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001. letter	Non-selection (Partial) (1 page)	07/01/1994	P6/b(6)
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Lynch, Sandy [1]

2013-0670-F

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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Sandy Lynet
- 1st CCA
(conf.)

Confirmed
8/28/95

THE WHITE HOUSE

July 20, 1994

Professor Alan Schechter
Wellesley College
Department of Political Science
Wellesley, Massachusetts 02181

Dear Alan,

Thank you for your letter and recommendation of Sandy Lynch to the First Circuit. As always, I value your endorsement and hope your trip to England was a good one.

With warm regards, I remain

Sincerely yours,


Hillary Rodham Clinton

cc: Vicky Radd
Anne Bartley

Withdrawal/Redaction Marker

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Wellesley College

Wellesley, Massachusetts 02181
(617) 235-0320 Cable Address: WELLCO

July 1, 1994

Dear Hillary,

(b)(6)

[001]

However, I do not know if you have had the opportunity to meet Sandy, who graduated in 1968, so I am sending you a copy of the letter I have sent on her behalf to Senator Kennedy, Senator Kerry, Joel Klein, and Jeff Blattner.

I think both women would make outstanding judges, and recommend them enthusiastically.

On a more personal note, I didn't get to the 50th reunion of the Washington Internship Program, since I was traveling in England, but I heard from those who were there that it was a great success, and the video you made was perfect for the occasion. Thanks for everything you are doing for Wellesley!

Affectionately,

Alan



Wellesley College

Wellesley, Massachusetts 02181
(617) 235-0320 Cable Address: WELLCO

June 26, 1994

Mrs. Hillary Rodham Clinton
Office of the First Lady
Old Executive Office Building
17th Street and Pennsylvania Avenue
Washington, D.C. 20500

Dear Hillary,

I am writing to recommend Ms. Sandra J. Lynch for appointment to the First Circuit Court of Appeals. I have known Sandy for nearly 30 years, and believe she would be an outstanding member of the Federal judiciary.

Sandy is ideally prepared to serve as a Federal judge. From the time I first met Sandy, when she studied Constitutional Law and American politics with me at Wellesley College, she has focused her efforts on the law. She has had a distinguished record in her two decades as a member of the bar.

Sandy's unusual ability and personal qualities were quite clear even when she was an undergraduate. She was one of my top students. She impressed me with the depth of her knowledge, her ability to understand complex issues quickly, and her judgment. She had strong liberal values, and she expressed her ideas clearly and powerfully. I recommended her enthusiastically to Boston University Law School, and was delighted when she became an editor of the law review there and was chosen to clerk for Federal District Court Judge Raymond J. Pettine after graduating.

Early on in her legal career Sandy began a career-long involvement in social policy questions. She worked in legal services, was involved in low-income housing issues, and spent five years on important school desegregation cases in Boston and Springfield. She served as an Assistant Attorney General and as counsel to the state Department of Education, litigating and implementing laws on a variety of issues, including racial imbalance, bilingual education, special education, and educational equity in both state and federal trial and appellate courts.

For the past 15 years, Sandy has worked at Foley, Hoag & Eliot in their Litigation Department, serving for part of that period as the head of the Department. As a result, she has had vast experience in both civil and criminal litigation at both the trial and appeals court levels. She has had far broader experience than many individuals who have been nominated to federal judgeships.

Because of her commitment to public policy issues, Sandy has been heavily involved in pro bono work throughout her years at Foley, Hoag and Eliot. Sandy played a crucial role in a number of abortion rights cases, including Baird v. Bellotti and Planned Parenthood of Massachusetts v. Bellotti. She has given outstanding lectures to my students at Wellesley on the legal struggle between proponents of abortion rights and defenders of restrictive state legislation.

In addition to her work on constitutional questions, Sandy has had vast experience representing both plaintiffs and defendants in major civil cases. She has represented individuals, corporations, non-profits, and public agencies.

Finally, Sandy has played a leading role in the Massachusetts bar. She is widely respected throughout the state for her work as the President of the Boston Bar Association in 1992-93. In addition, she has served on committees and commissions appointed by the Supreme Judicial Court, the Court of Appeals for the First Circuit, the American Arbitration Association, the ABA, the Boston Chamber of Commerce, the Massachusetts Taxpayers Foundation, the Civil Liberties Union. She has also served on screening committees for federal judicial appointments and on the Board of Bar Overseers. Despite her active legal practice, Sandy has devoted an extraordinary amount of time to public service.

It has been a great honor for me to have worked closely with Ms. Lynch during the early years of her career and to have followed her career with interest in the succeeding years. Given her record of accomplishments, she has the potential to be an outstanding judge on the U.S. Court of Appeals for the First Circuit. I recommend her to you with great enthusiasm.

Sincerely,



Alan H. Schechter
Professor

Edward M. Kennedy
Massachusetts



United States Senate

WASHINGTON, DC 20510

August 13, 1994

The Honorable William J. Clinton
The President of the United States
The White House
Washington, DC 20500

Dear Mr. President:

I am pleased to recommend to you Ms. Sandra L. Lynch of Brookline, Massachusetts for the position of Judge of the United States Court of Appeals for the First Circuit.

I am confident that you will find that she has outstanding character and qualifications and that she will fairly and faithfully enforce the laws of the United States.

Respectfully,

A handwritten signature in dark ink, appearing to be "E. M. Kennedy", written over a horizontal line.

Edward M. Kennedy

An outstanding nominee

SP14
A feminist maxim from the 1970s may be familiar to Sandra L. Lynch, who was recommended Saturday by Sen. Kennedy as the first woman judge on the US Court of Appeals for the 1st Circuit. The saying was that to make it a man's world, a woman had to be twice as smart and work twice as hard. Fortunately, it concluded, this was not difficult.

8.16
Lynch, now 48 and a partner at Foley, Hoag & Eliot, graduated from Boston University Law School in those days, and from the start she made succeeding in the man's world of law look easy. She was the first woman to head the firm's litigation department and the second woman president of the Boston Bar Association. An unapologetic liberal activist, she represented Planned Parenthood on a pro bono basis, arguing for the reproductive rights of minors, and as general counsel to the Massachusetts Department of Education she represented the state in the racial imbalance and school busing cases.

Incredibly, before President Clinton took office the last woman to be named to any federal bench

in the 1st Circuit, which covers New England, was Rya Zobel in 1979. That is because the president typically draws from recommendations made by the senior senator of his own party. Over their 12 years in office, Presidents Reagan and Bush appointed 23 judges to federal courts in the 1st Circuit's territory, every one of them male. Now, with Democrats controlling the White House and the Senate, Kennedy has again been forwarding recommendations, and his picks have included three outstanding women - Lynch, who is slated to succeed Stephen Breyer, and US Judges Nancy Gertner and Patty Saris.

Although women's rights activists grumbled last year when three men were named as finalists for the US attorney's post, any argument that these three women are tokens could not be sustained. For her part, Lynch was an Army brat and the first person in her family to get a college degree. She came to Massachusetts on a full scholarship to attend Wellesley and had no political connections. We are pleased to give her nomination an enthusiastic second.

Sandra
Lynch
1/19 CCA

Boston Globe

Merit on the bench

There may be few outside the Boston legal community who know the name of Sandra Lynch — until now that is. Prior to her nomination to fill the First U.S. Circuit Court of Appeals seat vacated by Supreme Court Justice Stephen Breyer, Lynch made few headlines, preferring instead to perform yeoman-like public service with her usual quiet dignity.

But the fact that the Massachusetts Legislature passed a sweeping court reform, including the creation of a new state-wide juvenile court system, is due in no small measure to the effective lobbying and coalition-building of Sandra Lynch. Her tenure as president of the Boston Bar Association and her earlier work on the association's study of gender bias in the courts helped bring a new level of awareness to her fellow professionals of the needs of people using the courts.

All the while, of course, she has — for more than a de-

cade — headed the litigation department of the Boston firm of Foley, Hoag & Elliot. Previously Lynch served as an assistant attorney general, where she dealt with the Boston and Springfield school desegregation cases, and as general counsel to the state Department of Education.

In short, Lynch will bring to the court that invaluable combination of a brilliant legal mind and the savvy that comes with dealing in the public sector and caring about those whose needs can sometimes only be met under the courthouse roof.

It is a credit to the consummate political skills of the man who made the recommendation to the White House, Sen. Edward M. Kennedy, that he also knows when to put politics aside and look for a candidate who is merely the best legal mind for the job. In Sandra Lynch he has found such a person.

We hope her confirmation will be prompt and painless.

Boston Herald

HP24 8-16

Boston Sunday Herald August 14

1st woman backed for appeals bench

By RALPH RANALLI

U.S. Sen. Edward M. Kennedy yesterday recommended the first ever woman to become an associate justice of the U.S. 1st Circuit Court of Appeals, naming Brookline attorney Sandra Lynch as his choice to replace new Supreme Court Justice Stephen Breyer.

Lynch, 47, is a former state assistant attorney general who worked on the landmark Boston and

Springfield school desegregation cases. She also was a former general counsel for the state Department of Education. "Sandy Lynch is superbly qualified to serve on this important court," Kennedy said in a statement released by his office. "She has already achieved many impressive firsts in her life and this will be another one."

Lynch was the first woman to head the litigation department of the Boston firm of Foley, Hoag & Eliot, where she has been a partner since 1981. □

File

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August 14

Lawyer set for Breyer vacancy

Lynch to be first woman on circuit

By Judy Ral sky
GLOBE STAFF

Sandra Lynch, whom Sen. Edward M. Kennedy recommended yesterday to fill a vacancy on the 1st US Circuit Court of Appeals, was an outspoken supporter of liberal causes as a law student in 1970, when student unrest shut down much of Boston University, recalled a former assistant dean of the law school.

But as she has throughout her career as a prominent lawyer in Massachusetts, Lynch managed to juggle activist causes

with a dedication to the law. Even with frequent bomb threats, the Boston University

School of Law never closed amid the turmoil, and Lynch persevered,

even to the point of editing articles for the law review, said Ernest M. Haddad, the former assistant dean.

"Through all the turmoil on campus, she remained committed to orderly process," said Haddad, now general counsel to Massachusetts General Hospital. "To meld those in-

Throughout an activist legal career that began with the Boston school desegregation case and recently included lobbying successfully for court reform legislation, Lynch has been lauded by colleagues and friends for sound judgment, fresh ideas and a negotiating style that gets results.

Kennedy yesterday recommended Lynch, 48, to President Clinton to fill the vacancy left by Supreme Court Justice Stephen G. Breyer on the 1st Court of Appeals. If confirmed, Lynch will become the first woman on the Appeals Court that handles cases from Massachusetts, Maine, New Hampshire, Rhode Island and Puerto Rico.

Lynch, who lives in Brookline with her son, has been a partner
LYNCH, Page 41

**'She has
always
served as
a role
model.'**

DEBBIE
RAMIREZ
Law professor

(continued)

THE BOSTON SUNDAY GLOBE • AUGUST 14, 1994

Kennedy picks woman lawyer for Breyer vacancy

LYNCH

Continued from Page 33

with the law firm of Foley, Hoag and Eliot since 1981.

Jack Curtin of Bingham, Dana and Gould, who chaired a panel that screened candidates for the district court bench and US attorney, described her selection as a "pure merit choice."

Lynch wins high praise in the legal community for her tenacity in the courtroom and a knack for building consensus in the corridors. She has drawn kudos for pro bono work for Planned Parenthood and for taking on the thorny topic of gender bias in the court system as president of the Boston Bar Association.

Lynch's selection was roundly applauded by the Massachusetts Women's Bar Association, which had lobbied Kennedy to use the appointment to break the last gender barrier on a federal appeals court.

Sally Greenberg, chairman of the Women's Bar, praised Kennedy for nominating Lynch and for selecting an all-female pool of finalists. They included Eleanor Dean Acheson, assistant US attorney general; Margaret Marshall, general counsel to Harvard University; and Superior Court Judge Margot Botsford.

Lynch, according to other lawyers, campaigned enthusiastically for her own selection. Friends said Acheson and Marshall were less active in their candidacies, instead choosing to concentrate on making their marks in their new jobs.

Lynch left little to chance, colleagues say, requesting recommendations from professional contacts dating back to law school. But Kennedy aides, saying the senator did considerable research of his own, noted that the letters had little effect.

A few critics describe Lynch as aloof or intimidating, but she has won the hearts of other female lawyers. She is known for taking time to share her experiences and to offer career advice.

University law professor, recalled meeting Lynch when Ramirez interviewed for a job at Lynch's law firm.

"She has always served as a role model and reached back to help women coming up behind her," said Ramirez. She added that Lynch made sure all the job candidates were sensitive to issues of diversity.

Karen Green, a deputy US attorney, was in college the first time she saw Lynch in court. She called Lynch an inspiration.

"She is part of the reason I became a lawyer," said Green.

Lynch was born in Oak Park, Ill., the oldest of four children. She was 13 when her father died while stationed with the US Army in Taiwan. The family then moved to Dallas, where Lynch attended high school.

Through scholarships, she earned an undergraduate degree at Wellesley College and a law degree at BU.

Firsts are nothing new to Lynch. When Senior US District Judge Raymond J. Petting of Rhode Island hired Lynch in 1971, she became the first female law clerk of that court.

"She has a superb legal mind, is a wonderful human being and is totally dedicated to the law," Petting said.

After the clerkship, Lynch arrived on the local legal scene as an assistant attorney general. She quickly became involved in the Boston school desegregation case, even-

Boston Bar Journal in 1993. "My lasting memory of Ms. Lynch in the courtroom is of her talking a straight line with extraordinary directness and clarity."

She joined Foley, Hoag and Eliot in 1978, and later became the youngest lawyer and first woman to head its litigation department.

In 1992, she led a successful lobby-

ing effort as Boston Bar president to persuade legislators to pass a court-reform package that she had helped write.

Robert Cordy, Gov. Weld's legal counsel at the time, said Lynch's strengths reminded him of the judge she may replace. Like Breyer, he said, "she's as smart as can be, pushes things to a conclusion and builds coalitions to get things done."



SANDRA LYNCH

1CCA

*signed
file*

1st woman backed for appeals bench

By RALPH RANALLI 8.14

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Lynch wins
high praise in
the legal

415

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Law professor

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ally becoming general counsel to the state Department of Education and representing a plaintiff in the desegregation suit.

Senior US District Judge W. Arthur Garrity Jr. praised Lynch's leadership in the case.

"Through the protracted school desegregation hearings, Ms. Lynch frequently led the way in solving intractable problems," Garrity told the

Boston Bar Journal in 1993. "My lasting memory of Ms. Lynch in the courtroom is of her talking a straight line with extraordinary directness and clarity."

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SANDRA LYNCH

5/5

I. INTRODUCTION.

This is the first evaluation the Chicago Council of Lawyers has conducted of the United States Court of Appeals for the Seventh Circuit.

A. Reasons for Conducting this Evaluation.

The Chicago Council of Lawyers is a public-interest bar association, founded in 1969. It has 1,400 members, and is a member bar of the American Bar Association. The Council's members predominantly are lawyers at large firms, as well as small firm lawyers, prosecutors and defense lawyers, academics, judges, and members of Chicago's legal aid and civil rights bar. The Council was founded because of a concern by a wide variety of lawyers that other local bar associations were unwilling to criticize sitting judges, and were too parochial in their interests.^{1/}

Since its inception, the Council has evaluated candidates for selection to state and federal trial and appellate courts. The Council worked closely with former Senators Charles Percy and Adlai E. Stevenson, III in evaluating candidates for the federal bench in Chicago. We have continued to evaluate candidates to the federal bench in Chicago during the past decade.

The Council has also conducted four evaluations of the entire U.S. District Court for the Northern District of Illinois, most recently in 1991. The Council found that its District Court evaluations have been useful to the bar by publicly identifying the strengths, weaknesses, and practices of the judges. In addition, the Council believes its evaluations helped the District Court by articulating problems perceived by the bar, as well as by letting judges know that good work was appreciated. Our 1991 evaluation also described characteristics shared by successful judges, as a guide in selecting future judges. That work was helpful in evaluating candidates for recent vacancies on the U.S. District Court in Chicago.

Upon completion of the 1991 District Court evaluation, the Council's Board of Governors approved an evaluation of the Seventh Circuit Court of Appeals. The Council's decision was based on several factors. First, the U.S. Court of Appeals is a very important institution for practitioners and litigants in Chicago. It has also become one of the most distinctive courts in the country. Second, to our knowledge, no U.S. Court of Appeals (including the Seventh Circuit) has ever been the subject of a detailed evaluation of its performance conducted by a bar association.

The Council's evaluation of the Seventh Circuit has the following objectives:

^{1/} Among the Council's founding members were some of the most prominent lawyers in the City including William Brackett, Kermit Coleman, Alex Elson, Albert E. Jenner, Jr., Alexander Polikoff, and Milton Shadur, as well as academics, including Gerhart Casper, David Currie, Philip Kurland and Dan Oaks.

- Providing information to the judges of the Court as to how each of them is perceived by the bar. This is particularly important for appellate judges, who spend less time with lawyers than District Court judges and may have less of an opportunity for interaction with the lawyers who appear before them.
- Providing information to the judges as to how their colleagues' work is perceived by the bar. Since the Court sits in panels of three and, occasionally, *en banc*, this information may be of interest to members of an appellate court in a manner that it may not be to members of a trial court.
- Providing information to the judges as to how the Court as an institution is functioning, as perceived by the bar.
- Providing information to lawyers and litigants who are not familiar with a judge about the bar's perception of the judge's strengths and weaknesses.
- Providing information to the public about any strengths or problems of individual judges, and the quality of the Court as a whole.
- Providing information to those who participate in the nomination and confirmation of Seventh Circuit judges as to factors that should influence their decisions.

As we noted in our last District Court evaluation, it is not easy for practicing lawyers to criticize judges before whom they appear. Nonetheless, the public has the right to informed views about the performance of its judges and its courts. A bar association is in a unique position to provide that information.

The members of the Court of Appeals are dedicated public servants who work hard to provide justice. Despite any criticism of individual members of the Court, the Council appreciates their efforts on behalf of the public.

B. Overview of the Study.

Our study is divided into three parts. The first discusses the functioning of the Court as a unit. We identify some of the Court's administrative aspects, including the role of the Chief Judge, and discuss problems identified by practitioners with the Court's current procedures.

The second portion of the report reviews statistical information concerning the Court and its members. Some statistics are gathered from reports compiled by the Administrative Office of the United States Courts, and compare the Seventh Circuit's performance with other federal appellate courts. We also report the results of a preliminary statistical analysis of the work of the individual judges conducted by Assistant Professor Lawrence Lessig of the University of Chicago Law School.

The third portion of our report is an evaluation of each judge of the Court. The Council has conducted many evaluations of our state appellate judges. The methodology used here,

discussed in more detail below, is an expansion of the approach taken in our past evaluations of state appellate judges. For each evaluation we read a substantial sample of each judge's opinions. We also interviewed attorneys who had cases before that judge, as well as former law clerks and frequent practitioners in the Seventh Circuit.

The judges of the Seventh Circuit vary substantially in ability. The Council sees no point, however, in categorizing judges with life tenure as "highly qualified," "qualified," or "not qualified," as we do when evaluating candidates for appointment to the federal bench, or election or retention to the state courts. Instead, we include solely a narrative description of their performance.

II. RECOMMENDATIONS FOR CRITERIA AND PROCEDURES FOR SELECTION OF JUDGES TO THE SEVENTH CIRCUIT.

A. How Circuit Judges Have Been Selected.

Judges of the Courts of Appeals are nominated by the President and confirmed by the Senate. When vacancies have occurred in the Seventh Circuit, judges have usually been replaced by another judge from the same state. When new positions have been created, they have been understood to "belong" to one of the three states of the Circuit -- Illinois, Indiana, and Wisconsin.

Over the past several decades, there have been different methods of selecting Circuit Judges. In the 1960's and 1970's, Circuit Judge appointments were usually made with the active participation of the senior Senator from the state who was from the same party as the President. During the Carter Administration, circuit-wide nominating commissions were established in most circuits to screen candidates for a vacancy and forward a small list of names to the President for his consideration.

During the Reagan and Bush Administrations, the selection of federal appellate court judges was centralized in the Justice Department and the White House. While Senators usually have been given control over District Court nominations, in recent years Senators have only had input into Court of Appeals nominations, with the final decisions made by the Administration.

It is too early to know how President Clinton and the Democratic Senators or other ranking Democrats from Illinois, Indiana, and Wisconsin will handle Seventh Circuit appointments. Early indications are that the Clinton Administration intends to choose Court of Appeals judges, with input and advice from the Justice Department, and without either a merit selection panel or feeling bound to follow Senatorial advice.

B. The Council Believes that Circuit Judges Should Be Selected by a Merit Selection Process.

The Council urges the President and the Senators to establish a circuit-wide nominating commission to solicit and review applications and forward the names of a small number of

finalists to the Senators and the President. There are a number of reasons for favoring the Commission approach:

- As seen by the recent District Court nominations in the Northern District of Illinois, where a commission approach was used, people of diverse backgrounds will be encouraged to come forward.
- It provides input to the Senators and the President from a wide group of people as to the abilities and talents that a Circuit Judge should have, and that the particular candidates do have.
- An open process is a fair way to proceed. The public perception of fairness is particularly important for the appointment of a Circuit Judge.

The finalists approved by the Commission should be screened by the Senators and the President, who should make a commitment to selecting one of the finalists absent unusual circumstances.

C. The Criteria the Council Has Used in Evaluating Candidates for Nomination to the U.S. Court of Appeals for the Seventh Circuit.

In evaluating candidates for the federal bench, the Council has identified the following standards for reviewing the qualifications of candidates:

- **Legal ability** (including intellect, the ability to understand and apply complex areas of the law, and knowledge of the law).
- **Litigation experience in complex matters** (including trial and appellate experience, preferably in federal court, and extensive experience in litigated matters involving sophisticated or complicated legal issues and analysis).
- **Integrity** (including independence, freedom from extra-judicial influence, personal ethics, and a demonstrated respect for professional ethical standards).
- **Judicial temperament** (including open-mindedness, a willingness to listen, respect for lawyers and litigants, patience, flexibility, compassion, and sensitivity to the rights and concerns of individuals of an age, race, sex, or socio-economic background different from the candidate).
- **Administrative skills** (including the ability to manage a demanding case load or docket, decisiveness, and sound judgment in the conduct of litigation).
- **Work ethic** (including willingness to work hard, conscientiousness, diligence, and thorough preparation).
- **Communication skills** (both oral and written).

We believe persons nominated to the federal courts should have demonstrated excellence in all of these areas.

The Council's standards for evaluating federal judges are deliberately high. Our high standards are most clearly seen when we review judicial candidates with substantial ability in some or most areas, but a lack of demonstrated excellence on one or more of the areas identified above. The Council believes that it is preferable to risk erring by not appointing such a candidate to the federal bench.

There are three reasons for doing so. First, because the appointment is for life, judges of limited ability or poor temperament cannot be removed. Second, the position is far too important to settle for less. Federal judges decide many of the most important and difficult issues our society faces. And even in less important matters, poor judges increase litigation costs, cause undue delay and uncertainty in rendering justice, and do substantial damage to litigants. Third, the position often defeats anyone lacking outstanding credentials. Experience has shown that for this position, being a good (or even a very good) lawyer or judge simply is not enough of a qualification for elevation to a federal judgeship.

In evaluating a proposed nominee to the Seventh Circuit, the Council weighs these factors somewhat differently than for District Judges. Appellate courts are strengthened by having members with different backgrounds. Thus, while strong trial court experience is good preparation for a potential appellate court judge, it is less necessary that every judge on an appellate court (as opposed to a trial court) have extensive trial experience.

Other backgrounds are also useful to an appellate court. An appellate court benefits from members with active (and differing) litigation backgrounds, experience in government, and academics. A diversity of personal characteristics is also important, so that the Court has the benefit of the perspectives of members from different groups in our society, and to increase the court's legitimacy among all parts of the public. However, in every case a judge must meet the necessary intellectual and experiential criteria.

