CHANGES TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT OVER A THIRD OF A CENTURY

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There have been many changes in the United States Court of Appeals for the Seventh Circuit since I arrived in September, 1971, to begin a one year clerkship with Circuit Judge Roger Kiley. In this article I want to do two things: one is to describe the changes and the second is to analyze those changes for their impact on justice.

COMPOSITION OF COURT

When I came to the Court of Appeals, there had never been a woman circuit or district judge in the Seventh Circuit. District Judge James Parsons was the only African American on either bench. He had been appointed in 1961 by President Kennedy. Chief District Judge Barbara Crabb was the first woman appointed in this circuit in 1979. There would not be a woman on the Court of Appeals until 1993 when Judge Ilana Rovner was appointed. It would not be until 1999 when the first African American, Circuit Judge Ann Claire Williams, would be appointed to the Court of Appeals.

Two interesting side notes are that Circuit Judge Ilana Rovner was hired as a law clerk by Judge Parsons and Circuit Judge Ann Claire Williams, the first African American on the Seventh Circuit, was interviewed as a Notre Dame law student by then Chief Judge Luther Swygert and myself. Chief Judge Swygert recommended her and she accepted a clerkship with Circuit Judge Robert Sprecher. Judge Swygert was a leader as a district judge and as a circuit judge in recruiting and hiring women and African Americans.

Congress authorized a second law clerk for circuit judges in 1970 and I was the first to fill that position with Circuit Judge Roger Kiley. The four senior circuit judges at that time all had only one law clerk, and three of the

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eight active judges only had one law clerk. The court regularly filled panels with visiting judges from other circuits and district judges from within the circuit. For more than a dozen years, the policy has been not to use visiting judges. When I started as a law clerk, there were about six en banc appeals argued each year. Now it is about one a year with some years none. I can remember a senior circuit judge visiting from another circuit who wrote four decisions. Two of his decisions had dissenting opinions which ended up as the majority after en banc reversals of the panel decisions. Not using visiting judges has, in my opinion, made the law of the circuit much more stable and predictable, thus minimizing the need for en banc decisions to correct the law of the circuit. An innovation which helps minimize en banc rehearings is Circuit Rule 40(e) which allows a panel to circulate for approval by all of the judges a decision which would overrule prior court precedent or create a conflict among circuits. This is an en banc decision without a rehearing.

In 1971 there was no circuit executive, no staff attorneys, and no settlement attorneys. Congress passed the Circuit Executive Act in 1971.[1] At that time the Judiciary was asking for funding for staff attorneys but the senior law clerk to the court position (now senior staff attorney) was not funded by Congress until 1974. Joel Shapiro was appointed as the first Settlement Attorney in 1994. In 1971 there were nine deputy clerks in the clerk's office compared to the 49 deputy clerks now.

In 1970 a second law clerk was hired by one of the judges and that law clerk's responsibility was to work for all of the judges as a staff attorney, but the person left early in the clerkship because of medical issues. I was hired by Judge Kiley to spend half of my time working for him as an elbow law clerk and half of my time handling motions for all of the judges. I shared the motions law clerk work with Judge Cummings' second law clerk.

CHANGES TO CASELOAD

The eight active and three senior circuit judges had 902 appeals filed in 1971, terminated 792, and were left with a pending caseload of 775. The previous decade had already seen rapid change. In 1961, with one less judge, there were only 328 appeals filed and 320 terminated.[2]

In 1971 the bankruptcy work was handled by referees who were appointed by the district judges, and those decisions were not directly appealable to the Court of Appeals. Later, Congress considered establishing

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1. Act of Jan. 5, 1971, Publ. L. No. 91-647, 84 Stat. 1907.
2. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE FISCAL YEAR ENDING JUNE 30,1971, at 101 tbl.3 and at 106 tbl.5.

Article III appointed bankruptcy judges, but instead allowed bankruptcy judges to be appointed by the Courts of Appeals for 14 year terms. Until the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,[3] decisions of bankruptcy judges were appealable to the district courts and then the courts of appeals. Although bankruptcy judge decisions can now be appealed directly to the court of appeals, few are.

