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United States Court of Appeals for the Seventh Circuit : Introduction

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INTRODUCTION

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United States Court of Appeals for the Seventh Circuit

The Illinois Institute of Technology Chicago-Kent College of Law is to be commended for initiating this Seventh Circuit Review. The volume fills a void in the legal library. Although other law reviews comment on individual cases from the Seventh Circuit, no publication treats the opinions of the circuit from each Term as a cohesive unit.

The Seventh Circuit Review will have many beneficial effects. First, it will give the judges of the Seventh Circuit an opportunity to review their opinions over an entire term, and to focus on how the individual opinion fits into the whole fabric of the court's work. Everyone including students, lawyers, and courts need periodically to consider the past in order to provide a guide for the future. Second, although I, as an individual judge, may not agree with particular comments, I think that it is important for judges to have a critique such as this of their own work as well as the work of the whole court. We have all witnessed the benefits from a scholarly note on a particular case. This review should amplify that benefit. A correlation of the constitutional independence of the federal judiciary is the lack of direct accountability other than in the United States Supreme Court. Desirably this review will increase our accountability to the public and the legal profession without infringement on our independence. Finally, it aids the bar and law students to obtain a working summary of the decisions of our court, as well as knowledge of its rules of practice and its procedure.

STATUS OF THE COURT CALENDAR

In recent years the court has experienced the same exponential growth in litigation as other courts. In 1966 when the last new circuit judgeship was created, there were 510 appeals. Last year there were 1050 and this year we expect about 1150. In the Spring of 1968, the court heard two appeals each day that it sat; since the beginning of the last term, we hear six each day. The result has been that our pending caseload has stabilized and even decreased slightly

although the number of docketed appeals has increased. We have no backlog in setting criminal appeals and our backlog in civil appeals ready for hearing has been reduced with hopes of eliminating it by the end of the present term. We still can improve in certain areas, but on the whole the court can take satisfaction of its record in meeting the burden of an increasing number of appeals without any additional judges and, more important, without sacrificing thorough consideration in each appeal.

All of the changes that we have adopted as well as the effort of the judges of our court will be thwarted if we do not have the support of the bar. I would call on attorneys to follow these suggestions: (1) develop a full record in the district court; (2) do not raise insubstantial issues; (3) comply with procedural time limits; (4) shorten the briefs as much as possible; (5) have in mind the admonition contained in Rule 35, F.R.A.P. that rehearings en banc are "not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure and maintain uniformity of its decisions, and (2) when the proceeding involves a question of exceptional importance."

PROCEDURAL CHANGES

In the last few years the court has changed many of its rules and practices. The purposes spear-heading these changes have been the need to save judicial time, attorney time, and costs to litigants and the need to expedite the appellate process. It is a truism that justice delayed is justice denied. I would add that justice with an exorbitant price tag is also justice denied.

The Seventh Circuit has been the first circuit to dispense with a requirement in all appeals that an appendix, a costly item, be filed. Circuit Rule 24.* The rule recommends instead a preferred practice of incorporating at the end of the brief copies of important material, such as the district court's findings or memorandum of decision, the document to be construed, the patent that is involved, etc. Circuit Rule 27 provides for the indexing of the transcript whether it be in the record or in an appendix. These changes are based on the belief by our judges that most appendices are a waste since the record is

* A copy of the local circuit rules is available through the Clerk's Office of the Seventh Circuit Court of Appeals. The Practitioner's Handbook For Appeals To The United States Court Of Appeals For The Seventh Circuit has been prepared for use by those attorneys admitted to practice before the Seventh Circuit Court of Appeals.

available to them and that an index to the transcribed testimony and exhibits reduces the time needed to locate relevant material.

Circuit Rule 22 allows the appellee to move to affirm without oral argument if the issues are insubstantial. During the last term 27 of the 62 motions filed have been granted. This rule, if not abused by appellees, will save both judge and attorney time. Circuit Rule 29 allows the parties to file additional authority without a formal motion, a saving again to the attorney and the court.

As many practitioners in our court are aware we do not write a full-blown opinion in every appeal. In a substantial number of appeals there are unpublished orders which may not be cited as precedent. The orders contain a statement of reasons for the judgment. The policy behind Circuit Rule 28 is to reduce the proliferation of opinions in the reports by not publishing decisions that rehash established precedent. Although it has not yet been widely used, the rule also allows for oral decisions from the bench after argument.