**D. The Qualities the Council Believes Should Be
 Possessed by the Next Few Appointments to the Seventh Circuit.**

The current Court has suffered because it has too many judges from only one or two categories of background and experience. The active members of the current Court include three judges whose principal backgrounds were academic, three with experience in the Solicitor General's office and one other government lawyer, two lawyers with substantial complex, commercial private practice experience, four who were former District Judges, one former state Supreme Court Judge, two former federal prosecutors, and one lawyer from a small private practice.^{2/} The Court does not have any lawyers with substantial criminal defense, civil rights, pro bono, or legal aid experience. The Court has few members with

^{2/} This summary totals more than eleven because some judges fell into more than one category.

substantial experience as trial lawyers.^{3/} The Court just received its first woman member. No judge is a member of a racial minority group.

We believe the next few appointments to the Seventh Circuit are very important. Every judge appointed to the Seventh Circuit should meet the criteria set forth in the preceding section. But, in addition, the Court would benefit if its next few appointments possessed some or all of the following qualities:

- The intellectual capacity to engage in principled argument with the present judges, several of whom have outstanding intellectual ability.
- Increased racial and gender diversity.
- Substantial experience in preparing, litigating, and trying civil cases, and an understanding of the practicalities of trial court and appellate practice.^{4/}
- Experience in responding to the needs of clients, and an understanding of what is needed in the Court's decisions to guide clients' behavior and resolve real conflicts.
- Substantial experience in civil rights, legal aid, criminal defense, and/or pro bono practice.

^{3/} Two *en banc* cases illustrate different perspectives arising from whether a judge had substantial trial court experience before becoming a Circuit Judge. In United States v. Best, 939 F.2d 425 (7th Cir. 1991)(*en banc*), cert. denied, 112 S. Ct. 1243 (1992), the Court reversed a panel opinion that had reversed a criminal conviction because the government exhibit books, which contained only materials entered into evidence, had been erroneously sent to the jury room. None of the five dissenting judges had experience as a trial judge, while five of the six majority judges had previously been trial judges.

Similarly, in G. Heileman Brewing Co. v. Joseph Oat Corporation, 871 F.2d 648 (7th Cir. 1989)(*en banc*), the Court ruled that a federal magistrate had inherent authority to order a party represented by counsel to appear at a pre-trial settlement conference even though Federal Rule of Civil Procedure 16(a) expressly authorizes the compelled appearance of counsel and *pro se* parties only. All four former District Judges then sitting on the Seventh Circuit joined the *en banc* majority in ruling that the ability to compel the attendance of parties at a settlement conference is an essential tool of District Courts in alleviating overcrowded dockets. (Three circuits have followed the majority's interpretation of Rule 16(a); no circuit has ruled to the contrary. See Official Airline Guides, Inc. v. Goss, 6 F.3d 1385 (9th Cir. 1993); In re Stone, 989 F.2d 898, 903 n.3 (5th Cir. 1993); In re Novak, 932 F.2d 1397, 1405, 1407 (11th Cir. 1991).)

^{4/} As we discuss more fully below, the Court has taken a very restrictive role towards procedural and jurisdictional issues in the past decade. In many cases, the Court's decisions seem out of step with the spirit of the Federal Rules of Civil and Appellate Procedure. Adding several judges who have practiced law and have a better understanding of how trial courts actually work would greatly benefit the Court.

III. COURT ORGANIZATION, PROCEDURES, AND DECISIONAL PRINCIPLES.

The Court, like any institution, does some things well and some things not as well.

A. What the Court Does Well.

A project like the current evaluation necessarily focuses on areas where the Court's procedures are subject to question or improvement. We recognize that for the vast majority of cases and litigants the Court functions very well. Among the Court's strengths are:

- All the Judges take their jobs seriously and appreciate the seriousness of the matters they decide.
- All the Judges read the briefs and almost all prepare well for oral argument. (This is not true of all appellate courts.) Lawyers appreciate the preparedness of the judges.
- Unlike some other circuits, the Court schedules oral argument in most cases. Compared to some circuits, the Court is (and appears to the public to be) relatively accessible to litigants. Lawyers and clients view the Court's preference for oral argument as an important indication that the Court's business is open to the public.
- Unlike some other circuits, the Court does not decide any cases on the merits without issuing an Order or Opinion explaining the reasons for its decision.
- The Court's Circuit Executive is skilled, accessible, and helpful.
- The Clerk's office is well-run and helpful. The deputy clerks are well-trained and knowledgeable.^{5/}
- Despite the philosophical, temperamental, and other differences among the judges, they have managed to avoid, for the most part, public acrimony. As far as the Council has determined, almost all are on good terms with their colleagues. Former Chief Judge Bauer deserves much of the credit for fostering this collegiality.

Nonetheless, there are a number of areas where the Council has concluded that the Court's operation and procedures should be improved.

B. Problems with the Court's Procedures and Decisional Principles.

We have not sought to conduct a detailed review of the Court's substantive jurisprudence. In the introductory sections, we are focusing on the Court's decisions on procedural matters, and on how its administrative and organizational aspects function. While our individual evaluations focus more on substantive law, we attempt to apply a standard of legal

^{5/} The Clerk's Office does take an overly strict approach to enforcing the Court's rules. It does so on the instruction of the Court, and cannot be faulted.

ability and faithfulness to a judge's job rather than whether we agree with the substantive results in every case (though, inevitably, views about the results are part of any views on the performance of any judge).

In our view, there are several procedural areas and approaches to decisions in which the Court is not fulfilling its role well.

1. Fidelity to the facts of the case and the issues presented.

The principal reason we have appellate courts is because our nation has never been satisfied that a single level of decision is fair. An appellate court provides us with protection against trial errors and arbitrary decisions by single judges. In the view of the Council, an intermediate appellate court serves the following functions:

- An appellate court must decide the disputes pending before it. In most cases, the Court should decide the disputes as framed by the parties and the trial court. At the same time, an appellate court does have an obligation to see that justice is done. In unusual cases, therefore, the appellate court may be required to reframe the issues in order to avoid manifest injustice. We believe that deciding disputes is the Court's core function.
- Within the context of the disputes presented before it, an appellate court's principal function is to correct error.^{5/}
- An appellate court also should articulate clear rules to guide the conduct of individuals, businesses, and other organizations within its jurisdiction, and to provide direction to lower courts. That includes identifying, and if presented, resolving unsettled, and often difficult, issues of law within the Circuit.
- An intermediate appellate court also has a responsibility to identify unsettled or important questions of law for consideration by the Supreme Court when issues need national resolution or previously decided issues need reconsideration.

In summary, we think the most important job of a judge is to get the result right in the case before the court and do justice to the parties. In doing so, judges have other responsibilities: (i) to respect precedent and other limitations on the judicial process, (ii) to identify important questions needing legislative, administrative, or scholarly consideration, and (iii) to articulate clear rules of law to guide future conduct. In the Council's view, the best appellate judges perform all three tasks well. But in our experience as practitioners and students of the law, the most important job remains to decide the cases before the court correctly and fairly.

Some judges and commentators view the law as an intellectual construct. They view an appellate court as a vehicle for discussing the state of the law, any infirmities, and the

^{5/} As then Judge Ruth Bader Ginsburg put it, "[f]irst, courts strive to 'get it right'-- to reach a correct result in the case at hand." Ginsburg, *The Obligation To Reason Why*, 37 Fla. L. Rev. 205, 206 (1985).

direction it should take. Many lawyers have told the Council that they believe the Seventh Circuit has gone too far in the direction of making general statements about the law, without due regard to the facts of the case and the issues properly before the Court. Opinions that stray from the facts of a case and the issues presented by the parties to general principles of law that are not presented in a concrete context take a court far from its core function.^{2/} The costs of such an approach include unclear decisions, decisions based solely on the judge's analysis without the basis of the factual information and analytic insights developed from an adversarial presentation, and a sense by litigants and lawyers that the reason they are in court -- to have their case decided fairly -- has been sacrificed. In addition, many lawyers have complained to the Council that the law of the Circuit, and the actions of the Court in any particular case, have become unpredictable,^{3/} since lawyers do not know which issues the Court will decide and, indeed, whether the Court will reach out and decide issues not presented by the parties.

The Council believes that most judges of the Seventh Circuit share its model of judging. Our evaluation has shown, however, that many lawyers believe that some judges of the Seventh Circuit do not share this view of the role of the Court. In addition, lawyers are concerned that some members of the Court frequently defer to those judges who advocate an expansive view of the judicial role. The Seventh Circuit's willingness, in many cases, to allow judges to write broad opinions that go beyond the facts in the record and the issues presented makes the Court appear unpredictable and unresponsive to the litigants. Practitioners perceive that some judges have an agenda of personal lawmaking, not dispute resolution.

If an issue -- no matter how important or interesting -- is not squarely presented by a case, the Court should not reach out to decide it.^{3/} The Court will get another chance --

^{2/} As stated recently by Judith Kaye, now Chief Justice of the New York Court of Appeals, "[c]ases are limits; courts do not render advisory opinions, they resolve live disputes on the facts before them." Kaye, *The Human Dimension In Appellate Judging: A Brief Reflection On A Timeless Concern*, 73 Cornell L. Rev. 1004, 1015 (1988).

^{3/} See Bidlack v. Wheelabrator Corp., 993 F.2d 603, 620 (7th Cir. 1993)(*en banc*)(Easterbrook, J., dissenting)(arguing that risk caused by inconsistent decisions makes business more difficult), cert. denied, 114 S. Ct. 291 (1993).

Of course, some cases do present broad issues of social policy, private law, or legal theory. The problem, as lawyers and litigants see it, is when judges inject those considerations into cases where they are not needed for decision.

^{3/} It is an axiom of appellate judges that the majority of cases are "easy." As Judge Harry Edwards of the District of Columbia Circuit put it, they are easy in the sense that "the pertinent legal rules are readily identified and applied to the facts, revealing a single 'right answer.'" Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 Wis. L. Rev. 837, 856. He goes on to note that there are some cases that are hard, in the sense that each party advances at least one plausible legal argument in its favor, and a few cases are very hard, in that there is no clear answer and the court is left at equipoise. Id. at 857-59. Judge Edwards notes the danger of turning hard cases into very hard cases, so as to allow the exercise of judicial discretion where none should be employed. Id. at 859. Accord Ginsburg, supra note 6, at 216 (quoting Judge Friendly of the (continued...)

particularly if the Court notes the issue but does not express any opinion on it.^{10/} Litigants will then present it in a future case, soon. When the Court expresses dicta on an issue that is unbriefed and not supported by a factual record, it necessarily expresses an opinion that is not fully informed. Nevertheless, the dicta will influence the law in the District Courts or the state courts, without being fully considered by a panel of the Court.

The problem created by broadly worded opinions is exacerbated because many judges of the Seventh Circuit rarely write separate opinions that could limit the phrasing of the majority. This is somewhat surprising, since most judges of the Seventh Circuit do not reach out for issues in writing their own opinions. How is it, then, that certain judges of the Court -- notably Chief Judge Posner and Judge Easterbrook -- write such broad opinions, often without comment by their colleagues?

As the statistics in part IV show, most judges of the Seventh Circuit rarely concur or dissent. The failure to write separately may be attributable to a failure to appreciate the cost of broad opinions to lower courts, lawyers, businesses, and the public. Some judges on the Seventh Circuit may believe that it is not necessary to concur or dissent from an expansive opinion because everyone will understand the opinion is mostly dicta. This approach leads judges to sign on to opinions that discuss a variety of nondispositive issues not necessarily presented by the case, and which the Council believes the judges joining the opinion may not have fully considered and with which they may not agree.

There are many reasons why judges may choose not to write separately. Members of the Seventh Circuit view their court as being very busy, and separate opinions may slow the Court's work. Also, the Court has a tradition of collegiality. The Council recognizes that collegiality can help a court to function effectively, and that appellate courts can be injured by interpersonal squabbles. Further, we acknowledge that there is a cost in clarity and efficiency when a court speaks in a multitude of voices.

The Council recognizes that negotiation over the language of opinions does in fact occur on a regular basis and that, in many cases, broad language and dicta are removed from draft majority opinions without the knowledge of the public. In addition, the Council has been advised that some judges write dissents and concurrences without first discussing concerns about the majority opinion with its author. We were also told that once a separate opinion

^{9/}(...continued)

Second Circuit). See also Levine, *The Seven Virtues of Judging: Alvin Rubin's Civil Rights Opinions*, 52 La. L. Rev. 1499, 1522-23 n.112 (1992)(discussing views of former Fifth Circuit Judge Carl Rubin).

There is an argument that some judges exaggerate the number of "easy" cases in order to mask the discretion they have in rendering their decisions. Nevertheless, the Council is troubled that too often the Seventh Circuit is turning even "easy" cases into "hard" or "very hard cases."

^{10/} It is a traditional role for a concurring opinion to telegraph a view on the merits of an issue that is not presented. This is generally accepted, since concurrences lack the same appearance of being a binding statement of the law. It is far more problematic for a majority opinion to express a view on an issue not clearly before the Court.

is drafted, positions often harden; the author of the majority opinion is often unwilling to make changes to accommodate the points raised in the dissent or concurrence.

Ideally, each judge likely would call or visit a colleague before committing a concurrence or dissent to writing. In addition, the author of a majority opinion might frequently change his or her phrasing after seeing a written dissent or concurrence, making many such opinions unnecessary. However, it is possible (though regrettable) that some judges feel that their points will likely go unheeded by the majority, so they do not bother raising them in advance. It is also possible, given the liberal use of dicta by some members of the Court, that some judges prefer to commit their doubts to writing as an attempt to inoculate against the dicta in the case before them, or on related matters.

In a perfect world, all judges, lawyers, and the public would recognize dicta as such and many separate opinions could be avoided. Nevertheless, the Council firmly believes that is not what happens. Instead, dicta is advanced by responsible advocates as evidence of the law's likely outcome. Dicta is viewed as almost binding by District Judges, particularly in the absence of a separate opinion explicitly limiting or questioning the dicta. Accordingly, dicta becomes law by appellate court lawmaking instead of via the decision of issues fully briefed and presented by the parties after full consideration by a panel of appellate judges.

The Council believes, therefore, that separate opinions serve a real purpose.^{11/} In addition to stating fundamental disagreements on issues, it is very useful, given the broad opinions written by some judges in this Circuit, for judges to write separately to identify portions of the majority opinion that are not necessary to the decision, or to point out issues that have not been given the consideration they deserve by the Court. The Council does not believe that principled concurrences and dissents to overly broad opinions will impair collegiality. They are, instead, a recognition of the importance of each judge's view as an individual.^{12/} Further, principled concurrences and dissents need not be lengthy, and need not overwhelm the Court with additional work, or significantly contribute to its backlog. A one or two paragraph statement of the point of disagreement will often suffice.^{13/} In addition, concurrences and dissents need not be personal. We note, as set out below, some judges on the Court

^{11/} There is relatively little scholarly literature on the virtues and vices of separate opinions, and most of it focuses on the U.S. Supreme Court. For recent commentaries, *see* Bennett, *A Dissent on Dissent*, 74 *Judicature* 255 (1991); Ginsburg, *Remarks on Writing Separately*, 65 *Wash. L. Rev.* 133 (1990); R. Posner, *The Problems of Jurisprudence* 448, 461 (1990); R. Posner, *The Federal Courts, Crisis and Reform* 232-42 (1985); Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 *U.C. Davis L. Rev.* 777 (1990); Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 *Temple L. Rev.* 307 (1988).

^{12/} They are useful despite the fact that all dissents and most concurrences do not state law binding on the Court or on District Courts. By pointing out issues that have not been fully considered, or language that is dicta and not binding, dissents and concurrences clarify which issues remain open for further consideration by the Court. That clarification can be relied on by District Judges, lawyers and litigants, and the Court itself in later cases.

^{13/} *See, e.g., Barron v. Ford Motor Co. of Canada, Ltd.*, 965 F.2d 195, 202 (7th Cir.) (Ripple, J., concurring), *cert. denied*, 113 S. Ct. 605 (1992).

regularly dissent and concur without making personal attacks and, as far as the Council is aware, without in any way impairing the Court's collegiality. We urge the other judges on the Court to follow their example.

2. **Waiver and reaching out to decide issues that
have not been briefed or that need not be decided.**

a. **The Court should not decide unbriefed issues.**

As discussed above, the Council believes that the Seventh Circuit is too prone to decide cases on issues that were not briefed by the parties. In addition, the Court rarely requests further submissions by the parties when it is about to decide an issue not submitted by them.^{14/}

Whenever the Court (or a judge of the Court) is considering addressing significant or potentially dispositive issues, precedents, legal theories, arguments, or facts not contained in the briefs and the record, the Court should notify the parties and provide them an opportunity to address these matters.^{15/} Here are several examples:

- Before oral argument, if the Court discovers an issue that the parties can address in oral argument but have not briefed, the Court should send a short written notice to the parties asking them to prepare to address the issue at oral argument.
- In preparing for oral argument, if the Court locates a case or statute that it believes should be addressed by the parties, the Court should so notify the parties prior to oral

^{14/} See, e.g., Perry R. Pennington Co. v. T.R. Miller Co., 994 F.2d 390, 392-93 (7th Cir. 1993)(finding it lacked jurisdiction to hear appeal even though the jurisdictional issue was not briefed and the Court admitted it had the authority under Fed. R. Civ. P. 60(a) to correct the trial court error that it claimed divested it of jurisdiction); United States v. Spears, 965 F.2d 262, 269 (7th Cir.)(changing standard of appellate review for warrantless searches without briefs, argument, or *en banc* ruling), cert. denied, 113 S. Ct. 502 (1992); Kamen v. Kemper Fin. Serv., Inc., 908 F.2d 1338 (7th Cir. 1990)(*sua sponte* creating federal common law of demand on corporate directors), rev'd, 111 S. Ct. 1711 (1991). Cf. Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989)(*en banc*)(adopting a highly deferential standard of review for Rule 11 sanctions after requesting *amicus curiae* briefs from bar associations).

When the Court has asked for additional briefs, it has frequently been on jurisdictional questions. See, e.g., Chambers v. American Trans Air, Inc., 990 F.2d 317 (7th Cir. 1993)(court ordered briefing on jurisdictional issue, then decided that parties correctly interpreted District Court's orders); Peters v. Welsh Dev. Agency, 920 F.2d 438 (7th Cir. 1990)(Court *sua sponte* raised jurisdictional issue, requested briefs, postponed ruling until after argument, and ordered briefs on the merits, then dismissed appeal for want of jurisdiction after argument).

^{15/} See Ginsburg, *supra* note 6, at 214 (parties' contentions "ordinarily" determine the issues to be addressed); *id.*, at 214-15 & n.45 (practice in D.C. Circuit is to give parties a chance to brief issues raised by the court).

argument so that counsel can prepare. In this case, telephone and fax notice should suffice.

- During or after oral argument, if the Court discovers an issue that the parties should address, it should ask the parties to address it in writing. The response can be limited in both length and time. For example, an order directing simultaneous submissions not to exceed five pages within seven days would be entirely appropriate.^{16/}

There are four reasons that we understand may motivate the Court's reluctance to use this approach. First, the Court may believe that the parties' submissions will not be helpful. Second, the Court may fear that these submissions will delay the appeal. Third, the Court may be concerned that post-argument submissions will require the panel to reassemble and therefore will be inconvenient. Fourth, the Court may consciously be trying to develop an incentive system to encourage lawyers to present their arguments completely and concisely in their initial briefs.^{17/}

We believe none of these arguments is sufficient to justify the Court's present practice. Litigants have a right to be heard on the merits of any matter being considered by the Court prior to the Court's actions. This may or may not rise to the level of a due process right under the Constitution. Nevertheless, it is the theory underlying the Federal Rules of Appellate Procedure. Even more important, lawyers' and litigants' fundamental sense of fairness is offended when the Court reaches out to decide issues or relies on precedent that the parties have not had an opportunity to brief. Respect for the Court's decisions is diminished when the Court takes such an approach.^{18/}

In addition to being insufficient to outweigh the need for fair treatment of litigants, we believe each of these four concerns is mistaken. First, while it is true that some parties' submissions will not be helpful to the Court, we believe the Court underestimates the assistance that parties can provide. The parties understand the record and background of each lawsuit better than the Court does, or can. Precedents, issues, and factual questions can be placed in their context by the parties in ways that will help frame the issue for the Court. For

^{16/} A similar order is appropriate for complex issues discovered prior to oral argument that justify a written response.

^{17/} Cf. Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 230 (7th Cir.)(skeletal argument is waived)("[i]f we assume the lawyers' responsibilities, we unbalance the market for legal services and take time away from our consideration and decision of other cases"), petition for cert. filed, 61 U.S.L.W. 3446 (Dec. 3, 1992)(No. 92-977).

^{18/} This is part of a broader issue of the need for the perception of fairness in the court's procedures and proceedings. As observed by Judge Edwards, given the stature of the judiciary in general and the federal appellate courts in particular, the judiciary's attitude towards the law and its job affects other groups, notably attorneys practicing before those courts. Edwards, supra note 9, at 864. As Judge Edwards notes, "the emphasis placed on principle by one group will find itself reflected in the work of the others." Id. This leads Judge Edwards to conclude that "the Judiciary, therefore, bears a heavy institutional responsibility to nurture a conception of law and justice as principled ventures" Id.

example, the parties may not have raised arguments for tactical or factual reasons not readily apparent from the record.

Second, the type of notice and comment that we suggest will not lead to substantial delays of any appeal. Providing notice and an opportunity to be heard will not delay an appeal if done before argument. And even if done after argument, a short schedule for submissions will not be a substantial cause of delay.^{19/}

As to the third point, with modern communications the judges can conference by phone or by fax if necessary. If the point is substantial enough to be a potential basis for decision, it is certainly substantial enough to give the parties an opportunity to address it. And if a conference is needed, that only highlights why the parties should be given an opportunity to address the point.

Finally, the "one bite at the apple" argument does not answer the fairness concerns that we raise. The adversary process sometimes places the Court in a position where it may see issues not fully addressed by the parties. The litigants should be given the chance to address how the facts (which they know better than the Court), precedent, and policy considerations affect the issues that the Court is considering for the basis of decision.^{20/}

b. The Court's practice on waiver is inconsistent.

The Court's willingness to address issues it wants to address -- whether or not those issues have been briefed -- stands in contrast to its strict enforcement of waiver rules to avoid addressing issues it does not want to address.

A recent opinion contains a good statement of the Court's formal rule:

[W]e conclude that . . . [appellant] has waived any claim to a due process violation. After raising the matter in his complaint, he let it lapse. He failed to argue it again during the proceedings leading up to the entry of final judgment, and he did not argue it in a post-final judgment motion or on appeal. See Hartz v. Friedman, 919 F.2d 469, 475 (7th Cir. 1990) (noting that an appellate court

^{19/} As we discuss at pp. 24-25 and 42-46 below, the Council is very concerned about the problem of delay in the Circuit. Nevertheless, allowing the parties to address issues before decision is appropriate, even if we are wrong and significant additional delay would result. In the Council's view, the benefits of accuracy in decisionmaking and the removal of the perception of arbitrary action far outweigh any incremental increase in delay.

^{20/} This is apparently the practice in the District of Columbia Circuit. See Ginsburg, supra note 6, at 214-15. In the view of an eminent former state Supreme Court Justice, the late Roger Traynor of California, if an appellate court is considering cases or legal theories not covered by the briefs, "it is only fair that the appellate court direct the attention of counsel to these materials, if it appears they may affect the outcome of the case, and give them the opportunity to submit additional briefs." Traynor, *Some Open Questions On the Work of State Appellate Courts*, 24 U. Chi. L. Rev. 211, 219 (1957).

generally considers only the arguments an appellant makes, not arguments he could have made).

Furthermore, we do not find this matter one of those rare instances where justice demands flexibility, causing us to examine a question the district court did not have the first opportunity to address. [Citations omitted.]

Brookins v. Kolb, 990 F.2d 308, 316 (7th Cir. 1993). Accord City of Chicago v. Matchmaker Real Estate Sales Center, Inc., 982 F.2d 1086, 1101 (7th Cir.) (issues not argued below are waived "except in rare cases involving jurisdiction or if justice demands flexibility"), cert. denied, 113 S. Ct. 2961 (1993).

