigned case until its final disposition.³⁰⁶ This permanent assignment of particular judges to a school desegregation case resulted in a great saving of judicial energy with judges able to draw upon their experience and expertise concerning a certain school district to make subsequent decisions.³⁰⁷

Similarly, Chief Judge Brown—aided by Bell’s committee—instituted panels analogous to the school desegregation case panels but for the broader purpose of screening all cases on the Fifth Circuit’s docket to determine if a case merited oral argument or other summary disposition.³⁰⁸ Similar to the

²⁹⁸ *Id.* at 465.

²⁹⁹ *Singleton v. Jackson Separate Mun. Sch. Dist.*, 419 F.2d 1211, 1216 (5th Cir. 1969) (discussing *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19 (1969)).

³⁰⁰ *READ & MCGOUGH*, *supra* note 33, at 450.

³⁰¹ *Id.* at 465, 469.

³⁰² *Id.* at 469.

³⁰³ *Id.*

³⁰⁴ *See id.* at 465–66, 469 (describing yet another innovative procedure instituted by the Fifth Circuit in school desegregation cases in 1969 requiring district judges, counsel, and the parties to following an expedited record and briefing schedule, which ensured that the school cases reached the Fifth Circuit within thirty to forty-five days of the trial court’s order).

³⁰⁵ *Id.* at 466, 469.

³⁰⁶ *Id.* at 466.

³⁰⁷ *See id.* (noting that, to guard against inconsistent decisions among the school desegregation case panels, each panel would circulate its tentative opinions to the other panels).

³⁰⁸ *See Murphy v. Houma Well Serv.*, 409 F.2d 804, 806 (5th Cir. 1969) (discussing the presubmission consideration for classification of each case); *Roth & Rahdert*, *supra* note 84, at 24–25

school-case panels, the screening panels included five panels of three judges who sat together for one-year terms.³⁰⁹ The parallel is evident—and displays how Chief Judge Brown cross-pollinated concepts to further civil rights into the arena of furthering judicial efficiency.

Likewise, similar to the development of Rule 21 authorizing affirmances without opinions, Chief Judge Brown urged judges to issue “opinion orders” to enforce their school desegregation decisions.³¹⁰ By the time he became Chief Judge, Brown had become a believer in brevity in opinions.³¹¹ As Read and McGough recognize, after fifteen years of desegregation jurisprudence, “Judge Brown concluded that all that could be written about school litigation had already been written.”³¹² As a result, the “opinion orders” that he encouraged his colleagues to issue in school desegregation cases usually consisted of only a preemptory reversal based on statistics concluding that officials had not achieved a sufficient amount of desegregation.³¹³

As with school-case screening panels, there is a clear similarity between those “opinion orders” in school cases and the new Rule 21 practice of allowing for affirmances without opinions. But the application of this same procedural approach across the distinctive areas created divergent results: for the enforcement of the rule of law in school desegregation cases resulted in civil rights justice after years of delay and obstruction of *Brown*’s ruling, while a one word ruling of affirmance in Rule 21 cases provided the opposite of fulfillment of rights. Instead, the one-word opinion provided no explanation to parties who sought redress for their legal rights and claims on appeal.

V. RECONSIDERING THE FOUNDATIONS OF APPELLATE COURT CASE MANAGEMENT

Persistent debates concerning the internal efficiency reforms continued unabated during the first decades after the reforms’ enactment in the 1960s and 1970s. But recently—as Professor McAlister recognizes—“the din has died down” and the courts and their users have become “inured to the status quo.”³¹⁴ This Article challenges the foundations of that status quo and the

(describing the considerations to determine whether to put an appeal on the calendar through the screening process); READ & MCGOUGH, *supra* note 33, at 466 (describing the screening procedures implemented under Judge Brown); *Hearings, First Phase*, *supra* note 65, at 142–52 (testimony of C.J. Brown); CECIL & STIENSTRA, *supra* note 12 (studying the procedures for the selection of cases for disposition without argument); *Screening of Criminal Cases*, *supra* note 55, at 89 (detailing the Fifth Circuit’s four classifications for argument); Haworth, *supra* note 7, at 276–77 (same); Bell, *supra* note 125, at 240–42 (same).

