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Quantitative Analysis of a Judicial Career: A Case Study of Judge John Minor Wisdom

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A. Z. Handford, a Negro, was tried in the Thomasville Division of the District Court for the Middle District of Georgia on a one-count indictment for illegal possession of nontaxpaid whiskey, in violation of 26 U.S.C. § 5008(b)(1) and § 5642. He was found guilty and sentenced to two years imprisonment.

Appellant specifies as errors: '(1) the evidence does not support the verdict, and the motion for judgment of acquittal should have been granted; (2) because of the prejudicial and inflammatory argument of the district attorney, a new trial should be granted.' The alleged 'prejudicial and inflammatory argument' consisted of (a) an appeal to racial prejudice

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* Professor of Law, Stanford Law School. I would like to thank my research assistant, Madeline Cohen, for her help and, of course, the Wisdoms for their continuing inspiration.

> and (b) argument that too many of the prosecutor's friends and friends' children get run over up and down the highways.
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> A United States district attorney carries a double burden. He owes an obligation to the government, just as any attorney owes an obligation to his client, to conduct his case zealously. But he must remember also that he is the representative of a government dedicated to fairness and equal justice to all and, in this respect, he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important that Anglo-American criminal law rests on the foundation: better the guilty escape than the innocent suffer. In this case zeal outran fairness. The argument of the United States attorney in the district court was improper, prejudicial, and constituted reversible error.[1]

With these words, released on November 13, 1957, John Minor Wisdom began one of America's outstanding judicial careers. Since that time, he has written nearly 1,400 signed, published opinions, published over a span of more than 800 of the 1300 volumes of the Federal Reporter. It is fitting that the first page of his first published opinion sounded themes that have featured prominently in those opinions: fairness, equal justice, and, so often, the problems of race.

Judge Wisdom's judicial career now sits in my computer. My computer's hard drive contains every published judicial opinion he has signed, from November 13, 1957 through the end of 1995, along with records of the citations to his opinions by the courts and law review articles. Such a distinguished career is not easily compassed — it consumes about 60 megabytes of memory: But it is all there.

Of course, it is not really there. Virtual reality is not reality. My carefully constructed, computerized record of Judge Wisdom's career is a colorless and distorted reflection of the real career, the real judge, and the real man. The career is a model of hard work, intelligence, and courage — in practice, in politics, and on the federal bench. The judge is a Solomon equipped with rigorous analysis, profound scholarship, and sparkling prose. The man, with his kindness, humor, and humanity, is an inspiration. Judge Wisdom and his indispensable partner, Bonnie Wisdom, have been parents, uncle and aunt, grandparents, advisors, and friends to more than ninety law clerks now, including, to my great good fortune, myself. Like them all, I am honored to have known the Wisdoms. My computer knows nothing of these things.

But can my computer help us learn anything new and interesting about his real career? I believe it can.

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1. United States v. Handford, 249 F.2d 295, 296 (5th Cir. 1957) (footnote omitted).

This article explores the kinds of questions about judicial careers we can approach by using computer data-bases, with the opinions that make up Judge Wisdom's career as a "case" study. Specifically, I have downloaded full-text versions of all of Judge Wisdom's roughly 1400 reported opinions[2] and have searched judicial opinion citators and law review databases for citations to those opinions. I searched the full text opinions for certain trends in his writing; I examined the citations for evidence of his influence. I conclude that these kinds of analyses can tell us some things about judges. The analysis of citations, in particular, has value for indicating the importance of a judge's reported decisions relative to each other and the influence of his opinions over time. These methods also have some limited value in indicating the relative influence of one judge compared to other judges.

The first section of this article describes quantitative analysis of publications, in general and then as it has been applied to legal materials. The second section provides basic information about Judge Wisdom's opinions. The third section analyzes some aspects of his opinions, notably his use of separate opinions, the length of his opinions, and his use of footnotes. These three areas are examined both over time within his own career and by comparisons with other judges. The fourth section analyzes citations to Judge Wisdom's opinions, once again both over time and compared with those of other judges. The article ends by offering a preliminary assessment of the usefulness of these kinds of research techniques.

This article serves both as an unusual contribution to the history of Judge Wisdom's career and, more generally, as an exploration of the uses of new technology. Almost everything done here could have been done through an exhaustive examination of more than 800 volumes of the Federal Reporter, second and third series; scores of volumes of the Federal Supplement, and careful use of Shepard's Citations. Computers have made this kind of work easier, although they have not made it easy or free from the need for judgment. The article ends with an appendix describing the methods I used in these analyses, to allow an assessment of this work and to offer help to anyone else who chooses to use these methods.

I. The Quantitative Analysis of Judicial Opinions

There has been little effort to analyze a judge's opinions quantitatively. The pioneering effort, and still the leader, is Judge Richard Posner's *Car-*

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2. These are the opinions found in the Lexis "Genfed" library as of the end of 1995 with a search of "written by (Wisdom)", with a few unpublished opinions and a few mistakes in attribution removed.

dozo: A Study in Reputation.[3] But quantitative analysis of the influence of publications has been employed in other contexts, particularly through citation analysis.

In one sense, lawyers pioneered citation analysis. The first index to citations was the Shepard's Citation System, begun by Frank Shepard in 1873.[4] The Shepard's system is a methodical listing and partial description of all citations to published American judicial opinions, and to certain other authorities, found in judicial opinions and some other publications. Shepard's thrived because lawyers found it useful for two reasons. They could use it to determine whether precedents they relied upon had been overruled or discredited. They could also use it to search for extensions of the reasoning of earlier cases or for cases that presented factual or legal issues similar to the first case. "Shepardizing" has become sufficiently important that the use of the Shepard's system has long been one of the first aspects of the "legal method" taught to law students.

Legal citations were very early used by scholars as well as practitioners. According to Professor Shapiro, the first known analysis of the frequency of particular kinds of citations was an 1894 analysis of judicial citations to different authorities, which was followed quickly by a more extensive study in 1895.[5] But since then, very little has been done to use that information quantitatively to reveal information about the opinions. Other fields, more quantitatively inclined than the law, have not been as reluctant.

In the late 1950s and early 1960s, the scientific community began to create its own citation indexes. Three journals created citation indexes to their volumes and a consulting firm called Eugene Garfield Associates created a citation index to more than 5,000 chemical patents. In 1961, the consulting firm, transformed into a business named the Institute for Scientific Information ("ISI"), created a pilot citation index for genetics, the 1961

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3. RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990). Judge Posner's leading position will be challenged by an extensive study of citations to federal circuit judges, soon to be published. *See* William M. Landes, Lawrence Lessig, & Michael E. Solimine, *Judicial Reputation: A Citation Analysis of Federal Courts of Appeals Judges*, J. LEGAL STUD. (forthcoming June 1996), which the authors were kind enough to share with me as I was completing this article. *See infra* note 35. Posner's work was preceded by one shorter effort that used citations to measure individual judicial influence, Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481 (1983).

4. Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540 (1985) [hereinafter Shapiro I]. This study was later somewhat revised and enlarged and published along with the law review articles it designated. FRED R. SHAPIRO, THE MOST-CITED LAW REVIEW ARTICLES (1987).

5. Fred R. Shapiro, *The Most-Cited Articles from the Yale Law Journal*, 100 YALE L.J. 1449, 1455 (1991) [hereinafter Shapiro II].

Genetics Citation Index, with financial support from the National Institute of Health. ISI was encouraged by the result, but the federal government rejected its request for further funding for a broader scientific index. So, beginning in 1964, ISI began publishing its own annual Science Citation Index. The index was a success and was followed by the Social Sciences Citation Index in 1973 and the Humanities Citation Index in 1978.[6]

The inspiration for these systems was, like the inspiration for Shepard's, an effort to trace ideas through succeeding publications. But, particularly in the natural sciences, the resulting lists of citations came to be used not just as an index but as data about the "value" of individual articles, scholars, and entire university departments. As citation analysis has come to affect the careers of individual researchers — including what jobs they get or keep — it has become controversial, but it continues to be used widely.[7]

By contrast, the legal world has put little effort into the quantitative analysis of publications or citations. Three very different kinds of analyses occasionally have been published: assessments of how particular courts have used authorities, lists of the most frequently cited publications, and assessments of the scholarly qualities of particular law school faculties.

The oldest and largest of these efforts is a continuing stream of scholarship examining what authorities different courts have relied upon during different periods. Professor John Henry Merryman performed perhaps the earliest rigorous assessment in 1954, when he looked at the authorities cited by the California Supreme Court in 1950.[8] Merryman returned to this analysis more than twenty years later, comparing that court's citation practices

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6. See the historical discussion in EUGENE GARFIELD, CITATION INDEXING — ITS THEORY AND APPLICATION IN SCIENCE, TECHNOLOGY, AND HUMANITIES 6-16 (1979). This history is summarized in Shapiro I, *supra* note 4, at 1541. Readers should note that Garfield is the founder of the Institute for Scientific Information, which is in business to produce these indexes.

7. Citation analysis has itself been studied for its significance and "value." *See, e.g.*, JONATHAN R. COLE & STEPHEN COLE, SOCIAL STRATIFICATION IN SCIENCE 35 (1973); EUGENE GARFIELD, ESSAYS OF AN INFORMATION SCIENTIST 337-47 (1980); Jonathan R. Cole & Stephen Cole, *Measuring the Quality of Sociological Research: Problems in the Use of the Science Citation Index*, 6 AM. SOC. 23, 23-24 (1971); Jonathan R. Cole & Stephen Cole, *Scientific Output and Recognition: A Study in the Operation of the Reward System in Science*, 32 AM. SOC. REV. 377 (1967); Emilie C. White, *Bibliometrics: From Curiosity to Convention*, 76 SPECIAL LIBR. at 35, 39-40 (1985). Garfield provided a general summary of the criticisms and a defense of the technique in CITATION INDEXING — ITS THEORY AND APPLICATION IN SCIENCE, TECHNOLOGY, AND HUMANITIES. *See* GARFIELD, *supra* note 6.

8. John H. Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613 (1954). The empirical study is located at pages 650-72.

in 1950, 1960, and 1970.[9] The broadest effort, by Professors Lawrence Friedman, Robert A. Kagan, Bliss Cartwright, and Stanton Wheeler, looked at citations in opinions from 16 state supreme courts over a period of 100 years.[10] A variety of other studies over many years have looked at citation patterns in particular state supreme courts.[11] Other efforts have included examinations of citation patterns in federal appellate courts.[12] These efforts all aimed at understanding better how courts use, or at least cite, different sources and identifying changes in those patterns over time.

A second, smaller, line of research has focused not on what authorities courts use, but on what citations say about the strength of particular authorities. Several studies have looked at the citation of law reviews by the courts and legal periodicals.[13] These studies often looked at the influence of partic-

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9. John H. Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381 (1977).

10. Lawrence M. Friedman, et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981); *see also* Lawrence M. Friedman, et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978).

11. *See* Robert D. Archibald, *Stare Decisis and the Ohio Supreme Court*, 9 W. RES. L. REV. 23 (1957); James Leonard, *An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990*, 86 L. LIBR. J .129 (1994); Richard A. Mann, *The North Carolina Supreme Court 1977: A Statistical Analysis*, 15 WAKE FOREST L. REV. 39, 43-45 (1979); William H. Manz, *The Citation Practices of the New York Court of Appeals, 1850-1993*, 43 BUFF. L. REV. 121 (1995); Peter McCormick, *Investigation of Citation Practices*, 22 MANSFIELD L.J. 286 (1993) (studying Canadian courts); William L. Reynolds, II, *The Court of Appeals of Maryland: Roles, Work and Performance* (pt. II), 38 MD. L. REV. 148 (1978); John Scurlock, *Scholarship and the Courts*, 32 U. MO.-K.C. L. REV. 228 (1964); George R. Smith, *The Current Opinions of the Supreme Court of Arkansas: A Study of Craftsmanship*, 1 ARK. L. REV. 89 (1947); Mary A. Bobinski, *Comment, Citation Sources and the New York Court of Appeals*, 34 BUFF. L. REV. 965 (1985); William L. Turner, *Comment, Legal Periodicals: Their Use in Kansas*, 7 KAN. L. REV. 490 (1959).

12. *See* Charles A. Johnson, *Citations to Authority in Supreme Court Opinions*, 7 LAW & POL'Y 509 (1985); William M. Landes & Richard A. Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. LEGAL STUD. 367 (1980); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 255-57 (1976).

13. *See* Wes Daniels, *"Far Beyond the Law Reports": Secondary Source Citations in United States Supreme Court Opinions October Terms 1900, 1940 and 1978*, 76 L. LIBR. J. 1 (1983); Douglas B. Maggs, *Concerning the Extent to Which the Law Review Contributes to the Development of the Law*, 3 S. CAL. L. REV. 181 (1930); Richard A. Mann, *The Use of Legal Periodicals By Courts and Journals*, 26 JURIMETRICS J. 400 (1986); Olavi Maru, *Measuring the Impact of Legal Periodicals*, 1976 AM. B. FOUND. RESEARCH J. 227, 233; Louis Sirico & Jeffrey Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131 (1986); *see also* The Executive Board, *Chicago-Kent Law Review Faculty Scholarship Survey*, 65 CHI.-KENT L. REV. 195 (1989) (compiling list of most-

ular journals, as measured by the rates at which they were cited. Other authors have looked more narrowly at the most frequently cited opinions of the United States Courts of Appeals[14] or the most frequently cited articles in a particular law review.[15]

Ranking the productivity of law faculties has been a third major use of quantitative analysis of legal writings. Professor Ira Ellman produced the first such analysis, looking at the average number of pages published in the "top 23" law reviews over a two and half year period by faculty members at American law schools.[16] An unpublished, but widely discussed, study by Professor Mayer Freed followed in the late 1980s, which examined the publications of the faculties of the "top 20" law schools in the "top 25" legal journals.[17] The staff of the Chicago-Kent Law Review decided to make this task routine. In 1989, it published a comparative assessment of the scholarly productivity of law school faculties, as measured by the average number of pages published in the "top" law reviews. The 1989 version promised that these studies would be produced every year. A second publication followed in 1990,[18] but the third was not published until late 1995.[19]

These studies of faculty productivity have focused on the number of pages published in particular legal periodicals; as far as I can determine, no one has published a systematic survey of the frequency of citations to the

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cited 50, 20, and 10 student-edited law reviews for use in survey of law faculty productivity).

14. *See* Robert Schriek, *Most-Cited U.S. Courts of Appeals Cases from 1932 Until the Late 1980s*, 83 L. LIBR. J. 317 (1991). Schriek used the paper version of Shepard's Federal Citations rather than electronic citation indices from either Westlaw or Lexis. *Id.* at 317, 320. The Westlaw system did not include citations from before 1956; Shriek found by test that, at least at that time, the Lexis version of Shepards was less complete than the paper version. *Id.* at 320-21.

15. *See* Shapiro I, *supra* note 4; Shapiro II, *supra* note 5 (for centenary volume of Yale Law Journal). Both Shapiro articles contain interesting and useful discussions of the history of "bibliometrics" — "studies which seek to quantify the processes of written communication," the definition given in Shapiro I, *supra* note 4, at 1541 n.8, which was taken from 12 ANN. REV. INFO. SCI. & TECH. 35 (1977).

16. Ira M. Ellman, *A Comparison of Law Faculty Production in Leading Law Reviews*, 33 J. LEGAL EDUC. 681 (1983).

17. Memorandum from Mayer Freed to Faculty and Deans of Northwestern University School of Law (Feb. 1, 1989). Freed's work was discussed in the first Chicago-Kent survey, The Executive Board, *supra* note 13, at 200-01, on whose discussion of the unpublished study I have relied.