In applying this rule, the Court has usually been very firm. In the recent case of Hartmann v. Prudential Ins. Co., 9 F.3d 1207 (7th Cir. 1993), the Court affirmed a summary judgment for an insurance company and its agent who had paid out a claim to a widow who was subsequently convicted of federal mail fraud charges in connection with the murder of the insured. The Court ruled that the plaintiffs' counsel had erred by pleading the wrong claims. The Court applied a strict rule of waiver, and explained why:

[Plaintiffs' counsel] had it backwards. They should have based the equitable reformation claim against Prudential on the fraud committed by . . . [the agent and the widow]. The only liability to which Prudential is properly subject on the facts of this case is vicarious liability, based on the acts or knowledge of its agent The plaintiffs mistakenly believed that the fraud claim depended on reforming the policies to name themselves as beneficiaries, and because of that mistaken belief have disclaimed vicarious liability. By disclaiming vicarious liability, the plaintiffs disclaimed . . . [relevant case authority]. Their disclaimer disclaimed them out of court.

We are not happy with this result. This is a sympathetic case for the plaintiffs. But we cannot have a rule that in a sympathetic case an appellant can serve us up a muddle in the hope that we or our law clerks will find somewhere in it a reversible error. One consequence of such an approach would be that prudent appellees would have to brief issues not raised or pressed by appellants lest the appellate court fasten on such a (non)issue and use it to upend the judgment of the trial court. So briefs would be even longer than they are, and their focus even more diffuse. Another consequence would be to diminish the responsibility of lawyers and to reduce competition among them, since the court would tend to side with the weaker counsel even more than it does anyway, at least when his was the more appealing case. Our system unlike that of the continent is not geared to having judges take over the function of lawyers, even when the result would be to rescue clients from their lawyers' mistakes. The remedy, if any, for the questionable tactical decisions apparently made by the plaintiffs' counsel in this case lies elsewhere.

It is true that courts sometimes relieve parties from the consequences of their waivers, even if the case does not fall within one of the established

exceptions such as those for issues of jurisdiction or comity. We did that in a recent case where the defendant had waived an issue in the district court but it was a pure issue of law fully briefed in our court and we could find "no reason to defer its resolution to another case. There will be no better time to resolve the issue than now." *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746, 750 (7th Cir. 1993). This is not such a case. Nor is it a case, most famously *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), where a court decides to reexamine a precedent so deeply entrenched in the law that a litigant might not think to challenge it – though, even so, the court's procedure in *Erie* has not escaped criticism. See, e.g., Henry J. Friendly, "In Praise of *Erie*--and the New Federal Common Law," in Friendly, *Benchmarks* 155, 171-72 and n.71 (1967). This is a case in which the lawyer for a party tells the appellate court that he does not base his claim on grounds X and Y . . . but the court's independent research and reflection persuade the court that the lawyer is wrong. If reversal on such grounds is proper, we no longer have an adversary system of justice in the federal courts.

Hartmann, 9 F.3d at 1214-15. See also In re Tolona Pizza Products Corp., 3 F.3d 1029, 1033 (7th Cir. 1993)(failure to argue that District Court used wrong standard of review in reversing Bankruptcy Judge's findings waives attack on findings)(Flaum, J., dissented); In re Scarlata, 979 F.2d 521, 527 n.7 (7th Cir. 1992)(question not argued effectively enough to warrant discussion); Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 230 (7th Cir.)(skeletal argument is waived), petition for cert. filed, 61 U.S.L.W. 3446 (Dec. 3, 1992)(No. 92-977); Mason v. Ashland Exploration, Inc., 965 F.2d 1421, 1425 (7th Cir. 1992)(party waives waiver argument by failing to raise waiver issue at the first opportunity); Deppe v. Tripp, 863 F.2d 1356, 1360-65 (7th Cir. 1988)(extremely limited, if any, plain error rule in civil cases)("[i]n civil cases where economic and property interests are usually at stake, as opposed to criminal cases where more substantial liberty interests are involved, a plain error doctrine is unneeded"); Tom v. Heckler, 779 F.2d 1250, 1258-59 (7th Cir. 1985)(Posner, J., dissenting)(collecting cases).^{21/}

Yet in other cases, the Court has allowed issues to be raised that were waived by parties, without articulating why justice requires overlooking the waiver. See, e.g., United States v. Spears, 965 F.2d 262 (7th Cir.)(changing standard of review for warrantless searches without briefs, argument, or *en banc* ruling), cert. denied, 113 S. Ct. 502 (1992); Flamm v.

^{21/} Cf. Burdett v. Miller, 957 F.2d 1375, 1380 (7th Cir. 1992)(Posner, J.):

Ours is an adversarial system; the judge looks to the parties to frame the issues for trial and judgment. Our busy district judges do not have the time to play the "proactive" role of a Continental European judge. True, they want to do justice as well as merely umpire disputes, and they should not be criticized when they point out to counsel a line of argument or inquiry that he has overlooked, although they are not obliged to do so and (with immaterial exceptions) they may not do so when an issue has been waived. [Emphasis added, citations omitted.]

See also Thompson v. Paasche, 950 F.2d 306, 315 n.7 (6th Cir. 1991)(criticizing Seventh Circuit's discussion of plain error rule in Deppe).

Eberstadt, 814 F.2d 1169 (7th Cir.)(deciding issue not raised by parties), cert. denied, 484 U.S. 853 (1987); Skycom Corp. v. Telstar Corp., 813 F.2d 810, 817-19 (7th Cir. 1987)(remanding to allow District Court to address issues not raised by parties).^{22/} The only apparent reason was that the issue was one of interest to the panel.

A review of the Court's cases suggests that the Court has not consistently applied its own rule of law, as stated in Brookins. The Court's actions in this area have been far too capricious. The Court should adopt a standard on waiver, and then apply it consistently. Otherwise, the decision whether to consider an issue that has not been raised appears to depend on whether the issue strikes the fancy of the panel.

- c. **The Court is willing to decide issues which are, or should be, before another forum, or are otherwise not necessary to the resolution of a case.**

The Seventh Circuit's "activist" approach causes it to decide issues that are not necessary for deciding a case. This activism has occurred in several cases where the Court refused to certify a controlling question of state law or decided an issue that was already before the U.S. Supreme Court following a grant of *certiorari*.

Circuit Rule 52 allows the Seventh Circuit to certify controlling questions of state law for decision by a state Supreme Court. The Court also can defer decisions when an issue presented by a case is currently pending before a state Supreme Court or the U.S. Supreme Court. The Court has, however, refused, at times, to issue such a certification or to defer a decision, even though such an approach was warranted. In Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388, 1395 (7th Cir. 1992), the Court decided an Illinois state law issue, despite being aware that the same issue was pending in another case in the Illinois Supreme Court. The Court could have held the case until the state Supreme Court decided the issue, or could have certified the issue to that court so the two cases could be considered together. Instead, the Court issued an advisory opinion, explicitly acknowledged as such.^{23/}

^{22/} See also Gacy v. Welborn, 994 F.2d 305, 308-09 (7th Cir.)(Court decided issues that were not of record and had not been briefed, but were raised by a District Court decision in another case)(stating that interests in finality in habeas corpus petition in a death penalty case outweighed normal rules of procedure), cert. denied, 114 S. Ct. 269 (1993); Glass v. Dachel, 2 F.3d 733, 739-40 (7th Cir. 1993) (county and sheriff allowed to raise Pickering defense to unconstitutional discipline case brought by employee even though defendants failed to raise defense in response to summary judgment motion). Cf. CFTC v. Collins, 997 F.2d 1230 (7th Cir. 1993), where the Court decided an issue "not presented . . . with the perspicuity ordinarily required to preserve an issue for appellate review; it is mentioned in their appeal brief, but only in passing." 997 F.2d at 1234. In Collins, the Court explained why it decided the question: "We are disposed to be lenient, however, where larger interests are at stake than those of the immediate parties" Id.

^{23/} The willingness of a majority of the Court to certify questions to a state Supreme Court may have changed. The Court just issued an *en banc* opinion in Todd v. Societe BIC, S.A., 9 F.3d 1216 (7th Cir. 1993)(*en banc*), in which a 6-5 majority certified two questions to the Illinois Supreme Court. The Illinois Supreme Court, however, refused to accept the certification. See Lighter case heads back to 7th Circuit, Chi. Daily L. Bull. at 1 (Nov. 23, 1993).

(continued...)

An unnecessary advisory opinion was also issued by the Court in Mojica v. Gannett Co., 7 F.3d 552 (7th Cir.)(*en banc*), petition for cert. filed, 62 U.S.L.W. 3378 (Oct. 28, 1993)(No. 93-800). In Mojica, the Court decided a question concerning the retroactivity of the Civil Rights Act of 1991. The Supreme Court had already agreed to decide that issue. See Landgraf v. USI Film Products, 113 S. Ct. 1250 (1993). As Judge Ripple pointed out in his dissent, "it is a significant judicial diseconomy for this court to proceed to judgment in this *en banc* proceeding" 7 F.3d at 570.²⁴

C. Comments on the Court's Operation and Internal Procedures.

In this section we review the Court's internal procedures with respect to matters such as jurisdictional rules, sanctions, delay in deciding cases, page limitations, panel assignments, oral arguments, petitions for rehearing, and settlement procedures. Some of our comments concern relatively minor matters. Others are of more significance.

Throughout, we are concerned with some recurrent issues. First, the Council finds that the Court in many areas imposes procedural rules and applies them in a way likely to interfere with the ultimate goal of speedy, efficient, and inexpensive resolution of litigation on the merits. Harsh application of a multitude of rules governing minor areas of practice involves the Court and litigants in expensive detours away from ultimate resolution of the merits. Second, the Council finds that the Court often acts adversely to litigants without giving them reasonable notice and an opportunity to be heard. This increases delay and expense as litigants seek to correct mistakes. It also fosters a sense that the Court itself does not respect and promote the orderly resolution of disputes. We illustrate these concerns in the discussion below.

²³/(...continued)

The refusal of the Illinois Supreme Court to accept certification in the Todd case may be construed by some judges as vindication of their view that they should not bother with certification. The Council believes that the refusal of the state Supreme Court to accept certification in one or two cases should not dissuade the Seventh Circuit from issuing a certification where it is appropriate.

²⁴ See also United States v. Lechuga, 994 F.2d 346, 355-56 (7th Cir.)(*en banc*)(Flaum and Kanne, JJ., concurring)(criticizing majority opinion by Judge Posner as unnecessary advisory opinion), cert. denied, 62 U.S.L.W. 3349 (1993)(No. 93-6308); Harris v. Board of Governors of Federal Reserve Sys., 938 F.2d 720, 724-25 (7th Cir. 1991)(Ripple, J., concurring)(arguing that the majority gave an advisory opinion after finding the case was moot); Norris v. United States, 687 F.2d 899, 904-05 (7th Cir. 1982)(in *pro se* appeal, without oral argument or argument of counsel, holding that prior Supreme Court precedent was no longer good law)(Cudahy, J., concurring)(arguing that ruling was not necessary to decision).

1. The Court's concern for its own needs.

Many lawyers are first introduced to the Seventh Circuit's practices and procedures by its *Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit* (1992 ed.) ("*Handbook*"), a publication available in the Clerk's Office. The *Handbook* explains the steps a lawyer must follow to litigate an appeal in the Seventh Circuit.^{25/}

The *Handbook* is, in general, a well-written and very useful publication. Some of its language, however, reveals more than its authors may have intended. Both its tone and its content are a series of admonitions to strictly adhere to the Court's rules. The *Handbook* makes it clear that the rules are for the administrative convenience of the Court. While these rules do not necessarily stem directly from the Federal Rules of Appellate Procedure, failure to follow them may have dire consequences. As the *Handbook* says: "Consistent and strict compliance with these rules and court orders is required of all attorneys handling appeals in this court." *Id.* at 40. According to the Court, this strict compliance "enables the court to handle its cases effectively and smoothly" *Id.*

The Council is aware that the Court perceives that many of the practitioners who appear before it do sloppy work, are unprepared for oral argument, and seem ignorant of -- or worse, indifferent to -- the Court's rules. Many of these lawyers may be first-time advocates before the Court.^{26/} Many of the cases do not provide sufficient economic returns to the client to justify hiring a more experienced lawyer or authorizing a lawyer to spend more time to prepare the briefs and argument. The Council does not minimize the need for rules. Nevertheless, when there are legitimate reasons for extensions of time, longer briefs, or other departures from the Court's standard model for briefing an appeal, those departures should be freely authorized.

The *Handbook* illustrates a frequent complaint against the Court -- that it is too concerned with the demands of managing its own business and not enough aware of, or concerned about, the real needs of lawyers and parties in litigating cases. The Council believes that the Court does not consider litigants as its customers. For the most part, it should. While it is true that the Court does not function in a market, and need not sell its services, its services are consumed by litigants. While the Court's decisions have a broader audience, as long as it remains true that a court can decide only the conflicts brought before it by real litigants, its obligations, in the first instance, are to those who have brought their disputes to it for resolution.

While the analogy of litigants as customers is obviously imperfect, it illustrates some of the problems with the Court's approach in drafting procedures in favor of facilitating its internal operations over adverse effects on litigants. In drafting procedures, the Court needs

^{25/} A new edition of the *Handbook* is being issued in early 1994. The Council hopes that some of the suggestions made in this Evaluation can be included in the new edition.

^{26/} Unlike the Northern District of Illinois' Trial Bar, there is no experience requirement for the conduct of an oral argument or the filing of a brief before the Court.

to show much greater appreciation of the effects of its actions on the ability of litigants to fully and efficiently present their cases. There are several areas in which this problem is revealed.

a. Excessive concern with jurisdiction and other procedural matters.

During the past decade, the Seventh Circuit has become perhaps the premiere court in the country for quirky jurisdictional decisions. All appellate courts and federal courts are courts of limited jurisdiction, and have an obligation to explore the basis for their jurisdiction in each case, if it is doubtful. The Seventh Circuit, however, has a tendency to find jurisdictional issues where other appellate courts would not. In addition, the Court has failed to articulate clear and simple jurisdictional rules to enable practitioners and the District Courts to know when and how to produce appealable orders.

Perhaps the best recent example of the Court's tendency to abuse a jurisdictional ruling to avoid a decision on the merits is its opinion in Perry R. Pennington Co. v. T.R. Miller Co., 994 F.2d 390 (7th Cir. 1993). There, the Court raised at oral argument *sua sponte* the question of whether the case was appealable because the last order issued by the District Court remanded the "action" to state court, after the District Judge dismissed federal claims. The Court acknowledged that the District Judge had not intended to remand the entire action, but only the claims he had not dismissed. The Court also admitted that it had the power to correct the District Judge's error under Rule 60(a). Nevertheless, the Seventh Circuit, having raised this matter *sua sponte* without briefing, failed to correct the error -- or at least invite a Rule 60(a) motion by appellant. Either approach would have been proper. Instead, it dismissed the appeal for lack of jurisdiction.^{27/}

^{27/} The Court's final paragraph states:

"Notwithstanding the clerk's failure to comply with Rule 58, the requirement of a separate judgment may be deemed waived when the final disposition of the district court clearly was intended to be the final decision in the case." The problem here is that the district court's June 10 order dismissed Count 3 and then remanded the "action" to the Illinois state court; the order did not simply remand Count 3. The word "action" suggests that the judgment refers to more than just Count 3. Since Counts 1 and 2 were never dismissed, we must assume that "action" in the judgment of June 10 meant all three counts still before the court. When a district court remands an action to a state court for lack of subject-matter jurisdiction, 28 U.S.C. § 1447(d) "puts the remand beyond our ken." The only reason the district court gave in its June 10 order for its remand to state court was that it lacked subject matter jurisdiction. Pennington should have realized the defect in the district court's order and moved under Fed.R.Civ.P. 59(e) or Fed.R.Civ.P. 60(a) to alter, amend or correct the judgment. Pennington did not, and thus we do not have jurisdiction to hear this appeal.

Penny R. Pennington Co., 994 F.2d at 392-93 (footnotes and citations omitted)(emphasis added).

See also, e.g., Peters v. Welsh Dev. Agency, 920 F.2d 438 (7th Cir. 1990)(Court *sua sponte* raised jurisdictional issue, requested briefs, and determined after argument on the merits that it had no jurisdiction to consider an appeal of a District Court order dismissing complaint without prejudice, even though the District Court refused to reinstate the case or take any further action).

The Federal Rules of Civil Procedure were designed to allow cases to be decided speedily, on their merits. See, e.g., Rules 1, 15(b), 60(a).^{28/} At times, the Seventh Circuit honors the spirit of the rules. See, e.g., Duff v. Marathon Petroleum Co., 985 F.2d 339 (7th Cir. 1993)(criticizing District Judge for hypercritical procedural approach and reversing grant of summary judgment); United States v. Security Pac. Business Credit, Inc., 956 F.2d 703, 707-08 (7th Cir. 1992)(permitting government to amend complaint five days before trial); Duran v. Elrod, 713 F.2d 292 (7th Cir. 1983)(possible defect in notice of appeal does not defeat jurisdiction when parties have argued the merits)(Federal Rules favor decisions on merits over rejected approach that pleading is a game of skill in which one misstep by counsel may be decisive to outcome), cert. denied, 465 U.S. 1108 (1984).

More often, however, the Seventh Circuit gives the impression in its jurisdictional and other procedural rulings that it desires to resolve as few cases as it can on the merits. See, e.g., Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654-55 (7th Cir. 1984)(applying fact pleading approach to dismissal of antitrust complaint).^{29/} The Seventh Circuit's jurisdictional rulings have created a minefield for attorneys and District Judges. While the Court prides itself on announcing clear rules, inexplicably, that has not been the result in this area. At a minimum, a misstep now causes wasted effort. Sometimes, even worse consequences follow. See, e.g., Penny R. Pennington, *supra*.

Another area where the Seventh Circuit has been very harsh is in its refusal to allow parties to amend their pleadings. See Holstein v. Brill, 987 F.2d 1268 (7th Cir. 1993)(bankruptcy judge abused discretion by allowing amendment of claim); O'Rourke v. Continental Casualty Co., 983 F.2d 94 (7th Cir. 1993)(employee not entitled to amend discrimination complaint to add retaliation claim)(Wood, J., concurring, cautioned against strict application of majority opinion); In re Rivinius, Inc., 977 F.2d 1171 (7th Cir. 1992)(refusing to allow party to amend pleadings to reflect case actually tried)(Cudahy, J., dissenting, accusing the Court of "resuscitating the theory-of-the-pleadings doctrine"); Daughterity v. T aylor Bros., Inc., 970 F.2d 348, 353 (7th Cir. 1992)(holding that District Court should not have granted leave to amend answer); Burdett v. Miller, 957 F.2d 1375, 1380 (7th Cir. 1992)(refusing to allow party to amend complaint after trial to conform to evidence). The clear pattern is an

^{28/} See also, e.g., Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. Pitt. L. Rev. 853, 853-55 (1989). There, Judge Keeton noted: "A 'just . . . determination,' in the sense that phrase is used in Rule 1, occurs when the dispute is resolved A) on the merits, and B) as determined by governing substantive law." 50 U. Pitt. L. Rev. at 853.

^{29/} See also Hirshman, *Foreword: Tough Love: The Court of Appeals Runs the Seventh Circuit the Old Fashioned Way*, 63 Chi.-Kent L. Rev. 191, 195 (1987)(hereinafter cited as "*Tough Love*") (arguing that the Seventh Circuit's jurisdictional decisions reflect a substantive commitment to minimize the reach of the federal courts); Heck v. Humphrey, 997 F.2d 355 (7th Cir.) (affirming dismissal of prisoner's lawsuit, instead of stay, for failure to exhaust state remedies, even though statute of limitations may prevent refiling of suit)(ruling is contrary to the decisions of the four circuits that have addressed this issue), petition for cert. filed, (Sept. 29, 1993).

exceptionally strict application of jurisdictional and procedural rules.^{30/} Again, the Seventh Circuit's approach prevents cases from being decided on the merits, with no clear offsetting benefit either to the public or the judicial system as a whole.

b. Sanctions.

In the early to mid-1980's, the Seventh Circuit seemed to be moving towards the position that a losing appeal could subject an appellant and its attorney to a substantial risk of sanctions.^{31/} This tendency appeared to be a manifestation of the desire of some judges to reduce what they saw as an uncontrollable appellate caseload by discouraging lawyers and litigants from taking appeals and, perhaps, a desire by some to move our legal system closer to the "English rule" where the loser pays the winner's attorneys' fees. See generally, e.g., Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983)(approving sanctions for "bad faith" litigation, despite dissent on merits).^{32/}

^{30/} See also, e.g., Knox v. WP, 998 F.2d 1405 (7th Cir. 1993)(affirming District Court's refusal to accept tardily-filed brief in response to summary judgment motion)("In today's climate of crowded dockets and limited judicial resources, a district court is not required to accept and to consider a response that is submitted after the court has ruled on a motion"); Harold Washington Party v. Cook County, Illinois Democratic Party, 984 F.2d 875, 880 (7th Cir.)(affirming District Court's refusal to reopen case, despite claim of meritorious defense, due to delay in filing papers, although recognizing "facts in this case are not as egregious as some"), WP, denied, 114 S. Ct. 86 (1993); WP v. Delaney, 969 F.2d 373, 375-77 (7th Cir. 1992)(affirming dismissal for failing to complete service of process); Schulz v. Serfilco, Ltd., 965 F.2d 516 (7th Cir. 1992)(affirming grant of summary judgment for failing specifically to deny one of "uncontested" statement of facts under local rule)(failing to grant party opportunity to amend answer to correct obvious oversight); Nelson v. City Colleges of Chicago, 962 F.2d 754 (7th Cir. 1992)(gross negligence of counsel not grounds for reopening litigation)(client's remedy is in legal malpractice action); Gomez v. Chody, 867 F.2d 395 (7th Cir. 1989)(affirming denial of Rule 60(b) motion when plaintiffs came forward with evidence that would have prevented summary judgment, since plaintiffs failed to exercise due diligence)(Cudahy, J., dissented). But see Glass v. Dachel, 2 F.3d 733, 739-40 (7th Cir. 1993)(county and sheriff allowed to raise Pickering defense to unconstitutional discipline case brought by employee even though defendants failed to raise defense in response to summary judgment motion).

^{31/} The Council makes these observations not because we act as a guild protecting lawyers. For over two decades, we have worked hard to improve the legal system whether or not the improvements adversely affect the parochial interests of attorneys. We have long focused on improving public participation in and confidence of the attorney discipline system in Illinois. Indeed, the Illinois Supreme Court created the Illinois attorney disciplinary agency in response, in part, to the efforts of the Council. See Final Report of the Illinois Supreme Court Special Commission on the Administration of Justice, vol. I, at 227 (1993). Although it is true that the Court's sanction practice has made the lives of some attorneys more difficult, that is not our complaint. Rather, it is that certain actions of the Court are fundamentally unfair and affect the confidence of litigants, their attorneys, and the public in the fairness of the system.

^{32/} The Analytica opinion was criticized on these grounds in Hirshman, Tough Love, supra note 29 at 202. See id., at 199-206 for a review of several cases from that era.

At times, the Seventh Circuit's decisions regarding sanctions showed a lack of concern with basic principles of notice and due process. In some cases, the Court imposed sanctions *sua sponte*, without giving a lawyer or litigant an opportunity to explain his or her behavior before sanctions were imposed. See, e.g., Weinstein v. University of Illinois, 811 F.2d 1091, 1098 (7th Cir. 1987); Westinghouse Elec. Corp. v. NLRB, 809 F.2d 419, 425 (7th Cir. 1987).

A similar concern was raised by the Court's actions in United States v. Best, 913 F.2d 1179 (7th Cir. 1990), rev'd, 939 F.2d 425 (7th Cir. 1991)(*en banc*), cert. denied, 112 S. Ct. 1243 (1992). In that case, the panel opinion for the Court excoriated an Assistant U.S. Attorney for allowing the Government's binders -- which consisted solely of material entered in evidence -- into the jury room. Without giving the Assistant U.S. Attorney an effective opportunity to respond, the Court said it was "persuade[d] . . . that in all likelihood the prosecutor dispatched the binders to the jury knowing that they were not supposed to go there," 913 F.2d at 1183, and referred the matter to the Illinois Attorney Registration and Disciplinary Commission. This action was taken despite the refusal of an experienced District Judge to find that any impropriety had occurred. The Court did take the case *en banc* and vacate the panel holding. But the *en banc* reversal of the panel opinion did not prevent the lawyer's career from being damaged by the equivalent of a *sua sponte* sanction, given without notice and an opportunity for counsel to explain the conduct.

