RE: Update on Judge Miner's article
1 message

Fri, Sep 14, 2012 at 5:26 PM

MJ Z <mzappen@hotmail.com>
To: rene.dubois@law.nyls.edu
Cc: alicia.surdyk@gmail.com, mzappen@gmail.com

Hi Rene:

Please find attached a revised draft of Judge Miner's article. The comments in the margin have been addressed in the revised draft, and where we have provided no response to a comment, we have reviewed and accepted sub silentio your edit or suggestion set forth in that comment.

The latest draft incorporates some additional supporting authority in the form of additional footnotes or sources cited. Please feel free to modify the parentheticals (and/or pinocites) for these footnotes and sources, as well as the location of these sources in the article. I will send these sources to you via Fed Ex early next week.

Your work on this article has been outstanding, and we, along with Mrs. Miner, are so very appreciative. The Judge would be very proud of the Law Review and your efforts.

Please let me know if you have any questions about any of our edits or the revised draft in general.

Kindest regards,

Matt Z.

From: rene.dubois@law.nyls.edu
To: alicia.surdyk@gmail.com; mzappen@hotmail.com
CC: kaitlin.jaxheimer@law.nyls.edu; lauren.majchrowski@law.nyls.edu; neil.giovanatti@law.nyls.edu
Subject: Update on Judge Miner's article
Date: Mon, 20 Aug 2012 16:20:06 +0000

Hi Alicia & Matt:

Since receiving the revised draft of Judge Miner's article, "Dealing With the Appellate Caseload Crisis": The Report of the Federal Courts Study Committee Revisited, I have had the opportunity to conduct a line edit with one of our Executive Editors. Please find attached the line edited version containing our edits, which have also been reviewed by our Publisher, Professor Marcey Griggsby, and our Editor in Chief. Please review our edits and accept or reject them using the "Track Changes" feature in Microsoft Word.

As you will see in the edits, we've updated the statistics to the 2011 figures. Additionally, we incorporated the material that was appended at the end of the article in various places throughout the piece. Please review the commentary attached to these revisions.

We ask that you return the article to me on or before September 3rd in order to help us ensure timely publication of the issue. Once I receive the article, it will go through citation and substance...
checking. You will receive a copy of the revised version reflecting changes to the footnotes and citations.

Please do not hesitate to contact me with questions about our line edits or the editorial process generally. I look forward to hearing from you. In addition, it would be very helpful if you could confirm your receipt of this email

René H. DuBois  
*Articles Editor*  
New York Law School Law Review  
Moot Court Association, Member  
185 West Broadway  
New York, NY 10013  
P: 516.361.6475  
rene.dubois@law.nyls.edu

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2 attachments

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"Dealing With the Appellate Caseload Crisis": The Report of the Federal Courts Study Committee Revisited

by Roger J. Miner*

I. Introduction

The Federal Courts Study Committee, created by Act of Congress in 1988, was charged with inquiring into the issues and problems confronting the Federal Courts of the nation and developing a long-range plan for the future of the Federal Judiciary.¹ In its Final Report, issued on April 2, 1990, the Committee recognized the need to respond "to mounting public and professional concern with the federal courts' congestion, delay, expense and expansion."² The Committee clearly identified the burgeoning volume of appeals as a major factor underlying this concern. Accordingly, the Final Report included a Chapter entitled "Dealing with the Appellate Caseload Crisis." This portion of the Report responded to the unprecedented volume of litigation the Federal Courts of Appeals were then confronting.³ The Chapter began as follows:

However people may view other aspects of the Federal Judiciary, few deny that its appellate courts are in a "crisis of volume" that has transformed them from the institutions they were even a generation ago. Further and more fundamental change to the appellate courts would seem to be inevitable unless there is a halt to the climb in appellate workload. While it is impossible to read the future, we see little reason to anticipate such a halt.⁴

* Senior Judge, United States Court of Appeals for the Second Circuit.


³ Id. at 71.