18. The Executive Board, *Chicago-Kent Faculty Scholarship Survey*, 66 CHI.-KENT L. REV. 509 (1990).

19. Colleen M. Cullen & S. Randall Kalberg, *Chicago-Kent Faculty Scholarship Survey*, 70 CHI.-KENT L. REV. 1445 (1995).

work of particular law professors or faculties.[20] There is some indication, however, through a published objection to the practice, that citation counts are being used to make decisions about hiring, tenuring, and paying law professors.[21]

Although use of these kinds of quantitative analysis seems to be growing more common, no one seems to have made rigorous use of this kind of analysis to look at an individual judge until 1990, when Judge Richard Posner published a monograph on the reputation of Judge and Justice Benjamin Cardozo.[22] Posner devoted the fifth chapter of his monograph to a quantitative analysis of citations to Cardozo's work.

Posner first examined the number of law review articles that mentioned various prominent judges and academics to see how often Cardozo was mentioned compared to others. He then shifted to comparing the number of citations in subsequent judicial opinions to majority opinions written by Cardozo, first on the New York Court of Appeals and then on the U.S. Supreme Court, and to a sample of majority opinions written during the same time by his colleagues on those courts. Finally, he examined the use of opinions by Cardozo in selected legal casebooks. Throughout this part of his analysis, Posner focused on citations as a measure of Cardozo's reputation relative to other judges.

Later in the book, Posner made some other quantitative comparisons of Cardozo's opinions with those of his colleagues on the New York Court of Appeals. Posner compared 60 Cardozo opinions with 60 other New York Court of Appeals opinions with respect to several aspects of how they were written: length of sentences, length of opinion, number of cases cited, and number of scholarly citations. Posner ended by, among other things, suggesting fuller use of computerized data bases in studying both Cardozo[23] and other judges.[24]

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20. In addition to these page tallies, Professor Richard Delgado has made a different and fascinating use of this kind of data. He has focused on citations to particular authors' law review articles. He examined the citations in law review articles on civil rights and concluded that they showed "white scholars' systematic occupation of, and exclusion of minority scholars from, the central areas of civil rights scholarship. The mainstream writers tend to acknowledge only each other's work." Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 566 (1984). *But see* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1770-78 (1989) (criticizing Delgado's argument).

21. *See* Arthur Austin, *The Reliability of Citation Counts in Judgments on Promotion, Tenure, and Status*, 35 ARIZ. L. REV. 829 (1993).

22. POSNER, *supra* note 3.

23. *Id.* at 144.

24. *Id.* at 149 (item 6), 150 (item 9).

Posner's book on Cardozo's reputation was widely reviewed; a number of the reviews focused critically on his use of citation analysis.[25] One reviewer dismissed Posner's effort "to measure Justice Cardozo's reputation by . . . the number of times that Cardozo's opinions have been cited in the legal literature over time as revealed by a search through Mead Data Central's Lexis computer data base" as "simply bizarre."[26] Another disparaged the work as Cardozo's "baseball card."[27] Several reviewers went so far as to note that measuring judicial stature by citations would bolster the standing of Judge Posner himself, a prolific, controversial, and often-cited scholar-judge.[28]

Posner has returned to judicial citation analysis at least once in print. In an appendix to his book review of Professor Gerald Gunther's biography of Learned Hand, Posner explored empirically the question he felt Gunther had slighted: "Was Hand really a great judge?"[29] He compared, in a series of seven five- or six-year time periods, the number of citations in the federal courts of appeals to Hand's published opinions with those to such opinions by his colleagues on the Second Circuit.[30] He looked both at total citations and citations from 1988 to 1992, long after Hand's last opinion was published in 1961.[31] He also corrected for "self-citations" and looked at cita-

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25. *See, e.g.*, Marc M. Arkin, *Judging by Reputation*, 60 FORDHAM L. REV. 739 (1992) (book review); Virgil L.P. Blake, *Citation Studies—The Missing Background*, 12 CARDOZO L. REV. 1961 (1991) (book review); Michael H. Cardozo, *Judicial Reputation Evaluated: The Cardozo Instance*, 12 CARDOZO L. REV. 1915 (1991) (book review); Richard D. Friedman, *On Cardozo and Reputation: Legendary Judge, Underrated Justice?*, 12 CARDOZO L. REV. 1923 (1991) (book review); James D. Gordon III, *Cardozo's Baseball Card,* 44 STAN. L. REV. 899, 900-02, 908 (1992) (book review); John W. Johnson, Book Review, 35 AM. J. LEGAL HIST. 323, 324 (1991); David A. Logan, *The Man in the Mirror*, 90 MICH. L. REV. 1739, 1752-53 (1992) (book review); William Powers, Jr., *Reputology*, 12 CARDOZO L. REV. 1941 (1991) (book review); David A.J. Richards, *Cardozo, the Idea of the Great Judge, and the Theory of Adjudication*, 12 CARDOZO L. REV. 1955 (1991) (book review); Keith A. Stiverson & Lynn Wishart, *Citation Studies—Measuring Rods of Judicial Reputation?*, 12 CARDOZO L. REV. 1969 (1991) (book review); Note, *The Judge's Path to Greatness*, 104 HARV. L. REV. 788, 792-93 (1991) (reviewing book); Paul A. Freund, *Reputation by Citation*, N.Y. TIMES, Nov. 4, 1990, § 7, at 31 (same); Sheldon M. Novick, Book Review, *A Study in Reputation*, TRIAL, Mar. 1991, at 84, 87 (same).

26. Arkin, *supra* note 25, at 744.

27. Gordon, *supra* note 25, at 900.

28. Note, *supra* note 25, at 793; Logan, *supra* note 25, at 1752-53.

29. Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 534 (1994) (reviewing GERARD GUNTHHER, LEARNED HAND: THE MAN AND THE JUDGE (1994)).

30. *Id.* at 535-39.

31. *Id.*

tions outside the Second Circuit.[32] Posner concluded that "[t]he analysis in this Appendix furnishes some confirmation — bearing in mind the high quality of the Second Circuit during Hand's tenure — that Learned Hand was indeed a great judge."[33]

In his study of Cardozo, Posner expressed the hope that his quantitative analysis of citations to judicial opinions would be followed widely. It seems instead to have been criticized and then largely ignored. The only published exception is some preliminary work by Professor Lawrence Lessig, set out as an appendix to a fascinating evaluation by the Chicago Council of Lawyers of the then-sitting members of the Seventh Circuit Court of Appeals.[34] Lessig described his work as "the *preliminary* results of a more extensive research project that Professor William Landes and I are conducting, designed to gauge the productivity of federal judges."[35] In this publication, at least, the data were presented without substantial interpretation, as forty tables or graphs with only explanations of the derivations of the data.[36]

For each judge on the Seventh Circuit, Lessig presented information about citations to the judge's opinions and the effects the judge had on the speed with which opinions were released.[37] His citation analysis looked at the number of citations to the judge's opinions in light of both the total number of the judge's opinions and the number of years the judge had served on the court.[38] He broke these citations down into district court and circuit court citations, both within and outside the Seventh Circuit, and looked at the percentage of self-citations.[39] Lessig also presented information on the treatment recorded by Shepards for the citations — criticized, distinguished,

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32. *Id.* at 539-40.

33. *Id.* at 540.

34. The Council released its evaluation in February 1994. The evaluation, with the Lessig appendix, was published later in 1994 as Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673 (1994).

35. *Id.* at 825. The work referred to, Landes et al., *supra* note 3, is a comprehensive effort to measure the reputation of individual judges by the number of times their opinions are cited. Landes, Lessig, and Solimine apply regression analysis to assess judicial "productivity" in terms of citations per opinion, after adjusting for length of tenure and other factors. *Id.* They then examine the productivity, so defined, of over 170 circuit judges sitting in 1992. *Id.* Their focus is on comparisons of this productivity across judges, not across time. *Id.* Their findings are most relevant to Section III of this article and will be discussed in that context.

36. Chicago Council of Lawyers, *supra* note 34, at 831-57.

37. *See id.* at 825 (stating that data contain studies of citations and of efficiency).

38. *See id.* at 826-28 (explaining Lessig's citation analysis).

39. *See id.*

explained, and so on.[40] He then provided citations to the ten most-cited opinions of each judge.[41] Lessig also provided information on the extent to which judges wrote separate concurrences and dissents, as well as information on how often they agreed or disagreed with specific colleagues.[42] Lessig's published preliminary analysis contained useful data about the Seventh Circuit, but did not put that data to work in discussing the judges' careers, either separately or relative to each other.

There are good reasons, many of them noted by Judge Posner himself, to be skeptical about ranking judicial reputations, let alone judges themselves, on the basis of citation counts. Yet, as Sections II and III below seek to demonstrate, a quantitative analysis of judicial opinions and citations to them can provide some useful insights.

II. Judge Wisdom's Opinions

This Section provides some overall data about Judge Wisdom's published judicial opinions. My analysis is based on downloaded versions of every opinion reported in the Lexis database that shows Judge Wisdom as the author, including dissenting and concurring opinions. The opinions I analyze include those that he has written as a member of three-judge district courts, of the Multidistrict Panel on Complex Litigation, and of the Special Court for the Regional Railroad Reorganization Act of 1973 ("the Railroad Court"). I did not include any per curiam opinions he has written, any short orders, or any unpublished opinions, whether or not present in the Lexis database.[43] For purposes of comparison, I determined the numbers of majority, concurring, dissenting, and concurring and dissenting opinions for nearly sixty other judges. My research assistant looked at the percentages of majority and separate opinions in sets of cases arbitrarily chosen from both the Fifth Circuit and from all circuits for eight sample years: 1960, 1965, 1970, 1975, 1980, 1985, 1990, and 1995. To provide comparisons for the counts of words and footnotes, I downloaded from Lexis some thirty to fifty arbitrarily selected majority opinions from the Fifth Circuit and from the Courts of Appeals as a whole for the same eight sample years.

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40. *See id.* at 827.

41. *See id.* at 828.

42. *See id.* at 829-30.

43. The Lexis database includes opinions that the courts involved did not expect to have published and whose validity as precedent may be limited by circuit rules. Lexis "publication" of such "unpublished" opinions appears to have become common in the 1980s, starting with Sixth Circuit opinions in 1982. I did, however, find two much earlier unpublished Wisdom opinions in Lexis, one from 1971 and one from 1973. I excluded both.

Judge Wisdom's first opinion, *Handford v. United States*, 249 F.2d 295 (5th Cir. 1957), was issued on November 13, 1957. In the thirty-eight years following, through December 31, 1995, he has written 1,393 signed, published opinions. Of these opinions, 1,227 were for the Fifth Circuit, 117 for other circuits, 28 for district courts, 9 for the Multidistrict Panel on Complex Litigation, and 12 for the Railroad Court.[44] Overwhelmingly, he has written majority opinions. His published opinions include only 25 concurring opinions, 99 dissenting opinions, and 6 opinions concurring and dissenting with a majority opinion.[45] His opinions are shown in Table 1, below.

Table 1. Total Judge Wisdom Opinions

Opinions	Total	Majority	Concurring	Dissenting	Concur. & Dissent.
Fifth Circuit	1,227	1,113	19	90	5
Other Circuit	117	110	3	3	1
District Court	28	20	3	5	0
Multidistrict Litigation	9	8	0	1	0
Railroad Court	12	12	0	0	0

A. The Fifth Circuit Opinions

The Fifth Circuit has, not surprisingly, accounted for most of Judge Wisdom's opinions, 1,227 out of 1,393. The number of his Fifth Circuit majority opinions per year, however, has varied substantially, from 54 in 1961 to only 10 in 1989.[46] The average number of his Fifth Circuit majority opinions per full year by decade was 36.1 in the 1960s, 39.0 in the 1970s, 16.2 in the 1980s, and, thus far, 20.7 in the 1990s. A more complete distribution of his Fifth Circuit opinions — majority, concurring, dissenting, and concurring and dissenting — over the past thirty-eight years is shown in Table 2, below.

44. Congress established the Special Court for the Regional Railroad Reorganization Act of 1973 to handle a variety of legal issues arising out of the statue that, among other things, created Conrail. Twenty-three years later, the court remains active.

45. Defining an opinion as "concurring and dissenting" can be difficult because many dissents could be characterized as "partially concurring." For this paper, I used the categorization used by Lexis; if it showed a case where Judge Wisdom had written both a concurrence and a dissent, I counted the opinion as concurring and dissenting.

46. This range excludes Judge Wisdom's first year on the bench, when his first opinion was released in mid-November.

Table 2. Judge Wisdom's Fifth Circuit Opinions

	Majority	Concurring	Dissenting	Con. & Dis.	Total
1957	3	0	0	0	3
1958	42	0	2	0	44
1959	50	0	5	0	55
1960	37	0	2	0	39
1961	54	1	4	0	59
1962	47	0	6	0	53
1963	39	0	2	0	41
1964	26	1	1	0	28
1965	33	0	1	0	34
1966	36	1	1	0	38
1967	26	2	4	0	32
1968	29	0	2	0	31
1969	34	0	2	0	36
1970	44	0	7	1	52
1971	47	1	3	0	51
1972	45	3	11	0	59
1973	37	0	5	0	42
1974	48	0	1	0	49
1975	35	0	4	0	39
1976	21	1	1	1	24
1977	36	1	4	0	41
1978	26	4	5	0	35
1979	31	0	2	0	33
1980	17	0	0	0	17
1981	20	0	1	0	21
1982	17	0	0	0	17
1983	19	0	2	0	21
1984	12	3	1	1	17
1985	19	0	1	0	20
1986	15	0	2	1	18
1987	18	1	2	0	21
1988	15	0	1	0	16
1989	10	0	0	1	11
1990	26	0	0	0	26
1991	18	0	1	0	19
1992	15	0	2	0	17
1993	15	0	0	0	15
1994	28	0	2	0	30
1995	23	0	0	0	23
Total	1113	19	90	5	1227

Excluding the three opinions of his first year, Judge Wisdom has averaged 29.2 Fifth Circuit majority opinions and 32.2 total Fifth Circuit opinions per year. Both the majority and total opinions per year show two peaks, one in the early 1960s and another in the late 1960s and early 1970s. Judge Wisdom had major heart surgery in 1976, leading to the drop in cases for that year. He took senior status on January 15, 1977 and his Fifth Circuit majority opinions fell to a lower level of between 36 and 10 per year. Overall, he averaged 36.6 Fifth Circuit majority opinions per year from 1958 through 1977 and 19 from 1978 through 1995.[47]

B. The Other Circuit Opinions

Judge Wisdom has written 110 published majority opinions while sitting by designation on other Courts of Appeals — the equivalent of more than three full years of service on such courts. He has written opinions for every federal court of appeals except the Sixth, Eighth, and Tenth Circuits. Table 3 shows the number of opinions he has written while sitting by designation on other circuits.

Table 3. Judge Wisdom's Opinions for Other Circuits — Listed by Circuit

Circuit	Majority	Concurring	Dissenting	Con. & Dis.
First	38	1	0	0
Second	2	0	0	0
Third	3	0	0	0
Fourth	6	0	0	0
Sixth	0	0	0	0
Seventh	18	0	1	0
Eighth	0	0	0	0
Ninth	12	0	1	1
Tenth	0	0	0	0
Eleventh	27	2	1	0
D.C.	2	0	0	0
Federal	2	0	0	0
Totals	110	3	3	1

47. The Landes, Lessig, and Solimine data indicate that, of their sample of 18 Fifth Circuit judges sitting in 1992 (which excluded those judges named most recently to the court), the judges had averaged about 34.5 signed majority opinions per year over their careers. Landes et al., *supra* note 3, at tbl. 1.