Circuit Rule 25 provides stringent requirements for obtaining an extension of time to file a brief. Circuit rule 26 provides the remedy for dealing with the failure to file a brief within the proper time. An individual attorney may not appreciate the rationale behind the denial of his request for an extension of time due to the press of his other work, but the denial is required if we are to decide appeals expeditiously. Complacency with the current length and costs of an appeal should not be our standard. We need to reduce both so that the public regards the courts as both accessible and efficient.

A practice instituted by the court since January of this year has resulted in a substantial expedition of criminal appeals. A conference, either in chambers or by telephone, is arranged with defense counsel and the United States Attorney or his assistant as soon as the notice of appeal is filed. At the conference assurances are required that the transcript has been ordered. A schedule is then set for filing the record with transcript, the briefs, and, in some appeals, the time for oral argument. We require strict compliance with these schedules. Besides catching problems before they develop such as the withdrawal of an attorney or a delay in obtaining a transcript, the conferences have reduced the time for the filing of the notice of appeal to the submission for decision to 5.6 months in comparison to 8.9 months during the previous calendar year.

Another practice which conserves judicial and attorney time is the perusal of the briefs prior to setting of the appeal for oral argu-

ment. Based on this review of the briefs, the court is able to allot time for argument commensurate with the difficulty of issues, to eliminate oral argument in a few instances, to set appeals with related issues together, and to hold in abeyance appeals with issues which are presently awaiting a decision in this court or in the Supreme Court.

SOME OF THE MORE IMPORTANT DECISIONS OF THE TERM

It is hard to do justice to the important decisions of the 1972 Term in a short review of the court's work such as this. I therefore have limited myself to a brief discussion of only the more important decisions.

In *United States v. Falk*, 479 F.2d 616 (1973), Judge Sprecher, speaking for a divided *en banc* court, vacated defendant's convictions for failure to possess valid selective service registration and classification cards, and remanded the case to the district court for a hearing on the defendant's allegations that the United States Attorney had improperly discriminated against him in the enforcement of the law. The court found that the defendant had presented a *prima facie* case of selective enforcement because the defendant had exercised his first amendment rights since the Government had a policy of not prosecuting violators of card possession regulations; the defendant had been a vocal dissenter to the draft and the Vietnam War; the decision to prosecute this minor draft case involved the United States Attorney, his First Assistant, and the Justice Department; there was a delay in the indictment; and the Government had a policy of withholding prosecution if a defendant should agree to induction.

In *United States v. United States Steel Corporation*, 482 F.2d 439 (1973), *cert. denied*, 42 U.S.L.W. 3226, the court, in an opinion written by Judge Cummings, affirmed the conviction of United States Steel for the discharge of refuse into the Grant Calumet River in violation of the Rivers and Harbors Act of 1899 (commonly known as the Refuse Act). The court rejected defendant's argument that the Act does not prohibit refuse discharges which do not threaten navigability, and that it was partially repealed by the Federal Water Pollution Control Act of 1948.

In *Jordan v. Weaver*, 472 F.2d 985 (1973), *cert. granted, sub nom. Edelman v Jordan*, 52 U.S.L.W. 3644, Judge Cummings rejected the state's argument the eleventh amendment prohibited the federal courts from awarding retroactive welfare payments to recipients who were deprived of timely benefits due to the failure of state

and local officials to follow the federal regulations. The court disagreed with the state's characterization that these were damages prohibited by the Eleventh Amendment and found that they were instead restitution within federal jurisdiction under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908).

In *Gautreaux v. City of Chicago,* 480 F.2d 210 (1973), Judge Sprecher's opinion upheld the equitable power of the district court to bypass a state statute requiring municipal approval of the construction of public housing when the municipality failed to act on the proposed housing after the Chicago Housing Authority and the Department of Housing and Urban Development had previously been found to have racially discriminated and had been ordered to provide for integrated public housing in areas of Chicago where there were few or no blacks. The court pointed out that the Chicago City Council had given no justification for its failure to act on the proposed construction sites and was therefore liable for its part in perpetuating the discrimination.