⁴ Id.
In this Article, I revisit the Committee’s Report and describe how the “Crisis of Volume” has endured and intensified; analyze various causes giving rise to the crisis; review some of its consequences; evaluate the Committee’s Study; discuss the inadequacy of methods presently employed to deal with the proliferation of appeals; and, finally, propose the adoption, in part, of a method considered and rejected by the Committee for dealing with the appellate caseload crisis.

II. Describing the Crisis, then and now

Over twenty years ago, the Committee made the following observations in regard to the evolving increase in appellate caseloads and in the workloads of individual judges:

In 1945, litigants appealed about one of every forty district court terminations; they now appeal about one in eight. As a result, appellant filing has risen nearly fifteen-fold. (As we note in the Overview, they have increased by ten-fold since 1958.) The number of appellate judges, however, has increased since 1945 by a factor of less than three, from 59 to 168. Consequently, the caseload per judge has multiplied by nearly six over the same period. Circuit judges of the 1940s and 1950s would find today’s caseloads unmanageable. Even in 1965, each appellate judge, sitting in panel of three, participated in an average of 136 terminations after hearing or submission. By 1989, that number had almost tripled to 372 per judge. In all but two circuits it exceeds 255, which is the Judicial Conference standard for an appellate judge’s annual workload. In the five busiest circuits, the range is from 411 to 525. The 255 participation standard, furthermore, is too high according to most judges who responded to the committee’s survey.\(^5\)

There has been a major expansion in the “appellate caseload explosion” described by the Committee,\(^6\) and the crisis of volume is now much more acute than when the Committee report was

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5 *Id.* at 72.

written. In 1990 40,898 appeals were filed. By 2003, the number had climbed to 60,847. Five years later, the number of filings for the twelve month period ending September 30, 2008, reached 61,104. For that year, there were 448 terminations on the merits and 156 procedural terminations per active judge nationally. The 255 participations per active judge, considered the standard in 1990, has long since been surpassed. Although filings declined 5.5% [MJZ to update percentage] to 55,922 for the twelve month period ended September 30, 2010, the terminations per active judge rose to 463 terminations on the merits and 161 procedural terminations on a national basis. The increase in the number of active judges from 168 twenty years ago to 179 today obviously has done nothing to stem the tide of individual judicial caseloads.

An overwhelming percentage of appeals are found to be without merit. For the twelve month period ending September 30, 2010, of the 59,526 total appeals that were terminated for all

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10 Id.


circuits, 30,914 or (51.9%) were terminated on the merits. Of those terminated on the merits, 24,588 were affirmed/enforced (including appeals reversed in part); 2,751 dismissed, 2,372 reversed; 574 remanded, and 629 terminated by other dispositions. Accordingly, less than ten percent of the cases were reversed outright. The same statistical report for the same year shows a “Percent Reversed” breakdown ranging from a high of 15.4 in the Seventh Circuit to a low of 4.9 in the Eighth Circuit. In my own circuit, the percent reversed was 7.1, a reversal rate which has varied very little over recent years. Nor has there been much variation in the national “reversed” statistics.


Not included in the reversal rates are the cases where a lack of merit has resulted in dismissal on remand. However, an outright reversal rate of less than ten percent in case terminations on appeal leads to the inevitable conclusion that more than ninety percent of the appeals filed were found to be without merit. Of course, an appeal found to lack merit certainly does not mean that the appeal lacks an arguable basis or was brought without substantial justification. But the statistics themselves compel the conclusion, by implication and logic, that a large part of that meritless ninety percent consists of appeals that are clearly meritless. Is surely cannot be denied that the expansion of the appellate caseload explosion in recent years has been exacerbated, if not caused by the filing of clearly meritless appeals.

