A Proposal for Descretionary Review in Federal Courts of Appeals

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ESSAYS

A PROPOSAL FOR DISCRETIONARY REVIEW IN FEDERAL COURTS OF APPEALS

by

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PROFESSOR Kallay has written:

> Whether access to appellate review can be denied or curtailed by means of a dismissal should rest ultimately on the difference between appeals as of right and discretionary appeals. *If a party can perfect an appeal as a matter of right, he should necessarily be entitled to the benefits of the entire deliberative process offered by the forum to which he has taken his appeal.*[1]

No one should seriously challenge Kallay's observations. Federal litigants in both civil and criminal cases have been given the right of appellate review in the courts of appeals since the Act of 1891 creating the federal courts of appeals.[2] The problem existing today is that federal courts of appeals are so inundated by the volume of appeals that appeals of right can no longer be given the full deliberative process to which they are entitled.[3] In 1960, 3,899 appeals were filed in the courts of appeals. By June 30, the end of the 1980 fiscal year, 23,200 appeals had been filed. Consider that 568% more appeals were pending in 1980 than in 1962, 158% more than in 1969, and 13% more than in 1979. This huge increase occurred notwithstanding that the courts terminated 401% more cases in 1980

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* Chief Judge, United States Court of Appeals for the Eighth Circuit.

1. Kallay, *The Dismissal of Frivolous Appeals by the California Courts of Appeal*, 54 CAL. S.B.J. 92 (1979) (emphasis added).

2. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826. Litigants are currently given the right to appeal by 28 U.S.C. § 1291 (1976). This statute is the successor of Act of Mar. 3, 1911, ch. 231, § 128, 36 Stat. 1133.

3. Judge Godbold of the Fifth Circuit has observed that the volume of cases has forced courts to alter their procedures for handling appeals, a development that he finds to be positive.

> If the enormous growth of appellate caseloads is an ill wind, it has blown considerable good. It has forced appellate courts to re-evaluate what they are doing and to think about whether and how they can do it better.
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> No more significant re-evaluation has occurred than scrutiny of the premise that all appellate cases, regardless of differences between them, must be immutably accorded the full range of all appellate procedures. Courts have found the courage to look with questioning eyes at their policies on oral argument, the necessity for opinions, the content of opinions, and the contents of records.

Godbold, *Improvements in Appellate Procedure: Better Use of Available Facilities*, 66 A.B.A.J. 863 (1980).

than in 1962, 132% more than in 1969, and 10% more than in 1979.[4] Although courts of appeals have experimented with many short cuts, they continue to experience such backsliding that a projection of the appellate process in federal courts by the year 2000 is overwhelming.[5] In this essay, I would like to pose the question whether the time has come for the exercise of discretionary jurisdiction in federal courts of appeals.

The appellate process today is so delayed and time-consuming for litigants in the majority of the courts of appeals that the situation is scandalous. The total number of cases under submission for longer than three months increased from 587 to 767 cases, or nearly 31%, between June 30, 1979, and June 30, 1980. The Fifth, Ninth, and Tenth Circuits accounted for more than 57% of these 767 cases. Cases under submission for longer than one year increased 23% during fiscal year 1980. The District of Columbia, Ninth, and Tenth Circuits accounted for nearly 76% of this increase. On June 30, 1980, 18% of the District of Columbia cases under submission for more than three months had been under submission more than one year. Fifteen percent of the Seventh Circuit's and 10% of the Ninth Circuit's appeals had been under submission for more than one year.[6] Even more egregious is the fact that in some circuits an appeal takes from one to two years to be calendared for oral argument. The ominous clouds of billowing appellate dockets are no longer merely on the horizon.

The tremendous increase of federal appeals has prompted various responses, some more effective than others. The most palliative response Congress has made, albeit ten years late, has been to increase the number of federal judges on the courts of appeals.[7] Such a move is unwieldly and controversial to say the least. It defies the wisdom of every recent student of judicial administration.[8]

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4. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 43 (1980).