After substantial protest, the Court enacted Circuit Rule 38, effective February 1, 1992, which requires it to give a lawyer or litigant notice and an opportunity to be heard before sanctions are imposed. In addition, the Court's decisions reflect a backing away from its attempt to use the threat of sanctions to curtail appeals in cases which it, in hindsight, considered easy.

While the Court usually follows Circuit Rule 38, see, e.g., Osuch v. INS, 970 F.2d 394, 396-97 (7th Cir. 1992)(*per curiam*), the Court continues to have an impulse to assess sanctions *sua sponte* and without adequate notice. A recent example is United States v. Ashman, 964 F.2d 596, 598 (7th Cir. 1992), where the Court turned a routine motion for leave to file an oversize brief by appellee as an occasion, *sua sponte*, and without real notice, to sanction appellants' counsel. That sanction was eventually withdrawn, see id. at 598; see also United States v. Ashman, 979 F.2d 469, 496 (7th Cir. 1992)(opinion following oral argument), cert. denied, 114 S. Ct. 62 (1993), but there was no excuse for its having been instituted in the first place, in derogation of the Court's own rule.

The Court at times seems unaware that criticism of an attorney in an opinion is a form of sanction. Indeed, it is a form of sanction that can, in practical terms, be more damaging than a formal, but unpublicized, censure or reprimand. See, e.g., Philips Medical Sys. Int'l B.V. v. Bruetman, 8 F.3d 600 (7th Cir. 1993)(reversing sanctions against one side, but ordering District Court's Executive Committee to investigate conduct of the lawyers for the other side), motion for reh'g filed, Court asked to delete comments in opinion on possible misconduct by two lawyers, Chi. Daily L. Bull. at 1 (Nov. 16, 1993)(discussing motion filed

following opinion in Philips case.) Circuit Rule 38 should also be considered as applying to criticism of a lawyer's conduct in a published opinion.^{33/}

Despite occasional slips, the Court's trend away from *sua sponte* sanctions shows that the Court can and does respond when the problems caused by its excessive concern for its operations are forcefully brought to its attention.

c. Delay.

While the Seventh Circuit is very prompt at setting oral argument in most cases, it is the slowest circuit in the country in issuing decisions after oral argument.^{34/} As shown in more detail in the statistical section below, this delay cannot be explained by caseload. Instead, it is the clear result of the Court's tolerance of slow judges.^{35/}

In the past, the Court has tended to treat this as a relatively minor problem. It is the Council's understanding that former Chief Judge Bauer did call other judges to request the issuance of overdue opinions, and that some progress has recently been made. Nevertheless, the statistics demonstrate that this approach was not effective.

Every party is entitled to prompt action by the Court. Litigants whose cases are assigned to a particular judge for the drafting of an opinion do not cease to have a right to a prompt decision. In the Council's view, it is the responsibility of the Chief Judge and the entire Court to ensure that all of the court's business is acted upon promptly. To effectuate that right, we suggest that the Court consider granting the Chief Judge authority to effectuate a mandatory reassignment of the responsibility for writing an opinion, if the opinion has not been issued within six months after argument, absent exceptional circumstances recognized by the Chief Judge.^{36/}

^{33/} The Council is not troubled by criticism of the type found in United States v. Alex Janows & Co., 2 F.3d 716 (7th Cir. 1993). There, the prosecutor defined "reasonable doubt" in closing argument, contrary to well-established case law. See id. at 722-23. The Court expressed its "incredulity" at the prosecutor's conduct, given the Court's repeated prior warnings, but found the error to be harmless. The criticism in Alex Janows was proportionate to the offense, did not single out the prosecutor by name, and was apparently made after the point was raised in the defendant's brief, the Government responded in its brief, and was given the opportunity to address the point in oral argument. Supervisors in the prosecutors' office will be aware of the criticism, and will take steps to see the conduct is not repeated. Further, the Council recognizes that the Court has an obligation under Canon 3(B)(3) of the Code of Judicial Conduct for United States Judges to "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." See Houston v. Partee, 978 F.2d 362, 369 (7th Cir. 1992)(directing Clerk to send opinion to the ARDC to monitor further litigation of allegations of gross prosecutorial misconduct), cert. denied, 113 S. Ct. 1647 (1993).

^{34/} See discussion at pp. 42-46 infra.

^{35/} As explained on pp. 1-2 of the Preface to the Appendix, the dates used in the study are taken from the length of time between argument and issuance of the opinion. In every case, ten days has been deducted from that number to reflect the approximate length of time it takes to print the opinions.

^{36/} Other circuits already have mechanisms to manage both isolated and systematic problems of delay. In the Second Circuit, for example, the court has monthly meetings at which the "60 day list" (cases in which more than 60 days has passed since oral argument) are publicly reviewed by the
(continued...)

Judges have traditionally been reluctant to institute such a policy because it means that conscientious judges in control of their docket have to work harder. In the Council's view, that is a fact of life that is unavoidable if the Court is to fulfill its responsibilities to litigants.

The Council has been assured that the Court is now actively considering the question of delay.

d. Page limitations.

The Federal Rules of Appellate Procedure provide a litigant 50 pages for presentation of its main brief in the usual case. That is enough space for most, but not all cases. For example, when a single appellant or appellee faces more than one opposing party, each of which has 50 pages, 50 pages may not be enough. In addition, the Seventh Circuit has frequently stated that it will not consider arguments that have not been discussed at some length in a brief.^{37/} Yet, many cases contain a large number of factual and/or legal issues. Also,

^{36/}(...continued)

judges. Feinberg, *The Office of Chief Judge Of A Federal Court of Appeals*, 53 Fordham L. Rev. 369, 385 (1984). In the District of Columbia Circuit, there is a similar monthly meeting, at which there is a presentation of each judge's current writing assignments. If a judge has too many cases awaiting completion of his opinion writing, the judge will be asked to stop sitting until he or she catches up. Ginsburg, *supra* note 6, at 214.

There are some cases, of course, that require more time. There may also be many legitimate reasons for a judge to be delayed in writing some opinions. Nonetheless, time limits (with an escape clause for the exceptional case) assure that the vast majority of cases are handled without undue delay.

^{37/} See, e.g., *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225, 230 (7th Cir.) (skeletal argument is waived), *petition for cert. filed*, 61 U.S.L.W. 3446 (Dec. 3, 1992) (No. 92-977); *In re James Wilson Assocs.*, 965 F.2d 160, 170 (7th Cir. 1992) (same); *United States v. Berkowitz*, 927 F.2d 1376, 1392 (7th Cir.) (Coffey, J., concurring in part and dissenting in part) (even though issue regarding constitutional violation was clearly raised on appeal, it was waived because of its "cursory treatment"), *cert. denied*, 112 S. Ct. 141 (1991); *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 891 (7th Cir. 1989) (*en banc*) ("failure to specifically articulate" an argument waived it), *rev'd on other grounds*, 499 U.S. 187 (1991); *Max M. v. New Trier High School District No. 203*, 859 F.2d 1297, 1300 (7th Cir. 1988) (scattershot arguments offered without extended discussion are insufficient) ("we decline to consider constitutional arguments that are offered undigested"); *Jungels v. Pierce*, 825 F.2d 1127, 1130 (7th Cir. 1987) (Court will not consider arguments that are raised but not developed); *Bonds v. Coca-Cola Co.*, 806 F.2d 1324, 1328-29 (7th Cir. 1986) (brief does not contain adequate discussion of relevant portion of record); *Hershinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984) (argument presented in perfunctory and underdeveloped manner is waived).

The Council recognizes that some of these cases involved briefs that were not close to the fifty-page limit. Despite the circumstances of any particular case, the Court's frequent repetition of its position that arguments in briefs must be fully developed creates a tension that is unfair to lawyers and, more importantly, to litigants in complex cases.

the Seventh Circuit not infrequently decides cases on grounds other than those invoked by the trial court. That requires the parties to brief issues that may not have been central below.

Taken together, these factors suggest that counsel in many cases are left in a real quandary -- they must fully discuss many issues, the discussion must be lengthy, but the total length of the brief is limited. In a significant number of cases, counsel legitimately need more than fifty pages to brief a case. However, the Court has viewed its own docket control as more important than full briefing of a case.

The Court has unequivocally announced its hostility to waiving the page limitations.

In rare cases, counsel may find that an adequate argument cannot be presented within the page limitations of Fed.R.App.P. 28(g). Extra pages are allowed only by leave of court. Because of the court's enormous workload and desire for concise and refined briefs, these enlargements are granted only in truly exceptional circumstances.

Handbook at 42.^{38/}

The Council understands the desire for concise and refined briefs. The statement, assumes, however, that in virtually every case competent counsel can produce such a brief within the 50 page limit. That is simply not true. In addition, it is no answer to litigants who are forced to truncate arguments that the Court has an "enormous workload."^{39/}

This problem is complicated by the Seventh Circuit's indication that it does not want counsel to use footnotes to "evade" its page limitation policies by moving material from double-spaced text to single-spaced footnotes. See Westinghouse Elec. Corp. v. NLRB, 809

^{38/} The *Handbook* continues:

Counsel should file a motion for leave to file an oversize brief long in advance of the due date. These motions are seldom granted and even then, only for a specific number of additional pages. Producing the brief before receiving permission can only result in needless delay and unnecessary production costs. The practice of tendering an oversized brief with a motion of leave to file has been unequivocally forbidden by this court. See United States v. Devine, 768 F.2d 210 (7th Cir. 1985)(*in banc*)[*per curiam*].

See also Connecticut Gen. Life Ins. Co. v. Chicago Title & Trust Co., 690 F.2d 115 (7th Cir. 1982)(Posner, J., in chambers)(regretting laxity in enforcing rule against accepting briefs filed *instantly*), cert. denied, 464 U.S. 999 (1983).

The Seventh Circuit has also further limited the parties' effective use of all 50 pages by requiring a mandatory jurisdictional statement, see Circuit Rule 28, which, unlike the table of contents, is not excluded from the page limit. See also Morgan v. South Bend Community School Corp., 797 F.2d 471, 480-81 (7th Cir. 1986)(questions presented and statement of the case must be included within the 50-page limit).

^{39/} It is by no means clear that the Court's workload is that heavy. See note 75 infra.

F.2d 419, 424-25 & 425 n.* (7th Cir. 1987).^{40/} Even if the footnotes are properly in the briefs, the Court has indicated that an argument made in the footnote may be insufficient to preserve a point for the Court's consideration. See Dresser Industries Inc. v. Gradall Co., 965 F.2d 1442, 1448 (7th Cir. 1992)(*per curiam*)(dicta). Sometimes, the Seventh Circuit's approach has led to extreme wastes of judicial resources, as the Court issues successive orders on whether or not a brief has met its standards of propriety. See, e.g., EDC, Inc. v. Navistar Int'l Transp. Corp., 915 F.2d 1082 (7th Cir. 1990)(Easterbrook, J., as motion judge)(compressed vertical type not permitted)(discussing 11-point and 11-pitch type).^{41/}

If a case appears to the Court to be complex, either factually or legally, the Court should give counsel any reasonable number of pages they request. Most lawyers understand that a concise brief improves their clients' chances on appeal, and will not abuse the request for more pages. If the Court finds that some lawyers do repeatedly abuse the process by filing excessive briefs, it should hold those lawyers more strictly to page limits.

A related problem is the Seventh Circuit's refusal to allow a party to file even a 50-page initial brief.^{42/} In United States v. Ashman, 964 F.2d 596 (7th Cir.)(opinion prior to oral argument), adhered to, 979 F.2d 469 (7th Cir. 1992)(opinion after argument), cert. denied, 114 S. Ct. 62 (1993), the Court refused to allow each defendant-appellant to file a 50-page brief in an appeal from a multiple defendant commodities fraud trial that lasted several months. The Court struck the defendants' briefs, ordered the submission of a single consolidated brief not to exceed seventy-five pages, and permitted each defendant to submit an additional brief not to exceed twelve pages. 979 F.2d at 495-96. The Council filed an *amicus curiae* brief supporting full briefing after the Court's initial ruling, and continues to believe the Court's ruling was in error. There are real due process questions about limiting a criminal defendant-appellant to a 12-page individual brief after a several month trial. While the Court may not appreciate reading full briefs from each defendant, each defendant's liberty is at stake. The trial took many months in the District Court. Defendants are entitled to a full hearing in the court of appeals before their conviction is considered. If the Court does not like

^{40/} There is, however, no proscription in the Federal Rules of Appellate Procedure, or the Circuit Rules, against the use of footnotes. Unwary counsel can submit a 50-page brief with extensive footnotes, then find that the Clerk will not accept it. Counsel must therefore pay strict attention to the Court's procedures. See Handbook at 41.

^{41/} In EDC, Judge Easterbrook denied appellant's third attempt at filing a brief instanter, after its initial motion for extra pages was denied. Judge Easterbrook issued an order to show cause why the appeal should not be dismissed as a sanction. After he heard the explanation, he vacated the order to show cause and a brief was filed. 915 F.2d at 1084-85.

^{42/} After the preparation of this Report, the Council was provided with a copy of proposed rules that the Court itself has submitted to its Rules Committee. These rules include a proposal to limit briefing of cross-appeals that would abrogate the present rule which essentially permits the cross-appellant to have more pages than in a single-party appeal. The proposal would, in every case, deny a cross-appellant any additional pages to present its cross-appeal and wholly denies a reply brief, absent leave of Court. Instead, a cross-appellant must make its entire presentation, both as appellee and cross-appellant, within the single brief and page limitation permitted it as appellee. The Council believes this proposal is misguided, and may submit a more detailed statement to the Rules Committee.

lengthy, multi-defendant, several month-long criminal trials, it should say so;^{43/} it should not take out its views on the defendants.

2. Assignments to panels and opinions.

The Seventh Circuit's official policy is to assign judges to panels at random. For a long time, many members of the bar have expressed their concern that assignments to panels are not in fact random. All evidence that the Council has seen is to the contrary, and the Council is convinced that the official policy is followed. However, assignments of judges to write opinions are not random, and some aspects of the Court's assignment policy are troublesome.

A panel hears six cases most days. The Court tries to balance each day's cases by assigning a mix of civil and criminal cases. In addition, the Court tries to assign some cases that have been allowed a short time for oral argument with others that have longer times assigned for argument because of perceived complexity. Also, the Court tries to assign a "difficult" case to each panel's sitting. This assignment process is conducted by the Circuit Executive, who reviews the briefs in all cases and then schedules each case. Randomness is achieved by not assigning judges to the settings until after the cases are set, and then assigning judges randomly.

After the last case of the day, the panel meets and the presiding judge assigns two cases to each judge for the drafting of the panel's opinions. The presiding judge (who is the Chief Judge or the most senior active Seventh Circuit Judge on the panel), usually tries to give one "easy" and one "more difficult" case to each member of the panel.^{44/}

The main problem with the presiding judge assigning cases is that judges are perceived as having areas of expertise. A judge with a strong interest in a subject matter will assign to himself (or herself) or be assigned a disproportionate number of cases in that area. This tendency is understandable, since it may minimize work for the other judges who are less familiar with that area. Congress, however, did not appoint a particular judge to be the "criminal" judge, or another judge to be the "establishment of religion" judge. The Seventh Circuit would never institute a rule to that effect, and the Council believes that it is wrong for the Court to

^{43/} See, e.g., United States v. Baker, ___ F.3d ___, 1993 U.S. App. LEXIS 32204, **14-15 (9th Cir. 1993)(stating court's concerns regarding "mega-trials").

^{44/} If the presiding judge is not in the majority in any case, the assignment is made by the next most senior judge. Since dissents are relatively rare, this does not happen often.

do by practice what it would not do directly. Indeed, multijudge appeals courts are created and sit in panels precisely in order to eliminate this kind of domination or specialization.^{45/}

The Illinois Supreme and Appellate Courts randomly assign cases before argument.^{46/} The Council believes that system creates even more problems, since it leads some appellate judges to pay attention only to the cases assigned to them. The Seventh Circuit's system has the benefit of encouraging every judge to prepare for every case, since any case might be assigned to him or her for drafting of the opinion. Thus, we do not recommend that the Seventh Circuit change its assignment system, but we do believe the members of the Court should ensure that too many cases of one type or another are not assigned to any individual judge. This could be facilitated if the Circuit Executive were to keep records of opinion assignments by subject matter.^{47/}

One other area of case assignment that troubles some attorneys is the Court's apparent unwritten practice of scheduling two unconsolidated cases that raise the same point of law for argument before the same panel. It is not clear from the Court's rules or *Handbook* how this happens, since it is not discussed. If the Court believes this practice is useful, it should enact a formal rule providing that such scheduling should be done by a judge or the Clerk's office. In each such case, notice of the joint scheduling should be given to all counsel, so each attorney can read the briefs in the other case or cases before argument and each

^{45/} The Council appreciates that some judges are better able than others to handle complex cases in certain subject areas. This is a partial explanation for why certain judges may dominate opinion writing in certain areas. Still, it is no answer to overconcentration, since the less experienced or able judge can call on the other panel members for assistance, if necessary.

The tendency of some judges to seek out more difficult cases is part of the reason why some judges' names seem to appear more frequently in the Federal Reporter. These same judges also are more likely to consider each opinion they write to meet the Court's standard for publication in Circuit Rule 53. Other judges may choose not to seek publication of their opinions in whole categories of cases, such as diversity personal injury cases. Thus, even though each judge is assigned the same number of cases, the number of published opinions and the number of opinions in significant cases may differ.

The ultimate decision on whether or not to publish an opinion is made by a majority of the panel, based on Circuit Rule 53. That rule says that a single member of a panel has the right to make an opinion available for publication, but is expected not to do so if the majority disagrees. That rule may be slightly harsh. If a single judge feels very strongly that the issues raised by an opinion merit publication, that judge should be permitted to publish the opinion.

^{46/} A common justification for random assignment is that it avoids the problems of one-judge dominance here discussed. As the late Justice Traynor of the California Supreme Court put it, under a random assignment system "no one judge carries overwhelming authority even in a field in which he is specially versed." Traynor, supra note 20, at 217. Random assignment of opinion writing is used by most of the state supreme courts. R. Posner, *Cardozo: A Study in Reputation* at 147 n.4 (University of Chicago Press 1990)(hereinafter cited as "*Cardozo*").

^{47/} We have been told that no such record currently exists.

lawyer is aware of other issues that may be before the Court and may affect the decision in his or her own case.^{48/}

Many courts announce panels in advance, but the Seventh Circuit does not. Lawyers believe they can better focus their arguments if they know their audience, and therefore prefer to know the assigned judge in advance. There are, however, both practical and theoretical difficulties to prior announcements. For example, if a lawyer knows the composition of a panel in advance, the lawyer may discover a sudden emergency that justifies a motion for re-scheduling the date of the argument. In addition, the Court rightly proceeds as though the members of its panels are fungible. Even though everyone knows there are substantial differences between judges, the sense of fairness is increased by the random and anonymous assignment of panel members.

One area of case assignment that may warrant reconsideration, however, is the practice of assigning new panels to successive appeals in cases, unless the Chief Judge determines otherwise. See Seventh Circuit Operating Procedure 6(b). This practice sometimes leads to unseemly results, where a second panel appears not to accept the decision made by the first panel. An example of this problem is the Chicago tort judgment case, Evans v. City of Chicago. The initial panel opinion, 689 F.2d 1286 (7th Cir. 1982), was reconsidered and described as "clearly erroneous" by a second panel, 873 F.2d 1007, 1013-16 (7th Cir. 1989) (panel does not have to follow law of the case if it strongly disagrees). The second opinion was later essentially ignored by a third panel, 995 F.2d 1393 (7th Cir. 1993). Rehearing *en banc* was subsequently granted and the third opinion vacated, No. 91-3277, 1993 U.S. App. LEXIS 21,677 (7th Cir. Aug. 19, 1993). A fourth opinion was issued overturning the third opinion, ___ F.3d ___, 1993 U.S. App. LEXIS 31,016 (7th Cir. Nov. 24, 1993) (*en banc*) (plurality opinion) ("the parties' current dispute arises out of the conflicting decisions of the first two panels").^{49/} Either the Court should reconsider its practice of assigning different panels to

^{48/} The notice could clearly state that the Court is not consolidating the cases, or otherwise formally linking them. The notice could explain that, even though the Court sees no formal connection between the cases, the Court does find it convenient to assign more than one case in the same general subject area to the same panel to minimize the possibility of inconsistent results and to facilitate study of a particular subject by the court. Counsel could then understand the other issues before the Court and be better prepared to address the Court's concerns in those cases where a question from one case may overlap issues from other cases.

The Court has from time to time received motions requesting that a case not be set at the same time as another case. The Court has routinely denied all such motions, taking the position that the parties have no right to address which cases are scheduled at which times (beyond notifying the Court of scheduling conflicts, vacations, etc.) The Court should consider stating this rule in its *Handbook*.

^{49/} Compare Philips Medical Sys. Int'l B.V. v. Bruetman, 8 F.3d 600, 603 (7th Cir. 1993) (at least tacitly criticizing leniency of prior panel's opinion in allowing defendant an opportunity to vacate default judgment), with 982 F.2d 211 (7th Cir. 1992) (earlier opinion by different panel in the same matter).

subsequent appeals in the same case, or its members should follow the law of the case, without trying to manipulate it.^{50/}

3. Oral argument.

Lawyers are often disappointed with the Court's questioning in oral argument. Part of this disappointment may be because lawyers' expectations are too high -- they expect the judges to know the case as well as they do (and better than the trial judge), and they want the judge to accept and discuss their theoretical framework for the case. Judges usually approach oral argument from a different perspective, seeking to fill in gaps in their understanding about the case, as well as, in some cases, seeking to make points about the issues presented by the case to counsel or to their colleagues.

In general, there is nothing about the Seventh Circuit's conduct of oral argument that differs from the other appellate courts the Council has studied, with two notable exceptions.^{51/} First, almost all the judges of the Seventh Circuit are routinely prepared for oral argument in a manner that is not always met by the Justices of the Illinois Supreme Court and the Illinois Appellate Court. They are to be praised for their preparation.

Unfortunately, the second difference is negative. As discussed in more detail in their individual evaluations below, the Council has received consistent complaints about the conduct at oral argument of two judges, Judges Coffey and Easterbrook. The Court's behavior in oral argument is the responsibility of the entire panel and, indeed, the entire Court. Litigants and lawyers are entitled to courtesy and respect.

It is the responsibility of the other judges on the panel to stop improper behavior as soon as it occurs. The Council understands that this is unpleasant, because it may require that the other two judges admonish one of their colleagues publicly. Nevertheless, all public officials, including appellate judges, have the obligation to treat members of the public to whom they are providing services -- and lawyers -- in a civil manner.^{52/}

As noted above, some judges use oral argument in an apparent attempt to persuade their colleagues of a particular view about the case. This use of oral argument punctures the fiction that all judges come to the argument with, if not a blank slate, at least an open mind. On the other hand, most lawyers prefer to know how a judge or, indeed, the whole panel,

^{50/} Since the preparation of this Evaluation, the Court has advised the Council that it has proposed a new rule to assign successive appeals to the same panel.

^{51/} The Council did receive a few reports that at least one judge of the Court would occasionally signal the clerk keeping time to limit the time of an attorney to less than had been assigned to the case. The Council is not sure if this practice occurs. It should not. If the Court does not wish to hear further argument from a party, it should explicitly say so. Under most circumstances, counsel should be given their full allotted time.

^{52/} See the discussion of civility at pp. 41-42 *infra*. See also note 62 *infra*, discussing the Council's willingness to file formal complaints about misconduct.

perceives a case before the judges retire to deliberate. That knowledge gives a lawyer a chance to address arguments to the Court's concerns.

The Council does not believe that it is improper for a judge to suggest his or her views in oral argument.^{53/} The practice becomes troublesome when the judge becomes an advocate, sacrificing a proper judicial demeanor to make his or her points, such as by demeaning the position expressed by the lawyer. In addition, if one judge dominates the argument to the point where counsel is not permitted to present his or her responses and address concerns raised by other judges, substantial problems exist. As long as counsel is treated courteously and permitted to respond to the concerns of the judges of the panel, lawyers should not object to a judge suggesting his or her own views.

