

ADDENDUM: ANALYSIS OF THE NUMBERS

On the federal level, there are annual reports from the Administrative Office of US Courts (“AO”) that include tables that show the number of oral arguments for each circuit by category (type) of case and type of termination. These reports go back to the late 1960s, but comparisons are at best rough measures for several reasons. (1) The number of cases in the appeals courts have increased dramatically since then, and so have the number of appellate judges, including senior judges. Thus, any comparison would have to factor in those changes, as well as significant unfilled vacancies. (2) There are many kinds of appeals that were rare if not unknown 50 or even 30 years ago. For example, on the criminal side, there have been significant increases in prisoner cases (both habeas and prison condition complaints), and appeals from federal sentences were virtually non-existent before the Sentencing Reform Act of 1984. Many of the current prisoner cases are brought *pro se*, by incarcerated individuals, which almost always precludes oral arguments. (3) Other changes include a major influx of immigration cases (discussed below), appeals in complex class action cases, including on issues of class certification and settlement approval, and the vast increase in complicated administrative appeals involving multiple parties and multiple claims, many of which are decided in the D.C. Circuit. (4) In 1979, the Appellate Rules were changed to require that the clerk of the district court transmit the notice of appeal

upon filing, which opened a new case on appeal. The prior practice was to hold the case until the record had been prepared, during which time many appeals were abandoned, particularly by appellants who filed protective notices of appeal and then did not proceed. This change increased the number of appellate filings but had no impact on the work of the judges. In addition, there have been several lesser changes in the statistical reporting methods, which further complicates comparisons with prior years.

Nonetheless, although we are not able to present a precise conclusion on the extent of the reduction in oral argument, there is no real dispute that the change is very real, both in terms of the percentage of cases that receive oral argument and the amount of time allocated to each argument. As a result of our study, we concluded that doing further breakdowns of existing data, rather than trying to make more refined efforts at comparisons with prior years, is a more fruitful way to examine the problem and look for solutions that would improve the situation for the courts, the parties, and their advocates. Moreover, there are areas where further breakdowns of data would enable courts to refine their consideration of what changes might be made in deciding which cases should be granted oral argument and how argument might be made more useful for the court and the parties.

We began our examination of the frequency of oral argument with the publicly available Table B-1 issued by the AO as of September 30th of each year, which includes data from all circuits except the Federal Circuit. We used the Table that ended on September 30, 2014. It reported that there were 6,646 appeals terminated after oral argument out of a total of 55,216 terminations, which would mean that only 12% of the cases received oral argument. But digging deeper into the numbers, with a significant assist from staff at the D.C. Circuit who answered many of our questions, we concluded that 12% is not a fair number. Therefore, we examined the data in greater detail in order to make further refinements with the goal of eliminating cases in which there was likely to be little reasonable basis for having oral argument and thus to focus on cases in which reasonable people could differ on whether to grant oral argument. This examination also led us to seek and obtain from the Federal Judicial Center additional data on *Pro Se* and Immigration (Board of Immigration Appeals) appeals that are not included in the public tables. Our study also revealed that there are substantial differences in the rates of oral argument across the circuits, both overall and within specific case categories, and so we decided to break down our refined data by circuits to reflect those differences. Before turning to the four Tables that are appended to the end of this report, we offer an explanation about the categories of cases on Table B-1 and why we made certain exclusions in the attached Tables.

“Procedural” Terminations and “Merits” Terminations

Case terminations are divided into procedural and merits terminations, with the former comprising about one third of all terminations in 2014. In the procedural category, about 72% were terminated by staff, for reasons such as voluntary dismissals, settlement, failure to file a brief, and other instances in which no judge was involved. Plainly, those cases are not candidates for oral argument.