Especially burdensome to the appellate courts are cases filed by pro se litigants. It is no secret that the vast majority of pro se appeals are clearly without merit. Much time and effort is spent in trying to discern the nature of the challenges raised by these litigants, and liberal consideration is given to their arguments.\(^\text{18}\) Despite the lack of success of pro se litigants, they continue to file at an alarming rate — 19,973 in 1995 [AJS to discuss with MJZ how to cite table] and 27,209 in 2010. Pro se filings constituted 39.89 percent of the caseload nationally in 1995 [AJS to discuss with MJZ] and 48.59 percent in 2010.\(^\text{19}\)

\(^{18}\) See, e.g., United States Courts of Appeals, Sources of Pro Se Appeals During the 12-Month Periods Ending September 30, 2007 and 2008 [MJZ - where is this table from?]; see also Triestman v. Federal Bureau of Prisons, 470 F.3d 471, 475 (2d Cir. 2006) ("[W]e construe pro se appellate briefs and submissions liberally and interpret them to raise the strongest arguments they suggest." (alteration in original; internal quotation marks omitted)).

III. Analyzing the Causes

What possible could account for the fact that litigants now appeal one in every six district court decisions, and what possibly could account for the fact that such a large proportion of appeals are found to be without merit? In the absence of a scientific survey, the causes of the increased rate of filings must rest in speculation informed by experience, anecdotal evidence, and the speech of the legal community. It seems certain, however, that many such appeals are driven by clients whose attorneys advise of the futility of appeal but nevertheless insist that the appellate court will see the “justice” of their cause or defense despite the lack of legal merit. The costs of appeal constitute relatively small barriers to such clients, who often have expended considerable sums on trial court proceedings. Some appellants use the appellate process as a means of “stalling for time,” delaying through appeal what they know to be the inevitable outcome. Some may press meritless appeals for vindictive reasons, their aim being to cause additional expense and anxiety to their adversaries.

Appellants who pursue appeals simply because they have nothing to lose undoubtedly account for some proportion of meritless appeals. In this category are pro se appellants who are free of the need to pay attorneys and are responsible only for the payment of filing fees. Those who proceed in forma pauperis need not even pay filing fees.\(^{20}\) Many indigent appellants who have pro

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\(^{20}\) FED. R. APP. P. 24(a)(5) ("A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1)."); see also 2ND CIR. R. 24.1 ("Motion for In Forma Pauperis Status and Related Relief"), available at http://www.ca2.uscourts.gov/clerk/Rules/LR/Local_Rule_24_1.htm ("A motion for leave to appeal in forma pauperis, for appointment of counsel, or for a transcript at public expense must include (1) the affidavit prescribed by FRAP 24(a)(1), and (2) a statement that identifies the relevant facts and makes a showing of likely merit as to each issue the appellant intends to present on appeal. Failure to comply with any of these requirements may result in denial of the motion and dismissal of the appeal."). See generally FED. R. APP. P. 24(a) ("Leave to Proceed in
bono counsel also fall into the "nothing to lose" class. In the same category are appellants in
criminal cases who have the benefit of counsel appointed under the provisions of the Criminal
Justice Act.  

Lawyers themselves sometimes motivate meritless appeals. According to a recent survey,
some lawyers simply overestimate their chances of success. Other lawyers pursue appeals lacking
in substantive merit to demonstrate to the client that they continue to support the client's cause.
Some, embarrassed that they lost in the trial court after advising that the client would prevail
encourage meritless appeals in order to have another court to blame for a loss occasioned by bad
advice or bad lawyering. Some lawyers, loath to lose a client for failure to satisfy the client's
command to appeal, go forward merely to satisfy the client's wishes. Some newly admitted
attorneys, especially those associated with large law firms, pursue assigned pro bono appeals they
know to be futile in order to gain experience in the appellate process. Finally, there are those
lawyers who encourage appeals that have no chance of success simply (dare it be said?) to collect
fees for briefing and argument in the appellate court.

Some blame for the spike in appeals must also fall on the academic sector of the legal
profession. The centerpiece of law school teaching continues to be appellate court decisions.
The

Forma Pauperis").


Amanda Bronstad, Attorneys Tend Toward Overconfidence Researchers Find, NAT'L
L.J. (May 13, 2010), reprinted in N.Y. L.J. (May 13, 2010).