Judge Stevens in *United States ex rel. Miller v. Twomey,* 479 F.2d 701, (1973) outlined the procedural due process requirements dealing with the revocation of prisoner good time and punitive segregation. The court found that the procedural requirements applied in parole revocation hearings under *Morrissey v. Brewer*, 408 U.S. 471 (1972), is the maximum required by the Fourteenth Amendment due process clause. The minimum is that the prisoner must receive advance written notice of the charges, a fair opportunity to explain his version of the incident, an opportunity to request other witnesses, and a factual determination by someone other than the person who reported the infraction. The court set the perameters rather than precise guidelines because it thought that the state officials should first be allowed a full opportunity to develop the rules and procedures in this area of the law, subject to review by the district court.

Another important decision is *Southern Illinois Builders Association v. Ogilvie,* 471 F.2d 680 (1972). Judge Sprecher's opinion upheld the constitutionality of the so-called Ogilvie Plan. This plan provided for the recruitment, placement, and training of minority group members in the highway construction industry in the East St. Louis area. The construction unions argued that the affirmative action provisions of the plan had established a quota system for hiring in contravention of Title VII of the Civil Rights Act of 1964 and the fifth and fourteenth amendments to the Constitution. The court upheld the affirmative action program as eliminating existing discrimination and moving "employment practices in the direction of true neutrality."

In *Portage Plastics Company, Inc. v. United States*, No. 71-1555 (March 2, 1973), Judge Cummings, speaking for the *en banc* court, held that a debt instrument with "interest" payable from profits did not constitute a second class of stock which would have prohibited the company from being defined as a Subchapter S small business cororation under section 1371(a) of the Internal Revenue Code. The Commissioner argued that the "thin capitalization doctrine" required the purported loan to be considered as a second class of stock. The court held, however, that the rationale behind the application of the doctrine did not apply since the congressional intent underlying the prohibition of a second class of stock was to eliminate the inequity to common stockholders who are taxed on undistributed earnings which are distributed during a subsequent year as dividend income to preferred stockholders.

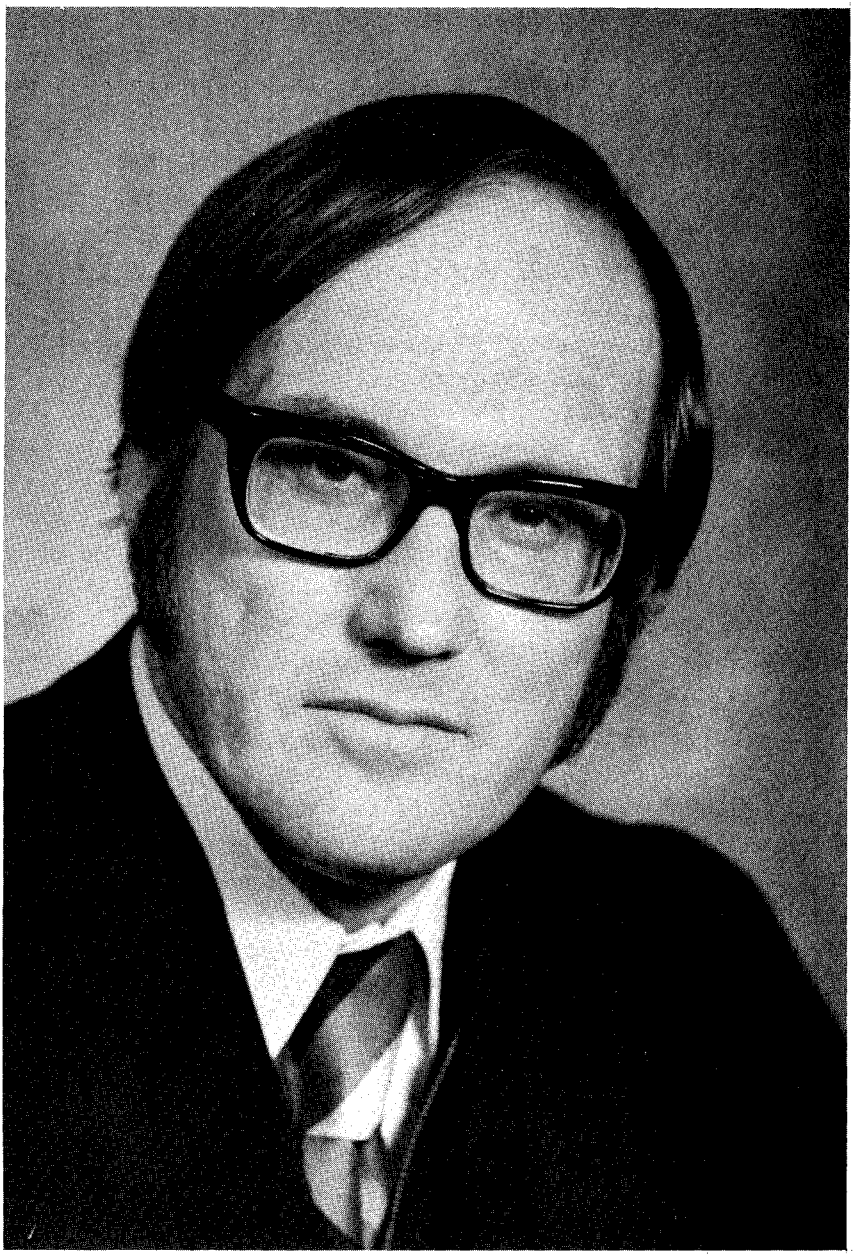
In *Littleton v. Berbling*, No. 71-1395 (October 6, 1972), Judge Pell held that the complaint did state a cause of action against state judges, the state's attorney, his investigator, and the police chief under the Civil Rights Acts since the judges were alleged to have imposed heavier fines and sentence and required high bail as respect to black citizens. The others were alleged to have abused their discretion in investigating and prosecuting crime. The court held that while money damages could not be awarded due to their judicial immunity against state judges and the state's attorney acting in his quasi-judicial role of prosecuting crime, injunctive relief would lie for violations of the Civil Rights Acts. Judge Pell further stated that money damages as well as injunctive relief would be proper remedies if the court found that the state's attorney acting in his investigative role and the police chief had violated the rights of the class of black citizens. The Supreme Court heard argument on this case. 42 U.S.L.W. 3254-55 (Oct. 17, 1973).