In 1970 Congress morphed commissioners into magistrates and gave them more responsibilities, but the magistrates had no authority to enter final decisions so there were no appeals from them. The Federal Magistrates Act of 1979 provided that magistrates could be delegated by the district court to decide civil cases if all of the parties consented. The magistrate decisions were directly appealable to the Court of Appeals.[4] The magistrates were renamed magistrate judges in 1990.[5]

There were only 28 district judgeships in the Seventh Circuit in 1971.[6] The Court of Appeals workload came from the appeals from district judge decisions and petitions to review decisions of administrative agencies, such as the National Labor Relations Board. Now there are 47 district judgeships plus an additional 18 senior district judges, 29 bankruptcy judges, and 32 full time magistrate judges. Although there are not many direct appeals to the courts of appeals from the bankruptcy judges, all of the other judicial officers generate appealable decisions. In calendar year 2007, there were 3,150 appeals handled by the now 11 active circuit judges and four senior circuit judges.

In 1971 15% of the appeals filed were state or federal habeas cases, 20% were criminal cases, 12% were administrative agency appeals, and just under half of the docket were other civil appeals.[7] Although criminal appeals climbed slightly to 22% of the docket, prisoner petitions including habeas and civil rights actions doubled to become a third of the docket while other civil appeals have moved from being half of the docket to only about a quarter.[8]

There were also big changes in the categories of cases. In 1971 there were 43 National Labor Relations Board review petitions and 29 other petitions to reviews from the Interstate Commerce Commission and other agencies. By 2007 the Interstate Commerce Commission had been abolished and there were 220 administrative agency cases, only 12 from the NLRB. The

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3. Act of Apr. 20, 2005, Pub. L. 109-8, 119 Stat. 23.
4. Act of Oct. 20, 1979, Pub. L. 96-82, 93 Stat. 643.
5. Act of July 28, 1989, Pub. L. 101-65, 103 Stat. 166.
6. 1971 MANAGEMENT STATISTICS FOR UNITED STATES COURTS, at 7-1 to 7-7.
7. 1971 MANAGEMENT STATISTICS FOR UNITED STATES COURTS, at 7-0.
8. *See infra* Appendix, tbl.1.

new big source for such appeals in 2007 is the Board of Immigration Appeals with 186 petitions to review. Original proceedings, which are usually petitions for writ of mandamus, had grown from 24 in 1971 to 190 in 2007.[9]

Criminal appeals also saw a dramatic change. In 1971 the three largest categories of the 183 criminal appeals were narcotics, fraud and selective service violations, all with 23 cases each. Each category of crime represented 8% of the docket.[10] Of the 713 criminal appeals in 2007, there were 94 fraud cases, 315 drug cases, and obviously no selective service offenses as there no longer is a draft. There were 31 money laundering cases, a crime that probably did not exist in 1971. Money laundering cases are usually offshoots of drug cases as drug dealers are trying to hide the money. Over the same period, firearms cases rose from 13 to 127 while robberies only increased from 11 to 25. The only sex offense case in 1971 was a white slave case, a term that described prostitution across state lines. In 2007 there were 30 sex offense appeals, nineteen of which dealt with pornography and six involved sexual abuse of a minor. The two criminal immigration cases in 1971 grew to 25 in 2007, 19 of which involved illegal reentry to the country by an alien. The Seventh Circuit cannot complain about the 19 illegal alien reentry appeals as the Fifth Circuit had 1118 such appeals.

On the civil side, social security cases rose from 8 to 33. There were only 99 civil rights cases in 1971, four of which were brought by the United States and 25 were filed by prisoners. In 2007 there were 312 prisoner civil rights cases and 473 other civil rights cases. Of these 473 cases, 221 were based on the new statutory provisions covering discrimination in employment. Personal injury cases cratered going from 67 in 1971 to only three in 2007. Insurance and other contract disputes rose from 63 to 123. There were only 27 patent appeals in 1971; now all such appeals are in the United States Court of Appeals for the Federal Circuit.