23 See John B. Attansio, Foreward - The Langdellian Paradigm, 52 J. LEGAL EDUC. 473,
747 (2002).
leading moot court competitions involve appellate brief writing and oral argument. This emphasis
on the appellate process encourages law students to believe that any adverse trial court
determination can and should be tested on appeal. Reinforcing this belief by example, many law
professors seek to advance their expansive approaches to legal doctrine through the use of the
appellate process. Sometimes they do so as amici curiae and sometimes as counsel for those seeking
to promote various social justice issues through the courts rather than through the legislative process
where they belong. These professors often are assisted in their endeavors by law students in
“clinical studies” programs. Is it any wonder that newly-minted lawyers see appellate courts as the
most important locales for the application of their law school skills training? In this they are of
course wrong, for the greater part of their work will be done in the trial courts, in administrative
proceedings, in negotiations, in transactional activities, and in providing legal advice to clients, both
public and private. Few cases are appealed, specialists in appellate work are few and far between,
and a relatively small percentage of appeals are successful, as noted earlier in this article.

Why, then, do the law schools place such emphasis on appeals court decisions and
processes? The fault lies of course with the increasing disconnect between the professoriate and
other branches of the legal profession, a matter that has been the subject of widespread comment.25

24 See Michael D. Murray and Christy H. DeSanctis, APPELLATE ADVOCACY AND MOOT
COURT 179 (2006) ("Moot Court competitions simulate appellate practice in particular . . . .").
See also NEW YORK CITY BAR, SIXTY-FIRST ANNUAL NATIONAL MOOT COURT COMPETITION,
COMPETITION RULES AND COMMENTS 2 (2010–11) ("The New York City Bar Association’s
National Moot Court Competition is an annual inter-law school event designed to promote the art
of appellate advocacy."); Colleen Walsh, Moot Points, HARVARD GAZETTE (Nov. 17, 2010)
("Established in 1911, the Ames Moot Court Competition unfolds in three rounds over the course
of two years and challenges students to develop briefs and oral arguments addressing legal issues
that the Supreme Court has not addressed or answered on-point.").

25 See e.g., Roger J. Miner, A Significant Symposium, 54 N.Y.L. SCH. L. REV. 15, 18–20
(2010); William R. Trail and William D. Underwood, The Decline of Professional Legal
Many professors have lost sight of their obligation to train lawyers in the skills and ethical responsibilities that will be pertinent to their employment.26 A good number of these academics have served as appellate clerks and have had little experience in the trial courts or in any type of legal practice. They are most comfortable teaching and litigating at the appellate level, which is a more familiar territory for them. Today, it is the rare professor who does not dwell on constitutional issues or Supreme Court decisions in whatever subject he or she might teach. In view of these developments, the proliferation of the “legal scholars” of academe as well as the proliferation of the students they educate,27 give cause for concern. I do not mean to say that there should be fewer law students and fewer professors just to cut down on the volume of appeals. I do say that greater emphasis in legal education should be placed on the duty of lawyers to assist in the effective functioning of the legal system.27 It seems to me that this duty includes the obligation to decline the pursuit of meritless appeals. The performance of this duty will be of great benefit to overburdened appellate courts.

In any analysis of the causes of the appellate caseload crisis, criminal appeals are worthy of special scrutiny. As an early critic of the federalization of criminal law, I estimated that there were

26 The Law School Admissions Council reports that since the 2000–01 cycle, the number of Law School Admission Tests administered have risen steadily, from 109,000 in 2000-2001 to 171,500 in the 2009–10 cycle. LSAC, LSAC VOLUME SUMMARY, available at http://www.lsac.org/LSACResources/Data/LSAC-volume-summary.asp. See also, Rebecca R. Ruiz, Recession is Pushing Up Law School Applications and Interest in Graduate Studies, N.Y. TIMES, Jan. 10, 2010 at A18.