There were also 4,935 procedural terminations decided by “Judge,” which could mean a single judge or a panel, but either way the termination was for some procedural reason, probably with an opposition. Those reasons could include an untimely notice of appeal, or filing in the wrong court, but could also include terminations for lack of standing, *etc.*

There are two ways that a procedural termination could arise: by motion or after full briefing and perhaps argument. Under Federal Appellate Rule 27(d)(2), motions and responses are limited to 20 pages each, whereas full briefing currently allows 14,000 words (about 60 pages, depending on formatting). In addition, Rule 27(e) excludes oral argument on motions “unless the court orders otherwise.” Many appellees seek to short-circuit the full briefing process (thereby saving time and money) and thus file motions for summary affirmance, which could be on a procedural ground, or on the merits.

A motion might also be brought on a ground such as non-compliance with the Antiterrorism and Effective Death Penalty Act of 1996, which sets limits on bringing some habeas corpus cases, and where non-compliance could be considered either procedural or on the merits. We have inquired, and have been advised, that the AO does not have statistics that break out whether a termination – either procedural or merits – was based on a motion, with shorter page limits and probably no oral argument, or after full briefing, in which case oral argument may or may not have been given.

In trying to determine an appropriate “denominator” against which to compare the actual number of oral arguments, we had to decide whether to include Procedural Terminations (Judge), knowing that some cases in that category will have received oral argument. Similarly, we also know that some merits terminations will be based on motions that did not receive oral argument. Although we have no way of knowing how many there are in each category, we do know that the motions terminations fall into both categories and will partially offset each other. Based on our experience, and our preference to understate the problem of reduced oral argument in cases of doubt, we decided to take out all procedural terminations in calculating our denominator.

Our examination also led us to suggest that the AO begin requiring the circuit courts to include on all terminations whether they were pursuant to a motion or after full briefing. That determination can be made very simply and requires no judgment at all. Indeed, the AO might also consider abandoning the procedural/merits line because it does require judgment and does not seem responsive to any particular need for data in the effective and fair administration of the federal courts of appeals. Changing the judge category to motions would also enable us and others to further refine the base of cases fully briefed against which the number of oral arguments could be assessed.

Consolidated Cases

The next category of adjustments relates to consolidated cases, of which there were 2,737 among the merits terminations in 2014 (7%), which is equal to about 41% of the total number of oral arguments nationwide (6,646). Within consolidations, there are several kinds of cases: criminal cases with several defendants (about 30% of all consolidations are in direct criminal appeals); administrative agency appeals direct to the courts of appeals (about 10%), which may involve multiple parties with some, but not total overlap of issues, including both claims that an agency rule went too far and did not go far enough; and private civil cases (about 35%), in which there could be cross-appeals or cases with more

than one plaintiff or defendant, with an indeterminable degree of overlap in the issues.

Again, we were faced with a binary choice: to take out all cases reported terminated by consolidation or leave them in. We decided to take them out, not just because the numbers were very large, but because the circuits differed widely in the impact of including them and measuring oral arguments in that category of cases. Thus, on the one extreme was the D.C. Circuit, in which there were more than 35% more terminations by consolidation of administrative appeals, than there were oral arguments of agency appeals. Most circuits had the reverse: several times the number of oral arguments as consolidation terminations, with one circuit (10th) where the ratio of oral arguments to consolidations was more than 10 to 1. We recognized that a consolidation of a massive EPA rulemaking appeal, for example, is not the same as an immigration appeal or a routine NLRB unfair labor practice ruling. We nonetheless concluded that leaving in all consolidated cases would create the opposite error, by understating the percentage of cases in which oral argument was a realistic possibility of being provided.

Prisoner Petitions

There are two categories of cases in which there are a large, but indeterminable number in which one side (almost always the plaintiff/petitioner) is not represented by counsel. These are U.S. Prisoner Petitions and Private Prisoner

Petitions, where the term “Private” refers to prisoners held by state and local, not U.S., authorities. These cases include habeas corpus proceedings and their federal equivalent under 28 U.S.C. § 2255, where the petitioner is seeking release from prison or other substantive reduction or change of sentence. In some number of these cases, the prisoner is represented by counsel, but we decided not to seek to break down prisoner petitions by *pro se* or counseled cases but instead decided to break out *pro se* cases on a separate table. Some of these cases receive oral argument, but only if the prisoner is represented by counsel. Some present important issues of law, while others are fairly routine. Another significant group within these categories are complaints about prison conditions, which include class actions seeking injunctive relief, as well as individual claims seeking damages from prison guards or doctors for violations of the prisoner’s constitutional rights. Many, perhaps most, of these cases are filed *pro se*, and there is a wide range regarding the difficulty and/or importance of the issues presented.