The United States, which filed 29 cases in 1971, only brought 22 in 2007 although cases with the United States as a defendant increased from120 to 546. In 1971 forty-four of these suits were brought by prisoners. Prisoner suits increased to 405 in 2007.

What can we glean from these statistics about changes? There have been big increases in criminal and habeas appeals and in civil rights cases, particularly those brought by prisoners. New statutes on drugs, money

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9. *Compare* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE FISCAL YEAR ENDING JUNE 30,1971, tbl.B-3,*with* ADMINISTRATIVE OFFICE CASELOAD TABLES FOR THE YEAR ENDING JUNE 30, 2007, tbl.B-3.

10. *Compare* ANNUAL REPORT FOR 1971, tbl.B7,*with* ADMINISTRATIVE OFFICE CASELOAD STATISTICS THROUGH JUNE, 2007, tbl.7.

laundering, and firearms have increased the amount of street crime being prosecuted in the federal courts. The courts do not keep statistics on gang crimes but the bulk of the appeals that I see involving drugs also involve gang members, often with multiple defendants.

As a result of increased street crime, Congress passed the Bail Reform Act of 1984[11] which made protection of the community from further criminal activity a consideration in granting release pending trial and appeal.[12] The presumption of release pending appeal was also reversed to require incarceration of the defendant found guilty at trial unless there is a substantial question of law or fact likely to result in reversal or vacating the sentence.[13] These changes have resulted in many appellate motions for release as well as the occasional request of the government to incarcerate a defendant released on bond.

Contracts cases between diverse parties have declined as a percentage of the docket whereas employment cases and immigration reviews now occupy a major part of the docket. Neither was even a statistical category in 1971.[14] The courts do not keep statistics as to whether parties are corporations or individuals, but based on personal experience, there has been a decrease of contract disputes between big corporations. I surmise that it is because corporate contracts generally contain mandatory arbitration agreements so the parties can select the arbitrators, keep the dispute confidential, and resolve it more quickly without any appeals.

DRAFTING DECISIONS BEFORE TECHNOLOGY

It may be helpful to compare my life as a law clerk to what it is for law clerks today. First there are now more law clerks in each chambers. When I arrived at the court, half of the active judges only had one law clerk and the other half had just filled the newly authorized second law clerk position. Although most of the judges now have three law clerks, four have four law clerks and one has five. In my day I knew of no circuit judge who used more than one law clerk on a given case. Now a number of judges involve more than one of their law clerks in the discussion and researching for each case.

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11. Act of Oct. 12, 1984, Pub. L. 98-473, § 202, 98 Stat. 1837.
12. 18 U.S.C. §§ 3142, 3143 (2006).
13. 18 U.S.C. § 3143.
14. *Compare* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE FISCAL YEAR ENDING JUNE 30,1971, tbl.B-3,*with* ADMINISTRATIVE OFFICE CASELOAD TABLES FOR THE YEAR ENDING JUNE 30, 2007, tbl.B-3.

Almost all decisions in 1971 were by published opinion. The judge or law clerk would do the first draft and then have it typed by the secretary. A lot of draft decisions were done on yellow legal pads although some law clerks typed their own drafts and the late Circuit Judge Walter Cummings would dictate his opinions to his secretary. Once a draft was typed, it would be proofread to make sure that there were no spelling, grammatical, or other mistakes. The proofreading process seemed endless in those days. The opinion was reproofread after every new typing. Often the law clerk and the secretary would be proofreading the opinion together by having one person read it out loud while the other read and made sure that nothing had changed. Proofreading including reciting the punctuation and capitalization. The proofed draft opinion would then be circulated to the other two judges on the panel either by mail or hand delivery. The copies of the opinion were carbon copies made on the typewriter but we were making the transition to photo copies from expensive machines with smelly sticky paper. But it still was an improvement from the carbon copies made on the typewriter.

When the authoring judge had received approval letters from the other two judges or their concurrence or dissent, the opinion would be sent to the printing company by the clerk's office. The printer would typeset the opinion and send a galley of the opinion back to the authoring judge and any concurring or dissenting judge for the respective judge or staff to proofread and approve the galley. Sometimes the authoring judge would change text in the galley which would require review by the judge's colleagues on the appeal. When the galleys were approved and returned to the printer, the opinion would be printed and returned to the clerk's office. It would not be released until the staff of the authoring judge or judges had approved the release of the opinion after proofreading it again to make sure that the corrections made on the galley had been implemented and the printer had not mistakenly changed something else in the opinion.