27 [MJZ: does RJM want to cite to one of his articles here?]
about 3,000 federal criminal offenses in the fifty titles of the United States Code. Current estimates run as high as 4,500, to say nothing of the thousands of federal regulations that criminalize all sorts of conduct deemed contrary to the public good. The problems implicated in the federalization of criminal law have long been recognized. The problems implicated in over-criminalization have now become the focus of attention, going so far as to draw the interest of a congressional subcommittee. Whatever the consequences of federalization and over-criminalization, it cannot be gainsaid that criminal cases are a major cause of an expanding appellate caseload. More federal crimes equals more criminal prosecutions. In 1990, 48,035 criminal cases


were filed in the nation’s district courts. By 2009, the number had climbed to 65,394. More criminal prosecutions of course equal more appeals. In 1990, when the appellate caseload crisis was identified, 9,642 criminal appeals were filed. In 2010, 12,797 criminal appeals were filed. This number has been fairly steady for the past three years, although a high of 16,060 was reached in 2005. The proliferation of federal crimes has required more law enforcement agents and more prosecutors but there has been no correspondent increase in the number of judges who hear criminal appeals.

All of this, of course, is the doing of Congress, which needs to take a hard look at over-criminalization and over-federalization, not only because of the impact of factors on the caseloads of the federal courts, but also because it is the right thing to do. No sensible person would say that the transport of water hyacinths in interstate commerce should be a federal offense.

32 [AJS to discuss figure with MJZ – can’t reconcile Judge’s number w/ table]  
33 [AJS to discuss figure with MJZ – can’t reconcile Judge’s number w/ table]  
34 [AJS to discuss figure with MJZ – can’t reconcile Judge’s number w/ table]  


38 See 18 U.S.C. § 46 (2006) (“Whoever knowingly delivers or receives for transportation, or transports, in interstate commerce . . . water hyacinth plants . . . shall be fined under this title, or imprisoned not more than six months, or both.”).
Nor would any sensible person believe that garden variety state drug offenses should be prosecuted in federal court.\textsuperscript{39} The list goes on, and the result is a federal system warehousing too many inmates at too great an expense,\textsuperscript{40} and an avalanche of federal appeals filed on behalf of those convicted of these crimes. In the Committee Report, the crisis of volume in the federal appeals courts was said to be caused "mainly by a heightened proclivity to appeal district court terminations."\textsuperscript{41} Having analyzed various factors underlying an even more "heightened proclivity" two decades later, I now turn to some of its consequences.

IV. Reviewing the Consequences

The Committee saw the consequences of a spiraling appellate caseload as jeopardizing the need "to preserve the hallmarks of our judiciary."\textsuperscript{42} Its Report defined the "hallmarks" to include that the judges do most of their own work, grant oral argument in cases that need it, decide cases with sufficient thought, and produce opinions in cases of precedential importance with the care they deserve, including independent, constructive insight and criticism from judges on the court and the panel other than

\textsuperscript{39} In a report released by the Director of the Office of Research and Data of the United States Sentencing Commission, it was reported that drug offenses represented 30.3\% of the cases (25,206 convictions) in the federal system, including 760 convictions for "an offense involving simple possession of a drug." United States Sentencing Commission, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2009 3, 7, available at http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf. Prosecuting these types of state drug offense in federal court has been the subject of widespread criticism. See also supra note 30.


the judge writing the opinion.\textsuperscript{43} The Committee opined that the foregoing, "conditions are essential to a carefully crafted caselaw" and concluded that "[m]odern society requires no less."\textsuperscript{44}

More than twenty years ago, the Committee found that "[t]oday's federal appellate courts have been able to provide these conditions only through increases in productivity that seem to be approaching their limit."\textsuperscript{45} Attempts to further raise "productivity" by such measures as increasing staff and reducing oral argument were said to be such as could threaten the integrity of the process.\textsuperscript{46} Anyone familiar with the operation of the federal appellate court system over the past two decades will have noticed a continuing erosion of "hallmarks" that an overburdened judiciary just cannot maintain. One of the major consequences is the reliance on staff to achieve the necessary productivity.

While active court of appeals judges usually are assisted by four law clerks and a judicial assistant,\textsuperscript{47} they also are assisted in their work by staff attorneys, who provide support to the judges in various aspects of their work.\textsuperscript{48} In my own court, the Staff Attorney Office is headed by a


\textsuperscript{44} The Federal Courts Study Committee, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990).