5. Assuming the caseload continues to grow and the courts continue to dispose of cases at the same rate in the next 18 years as they have in the past 18 years, the courts of appeals, in 1998, will terminate 104,644 cases and will have 135,283 cases pending. These figures are compared to 20,887 cases terminated and 20,252 cases pending in 1980 and 4,167 cases terminated and 3,031 cases pending in 1962. The 1998 caseload would be a 2414% increase in cases terminated and a 4363% increase in cases pending over the figures for 1962. *See id.* Although this assumption may seem somewhat specious, no one doubts that there will be a large increase in filings in the next 20 years. Under the present system the courts of appeals will be unable to cope with even any realistic increase in caseload.

6. *Id.* at 52-54.

7. *See* 28 U.S.C. § 44 (Supp. II 1978).

8. Justice Frankfurter once wrote:

> The consequences that [the expanding federal caseload] entails for the whole federal judicial system . . . cannot be met by a steady increase in the number of federal judges. . . . The function and role of the federal courts and the nature of their judicial process involve impalpable factors, subtle but far-reaching, which cannot be satisfied by enlarging the judicial plant. . . . In the farthest reaches of the problem a steady increase in judges does not alleviate; in my judgment, it is bound to depreciate the quality of the federal judiciary and thereby adversely to affect the whole system.

Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 58-59 (1954) (Frankfurter, J., concurring). Robert Bork, Solicitor General of the United States, has written that a large number of judges on a court "damage[s] collegiality, lessen[s] esprit, and diminish[es] the possibility

During Congress's extended delay, the courts of appeals, by necessity, have created their own innovations to cope with the ever increasing volume of appeals. The latest experiment has been the Second Circuit's Civil Appeal Mediation Plan, which fosters attempts to settle cases before the appeal process takes place. This process is time consuming, and it is not the most convenient tool for circuits that have broad geographic areas such as the Eighth and Ninth Circuits. Furthermore, the program's effectiveness is hard to measure because it is difficult to assess how many cases that are settled would have been settled without the program's special efforts. Additionally, the Ninth Circuit has experimented with arguments without briefs or written opinions. Another long-needed innovation every court of appeals has found necessary is the lessening of the number of full-length opinions.

The most universally adopted innovation has been the screening of cases either for limitation of the time for oral argument or for complete elimination of argument. Various summary techniques have been developed for deciding cases screened for no argument. Central court staffs have been enlarged to work principally on these cases. In many courts of appeals, staff memoranda, written by first-year law clerks, are utilized as the court opinion in no-argument and even some argument cases. Many circuits, including my own I am embarrassed to add, decide no-argument cases without a collegial conference of the three judges meeting together and exchanging possible divergent views. Due to the geographic spread of the Eighth Circuit judges' home bases, the "conference" is, through necessity, by United States mail. In this situation, the danger of one-judge opinions becomes significant.[9]

The concept of screening is a good one; courts of appeals should not

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of interaction throughout the judicial corps." Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 234 (1976). Embracing this same idea, Judge Friendly indicated that nine is the maximum number of active judges that can sit on a court without losing the attributes of a small, intimate body. H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 44-46 (1973). In 1964 the Judicial Conference of the United States resolved: "[N]ine 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." REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 15 (1964).

9. Dean Carrington observed:

> A few years ago lawyers usually were assured in most courts that they would receive an attentive response to their arguments. Judges presented themselves at oral argument to discuss their contentions and in their opinions would present their reactions to advocacy. One could reasonably infer from the opinions that the judges had conferred and reached a deliberative decision.
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> The effect of these procedural amenities was that the court could be seen to be obeying and enforcing the law. Trial judges could be seen to be accountable for their obedience to the law. Lawyers so assured were better able to make predictions about the outcome of litigation, better able to identify hopeless claims and appeals that ought not to be litigated, and better able to plan transactions which avoid the presentation of disputes.
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> Gone are those days. In more than half the cases decided by some courts there is no oral argument, no conference of the judges, and no opinion. This is