When the opinion was released to the parties, lawyers, and public, it would also be sent to West Publishing which would set the opinion in type to be published and add a synopsis and headnotes and list the lawyers. West Publishing would mail the galley to the authoring judge to review the galley. Sometimes the West editor would catch grammatical or spelling errors or have questions. As the law clerk, you were expected to proofread and review those West Galleys because the law was not in the slip opinion but in what West reported in the Federal Reporter series.

When working on the case, the law clerk, then as now, always needed to check the docket in the case. No sense writing a draft decision in a case which was dismissed after argument. In 1971 there was only one copy of the docket in each case and that was in the clerk's office. If a motion or order was

erroneously left off the docket sheet, for all practical purposes it did not exist until an attorney called it to the court's attention. Fortunately, then like now, the clerk's office had excellent people and mistakes were rare. But every now and then you could not find the docket sheet as it was misfiled or someone else in the court had used it and failed to return it.

THE JOYS OF TECHNOLOGY

I mention the procedures back then because photocopying made law clerks and other court staff much more productive. Good photocopies minimized the blurriness of carbon copies. It was easier for the secretary to type an original without carbon copies. Correcto tape and white out were much easier when you did not have to worry about carbon copies.

The next big productivity improvement was word processing. When the computer replaced the typewriter, you could type faster without the necessity of returning the carriage after so many key strokes. Mistakes were more easily corrected. A number of decades ago, it was the rare professional that learned to type but today computers make typing skills essential for everyone. Many law clerks and judges now prepare draft opinions without the need of a secretary. The documents can easily be put in final form for printing and distribution.

Once you typed it on the computer, you did not have to worry about making mistakes in other parts of the opinion when you were making corrections elsewhere. The drudgery of proofreading to catch errors made by typists or the printing companies was eliminated.

There is another great benefit from preparing opinions on computers. Opinions are now better crafted as it is easier to make corrections. In the old days, you would think twice as to whether you wanted to ask the secretary to retype an opinion that had already been typed on multiple occasions. You had to balance whether the editorial change to improve the opinion outweighed the grief that you might receive from the secretary for having to retype something and the additional risk that in the retyping, another error in the opinion would be made.

Another great innovation which increased law clerk and judge productivity has been computerized legal research. In 1971 one of the law clerk's duties was to keep the chambers library current by replacing pocket parts, shelving new reporters, and my personal favorite, filing loose leaf services. My law clerk skills of Shepardizing a case used a lot of my time but now are as useful as my knowledge of using a slide rule. Law clerks today can do their legal research from any computer. They do not have to go to the court's library or leave the building to go to another more complete law library

to find old treatises or case reporters. They do not have to put aside work and wait for the library to get the book. The limited chambers library has been replaced by the seemingly unlimited online legal resources. This has been a great saving in staff time as no time is wasted maintaining the chambers library, no time is lost going somewhere else to find a book, and finding and searching cases and case history is faster.

The late Circuit Judge Wilbur Pell drafted a uniform vote sheet with attached carbons which made circulating and voting on decisions more efficient. That replaced the individualized carbon copy letters and notes. It allowed the judges to quickly concur by checking off the appropriate box and adding a note to it if needed. That vote sheet is still in use but is now composed and sent via computer.

Other innovations have been the fax and e-mail to replace regular mail. These innovations make delivery of draft decisions and the subsequent panel votes instantaneous. Electronic filing, a computerized docket, and copying court documents into the court's computer means that there is electronic access from anywhere to the briefs and filed documents, no lost documents. Judges and staff were no longer lugging briefcases of briefs and appendices. All you need is the laptop computer. The court can easily promulgate rule changes and other notices by posting them on the court's web site and anyone in the world can see the court's decisions shortly after they are rendered.