\textsuperscript{47} 28 U.S.C. § 712 (2006) ("Circuit Judges may appoint necessary law clerks and secretaries."). [Internal regulations set by the Judicial Council?]

Director of Legal Affairs. There are four supervisory staff attorneys, twenty staff attorneys and an
administrative staff of eight⁴⁹. The major responsibilities of the staff attorneys pertain to motions
and pro se matters, for which they prepare bench memoranda and proposed dispositions. There is
also a separate Immigration Unit consisting of three supervisory attorneys and nine [eight]
immigration attorneys. Their responsibilities lie in the processing of immigration cases assigned to
the non-argument calendar.⁵⁰ They prepare memoranda and proposed dispositions for the cases to
which they are assigned. Our Civil Appeals Management Program (CAMP) has four attorneys with
preargument responsibilities in civil cases and an administrative staff of three.⁵¹ Among other
things, the CAMP attorneys confer with counsel for the parties in civil cases in an attempt to narrow
the issues for appeal and effect settlements. The Office of the Clerk of Court has two attorneys on
staff — an administrative attorney and a motions staff attorney.

What use is made of all this legal firepower? It is used, of course, in the decisional process.
It is no secret that the first drafts of opinions of the court frequently are undertaken by the judges’

⁴⁹ Directory: United States Courts for the Second Circuit (March 7, 2011) (on file with the
United States Court of Appeals for the Second Circuit).

⁵⁰ See Elizabeth Cronin, *When the Deluge Hits and you Never Saw the Storm: Asylum
[asylum cases on the non-argument calendar], the Staff Attorney’s Office within the Office of
Legal Affairs became authorized to hire a supervisor and . . . attorneys to establish an
immigration unit.”). Pursuant to Second Circuit Local Rule 34.2, the court maintains a non-
argument calendar for immigration cases raising claims for asylum, withholding of removal
under the Immigration and Nationality Act, withholding or deferral of removal under the
Convention Against Torture, or a motion to reopen or reconsider an order involving one of the
preceding substantive claims. 2ND CIR. R. 34.2 (“Non-Argument Calendar”).

the United States Court of Appeals for the Second Circuit).
Similarly, staff attorneys prepare proposed orders for the disposition of motions and, in our court, for the disposal of immigration cases scheduled for the non-argument calendar. The sheer volume of cases makes reliance upon staff inevitable. Some say that this is leading to the bureaucratization of the judiciary. It cannot be denied that appellate judges, although they still retain the power to decide, serve more and more as managers and editors in response to the demands for productivity in the face of the expanding volume of cases. But laying out the path to a decision is often the most important part of the decisional process. Rather than playing an adjunctive role in this regard, staff increasingly provides the path. And therein lies the erosion of the hallmark that judges do "their own work."

The increased use of staff itself has consequences. The majority of staff are fresh out of law school and anxious to display their vast legal knowledge. The result is opinions that are overly lengthy and replete with basis legal precedent that every opinion reader should be familiar with. One need not rehearse all the elements of a contract in every opinion resolving a breach of contract claim. While it is true that the judge is the ultimate decision-maker, the system suffers when staff provides a longer path when a shorter one will do. The result may be an opinion not only much longer than necessary but also broader than necessary to resolve the issue before the court.

The higher the volume of cases decided in the federal appellate courts, the higher the number of intercircuit conflicts there will be. The result is inevitable, given the fact that two or

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[MJZ: do you think RJM wants a see e.g., to specific opinions here?]
more of the thirteen circuits are constrained to deal with novel issues of law and sometimes resolve them in different ways. Every month, U.S. Law Week provides a list of conflicting decisions rendered in various circuits during the preceding month.\textsuperscript{55} And although intercircuit conflict is one of the criteria for granting certiorari in the Supreme Court,\textsuperscript{56} only a small proportion of intercircuit conflicts are resolved by the nation's highest court each year.\textsuperscript{57} Consequently, the law becomes “fractured,” with different rules applying in different parts of the country. This situation would seem to be intolerable to most citizens, although the Federal Court Study Committee had this to say about intercircuit conflicts:

