

December 18, 2002
11510 Summerhill Ln.
Houston, TX 77024

Charles R. Fulbruge III, Clerk
United States Court of Appeals for the Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Dear Mr. Fulbruge:

This is to formally request that the Fifth Circuit Rule of Appellate Procedure 47.6 entitled *Affirmance Without Opinion* be modified as attached. The underline indicates the proposed additions. There is no proposed removal of text.

In contemplating this proposal, I have consulted with a large number of people, including former Fifth Circuit clerks, analysts for public interest legal foundations, many staffers in the House and Senate Judiciary Committee, and staff in the Administrative Office of the U.S. Courts. They have made me keenly aware of the high workload facing the Fifth Circuit as well as the existing vacancies.

I firmly believe that the practice of affirmance without opinion is an unconstitutional denial of due process, and would like to see Rule 47.6 eliminated completely. Given the current workload facing the Fifth Circuit, however, I am therefore making only this modest proposal.

Concerning the requirement for written opinions when the court is sitting en banc, I point to Federal Rules of Appellate Procedure 35 for the two reasons for en banc hearings: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance. Both of those reasons cry out for reasoned, written opinions. See also the dissent in *United States of America v. McFarland, Jr.*, 00-10569 (5th Cir., 2002), 82-97.

Note that the proposal on required opinions for removal jurisdiction in diversity cases actually has the potential to reduce the workload on the Court

by ensuring that cases that should not be in the federal courts, get the attention needed.

I include the requirement for opinions in inherent powers cases because the potential for abuse of power and manifest injustice is high in those cases, and because precedent in the Supreme Court and the Fifth Circuit is so clear about the need for scrutiny of all inherent powers sanctions cases. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 64: “inherent powers must be exercised with great caution”. See also *Crowe v. Smith*, 151 F.3d 217, 226 (5th Cir. 1998): “Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.”

Note that this proposal takes no sides on the published vs. unpublished opinion controversy. The required opinions can still be unpublished at the court’s discretion once these rules are in place.

Although the practice of unpublished opinions, and especially their citability, has received a good amount of attention, I believe the practice of simply ruling without rationale is a more serious problem. At least those with unpublished opinions know why the court did what it did. Those without a written factual or legal basis upon which their lives are ruined are left to wonder about the fairness of ruling, and indeed about the integrity of the Court.

The practice of affirmance without opinion in substantive cases increases the cynicism of the general public about the judicial system and undermines the rule of law, upon which all political values that Americans hold dear rest.

For learned commentary on this topic, please see:

- Martha Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 Am. U. L. Rev. 757 (1995)
- William Richman & William Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996)
- Patricia Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge*, 42 Md. L. Rev. 766 (1983)

Please keep me informed of the process this request will see as it is reviewed, and any opportunities for comment by the general public.

Toward liberty and justice for all,

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Enclosure - Proposed Changes to 5th Cir. Rule of Appellate Procedure 47.6

cc: The Honorable:

John Culberson	Kay Bailey Hutchison	John Cornyn
Patrick Leahy	Charles Schumer	Orrin Hatch
Jeff Sessions	Edward Kennedy	Russell Feingold
Richard Durbin	Charles Grassley	Arlen Specter
Lindsay Graham		
James Sensenbrenner		John Conyers
Howard Coble	Howard Berman	Henry Hyde
Elton Gallegly	Bob Goodlatte	Rick Boucher
Bill Jenkins	Zoe Lofgren	Chris Cannon
William Delahunt	Robert Wexler	Spencer Bachus
Maxine Waters	John Hostettler	Marty Meehan
Ric Keller	Tammy Baldwin	Darrell Issa
Anthony Weiner	Melissa Hart	Mike Pence
Lamar Smith	Sheila Jackson Lee	Ron Paul
John Carter		
Dennis Hastert	Tom DeLay	Richard Gephardt

John Rabiej