4. Motions and staff law clerks.

In the Seventh Circuit, substantive motions are presented either to a single judge, two judges, or a panel of three judges, depending on complexity.^{54/} The procedures for deciding how motions are assigned are set forth in the Seventh Circuit's Operating Procedures. Since panels are not assigned until about six weeks before oral argument, motions filed before that time will not regularly be assigned to the argument panel. These provisions are sensible.

The Court's Operating Procedures formally provide for a rotating motion judge and motions panel. Most pre-oral argument motions are reviewed by staff law clerks prior to presentation to a judge of the Court. The Council's inquiries suggest that in the past staff law clerks have not always adhered to a rigid rotation of motion judges and motion panels, but instead have contacted whichever judge is available and presented the motion for ruling. The Court has assured the Council that now a strict, random rotation system is followed.

One of the Court's practices with respect to motions is disturbing. The Court has two forms for deciding motions. One form is labelled "By the court," and the Council understands it is for routine motions resolved by the Court's staff. The other form identifies the judge or judges who ruled on the motion. Unfortunately, the Court from time to time has issued rulings on nonroutine, substantive motions on the "By the court" form. This is a problem for two reasons. First, it does not tell the parties how many judges decided the motion. A motion for reconsideration may well be more appropriate if an order has been issued by less than a full panel. Second, it does not tell the parties the identity of the judge or judges who decided the motion. That approach is contrary to our system, where the judicial officers who participate in ruling on a matter are always identified to the parties. In addition, lawyers will be better able to decide how to conduct future matters when they know which judge or judges have decided a motion. The "By the court" form should only be used for routine

^{53/} Justice Ginsburg admitted that questions are sometimes framed to elicit a concession. Ginsburg, supra note 6, at 210. She wrote that she finds the questions asked by other judges helpful, as they alert her to concerns that will have to be addressed at conference. Id. at 211.

^{54/} Routine motions, such as for a first extension of time or the consolidation of appeals arising from the same matter, are normally decided by court staff. See Seventh Circuit Operating Procedure 1(c).

motions decided by the Clerk's office. Whenever one or more judges acts on a motion, the name or names should be listed.^{55/}

There is one other area where the Court's practices with respect to motions should be reviewed. The Court almost never hears arguments on motions. Some appellate courts do hear motions on some matters. It may be useful to the Court and advance the timely and accurate resolution of the motion to schedule a brief oral hearing, particularly on substantive motions or questions related to jurisdiction. That hearing need not be conducted in person; a telephone conference would frequently suffice when either the judges or lawyers are in different cities. The Court should consider revising its practices, at least on an experimental basis, to permit oral argument of certain motions.

5. Appointments in pro bono cases.

The Court operates a pro bono panel for appointment of counsel to indigents on a "volunteer" basis. The Clerk accepts self-nomination for a spot on the panel. While the existence of the panel is certainly not a secret, it has not been well-publicized. For that reason, the membership of the panel does not appear to be a cross-section of the membership of the bar.

Many lawyers, particularly younger lawyers, would be interested in accepting a pro bono appointment in order to gain the experience of briefing and arguing a case in the Court. The Clerk and the Circuit Executive do mention the existence of the panel when they speak to lawyers' groups, but that publicity is not sufficient. Instead of making the opportunity to argue pro bono appeals generally known, the Court has allowed a situation to develop where too many appointments to the pro bono panel go to a few law firms.^{56/}

The Council recommends that the Court re-evaluate its process for making appointments. At a minimum, the Court should publicize the program to new admittees to the bar. In addition, for broader publicity, the Court could include a notice of the existence of the pro bono panel with the first notice or order it sends to counsel in every case.

^{55/} The Court has informed us that it uses the "By the court" form when a motion is decided by the panel that has been assigned to hear oral argument, prior to the argument. That happens if a substantive motion arises in the several weeks before oral argument. The Court uses the "By the court" form to conceal the identity of the assigned panel. Otherwise, counsel could determine the identity of the panel by filing a nonroutine motion that requires action shortly before argument. That practice is sensible, and may account for many, or even most, of the uses of the "By the court" form for nonroutine motions. That does not explain the use of the form after the case is argued, which has occurred.

^{56/} The Court has two practices in this area that are not publicized. First, it assigns cases that it views as requiring particularly strong briefs to counsel whose abilities it trusts. Second, it assigns cases that may involve large, unreimbursable costs to large firms that it views can afford the costs. The first practice is difficult to criticize. The second practice is more problematic. The Court can ask other counsel if they are willing to accept appointments in such cases, disclosing the amount of costs anticipated.

6. Court-assisted settlement efforts.

In the past decade, the Court has not taken an active role in promoting settlement of cases on appeal. The Council understands that the Court is reviewing possible programs to promote the pre-argument settlement of cases. Such programs have been successful in some appellate courts. The Council urges the Court to implement such a program on a trial basis.

Some cases could be settled before oral argument if the Court were to provide assistance to the parties. Most lawyers tend to find it easier to settle if a judge or former judge is actively involved to promote compromise by the parties. It does not make sense, however, for an active judge of the Court to be involved in the settlement efforts.

Not all judges have equal abilities to facilitate settlement. The Court should consider designating senior Circuit or District Judges, Magistrate or Bankruptcy Judges, or retired judges or magistrates, who are respected for their settlement ability, to act as settlement facilitators on behalf of the Court.^{52/} Before briefing in each non-pro se civil appeal, the Court should require a conference either in person or by phone between counsel and a settlement facilitator to explore whether settlement is possible. After the briefs are submitted, the settlement facilitator should review the briefs and then arrange a second conference, either by phone or in person, to explore settlement again.

The Council is concerned that the settlement facilitator position not be filled by an inexperienced attorney. The procedure is only likely to work in many cases if the parties have respect for the experience and judgment of the facilitator. While we believe that senior or retired federal judges are best suited for this role, if they are not available in sufficient number, the Court may wish to consider using senior members of the bar with substantial appellate experience.

7. Rehearings and rehearings *en banc*.

The Council recognizes that petitions for rehearing and suggestions for rehearing *en banc* place special burdens on the Court. The volume of petitions is enormous, and judges are forced to consider these petitions on a daily basis. The time that judges and their staffs can devote to such petitions is limited, and hence the Court's consideration of petitions for rehearing is limited as well. In the Council's view, however, the Court is not altogether free from responsibility for the volume of petitions for rehearing with which it must deal.

The Court has neither adopted nor enforced meaningful criteria for when it will grant suggestions for rehearing *en banc*. Hence, the bar has no clear sense of what types of cases are appropriate for such suggestions. Circuit Rule 40(c) states:

(c) *Required Statement for Suggestion of Rehearing In Banc.* Suggestions that an appeal be reheard in banc shall state in a concise sentence at the beginning of the petition why the appeal is of exceptional importance or with

^{52/} The parties may prefer that retired judges whom they respect be assigned this role. The Court may have to make arrangements for the payment of the retired judges.

what decision of the United States Supreme Court, this court, or another court of appeals the panel decision is claimed to be in conflict.

Because the first factor stated is "exceptional importance," and because the Court too often construes this factor very loosely, counsel view filing a suggestion for rehearing *en banc* as a gamble without rules.^{58/} Thus, counsel often file suggestions for rehearing *en banc* that present only fact-specific issues that should be reheard, if at all, by the original panel. The problem is exacerbated because of the Court's tendency to grant rehearing *en banc* in cases that are highly fact-specific, apparently because the case presents some highly charged issue even though the legal significance of the precise holding may not be that great. See, e.g., Billish v. City of Chicago, 989 F.2d 890 (7th Cir.)(*en banc*)(remanding for factual finding on whether affirmative action provided for by consent decree was justified by prior discrimination), cert. denied, 114 S. Ct. 290 (1993); Doe v. Small, 964 F.2d 611 (7th Cir. 1992)(*en banc*)(holding injunction granted by lower court was too broad, after fact intensive review of case involving the constitutionality of private religious speech in a public forum); Auriemma v. Rice, 910 F.2d 1449 (7th Cir. 1990)(*en banc*)(determining that there was no factual basis for affirmative action argument raised to support qualified immunity defense in action against police chief for demoting white police officers), cert. denied, 111 S. Ct. 2796 (1991); Greenberg v. Kmetko, 840 F.2d 467 (7th Cir. 1988)(*en banc*)(remanding for factual determination of qualified immunity in public employee's claim of retaliation for speech made outside office); Egger v. Phillips, 710 F.2d 292 (7th Cir.)(*en banc*)(overturning panel's ruling that summary judgment was not appropriate in case alleging intent to retaliate against FBI agent complaining of interdepartmental corruption), cert. denied, 464 U.S. 918 (1983). Thus, counsel are encouraged to believe that even fact-specific cases will be reheard *en banc*.

The rehearing process should serve two functions. First, the rehearing process provides the panel with an opportunity to correct clear and demonstrable errors in its opinion. This function, while valuable, is one for the original panel itself, and should not justify rehearing *en banc*.^{59/} Second, in areas in which the law is unsettled or the current law in the Circuit unsatisfactory, the rehearing process provides the Court as a whole an opportunity to address the question. This, in the Council's view, is the appropriate function of the rehearing *en banc* process.

The Court also grants rehearing *en banc* to correct "aberrant" panel decisions that are inconsistent with the law of the Circuit. The Council views it as unfortunate that the Court must waste its limited *en banc* resources on "disciplining" aberrant panels. Judges on all sides of more "political" issues should respect the Court's decisionmaking process. If the law of the Circuit is clear, a judge who disagrees should not try to ignore it or change it by questionable distinctions. Cf., e.g., Evans v. City of Chicago (discussed at p.30 supra). By the

^{58/} See Note, The Politics of En Banc Review, 102 Harv. L. Rev. 864, 866 (1989)(hereafter "Note, *En Banc Review*")(arguing that "exceptional importance" is frequently used as an invitation to partisan decisionmaking).

^{59/} The Court rarely grants rehearing by a panel. But see, e.g., Bennett v. Jett, 966 F.2d 207 (7th Cir.), vacating 956 F.2d 138 (7th Cir. 1992). Several attorneys commented that they believed the Court should grant panel rehearings more frequently to correct errors of fact or law in opinions.

same token, an *en banc* rehearing should not automatically be granted just because the decision of a new issue may be unpopular with some, or even a majority of, the judges. All judges should respect the law and the processes of the Circuit.

The Court should "uncouple" requests for panel rehearing from suggestions for rehearing *en banc*. In addition, if the Court were to clarify its specific criteria for evaluating rehearing petitions and were more willing to correct errors at the panel rehearing level, in all likelihood the volume of suggestions for rehearing *en banc* would, over time, be reduced, and the quality of the Court's consideration of those petitions would be improved.

We also suggest the Court consider modifying Circuit Rule 40(c) to move the phrase "exceptional importance" to the end of the list of criteria justifying rehearing *en banc*, and perhaps add the qualifier "truly" in front of it. The Court should state that suggestions for rehearing *en banc* will not be granted merely because the petitioner claims that the panel opinion is incorrect. Further, the Court should permit a rehearing *en banc* request to be circulated without a petition for panel rehearing in those cases where the parties are not seeking a panel rehearing but are instead asking the entire Court to note and resolve a conflict of the kind identified above.

The Seventh Circuit employs a procedure in which proposed opinions are circulated to the entire Court before they are issued if they overrule a prior decision or create a split in the circuits. See Seventh Circuit Rule 40(f). The Council questions this procedure. While it clearly has efficiency benefits, it has a major disadvantage. When draft opinions are circulated to the entire Court, the other members of the Court, who have not had the benefit of full briefing and argument, are unlikely to be able to give full consideration to the arguments on both sides of an issue. But once the members of the Court have approved a draft opinion utilizing this procedure, the ability of a party seeking rehearing to convince the entire Court to reverse itself is highly circumscribed. If a case presents an issue important enough to be circulated to all active members of the Court, then that issue, the Council believes, is probably entitled to the circulation of briefs.^{50/}

The Court should also clarify when rehearing *en banc* will be granted and scheduled before a panel opinion issues. That appears to have happened in the recent case of Cuppert v. Ducksworth, 8 F.3d 1132 (7th Cir. 1993)(*en banc*). The circumstances should be specified in the Local Rules or the Internal Operating Procedures.

Finally, the Court may need to settle better the extent to which panels are bound by rulings of prior panels on the same issue. It is preferable that all panels follow prior Circuit precedent unless that precedent is overturned by the Court *en banc*. Yet panels of the Court sometimes declare that issues are "open" because there are inconsistent panel decisions.

^{50/} If the Court continues to use Circuit Rule 40(f), it should consider modifying it to allow any member of a panel to circulate an opinion to the entire Court if that judge believes an appropriate conflict has been created. As it reads now, it appears that a panel majority can tacitly overrule prior Circuit precedent, claim it is not doing so, and refuse to circulate an opinion, even if there is a dissent on the point. We have been told that, in practice, any judge can request the circulation of an opinion. If that is the policy, it should be expressly stated in the rule.

See, e.g., United States v. Davenport, 986 F.2d 1047, 1050 (7th Cir. 1993). That can lead to a series of arguments about what the law of the Circuit is. See, e.g., Guinan v. United States, 6 F.3d 468 (7th Cir. 1993)(discussing various panel opinions on the timing of claims by criminal defendants of ineffective assistance of counsel).

The policy considerations in the area of the proper circumstances of panel decisionmaking and *en banc* review are complicated. See Solimine, *Ideology and En Banc Review*, 67 N.C.L. Rev. 30 (1988); Note, *En Banc Review*, *supra* note 58. The Seventh Circuit's law is not clear. The Court should clearly articulate its rules for determining the binding force of prior panel decisions and the reasons it will accept cases *en banc*. All panels should respect the Court's law.

8. The Circuit Judicial Council and the discipline of judicial officers.

Pursuant to 28 U.S.C. §332, each Circuit has a Circuit Judicial Council, consisting of the Chief Judge of the Circuit and an equal number of Circuit Judges and District Judges. The Judicial Council is authorized "to make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." 28 U.S.C. §332(d)(1). Working with the Circuit Executive, the Judicial Council exercises administrative control of all non-judicial activities of the Court of Appeals, and administers the personnel system, budget, and accounting system of the Court of Appeals. Among other duties, the Circuit Executive is responsible to the Judicial Council for conducting studies related to the business and administration of the courts within the Circuit and collecting and analyzing data about the courts within the Circuit. In general, we have heard few complaints about the administrative functions of the Judicial Council.^{81/}

The Judicial Council has one other important role. Together with the Chief Judge, the Judicial Council has the power to discipline judicial officers pursuant to 28 U.S.C. §372. Under that section, any person may file a complaint with the Chief Judge about the conduct of a judicial officer in the Circuit. The Chief Judge may either dismiss it, take corrective action and conclude the proceeding, or, if the Chief Judge finds the matter to be sufficiently serious, "appoint himself and equal numbers of circuit and district judges . . . to a special committee to investigate the facts and allegations contained in the complaint" 28 U.S.C. §372(c)(4)(A). If a complaint is found to be warranted, the Judicial Council may "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts . . . including, but not limited to," directing the chief judge of the appropriate court to take such action as the Judicial Council considers appropriate, certifying disability of a judge, requesting that a judge retire, ordering that no further cases be assigned to a judge, censuring or reprimanding a judge, or ordering such other action as it considers appropriate, short of removal from office. 28 U.S.C. §372(c)(6)(B).

^{81/} We do note, however, that there has recently been an unseemly dispute concerning the location of a new courthouse, with the two District Judges in Hammond strongly disagreeing with the local Congressman. We have not been able to determine the role the Judicial Council has played in that dispute.

Only a small number of non-frivolous complaints have been filed under this provision. Most of the complaints are from disgruntled litigants, and concern matters subject to correction only by appeal. A small number have concerned serious matters of inappropriate judicial conduct. We are aware of one case where a private reprimand was administered by the Chief Judge, and one other case where action was taken against a District Judge.

In our 1991 evaluation of the U.S. District Court for the Northern District of Illinois, we identified several judges whose conduct may warrant the attention of the Judicial Council. Our past evaluations have contained reports of similar problems. We believe that the members of the Seventh Circuit and the Judicial Council are aware of judicial officers with problems warranting the attention of the Circuit Judicial Council.

Under 28 U.S.C. §372(c)(1), the Chief Judge of the Circuit may, by written order, initiate a complaint for purposes of the disciplinary process without actually receiving a formal written complaint from any party. We believe that the Chief Judge and the Judicial Council have not fulfilled their responsibilities under this statute.

It is very difficult for attorneys to file a complaint against a judge. Attorneys in offices that frequently appear before each judge, such as the U.S. Attorney or the Federal Defender, are extremely reluctant to antagonize any judge. Attorneys in private practice are afraid to sacrifice the interests of present or potential clients in matters that are or might be assigned before that judge. In addition, many complaints of misconduct may relate to repeated patterns of behavior. Few private attorneys can be expected to spend time documenting such a pattern of conduct when there is no prospect of compensation and it is likely to harm, and not benefit, their clients. Even bar associations have been unwilling to file such complaints. Most bar associations are not interested in antagonizing judges, and the leaders of such associations are reluctant to sacrifice their own clients by signing a complaint.

It may be that the Chicago Council of Lawyers and other bar groups share the blame for not filing formal complaints against judges in the past. Nevertheless, most of the blame belongs with the Judicial Council acting with the Chief Judge, since under the statute they are charged with the responsibility of acting *sua sponte*, as soon as the Chief Judge receives credible information concerning a possible problem. The Judicial Council and the Chief Judge share responsibility for ensuring that litigants in the Circuit receive courteous and competent treatment from judges.^{62/} When, for example, a judge appears no longer to be competent due to illness (whether related to age or otherwise), or appears to be behaving in a recurring,

^{62/} Indeed, Canon 3(B)(3) of the Code of Judicial Conduct requires a "judge . . . [to] initiate appropriate disciplinary measures against a judge . . . for unprofessional conduct of which the judge may become aware." See Houston v. Partee, 978 F.2d 362, 369 (7th Cir. 1992), cert. denied, 113 S. Ct. 1647 (1993).

The Chicago Council of Lawyers is ready to act as an intermediary to protect a lawyer by filing a complaint of misconduct. The Council is able to order transcripts of court sessions where egregious conduct occurs. In the past, while the Council has received repeated reports of misconduct by some judges, most lawyers have been unwilling even to identify the date and times so that the Council can obtain transcripts; the lawyers fear the judge will determine who provided the information to the Council and retaliate against that lawyer. Should the Council receive such detailed information, it is willing to file a complaint with the Judicial Council.

very erratic fashion, the Judicial Council, on the Chief Judge's own motion, should initiate an appropriate inquiry. Lawyers and bar associations find it difficult to allege and "prove" lack of mental capacity. The Court, on its own motion, when it is aware of the need for such an inquiry, should request that judicial officers submit to appropriate medical examinations.

When our federal judiciary was small, peer pressure was often sufficient to resolve problems in judicial conduct. Given the increase in size of our federal judiciary and the procedures created by Congress to manage the judiciary, the Judicial Council has the clear responsibility to take the active role outlined above. Notions of judicial independence and comity apply to the substance of decisions made by judicial officers -- they do not apply to issues of physical and mental competence or misconduct in the manner of performing duties.

9. Role of the Chief Judge.

The Chief Judge has both less and more power than the bar realizes. In most judicial matters, the Chief Judge is merely the first among equals, presiding over the Court, but entitled only to one vote. The Chief Judge's main prerogative in judicial matters is to assign the opinion in all cases where he or she sits and is in the majority.

In administrative matters, the Chief Judge has greater influence. The Chief Judge has statutory responsibility for a number of functions, including certifying whether senior judges are eligible to continue to receive salary and staff (*i.e.*, that they are competent and working), instituting and reviewing complaints of judicial misconduct, and coordinating administrative matters with the Judicial Council and the Circuit Executive. The Chief Judge also approves reimbursement for private criminal defense lawyers who are appointed to represent defendants when the request for reimbursement exceeds \$3,500 for a felony trial, \$1,000 for a misdemeanor trial, or \$2,500 for appellate work. 18 U.S.C. §3006A(d).^{63/}

In addition, the Chief Judge has an important leadership role. The Chief Judge can set a tone for the Court as to how it conducts its business. The Chief Judge also has a liaison role with the bar, and can set a tone for the conduct of the bar. Given the nature of the position, the Chief Judge is able to bring issues to the attention of the Court, the bar, and the public, and see that they are resolved.^{64/}

^{63/} Private practitioners play an important role in the criminal justice system by providing representation to many indigent criminal defendants. Congress has chosen to fund that representation at an hourly rate of \$40 for out-of-court and \$60 for in-court time. 18 U.S.C. §3006A(d). To represent defendants competently, substantial time is required to investigate and prepare a case. The current level of compensation is very low, and requires successful practitioners to make some sacrifice to accept appointments in complicated cases. Former Chief Judge Bauer had a good reputation for appropriate review and approval of fee requests, without requiring practitioners to jump through unreasonable hoops to collect their fees.

^{64/} For a useful review of the public role of an active chief judge, see the account of Wilfred Feinberg, former Chief Judge of the Second Circuit, in Feinberg, *The Office of Chief Judge of A Federal Court of Appeals*, 53 Fordham L. Rev. 369, 383 (1984). There he recounts, among his other activities as Chief Judge, numerous talks, both informal and formal, before state and local bar associations and their committees on the practice and procedures of his court.

The Chief Judge also invites visiting judges to sit with the Court.^{65/} The Chief Judge must also authorize the designation of any Circuit, District, Bankruptcy, or Magistrate Judge to sit on another Court within the Circuit, whether to meet a special need or for administrative or personal convenience. The Chief Judge can request the Chief Justice to designate judges outside the Circuit to sit on the Seventh Circuit or one of its lower courts, as needed, and can reject the assignment of any judge from within the Seventh Circuit to another court. 28 U.S.C. §295.

The performance of Chief Judge Bauer as Chief Judge is discussed in his evaluations below. (In brief, most attorneys appreciated Judge Bauer's performance as Chief Judge.) As a whole, we think Chief Judge Posner (and his successors) could improve the Court by being more active in five areas:

- The Chief Judge should exercise a more thorough review of senior judges at all levels before certifying their eligibility to continue to have a staff to hear cases. In the past, the Chief Judge has been too willing to recertify senior judges who are no longer competent to hear matters. While the illness of a senior judge is lamentable, the Chief Judge must, by law, deal with that problem when it develops.
- The Chief Judge should take a more active role in instituting complaints concerning judicial performance. See pp. 37-39 supra.
- The Chief Judge should take a more active role in caseload management. If a Circuit Judge is substantially behind in resolving cases, the Chief Judge must persuade that judge to issue decisions more promptly. As discussed above, he should be given authority to reassign the case after six months.
- The Chief Judge should act with the Judicial Council to ensure that disputes over administrative matters, such as the location of the Hammond courthouse, are resolved more expeditiously and harmoniously.
- The Chief Judge should act more forcefully to foster civility by the Court towards the District Court and the bar.

The citizens of the Circuit are entitled to have their cases decided promptly by a competent judge. It is the responsibility, by law, of the Chief Judge to ensure that senior judges are competent to hear cases. For active judges, the Chief Judge has the responsibility, by law, of bringing any problem to the attention of the Judicial Council. While this is not a pleasant responsibility, it is important that the Chief Judge exercise it more swiftly than has been done in the past.

^{65/} In the past, invitations have appeared to be based on factors other than ideology. We understand that the new Chief Judge intends to continue this practice, which we commend.

10. Civility.

Civility has been a buzzword in the Seventh Circuit the last few years. Indeed, the Seventh Circuit commissioned a major study of the matter, setting up a "Committee on Civility," chaired by U.S. District Judge Marvin Aspen. That study suggested that a civility problem existed, and that a wide range of steps be taken to foster civility among the bar.

We believe that the Judges of the Seventh Circuit should play a leadership role in fostering civility. As noted above, several members of the Seventh Circuit are often impolite during oral argument. That sets a tone for advocacy that is wrong. Also, several members of the Court at times have gone out of their way to be harshly critical to District Judges^{66/} and lawyers in written opinions.^{67/} Those opinions are usually not constructive.