Table 4. Judge Wisdom's Opinions for Other Circuits — Listed by Year and Total Majority Opinions

	Majority	Concurring	Dissenting	Con. & Dis.	Totals
1973	2[48]	0	0	0	37
1974	0	0	0	0	48
1975	0	0	0	0	35
1976	0	0	0	0	21
1977	0	0	0	0	36
1978	2[49]	0	0	0	28
1979	2[50]	0	0	0	33
1980	6[51]	0	0	0	23
1981	5[52]	0	0	0	25
1982	8[53]	1	0	0	25
1983	4[54]	0	1	0	24
1984	20[55]	1	0	0	32
1985	15[56]	0	1	0	34
1986	8[57]	0	0	0	23
1987	12[58]	1	1	0	30
1988	7[59]	0	0	0	22
1989	7	0	0	0	17
1990	0	0	0	0	26
1991	4[60]	0	0	0	22
1992	7[61]	0	0	1	22
1993	0	0	0	0	15
1994	0	0	0	0	28
1995	0	0	0	0	23

48. D.C. Circuit.

49. Seventh Circuit.

50. Seventh Circuit.

51. First Circuit, 5 cases; Seventh Circuit, 2 cases.

52. Seventh Circuit.

53. Seventh Circuit, 2 cases; Ninth Circuit, 3 cases; Eleventh Circuit, 4 cases, including the concurrence.

54. Second Circuit, 1 case; Seventh Circuit, 1 case; Eleventh Circuit, 2 cases, including the dissent.

55. First Circuit, 5 cases; Ninth Circuit, 3 cases; Eleventh Circuit, 11 cases, including a dissent; and Federal Circuit, 2 cases.

56. First Circuit, 8 cases; Third Circuit, 3 cases; Seventh Circuit, 4 cases; Ninth Circuit, 1 case, a dissent; and Eleventh Circuit, 1 case.

Almost all of this activity on other circuits came after Judge Wisdom had taken senior status. Of his 117 opinions for other circuits, all but two came after 1977. The distribution of these opinions over time is shown in Table 4, above. Footnotes identify the particular circuit or circuits for which Judge Wisdom wrote in a given year.

Table 4 provides a more accurate assessment of Judge Wisdom's workload since taking senior status in January 1977. When Fifth Circuit majority opinions are combined with majority opinions for other circuits, his average number of majority opinions per year and before and after senior status changes as shown in Table 5, below.

Table 5. Judge Wisdom's Average Majority Opinions Per Stated Period

	Fifth Circuit	Other Circuits	Total
1960s	36.1	0.0	36.1
1970s	39.0	0.6	39.6
1980s	16.2	9.3	25.5
1990s	20.8	1.8	22.7
Before 1977	38.4	0.1	38.5
1977 and After	20.0	5.7	25.7

C. The Non-Appellate Opinions

In addition to his appellate work, Judge Wisdom has served as a federal judge in three other contexts. First, like other circuit judges of his era, he served on the three-judge district courts required for many years to hear federal constitutional challenges to state statutes.[62] Second, Judge Wisdom

57. First Circuit, 4 cases; Eleventh Circuit, 4 cases.

58. First Circuit, 9 cases, including one concurrence; Fourth Circuit, 2 cases; Seventh Circuit, 1 case; Eleventh Circuit, 2 cases.

59. First Circuit, 4 cases; Ninth Circuit, 1 case; Eleventh Circuit, 2 cases.

60. Eleventh Circuit.

61. Third Circuit, 1 case; Seventh Circuit, 5 cases; Ninth Circuit, 3 cases.

62. The three-judge district court arose as a congressional response to fears of expanding federal jurisdiction following the Supreme Court's holding in Ex Parte Young, 209 U.S. 123 (1908). As originally enacted, the law required that suits for certain preliminary injunctions against state officials be heard by three-judge district courts. In 1925, Congress extended the requirement to suits seeking final injunctions against unconstitutional state laws, and in 1937, during the controversy over the constitutionality of New Deal statutes, Congress adopted a similar requirement for constitutional challenges to federal laws. *See* 28 U.S.C.

served on the Multidistrict Litigation Panel from 1968 to 1978 and was its chair from 1975 to 1978. The Panel coordinates the federal judicial response to situations where plaintiffs have filed a large number of related civil cases in different districts. Third, Judge Wisdom sits on the Railroad Court. Congress established this court to resolve legal issues arising largely from the federal acquisition of the properties of bankrupt railroads and their consolidation into Conrail. Judge Wisdom has been on this court since its inception and has been presiding judge since 1986.[63] Judge Wisdom's opinions in these three non-appellate contexts are shown in Table 6, next page.

The entirety of Judge Wisdom's signed and published judicial output in all courts — what might be called Judge Wisdom's baseball card[64] — is summarized in Table 7, page 117.

III. Analyzing the Opinions

The digital texts of Judge Wisdom's nearly 1400 opinions could be used to explore many issues.[65] I use them in this article to compare certain aspects of Judge Wisdom's published opinions both to each other, over time, and to the published opinions of other judges on the Fifth and other circuits. This Section will look at his separate opinions, the length of his majority opinions, and the number of footnotes in his majority opinions.

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§§ 2281, 2282 (repealed 1976). Perhaps because of the complexity of the law to which these provisions gave rise and the burden on the lower courts, Congress repealed the general three-judge court provisions in 1976. Today, three-judge district courts are required only for some limited statutory cases or "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a) (1988); *see generally* PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 893 (3d ed. 1994); David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964).

63. The Railroad Court's first members, appointed in 1975, were Judge Henry Friendly of the Second Circuit, Judge Rozel C. Thomson of the District of Maryland, and Judge Wisdom. All three men were about 70 years old when appointed to the Railroad Court. Both Judges Friendly and Thomson have died and been replaced, but the work of the Railroad Court, based on the now-23 year old acquisition, continues.

64. The phrase is from James D. Gordon III in his review of Posner's work on Cardozo, *supra* note 25, but without intending to include the pejorative connotation that Gordon gives it. Baseball cards are not broad or incisive analyses of important matters, but they do have their uses.

65. To give one very parochial example, generations of Judge Wisdom's law clerks have been told never to begin a sentence with "however" unless using it in the sense of "in whatever manner." At least that audience would be interested in seeing how consistently the Judge has followed his own rule.

Table 6. Judge Wisdom's Non-Circuit Opinions

	District Court			Railroad Court			Multidistrict Litig.		
	Maj.	Con.	Dis.	Maj.	Con.	Dis.	Maj.	Con.	Dis.
1957									
1958	1								
1959			1						
1960	1								
1961									
1962	1		1						
1963	5								
1964			1						
1965	1								
1966	3								
1967	1	1							
1968	1	1	1				1		
1969	1						1		
1970	1								
1971			1				1		
1972	1	1							
1973									
1974							1		1
1975									
1976	1			1			4		
1977									
1978									
1979				1					
1980									
1981				1					
1982				1					
1983				2					
1984									
1985									
1986				2					
1987									
1988									
1989	2								
1990				1					
1991									
1992									
1993				2					
1994				1					
1995									
Totals	20	5	3	12	0	0	8	0	1

Table 7. Judge Wisdom's Opinions by Year of Publication

	CA 5		Other CA		Dist. Ct.		MDL Panel		R.R. Ct.		
	Maj	Sep	Maj	Sep	Maj	Sep	Maj	Sep	Maj	Sep	Total
1957	3										3
1958	42	2			1						45
1959	50	5				1					56
1960	37	2			1						40
1961	54	5									59
1962	47	6			1	1					55
1963	39	2			5						46
1964	26	2				1					29
1965	33	1			1						35
1966	36	2			3						41
1967	26	6			1	1					34
1968	29	2			1	2	1				35
1969	34	2			1		1				38
1970	44	8			1						53
1971	47	4				1	1				53
1972	45	14			1	1					61
1973	37	5	2								44
1974	48	1					1	1			51
1975	35	4									39
1976	21	3			1		4		1		30
1977	36	5									41
1978	26	9	2								37
1979	31	2	2						1		36
1980	17		6								23
1981	20	1	5						1		27
1982	17		8	1					1		27
1983	19	2	5	1					2		29
1984	12	5	20	1							38
1985	19	1	15	1							36
1986	15	3	8						2		28
1987	18	3	12	2							35
1988	15	1	7								23
1989	10	1	7		2						20
1990	26								1		27
1991	18	1	4								23
1992	15	2	7	1							25
1993	15								2		17
1994	28	2							1		31
1995	23										23
Maj	1113		110		20		8		12		1263
Total	1227		117		28		9		12		1393

A. Separate Opinions

Judge Wisdom has written 1,393 published opinions. Of those, 1,263 were majorities, 25 were concurrences, 99 were dissents, and 6 were opinions both concurring and dissenting. Thus, the overwhelming majority of his opinions (90.7%) were majorities, with only rare concurrences and dissents. These numbers, by themselves, tell us little. We can use them to look at two questions: How has Judge Wisdom's pattern of separate opinions varied at different times and in different settings, and how does his pattern compare with those of other judges?

Judge Wisdom often has written separately in the context of three-judge district courts and in Fifth Circuit en banc decisions and much less often in non-en banc Fifth Circuit cases and in decisions for other circuits. As shown in Table 2,[66] Judge Wisdom's separate opinions in the Fifth Circuit have not been frequent: about 0.5 concurrences, 2.5 dissents, and 0.12 concurring and dissenting opinions per year on average. He was, however, much more willing to write separately when the decision was made by the court en banc. Five of his 19 concurrences, 19 of his 90 dissents, and 2 of his 5 opinions concurring and dissenting were written in response to en banc decisions of the court. Over the years, Judge Wisdom wrote only 6 majority opinions for the en banc Fifth Circuit; concurring opinions are 16% of his total en banc opinions, dissents are 59%, and concurring and dissenting opinions are 6%. When en banc decisions are subtracted from his Fifth Circuit separate opinions, his separate opinions as a percentage of his total opinions fall to 7.3%.

The increasing willingness to write separately in en banc decisions has at least two plausible explanations. First, the process of selecting en banc decisions guarantees that any case so heard is a contentious one. A case is set for rehearing en banc only if a majority of the active members of the Fifth Circuit believe that the case justifies such treatment, presumably because those judges believe the issue is important and are uncertain about the way the panel resolved it.[67] Second, en banc decisions are more important to the law of the circuit than panel decisions.

When writing for other circuits, only 7 of Judge Wisdom's 117 opinions were separate, or 6%, compared with 9.3% of his total Fifth Circuit opinions. Notably, however, Judge Wisdom sat on no en banc cases in other circuits. When compared with his non-en banc separate opinions for the Fifth Circuit, the difference is smaller; Judge Wisdom has written separately in only 7.3% of the non-en banc Fifth Circuit opinions.

Judge Wisdom wrote separately often when sitting in three-judge district courts. He has written 28 opinions for such courts, all but two before the

66. *See infra* part II.A.

67. 5TH CIR. R. 35.6.

jurisdiction of three-judge district courts was reduced greatly in 1976. Eight of those opinions were separate. All 8 of his separate opinions appeared between 1959 and 1972; 4 involved questions of racial discrimination and 3 others involved nonracial voting rights issues. The statistics for separate opinions in these settings are set forth in Table 8, below.[68]

Table 8. Separate Opinions as Percentage of Total Opinions: Fifth Circuit, Fifth Circuit Non-En Banc, Other Circuit, Three-Judge District Courts

	Concurring		Dissenting		Con. and Dis.	
	No.	Percent	No.	Percent	No.	Percent
All Fifth Cir. Opinions	19	1.5%	90	7.3%	5	0.4%
En Banc Fifth Cir.	5	16%	19	59%	2	0.6%
Non-En Banc Fifth Cir.	14	1.2%	71	5.9%	3	0.3%
Other Circuit Opinions	3	2.6%	3	2.6%	1	0.9%
3-Judge District Courts	5	17.9%	3	10.7%	0	0.0%

A second question is whether Judge Wisdom's likeliness to write separately has changed over time. Table 9, below, shows the distribution of Judge Wisdom's separate appellate opinions over time calculated in roughly five-year increments, both in absolute terms and as a percentage of his total opinions.

Table 9. Number of Separate Appellate Opinions by Judge Wisdom Over Time and as Percentage of Total Opinions

	Concurring		Dissenting		Con. & Dis.		Total Sep.	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent
1957-1960	0	0.0%	9	6.4%	0	0.0%	9	6.4%
1961-1965	2	0.9%	14	6.5%	0	0.0%	16	7.4%
1966-1970	3	1.6%	16	8.5%	1	0.5%	20	10.6%
1971-1975	4	1.7%	24	9.9%	0	0.0%	28	11.6%
1976-1980	6	3.8%	12	7.5%	1	0.6%	19	11.9%
1981-1985	5	3.3%	7	4.6%	1	0.7%	13	8.6%
1986-1990	2	1.6%	6	3.9%	2	1.6%	10	7.1%
1991-1995	0	0.0%	5	4.3%	1	0.9%	6	5.2%

68. I have not included the Multidistrict Litigation Panel or the Railroad Court in this analysis because Judge Wisdom wrote so few opinions for either (9 and 12 respectively) and only one separate opinion, a dissent from a Multidistrict Litigation Panel decision.

This table reveals that Judge Wisdom was most likely to write separately in the middle part of his career, from 1966 through 1980. One partial explanation may be that, as noted above, he wrote separately more readily in response to en banc decisions. Once he took senior status in 1977, his participation in en banc decisions was limited greatly. This distinction, however, does not explain the lower rate of separate opinions before 1966.

One possible explanation is the combination of the political make-up of the Fifth Circuit's judges and the kinds of issues presented. In 1957, when Judge Wisdom joined the court, it had 7 members, including four other Eisenhower appointees and one Hoover appointee, Chief Judge Hutcheson. In an ironic counterpoint to today's politics, the Eisenhower appointees were much more likely to be "liberal" in their decisions, particularly about civil rights, than later Democratic appointees, even those appointed by Presidents Kennedy and Johnson.[69] The burst of dissents in the second half of the 1960s may reflect both the addition of these judges and the litigation that followed the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. The judges to whose Fifth Circuit opinions Judge Wisdom wrote separately are shown in Table 10, next page.

Many of these judges clearly were viewed as politically opposite to Judge Wisdom. Among such judges one might group Judges Bell, Cameron, Coleman, and Gewin. These four judges, collectively, account for 29 of the Fifth Circuit opinions, over 30%, to which Judge Wisdom wrote separately.[70] On the other hand, no similar burst of Wisdom separate opinions heralded the arrival of the more conservative judges appointed by Presidents Reagan and Bush.

Looking at majority opinions written by Judge Wisdom to which his Fifth Circuit colleagues have written separately may provide another perspective. His colleagues on the Fifth Circuit have written 90 separate opinions to Wisdom majority opinions. The distribution of such opinions over time is shown in Table 11, next page.

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69. Judge Harold Cox of the District of Mississippi, for example, was the first district judge appointed by President Kennedy, and, during his tenure, perhaps the most openly racist and obstructionist member of the federal judiciary. *See* JACK BASS, UNLIKELY HEROES 164-68 (1981). Cox, of course, was "nominated" by the President, but effectively selected by the Democratic senators from his state, then Senators Eastland and Stennis, whose views on civil rights were clearly different from President Kennedy's.

70. Cameron is particularly interesting. He dissented from Wisdom opinions 10 times, while writing majorities to which Wisdom dissented only 2.5 times.