Taking notes at oral argument is still important, but the importance has diminished from the days when there were no recordings of arguments. Now you can listen to any argument that you wish from the internet with digital sound quality.[15] You can even subscribe to arguments and get them on RSS and listen on your iPod.

STREAMLINING THE DECISIONAL PROCESS

While technology increased the productivity of judges and their law clerks, changes in rules and procedures have also greatly aided the Court of Appeals in handling the higher volume of cases. When I arrived at the court in 1971, all cases had briefs that were professionally printed unless a party was proceeding pro se or the counsel asked permission to file fewer copies of the brief in typewritten form. As the quality of photocopiers improved and they became cheaper, the court actually encouraged parties to submit photocopied briefs instead of typeset printed briefs. Besides saving parties money, it reduced the time necessary to file briefs as there was no need to take

15. http://www.ca7.uscourts.gov/fdocs/docs.fwx?dname=arg (last visited Apr. 9, 2008).

the extra step of sending them to the printer followed by the necessary proofreading of the brief to catch printer's errors.

In 1971 most cases had a separate appendix which was a reproduction of the entire district court record. The big money cases also included a printed book of all of the trial exhibits. In today's parlance we were killing a lot of trees. Federal Rule of Appellate Procedure 31(b) required 25 copies of each brief to be filed. As the extra copies of the briefs and the large appendices took up a lot of storage space and most of them would be tossed out after the appeal was decided, the Seventh Circuit by Circuit Rule 31(b) reduced the number of copies of the brief from 25 to 15 and encouraged the parties to submit a limited appendix attached to the main briefs. The limited appendix started out as merely the trial court's final decision but has slightly expanded to include all relevant court and agency decisions as well as other specified documents needed to decide the case.[16]

All of the courts of appeals saw a great increase in the number of published decisions which meant the number of volumes and the cost of the Federal Reporter Series also grew exponentially. In response the circuits were asked to limit the number of opinions sent to the publishers. This was the impetus for bifurcating decisions into precedential published printed opinions and nonprecedential unpublished orders. These unpublished orders were photocopied and had a limited distribution and could not be cited in the federal courts of the Seventh Circuit. Circuit Rule 53 was amended to provide that these orders issued after January 1, 2007, could be cited but were still not precedential. Since the orders are written for the trial judge or agency and the parties and their counsel, time was saved by not going into a detailed explanation of the facts of the case since all of the parties involved in the appeal would know the facts and the proceedings. Nor did the reasoning of the decision need to be so detailed.

SCHEDULING CASES AND RANDOM SELECTION OF JUDGES

In 1971 the clerk of court would bring a cart of all the briefs in fully briefed cases to Chief Judge Luther Swygert's chambers in order to schedule the calendar. The judge would look at the size of the briefs and set the argument time which was usually 20 or 30 minutes per side. There would be two or three appeals argued each day. Now each day of argument has six cases with 10 to 30 minutes per side. There are 16 days during the year on which there are nine usually simpler one issue appeals with 10 minutes per

16. U.S. Ct. of App. 7th Cir. R. 30.

side. A staff attorney is assigned to prepare a memorandum in each of the short argument appeals and to work on the final decision if the authoring judge so desires. The innovation of the short argument calendar days was instituted as the judges were willing to decide more cases if it would not result in more work for their chambers staff. The judges are still free to use their own law clerks but most do not, thus saving staff time. The setting of cases in multiples of three eases assignment of authoring judge responsibilities, as all usually get an equal share unless a judge dissents a lot. The calendar of cases for a week is prepared and circulated to the judges for them to identify any conflicts with particular cases or days when they cannot sit. A panel of three judges is then randomly drawn from the judges eligible to sit on a given days. There is a similar random assignment system for deciding unargued cases.

Chief Judge Swygert instituted the random selection of judges. Prior to that, the chief judge selected the judges to sit each day after the cases were scheduled. The first randomly drawn panel involved the convictions and contempt citations of the Chicago Seven and the contempt citation of Bobby Seale.[17] The trial had received extensive national coverage and the appellate review would take a lot of work. The judges' names were put on slips of paper and then placed in a black bowler hat that Judge Swygert donated to the court. The panel was drawn literally out of the hat. There were informal rules such as if a judge's name was drawn to sit on two days of cases during a particular week, his name would not be put in the hat for drawing for the rest of the week. A bedrock principle was that each active judge would sit as much as the other judges over the course of the term.