require the calendaring of cases for oral arguments that are either frivolous or so simplistic on their face that the result is obvious to perceive. The difficulty with screening is, however, that meritorious cases as well are being screened for no argument. Estimates in the Fifth Circuit are that 65% of the cases are screened for no argument. Many judges feel this procedure is necessary to save time and expense for the court, counsel, and the parties. The truth is that in many appeals the denial of oral argument is simply short-sighted justice. I have long believed in the Frankfurter admonition that if a case is worthy of appeal, it is worthy of oral argument.[10] First and foremost, oral argument simplifies cases for the judges. Socratic confrontation between judge and counsel at oral argument often disposes of seemingly complex issues by practical resolution. Oral argument often serves to correct false impressions gained from reading briefs. Invariably, I have found that an exchange between judge and counsel during oral argument alters a judge's attitude or vote in conference. This is true in even single issue cases. Finally, I agree with the philosophical importance of oral argument: visibility of oral confrontation between counsel and judge lends virtue to the legal system.[11] Once a litigant is denied his right to have counsel present oral argument in a case worthy of appeal, he has indeed lost his right to the full deliberative process of the court.

On an individual level, circuit judges have designed different work habits in order to lessen the demand of each case on his or her time. The most time-consuming method of preparing a case is for the appellate judge to prepare himself for each case without the aid of law clerk memoranda. I strive to use this approach because I feel a personal, empirical grasp of the subject matter is essential for oral argument. On the other hand, some judges feel they prepare more adequately for oral argument aided by law clerk memoranda, while others prepare exclusively from law clerk memoranda. In some circuits, though not in the Eighth, panels in preparation for oral argument use a single memorandum prepared by the central staff, or the judges equally allocate the preparation of calendared cases by having their law clerks write memoranda in one-third of the cases and then enter into an equitable exchange. In this time-saving technique, judges fall back on their law school days when they engaged in the same short-sighted study device of briefing pools. This short-cut may save preparation time,

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truly a radical change. Its like has occurred in almost every appellate court in the United States, federal or state.

There is no blame to be assigned to the judges. Caseloads have grown manyfold; judgeships have not. While Congress in 1978 increased the number of circuit judgeships by almost half, this number is still far less than enough to maintain the traditional ceremonies of appellate procedure. But the absence of fault does not assure the wisdom of what has been done. There is indifference to the radical change, which is widely shared among judges, legislators, and scholars. That indifference seems unjustified.

Carrington, *Ceremony and Realism: Demise of Appellate Procedure*, 66 A.B.A.J. 860 (1980).

10. *See also* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 240 (1960).

11. *Cf.* Carrington, *supra* note 9, at 862.

but it also inhibits diversity of thinking, original thought, and the judge's individual contribution at conference.

Although many of these innovations are today deemed minimally essential to keep the courts of appeals afloat, they defy Professor Kallay's and Dean Carrington's premise that every appeal of right is entitled to the full deliberative process. The possible truth is that courts of appeals today may provide in many appeals only an appearance of justice rather than justice itself. I submit that through the lessening of the full deliberative process, courts of appeals are, in reality, invoking a form of discretionary dismissal without calling it such. This conclusion brings me to the question posed: Whether the time has come for society to make a cost analysis and determine whether the cost of the delay in resolving disputes and of the increase in the size of the judicial machinery necessary to handle the torrent of appeals exceeds the value gained in providing the formal recognition and appearance of a deliberative process and the continuation of formal decisions and written opinions in frivolous and nonmeritorious appeals.