Table 10. Authors of Fifth Circuit Majority Opinions to Which Judge Wisdom Wrote Separately[71]

Author	No.	Author	No.
Ainsworth	2	Hutcheson	3
Barksdale	3	Ingraham	1
Bell	7	Warren Jones	3
Brown	3.5	Edith Jones	2
Cameron	2.5	Morgan	2
Clark	2	Roney	2
Coleman	12.5	En banc per curiam op.	3
Connally (Dist. Judge)	3	Reavley	1
Davis	1	Rives	7.5
Dyer	1	Simpson	2.5
Fay	1	Smith (Dist. Judge)	0.5
R. Garza	1	Thornberry	1.5
Gee	4	Tjoflat	1.5
Gewin	7	Tuttle	2
Godbold	4	Williams	1
Higginbotham	2		

Table 11. Fifth Circuit Separate Opinions to Wisdom Majorities

	No. of Separate Opinions to Wisdom Fifth Circuit Majorities	As Percentage of Wisdom Fifth Circuit Majorities
1957-60	12	9.1
1961-65	24	12.1
1966-70	14	8.3
1971-75	18	8.5
1976-80	9	6.9
1981-85	6	6.9
1986-90	3	3.6
1991-95	4	4.0

71. Many of these dissents were written to per curiam opinions. When the per curiam opinion was written by the en banc court, I have put it into its own category. A surprising number of the dissents, however, were written to per curiam opinions joined by only two judges on the panel. In such cases, I have counted the majority opinion as one-half written by each of the judges who joined it. And one of the dissents, in Noah v. Liberty Mut. Ins. Co., 265 F.2d 547, *vacated*, 267 F.2d 218 (5th Cir. 1959), was to a majority opinion written by Judge Wisdom himself — which Judges Hutcheson and Cameron joined but to which its author wrote a dissent. This style of opinion assignment has gone out of fashion.

Like Judge Wisdom's separate opinions, Fifth Circuit separate opinions to his majority opinions are concentrated in the first half of his career. Interestingly, though, these opinions peaked in the first part of his career, before 1971. In fact, the two highest time periods were the first two periods that he was on the court — 1957-1960 and 1961-1965.

Table 12, below, shows the judges sitting on the Fifth Circuit who wrote separately to Wisdom majorities. A large percentage of the separate opinions to Wisdom majorities were written by judges often viewed as politically on the opposite side from him. Such judges clearly would include Bell, Cameron, Clark, Coleman, Cox, Gee, and Warren Jones. Those 7 out of 28 judges account for 41, or 45%, of the separate opinions.

Table 12. Fifth Circuit Separate Opinions to Wisdom Majorities, By Judge

Author	No.	Author	No.
Ainsworth	1	Godbold	4
Bell	2	Henderson	1
Brown	6	Higginbotham	1
Cameron	10	Hutcheson	5
Clark	3	Jolly	1
Coleman	11	Jones (Warren)	8
Cox (Dist. Judge)	3	Jones (Edith)	1
DeVane (Dist. Judge)	1	Randall (King)	1
Estes (Dist. Judge)	1	Rives	8
Fay	1	Roney	1
Fitzwater (Dist. Judge)	1	Rubin	2
Garza	2	Simpson	5
Gee	4	Tate	3
Gewin	3	Tuttle	2

On the other hand, in Judge Wisdom's first few years on the Fifth Circuit, even those who were often viewed as his allies dissented from him occasionally. His first nine years on the bench, through 1963, accounted for 36 of the 90 dissenting opinions. During that period, Judge Brown wrote 5 dissents from Wisdom's opinions, Judge Tuttle wrote 2, and Judge Rives wrote 4.

The curve of separate opinions to Wisdom opinions trends downward, almost from the beginning. This may indicate that, in his early years, Judge Wisdom was more likely to write opinions that his colleagues would find objectionable, perhaps because he had not yet mastered either the craft of writing majority opinions that would be persuasive to his colleagues or the art of modifying draft majority opinions to avoid separate opinions. It might also be, of course, that Judge Wisdom's reputation with his colleagues grew over the years in a way that would make them less likely to write separately. By

contrast, the curve of his separate opinions climbs after several years. Perhaps only after several years was he confident enough of his positions to write separately regularly. This is not to ignore the political issues but to suggest that an internal factor — the state of Judge Wisdom's career — may also have influenced this pattern. Whether separate opinions by, and to, other circuit judges show the same pattern is an interesting question that could be tested.

My first reaction to seeing how rarely Judge Wisdom had written separately was that my data must be wrong. Then I realized that I was probably, subconsciously, comparing his rate of separate opinions to that of United States Supreme Court justices. Their patterns of writing separately may be very different from those of circuit judges. And different circuits, or different periods of time, may have different patterns of separate opinions. I examined, therefore, the percentage of separate opinions for 16 of the Supreme Court justices who sat during Judge Wisdom's tenure on the Fifth Circuit, for 13 Fifth Circuit judges, and for thirty-three judges from other courts of appeals.[72] The results are shown in Tables 13, 14, 15, 16, and 17. Each table shows, for each of the judges listed, the total number of published, signed opinions that the judge has written in cases on his or her own court and the percentage of those opinions that were majorities, concurrences, dissents, or opinions both concurring and dissenting.[73] (Opinions concurring and dissenting are not counted as either the concurrences or the dissents in order to avoid double-counting.) Each table ends with the averages of the percentages of each kind of opinion for all the judges listed.[74]

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72. I chose judges who had substantial service and who seemed to me prominent. I did not make a methodical search and have left off some undoubtedly distinguished prominent judges, both for reasons of space and from oversights. Two other caveats are important. First, I avoided judges who shared a last name with judges on the same court during the same period. Thus, the Judges Nelson of the Ninth Circuit, Ginsburg (one current, one former) of the District of Columbia Circuit, and Arnold of the Eighth Circuit, among others, are not included. Second, I did not look for opinions by judges sitting outside their own court of appeals. I was concerned that I would get additional name conflicts if I did not limit the search to a particular court of appeals file (the Judges Higginbotham of the Third and Fifth Circuits, for example). I also feared that judges might have a different pattern of writing separate opinions when they were sitting by designation in other circuits, either out of deference to their hosts or for lack of established, long-term relationships with the other judges.

73. These tables looked only at opinions the circuit judges wrote for their own circuits; thus, the totals for Judge Wisdom are slightly different from those given above.

74. Note that this is different from the overall percentage of any type of opinion among those listed. If the table had two judges, one of whom had written 500 majority opinions out of 1,000 total opinions and the other had written 400 majority opinions out of 500 total, the average shown would be (50% + 80%)/2 = 65%, while the overall percentage would be 500 + 400 / 1500 = 60%. In these tables, I am interested in the average of the percentages of each judge, rather than the overall percentage from among all the opinions of the selected judges.

Table 13. Opinions by Type: Selected Supreme Court Justices[75]

	Total No.	Percent Majority	Percent Concur	Percent Dissent	Percent Con. and Dis.
Black	903	54.0	9.6	33.6	2.9
Blackmun	837	38.0	28.9	28.2	4.9
Brennan	1161	39.2	18.3	36.6	5.9
Burger	484	53.3	23.3	21.1	2.3
Douglas	1305	41.2	12.6	45.2	0.9
Harlan	601	28.5	24.6	37.1	9.8
Kennedy	191	46.6	34.6	16.2	3.1
Marshall	805	40.4	11.1	44.0	4.6
O'Connor	474	44.9	28.1	20.0	7.0
Powell	597	42.4	29.6	22.9	5.0
Rehnquist	737	50.5	10.3	36.4	3.1
Scalia	343	30.9	43.1	20.4	5.5
Stevens	1000	27.8	23.3	41.9	6.1
Stewart	662	47.9	21.3	29.3	1.5
Warren	229	74.7	3.9	20.1	1.3
White	1117	42.7	20.9	26.2	3.7
Average		43.9	21.5	30.0	4.2

Table 14. Opinions by Type: Selected Fifth Circuit Judges[76]

	Total No.	Percent Majority	Percent Concur	Percent Dissent	Percent Con. and Dis.
Brown	1758	81.2	7.4	10.0	1.6
Cameron	425	66.1	9.2	26.1	0.0
Clark	1077	82.5	5.5	10.3	1.7
Coleman	649	80.9	5.5	11.1	2.6
Gee	963	84.6	5.7	8.4	1.5
Higginbotham	620	88.2	6.5	3.7	1.9
E. Jones	494	87.2	5.5	6.3	1.2
King[77]	657	91.5	3.7	5.8	0.5
Politz	907	95.1	1.1	3.5	0.2
Rives	1227	79.5	5.5	15.0	0.5
Roney	1466	85.5	5.5	7.8	1.1
Rubin	910	84.6	5.4	9.2	1.0
Tuttle	1174	89.7	2.0	7.2	1.3
Wisdom	1224	90.9	1.7	7.2	0.5
Average		84.8	5.0	9.4	1.1

Table 15. Opinions by Type: Selected D.C. Circuit Judges

	Total No.	Percent Majority	Percent Concur	Percent Dissent	Percent Con. and Dis.
Bazelon	1034	58.0	15.2	24.1	3.3
Buckley	248	85.1	7.2	4.0	4.0
Burger	415	67.2	13.7	16.6	2.4
Leventhal	504	80.0	12.7	6.7	1.4
McGowan	454	86.1	8.8	4.2	0.9
MacKinnon	591	56.0	16.1	19.3	9.0
Robinson	435	81.1	9.7	8.3	1.1
Silberman	311	69.1	17.7	10.3	2.9
Tamm	525	76.8	8.2	13.3	1.9
Wald	576	70.8	6.8	20.3	2.8
Wright	624	64.7	13.1	19.1	3.0
Average		72.3	11.7	13.3	3.0

75. I conducted these searches in August and September 1995. I intended to include only opinions in argued cases. For each justice, I searched the U.S. file in the "Genfed" library in Lexis in the following pattern: "writtenby (X) and argued", "opinionby (X) and argued", "concurby (X) and argued", "dissentby (X) and argued", and "concurby and dissentby (X) and argued". As the search for "argued" would pick up any use of the word "argued," and not just its use in caption where the date of argument is given, it is possible that a dissent from denial of certiorari or other memorandum order that contained the word "argued" was included in the count. A brief look at some of the citations disclosed no such orders; I believe that any such instances are too few to affect the results significantly. For Justices Harlan, Marshall, and White, who shared their last names with earlier Supreme Court justices, I also imposed a date limitation, such as, for example, "date aft 1950".

76. Almost all of these searches were conducted in September 1995; a few were conducted in October 1995. For these searches, and those in other circuits, I used the circuit-specific file of the Lexis "Genfed" library. I sought only full, published opinions by searches in the format "writtenby (x) and not (per curiam or unpublished opinion or unpublished order)". This would have excluded opinions that concurred with or dissented from per curiam opinions, as well as full opinions in which the excluded words appeared. This might or might not be a trivial number. This search, for example, found 1224 published Fifth Circuit opinions written by Judge Wisdom. The complete count from downloading his opinions for the relevant period revealed 1226. These exclusions seem unlikely to differ from judge to judge or to substantially affect the results.

77. Judge King was known as Judge Randall until 1988. This count includes her opinions under both last names and excludes a Judge King who served on the Fifth Circuit in the early part of this century.

Table 16. Opinions by Type: Selected Ninth Circuit Judges

	Total No.	Percent Majority	Percent Concur	Percent Dissent	Percent Con. and Dis.
Browning	394	84.0	5.1	9.6	2.0
Duniway	780	90.5	6.0	5.3	1.8
Fletcher	595	83.5	5.0	10.4	1.2
Goodwin	707	90.4	3.0	5.7	1.0
Kozinski	297	64.0	10.8	27.3	0.7
Norris	395	67.3	9.9	20.0	3.5
Pregerson	543	74.0	4.6	19.5	1.8
Rymer	194	62.9	12.9	19.6	5.7
Sneed	756	81.6	9.4	8.2	1.1
Wallace	888	78.3	8.9	9.5	4.7
Wright	829	90.0	4.3	6.8	1.0
Average		78.8	7.3	12.9	2.2

Table 17. Opinions by Type: Selected Other Circuit Judges

	Total No.	Percent Majority	Percent Concur	Percent Dissent	Percent Con. and Dis.
Adams	657	67.3	16.3	14.3	2.3
Bright	1046	77.8	7.4	12.5	2.5
Becker	569	77.9	8.3	9.5	4.6
Coffin	1191	95.0	1.8	3.2	0.2
Cummings	1132	92.1	1.9	5.1	0.6
Easterbrook	799	86.2	7.6	5.4	0.6
Flaum	837	88.4	6.1	3.9	1.6
Friendly	997	81.5	8.4	8.5	1.5
Murrah	858	91.7	2.7	5.6	0.0
Posner	1244	91.5	3.0	4.8	0.7
Tacha	759	97.5	0.8	1.6	0.1
Average		86.1	6.7	6.8	1.5

In addition to information about individual judges, I sought information about the overall pattern of separate opinions in various circuits. I did not discover any quick way to search circuit files for separate opinions akin to that used for searching for separate opinions by individual judges.[78] So my research assistant searched all Fifth Circuit and all-circuit opinions, not

78. Lexis would not search "dissentby (!)," saying that a universal symbol is an inappropriate subject for that search. Nor would Lexis "see" the "words" "dissentby" and "concurby" in opinions although they are present in the Lexis versions of the opinions.

unpublished and not per curiam, released in the month of April in eight sample years. The results are shown in Tables 18 and 19.

Table 18. Separate Opinions in Fifth Circuit Samples Over Time

	No. of Opinions	Percent Majority	Percent Concur	Percent Dissent	Percent Con. and Dis.
1960	47	85.1	4.3	8.5	2.1
1965	28	85.7	3.6	7.1	3.6
1970	78	89.7	2.6	7.7	0.0
1975	86	83.7	5.8	10.5	0.0
1980	125	84.8	4.8	9.6	0.8
1985	121	93.4	2.5	2.5	1.7
1990[79]	80	93.7	2.5	3.8	0.0
1995	48	89.6	4.2	4.2	2.1

Table 19. Separate Opinions in All-Circuit Samples Over Time

	No. of Opinions	Percent Majority	Percent Concur	Percent Dissent	Percent Con. and Dis.
1960	213	91.1	2.8	5.2	0.9
1965	243	89.7	3.7	5.3	1.2
1970	357	92.2	2.5	5.0	0.3
1975	360	88.1	4.2	6.4	1.4
1980	662	92.9	2.0	4.4	0.8
1985	606	91.4	2.1	5.6	0.8
1990	893	95.2	1.5	3.9	0.6
1995	752	94.8	2.0	2.7	0.4

Several general points seem worth making from this data. The first is the unsurprising point that circuit judges, or at least this possibly unrepresentative sample of them, do behave differently from Supreme Court justices. Apart from Chief Justice Warren, who rarely wrote opinions of any kind, the justice who wrote majorities *most* often — Justice Black at 54% —

79. The 1990 and 1995 figures for the Fifth Circuit conceal an increase in the number of cases found in Lexis because a large percentage of the total cases found in Lexis in April of those years were unpublished. In April 1990, Lexis contained 170 unpublished Fifth Circuit majority opinions plus another 43 per curiam opinions, in addition to the 75 signed, published opinions counted for this table. For April 1995 there were 159 unpublished majority opinions and 21 per curiam opinions to complement the 43 published, signed opinions. By contrast, the sample picked up 14 unpublished majority opinions in April 1985 and none before that date. Many of the earlier months had sizeable numbers of published per curiam opinions: 9 in 1985, 151 in 1980, 37 in 1975, 96 in 1970, 27 in 1965, and 18 in 1960.

did so less often than the circuit judge who wrote majorities *least* often — Judge MacKinnon at 56%.[80]

Second, courts of appeals judges differ substantially in their willingness to write separately. The highest percentage of majority opinions found were Judge Tacha at 97.5%, Judge Politz at 95.1%, and Judge Coffin at 95.0%; the lowest was Judge MacKinnon at 56.0%. Almost all judges write more dissenting opinions than concurring opinions, but not all.[81]

Third, the data provide at least some evidence that circuits have different patterns of writing separate opinions. Specifically, the judges sampled from the Ninth and the District of Columbia Circuits seem to write separately much more often than those from the Fifth or the other circuits. Although the Fifth Circuit judges sampled wrote separately less frequently than those from the Ninth or the D.C. Circuits, they wrote separately about as much as the "other circuit" sample — 84.8% to 86.1%. On the other hand, in the April samples, the Fifth Circuit wrote separately more frequently than the "all circuit" sample in every year except 1985 and substantially more in many years, particularly the earlier ones. The apparent differences among circuits raise several general questions. Are the differences real or just artifacts of these searches? If real, are they stable over time? And, if they are both real and stable, what causes them: something about the kinds of cases presented to different circuits, something in the decision-making process in different circuits, or something in the "culture" of the circuit? These are interesting questions for future exploration.