Two subsequent developments in the random selection system were introduced later. Then Circuit Judge Frank Easterbrook prepared a matrix of panels with each judge sitting with each other judge so that over the course of two years, almost every combination of judges would be used. Former Chief Judge Joel Flaum introduced the use of a computer to select the panels. Judge Swygert's hat was retired to the court history collection.

An innovation that has helped make the judges more efficient and helped with *stare decisis* has been having successive appeals return to the same panel.[18] This has the obvious effect of lessening the attempts of the loser in the earlier appeal arguing why the first decision was wrong. But there are many other benefits. The predecessor of Operating Procedure 6(b) grew out of the multiple appeals in the Indianapolis School desegregation case. After

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17. United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972); *In re* Dellinger, 461 F.2d. 389 (7th Cir. 1972); United States v. Seale, 461 F.2d. 345 (7th Cir. 1972).
18. Operating Procedure 6(b).

four appeals, all with different panels, the court agreed to have the fifth and sixth appeal go to the panel that heard the fourth appeal.[19] The appeal involved a large record and it saved judge time by not having three new judges educate themselves as to the facts and the law when there were subsequent appeals. The rule provides that the first panel decides whether to take the case as successive or return it to be assigned a random panel. If the first panel declines, the new second panel becomes the successive panel if a third appeal is filed. An offshoot of the successive panel rule is Operating Procedure 6(c) which provides for subsequent collateral attacks on a conviction to return to the panel that decided the merits of the appeal the first time.

Judge Swygert hired me as his law clerk and administrative assistant in 1972. As his assistant he asked me to review the briefs and give him an estimate of how much time should be assigned for argument. I would then go over the proposed calendar of cases with him and tell him my recommendation for the time for each case. After a while he told me that it did not make sense for him to be involved as he never changed my recommendation. The screening of the appeals and the limitation of the time allowed for more appeals to be scheduled. This helped the court cope with its ever increasing caseload.

As the calendaring screening developed, I raised with Judge Swygert the idea of having appeals with similar legal issues argued before the same panel of judges. The idea was that it would help insure consistency of decisions. It would also allow judges to spend more time on one area of the law. This only applied to appeals which were fully briefed at about the same time. Appeals with similar controlling issues of law arising after a similar appeal was argued in the Supreme Court or Court of Appeals are held to await the decision under advisement. When the controlling case is decided, the parties are asked to file supplemental briefs addressing the issue.

By circuit rule and by admonitions in the Practitioner's Handbook, counsel were advised to tell the court of dates when they did not want argument due to conflicting professional or personal schedules. Out of town counsel with multiple appeals were advised that they could request that those cases be set for the same day or on subsequent days. This minimized travel expenses and time for counsel.

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19. United States v. Bd. of Sch. Comm'rs of Indianapolis, Ind., 474 F.2d 81 (7th Cir. 1973); United States v. Bd. of Sch. Comm'rs of Indianapolis, Ind., 483 F.2d 1406 (7th Cir. 1973); United States v. Bd. of Sch. Comm'rs of Indianapolis, Ind., 503 F.2d. 68 (7th Cir. 1974); United States v. Bd. of Sch. Comm'rs of Indianapolis, Ind., 541 F.2d 1211 (7th Cir. 1976); United States v. Bd. of Sch. Comm'rs of Indianapolis, Ind., 573 F.2d 400 (7th Cir. 1978); and United States v. Bd. of Sch. Comm'rs of Indianapolis, Ind., 637 F. 2d 1101 (7th Cir. 1980).

In 1971 all appeals were argued in person. Later, the court allowed counsel stuck in a snow storm or with some personal emergency to argue by speaker phone although there remains a strong preference for in person arguments. The speaker phone also enabled sick judges or judges delayed by weather to hear arguments.