Again, we had to decide whether to include these cases as part of our denominator. After excluding procedural terminations and consolidations, there were 3,485 cases in the US prisoner category and 6,368 in the Private group. Of those 163 and 465 received oral argument, or about 5 and 7 %, respectively, which is hardly surprising given the large number of these case brought *pro se*. As a

result, we decided to have a separate table that shows the impact of eliminating all pro se cases.

Agency Appeals, Including Immigration Appeals

The category of Agency Appeals includes only those cases that come directly from an administrative agency (and the Tax Court) and do not go through the district court. For some agencies, there is direct review in the courts of appeals for all of their cases involving their substantive laws (NLRB and FCC are two examples); others, such as FDA, have only limited direct review, with most of its cases going to district court first. In addition, all Title VII and FOIA cases against all agencies go to district court, where they are treated on appeal as US cases.

The Tables that are publicly available do not have breakdowns by agency for Agency Appeals, but we obtained a breakdown from the Judicial Conference for the largest category of such appeals: immigration cases coming from the Board of Immigration Appeals. In 2014, BIA appeals represented 68% of all direct agency cases after excluding consolidated cases and more than 10% of all terminations in all categories of cases. Of the 2,374 BIA cases terminated on the merits, 372 (16%) had oral argument, with a wide variation among the circuits as to the percentage of BIA cases that had oral argument.

The largest numbers of immigration cases are in the Second (417) and Ninth (1,503) Circuits, which are considerable reductions from 2012 (1,582 and 2,860). There are significant numbers of BIA cases in all of the other circuits, except the D.C. Circuit, which had none in 2014. In every other circuit except the 10th, there were more BIA cases than those from all other agencies combined. Two points on oral argument in BIA cases in the Second and Ninth Circuits bear noting. In the Second Circuit, under Local Rule 34.2, the court maintains a non-argument calendar for immigration cases claiming asylum or seeking to withhold removal. In the Ninth Circuit, although oral argument is also limited, the court appoints counsel in prescreened cases, including immigration cases, “presenting issues of first impression or some complexity, or cases otherwise warranting further briefing and oral argument.” See

<http://cdn.ca9.uscourts.gov/datastore/uploads/probono/Pro%20Bono%20Program%20Handbook.pdf>

In the end, we decided to leave BIA cases in the basic tables, but to do a separate table showing, among agency appeals, the relative percentages of BIA and other agency appeal cases that received oral argument.

U.S. Civil, Other Private Civil, and Bankruptcy

Three categories – Other U.S. Civil, Other Private Civil, and Bankruptcy – do not have any apparent needs for adjustments beyond eliminating procedural terminations and those based on consolidations, which apply to every category of cases. By way of background, the first category is for those cases in which the United States, a federal agency, or a federal official is either a plaintiff or a defendant, the case was initially brought in a district court, and the appeal is from a judgment of that court. The second is comprised of all other non-bankruptcy civil appeals from district court judgments. They are mainly federal question and diversity cases, and both extend to a wide range of subjects. Although labeled “private civil,” it also includes suits by and against states, municipalities, and their officers and employees. Third is the relatively small group of bankruptcy cases. The United States or one of its agencies is a party to many such cases (especially those that are appealed), but the presence of the US does not take the case out of this category.

Original Proceedings

The final category of cases is Original Proceedings, which is comprised mainly of writs of mandamus or prohibition, most of which are filed by pro se parties. In 2014, there were 5,145 terminations in this category of which only 35 received oral argument (0.7% after eliminating consolidations). All of the circuits

had a significant number of those proceedings, but no circuit had an overwhelming number. No circuit had more than nine oral arguments among these cases, and several had none. For these reasons, this category will be excluded from our basic denominator.