The Council is not criticizing the Court's incivility to the bar because we wish to protect lawyers. See note 31 supra. There is no question that the quality of lawyering in our courts should be improved, and that the Seventh Circuit is too often burdened by lawyers whose briefs are poor, and whose oral arguments are inadequate. Yet the Court's reaction is often too harsh.

The Court may not recognize that the quality of lawyering before it is often a reflection of the value that a litigant puts on its case, or the amount the litigant can pay for the case. In both instances, this may lead to lesser funding, and hence advocacy of a lower order than the Court may desire. The Court nonetheless must hear every case brought before it and must treat all cases seriously, even though, for these market reasons, the lawyers before it in many cases are not as experienced, as skillful, or paid enough to spend as much time on the case as the Court would like.

For example, criminal appeals, social security and other government benefits, and other disputes are very important to the litigants. But the litigants in those cases often do not have sufficient funds to pay their attorneys for extensive research, brief writing, and preparation.^{68/} Even when litigants do have sufficient funds, the amount at stake in the litigation

^{66/} Cf. United States v. Mittelstadt, 969 F.2d 335 (7th Cir. 1992)(Court lectures District Judge, then rules that Seventh Circuit has no jurisdiction for the appeal). This is not to say that erroneous rulings and improper conduct of District Judges should not be noted and corrected, of course. Our point is a question of tone.

^{67/} See, e.g., United States v. Best, 913 F.2d 1179 (7th Cir. 1990), rev'd, 939 F.2d 425 (7th Cir. 1991)(*en banc*), cert. denied, 112 S. Ct. 1243 (1992)(discussed at pp. 107-08 infra); Olympia Equip. Leasing Co. v. Western Union Tel. Co., 802 F.2d 217, 219 (7th Cir. 1986)(Flaum, J., specially concurring on denial of rehearing and rehearing *en banc*)(discussed at pp. 85-86 infra). See also Hirshman, Tough Love, supra note 29, at 206-08.

^{68/} By no means does the Council suggest that solo practitioners, lawyers in small firms, and the lawyers in legal services, Federal Defender, and other agencies that litigate those types of cases are incapable of doing top-quality work, or regularly do not do such work in the Court. The reality of the way in which legal services are provided in this country, however, is that most criminal defendants and poor people do not have access to lawyers who have the luxury of a caseload sufficiently small to permit them to give the attention to every case that it might deserve.

may not justify spending the money required to hire an experienced appellate practitioner or to pay him or her enough to do the best possible job. Demeaning criticism of well-intentioned counsel who are doing the best they can for their client under the circumstances of the case is not constructive.^{69/}

IV. STATISTICAL ANALYSIS OF THE COURT AND ITS JUDGES.

The Council looked at statistics regarding the Court's performance in three areas: delay in writing majority opinions, frequency of concurrences and dissents, and a citation analysis of the active judges. Although the work, particularly in the citation analysis, is still quite tentative, the results are of interest. Statistical analyses of these areas are attached as an Appendix to this evaluation report.^{70/}

A. Delay in Disposition of Appeals.

Delay in issuing opinions is a problem in the Seventh Circuit. For the twelve month period ending September 30, 1992 (the most recent period for which figures are available), the Court ranked 10th out of the 12 Circuits in the median time interval between notice of appeal and final disposition. 1992 Annual Report of Director, Administrative Office of the United States Courts Table B-4 at 151 ("1992 Annual Report"). In terms of actual time, its median time for disposition from notice of appeal to final disposition was 13.5 months, as compared to 10.6 months in all courts of appeals for all cases. Id.

That the problem is not caused in substantial measure by delays in briefing is made clear by the figures for the time between the notice of appeal and the filing of the last brief. Thus, for the year ending September 30, 1992, the Seventh Circuit had a median time for all cases of 4.3 months from the notice of appeal to the filing of the final brief, as compared to

^{69/} Excessive criticism of the bar creates unnecessary friction with the Court. It engenders disrespect among the bar, and disrespect for the legal process. In addition, no lawyer deserves to be criticized in an opinion unless given notice and an opportunity to respond, since such criticism is a form of sanction. See pp. 23-24 above.

^{70/} The statistical analyses were prepared by Assistant Professor Lawrence Lessig of the University of Chicago Law School. They were taken from a LEXIS search of the Court's written opinions from January 1985 to March 1993. Because of the nature of LEXIS searches, Professor Lessig is not certain that all of the Court's cases were included. If any cases were missed, however, he does not believe there would be any systematic bias to the missed cases; the basic conclusions of the study should remain valid.

While Professor Lessig is responsible for the search data and the statistical analysis performed upon them, the Council has reached its own conclusions based on the data. Any opinion stated in this evaluation, including Section IV, is that of the Council, and not of Professor Lessig.

a median for all circuits combined of 4.8 months. 1992 Annual Report, Table B-4 at 151.^{21/} Rather, the Seventh Circuit's record in the time for its dispositions is largely caused by delay between oral argument and final disposition.^{22/} In this area, the Administrative Office reports that for the year ending September 30, 1992, the Court is last both overall and in each of the three major categories (prisoner petitions, other civil, and criminal) reported by the Administrative office. 1992 Annual Report, Table B-4 at 151-52. For example, the time between hearing and final disposition for all cases terminated by the Seventh Circuit in the past was 4.3 months (or roughly 130 days), as compared to an overall median interval for all circuits of 2.5 months (or roughly 75 days).^{23/} Id.

Delay in several of the Circuits can be explained at least in part by either organizational or caseload factors. Thus, the Ninth Circuit, with 28 active judges and a huge geographical area, has built-in reasons for the slow overall disposition rate, and where it is last both in the median time interval for all cases both from the filing of the notice of appeal to final disposition and from the filing of the last brief to hearing or submission. Administrative Office of the United States Courts, 1992 Federal Court Management 27 ("1992 Court Management"); 1992 Annual Report, Table B-4 at 151. However, in the area which the Ninth Circuit judges can control -- time between hearing and disposition -- the court is tied for fourth. 1992 Annual Report, Table B-4 at 151. Similarly, the D.C. Circuit, which gets a number of multi-party appeals from complex administrative proceedings, is last in the median interval between notice of appeal and completion of briefing, both overall and in the "other civil" category. Id. But again, in the area that its judges can control -- the time between hearing and final disposition -- it is tied (with the Ninth Circuit) for fourth overall and tied for fifth in "other civil" cases. Id.

^{21/} In this category, the Court ranked fifth overall. 1992 Annual Report, Table B-4 at 151. The Seventh Circuit had similar favorable rankings in the two principal subcategories provided by the Administrative Office of the Courts: it ranked fifth overall in civil cases (other than prisoner petitions), with a 3.7 month median time interval as compared to an overall median of 4.2, and was tied for fourth in criminal cases, with a 5.0 month median interval, as compared to an overall interval of 5.9. 1992 Annual Report, Table B-4 at 152. It was only in prisoner petitions, where its performance (10th overall), with an interval of 6.3 months as compared to an overall interval of 4.6 months, that the Seventh Circuit's slow disposition process could even in part be attributed to prehearing delays. Id. at 151.

^{22/} The Court also does poorly in scheduling fully-briefed appeals for hearing. Thus, for the year ending September 30, 1992, the Seventh Circuit was second to last (again doing better only than the Ninth Circuit) in the median time intervals for all cases between last brief and hearing or submission (5.1 months, as compared to an overall median interval of 3.3 months), with a similar picture reflected in the Administrative Office's subcategories (prisoner petitions, other civil, and criminal). 1992 Annual Report, Table B-4 at 151.

^{23/} As noted, the pattern is repeated in each of the three major subcategories reported. In criminal cases, the Seventh Circuit's median disposition time after oral argument was 4.1 months as compared to a median for all courts of appeals of 2.2 months. 1992 Annual Report, Table B-4 at 152. In prisoner cases, it was 4.0 months, as compared to 2.7 months, and in other civil cases (which comprised 54.8% of all dispositions in which oral argument was held in the Seventh Circuit), it was 4.5 months (or approximately 135 days) as compared to 2.7 months (or 81 days) for all the Courts of Appeals combined. Id. at 151-52.

In contrast, the Seventh Circuit has nothing either in its case load, geographical area, or number of judges that can justify its overall poor performance. While the Seventh Circuit does hear argument in a greater percentage of cases than most Circuits,^{24/} the Court is only fourth in the number of signed opinions written by each judge, and is close to the Circuits in fifth and sixth place.^{25/} Rather, as suggested above, the Council believes that the delay is

^{24/} In the year under discussion, the Court heard oral argument in 56.4% of the matters that it terminated on the merits, as compared to an overall average of 43.9%. 1992 Annual Report, Table B-1 at 131, 133.

^{25/} The number of signed opinions per active judge per year may be a good measure of the relative burden on each judge. If we assume that a Circuit Judge devotes most of his or her time to writing opinions (which in the Seventh Circuit, given its low dissent and concurrence rate, see p. 46 *infra*, means majority opinions), the work load measured as output of a Seventh Circuit judge does not appear to be materially higher than that of other circuits (1st, 5th, 8th) with similar output per judge but far lower medians for producing decisions as the following table shows:

TABLE 1

CIRCUIT	SIGNED OPINIONS PER ACTIVE JUDGE	MEDIAN TIME -- ORAL ARGUMENT TO DISPOSITION
10	131	3.2
2	108	0.7
5	67	2.5
7	64	4.3
8	59	3.3
1	58	2.3
3	44	1.8
4	36	3.3
11	30	2.8
6	28	1.8
9	24	2.2
D.C.	22	2.2

1992 Annual Report, Table B-4, at 6-7; 1992 Federal Management Statistics 26. The figures for 1991 are similar. 1991 Annual Report B-4, App. at 8; 1991 Federal Court Management 26. The above table overstates the productivity of the Tenth and Second Circuits, as those circuits appear to sign virtually all their opinions. In contrast, the Seventh, First, Fifth, and Eighth Circuits issue a substantial number of unsigned, substantive decisions (at least half of their substantive decisions) which are not included in the above table. However, at least in the case of the Seventh Circuit, these decisions are all, or virtually all, short, *per curiam* opinions which are not to be published, and so do not substantially increase the writing burden on the judges.

It is true that in the year ending September 30, 1992, there was at least formally one vacancy on the Court for about 8 1/2 months, between the time that Judge Wood took senior status and Judge
(continued...)

caused by a few judges whose slow conduct is tolerated by the Court. An analysis performed for the Council looked at time between oral argument and disposition by Seventh Circuit judges for the years 1988 to 1992 (Federal Reporter, Second Series, volumes 836 to 983). Overall, the study found the average time to write an opinion in the Seventh Circuit without a dissent or concurrence was 141 days.^{25/} However, what is interesting is the substantial disparity in the average time between oral argument and decision from judge to judge. This disparity is set forth in the tables on pages 58-59 of the Appendix.

As can be seen, several judges take consistently longer than the Court's average of 4 3/4 months. On the other hand, several of the Court's judges are extremely quick (by Seventh Circuit standards). Judges Posner, Easterbrook, and Cummings normally issue opinions within about two to three months of oral argument. Nonetheless, these judges by themselves cannot prevent serious delay.

The delay created by the slower judges is even more stark when compared to the judges on the Courts of Appeals nationwide, as reported by the Administrative Office. Thus, while the slow Seventh Circuit judges were taking 5 to 8 months to write their opinions, the nationwide figure for Circuit Judges in 1992 was 2 1/2 months. 1992 Annual Report, Table B-4 at 151. It is true that the figures compared are not fully comparable, since the Seventh Circuit figures are in terms of an average time over an approximately five-year period, while the nationwide figures are in terms of median numbers for one year. However, given the large number of opinions included in the Seventh Circuit figures for each judge, the different measures are not likely to produce significantly different results, nor is review of only 1992 likely to make much of a difference.^{27/}

^{25/}(...continued)

Rovner assumed the bench. However, this cannot in large measure explain the 1992 results since Judge Wood remained active throughout this period and, in any event, in 1991 -- when the Court was at all times fully staffed -- the Seventh Circuit in terms of median time for dispositions did even worse, ranking 11th out of 12. 1991 Annual Report of the Director, Administrative Office of the U.S. Courts, Table B-4 at 175. Another possible explanation is that the burden on judges on the Seventh Circuit is atypically heavy. In terms of appeals filed per panel, the Seventh Circuit in 1992 was 6th, and third in 1991. 1992 Federal Court Management 27; 1991 Federal Court Management 27. In terms of total terminations, it was tied for third in 1992 and fifth in 1991, and in terms of terminations on the merits, it was fourth in 1992 and seventh in 1991. *Id.* While these figures suggest a busy court with a relatively high filing and disposition rate, they do not provide a clear explanation of the Court's slowness in writing opinions.

^{26/} This is reasonably close to the median time interval reported for the year ending September 30, 1992, by the Administrative Office, which found a median disposition interval of 4.3 months (or approximately 129 days). 1992 Annual Report, Table B-4, at 151.

^{27/} The slow judges seem to inhibit panel action even when they are not writing the opinion. The study suggested that their mere presence on a panel is enough to slow down the opinion producing process. Thus, an examination of panel combinations that have produced ten or more reported opinions and took on average more than six months to write a decision, two of the four slowest judges over the five-year period (Coffey, Kanne, Manion and Ripple) turned up on 20 of the 34 panels, or 59% of these slower panels, although two or more of them sat on only 23% of all panel combinations that issued ten or more written decisions (35 out of 154). (These figures are derived from Appendix pp. 35-52.)

The cure is clear: the Court must stop permitting the slower judges to delay the Court's cases. As discussed above at note 36, other Circuits routinely act when an opinion is not produced within six months of oral argument, either by reassigning the opinion or not permitting the assigned judge to hear more appeals until he or she has caught up. The Seventh Circuit should adopt a similar practice.

B. Concurrences and Dissents.

Seventh Circuit judges rarely dissent and rarely concur. An analysis of 3,175 reported decisions in the five year period from 1988 to 1992 found only 184 dissents and 185 concurrences. Moreover, just two judges account for a substantial part of this activity. Judges Cudahy and Ripple together accounted for 41 % of the dissents (41 for Judge Cudahy, 35 for Judge Ripple) and 52% (50 and 46, respectively) of the concurrences.

Some judges may feel less of a need to concur or dissent because they have a talent for persuading other judges to change opinions to remove troublesome language. Other judges may concur or dissent more, in part, because they lack that facility. Nevertheless, the numbers and circumstances of the variations in the frequency of separate opinions by Seventh Circuit judges are too extreme to explain on those grounds alone.

As discussed above, the Council is troubled by the infrequency of dissents and the practice of some judges to write separate opinions only on rare occasions. The Court too frequently reaches out for issues not squarely presented by the parties or raised by the record, writes overly broad opinions, is inconsistent in its use of waiver, uses jurisdictional and other procedural hurdles in a way that frustrates legitimate expectations of the District Court and the parties that disputes will be resolved on the merits, and does not appropriately defer to other courts better suited to resolve pending issues. See pp. 8-18 supra. Absent appropriate limitation by concurrence or dissent, these majority opinions become the *de facto* law of the Circuit even if the issue addressed was not squarely presented by the case, briefed by the parties, or even fully considered by the other judges. K

C. The Citation Analysis.

Assistant Professor Lessig also provided the Council with a preliminary citation analysis of the opinions of the active judges of the Seventh Circuit. Citation analysis looks at the citations of a judge's work to see how frequently the judge's work is cited. This analysis, which is set out in the Appendix at 1-27, is preliminary, but contains some interesting points. Work on the analysis is continuing, and the Council understands that it is being amplified by a citation analysis of other circuits.^{78/}

^{78/} For a discussion of the utility of citation analyses in general, see R. Posner, *Cardozo*, supra note 46, at chapter 5 and pp. 69-72.

V. EVALUATION OF INDIVIDUAL JUDGES.

Methodology.

The Council has prepared an individual evaluation of each active and senior judge of the Seventh Circuit. These evaluations are not designed to be a comprehensive summary of the cases considered by the Court, or of the opinions written by each judge -- we are not writing a digest of the Court's substantive rulings. Instead, we have asked practicing lawyers what they think of each judge, based on their own experience and their review of a number of the judge's opinions. We try to describe the strengths, weaknesses, and distinctive individual traits of the work of each judge over approximately the past decade.

While we have tried to give examples for most of the conclusions we have drawn about judges, in some instances we have not done so. Because we promise confidentiality to our sources, we do not always use the best possible examples of cases to illustrate our conclusions. For example, if lawyers involved in a case tell us that Judge X was not fair to the facts in that case, we will evaluate that opinion and see if that lawyer's viewpoint is shared by other lawyers. We try to determine for ourselves if the general criticism is true. We will not, however, necessarily point to the particular cases raised by lawyers with whom we have spoken, in order to protect their confidentiality.^{79/} In some cases, we cite to concurrences, dissents, other opinions, or law review articles to illustrate a more widely-stated criticism. The item we cite may not be the best or only illustration of this point.^{80/}

For the individual evaluations, the Council assigned a team of lawyers to study each judge of the Court. The investigators, who are members of the Council, were almost all experienced litigators who had participated in past Council evaluations of state and/or federal judges. Most are from large Chicago firms, with some from law school faculties, small firms, and legal service organizations. In each case, a principal investigator was assigned to coordinate the work of the team.

^{79/} We must pledge confidentiality to obtain accurate information. We discuss in the text why lawyers insist on confidentiality. One other situation is where a lawyer who won a case has critical things to say about the opinion or the judges. That lawyer may not be free to speak honestly, for attribution.

^{80/} Indeed, in some cases the author of a majority opinion may be able to argue persuasively that a dissent criticizing the opinion was inaccurate or wrong. We cite the dissent as an illustration of a theme that is broadly heard among the bar. The accuracy of the critical comment is not refuted by showing that one opinion or another source on which we relied missed the point in a particular case, for the criticism is a broader one. The alternative, which would be to read the briefs in every case and compare them to the opinion was not practical and, in the Council's view, unnecessary. Interviews with attorneys who actually litigated the cases (both winning and losing) provided substantially the same information.

We do not credit a random comment about a problem; we do credit recurrent comments when they become a theme. We have developed this methodology in conducting evaluations over twenty years of well over a thousand candidates and incumbents on the state and federal bench.

The Council asked the investigators to read a substantial sample of the assigned judge's opinions, generally at least 150, as well as almost all dissents and concurrences.^{81/} In addition, the investigators were asked to interview a number of the attorneys who had briefed and argued cases before the judge. Overall, the Council reviewed well over 1,000 opinions.

The Council also interviewed practitioners who appear frequently before the Court, along with former Seventh Circuit law clerks and others familiar with the Court's business. These interviews were by no means limited to lawyers who are members of the Council; we tried to reach a cross-section of Seventh Circuit practitioners. The interview reports on each judge were transmitted to the investigators assigned to the judge. The investigators also had access to the statistical information reported in Part IV.

After reading the opinions and the interview reports, and conducting interviews with persons who appeared before the judge, the investigators prepared preliminary reports, which were reviewed by the Council's Board. The reports were then revised, edited, and incorporated into this evaluation.^{82/}

To obtain information, representatives of the Council met with Chief Judges Bauer and Posner and the Circuit Executive. In addition, each of the Court's active and senior judges was given a chance to comment on his or her own evaluation. The Council thanks the Court for its cooperation.

^{81/} There is no reason to believe that the opinions we read were not typical of each judge's work. In some cases, we read almost all of a judge's published opinions. In every case, the sample of work performed over the past decade was sufficiently large to be fair. In addition, the interviews we conducted acted as a check. If the interview results were different from the tentative conclusions we drew reading opinions, we would have viewed that as an indication that additional work was required, so that accurate conclusions reconciling different views could be drawn.

^{82/} The reports focused on the most important and interesting aspects of each judge's performance. For that reason, and because there were dozens of attorneys working on this project, the length and focus of the individual evaluations vary.

The Council gives little weight to whether a judge writes the first draft of all opinions, or only edits opinions after his or her law clerks have drafted them. As long as there is a consistent quality to the opinions and the judge is actively involved in ensuring that the opinions are accurate and reflect his or her views, the Council believes the approach to writing the opinion is not a matter of substantial import. Indeed, in reading hundreds of opinions, the Council found that the style of most judges was consistent over time, which suggests that whether the judge writes or edits his or her opinion, the judge's voice comes through.

The Council would view the matter differently if a judge took little or no role in drafting or even editing the opinions issued from his or her chambers. That would raise a serious question as to whether the judge may be abdicating an important part of his or her role. We were unable to verify that any judge is acting that way, and thus do not discuss the issue in the individual evaluations.

We do not grade judges by whether their decisions are "liberal" or "conservative."^{83/} Instead, we have tried to evaluate each judge's work by the criteria discussed in the introduction. That includes legal ability, fairness, temperament, integrity, work ethic, and communication skills. As noted at pp. 8-10 supra, we think the most important job of a judge sitting on an intermediate appellate court is to get the result right in the case before him, and do justice to the parties. In doing so, judges have three other responsibilities: to respect precedent and other limitations on the judicial process, to identify questions meriting further legislation, administrative action, or study, and to articulate clear rules of law to guide future conduct.

Our individual evaluations reflect these views as applied from the perspective of practicing lawyers. Judges who look only at the facts of the case before them and decide those facts, without advancing the law through the articulation of rules and the illumination of areas of confusion, cannot be excellent judges because they are only doing part of their job. Similarly, brilliant judges who advance the law through new insights but fail to get the result right in the case before them or fail to respect the appellate process disserve the litigants and the public.

We value highly the work of a judge who is always prepared, willing to follow precedent, open-minded, and understands the vagaries of life and the practical aspects of litigation, even if that judge's legal ability is very good, but would not be described as brilliant. The best appellate judges have deep appreciation of the human condition, a wide base of knowledge, superb legal ability, and a devotion to the appellate process. They are fair to the parties before them, reach the correct result in almost every case, respect their roles, and articulate clear rules of law. The Council has evaluated all judges against that ideal, recognizing that very few judges will measure up in all respects. We do not believe, however, that any one of those virtues must be sacrificed for another. Brilliant judges need not ignore the record, and craftsmanlike judges need not blind themselves to the larger implications of their work.

The views expressed in each evaluation -- as in this Report overall -- are those of the Council, as approved by its Board of Governors.

WILLIAM J. BAUER

William J. Bauer, 67, graduated from DePaul Law School in 1952. From 1953 to 1964, he was a partner with the firm of Erlenborn, Bauer & Hottle, and served as Assistant State's Attorney, First Assistant State's Attorney, and the State's Attorney (1959-64) of DuPage County. From 1964 to 1970, Judge Bauer was a Circuit Judge in DuPage County.

^{83/} The Council of Lawyers has sometimes been characterized as a "liberal" organization. Whatever the merits of that characterization, we do not view the evaluation we have conducted here -- or any other of our evaluations -- as based on politics. Indeed, we have substantial praise for the work of some of the Court's more conservative judges. Also, many of the lawyers who work on this project represent a wide range of corporate and other clients, whose interests would as (or more) often be protected by the "conservative" members of the Court as by its more moderate members. Some of the Court's less successful judges happen to be conservative, but the criticism we report is a reflection of those judges' standing among the bar.

Bauer

For a portion of that period, he was assigned to the Illinois Appellate Court, Second District. Judge Bauer was the U.S. Attorney for the Northern District of Illinois from 1970 to 1971, when he was appointed to the U.S. District Court in Chicago. He was appointed to the Seventh Circuit in 1975 by President Ford, and served as Chief Judge from 1986 to 1993.

Judge Bauer is generally well-regarded. While he is not viewed as a scholar, his legal ability is very good. Judge Bauer draws upon a depth and range of experience. Relying on that experience, he is perceived to be highly practical and is respected for his common sense understanding of courtroom practice and of the real life effects of legal decisions on litigants. See, e.g., Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic, 980 F.2d 449 (7th Cir. 1992)(Bauer, J., dissenting)(international hospital collection case); United States ex rel. Walker v. O'Leary, 973 F.2d 521 (7th Cir. 1992)(ordering Illinois Attorney General to take active approach to ensure that prisoners held under improper sentences receive correct sentences).