Based on the data, Judge Wisdom has written separate opinions fairly rarely in comparison to other judges on his circuit, at least until the last ten years. This difference is even greater compared to many other prominent circuit judges. The difference is most marked for concurrences, where Judge Wisdom is the third least likely circuit judge in the sample to write separate concurrences. His concurrences come at about half the rate for his circuit in general. Judge Wisdom's dissents are fewer than average, but much closer to his circuit's average than his concurrences.

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80. Three of the four justices who wrote separately least often were Chief Justices — Warren, Burger, and Rehnquist. Not counting his opinions as associate justice, Chief Justice Rehnquist has written majority opinions 66% of the time. It would be interesting to see if chief judges in the circuits or chief justices in state supreme courts display a similar bias towards majority opinions.

81. The category of "concurring and dissenting" opinions is included to avoid double counting because Lexis sometimes categorizes the same opinion by a judge as both a "dissentby" and a "concurby". The grounds on which Lexis makes that determination were not clear to me nor are the grounds on which a judge decides to call an opinion that dissents in part an opinion "concurring and dissenting." This category seemed to have little meaning and perhaps should be included in the column with dissents.

Overall, Judge Wisdom's separate opinion profile seems most like that of his old friend Judge Tuttle of the Fifth and Eleventh Circuits, Judge Goodwin of the Ninth Circuit, and Judges Cummings and Posner of the Seventh Circuit. Each of those judges writes separately about 10% of the time and writes separate concurrences quite infrequently. Beyond the fact that all those judges are well respected, it is hard to find other similarities between them.

B. Length of Opinions

When I got all of Judge Wisdom's opinions in my computer as word processing files, I realized that my "word count" command could tell me how long they were. I therefore began counting the number of words in all of Judge Wisdom's majority court of appeals opinions[82] only to discover that this was not an easy task.[83] As a result, I decided to analyze all of Judge Wisdom's majority court of appeals opinions for eight sample years: 1960, 1965, 1970, 1975, 1980, 1985, 1990, and 1995. Table 20 shows the results.

Table 20. Length of Judge Wisdom's Majority Opinions: Selected Years

	Number of Majority Opinions	Average Words per Opinion
1960	37	3,240
1965	32	3,376
1970	44	3,407
1975	35	6,040
1980	25	3,955
1985	33	4,788
1990	26	3,436
1995	14	3,459

Two points leap out from Table 20. The first is how consistent in average length Judge Wisdom's opinions have been over time. At both the early

82. Dissenting and concurring opinions have such different structures and purposes from majority opinions that I did not want to include them with the majority opinions. The same is true of the opinions Judge Wisdom wrote for three-judge district courts, the Multidistrict Litigation Panel, and the Railroad Court.

83. Counting words was more difficult than I expected for two reasons. First, in order to get Wisdom majority opinions only, I had to eliminate from my data files (for purposes of the count) all Wisdom separate opinions and all separate opinions *to* Wisdom opinions. For the comparison opinions, I had to remove all separate opinions. Even then, the Lexis software I used downloaded the opinions with Lexis headers at each page and the original page numbers, in brackets, when those pages had been changed. (Some, but not all, of these can now be eliminated by new Lexis software). All of these, plus the opening information about the case, were counted as "words" of the opinion. I estimate that, on average, 300 "words" were added to each opinion.

and the late parts of his career, his opinions were about 3,420 words long; four of the eight data points differ from that number by less than 1.5% and a fifth by about 5%. One might have expected that published opinions would, on average, get longer over this period, either from the increasing relegation by all courts of appeals of simpler cases to unpublished opinions or the increasing complexity and size of the statutory, regulatory, and judicial law to be considered. Instead, Judge Wisdom's opinions are of almost exactly the same length in the first and last thirds of his career.

The second observation is that the middle data points — 1975, 1980, and 1985 — are different. Judge Wisdom's 1975 opinions were nearly 75% longer than his average for the first and last periods. His 1980 opinions were about 15% longer and his 1985 opinions were nearly 50% longer. I have re-examined the cases for those years and do not find any one or two particularly long opinions that inflate the averages. Were the issues that much more complicated?

There is another plausible explanation: law clerks. Judge Wisdom had one law clerk each year from 1958 through 1964. For the years beginning in 1965 through 1972, he had two clerks. With the addition of the Railroad Court to his load as an active judge, Judge Wisdom had four law clerks each year from 1973 to 1976. After taking senior status, he went down to three clerks in 1977 and down to two clerks (for the most part) beginning in the late summer of 1985.[84]

Of the eight years examined, in one year Judge Wisdom had one law clerk, in four years he had two, in one year he had the equivalent of about 2.7 (as it was a transition from three law clerks, ending in July or August, to two law clerks thereafter), in one year he had three, and in one year he had four. As shown in Table 21, below, the length of the opinions correlates almost perfectly with the number of law clerks.

Table 21. Average Opinion Length Compared with Number of Law Clerks

Rank	Year	Average Length	No. of Clerks
8	1960	3,240	1
7	1965	3,376	2
6	1970	3,407	2
5	1990	3,436	2
4	1995	3,459	2
3	1980	3,955	3
2	1985	4,788	2.7
1	1975	6,040	4

84. I based this data on a directory of law clerks, secretaries, interns, and families that Judge Wisdom's office prepared (on file with the *Washington and Lee Law Review*).

Judge Wisdom's clerks typically prepare first drafts of some, but not all, of his opinions. If the number of clerks grew faster than the number of cases, clerks might make their first drafts longer. Whether the majority opinions of other judges show a similar effect could be an interesting future project.[85]

I next compared the lengths of Judge Wisdom's majority opinions to those of other circuit judges. To do this, I downloaded a sample of about 25 to 60 published, non-per curiam majority opinions from the same years for both the Fifth Circuit and the Courts of Appeals as a whole.[86] Table 22 shows the results, with the Wisdom data from Table 20 included for ease of comparison.

Table 22. Average Length of Published, Non-Per Curiam Majority Opinions

	Judge Wisdom		Fifth Circuit Sample		All-Circuit Sample	
	No. of Opinions	Words per Opinion	No. of Opinions	Words per Opinion	No. of Opinions	Words per Opinion
1960	37	3,240	33	2,350	44	2,467
1965	32	3,376	57	3,061	49	2,397
1970	44	3,407	58	2,901	42	3,044
1975	35	6,040	48	3,641	41	3,680
1980	25	3,955	45	3,856	47	3,585
1985	33	4,788	31	5,208	49	3,771
1990	26	3,436	48	3,270	58	3,807
1995	14	3,459	27	4,354	22	3,561

These are fairly small samples of both Fifth Circuit and all-circuit opinions, and they were not selected in a rigorous manner.[87] I have not tried to assess their statistical significance. For what they are worth, they do show a marked overall increase in the length of appellate opinions over time, with the length nearly doubling in the Fifth Circuit and increasing by almost 50% across the circuits. Most of the change in the all-circuit sample had occurred by 1975; the Fifth Circuit sample was substantially longer than the all-circuit sample for both 1985 and 1995.

85. Such a project would require, however, information about the number of clerks employed by the sampled judges in various years that could probably be obtained easily only from those judges' chambers.

86. These samples were not meant to be separate so there are some Fifth Circuit opinions and even some opinions by Judge Wisdom in the overall circuit sample.

87. I chose opinions by downloading all opinions released on particular days. The number and identity of the days I chose varied from sample to sample.

After being substantially longer than both Fifth Circuit majority opinions and circuit opinions in general through 1980, Judge Wisdom's opinions have fallen back to about the overall average, which seems somewhat lower than the Fifth Circuit average. The average number of law clerks per circuit judge probably expanded during this period, which may have played a part in the overall trends. Judge Wisdom, by contrast, has had fewer clerks in recent years.

C. Footnotes

The footnote enjoys an odd, almost talismanic, significance in the legal world. Differences in the number of footnotes used by different legal authors — judicial, academic, or student — can reflect many things: different views about what is relevant, about what should go into text, about how often to put different authorities into one note, about how often to footnote the same authority in a passage, or just different sporting urges.[88] It is possible, and perhaps even plausible, that the number of footnotes used does, overall, indicate *something* about a judge's use of authority. It is possible, for example, that an opinion with many footnotes might be viewed as more "scholarly." A close examination of the kinds of materials cited in the opinions — cases, law review articles, other scholarship — might have been more revealing, but as I was already counting the number of words, I decided to count the number of footnotes in the sampled cases as well. Table 23, next page, shows the results for Judge Wisdom, the Fifth Circuit sample, and the all-circuits sample. These results are both the average number of footnotes per opinion and the average per 1,000 words of each opinion. (Otherwise, changes in the lengths of opinion might affect the number of footnotes without changing the "density" of footnote use.)

It is hard to find patterns in this data. There is no clear consistent trend in the number of footnotes per 1,000 words. The Fifth Circuit seems to footnote more than the all-circuit sample. Judge Wisdom seems, for most of his career, to footnote at about the same rate as the rest of the Fifth Circuit.

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88. Professor Arthur Austin has published several articles on the uses and abuses of footnotes in legal scholarship. *See* Arthur D. Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131 (1987); Arthur D. Austin, *Footnote Skulduggery and Other Bad Habits*, 44 U. MIAMI L. REV. 1009 (1990); Arthur D. Austin, *Political Correctness Is a Footnote*, 71 OR. L. REV. 543 (1992); and Arthur D. Austin, *The Reliability of Citation Counts in Judgments on Promotion, Tenure, and Status*, 35 ARIZ. L. REV. 829 (1993). As to sport, see David A. Kaplan, *The Article in a Law Review That Included the Most Footnotes Is . . .*, NAT'L L.J., Mar. 18, 1985, at 4.

Table 23. Average Number of Footnotes and Footnotes per Thousand Words in Published Majority Opinions

	Judge Wisdom		Fifth Circuit Sample		All-Circuit Sample	
	Fns per Opinion	per 1,000 Words	Fns per Opinion	per 1,000 Words	Fns per Opinion	per 1,000 Words
1960	5.5	1.7	4.5	1.9	3.0	1.2
1965	7.4	2.2	7.2	2.4	4.1	1.7
1970	5.9	1.7	6.7	2.3	3.0	1.0
1975	9.8	1.6	6.0	1.7	7.3	2.0
1980	8.8	2.2	6.2	1.6	6.6	1.8
1985	9.1	1.9	15.1	2.9	5.0	1.3
1990	19.9	5.8	6.1	1.9	5.0	1.3
1995	24.5	7.1	9.8	2.3	3.4	1.0

The only real surprise in the table is the last two data points for Judge Wisdom. In 1990 and in 1995, his opinions contained far more footnotes than earlier in his career, both absolutely and on a per word basis. It is hard to know what accounts for this, as the cases do not appear obviously more complex, and the opinions are no longer than those from earlier in his career. One speculative possibility is that Judge Wisdom may have given his recent law clerks more discretion in adding footnotes than he gave earlier clerks. As his law clerks were almost always law review editors just before beginning their clerkships, given greater latitude they may have chosen to add more footnotes.

IV. Citations to the Opinions

The previous section looked at Judge Wisdom's opinions themselves and asked what could be learned from them over time and in comparison to samples of similar opinions. This section looks at how, and how often, Judge Wisdom's opinions have been used by others. It examines the median number of citations to his majority opinions, both inside the circuit from which they were issued and in other contexts. (These other contexts include not just other circuits, but the Supreme Court, state courts, law reviews, and A.L.R. annotations.) It compares those averages over time and with citations to the majority opinions contained in the samples from the Fifth Circuit and all circuits discussed above. Finally, it looks at which of Judge Wisdom's opinions have been cited most often and compares the results with some traditional views of Judge Wisdom's most influential opinions.

The work in this section is based on down-loaded files from the electronic version of Shepard's Federal Citations. As discussed in the Appendix, using Shepard's has both advantages and disadvantages. Perhaps the most notable disadvantage is that Shepard's does not track citations to concurring or dissenting opinions. Thus, this analysis misses some of Judge Wisdom's most famous opinions, such as his dissents in *Dombrowski v. Pfister*,[89] *United States v. Barnett*,[90] In re *Unterweser Reederei*,[91] and *Weber v. Kaiser Aluminum & Chemical Corp.*,[92] and his concurrence in *United States v. Cox*.[93] This assessment, therefore, is limited to Judge Wisdom's majority opinions for the courts of appeals.[94]

A. Citations to Wisdom Majority Opinions: Trends and Comparisons

Table 24 shows the basic data: the median number of citations for the majority opinions written by Judge Wisdom in each year from 1958 to 1995. The table distinguishes between citations by federal courts, district or appellate, within the circuit, and total citations inside and outside the circuit. It also includes the average of the medians for both in circuit and total citations for five year periods during his career.[95]

Analyzing citation frequency is particularly difficult as two countervailing trends are at work. The longer the time since a case was published, the greater the opportunity — the more subsequent opinions — for it to be cited. On the other hand, most citations come, if at all, relatively quickly,

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89. 227 F. Supp. 556 (E.D. La. 1964), *rev'd*, 380 U.S. 479 (1965).

90. 346 F.2d 99 (5th Cir. 1965).

91. 428 F.2d 888 (5th Cir. 1970), *aff'd*, 446 F.2d 907 (5th Cir. 1971), *vacated*, Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

92. 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

93. 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

94. It excludes his district court, Multidistrict Litigation Panel, and Railroad Court opinions as too rare, and, in the latter two cases, too unusual for sound useful comparisons. It does include the many court of appeals opinions he has written for other circuits. In such cases, the "in circuit" comparison refers to the circuit from whence the opinion was published and not to the Fifth Circuit.

95. I used the median rather than the mean to avoid allowing the rare hugely cited case to change the average dramatically. The difference between a case with 50 citations and one with 250 citations will not change the median in any of these years, but it would add four to ten citations to a mean. My interest in long term trends seemed to dictate using the medians.

96. Only 12 of the majority opinions for 1995 are included because only those had appeared in the electronic version of Shepard's as of November 5, 1995.