Some conflicts, of course, may have the redeeming feature, especially in the constitutional area, of helping to develop legal doctrine and insight. Other conflicts need rapid resolution. Conflicts over some procedural rules and laws affecting actors in only one circuit at a time may have a negligible affect. A federal judicial system, however, must be able within a reasonable time to provide a nationally binding construction of these acts of Congress needing a single, unified construction in order to serve their purpose.\textsuperscript{58}

The Report went on to discuss various criteria established by commentators to distinguish “tolerable” conflicts from “intolerable” ones. The Committee ultimately recognized “the proposition that there are an excessive number of unresolved intercircuit conflicts.”\textsuperscript{59}

The exploding federal caseload has led to a vastly increased use of summary dispositions.

\textsuperscript{55} [US Law Week website says that it's published weekly?]


\textsuperscript{58} The Federal Courts Study Committee, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 125 (1990).

marking the termination of the decisional process. These dispositions are sometimes referred to as unpublished opinions, although they now are actually published and available to the public on-line as well as in regular print publications. A great debate preceded the adoption of the present federal rule governing these summary dispositions, owing to the fact that many circuits either prohibited the publication or denied precedence to the dispositions they represented. One school of thought went so far as to consider such prohibitions unconstitutional. In any event, the new rule provides that a court may not prohibit or restrict the citation of a written disposition even though marked “unpublished,” “not for publication,” “non-precedential,” “not precedent” or similarly designated. The summary orders issued by my court still contain the following designation: Rulings by Summary Order do not have precedential effect.” Other courts also deny precedential effect to designated


62 In 2000, the Eighth Circuit held that its local rule on discouraging citation to unpublished opinions, “insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional.” Anastasoff v. United States, 223 F.3d 898, 900 (2000), vacated as moot on reh’g en banc, 235 F.3d 1054 (2000).

63 FED. R. APP. P. 32.1(a).

64 See e.g., Donovan v. Centerpulse Spine Tech Inc., No. 10-1769-cv (2d Cir. Mar. 25, 2011), http://www.ca2.uscourts.gov/decisions/isysquery/5b83fc39-ecb4-4d5e-ac60-d80af7c72d2d/6/doc
opinions.\textsuperscript{65} But why cite an opinion that has no such effect? The courts themselves seem confused by the designation. For example, my own court has stated that “denying summary orders precedential effect does not mean that the court considers itself free to rule differently in similar cases.”\textsuperscript{66} What then does it mean?

In any event, the use of summary dispositions has gained favor over time as a means of conserving judicial resources. These “unpublished opinions,” whatever they are called, were developed strictly as a shortcut to a disposition and in response to a caseload that does not permit a full opinion in every case. Many of these abbreviated writings start out by “presuming that the reader is familiar with the facts and the procedural background of this case.”\textsuperscript{67} The use of these dispositions is predicated on the assumption that the facts pertaining to the case are crystal clear and the applicable law well-settled. This is always a questionable assumption.

More than two decades ago, long before the “no publication” rules were superseded, the Committee wrote the following: “There are also doctrinal reasons for questioning the non-publication rules: litigants should be able to argue that they are indeed similarly situated to a party in


\textsuperscript{66} 2ND CIR. R. 32.1, cmt. (“Dispositions By Summary Order”)(effective as of June 26, 2007 and subsequently amended).

\textsuperscript{67} See supra note 64.
a previous case even if the court thought it not significant enough to warrant publication.\footnote{68} Any
doctrinal concerns however have been outweighed by the need for summary disposition occasioned
by the crisis of volume. And whether designated “unpublished” or “non-precedential,” there has
been a spectacular rise in such dispositions, as illustrated by the following national statistics issued by
the Administrative Office of the United States Court:

In 1990, case dispositions classified as “oral” numbered 94. Dispositions classified as
“written, signed” numbered 6,008 designated as published and 2,347 as unpublished. Dispositions
classified as “written, reasoned, unsigned” numbered 712 published and 9,669 unpublished. In the
classification of “written, unsigned without comment” were 4 published and 2,161 unpublished.
Within these classifications, 14,204 dispositions by opinion or order were unpublished, 68.01% of
the total.\footnote{69}