Perhaps the best recent example of Judge Bauer's practical wisdom is his opinion for the *en banc* Court in United States v. Best, 939 F.2d 425 (7th Cir. 1991)(*en banc*), cert. denied, 112 S. Ct. 1243 (1992). In Best, the panel held that the fact that the jury had the Government's binder of exhibits in the jury room was reversible error -- even though all of the exhibits had been introduced into evidence. 913 F.2d 1179 (7th Cir. 1990). Judge Posner, for the panel, had gone so far as to suggest that the Assistant U.S. Attorney on the case had "quite possibly" committed misconduct. 939 F.2d at 431 n.3. After examining each juror, however, District Judge Bua had found no prejudice to the defendants at all. Judge Bauer, writing for the *en banc* majority saw the issue as a defense attempt to make a minor error into reversible prosecutorial "misconduct," and properly vacated the panel opinion.

Judge Bauer has an engaging writing style. Most of his opinions are straightforward and solid. They are clear, coherent, and generally articulate easily understood rules. While his opinions usually do not contain elaborate legal scholarship, he has produced some very good opinions in complex cases. See, e.g., Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990)(replevin action brought by the Greek Cypriot Church against innocent purchaser to recover 1,400 year-old antiquities stolen during the Turkish invasion of Cyprus).

An overview of Judge Bauer's work reflects that he is fair to many different types of litigants. For example, though Judge Bauer was long a prosecutor and may defer in some cases to the concerns of law enforcement personnel more than some of his colleagues, see, e.g., Ellis v. Wynalda, 999 F.2d 243, 247 (7th Cir. 1993)(Bauer, J., dissenting)(Court denied qualified immunity to officer who shot suspect), his decisions reflect an appropriate concern for the rights of criminal defendants. See, e.g., United States v. Davenport, 943 F.2d 13 (7th Cir. 1991)(Bauer, J., dissenting from denial of rehearing *en banc*)(discussion of prosecutorial comment on post-arrest silence), cert. denied, 112 S. Ct. 871 (1992); United States v. Cortina, 630 F.2d 1207 (7th Cir. 1980).^{84/} He relies on his substantial experience to ensure

^{84/} As Chief Judge, Judge Bauer was responsible for assigning opinions in every case in which he sat, as long as he was in the majority. He seems to have used that authority to assign himself a large number of criminal opinions.

Bauer

fairness in trial procedures. See, e.g., United States v. Randle, 966 F.2d 1209 (7th Cir. 1992)(reversing conviction because trial judge failed to allow defense lawyer time to request polling the jury).

Few would describe Judge Bauer as a bold jurist, but he is not unduly cautious either. Indeed, he shows an appropriate commitment to follow applicable governing precedent. See, e.g., Gonzales v. North Township of Lake County, Indiana, 4 F.3d 1413 (7th Cir. 1993) (reversing District Court and requiring removal of crucifix from public park); Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991)(rejecting dissent's attack on Lemon v. Kurtzman), cert. denied, 112 S. Ct. 3025, 3054 (1992). When Judge Bauer has been willing to write or join in concurrences and dissents, his opinions are frequently solid. See, e.g., United States v. Brigham, 977 F.2d 317, 320 (7th Cir. 1992)(Bauer, C.J., dissenting)(Court affirmed conviction); Clay v. Director, Dep't of Corrections, 749 F.2d 427, 437 (7th Cir. 1984)(Bauer, J., concurring)(criticizing Judge Posner's analysis of ineffective assistance of counsel), cert. denied, 471 U.S. 1108 (1985). His opinions in divided cases are not predictably doctrinaire -- he looks at the facts and the law applicable to each case to reach the result he thinks is correct.^{85/}

Judge Bauer's conduct at oral argument is usually courteous. While he asks relatively few questions, his questions show an understanding of the record and the applicable precedent. When he is active at oral argument, he asks direct and pointed questions, cross-examining advocates with the skills of an effective trial lawyer. The Council received a few reports that he can be curt at oral argument with those counsel with whom he has had an unfavorable relationship. The Council also heard that he can, at times, strictly limit an attorney's time when he believes the argument is no longer productive.

While lawyers describe the strengths and overall positive performance noted above, they also raise some concerns about Judge Bauer. Judge Bauer is one of the Seventh Circuit judges who have not been active writers of separate opinions. That may stem, in part, from an ability to persuade others to modify their opinions,^{86/} but it also may stem, in part, from a sense of collegiality that, in the Council's view, is mistaken. As discussed in more detail at pp. 85-86 below, Judge Bauer joined in a special concurrence in one case that seemed more concerned with protecting another judge than with frank presentation of important issues. See Olympia Equip. Leasing Co. v. Western Union Tel. Co., 802 F.2d 217 (7th Cir. 1986), cert. denied, 480 U.S. 934 (1987).

In addition to accommodating his colleagues on the Seventh Circuit, Judge Bauer is sometimes overly deferential to District Judges. See, e.g., Higgins v. White Sox Baseball

^{85/} Compare, e.g., Evans v. City of Chicago, ___ F.3d ___, 1993 U.S. App. LEXIS 31016 (7th Cir. Nov. 24, 1993)(No. 91-3277)(*en banc*)(Bauer, J., joining plurality opinion by Judge Easterbrook)(supporting government effort to invalidate consent decree)(opinion also joined by Judges Posner, Coffey, and Manion), with Graff v. City of Chicago, 9 F.3d 1309, 1335 (7th Cir. 1993)(*en banc*)(joining Judge Cudahy's dissent from narrow construction of First Amendment)(plurality opinion by Judge Manion joined without reservation by Judges Posner, Coffey, Easterbrook, and Kanne).

^{86/} The Council also received reports that those skills have been successfully used by Judge Bauer to convince colleagues to modify portions of opinions with which he disagreed.

Bauer

Club, Inc., 787 F.2d 1125, 1131 (7th Cir. 1986)(Bauer, J., dissenting)(Court remanded for new trial because of garbled and error-filled jury instructions)(dissent based largely on the ground that trial judge was "a veteran of ten years on the district court and twelve years as a trial and appellate court judge of the state of Illinois"). Judge Bauer is also sometimes unwilling to re-examine Seventh Circuit precedent that has been criticized or rejected in other circuits. See, e.g., Thomas v. United Parcel Serv., Inc., 890 F.2d 909, 924 (7th Cir. 1989)(Bauer, C.J., concurring)(refusing to join majority's observation that every other Circuit had taken a position on a question of law that was opposite to that of the Seventh Circuit and more in accord with Supreme Court precedent). Moreover, while many of Judge Bauer's decisions show that he certainly can handle difficult cases, some of his opinions avoid the tough analysis required in a particular case. See, e.g., United States v. Bafia, 949 F.2d 1465 (7th Cir. 1991)(case concerning criminal jury instructions)(Posner, J., dissenting), cert. denied, 112 S. Ct. 1989 (1992); King v. General Elec. Co., 960 F.2d 617 (7th Cir. 1992)(employment discrimination case)(Cudahy, J., dissenting).^{87/}

With regard to Judge Bauer's tenure as Chief Judge, most believe he performed well. Judge Bauer has the skills of a politician, in the positive sense of the word. He used those skills well as Chief Judge. Judge Bauer's friendly style and temperament make him especially adept at working out personality problems on the Court. He has done a good job at keeping a very diverse group of judges on speaking terms. He also performed well in his role as ambassador to the bar and the public.

While Chief Judge Bauer reportedly did try to encourage his slower colleagues to issue prompt opinions, those efforts have been only partially successful. See Part IV supra. Also, the Council believes that Chief Judge Bauer should have been more active in dealing with problems relating to the performance of District Judges within the Circuit. In that respect, Judge Bauer was too willing to live with unacceptable performance among judicial colleagues.

JOHN L. COFFEY

John L. Coffey, 71, is a 1948 graduate of the Marquette Law School. From 1949 to 1954, he was a Milwaukee Assistant City Attorney. From 1954 to 1978, he was a judge of various civil and criminal courts in Milwaukee. Judge Coffey served on the Wisconsin Supreme Court from 1978 to 1982. He was appointed to the Seventh Circuit by President Reagan in 1982.

^{87/} In King, there were two groups of age discrimination claims (for the Haney plaintiffs and the Sobin plaintiffs) against GE. Both were joined for trial as to whether GE had engaged in a pattern and practice of age discrimination, but only one group, the Haney plaintiffs, had obtained verdicts on their individual claims when GE appealed from those verdicts. The Haney plaintiffs defended the appeal on the basis of both statistical and anecdotal evidence demonstrating age bias in GE's selection as to who would be laid off. The Court, in a decision by Chief Judge Bauer, vacated the judgments and ordered new trials for both the Haney and the Sobin plaintiffs. Thus, the Sobin plaintiffs had their rights adjudicated even though their case was not on appeal. With regard to the Haney plaintiffs, Chief Judge Bauer (joined by Judge Kanne) rejected the statistical and anecdotal evidence for reasons that Judge Cudahy convincingly argues in his dissent were erroneous. King, 960 F.2d at 628-29 (Cudahy, J., dissenting).

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The Council believes that Judge Coffey's performance as a Circuit Judge leaves much to be desired and is troubling in significant respects. In particular, while many of Judge Coffey's decisions are sound and well-reasoned, many are not; his overall body of work is characterized by extremely inconsistent quality. Moreover, we believe that Judge Coffey's opinions sometimes display a marked tendency to cross over the line separating judge from advocate, thereby creating an inappropriate appearance of a result-oriented approach and judicial bias. Finally, we have significant reservations about Judge Coffey's temperament, both judicial and otherwise. Indeed, the Council has received repeated reports of abusive conduct to litigants and court personnel.

Although our review of Judge Coffey's opinions has revealed a disconcerting inconsistency in the quality of those opinions, certain consistent themes emerge.

Judge Coffey's opinions are almost invariably written forcefully in favor of a particular result. They also typically treat that result as being clear and beyond dispute. Indeed, the opinions usually suggest that the case is governed by a black-letter rule and proceed to attempt to apply that rule to the facts.

There are, of course, many cases of this type, and in these instances Judge Coffey's opinions are usually solid and straightforward. But there are also many cases where either the legal rules or the facts are not so black and white. Judge Coffey's opinions rarely acknowledge serious factual or legal uncertainties, however. The consequence is a somewhat mechanical jurisprudence that, while effective and persuasive at some times, at other times seems to overly simplify or distort difficult issues. See, e.g., Teague v. Lane, 820 F.2d 832, 848 (7th Cir. 1987)(*en banc*)(Cudahy, J., dissenting)(arguing that majority opinion by Judge Coffey "devotes many pages" to establishing the lack of right to a representative petit jury when that is not the real issue), aff'd, 489 U.S. 288 (1989); Senn v. United Dominion Indus., Inc., 951 F.2d 806 (7th Cir.)(Coffey, J.), reh'g denied, 962 F.2d 655 (7th Cir. 1992)(Cudahy, J., dissenting from denial of rehearing *en banc*)(criticizing panel opinion for use of a "default rule" that ignores the problem of contractual ambiguity), cert. denied, 113 S. Ct. 2992 (1993); Castillo v. Cook County Mail Room Dep't, 990 F.2d 304 (7th Cir. 1993)(Coffey, J., dissenting)(claiming that "unintentional and isolated" opening of prisoner letters does not violate any constitutional right, while majority points out that there is no way to make such factual determinations on the basis of the complaint alone). Moreover, the cost of Judge Coffey's failure to acknowledge on occasion the difficulties or ambiguities presented by a case and his failure to acknowledge at least the legitimacy of competing arguments and concerns is that his opinions at times appear result-oriented.

These problems are exacerbated by Judge Coffey's tendency to go too far in attempting to prove that a given result is the right one for every conceivable reason. For example, United States v. Martin, 964 F.2d 714 (7th Cir. 1992), involved a criminal defendant's challenge to his conviction on the ground that he had been prejudiced by being forced to appear at trial in prison garb, consisting of a blue jumpsuit. Moreover, the defendant initially appeared before the jury together with two co-defendants (who subsequently pled guilty), also dressed in the identical prison jumpsuits. The established constitutional rule under Estelle v. Williams, 425 U.S. 501 (1976), acknowledged in Judge Coffey's opinion, is that it violates the right to a fair trial to compel a defendant to stand trial before a jury in prison attire. Notwithstanding this rule, the conviction could have been affirmed on several grounds,

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including harmless error in light of overwhelming evidence of guilt. Judge Coffey in fact reached such a conclusion of harmless error. But he went further, finding that there was no reason to believe that the jury was able to identify the identical jumpsuits worn by the three co-defendants as prison garb. This determination has an air of unreality about it, as suggested in Judge Ripple's concurrence; the very lack of necessity for making such a finding makes it all the more troubling. See also, e.g., Cole v. Bertsch Vending Co., 766 F.2d 327 (7th Cir. 1985)(majority of panel criticizes Judge Coffey for attempting to decide a proximate causation issue unnecessary to the decision).

Judge Coffey often deals with potentially troublesome issues that could stand in the way of a given outcome by finding that the issues either have not properly been raised or have been waived. While in some cases these findings clearly have been legitimate, in others they appear to disregard the facts and the law. See Hunter v. Clark, 906 F.2d 302 (7th Cir. 1990), vacated, 934 F.2d 856 (7th Cir.)(*en banc*), cert. denied, 112 S. Ct. 388 (1991). In the panel opinion in Hunter, Judge Coffey held, over a strong dissent by Judge Flaum, that a defendant had waived his constitutional right to have the jury informed that no adverse inference could be taken from his failure to testify. The basis of the waiver was that the defendant had refused to accept a proposal made by the state trial judge at the end of the trial to start the defendant's trial over again in a proceeding severed from his co-defendants (who did not wish a "no adverse inference" instruction to be given). In short, Judge Coffey found that defendant's refusal to waive his double jeopardy rights constituted a waiver of his self-incrimination rights. This rationale was subsequently abandoned by Judge Coffey in the *en banc* affirmance of the conviction on "harmless error" grounds. See also, e.g., Banks v. NCAA, 977 F.2d 1081, 1094-1100 (7th Cir. 1992)(Flaum, J., dissenting)(claiming that majority opinion by Judge Coffey failed properly to acknowledge the issues raised by complaint), cert. denied, 113 S. Ct. 2336 (1993); Teague v. Lane, 820 F.2d 832 (7th Cir. 1987)(*en banc*)(Coffey, J.)(majority opinion criticized by concurrence and dissent for finding waiver of equal protection claim), aff'd, 489 U.S. 288 (1989); United States v. Berkowitz, 927 F.2d 1376 (7th Cir.)(Coffey, J., concurring in part and dissenting in part)(finding, over dissent by Judge Ripple, that although issue regarding constitutional violation was clearly raised on appeal, it was waived because of its "cursory treatment"), cert. denied, 112 S. Ct. 141 (1991).

Some of Judge Coffey's opinions appear to be heavily influenced by his personal values and biases, to an extent that casts considerable doubt upon his ability to apply the law fairly in certain areas. This is particularly true with regard to church/state issues. For example, Judge Coffey's lengthy dissent in Doe v. Village of Crestwood, 917 F.2d 1476 (7th Cir. 1990), cert. denied, 112 S. Ct. 3025 (1992), which attempted to defend government sponsorship of a Roman Catholic mass as part of an Italian festival, ends with a diatribe against "the eroding moral fibre of this nation," which he ascribes in part to "unhealthy secularism." Doe, 917 F.2d at 1494. Similarly, although Judge Coffey's majority opinion in Welsh v. Boy Scouts, 993 F.2d 1267 (7th Cir.), petition for cert. filed, 62 U.S.L.W. 3299 (Oct. 14, 1993)(No. 93-597), contains a reasonable statutory language analysis of why the Boy Scouts are not covered by Title II, the opinion ends with an extraneous paean to the virtues of the Boy Scouts that bears no relation to the purported grounds for the decision, but succeeds in raising questions about whether there is a policy agenda underlying the seemingly neutral statutory analysis. See id. at 1278. Moreover, in cases where he obviously has strong personal views, Judge Coffey displays a willingness to second-guess District Court or jury

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factual findings that is at odds with his approach in other types of cases, such as appeals by criminal defendants. Compare, e.g., Doe v. Village of Crestwood, 917 F.2d at 1488-89, and Madison County Jail Inmates v. Thompson, 773 F.2d 834 (7th Cir. 1985)(Coffey, J., concurring)(Court overturned jury verdict for prisoners in unconstitutional conditions case, finding expert testimony inadequate to establish actual injury), with United States v. Martin, 964 F.2d 714, 720 (7th Cir. 1992), and United States v. Marin, 761 F.2d 426 (7th Cir. 1985)(deferring to District Court finding that it was not "credible that a woman who has been in the country for nine years indicates that she does not read and understand English").

Judge Coffey sometimes makes inappropriately disparaging or hostile remarks in rejecting opposing arguments. While these ad hominem attacks are usually directed at litigants, they have sometimes spilled over to his colleagues on the bench. See, e.g., United States v. Berkowitz, 927 F.2d 1376, 1400 n.1 (7th Cir.)(Judge Ripple expressly objects to Judge Coffey's "ad hominem argumentation"), cert. denied, 112 S. Ct. 141 (1991); In re Scarlata, 979 F.2d 521 (7th Cir. 1992)(Coffey, J., dissenting).

From a stylistic standpoint, while some of Judge Coffey's opinions are well written, many are unnecessarily lengthy, redundant, and poorly written. The opinions usually spend a great deal of time detailing facts, and often quote at length from transcripts. Consistent with his general approach of trying to demonstrate that the case at hand is clearly governed by an existing rule, Judge Coffey's opinions also typically quote prior decisions at length and string together blocks of additional citations.

We do not mean to suggest that all, or that even most, of Judge Coffey's opinions suffer from these problems. As we have said earlier and wish to reiterate, Judge Coffey produces many sound and well-reasoned opinions, including opinions in complex cases. But an unacceptably large number of Judge Coffey's opinions do evidence the faults described above.

Moreover, Judge Coffey takes longer to issue his opinions than the majority of other Seventh Circuit judges. Over the last five years, on average, majority opinions written by Judge Coffey have been issued approximately seven months after the oral argument. We have also received reports that even when he is not the author of the majority opinion, Judge Coffey is slow in responding to circulated opinions, thereby causing the panels he sits on to take a longer than average time in issuing opinions.^{88/}

Judge Coffey's performance at oral argument has also been the subject of significant criticism. Attorneys who have argued before him or who have otherwise been present at oral argument complain that he often appears poorly prepared, seems uninterested, and frequently does not participate. When Judge Coffey does participate, he often asks questions that are of little relevance to the major issues, causing some attorneys to question his legal ability. Several attorneys also complain that Judge Coffey is discourteous to counsel and lacks an appropriate judicial temperament from the bench.

^{88/} Judge Coffey is willing to write dissents or concurrences. See, e.g., Hessel v. O'Hearn, 977 F.2d 299, 305 (7th Cir. 1992)(Coffey, J., dissenting)(contending that Court expanded plain view doctrine); HOPE, Inc. v. County of Du Page, 717 F.2d 1061 (7th Cir. 1983)(Coffey, J., dissenting)(objecting to Court's finding of standing in fair housing case), rev'd, 738 F.2d 797 (7th Cir. 1984)(*en banc*)(Coffey, J.).

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The complaints about Judge Coffey's temperament are not limited to his conduct from the bench. From our investigation, Judge Coffey possesses a considerable temper and is often abusive to Seventh Circuit staff members, and especially to his law clerks.^{29/} We are also concerned about reports that Judge Coffey does not enjoy a good collegial relationship with his fellow judges.^{30/} Unfortunately, these strains may be showing through and affecting the Court's work. See, e.g., United States v. Berkowitz, 927 F.2d at 1400 n.1.

The criticisms of Judge Coffey that we have voiced and reported are major ones. In his better opinions, Judge Coffey has demonstrated that he can issue opinions of average, and even better, quality. Judge Coffey's overall performance, however, is, in the Council's view, unacceptable.

RICHARD D. CUDAHY

Richard D. Cudahy, 67, is a 1955 graduate of the Yale Law School. After serving as a law clerk on the Second Circuit and a lawyer at the State Department, he was an associate at Isham, Lincoln & Beale in Chicago from 1957-60, and managing partner of the Washington, D.C. office of the Isham firm from 1976 to 1979. During the intervening years he served as Chief Executive Officer of Patrick Cudahy Inc., an 800 employee firm, and practiced law with Godfrey & Kahn in Milwaukee. He was a commissioner and chairman of the Wisconsin Public Service Commission. He also taught law at several law schools, and was active in Wisconsin Democratic politics, serving as party chairman and a candidate for Attorney General. Judge Cudahy was appointed to the Seventh Circuit by President Carter in 1979.

Judge Cudahy has been one of the Court's most prolific writers. He files separate concurring or dissenting opinions far more often than the Court's other members, and he also writes the Court's opinion more frequently than many of the other judges.

Judge Cudahy writes opinions for the Court in a direct and pointed style, characterized by most lawyers as scholarly. His writing is uncomplicated without being simplistic, and notable for its clarity. Judge Cudahy usually begins by stating the issue before the Court, summarizing the treatment given the issue in the court below, and announcing the disposition of the case. He then presents the facts as developed in the record, with appropriate deference to the fact-finding province of the District Court. Next, Judge Cudahy almost invariably turns to a practical exposition of the controlling law, liberally salting the text with citation of precedent and other authority. He makes ample use of explanatory footnotes, but he is rarely given to lengthy discourse on the law's history or its underlying philosophy, unless the point is essential to the Court's decision.

His opinions' treatment of the applicable law generally leads to a straightforward application of the law to the facts of the case. Before concluding, he often -- but not always -- will

^{29/} A lengthy article about Judge Coffey in the March 1987 issue of *Milwaukee Magazine* contains similar reports.

^{30/} Both Chief Judge Posner and former Chief Judge Bauer, however, say that while Judge Coffey expresses himself forcefully, he is on good terms with all the members of the Court.

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give attention to the most important arguments of the losing side, further explaining the basis of the decision. Judge Cudahy's writing is even-handed and temperate, neither displaying nor evoking passion or notoriety. This basic sturdiness of style is considerably easier to appreciate than it is to achieve. Posing few obstacles to the reader, Judge Cudahy's opinions usually accomplish what they set out to do -- to decide the case before the Court -- and incrementally advance the law without regard to generalized theories or activist agendas. In contrast to Judge Cudahy's established reputation as a frequent dissenter, other judges of the Court dissent from Judge Cudahy's majority opinions at no more than an average rate.

Although almost any of Judge Cudahy's published opinions would provide a good example of his style and care, some cases make particularly good examples of his skill for resolving difficult issues. In FMC Corp. v. Capital Cities/ABC, Inc., 915 F.2d 300 (7th Cir. 1990), the Court reversed the District Court's ruling that the plaintiff defense contractor could not state a claim against a television network for conversion of the contractor's confidential documents. Judge Cudahy's opinion for the panel carefully sorted through a choice of law issue and deftly harmonized the defendant's important First Amendment concerns with the plaintiff's need for the information allegedly pilfered from its files.

In Merk v. Jewel Food Stores Div., 945 F.2d 889 (7th Cir. 1991), cert. denied, 112 S. Ct. 1951 (1992), Judge Cudahy wrote the majority opinion, withstanding a lengthy and caustic dissent by Judge Easterbrook. The Court reversed a judgment entered in the defendant's favor by Judge Posner, who had presided over a jury trial in the District Court. Judge Cudahy's opinion held that secretly negotiated oral agreements between the company and the union did not override the collective bargaining contract, noting "the grave dangers posed by a backroom deal that is secretly negotiated between union officials and company management without the knowledge or consent of the union rank and file." This decision permitted approximately 15,000 former food store employees to sue the company for back pay and benefits under a collective bargaining agreement. Both Judge Cudahy's majority opinion and the dissent were thoroughly researched.^{91/}

Judge Cudahy will not necessarily jump at the chance to resolve an important question, if the case can be decided without doing so. Judge Posner criticized Judge Cudahy in a separate concurrence in Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078 (7th Cir. 1992), writing that the Court should have used the case "as a vehicle for clarifying issues that have been a recurrent source of uncertainty and confusion," i.e., the distinctions between self-concealing fraud and active concealment of an underlying fraud, and equitable estoppel and equitable tolling. The two scholarly opinions reached the same result for the case before the Court, but Judge Cudahy's principal opinion was content to decide the case on narrow grounds and not to resolve other issues.