Description and Highlights of Attached Tables

Table I includes only percentages and not numbers of terminations. It is divided into circuits and type of case (eliminating only the Original category). It also eliminates procedural terminations and cases that were consolidated. The overall average percentages of oral arguments run from the mid-teens (3rd, 4th, 6th & 11th), to a group in the low 30s (1st, 2nd & 10th), with the 7th & DC Circuits at 45 and 55%, respectively. A similar pattern followed for direct criminal appeals, whereas for US prisoner petitions, DC stood out at 35%, although it had only 52 after consolidations. Private (state) prisoner cases were also rarely argued, except in the 1st Circuit (31%, out of 41 cases). Civil appeals in US, private, and bankruptcy cases were more often given oral argument, and there were fewer widespread differences among the circuits in these categories (although no circuit had a higher percentage in any of these categories than the 7th). Finally, on agency appeals, the 7th and DC Circuits heard 72% (after consolidation), followed by the

10th at 38%, the 5th & 7th at 23 & 24%, with four in the teens and four in single digits.

Table II takes out all 9,610 prisoner cases (US & private/state) from the cases terminated on the merits on Table I (29,212). It shows the actual numbers of cases (same basis as Table I), prisoner cases, and non-prisoner cases. Direct criminal appeals, which usually have counsel, are not treated as prisoner cases for this Table. The right column shows the percentage of orally argued cases by circuit when prisoner cases are removed. The increase in percentage of oral arguments is less than 10% (*i.e.*, 14-21 = 7%) for every circuit except the 7th (increase from 45 to 65%) and the 10th (increase from 30 to 41st).

Table III starts with the basic cases & percentages in Table I and shows the number and percentages of oral arguments for pro se and then counseled cases on the merits, after consolidations and original cases are removed. If the appellee is the only pro se, the cases are counted as counseled cases. The contrast in orally argued cases is quite dramatic: overall = 23%; pro se = 3%; and counseled cases = 40%. Of the circuits, five had less than 1% of their pro se cases argued, seven had between 3 & 6% argued, and DC led the pack with just 10%. For counseled cases, three had 25% (3rd, 4th, and 11th), eight between 31 & 51%, and DC and the 7th on top at 77 & 86%, respectively.

Last, Table IV shows the impact of immigration (BIA) appeals on the percentage of oral arguments among agency appeals only (merits cases, after eliminating consolidations). First, BIA cases are more than twice the number of other agency appeals, although they are not all as complex and many agency rulemaking challenges are often filed in the DC Circuit (which had no BIA cases in 2014). Second, while overall there were fewer oral arguments in BIA than in non-BIA cases (16 vs 22%), the disparity was much less than for pro se vs counseled cases (Table III). Third, at the top of BIA argued cases was the 7th, with 77% of its BIA cases argued (and only 57% of its other agency appeals), followed by the 9th tied with the 8th (at 19%), even though the 9th decided 1026 BIA cases on the merits. Fourth, for non-BIA appeals, three circuits had appreciably higher percentages (DC/72, 10th/62 & 7th/57), with three circuits below 10% (1st, 2nd & 3rd), four in the teens (4th, 6th, 9th & 8th), and the others between 22 & 36%.

TABLE I
PERCENTAGE OF ORAL ARGUMENTS
IN CASES DECIDED ON THE MERITS
U.S. COURTS OF APPEALS 2014
BY CIRCUIT & BY CASE CATEGORY¹

	All	Criminal	US Prison	US Civil	Private Prison	Private Civil	Bank	Agency
All	23	22	5	38	7	46	51	18
DC	55	65	35	53	0	47	50	72
1 st	32	29	4	34	31	57	44	4
2 nd	32	37	5	51	9	55	56	9
3 rd	12	12	5	19	4	23	39	9
4 th	11	12	2	24	2	26	38	16
5 th	22	14	7	56	5	54	75	23
6 th	18	14	6	21	7	39	50	7
7 th	45	60	5	61	13	68	75	72
8 th	22	18	6	34	7	50	37	24
9 th	24	30	5	49	10	53	47	16
10 th	30	41	2	26	7	43	59	38
11 th	14	12	3	17	5	35	35	15

¹ Source: Administrative Office, Table B-1 for 12 months ending September 20, 2014. This table does not include cases from the Federal Circuit, and it excludes procedural terminations, consolidated cases, and cases in the original proceedings category.