Table 24. Median Number of Citations to Wisdom Majority Appellate Opinions

	Citations Inside Circuit	Total Citations	Total Majority Opinions	Five Year Means	
				Within	Outside
1958	6	20	42		
1959	8	18.5	50	7	19.2
1960	7	19	37		
1961	6	19	54		
1962	8.5	23	47		
1963	7	24	39	7.4	24.9
1964	5.5	23.5	26		
1965	10	33	33		
1966	6	15	36		
1967	7.5	28.5	26		
1968	15	29	29	9.7	24.3
1969	10	20	34		
1970	10	29	44		
1971	8	19	47		
1972	9	22	45		
1973	11	29	37	9.8	28.3
1974	10	31.5	48		
1975	11	40	35		
1976	17	50	21		
1977	14	37	36		
1978	10	32.5	28	10.4	32.3
1979	8	29	33		
1980	3	13	23		
1981	7	22	25		
1982	8	25	25		
1983	9.5	21.5	24	8.7	24.1
1984	11	30.5	32		
1985	8	21.5	34		
1986	7	15	23		
1987	7	13.5	30		
1988	5	13.5	22	5.1	11.7
1989	2	7	17		
1990	4.5	9.5	26		
1991	4.5	6.5	22		
1992	2	5	22		
1993	3	4	15	2.1	3.7
1994	1	3	28		
1995	0	0	12[96]		

and older cases were published in an environment that contained far fewer judges and law reviews.[97] Citations to Judge Wisdom's opinions show both effects. The number of citations generally climbs through the 1950s and 1960s, peaks in the 1970s, and declines, at first slowly and then precipitously, in the 1980s and 1990s.

More consistent, however, has been the percentage of "in circuit" citations among total citations. In the periodic averages, this percentage varied between 29.7% and 36.5% with no discernible trend until the last two periods, when the percentage climbed first to 43.6% and then to 56.8%.

Table 25 adds the data from the samples of majority opinions from the Fifth Circuit and all circuits for eight selected years. (For ease of comparison, Judge Wisdom's figures are repeated in this table.)

Table 25. Median Citations for Majority Opinions During Year

	Judge Wisdom[98]		Fifth Circuit Sample		All-Circuit Sample	
	Median in Circuit	Median Total	Median in Circuit	Median Total	Median in Circuit	Median Total
1959	7	19.2	2	7	5	13.5
1963	7.4	24.9	5	12	5	16
1968	9.7	24.3	5	13	3	14
1973	9.8	28.3	5	16	4.5	11.5
1978	10.4	32.3	4	11	6	21
1983	8.7	24.1	9	19	7	19
1988	5.1	11.7	6	12	6	15
1993	2.1	3.7	2	4	4	5

This table demonstrates that from his earliest opinions through those of the mid-1980s, Judge Wisdom's opinions have been cited much more often than either those of his Fifth Circuit colleagues or those of the all-circuit sample. Table 26 shows the ratios.

97. See the discussions of this point in Landes et al., *supra* note 3 and Chicago Council of Lawyers, *supra* note 34, at app. (discussing effect of fewer judges and law reviews on citation likelihood).

98. The numbers for Judge Wisdom are the means of the median citations for the periods 1957-1960, 1961-1965, 1966-1970, 1971-1975, 1976-1980, 1981-1985, 1986-1990, 1991-1995.

Table 26. Ratio of Median Citations to Wisdom Opinions to Median Citations to Fifth and All-Circuit Samples

	Wisdom to Fifth Circuit Sample		Wisdom to All-Circuit Sample	
	In Circuit	Total	In Circuit	Total
1959	3.5	2.7	1.4	1.4
1963	1.5	2.1	1.5	1.6
1968	1.9	1.9	3.2	1.7
1973	2.0	1.8	2.2	2.5
1978	2.6	2.9	1.7	1.5
1983	1.0	1.3	1.3	1.3
1988	0.9	1.0	0.9	.8
1993	1.1	0.9	0.5	.7

Compared with other Fifth Circuit opinions, the difference between citations to Wisdom opinions and other opinions was greatest for opinions written in the very earliest period of Judge Wisdom's service on the court.[99] It is not clear that the first period, comprising only 1958, 1959, and 1960, plus three opinions from 1957, should be given as much weight as later periods, but Wisdom opinions from throughout the 1960s have been cited from 50% to 110% more frequently than those of other Fifth Circuit judges. The citation rates then peaked again for opinions from the 1970s, which were generally cited more than twice as often as those of other Fifth Circuit judges. Judge Wisdom's post-1980 opinions, however, have been cited at a nearly average rate. Both citations within the Fifth Circuit and total citations followed the same general pattern.[100] Thus, to the extent that

99. Note that this analysis is based on the date of the opinion cited, not the date of the opinion citing it. One might also want to see if the number of citations to Wisdom opinions of a particular vintage, compared to citations to other judge's opinions of the same vintage, changed over time. Such an analysis is feasible, though not easy. Given that most citations to opinions come within the first few years, it seems unlikely that this approach would lead to substantially different results, but it might. I have not attempted it for this article.

100. I have ignored the all-circuit sample in this analysis. The differences in ratios between citations to Wisdom opinions and the Fifth Circuit sample and Wisdom opinions and the all-circuit samples shows only differences between the Fifth Circuit and all-circuit baselines. I did not know whether there was much difference between those baselines before checking the citations. The differences exist, but they are not large and no trend is obvious. The clearest difference is that for the first two time periods, there were fewer citations to Fifth Circuit opinions. For purposes of measuring Judge Wisdom's reputation against that of other judges, either sample would do and use of the Fifth Circuit baseline seems fairer in measuring a Fifth Circuit judge. The actual analysis would be much the same using either

one connects a judge's "good reputation" with number of citations relative to other judges, this data suggests that Judge Wisdom's reputation immediately was higher than average, peaked again in the 1970s, but, relative to his peers, has declined to an average position since then.[101]

This use of citation analysis is similar to that used by Judge Posner as one measure of Cardozo's reputation.[102] One part of his argument compared the number of citations to Cardozo opinions to those of a sample of opinions by his colleagues on the New York Court of Appeals. He found that Cardozo opinions were cited by New York courts between one and a half and two times as often as those from the sample; this was about the same ratio as that between Wisdom opinions and those of his colleagues. Cardozo opinions were cited by courts outside New York more than seven times as often as those of Cardozo's colleagues — a far higher ratio than that found for Wisdom opinions — but the nature of their respective judicial systems probably accounts for this difference. Although Fifth Circuit opinions are not binding precedents for courts in other federal circuits, all federal courts are interpreting the same Constitution, statutes, regulations, and Supreme Court decisions. State courts, when dealing with issues of federal law, will also have to apply

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baseline. Compared with both, citations to Wisdom opinions started strong, peaked in the 1970s, and declined to about average thereafter.

101. At least part of this is consistent with Landes et al., *supra* note 3, who find, after adjusting raw citations in a variety of ways, that Judge Wisdom is one of the most frequently cited judges on the courts of appeals, especially for citations out-of-circuit. The special frequency of noncircuit citations in their analysis does not appear in my less sophisticated analysis, although it might be expected.

As Landes, Lessig, and Solimine point out, citations from within an opinion's circuit may not be as good evidence of the opinion's perceived merit as citations to it from other courts. Within an opinion's circuit, the case may be cited as either binding precedent or persuasive precedent. Outside the circuit, the case cannot be binding precedent but can only be a persuasive precedent, whether it is cited by a federal court or a state court. That a citing court finds the opinion persuasive may be higher evidence of its quality than that a citing court finds the opinion binding. My data also includes citations to law reviews and annotations. Those also might be given more value than "in circuit" citations. Although the article or annotation may cite an opinion as the binding precedent of the circuit involved or as a persuasive precedent, the mere fact that it is noted in such a publication might be seen as evidence that it is an unusually important decision.

One might expect, therefore, that a more prestigious judge would have even more total citations, compared with his peers, than citations within the circuit. This does not seem to be the case with the Wisdom citation data. For some time periods, the ratios between total citations to Wisdom opinions and total citations to those in the Fifth Circuit and all-circuits samples are higher than those for in circuit citations, for others they are lower. Overall, of the 16 possible comparisons (each of the eight time periods or test years, both with the Fifth Circuit and the all-circuits samples), the ratios are higher for total citations seven times, lower for total citations seven times, and the same twice.

102. POSNER, *supra* note 3, at 80-90.

the same authorities. Most state law, by contrast, is unique to the individual state. Thus, citations to a state court opinion from outside that state (or the federal courts in that state) likely will be much rarer than citations to one federal circuit's opinions in other courts, thus depressing the number of "other court" citations to less famous state judges.

Why has the rate with which Wisdom opinions are cited relative to those of other judges declined for opinions written after the 1970s? Several theories could be advanced. One might argue that changes in the politics of the federal bench have led to more conservative judges who are less willing to cite Wisdom majority opinions, either because the opinions differ, in reasoning or results, from their view of the proper law, or because Judge Wisdom's reputation is poorer with more conservative judges. Another possibility concerns case assignment. Who writes the majority opinion is decided generally by the senior active judge on a panel. Judge Wisdom, as a senior judge, has not had the assignment privilege since 1976. The assigning judges since then may have assigned him less interesting or challenging majority opinions — out of concern for Judge Wisdom's age or health, out of concern for the way Judge Wisdom would write the opinion, or out of a desire to keep a challenging opinion for himself or herself. Finally, it is possible that the quality of the opinions has declined.

There is another, more testable, theory, which is both plausible and wrong. Since 1980, only 259 of his 357 majority opinions have been written for the Fifth Circuit. Before that time, only 755 of his 767 majority opinions were written for other circuits. If Wisdom's non-Fifth Circuit majority opinions are, on average, cited less frequently than his Fifth Circuit majority opinions, that may explain part or all of this apparent decline. In fact, however, as Table 27 shows, his opinions outside the Fifth Circuit have actually been cited more frequently than those from within the Circuit, particularly since 1985.

Table 27. Median Total Citations to Fifth Circuit, Non-Fifth Circuit, and Total Judge Wisdom Opinions[103]

	Fifth Circuit	Non-Fifth Circuit	Total
1981-1985	23	25.5	24.1
1986-1990	10.5	16	11.7
1991-1992	5	15	5.8

103. The figure given for the "total" is not the median for all the opinions during that period, but, as in Tables 24 and 25, the mean of the medians for each of those three periods. As Judge Wisdom has not written any majority opinions for other courts of appeals since 1992, I excluded 1993-95 from the analysis.

One might suspect that presiding judges on panels from other circuits would be more likely to assign important cases to an honored visiting judge, but that seems speculative and probably unprovable. Other than demonstrating that the relative decline in citations to Wisdom opinions has been concentrated in the Fifth Circuit opinions, these data do not seem to be much help in understanding the change they highlight.

The collected citation data can help answer at least one other interesting question: Does the existence of dissenting opinions affect how often a majority opinion is cited? One might have two different hypotheses. The existence of a concurring or dissenting opinion might weaken a majority opinion by throwing doubt on its reasoning or result. On the other hand, it could be that dissenting opinions are more likely in more controversial, important, or interesting cases, which may in turn be cited more often. More specifically, one might wonder whether dissenting opinions by Judge Wisdom had a particularly strong effect in weakening the majority. To examine these questions, I analyzed the median number of total citations both to opinions where Judge Wisdom wrote a dissenting opinion and to opinions where Judge Wisdom wrote the majority and someone else wrote a dissent. The results, along the median number of total citations for all Wisdom and Fifth Circuit majority opinions for comparison, are shown in Table 28, below.

Table 28. Median Total Citations to Cases with Wisdom Dissents or with Wisdom Majorities and Others' Dissents

	Citations to Cases with Wisdom Dissents	Citations to Wisdom Majorities with Dissents	Citations to All Wisdom Majorities	Citations to 5th Circuit Sample Majorities
1957-1960	20	12	19.2	7
1961-1965	20	22.5	24.9	12
1966-1970	9	46	24.3	13
1971-1975	41	29	28.3	16
1976-1980	29.5	24.5	32.3	11
1981-1985	49	18	24.1	19
1986-1990	26.5	28	11.7	12

The numbers of opinions in any one box is fairly small — they range from 4 cases to 24 cases. (I excluded 1991-1995 entirely as there were only four dissenting opinions by Judge Wisdom and four to him during that period.) As a result, the medians jump around. Overall, the median number of citations to Wisdom majority opinions does not seem to differ very much

when there is a dissenting opinion. The majorities with dissents are cited substantially more often in the late 1960s and late 1980s and somewhat less often in the late 1950s, late 1970s, and early 1980s. The Fifth Circuit majority opinions where Judge Wisdom dissented, however, are cited much more often than the relevant Fifth Circuit samples. They are cited more than twice as often for every period except the late 1960s, when they are cited less frequently than the sample opinions. Decisions to which Judge Wisdom dissented attracted more attention, but we cannot say why from this data. It may be that Judge Wisdom dissented disproportionately in cases that were more important than usual; it may also be that the increased number of citations of a case reflect en banc consideration, Supreme Court action, or disapproving citations. Further analysis of the data is necessary before drawing any conclusions.

B. Most Cited Opinions

Finally, I looked at citations to Wisdom opinions to see which opinions of his were cited most frequently in their respective eras. Table 29 shows the twelve Wisdom opinions with the most total citations compared with other Wisdom Opinions from their periods; Table 30 shows the twelve with the most citations within the Fifth Circuit. I have excluded from both tables cases decided after 1990 because the number of citations for these cases, and the median numbers of citations, are so low.

These twelve cases represent slightly more than the top 1% of Judge Wisdom's 1,113 majority court of appeals opinions from before 1991. For both tables, the rank of the opinions is determined not by the raw number of citations but by the ratio of the raw number to the average number of citations, total and within circuit, to Wisdom opinions during the relevant period.[104]

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104. This is, admittedly, an imperfect solution to a real problem. The problem of comparing the number of citations to opinions from different eras is that the opportunities to be cited have varied, as noted above. One solution, adopted by Lessig in his Seventh Circuit analysis, was to look at citations per year. That only works if the opportunity to be cited increases as a linear function of the number of years. The evidence in this paper indicates that, at least over this period, the opportunity to be cited did not increase for Judge Wisdom, the Fifth Circuit, or all circuits. Opinions about 10 to 25 years old were most likely to be cited.

I have used the average medians over five year time periods. This has two problems. The more obvious is that not every year within the time period has the same median. The more subtle is that this assumes that the distribution of opinions around the median stays the same over time. I suspect that, for older cases, the standard deviation of the distributions are greater, meaning the heavily cited cases are more heavily cited. This could be solved by looking at how many standard deviations from the mean the cases fell, but the importance of

Table 29. The Twelve Wisdom Opinions Most Frequently Cited

Rank	*Citation Ratio*	*No. of Cites*	*Case*
1	31.5	604	Robison v. Offshore Co., 266 F.2d 769 (5th Cir. 1959)
2	29.3	343	Wood v. Wood, 825 F.2d 90 (5th Cir. 1987)
3	24.8	477	MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960)
4	18.4	447	United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966)
5	16.2	459	Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973)
6	15.9	387	Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969)
7	11.3	319	Reyes v. Wyeth Lab., 498 F.2d 1264 (5th Cir. 1974)
8	10.7	267	De Luna v. United States, 308 F.2d 140 (5th Cir. 1962)
9	10.0	244	Amador-Gonzales v. United States, 391 F.2d 308 (5th Cir. 1968)
10	9.5	308	United States v. Gipson, 553 F.2d 453 (5th Cir. 1977)
11	8.8	249	United States v. Warner, 441 F.2d 821 (5th Cir. 1971)
12	8.8	218	Northwestern Nat. Casualty Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962)

Table 30. The Twelve Wisdom Opinions Most Frequently Cited Within Their Circuit

Rank	*Citation Ratio*	*No. of Cites*	*Case*
1	47.1	330	Robison v. Offshore Co., 266 F.2d 769 (5th Cir. 1959)
2	24.1	169	MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960)
3	24.1	234	United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966)

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getting a "correct" ranking of these opinions has not seemed to justify the work that would involve.