In *Ricciardi v. Thompson*, 480 F.2d 167 (1973), Judge Kiley, speaking for the court, promulgated a procedure which the Government is to follow when it wishes to seize films as evidence of a crime and when the seizure might infringe on the film owner's exercise of his First Amendments rights. In *Ricciardi* the Government wanted the films in order to prosecute a violation of the federal statute which prohibits interstate shipment of obscene films. Judge Kiley pointed out that there was no federal equivalent to the state censorship statute and that obscenity was only one element of the crime. The procedure set forth by the court was designed to avoid interference with the prosecutorial process without undue inhibition of first amend-

ment rights. The court approved the *ex parte* determination of probable cause so that a warrant may issue for the seizure of the evidence, but the court then required that the film be returned to the owner within twenty-four hours. The Government could copy the film during that time or if additional time was required, could, with notice to the film owners, request additional time for the copying.

Judge Fairchild speaking for the court in *United States v. DeMet*, No. 72-1657 (October 25, 1973), upheld the conviction of a policeman for violating the Hobbs Act which prohibits extortion. The police officer had taken money from a tavern owner in exchange for not enforcing a late night parking ordinance which would have affected the tavern's customers. The tavern owner had also feared that his refusal to make payments to the policeman might result in his being charged with liquor violations or losing his license. The court found that although the tavern business was primarily local, depletion of the tavern owner's assets or the cessation of his business would tend to affect, though small by most standards, the demand for and the amount of beer and liquor moving in interstate commerce. Judge Fairchild then pointed out that since Congress has exercised its full power to regulate commerce under the Commerce Clause, the extortionate conduct may be punished regardless of the *de minimis* effect.

I trust that the above report furnishes some insight into the current operations of the Seventh Circuit. If I were to attempt a short appraisal, I think it could justifiably be said that the court has probed and continues to probe for improvement in the appellate process and that it is striving for better craftsmanship in its opinions. The court recognizes that its members should be self-disciplined in stare decisis, yet keenly aware that the law be responsive to the dynamics of our society.



JUSTICE WILLIAM H. REHNQUIST
United States Supreme Court Circuit Justice
For The United States Court Of Appeals
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