As the number of appeals increased, the lawyers practicing in the Court of Appeals changed. When I arrived at the court, I learned from the clerk of court and the judges that counsel used to attend court in a morning coat. There had been a limited number of attorneys who specialized in appellate practice, probably similar to the current situation in the Supreme Court where a number of regular appellate practitioners are hired by other attorneys to argue before the Supreme Court. Chief Justice John Roberts was such a practitioner. Now in the Court of Appeals there are usually a good number of attorneys who have never argued an appeal and a good number who will never argue another one.

HANDLING MOTIONS

Shortly prior to my start with the court, the practice was for the clerk of court to simply present the motions filed in a given week to the judge assigned to consider motions. There was no research done for the judge. Motions judges were assigned in order of seniority so counsel had a good idea who would be motions judge and could wait until that judge rotated before filing the motion. If the motions judge asked for an answer, the motion and answer would be brought to the judge who was motions judge when the answer was filed. This sometimes created the view that the judge requesting the answer was ducking.

A number of changes were made in the motions practice. The assignment of motions judges was made random so counsel could not predict who would be the motions judge in another week. If a judge requested an answer, the motion was returned to that judge for decision when the answer was filed so there could be no perceived ducking.

As motions practice grew along with the caseload, there was a need to increase efficiency. There was a great inconsistency in how judges ruled on requests for extension of time. The poster boy for a need to change the rules was a criminal defense lawyer who had received 12 extensions of time to file his brief over the course of a year. The orders of the Court of Appeals on three occasions stated that there were to be no more extensions granted and a couple of other orders stated that it was the final extension. Some judges were lenient and some judges were tough on extensions. The court was only consistent in its inconsistency. As the court had no written procedures

governing motions, there was also inconsistency in how many judges were needed to decide different types of motions. There was clearly a need for rules to govern the handling of motions. The result was an internal rule now known as Operating Procedure 1. This procedure, for the first time, authorized staff to rule on motions which were classified as routine such as to consolidate appeals and extend time for filing briefs. Operating Procedure 7 was a subsequent innovation which relieved judges from having to consider other routine matters by assigning the responsibility to the clerk of court.

PROACTIVE COURT MANAGEMENT

In 1971 the court was not proactive in managing the docket. If counsel did not care about the appeal languishing, the judges did not either. Periodically, the long time Clerk of Court, Kenneth Carrick, would bring a docket sheet to me in which nothing had happened in the appeal for six months. I would review the file and recommend that the motions judge issue a rule to show cause as to why the appeal should not be dismissed for lack of prosecution. Usually there was no response and the appeal would then be dismissed. But as the case filings increased, the judges felt the need to monitor cases and make sure deadlines were met. Rather than rely on counsel to look at the rules to see when briefs were to be filed, a scheduling order would be issued setting forth when the record was to be filed and when the briefs were due. The clerk's office developed tickler systems to make sure that counsel met the deadlines and were notified of their failure to do so.

The court in those days was also not very concerned about jurisdiction in the court of appeals or in the district courts. If counsel did not raise the jurisdictional issue, the judges did not address it. Now, of course, jurisdiction is a major bridge that must be crossed in every case. The Circuit Rule 3(c)(1) docketing statement requires information as to prior proceedings and jurisdiction. Such a statement did not exist in 1971 nor did the requirements of Circuit Rule 28(a) and (b) that the parties include a statement of district court and appellate court jurisdiction in their main briefs.

As more appeals were filed and as more counsel came to the court of appeals for just a few appeals or maybe only one, the old system of the court depending on specialist lawyers was replaced by the judges and court staff developing rules and procedures to monitor the processing of appeals through the decisional process.

In 1971 many cases with pro se appellants were decided under Federal Rule of Appellate Procedure 2 which allowed the court to dispense with the requirements of all of the other rules. These cases were usually civil rights cases or state habeas corpus cases with the appellant without counsel. The pro

se appellant may or may not have filed a brief or some other document which the court took as a brief. Usually there would be no appellee's brief. The record would be reviewed to see what the case was about and whether there was any merit to the appeal. If counsel was not appointed, these appeals would be decided by what I refer to as a lineal decision process. The motions attorney would take the case to three judges seriatim. It would be rare for the judges to discuss the case unless someone disagreed. Often the third judge would wonder why you were bothering to get his vote as the other two judges had in effect decided the matter without him.