The concept of granting courts of appeals discretionary review power is not new. Judge Friendly some time ago recommended discretionary review in administrative proceedings.[12] He suggested that when the district court has affirmed the action of an administrative agency, appeal should only be allowed by leave of the court of appeals. His reasoning is that one appeal of right is adequate to correct errors of law committed by the agency, especially considering the narrow and limited standard for reviewing agency action. I suggest that Judge Friendly's proposal be expanded to allow courts of appeals discretionary leave to refuse to review, at least in civil cases, any appeal that on its face does not appear to be substantial or meritorious.

In order to avoid denying review to meritorious cases, certain controls should be legislatively established guiding the courts of appeals' exercise of discretionary jurisdiction. I would propose guidelines that allow a court of appeals to deny review of only those cases that are patently frivolous or those in which the district court opinion appears on its face to be correct as a matter of law or fact. First, all defendants, whether appealing as indigents or not, would have a right of full review, including oral argument, in direct criminal appeals. The denial of liberty and the stigma of conviction should require in every criminal appeal a full deliberative process. Second, each litigant seeking an appeal in any civil proceeding would be required to file a petition for discretionary review with the notice of appeal. The petitions would be limited to ten pages and would set forth the reasons the appeal should be allowed. Each petition would attach a copy of the district court's memorandum and judgment. Third, a three-judge panel would then review this petition within ten days of its filing. Any one circuit judge could grant the petition by directing the clerk's office to docket the appeal and to require the docket fee be paid or, if the appeal is in

12. H. FRIENDLY, *supra* note 8, at 38, 177.

forma pauperis, to have it so certified under section 1915 of title 28. If the panel desires, it may request a response to the petition from the other side. Fourth, if the face of the petition presents any colorable issue of disputed law or presents a serious challenge to the sufficiency of the evidence, the appeal should be allowed. Fifth, a district court could certify that an appeal presents a colorable issue for review; if such a certification is given, the parties could proceed without further permission from the court of appeals. Sixth, if the petition for review is not deemed insubstantial by the panel, but nonetheless appears to raise a narrow or simple issue for review, the court may allow docketing of the appeal, set the matter down for summary argument without plenary briefing, and summarily dispose of the case by opinion or order. This latter procedure could aid the courts in establishing a summary calendar and serve to expedite and process a large number of appeals.

Courts of appeals are neither unfamiliar nor inexperienced with granting or denying discretionary review by preliminarily reviewing cases to determine if a proposed appeal is frivolous. The fundamental exception to the right of appeal in federal courts concerns habeas corpus appeals brought by state prisoners under section 2254 of title 28. A state prisoner cannot appeal a denial of a writ of habeas corpus by a federal district judge without the issuance of a certification of probable cause by either the district court or the court of appeals. When the certification is denied by the district court, the court of appeals must exercise its discretion as to whether a certificate may issue and an appeal may be taken. One obvious reason for this exception is that state courts have already reviewed the issues at least once before a prisoner may proceed in federal court. In my opinion, the courts of appeals, in their experience of reviewing habeas corpus cases to ascertain whether a certificate of probable cause should issue, have not abused the discretion given to them. In exercising discretion as to whether to allow the appeal, circuit judges are meticulous in reviewing district court files, which often contain state court transcripts, opinions, and records. The fact that the case is not briefed detracts little from the judgmental decision regarding not the rightness or wrongness of the district court's ruling, but whether a colorable issue is revealed. The time-saving factor follows when a certificate is denied; the court merely orders the denial without a formal written opinion.[13]

Courts of appeals also exercise discretionary jurisdiction in determining whether to grant a certificate of good faith under section 1915 of title 28 involving in forma pauperis appeals. When a district judge certifies that

13. Judge Friendly has recommended that § 2254 be amended so that only the court of appeals can grant the certificate of probable cause. This change would provide greater supervisory control over the appellate docket. On the other hand, a strong argument can be made that district courts are well-equipped to measure the substantiality of the legal issues and closeness of their decisions and that the courts of appeals profit by their preliminary review. Of course, if district courts are abusing either the grant or denial of the certificate, then legislative change is warranted. I have not observed such abuse in my experience. *But see* H. FRIENDLY, *supra* note 8, at 38.