4	23.1	226	United States v. Warner, 441 F.2d 821 (5th Cir. 1971)
5	15.7	152	Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969)
6	14.7	75	Wood v. Wood, 825 F.2d 90 (5th Cir. 1987)
7	13.8	102	Rodriguez v. East Tex. Motor Freight, 505 F.2d 40 (5th Cir. 1974)
8	12.0	104	Whitney v. Schweiker, 695 F.2d 784 (7th Cir. 1982)
9	11.3	98	Jarvis Clark Co. v. United States, 733 F.2d 873 (Fed Cir. 1984)
10	11.2	57	United States v. Gonzales-Sanchez, 825 F.2d 572 (1st Cir. 1987)
11	10.4	90	Spinks v. Chevron Oil Co., 507 F.2d 216 (5th Cir. 1975)
12	10.3	107	James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977)

These are not just lists of "the usual suspects," although some of Judge Wisdom's most famous cases are highly ranked. *Robison*, in the context of a mobile off-shore drilling rig, established the rule for defining a "seaman" under the Jones Act, which provides a remedy for injured seamen but not for others on vessels. *Jefferson County* was the key precedent with which the Fifth Circuit finally, more than a decade after *Brown v. Board of Education*, moved to desegregate public education in the Deep South. *Local 189* was a crucial early employment discrimination case under Title VII. *Borel* was the first case to hold an employer liable for its failure to warn an employee of the dangers of asbestos exposure. But many of the other cases have little, if any, fame.

In an earlier symposium on Judge Wisdom, Professor Harvey Couch, a historian of the Fifth Circuit, discussed fourteen noteworthy Wisdom opinions.[105] Couch first noted that other symposium authors were discussing four important Wisdom opinions: *Singleton v. Jackson Municipal Separate School District*[106] — an important school desegregation case — *Jefferson County*, *Robison*, and the three-judge district court voting rights decision in *United States v. Louisiana*.[107] Only three of those cases are appellate and within the

105. Harvey Couch, *A Small Sampling of Judge Wisdom's "Other" Opinions*, 60 TUL. L. REV. 356 (1985).

106. 348 F.2d 729 (5th Cir. 1965).

107. 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

scope of the present study; one of those three, *Singleton*, was not among the most cited cases. (*Singleton*, decided in 1965, has been cited only 40 times, and only 25 of those within the Fifth Circuit.) Of the fourteen he then discussed, eight were separate opinions and hence cannot be tracked through Shepard's.[108] Of the remaining six cases, only three are among Judge Wisdom's most cited cases: *DeLuna*, *Local 189*, and *Borel*. The other three cases, *Dallas County v. Commercial Union Assurance Co.*,[109] *Great Western United Corp. v. Kidwell*,[110] and *Plante v. Gonzalez*,[111] although fairly well cited, fall well short of making either list.[112]

Of the cases that made the lists, many are relatively unknown. This may reflect the areas of law in which I work, but before starting this research, I had never heard of *Wood*, *MacKenna*, *De Luna*, *Amador-Gonzales*, *Gipson*, *Warner*, *Northwestern National*, *Whitney*, *Jarvis Clark Co.*, or *Gonzales*, in spite of taking a more than usual interest in Judge Wisdom's opinions.

The differences between the lists point out another interesting aspect of citations to Wisdom opinions. The types of sources that cite the opinions often differ substantially. A few of the listed opinions, notably *Robison*, *Wood v.* Wood,[113] *Jefferson County*, *Local 189*, and *Borel*, are extensively

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108. Williams v. City of New Orleans, 694 F.2d 987 (1982), *rev'd en banc*, 729 F.2d 1554 (5th Cir. 1984) (Wisdom, J., dissenting); Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd sub nom.* United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979); *In re* Unterweser Reederei, 428 F.2d 888 (1970) (Wisdom, J., dissenting), *aff'd en banc*, 446 F.2d 907 (5th Cir. 1971) (Wisdom, J., dissenting), *vacated sub nom.* Breman v. Zapata Shore Co., 407 U.S. 1 (1972); McKenna v. Wallis, 344 F.2d 432 (5th Cir. 1964) (Wisdom, J., dissenting), *vacated sub nom.* Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63 (1966); United States v. Cox, 342 F.2d 167 (5th Cir.) (en banc) (Wisdom, J., concurring), *cert. denied*, 381 U.S. 935 (1965); United States v. Stapf, 309 F.2d 592 (5th Cir. 1962) (Wisdom, J., dissenting), *rev'd*, 375 U.S. 118 (1963); United Servs. Life Ins. Co. v. Delaney, 308 F.2d 484 (1962) (Wisdom, J., dissenting), *rev'd*, 358 F.2d 714 (5th Cir.) (adopting Wisdom position), *cert. denied*, 385 U.S. 846 (1966).

109. 286 F.2d 388 (5th Cir. 1961) (creating a "residual" hearsay exception, later codified in FED. R. EVID. 803(24), 804(b)(5)).

110. 577 F.2d 1256 (5th Cir. 1978), *rev'd sub nom.* Leroy v. Great W. United Corp., 433 U.S. 173 (1979) (striking down Idaho antitakeover statute after finding personal jurisdiction over Idaho securities officials; reversed on grounds of improper venue).

111. 575 F.2d 1119 (5th Cir. 1978) (upholding Florida constitutional amendment requiring substantial financial disclosure by certain elected officials), *cert. denied*, 439 U.S. 1129 (1979).

112. *Dallas County* was cited 171 times, for a ratio of 6.9; *Great Western* was cited 160 times, for a ratio of 5.0; *Gonzales* has been cited 143 times for a ratio 4.4.

113. Whether Wood v. Wood belongs on either list may be debated. It is a bankruptcy

cited both inside and outside the Fifth Circuit, as is, at a lower level, *James v. Stockham Valve*. On the other hand, the seventh through eleventh cases on the "Within Circuit" list do not appear on the "All Citations" list and the seventh through tenth cases, plus the twelfth, on the "All Citations" list do not make the "Within Circuit" list.

For some cases, the discrepancies between their treatment within the circuit and outside it are dramatic. *United States v. Warner*, for example, although it appears on both lists, does so by virtue of its citation in the Fifth Circuit: 226 of its 249 citations are within the circuit. Not surprisingly, the case is "circuit precedent" for a common point: "On a motion for judgment of acquittal, the test is whether, taking the view most favorable to the Government, a reasonably minded jury could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt."[114] Other circuits have their own cases to cite for the same legal point. Similarly, *Jarvis Clark Co. v. United States* is a Federal Circuit trade case. Fully 98 of its 100 citations are from within the Federal Circuit and its Court of International Trade.

Equally dramatic differences run in the other direction, particularly with criminal cases. *Amador-Gonzales v. United States* is a criminal procedure case concerning the constitutionality of a car search after a stop and the admissibility of a confession that flowed from the search. Of the 244 times it was cited, 148 were from state courts; only 33 were from the Fifth Circuit. *De Luna v. United States*, a criminal case involving the privilege against self-incrimination, was cited 267 times overall: 13 times in law reviews and annotations, 100 times in state courts, and 154 times in federal courts, but only 45 times in the Fifth Circuit.

In *United States v. Gipson*,[115] another criminal case, the court confronted a novel question about unanimous jury verdicts in criminal cases:

> Where a single criminal statute prohibits a number of acts, and a finding by the jury that the defendant did any one of the prohibited acts is sufficient to convict him (provided, of course, that all other elements of the offense are found), is the defendant's right to a unanimous verdict in-

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case and 262 of the 343 citations to it were from the Bankruptcy Reporter. Both the size of the bankruptcy courts and the extent their cases are reported have expanded substantially in recent years.

114. United States v. Warner, 441 F.2d 821, 825 (5th Cir.), *cert. denied*, 404 U.S. 829 (1971).

115. 553 F.2d 453 (5th Cir. 1977).

> fringed if a guilty verdict is returned when all members of the jury agree that the defendant performed one of the prohibited acts, but disagree as to which of the acts he performed?[116]

Gipson has been cited 203 times in state courts, 98 times in federal courts, but only 20 times in the Fifth Circuit.

Some of these differences seem attributable to the nature of the cases. Criminal cases, particularly those involving constitutional criminal procedure, may be cited frequently by state courts, adding greatly to the numbers of citations. Employment discrimination cases are cited widely, but cases involving the National Labor Relations Board rarely are cited by either state courts or district courts. Most cases arising from NLRB actions go directly to the Courts of Appeals; although Judge Wisdom has written in more than 50 actions in which the Labor Board was a party, none makes either top dozen list.[117] Bankruptcy cases now are cited widely in reported Bankruptcy Court decisions; international trade decisions are restricted almost totally to the Court of International Trade and the Federal Circuit. These differences are important to using citation analysis to compare different judges. A judge whose caseload contains a higher percentage of constitutional criminal procedure issues may have more citations than a judge whose caseload contains administrative appeals.

V. The Strengths and Weaknesses of Quantitative Analysis

Posner's chapter on measuring Cardozo's reputation begins by looking for references to Cardozo in law reviews and comparing their number with references to other leading figures.[118] His broadest count is reproduced below:[119]

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116. United States v. Gipson, 553 F.2d 453, 456-57 (5th Cir. 1977).

117. NLRB v. Camco, 340 F.2d 803 (1965), however, would be thirteenth on the "in circuit" list.

118. Posner also examines the use of Cardozo opinions in casebooks. I have not made a similar survey for Wisdom opinions in casebooks. I suspect that a federal appellate judge would have somewhat lower chances of ending up in a casebook than a judge on either a state's highest court (for common-law courses) or on the United States Supreme Court (for federal law courses, including especially constitutional law). I would note, however, that I currently use teaching materials in two courses that include cases written by Judge Wisdom in the 1980s, and neither course concerns civil rights or employment discrimination: Step-Saver v. Wyse Technologies, 939 F.2d 91 (3d Cir. 1991), in contracts, and Piney Woods Country Life Sch. v. Shell Oil Co., 726 F.2d 225 (5th Cir. 1984) in Energy Law.

119. POSNER, *supra* note 3, at 78 (citing information in table 4). The table refers to the second Justice John Marshall Harlan, a Supreme Court Justice from the 1950s to the early

Table 31. Articles Mentioning Judges and Scholars

Brennan	2,716	Hand	679
Rehnquist	2,407	Jackson	660
Powell	2,257	Calabresi	656
Blackmun	1,985	Rawls	618
Burger	1,974	Wigmore	597
Holmes	1,820	Michelman	577
Frankfurter	1,553	Friendly	551
Tribe	1,456	Cardozo	499
Black	1,336	Bentham	499
Prosser	1,189	Coase	438
Harlan	1,154	Kant	365
Brandeis	1,120	Aristotle	356
Ely	1,110	Warren	320
Dworkin	1,031	Traynor	312
Blackstone	857	Nozick	279
Marshall	773	Schaefer	59

Last summer, I searched the "Lawrev" library and the "Allrev" file for references to "judge w/3 wisdom," "j w/2 wisdom," "minor wisdom," or "john w/2 wisdom." This probably missed some references to "Wisdom," standing alone, but it produced 602 articles. Of those, many turned out to be using "the wisdom of the judges." After excluding the irrelevant matches, I had 316 references. This seems to be a respectable total compared with Judge Posner's list: Judge Wisdom ranks just above Justice Traynor and just below Kant and Aristotle. Only two circuit judges, Learned Hand and Henry Friendly, rank above him (although Posner does note that his list is not exhaustive and some unlisted judges or scholars had enough citations to be on it).

But this effort to fit Wisdom into Posner's previous work reveals several of the problems of this method. First, this kind of work is hard to reproduce. The databases from whence the data is drawn are not static — they change. Posner's book on Cardozo was published in 1990; the work that went into it must be six or more years old. During those six years, more articles have been written, adding further citations to all the luminaries in Table 31. My search for Wisdom citations in the summer of 1995 is not comparable to Posner's searches five years earlier. If I want to com-

1970s, not his grandfather of the same name, and to Justice John Marshall, not Justice Thurgood Marshall.

pare Judge Wisdom to the judges and scholars in Table 31, I have to run all those searches again, thus undercutting one of the advantages of incremental research. Or I could have searched for citations to Wisdom in articles published before 1990, but if the database has added more back issues of its journals or added back issues of new journals, even this solution fails. I cannot reproduce Posner's searches because I cannot reproduce the database he examined.

Second, the research is hard to verify. Consider the problem of the *Washington and Lee Law Review* staff. Some parts of this paper, particularly Section I and the cases listed in Section IV, have citations that the staff can check in the usual way. But the body of the paper is drawn from over 60 megabytes of information in my computer's memory. My computer is nearly 3,000 miles away and 60 megabytes is a lot of information to transmit. With good technical advice, we might be able to make the transfer through cyberspace, but we would still be likely to face problems of translating the data from one type of software to another. Even if the Law Review got my entire computer files, it would still have only my word about what those files *were* and how I created them. Short of redoing all my tedious hours of work in creating the files, it would not be able to verify the facts on which the article is based. The *DePaul Law Review* faced this same issue in publishing Professor Lessig's preliminary work on the Seventh Circuit. It ended up disclaiming any responsibility for the accuracy of the statistical information.[120]

Of course, the Law Review staff could try to redo my work, but that raises a third problem. The results of these searches depend exquisitely on *exactly* how they are conducted. Look for "Wisdom w/2 Judge" and you get a very different result than looking for "Wisdom w/3 Judge". To have any chance of success, the putative reproducer would need the exact terms of the searches; the precise identities of the databases searched (including which libraries and files); and the dates, or in some cases, the times, all the searches were conducted. That information is not impossible to record and the database services even can make some of it relatively easy. But it needs to be recorded and kept, and perhaps even published, with a fidelity more akin to a scientist's laboratory notebooks than a law professor's notes.

These are questions about the mechanics of the research, but they are not trivial. Quotation research makes its most useful contribution when the facts that underpin it can be built upon, can be verified, and can be repro-

120. Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 673 (1994).

duced. When those facts are references to judicial opinions, law review articles, and books, as they are in most legal research, these issues are handled easily. Over the years, some law reviews have worked out ways to handle empirical data concerning legal issues. But when the relevant facts become bits (and bytes) of changeable and nonreproducible computerized data, the issues become very difficult.

Still, these pragmatic problems are secondary to the greater issue raised by this kind of work: What, if anything, does it mean? To return to Judge Posner's table listing citations, as Judge Posner points out himself, the list shows a number of strong biases. One bias relates to time. Modern judges and authors are cited more often than older ones. The bigger bias, though, seems to be the law review focus on constitutional law and the Supreme Court as its arbiter. Supreme Court Justices, particularly sitting justices, reach far greater levels than anyone else and, as Posner points out, higher relative levels than anyone could reasonably support. Among academics, it overrepresents both constitutional scholars (Tribe, Ely, and Dworkin) and the authors of common treatises (Prosser and Wigmore). Looking at how often law reviews refer to individuals does not necessarily tell you much about them, except that they did things law reviews like to refer to. This is surely not very helpful. Even if one wants to study reputation, the list provides an odd and skewed measure of reputation.

The study of judicial citations to judicial opinions may be more useful, although even there it is hard to know what is being measured.[121] Is Judge A cited more than Judge B because she sits on a more prominent court? Because of her extra-judicial writings or other fame? Because she has a memorable name? (It surely did not hurt the fame of Learned Hand, Henry Friendly, or John Minor Wisdom that their names were memorable.) Or is she a better judge, one who writes better opinions? Many people are interested in answering the last question about a vast array of judges. Analysis of the frequency of citations may provide some support for answering those questions, but much work needs to be done before anyone can put much weight on it. Citation analysis to evaluate scholars, particularly in the sciences, remains controversial even though a great deal of work has been done to see if its results correspond to other measures of scholarly ability. Almost none of that work has been done yet in law.