The major innovation here was to decide such cases without argument using the same collegial decision making conference that follows oral argument. Rather than have the staff attorney talk to one judge at a time, the judges would meet after reading the briefs and the staff attorney memorandum. The judges would discuss the case among themselves and have the staff attorney at the conference to answer any questions. This process also aids the staff attorney who listens to the discussion and incorporates any points made by the judges in the draft decision. Judges can now eliminate travel by participating via video or audio conferencing. This collegial decision making was a great improvement over the old process of considering the case under Federal Rule of Appellate Procedure 2.

Forty-four percent of the decisions decided on the merits are decided without oral argument.[20] These appeals are almost entirely ones brought by prisoners proceeding without counsel or pro se appellants who are not incarcerated, but whose brief is not very helpful to the judges. The court prides itself in writing reasoned decisions in all cases and arguing all the cases that can be argued. The Seventh Circuit is an exception among the courts of appeals on both issues.[21]

One innovation that has taken the guess work out of deciding cases is Circuit Rule 52, which provides for certifying controlling questions of state law to the supreme court of the respective states. This allows the state supreme court the final word on the interpretation of state law to decide the issue. When I came to the court, the judges did not have the certification procedure. It had to be worked out with each of the three state supreme courts in the circuit. Prior to the certification procedures, the judges were guessing as to how a state supreme court would interpret state law as there was no state supreme court decision.

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20. UNITED STATES COURT OF APPEALS STATISTICAL TABLES FOR SEPTEMBER, 2007, tbl.B-1.
21. *See infra* Appendix, tbl.2.

CONCLUSION

Judges are deciding more cases than they did when I was a law clerk because they have more staff and the rules and procedures and technology have greatly increased productivity. I will leave to others questions as to the quality of decisions, the fairness of the process and whether there is undue delegation of judicial authority to staff.[22]

22. A final note of interest: When I was a law clerk, we used to rate the judges on a conservative to liberal scale. The consensus of the law clerks was that then Judge John Paul Stevens was the second most conservative judge on the court.

Table 1
Seventh Circuit Court of Appeals Filings for 1971 and 2007

	1971[23]		2007[24]	
Number of Filings	902		3,227	
Criminal	183	20.2%	697	21.5%
Civil - Private	430	47.6%	824	25.5%
Civil - U.S.	149	16.5%	177	3.3%
Bankruptcy	17	1.8%	48	1.4%
Administrative Agency	99	10.9%	209	6.4%
Original Proceedings	24	2.6%	197	6.1%
Habeas Corpus	10[25]		350[26]	

23. Figures are for the fiscal year ending on June 30, 1971.
24. Figures are for the twelve month period ending September 30, 2007.
25. Appeals filed in the Court of Appeals for the fiscal year ending June 30, 1971
26. Cases pending in appeals arising from the District Courts ending September 30, 2007.

Table 2

CIRCUITS	2007 Filings[27]	Termination After Argument	Termination After Submission	Time from Filing Notice of Appeal to Disposition[28]	Reversal Rate	Percent Unpublished
D.C.	1,310	285	256	12.2	13.1%	56.7%
First	667	285	667	12.1	6.9%	61.9%
Second	6,334	914	1,971	12.7	8.9%	87.7%
Third	3,924	359	1,892	13.4	10.0%	88.4%
Fourth	4,542	372	2,369	13.6	5.7%	93.0%
Fifth	8,055	981	3,996	8.8	6.7%	89.8%
Sixth	4,818	1,078	1,637	14.1	10.9%	81.4%
Seventh	3,227	817	650	10.9	14.4%	55.0%
Eighth	3,020	576	1,279	11.2	9.6%	62.8%
Ninth	12,459	1,849	4,654	17.4	6.0%	89.6%
Tenth	2,407	505	1,092	11.6	8.5%	73.6%
Eleventh	6,361	603	2,592	9.4	9.5%	89.3%

27. Figures are for 12 month period ending September 30, 2007.
28. Intervals are shown in months.