an appeal would be frivolous and not in good faith, a petitioner must seek a certificate of good faith from the court of appeals before going forward with the appeal. As under section 2254, the court of appeals must review the complete file and if, in its judgment, an appeal would be frivolous, the appeal can be denied, and generally no opinion is written. On the Eighth Circuit, upon application for a certificate of good faith, if the appeal appears to be frivolous after review of the record, an order to show cause is entered, and the petitioner is given fifteen days to show why the case should not be dismissed as frivolous. If the panel remains convinced the appeal would be frivolous, a brief per curiam order is filed dismissing the case.

The fact that leave to appeal may be denied in an in forma pauperis case on the ground that it is frivolous may seem somewhat anomalous under equal protection standards. The practical effect is that only in forma pauperis appeals are denied as frivolous before the briefing stage. Our court does not review paid appeals until after plenary briefing.[14] Thus, as a practical matter, section 1915 places in forma pauperis cases on a different footing than paid appeals. Of course, paid appeals are often dismissed as frivolous before oral argument, but this dismissal occurs only after full briefing and screening by the court.[15] Many appeals should be screened out as insubstantial whether they are in forma pauperis appeals or not. Many appeals should be denied the right of plenary review without briefing, oral argument, and opinion writing, much in the same manner as discretionary denial of a certificate of probable cause as exercised in section 2254 cases.

Numerous benefits would arise in providing courts of appeals the power to deny leave to appeal cases that are insubstantial on their face. First, the judicial time needed to review petitions for discretionary appeal would be no greater than that which is now spent on screening cases for no argument. Second, tremendous saving of judicial time and resources could be had by obviating the need for full review of lengthy briefs and records and the writing of formal opinions in hundreds of cases. Third, such procedures would tend to place the indigent's petition for review on the same evaluative basis as the appeal filed by the paid litigant. Fourth, the long delay between filing notice of appeal and the appellate decision would be drastically curtailed for all cases. Fifth, and most importantly, all cases worthy of appeal would be afforded the full deliberative process, including the right to oral argument and written opinion. The recommended procedure would actually provide more thoughtful judicial input into meritorious appeals than presently exists.

I suggest that the necessity to file a petition seeking discretionary review

14. In forma pauperis appeals may be denied only if they are "clearly frivolous." Coppedge v. United States, 369 U.S. 438, 446 (1962). The frivolousness of the issues presented in an in forma pauperis appeal must be evaluated under the same standards as paid appeals. *Id.* at 447.

15. *See* Perry v. Ralston, No. 80-1814 (8th Cir., filed Dec. 22, 1980).

will deter the filing of many appeals because lawyers will be required to evaluate immediately whether the issues they intend to raise are substantial enough to warrant an appeal. It is doubtful that initial review under this procedure will seriously impede the filing of any meritorious appeal. The waste of judicial resources in attempting to take short cuts by screening, reviewing central staff opinions, and writing formal opinions in insubstantial cases is time well worth saving. The goal of giving full deliberative and expeditious process in all cases worthy of appeal is one worth pursuing. In the final analysis, as the population continues to increase and interests become more diverse, the grant of discretionary review to United States Courts of Appeals may be the only procedure that will enable the courts to provide effective appellate review for society.[16]

16. Although the caseload of the Supreme Court of the United States is not within the scope of this essay, discretionary review in courts of appeals would drastically reduce the volume of frivolous petitions for certiorari in the Supreme Court. Justice Frankfurter observed:

> The litigious tendency of our people and the unwillingness of litigants to rest content with adverse decisions after their cause has been litigated in two and often in three courts, lead to attempts to get a final review by the Supreme Court in literally thousands of cases which should never reach the highest court of the land.

Dick v. New York Life Ins. Co., 359 U.S. 437, 459 (1959) (Frankfurter, J., dissenting); *see* H. FRIENDLY, *supra* note 8, at 47.