So, with all these problems, does the quantitative assessment of judicial careers play any useful role? I believe that it may have some value in

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121. Landes, Lessig, and Solimine have a useful discussion of a variety of objections to citation analysis. Landes et al., *supra* note 3, at 2-7.

comparing one judge with others, but that it clearly can help us understand better the career of that particular judge. Discovering how rarely Judge Wisdom writes separately compared with other judges, particularly given the prominence of some of his dissents, has changed my view of how he works. The length of his opinions and his use of footnotes indicate some things about the stability of his approach to writing opinions, as well as his relationships with his law clerks. The record of citations to his work seems to indicate when other judges began to view him as special. The number of citations to particular opinions helps show where his opinions have been read and used and can help us trace a path of his influence, in particular fields or particular courts.

To give one example, I spent some time determining whether law review articles that were found in my searches discussed "Judge Wisdom" or "the wisdom of judges." While doing that, I made notes on the subjects of about 200 of the articles, as far as I could tell the subjects from their titles. I was not surprised that the greatest number, about 30%, dealt with civil rights. I was surprised to find that the next three categories, each at about 10%, were civil procedure, admiralty, and torts. That does not tell me where Judge Wisdom ranks in the "Judicial Hall of Fame," but it did tell me something about the effects of Judge Wisdom's work that I had not known.

In this way, quantitative assessment of judicial careers may add to our knowledge about individual judges and courts. Such knowledge, in itself, may or may not be very important, but given the legal world's continuing fascination with judges, it cannot be called uninteresting.

Conclusion

I began this article as a test of whether quantitative analysis of judicial opinions was both practicable and useful. I end it with two answers of "qualified yes." And with a sense that I have learned more about Judge John Minor Wisdom.

Even more, though, I have come away with more glimpses of the Judge through reading snatches of the 46 megabytes, about 15,000 pages, of his judicial opinions. His judicial career has made a difference to millions of Americans in ways they will never know. It is a career built on intellectual honesty and rigor, a commitment to justice, and a love of good English. It is a career that our nation has been lucky to enjoy, and that, in small part, I personally have been privileged to witness. I only hope I will be able to continue downloading "Words of Wisdom" for many years to come.

Appendix

This appendix does two things. First, it provides some advice for others interested in this kind of research. Second, it describes in some detail the way I conducted the research in this paper. It starts with six general pieces of advice to anyone considering this kind of research.

Advice. First, do not even think about doing this kind of research without largely free access to one of the legal databases and a fast data connection. I estimate that I spent well more than 100 hours doing searches and, consuming the greatest share of that time, downloading the results. I have fast data access, but I downloaded more than 60 megabytes of information.

Second, talk to representatives of the legal database firms about your plans. I did not do this in detail and I regret it. I used Lexis rather than Westlaw because I was trained on Lexis in 1976 and had never bothered to learn the other system. My Lexis training since that time has been haphazard; in several places my research assistant was able to suggest newer search techniques. I am confident that Lexis representatives would have been able to improve my searches even more and I would like to have known ways in which Westlaw might have offered alternatives.

Third, if your Lexis or Westlaw representative talks about upcoming software, do not listen very seriously. I delayed my research several months while waiting for promised new software for Lexis and the Macintosh. Although some of it eventually appeared, it remained for a long time that very common variety of software improvement — vaporware. Waiting for it did me no good.

Fourth, do not rely entirely on your search results. Check everything. Go into the data you have pulled up and test to see if it is really what you were expecting. This operates on two levels. At one level, you need to make sure that your search, in general, worked. I found, for example, that excluding unpublished opinions from searches was difficult. Lexis had no special tag for unpublished opinions, but it did generally insert language into the case citations warning that circuit rules might limit their citation. Different circuits asked Lexis to use different formulas; finding out how to exclude unpublished opinions was a matter of trial and error. Similarly, I looked at some of the citations when I searched for separate opinions by various circuit judges in order to find out whether I was picking up other judges with the same name. Those searches showed me that the Fifth Circuit had had two judges named Jones and two judges named King, and that one of the judges named King had started her judicial career under the name of Randall.

At a deeper level, for some questions you will want to look at each case individually. I ended up looking at each of the nearly 1,400 Wisdom opinions I downloaded. I found that several of them were not, in fact, written by Judge Wisdom, including a 1963 Seventh Circuit opinion that appeared in my search for no discernible reason. I also found several cases where Judge Wisdom was listed as writing separately when he did not or as writing a dissent when he actually wrote the majority.

Fifth, document everything you do. The exact wording and date of a search may turn out to be relevant, to you or someone else, in trying to understand your results. Keep records of the wording of the searches you use, the files you searched, and the dates you conducted them. I thought I had done this carefully until I looked for my records at the end of the project. Most of them were written on various pieces of paper, but were not kept in any organized manner. Something like a laboratory notebook would have been more useful.

Finally, be prepared for your research to twist and turn. You will discover that some of the questions you thought would be interesting are not; you will notice new questions that you will find interesting; and you will come to be both impressed with and frustrated by the technology available. These surprises are both enjoyable and dangerous. More than in most legal research, you feel that your ending point is somewhat arbitrary; that, with more time and effort, more could be done. At some point, declare victory and retreat, perhaps to return to the data again in another article.

Methods. I started my research by collecting all of Judge Wisdom's published opinions. I did so by searching the "Genfed" library in Lexis, in the "Newer" file (which contains cases since 1944, well before the start of Judge Wisdom's career), for any opinions "writtenby (Wisdom)." It listed about 1,400 cases, which I downloaded, first in cite format and then, in groups of two hundred or so at a time, in full format. The citation format list became a basic resource. I printed out the list and put it, in chronological order, into a three ring binder. I used the hard copy in the binder to make notations about each case, ranging from the number of times it was cited, to whether it was a separate Wisdom opinion, and to whether it was really a Wisdom opinion at all. The citation format in the printout itself told me for which court the opinion had been written.

Each of my seven downloaded full text files contained about 6 to 9 megabytes of information. I divided that data into a separate full text case file for each year. I saved these more manageably sized files (about 1.5 megabyte each) in Word 6.1 format on my Macintosh. Because my Lexis software for the Macintosh did not contain any filters or automatic format-

ting features, I received the files in text only format, with carriage returns at the end of every line and Lexis headers and star page numbers sprinkled regularly throughout the text. This was a nuisance, but I had no good way to fix it so the files have remained imperfect. (A Lexform routine for the Macintosh has become available since then.)

I also did separate searches for "concurby (Wisdom)" and "dissentby (Wisdom)". I downloaded the results in citation format to have a list of his separate opinions. Eventually, I decided to check each full text case file to verify that the concurring and dissenting opinions were listed properly. This revealed some errors and made me realized that I had initially been counting opinions that were *both* concurring and dissenting as two opinions rather than one. I noted in my binder which opinions were concurring, dissenting, and concurring and dissenting. Using that as a guide, I compiled Tables 1 through 7.

Tables 8 through 12 were built from the information in the binder, supplemented with my information from the full text case files. I looked up each Wisdom dissent in the full text files to see whether it was a dissent to an en banc opinion and who had written the majority. I also searched the full text files for the word "dissentby", and so found all the opinions where Judge Wisdom had written a majority that generated a dissent.

The information in Tables 13 through 17 was both easy and difficult to obtain. When I wanted a basis for comparing Judge Wisdom's use of separate opinions to that of other judges, I quickly found I could get some information easily. For example, five searches for "writtenby (Friendly)", "opinionby (Friendly)", "concurby (Friendly)", and "dissentby (Friendly)" gave me numbers of opinions quite rapidly and without requiring me to download anything. I could just record the numbers and try again with another judge.

I soon realized, however, that there were some problems. For judges sitting after about 1985, there were sometimes numerous unpublished opinions. Opinions that Lexis characterized as "concurring and dissenting" appeared as two opinions "writtenby" the judge and as both a concurrence and a dissent. And I discovered that duplicative judicial names were more common than I had expected.

I solved the first problem by determining the formula used by Lexis to warn readers of the unpublished nature of the opinion and incorporating that in the search. This formula varied some from circuit to circuit. The most common variation in the circuits I searched included language that circuit rules "may limit the citation of unpublished opinions." For those circuits, my search would include "and not limit citation unpublished." For other

circuits, I would use other relevant language. For Supreme Court justices, I included the term "argued" in my search, thus avoiding most opinions on denial of certiorari, summary decisions, or other unusual opinions.

I solved the second problem by adding a search for "concurby (friendly) and dissentby (friendly)", thus getting a separate count for that kind of opinion. I used that count to eliminate double-counting in the totals for overall opinions, concurrences, and dissents.

For the third problem, I did two things. First, I limited my search to the file for the circuit to which the judge was appointed. This greatly limited the chance of picking up opinions written by a Third Circuit Judge Higginbotham while looking for opinions written by a Fifth Circuit Judge Higginbotham. (It also had the advantage of removing out-of-circuit opinions, where I suspected visiting judges might be less likely to write separately.) I also began looking in citation format at the beginning and end of the cases my search uncovered. If there the differences in the dates of the opinions seemed suspiciously large, I would look at the opinions in full text to see if they were written by different judges with the same last name. If so, I would determine where in the list of citations the judges changed. I never did uncover a good solution to the problem of two judges with the same last name serving in the same circuit at the same time. The solution I chose was to exclude such judges, thus eliminating, among others, the Judges Arnold, Ginsburg, Hand, and Nelson from consideration.

Tables 18 and 19 were frustrating. I wanted to get a sense of both the use of separate opinions by prominent judges and of their use across entire circuits. I thought I could do this by using the "5Cir" file, for example, for Fifth Circuit cases, and searching "date is 1965 and dissentby", thus getting the total number of dissents published that year in the Fifth Circuit. I would then repeat the process for the other kinds of opinions for as many circuits and as many years (or spans of years) as I chose.

I learned, though, that I could not search for the words "writtenby", "opinionby", "concurby", or "dissentby". Although they appear in the Lexis report of the case, they seem not to be searchable. Nor would Lexis allow me to search for "writtenby (!)", with "!" as its universal symbol. My research assistant also tried to find a way to do the search, on Lexis and on Westlaw. We finally gave up and she searched for separate opinions in all opinions published, by the Fifth Circuit, and by all circuits, during the month of April for each of eight sample years.

Tables 20 through 23 are founded on the full text case files of Wisdom opinions, with the addition of some full text Fifth Circuit and All-Circuit sample case files. Those files contained the full text of all opinions in cases

where Judge Wisdom wrote an opinion, majority or separate. I went through eight of the year-long full text case files one at a time and temporarily removed all Wisdom separate opinions, all non-Wisdom majority opinions, all separate opinions to Wisdom opinions, and all non-appellate opinions. I then ran a "word count" routine on the remainder of the file and recorded the result. Unfortunately, this is not an exact word count of the opinion as it would appear in F.2d or F.3d. It includes the full caption information, plus Lexis-generated additions — the headers at each Lexis screen and the page notations in the "[***]" format. I estimated that these added, on average, about 100 words for the caption information and about 20 words per screen. As the same additions existed for all my files, this should not make a difference in my comparisons, but it does mean that my word estimates are about 10% too high.

Once I had done that for the Wisdom opinions, I still needed other opinions for comparison. I then created some samples, to compare the length of Judge Wisdom's opinions to those of other Fifth Circuit judges and, in case the Fifth Circuit were unusual, to those of judges from all other circuits. I did a date sensitive search in both the "USApp" and the "5Cir" files, seeking a result that gave me about 30 published opinions. The search would vary with the library and the year. For more recent years, I was able to get more than 30 published opinions from the "USApp" file by searching for opinions released on just one day. For the early sample years in the Fifth Circuit, I had to search something like "date is aft April 30, 1960 and date is bef May 17, 1960." I wanted to use all the opinions from a time period in order to limit the risk that opinions delivered in the same period were ordered in some way that would bias my count. After downloading these files, I deleted separate opinions from them and ran the same word count routine. A larger number of opinions in the samples might have been preferable, but both downloading the full text files and cleaning them of separate opinions was very time consuming.

I did the footnote count while preparing the full text files for the word count. I would look for the last footnote number in each majority opinion as I scrolled through the file. I recorded these numbers and totaled them for each file. When opinions had a single note, denoted by an asterisk, I counted that as one footnote.

Tables 24 through 30 are based on downloaded information from the electronic version of Shepard's Citations, which I used through my Lexis software. I entered the citations for each of the more than 1,200 Wisdom majority appellate decisions and downloaded, in "full text" format, the resulting list of citations. I also created comparison samples of citations to

arbitrarily selected Fifth Circuit and all-circuit majority opinions in the same manner. I did not use the cases from the earlier samples because I wanted different years — years in the middle of the five year periods I was working with rather than at the ends — and because I had not preserved the citations to the early sample cases in a way that would be easy to enter.

There is little discretion in how to do the Shepard's search, but there are some questions about how to tally the results. Shepard's is not a perfect tool for this kind of search for several reasons.

First, Shepard's does not distinguish between citations to majority opinions and separate opinions. That makes it useless for testing the influence of dissenting opinions, for example.

Second, it lists the times a case has been cited, not the cases in which a case has been cited. If a citing opinion cites the source opinion four times, that gets four separate listings in Shepard's. If the citations are close together, there is no way to be certain whether they are from one case or several cases published near each other.

Third, it provides, and counts, redundant citations to some courts. Any case where certiorari was sought would have at least three citations: U.S. Reports, Supreme Court Reporter, and Lawyer's Edition. For some state courts, but not all, Lexis would give both a regional reporter and an official state citation.

Fourth, it does not provide dates for the citations. This makes it more difficult to analyze *when* a case is being cited. It would not be difficult to establish a rough dateline for the Federal Reporter and the Federal Supplement; determining the dates of all the possible law review, annotation, and state reporter citations would not be easy.

Fifth, Shepard's in its Lexis format does number its citations, which usefully allows one to avoid actually counting the citations. However, its numbering system is intended to give users a short cut to the cited source and so the only citations with numbers are those that are found in Lexis. What sources can be found in Lexis changes over time. This was particularly noticeable with law reviews, most of which are now entered in Lexis, but very few of which have their older volumes in Lexis. If the "unnumbered" citations came in the middle of the list of citations, the numbers would usually, but not always, take them into account. For example, the citations might go to number 11, then have two unnumbered law review articles, and then end with an ALR annotation that was given number 14. If, however, the last citations are to sources not in Lexis, the last number will not be at the end of the list of citations.

These disadvantages were not trivial, but Shepard's was more useful than the alternative I explored — the Lexis "Lexcite" option. Lexcite effectively ran a search of the engaged Lexis file for the citation. It found the cases containing that citation, thus avoiding some of the double-counting problems and providing the dates for the citing sources. On the other hand, it produced this information in full-scale Lexis cite format. The same twenty citations that would take one screen in Shepard's would take five in Lexcite, with a concomitant increase in downloading time. The Lexcite results also depend on the library being used. A Lexcite search in the "Genfed" library would not produce any state court or law review citations. Finally, Lexcite lacks the signals Shepard's gives about how the citation was used, whether the citing case is the same case or a related case, and so on.

After some fruitless experiments, I stayed with Shepard's. I turned the downloaded citations into one file for each year of cases. I then looked through the citations to each case and recorded the number of total citations, based on the last number in the citation list, and the number of citations from within the circuit for which the opinion was written (usually the Fifth Circuit). I added "same case" or "related case" citations to the "within circuit" total, although those citations come at the beginning of the listing. I did not seek to correct for the treble counting of Supreme Court citations or the double counting of some state citations. I did limit my citation count to only Shepard's Federal Citations. Thus, citations to some sources that appear in other Shepard's units, such as the Labor Law Citations, are not included in my count.