Eighteen years later, there were no oral dispositions and in the “written, signed” category
there were 4,949 dispositions unpublished and 5,870 unpublished. The “written, reasoned,
unsigned” category included 388 published and 17,399 unpublished. The category designed
“written, signed without comment” contained 40 published and 962 unpublished. The unpublished
total for the year 2008 was 24,231, amounting to 81.84% of the total\footnote{70} Even under the new regime,
when all dispositions are “published” and may be cited, one may wonder whether the non-
precedential status of over 80% of all decisions leads to a confused jurisprudence.

Oral argument has been a big loser as caseloads continue to rise. Much has been written

\footnote{68} Federal Courts Study Commission, Report of the Federal Courts Study
Committee 130 (April 2, 1990), available at 1990 WL 538955.

\footnote{69} [To discuss with RJM: clerks and library can’t find source]

\footnote{70} [To discuss with RJM: clerks and library can’t find source]
about the value of oral argument, which most lawyers and judges have always thought to be an important ingredient of appellate advocacy.\(^{71}\) To me, it has been a co-equal ingredient, along with the brief and appendix.\(^{72}\) Oral presentation gives counsel an opportunity to advance their contentions in a way that the written brief does not. Appellate advocates who argue before the court are able to provide emphasis to the points they consider important to their clients.\(^{73}\) Oral argument provides judges with the opportunity to test counsel on the critical points in their cases and, through questioning of the lawyers, to share their thoughts with their colleagues as well as counsel. Counsel usually relish the opportunity to respond to questions from the court in order to


I should like to leave with you, particularly those of you who are among the younger barristers, the thought that your oral argument on an appeal is perhaps the most effective weapon you have got if you will give it the time and attention it deserves. Oral argument is exciting and will return rich dividends if it is done well. And I think it will be a sorry day for the American bar if the place of the oral argument in our appellate courts is depreciated and oral advocacy becomes looked upon as a pro forma exercise which, because of tradition or because of the insistence of his client, a lawyer has to go through.


\(^{72}\) Roger J. Miner, *Common Disorders of the Appendix and their Treatment*, 3 J. App. Prac. & Process 39, 39–40 (2001) (“The three elements of appellate advocacy—preparation of the brief, compilation of the appendix, and presentation of oral argument—are co-equal in importance. Indeed, it is excellence in all three elements of a case on appeal that is the hallmark of successful appellate advocacy.”).

\(^{73}\) See Michael Duvall, *When is Oral Argument Important? A Judicial Clerk’s View of the Debate*, 9 J. App. Prac. & Process 121, 39–40 (2007) (“Oral argument can prompt the judges to “zero in” on the precise turning point in an important case, which helps both the courts and litigants achieve a thorough, correct, and timely decision. In a “fifty/fifty,” “fifty-one/fifty-nine,” or even a “sixty/fifty” case, the importance of this impact cannot be overstated.”).
dispel any doubts that the court may have about the positions they have taken. A not unimportant function of oral argument is its "public face." The exchange between counsel and judges in open court is the only means that the public has to observe appellate courts in operation. The actual decision-making process is necessarily accomplished out of public view, taking place as it does in the conference rooms and chambers of the appellate judges. A well known aphorism notes the need not only to do justice but to see justice done.\textsuperscript{74} The oral argument of appeals provides the citizenry with some insight in this regard. It is for this reason that I have long advocated the televising of oral arguments, especially arguments in the Supreme Court.\textsuperscript{75}

\textsuperscript{74} See R. v. Sussex Justices ex parte McCarthy, 1 KB 256, 259 (1924) ("... it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."); see also Richmond Newspapers Inc. v. Virginia, 448 US 555, 564–575 (1980) (detailing the value and history of open justice in the courts).

\textsuperscript{75} [Note to RJM: is there a particular article you had in mind to cite here?]