³⁰⁹ CECIL & STIENSTRA, *supra* note 12 (describing screening panels as “year-long panels established each July”); READ & MCGOUGH, *supra* note 33, at 466.

³¹⁰ READ & MCGOUGH, *supra* note 33, at 467–68.

³¹¹ *Id.* at 467.

³¹² *Id.*

³¹³ *Id.* at 467–68.

³¹⁴ McAlister, *supra* note 3, at 1163.

aims of the procedural innovation—tied to worthy civil rights procedural innovation and the stress of a potential circuit split—that spurred the present case management system. Other works have challenged whether practices such as screening, the summary calendar, and reliance on staff attorneys in dispositional decisions need to be revised or scrapped or are beneficial.³¹⁵ But this study urges courts, attorneys, and scholars to rethink the original paradigm set in the 1960s and 1970s as narrowly and particularly shaped for the Fifth Circuit, and not necessarily representing the best interests for the entire federal system. Jurists and scholars should erase the starting point concerning the default structure, and instead consider with a blank slate what structure is most beneficial to serve justice and, of lesser importance, the docket pressures of the federal appellate courts. Just as numerous alternative reform approaches were available to the federal courts in the 1960s, they are likewise available today—ranging from additional judges and alternatives in structuring the judiciary, jurisdictional adjustments, and numerous other approaches to internal procedures.³¹⁶ Instead of confining the inquiry to whether the current system needs to change, the question should also be whether the entire system followed an incorrect model and the possibility of abandoning the current structure (instead of only revising it) to incorporate different and perhaps a broader array of reforms to address both justice and docket pressures.³¹⁷

Second, the Fifth Circuit's, and ultimately the federal appellate court system's, experience portrays the slippery slope once a jurist changes the intent of procedural innovation from promoting the rule of law and justice to defensively protecting the court as an institution and the workload of its justices. The distinction between employing screening panels and "order opinions" in school desegregation cases verses for the full docket was likely blurry to Chief Judge Brown and his colleagues. But the result to the litigants differed immensely—for in the school desegregation cases, the innovations sped recognition of long-denied civil rights and racial equality while, for the docket as a whole, the innovations often deprived that same class of disadvantaged litigants their full appellate rights of oral argument and full consideration by a panel of Article III judges. Indeed, they were granted unequal appellate rights given to those screened for oral argument and full review. Chief Judge Brown reflected the detrimental effect of such a focus in his remarks at Tulane Law School, which ignored his, and the Fifth

³¹⁵ See *supra* text accompanying notes 9–12.

³¹⁶ See discussion at Part II *supra*.

³¹⁷ Although Marin Levy rightly notes that proposed reforms of additional judicial appointments or fewer cases on the docket have not received "political traction," the proposal here does not ignore those political realities. Levy, *supra* note 9, at 404–05. Rather this Article advocates for a conception of internal case management procedures unencumbered by the paradigm imposed by the first mover, the Fifth Circuit, and then to move towards implementing those broadly conceived reforms in the context of political conditions. See McAlister, *supra* note 3, at 1195–1218 (suggesting a proposal for Congress to increase the number of and distribute Article III judges).

Circuit's, valiant actions in delivering civil rights justice in the South and instead focused on the Court's success under his helm of efficiently speeding cases to disposition.³¹⁸

CONCLUSION

Over fifty years ago, District of Columbia Circuit Judge David L. Bazelon warned, "there is a grave danger that we have been oversold on the benefits of efficiency."³¹⁹ The pressures of the docket crisis that arose in the 1960s and 1970s were intense and called for reform, but the circuit courts' adopted case management structure—based on an inapplicable, unique Fifth Circuit model—has transformed the federal appellate system into a tiered regime granting a large number of appeals scant attention by judges and little voice to litigants denied oral argument. Unless we rethink the foundations of the internal procedures and the associated use of procedural innovation to serve the interest of the court and judges instead of to further the rule of law, Judge Bazelon's admonishment will continue to apply.

³¹⁸ *Proceedings of the Degree Ceremony*, *supra* note 17, at 265–70.

³¹⁹ David L. Bazelon, *New Gods for Old: "Efficient" Courts in a Democratic Society*, 46 N.Y.U. L. REV. 653, 653 (1971).