

APPELLATE PROCEDURE UPDATE

by
Deborah Pearce

I. ANNUAL REPORT ON THE INNER WORKINGS OF THE COURT: INFORMATION TO HELP THE APPELLATE PRACTITIONER GAUGE THE COURSE OF AN APPEAL IN THE FIFTH CIRCUIT.

The Fifth Circuit's fiscal year ends on June 30 of each year, and each year the Clerk of Court issues a report analyzing the handling of all appeals filed with the Court. The fiscal year ending June 30, 2006 showed some slight changes in caseload and handling as compared to fiscal year 2005, but overall the statistics remained similar. These statistics, outlined below, should help appellate practitioners gauge the handling of an appeal filed—whether or not it will receive argument, whether or not it will result in a published opinion, and other information of interest.

For fiscal year 2006, 8,966 new appeals were filed, a decrease of 7% from fiscal year 2005. While direct criminal appeals dropped by 14.1, civil appeals increased by 37.6%—although this figure is somewhat misleading as the Court experienced an unusually high increase in N.L.R.B. appeals—57.1%. A look at other civil appeal categories actually show drops in the number of new appeals filed: diversity appeals dropped 2.3% and federal question appeals dropped 5.4%. By far, the largest geographic source of new appeals was, as usual, Texas, which accounted for a whopping 70.9% of all new appeals filed.

Out of the 8,966 new appeals, 8,164 were terminated by the Court—5,539 by judges and 2,048 by the clerk. The total number of cases screened for oral argument was 3,328 and, of those, 711 actually received argument.¹ This represents a decrease in the number of oral argument cases, with roughly 21.4% going to argument. The statistics below break down the percentage receiving argument by case type:

Case Type	% Summary	% Oral
	<u>Calendar Disposition</u>	<u>Argument Disposition</u>
Direct criminal	89.5	10.5
Civil diversity	28.8	71.2
Civil federal question	27.8	72.2
U.S. civil	59.3	40.7
Civil Rights	60.8	39.2
Bankruptcy	25.5	74.5
Tax	60.0	40.0
NLRB	54.5	45.5
Other agency	78.7	21.3
Social security	86.2	13.8

The total opinions issued was 3,712, an increase of 5% from fiscal year 2005. Of these, 468 were published and 3,244 were unpublished. The publication rate was 12.6%.

The Court's reversal rate decreased from 11.6% to 9.1%. The chart below outlines the specific numbers by calendar and disposition type:

1. As of June 30, 2006, 179 cases were awaiting argument.

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Disposition	%	Summary	Oral	Conference	Total
		Calendar	Argument	Calendar	
Affirmed	66.4	105	469	931	2,465
Affirmed in part	11.1	249	95	67	411
Dismissed	12.4	173	67	221	461
Remanded	1.0	4	34	0	38
Reversed/vacated	9.1	162	171	4	337
<u>Total Number</u>		1,653	836	1,223	3,712

The next chart shows the reversal rates for select, general case types:

Case Type	Reversal Rate
Criminal	8.3
U.S. Civil	7.3
Other Private Civil	13.4
Bankruptcy	20.4
Administrative Agency	4.6

Finally, 4.6% (or 171) of all oral argument cases resulted in petitions for rehearing *en banc*. Of those, 153 were disposed of without a poll, 10 were disposed of with a poll, and 5 were granted.

II. APPELLATE JURISDICTION: DETERMINATION, EXISTENCE, AND NON-EXISTENCE.

Several cases touched upon appellate jurisdiction over the course of the last few months. The first, *Larin-Ulloa v. Gonzales*, 462 F.3d 456 (5th Cir. 2006), reiterated the established principle that the appellate court has jurisdiction to determine its own jurisdiction. In *Larin-Ulloa*, an alien petitioned for review of a Board of Immigrant Appeals decision, which had found that he was removable from the United States based on his conviction for an aggravated battery felony. The question raised was whether the statutory provision under which *Larin-Ulloa* was convicted constituted a “crime of violence” as a matter of immigration law. The Fifth Circuit first addressed its jurisdiction. 8 U.S.C. § 1252(a)(2)(c) generally prohibits judicial review of any final order of removal against an alien who is removable by reason of having committed certain designated criminal offenses, including an aggravated felony. The REAL ID Act of 2005 amended this section, however, to provide that it does not bar judicial review of “constitutional claims or questions of law. . . .” 8 U.S.C. § 1252(a)(2)(D) (Pub.L.No. 109-13, 119 Stat. 231). Determining that this amendment applies retroactively to cases pending on the date of its passage, see *Rodriguez-Castro v. Gonzales*, 427 F.3d 316 (5th Cir. 2005), the Court held that *Larin-Ulloa* presented a purely legal question for review, and thus the Court possessed appellate jurisdiction: “[m]any of our sister circuit’s have similarly concluded that whether a conviction is an aggravated felony is a reviewable question of law.” (Citations omitted). Turning to the underlying criminal statute, the Court then held that *Larin-Ulloa*’s conviction did not constitute the necessary crime of violence to justify his removal from the United States.

In another immigration case, *Martinez-Lopez v. Gonzales*, 454 F.3d 500 (5th Cir. 2006), the Court similarly held that it had jurisdiction to review immigration questions of law and that its review would be *de novo*. Martinez-Lopez had been convicted of possession of less than one gram of cocaine, a felony in the state of Texas, and was ordered to be removed from the United States as a result. On appeal, he argued, *inter*

alia, that this state law federal law, and thus removal violated certa

Regarding *Martin Avalos*, 251 F.3d 505 on appellate procedu granted certiorari to c existing Fifth Circuit otherwise. See *Martin* court can only overru by controlling Suprem

Martinez-Lopez’ sented the Court with that this legal argum jurisdiction over the proceedings when “qu Court found that the Lopez’ removal was th

A final case, *Certo to Reinsurance Agree*. F.3d 568 (5th Cir. 2) administration of wa Comp USA contracte insurance to cover t reinsured a portion of stopped paying on t Houston General, a n Underwriter’s obligat Foreign Arbitral Awa and the arbitration pa

A month later, Uti tion, to recoup the pa General. Warrantech ba collateral estoppel ba claims for fraud, unfa good faith and fair dea reliance on affirmative court denied Underw. related affirmative de however, that if it lat would reconsider Und

Underwriters thei defenses and state-law the affirmative defens with prejudice. After motion and held that state court because all case. Specifically, the defenses were, indeed,

2. 9 U.S.C. § 205 a proceeding pending in a Convention. . . .” Intere removal need not appear petition.