TABLE II
PERCENTAGE OF ORAL ARGUMENTS
IN CASES DECIDED ON MERITS
US COURTS OF APPEALS 2014
BY CIRCUIT WITH PRISONER ADJUSTMENT²

	Cases Table I	Oral % Table I	Prisoner Cases	Cases Minus Prisoners	Oral Non- Prisoners	Oral % Non- Prisoners
All	29212	23	9610	19602	5983	31
DC	426	55	51	375	219	58
1 st	770	32	125	645	227	35
2 nd	2522	32	458	2064	780	38
3 rd	1782	12	581	1201	206	17
4 th	3081	11	1276	1805	315	17
5 th	3645	22	985	2660	749	28
6 th	2720	22	950	1770	413	23
7 th	1506	45	526	980	633	65
8 th	1881	22	717	1164	363	31
9 th	6439	24	2406	4033	1306	32
10 th	1303	30	358	945	383	41
11 th	3137	14	1227	1910	393	21

² Prisoner cases include both US and Private (state) prisoners. They are excluded from the total cases and their oral arguments are also excluded.

TABLE III

**PERCENTAGE OF ORAL ARGUMENTS
IN CASES DECIDED ON MERITS
US COURTS OF APPEALS 2014
BY CIRCUIT WITH *PRO SE* ADJUSTMENT³**

	Cases Table I	Oral % Table I	<i>Pro Se</i> Cases	% Oral in <i>Pro Se</i> Cases	Counseled Cases	% Oral Counseled Cases
All	29212	23	13790	3	15422	40
DC	426	55	138	10	288	77
1 st	770	32	234	0.8	534	46
2 nd	2522	32	1016	6	1506	50
3 rd	1782	12	538	0.2	944	25
4 th	3081	11	1731	0.2	1350	25
5 th	3645	22	1904	5	1741	41
6 th	2720	22	1303	3	1417	31
7 th	1506	45	744	3	762	86
8 th	1881	22	901	3	980	39
9 th	6439	24	3065	6	3374	40
10 th	1303	30	534	0.6	769	51
11 th	3137	14	1380	0.5	1757	25

³*Pro se* cases include only cases with no counseled party and *pro se* is appellant; if *pro se* is appellee, case is treated as counseled case. *Pro se* cases obtained by special FJC report 7/15/15.

TABLE IV
PERCENTAGE OF ORAL ARGUMENTS
IN AGENCY CASES DECIDED ON MERITS
US COURTS OF APPEALS 2014 BY CIRCUIT
WITH AND WITHOUT IMMIGRATION (BIA) ADJUSTMENT⁴

	Agency Cases Table I	Agency Oral % Table I	BIA Cases	% Oral BIA Cases	Non BIA Cases	% Oral Non-BIA Cases
All	3514	18	2374	16	1140	22
DC	100	72	0	0	100	72
1 st	92	4	79	4	16	6
2 nd	552	9	417	10	135	8
3 rd	195	9	120	8	75	9
4 th	167	16	110	16	57	18
5 th	202	23	140	19	62	33
6 th	257	7	190	4	67	15
7 th	81	72	60	77	21	57
8 th	92	24	64	19	28	36
9 th	1503	16	1026	19	477	11
10 th	112	38	49	6	63	62
11 th	158	15	119	13	39	18

⁴ Agency cases from Table B-1, after excluding procedural and consolidated terminations. BIA case information obtained by special FJC report 7/15/15.