

FOREWORD

*Judge Jerry E. Smith**

It is a privilege for me to be asked, for the second time,¹ to provide a Foreword to the annual Fifth Circuit Survey for the *Texas Tech Law Review*. I grew up in Lubbock, and my connection to Texas Tech Law School goes back to 1972-1973, when I regularly used the then-new Law Library to research issues as a Law Clerk to United States District Judge Halbert O. Woodward. (Back then, we pulled heavy things called “books” off the shelves and viewed them with the naked eye, unassisted by any electronic device).

In January 2013, I celebrated my twenty-fifth anniversary as a Fifth Circuit judge. “The more things change, the more they remain the same.”² There is something about the majestic John Minor Wisdom Fifth Circuit Court of Appeals Building in New Orleans, about to celebrate its one-hundredth birthday, that makes time stand still. There is nothing fundamentally different about the court to which I was introduced a quarter-century ago compared to the one that our newest judges are getting accustomed to now. The number of authorized active judgeships has grown slightly—from fourteen to seventeen—but each active judge still sits on seven three-judge argument panels a year (usually in New Orleans) deciding a docket of twenty cases, and attorneys are still given twenty minutes per side to present their cases. And the judges still ask hypothetical questions that the lawyers fear and detest.

In terms of the Fifth Circuit’s workload, there is good news indeed: The docket is quite manageable with the available resources and in light of continuing innovations in the handling of cases. My 1994 Foreword focused on the then-nascent Fifth Circuit “Conference Calendar,” a means of assigning a three-judge panel to dispose of a large number of routine cases, without oral argument, in a concentrated session or conference. I noted that at that time, “the per-judge caseload has increased unabated.”³ That statement would be far from true today. The average number of opinions produced by a Fifth Circuit active judge, which was 217 in 1993,⁴ peaked at 229 in 2003 but declined markedly to 144 in 2012.

Part of the reason for the decline is a decreased number of Fifth Circuit appeals filed, from a maximum of about 9,600 in 2005⁵ to about 7,600 in 2012,

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1. See Jerry E. Smith, *Foreword*, 25 TEX. TECH L. REV. 255 (1994).

2. “*Plus ça change, plus c’est la même chose.*” Jean Baptiste Alphonse Karr (*Les Guêpes* Jan. 1849).

3. Smith, *supra* note 1, at 255.

4. *Id.* at 256.

5. This peak was largely attributable to appeals generated by *Booker v. United States*, 543 U.S. 220 (2005).

which is almost the same load as in 1997. Significantly, we also have a larger number of senior Fifth Circuit judges—seven as of early 2013, the largest number during my tenure—who are hearing and deciding cases and taking a full or partial docket. That significantly supplements the complement of active judges—fifteen as of early 2013⁶—who take a full docket by serving on seven argument panels per year.

Another driving force behind the decrease is that, hidden in these statistics, are a large number of cases disposed of using devices such as the Conference Calendar. No case is disposed of on the merits without the participation of judges on a Fifth Circuit panel, and every case deserves and receives the individual attention of the judges on the panel. The fact that a case is not placed on the oral-argument panel does not mean that it is not scrutinized with care by the judges, assisted by their law clerks and the Fifth Circuit Staff Attorney's Office.

For example, about 55% of the merits dispositions are on the so-called Summary Calendar, devised in 1968, whereby a three-judge panel issues a full merits opinion, by unanimous agreement, on the district court record and appellate briefs, without assignment to an oral argument calendar. Also, in 2012, over 700 cases were disposed of by special jurisdictional panels that meet monthly. In that year, almost 14% of the merits decisions were by the Conference Calendar, which now—unlike in the past⁷—operates entirely electronically by three judges deciding the cases remotely from their respective chambers in the three states comprising the Fifth Circuit.

The mix of the docket has changed noticeably since I wrote the 1994 Foreword. Criminal appeals have expanded from about 18% of all appeals in 1995 to about 35% now. There are 10% fewer civil cases now than then. On average, the civil cases are more complex and involve more issues than do the criminal appeals, which often raise only simple sentencing or suppression questions. So, the dramatic increase in the percentage of criminal appeals does not necessarily result in a clogged docket at the appellate level.

One particular process that deserves mention is the Fifth Circuit Clerk's Office's so-called Appellate Task Manager (or ATM, though it does not dispense \$20 bills). The ATM is a work-management system for the Clerk's case processors that establishes deadlines and reminders for every task required in processing an appeal, greatly improving efficiency and reliability to ensure that briefs, documents, and other required items are produced correctly and timely before being submitted to the judges for merits disposition. No other appellate court has such a system, so the Fifth Circuit—with due credit to our innovative Clerk's Office—has a well-earned reputation as the leader in cutting-edge development of applications for appellate-case processing.

6. There are two vacancies.

7. See Smith, *supra* note 1, at 257-58.

At bottom, the Fifth Circuit operates efficiently and stacks up well among the federal circuit courts of appeals, with an average merits disposition time of 9.7 months from the filing of the notice of appeal to issuance of the mandate. For cases receiving oral argument, the corresponding time is only 13.6 months. The point is that, despite common misconceptions, there is no judicial crisis or emergency on this court, as distinguished from severe backlogs on some district courts, especially those on the Mexican border with large numbers of drug and immigration criminal appeals and resulting sentencing proceedings.

I commend the *Texas Tech Law Review* for its annual Fifth Circuit Survey. It is useful not only to the attorneys who practice in the circuit but also to the judges and their staffs. I am honored to be asked to provide the Foreword to the 2013 Survey.