Quite recently, Judge Cudahy wrote for a unanimous panel in Great Lakes Dredge & Dock Co. v. City of Chicago, 3 F.3d 225 (7th Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3493 (Jan. 5, 1994)(No. 93-1094), one of the many cases arising out of the Chicago flood

^{91/} See also Bidlack v. Wheelabrator Corp., 993 F.2d 603, 610-13 (7th Cir. 1993)(*en banc*)(Cudahy, J., concurring in the judgment)(clearly explaining positions of plurality, concurrence, and dissent).

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of April 1992. The City's contractor, Great Lakes, had been sued in the state court by thousands of plaintiffs, including individuals, businesses and the City, who alleged that the contractor had negligently installed pile clusters in the Chicago River, causing a breach of a subterranean freight tunnel that sent millions of gallons of river water into basements of many Loop buildings. The contractor filed a complaint in the District Court, claiming the existence of federal admiralty jurisdiction and seeking the benefit of a statutory limitation of liability for vessel owners. The City successfully moved to dismiss the action in the District Court, but the Court of Appeals reversed, concluding that the contractor's alleged negligence was within admiralty jurisdiction. The scholarly opinion traces the origins and development of the somewhat arcane field, carefully grounding the Court's holding in the statutes and cases and methodically applying a three-staged inquiry to the specific facts of the case. The Court remanded the case to the District Court for further proceedings relative to the limitation of liability, which Judge Cudahy wryly notes is "the substantive law upon which Great Lakes anchors its claim." *Id.* at 230.

While Judge Cudahy is to be commended for his ability to produce opinions of this quality with reasonable speed, he can also be criticized for contributing to the Court's backlog. Because Judge Cudahy is more apt than anyone else on the Court to voice objections to opinions circulated from other chambers, he has been known to slow down the issuance of others' final opinions. Judge Cudahy's own opinions tend to be longer and more academic in style, and they sometimes take him longer than his colleagues to write. Most of the opinions written by Judge Cudahy and reviewed by the Council were issued within six months after oral argument. On occasion, however, Judge Cudahy can take a seemingly inordinate amount of time to produce a decision.^{92/} In recent years, his opinions reveal a tendency to request supplemental briefing of particular issues, especially jurisdiction. In all, however, Judge Cudahy's contribution to the Court's backlog is small. The Council views the delay attributable to Judge Cudahy's independent thought as worthwhile.

Judge Cudahy prepares intensely for oral argument, requiring detailed bench memos from his law clerks. He often discusses a case at length with his clerks before argument, and his opinions reveal independent research of the issues briefed (or not briefed) by the parties. During oral argument he is consistently engaged, but shows an affable, calm style. Appellate advocates report that he is courteous from the bench, raising questions when they are important to him but not otherwise speaking. His questions reflect thorough preparation and understanding of the issues. Like his opinion writing, Judge Cudahy's performance in oral argument also shows self-confidence and independence from the rest of the Court.

As is probably true of many appellate courts, there are a number of judges on the Seventh Circuit bench who disdain dissent, seeking consensus and believing that it is important for the Court to speak with one voice. Judge Cudahy is not among them. Unlike many of his colleagues, Judge Cudahy will refuse to join in an opinion with which he has serious reservations, whether his difference goes to the majority's result or to its reasoning; hence his prodigious total of separate opinions, both concurrences and dissents.

^{92/} See, e.g., *In re Chicago R. I. & P. R. Co.*, 753 F.2d 56 (7th Cir. 1985), in which the Court took 14 months to issue Judge Cudahy's majority opinion in a relatively uncomplicated dispute with a particularly small amount of value in controversy.

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Judge Cudahy also has come to be perceived by the bar as somewhat ideologically distanced from his colleagues on the Court. For some, this perception raises a question as to the extent of Judge Cudahy's influence on the Court when he must compete for a colleague's deciding vote. His dissents have grown shorter and pithier, though usually not biting. See, e.g. In re Rivinius, Inc., 977 F.2d 1171 (7th Cir. 1992). But Judge Cudahy can be biting when Chief Judge Posner or Judge Easterbrook is on the other side, as in Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273 (7th Cir. 1992).^{93/}

The Council believes that published dissents and separate concurrences are useful instruments in the explication and advancement of the law. Judge Cudahy has issued so many important and effective separate opinions that we cannot list them all. They include, e.g., Cuppert v. Ducksworth, 8 F.3d 1132, 1149 (7th Cir. 1993)(dissenting from denial of habeas corpus and attacking majority's acceptance of the validity of a pre-Gideon conviction); In re Rivinius, Inc., 977 F.2d 1171, 1177-78 (7th Cir. 1992)(Court refused to allow party to amend pleadings to reflect case actually tried)(Cudahy, J., dissenting)(attacking Court's "resuscitation" of the theory-of-the-pleadings doctrine"); Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1123-26 (7th Cir.)(Court reversed NLRB policy allowing illegal aliens to recover back-pay)(Cudahy, J., dissenting), amended on denial of reh'g, 976 F.2d 1115 (7th Cir. 1992)(*en banc*)(Cummings, Cudahy, Ripple, and Rovner, JJ. voted to grant *en banc* rehearing); King v. General Elec. Co., 960 F.2d 617 (7th Cir. 1992)(Cudahy, J., dissenting)(charging majority with applying wrong standard in employment discrimination case); Wallace v. Robinson, 940 F.2d 243, 249 (7th Cir. 1991)(*en banc*)(Cudahy, J., dissenting)(charging majority with applying new analysis in prisoner due process case that conflicted with precedent of Supreme Court and every other Circuit), cert. denied, 112 S. Ct. 1563 (1992); Flamm v. Eberstadt, 814 F.2d 1169, 1173-74 (7th Cir.)(Cudahy, J., dissenting)(majority opinion was later criticized in Basic Inc. v. Levinson, 485 U.S. 224, 235 n.11 (1988)), cert. denied, 484 U.S. 853 (1987); Merritt v. Faulkner, 697 F.2d 761 (7th Cir.)(reversing failure to appoint counsel for prisoner)(Posner, J., dissenting, argued that if a prisoner had a good case, the market would provide counsel)(Cudahy, J., concurring, noted that "the barriers to entry into the prison litigation market might be very high" for prisoners), cert. denied, 464 U.S. 986 (1983); Norris v. United States, 687 F.2d 899 (7th Cir. 1982)(Court refused to follow Supreme Court decision that the majority claimed was no longer good law)(Cudahy, J., dissenting)(criticizing decision as unnecessary to result, bad law, and inappropriate for decision without oral argument or appointment of counsel).

Judge Cudahy has also played an important role in the Court by writing majority opinions that narrow overly broad opinions issued by other judges. See, e.g., Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 826 F.2d 712, 716-19 (7th Cir. 1987)(limiting Will v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985)(discussed at p. 73 *infra*), cert. denied, 475 U.S. 1129 (1986)), appeal after remand, 866 F.2d 228, cert. denied, 493

^{93/} "Apparently, the legislators had not read enough scholarly musings to realize that any efforts to protect the weak against the strong would, through the exhilarating alchemy of economic theory, increase rather than diminish the burden upon the powerless." Original Great Am. Chocolate Chip Cookie Co., 970 F.2d at 283 (Cudahy, J., dissenting). The same dissent goes on to agree that a judge's thumb should not be on the scales of justice, perhaps in response to Judge Easterbrook's criticism of Judge Cudahy's majority opinion in Merk v. Jewel Food Stores Div., 945 F.2d 889, 906 (7th Cir. 1991)(Easterbrook, J., dissenting), cert. denied, 112 S. Ct. 1951 (1992).

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U.S. 847 (1989). See also Benning v. Board of Regents, 928 F.2d 775, 778 (7th Cir. 1991) (limiting Watkins v. Blinzinger, 789 F.2d 474 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987)).^{24/} But see Evans v. City of Chicago, 995 F.2d 1393 (7th Cir. 1993)(Evans III), rev'd en banc, ___ F.3d ___, 1993 U.S. App. LEXIS 31,016 (7th Cir. Nov. 24, 1993), in which Judge Cudahy joined an opinion written by a visiting judge that, over a dissent, essentially ignored the opinion issued by a prior panel in Evans II, see pp. 30-31 supra.

Judge Cudahy's record, whether speaking for the Court, concurring, or dissenting, reflects a substantial contribution to the law and the Court. He continues to be an excellent judge.

WALTER J. CUMMINGS

Walter J. Cummings, 77, is a 1940 graduate of the Harvard Law School. From 1940 to 1946, he worked in the Justice Department, primarily in the Solicitor General's office. He served as Solicitor General at the end of the Truman Administration from 1952 to 1953. For most of the period 1946 to 1966, he was a partner with the firm that is now Sidley & Austin in Chicago. President Johnson appointed Judge Cummings to the Seventh Circuit in 1966. He served as Chief Judge from 1981 to 1986.^{25/} Judge Cummings is also a former president of the Seventh Circuit Bar Association.

Judge Cummings is the most senior of the active judges on the Seventh Circuit, having taken the bench in August 1966. The Council believes that he also is one of the more able judges on the Court.

The Council is impressed with the high quality of Judge Cummings' opinions. They reflect a fair-minded approach to the cases that come before him without regard to subject matter, and without apparent bias by his own political or ideological views. Indeed, it is difficult to discern from his opinions what those views might be.

Year in and year out, several positive themes consistently run through Judge Cummings' written opinions:

^{24/} In Benning, however, Judge Cudahy did not expressly limit Watkins. Instead, he appears to have mischaracterized the Watkins decision as being limited to declarations that state officials violated state law and not federal law. This mischaracterization appears to have been designed to narrow the scope of Watkins. While the Council believes that Watkins was an inappropriate expansion of precedent, Benning is not an accurate reading of Watkins.

^{25/} During Judge Cummings' tenure as Chief Judge, the Court was given the power to appoint Bankruptcy Judges. (That power had previously been exercised by the District Court, and the Bankruptcy Court had functioned as a legal backwater.) With the cooperation of other members of the Seventh Circuit, Judge Cummings succeeded in attracting and appointing outstanding candidates to the Bankruptcy Court. In our 1992 evaluation of that Court, the Council praised it as perhaps the best court, top to bottom, sitting in Chicago. It is viewed as one of the best Bankruptcy Courts in the country.

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- They focus closely on the facts presented, and exhibit appropriate deference -- without abdication -- to the fact-finding function that is the province of the District Court.
- They reveal those instances where there are conflicting lines of legal authority from which the Court can choose, fairly describe the conflicting lines, and explain why the Court has chosen one and not the other.
- They are narrowly drafted to decide only those issues that need to be addressed to resolve the dispute, and thus do not seize upon the case as a vehicle for blazing a new legal path on an issue not fairly presented. At the same time, the opinions will note and discuss collateral issues of interest, and explain why they need not be resolved in order to decide the case at hand.
- They are well-organized and well-written, if without the rhetorical flourishes for which some other judges on the Court have been praised and criticized.
- They are courteous and respectful to the District Court and the parties.

Judge Cummings uniformly receives praise as being well-prepared for argument. He exhibits a thorough knowledge of the briefs and the issues, and is courteous to the attorneys who appear before him. He is not the most active questioner on the Court, but his questions are thoughtful and typically focus on the crux of the issues presented in the case.

Judge Cummings is described as one who strongly believes that the Court should speak with one voice whenever possible and, accordingly, seeks to create consensus rather than conflict with his colleagues on the Seventh Circuit. This may help account for the fact that rarely do judges who preside over a case with Judge Cummings write separate concurrences or dissents to the majority opinions he writes.

Likewise, Judge Cummings himself writes concurring and dissenting opinions very sparingly. Between January 1985 and March 1, 1993, Professor Lessig's study of a large sample of the Court's opinions showed that Judge Cummings authored relatively few concurrences and dissents. As a percentage of the total number of opinions he wrote during that time period, 415, Judge Cummings' rates of concurring (2.65%) and dissenting (3.86%) were far lower than the average rates for all judges on the Court (7.51% and 8.07%, respectively). See Appendix at 53-56.

In the Council's judgment, several of Judge Cummings' concurrences served the important jurisprudential function of highlighting limitations in the reach of seemingly expansive majority opinions or serious defects in majority or dissenting opinions in the case. For example, in Wilcox v. Niagara of Wisconsin Paper Corp., 965 F.2d 355 (7th Cir. 1992), Judge Cummings wrote separately to criticize Judge Easterbrook's dissenting opinion for its factual analysis and its misreading of the governing state law. In Ford v. Childers, 855 F.2d 1271 (7th Cir. 1988)(*en banc*), which affirmed a directed verdict in a case seeking to impose liability for a law enforcement officer's use of deadly force, Judge Cummings wrote separately to explain the distinction that led him join Judge Coffey's majority opinion in Ford but to dissent from Judge Coffey's opinion in Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1988)(*en banc*), which nullified a damage award for the plaintiff in a deadly force case. And in Faheem-El v. Klinkar, 841 F.2d 712 (7th Cir. 1988)(*en banc*), the Court overturned a preliminary

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injunction the panel had affirmed, which prohibited the State of Illinois from continuing its per se denial of bail to parolees being detained pending a final parole revocation hearing. Judge Cummings wrote separately to emphasize that he had not departed from the views in the panel opinion he authored in the case. Id. at 729. Judge Cummings emphasized that the *en banc* opinion left open the possibility that on remand the District Court might find that the Illinois procedure violated due process, and argued forcefully that this would be the correct finding and could justify an injunction requiring that Illinois consider parolees for conditional release pending the parole revocation hearing.

Similarly, some of Judge Cummings' dissents have, in the Council's judgment, been particularly appropriate. For example, in Sherrod, the jury had awarded damages against an officer who had shot and killed a criminal suspect, despite the officer's testimony that the suspect had made a quick hand motion, as though reaching for a gun. The *en banc* opinion written by Judge Coffey reversed the jury verdict and held that the trial court had improperly admitted evidence that the suspect in fact had been unarmed. Judge Cummings' dissenting opinion criticized this ruling as "a miscarriage of justice," reasoning that even though the police officer did not claim to have seen a gun, the suspect's lack of a weapon was relevant to the credibility of the officer's testimony that he believed the suspect had reached for a gun. Judge Cummings wrote that the *en banc* opinion "misrepresents the parties and events involved in the killing . . . misinterprets the applicable legal standards . . . and allows an argument waived by the defendants to prevail." Sherrod, 856 F.2d at 808. See also, e.g., Mojica v. Gannett Co., 986 F.2d 1158 (7th Cir.)(Cummings, J., dissenting from grant of rehearing *en banc*), on reh'g, Mojica v. Gannett Co., 7 F.3d 552 (7th Cir.)(*en banc*), petition for cert. filed, 62 U.S.L.W. 3378 (Oct. 28, 1993)(No. 93-800).

The quality of Judge Cummings' concurring and dissenting opinions have caused the Council to regret that he chooses to write separately so infrequently. Several attorneys suggested that Judge Cummings places a very high value on consensus. While we recognize the importance of consensus and do not suggest that judges should issue concurrences and dissents lightly, the Council hopes that Judge Cummings will feel free to write separately when he disagrees with the majority.^{96/}

A few instances involve cases where Judge Cummings joined without explanation in a majority opinion that contained broad language, when later opinions revealed that his views in fact were much narrower. For example, Visser v. Packer Eng'g Assocs., Inc., 924 F.2d 655 (7th Cir. 1991)(*en banc*), affirmed summary judgment for the defendant on a claim by a 64 year-old that his discharge nine months before he vested for a pension constituted age discrimination. Judge Posner's majority opinion, joined by Judge Cummings, categorically stated that the fact that plaintiff "incurred a loss of pension benefits when he was fired . . . is

^{96/} Judge Cummings has joined some of the Court's most mistaken decisions, including important decisions that were subsequently reversed. See, e.g., Soldal v. County of Cook, 942 F.2d 1073 (7th Cir. 1991)(*en banc*), rev'd, 113 S. Ct. 538 (1992)(discussed at p. 112 *infra*); United States v. Best, 913 F.2d 1179 (7th Cir. 1990), rev'd, 939 F.2d 425 (7th Cir. 1991)(*en banc*)(discussed at pp. 107-08 *infra*), cert. denied, 112 S. Ct. 1243 (1992); Kamen v. Kemper Fin. Servs., Inc., 908 F.2d 1338 (7th Cir. 1990), rev'd, 111 S. Ct. 1711 (1991)(discussed at p. 68 *infra*).

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[not] evidence of age discrimination." Id. at 658-59. Yet, not long thereafter, in Castleman v. Acme Boot Co., 959 F.2d 1417 (7th Cir. 1992), Judge Cummings wrote a majority opinion in which he held that "evidence of timing in relation to the vesting of pension benefits can be evidence of age discrimination." Id. at 1421. He stated that Visser was "not to the contrary," distinguishing the decision on the factual basis that the evidence in that case was "overwhelming" that the reason for the termination was not age but the employee's failure to "express complete loyalty to the chief executive of his employer." Id. at 1421 n.2. The limitation of the broad language of the Visser majority opinion would have been the appropriate subject of a concurring opinion in that case.^{97/}

Similarly, in Sherman v. Community Consol. School District 21, 980 F.2d 437 (7th Cir. 1992), cert. denied, 113 S. Ct. 2439 (1993), Judge Cummings joined Judge Easterbrook's majority opinion which upheld the Illinois statute providing that the Pledge of Allegiance (containing the phrase "one Nation under God") "shall be recited each day" by public school elementary pupils. The majority opinion stated that in light of the Supreme Court decision in Lee v. Weisman, 112 S. Ct. 2649 (1992), the establishment clause analysis articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971) "is in doubt Lee concluded without renewing Lemon's lease." Sherman, 980 F.2d at 445. But thereafter, in Berger v. Rensselaer Cent. School Corp., 982 F.2d 1160, 1162 (7th Cir.), cert. denied, 113 S. Ct. 2344 (1993), which held the distribution of Gideon Bibles to elementary public school students violated the Establishment Clause, Judge Cummings wrote in the majority opinion that Lee v. Weisman "left Lemon untouched." Berger, 982 F.2d at 1162. Judge Cummings distinguished the Seventh Circuit's Sherman opinion as inapplicable, describing it as a "narrow" decision which did not "trigger Establishment Clause analysis" because the Pledge was civic and not religious in character, Berger, 982 F.2d at 1169 n.8, a limitation that Judge Cummings did not take the opportunity to articulate in Sherman.

In another case, Bennett v. Jett, 956 F.2d 138 (7th Cir. 1992), Judge Cummings joined, without explanation, Judge Kanne's majority opinion holding that a Supreme Court decision should not be applied retroactively to require the Illinois Department of Human Rights to adjudicate old charges of discrimination that it had previously failed to process. The majority opinion relied exclusively on the retroactivity analysis in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), and had failed to mention a more recent Supreme Court case that the parties had brought to the Court's attention, James Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991). To its credit, in response for a petition for rehearing, the Court vacated its initial opinion in a subsequent *per curiam* decision. Bennett v. Jett, 966 F.2d 207 (7th Cir. 1992).

The length of this discussion of Judge Cummings' record of concurring and dissenting opinions is necessary to explain why the Council believes that separate opinions serve an important function and that Judge Cummings, who has written some very fine concurring and dissenting opinions, should consider writing them more often. We recognize the risk that any discussion of a handful of specific decisions, out of the hundreds written by a judge, can be

^{97/} The Supreme Court implicitly disapproved of Castleman in Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1707-08 (1993). Our point is not tied to which opinion accurately predicted the Supreme Court's position on the law, but rather that Judge Cummings supported apparently inconsistent positions.

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misconstrued or taken out of context, and thus the Council emphasizes that its discussion of concurring and dissenting opinions is not intended as a major criticism of Judge Cummings' abilities and performance. We end our evaluation as we began it, by praising Judge Cummings for the quality of his entire body of work during his many years on the bench.

FRANK H. EASTERBROOK

Frank H. Easterbrook, 45, is a 1973 graduate of the University of Chicago Law School. Judge Easterbrook was an assistant and deputy solicitor general from 1974 to 1979, a University of Chicago law professor from 1978 to 1985, and a principal of Lexecon, an economic consulting firm co-founded by Chief Judge Posner, from 1980 to 1985. President Reagan appointed Judge Easterbrook to the Seventh Circuit in 1985. From 1982 to 1991, Judge Easterbrook was an Editor of the *Journal of Law and Economics*. Judge Easterbrook continues to serve on the University of Chicago faculty and remains a prolific and influential writer.^{98/}

Judge Easterbrook is generally praised as being exceptionally smart (many say "brilliant"). He has a great knowledge of the law, is a clear writer, and produces opinions faster than any judge on the court. (Opinions authored by Judge Easterbrook are issued, on average, 67 days after argument, while the average for the Court is 141.) He is well prepared for oral argument, and is, by all accounts, extremely hard working.

Nevertheless, the Council is deeply troubled that Judge Easterbrook appears less concerned about the actual facts and issues presented in the appeals before him than about advancing his own philosophy. Further, Judge Easterbrook communicates a lack of appreciation of the litigants as real human beings with real life problems. He also can communicate a lack of respect for the facts of each case, and for precedent. In addition, he has been resoundingly criticized for his poor judicial demeanor. Both at oral argument and in his writing, Judge Easterbrook displays a contempt for attorneys and, to some extent, the litigants as well.

Because Judge Easterbrook is so creative, hardworking and dedicated, yet has in the Council's view very serious failings, the Council discusses its concerns at some length.^{99/}

^{98/} See, e.g., Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 59 U. Chi. L. Rev. 1391 (1992)(hereinafter as "*Making a Difference*"), reviewing F. Easterbrook & D. Fischel, *The Economic Structure of Corporate Law* (1991), and suggesting that "[t]his may be the best book ever written about corporate law. 59 U. Chi. L. Rev. at 1392.

^{99/} The Council was struck by the extensive influence exercised on the Court by two judges, Chief Judge Posner and Judge Easterbrook. Many of the strongest opinions of the other judges come in response to opinions by those two judges. Also, as we discussed above, their view of the appropriate function of an appellate judge -- which is far more expansive than that of their colleagues -- also has influenced our evaluation. Without those two judges, the entire Court would be a different, and much less interesting, place. This evaluation would certainly be different. For that reason, the discussion of those judges is somewhat longer than for most of their colleagues.

Easterbrook

Judge Easterbrook's Opinions.

Judge Easterbrook's opinions are generally insightful and often path-breaking. Indeed, Judge Easterbrook's reasoning has been adopted by subsequent federal judges facing similar issues. For example, Judge Easterbrook's dissent in International Union, UAW v. Johnson Controls Inc., 886 F.2d 871, 908-21 (7th Cir. 1989)(*en banc*)(Easterbrook, J., dissenting), *rev'd*, 499 U.S. 187 (1991), was subsequently adopted by the Supreme Court. Judge Easterbrook also has been commended by several attorneys for properly encouraging lower courts and members of the bar to return to certain basic "first principles" regarding obligations under Rule 11 of the Federal Rules of Civil Procedure, pleading requirements, jurisdictional predicates, and the proper role of discovery in civil litigation.

There are several areas of law in which Judge Easterbrook has distinguished himself as the author of several of the Court's key decisions, such as attorney sanctions under both Rule 11 and under Rule 38 of the Federal Rules of Appellate Procedure.^{100/} Securities, corporate, and antitrust cases are other areas in which Judge Easterbrook has had a significant impact on the Court's jurisprudence.

Judge Easterbrook has been praised for simultaneously writing clearly and creatively. He has written many strong, solid opinions that clearly articulate appropriate concerns. *See, e.g., Hill v. Richardson*, 7 F.3d 656 (7th Cir. 1993)(explaining why counsel for plaintiff who obtains desired relief by settlement in a §1983 case is entitled to an award of fees); Guinan v. United States, 6 F.3d 468, 473-76 (7th Cir. 1993)(Easterbrook, J., concurring)(discussing concerns related to timing of claim by criminal defendant of ineffective assistance of counsel); United States v. Springs, 988 F.2d 746 (7th Cir. 1993)(discussing District Judge's ability to modify sentence); In re Krynicki, 983 F.2d 74 (7th Cir. 1992)(refusing to seal briefs, recognizing public's right to know); NAACP v. American Family Mut. Ins. Co., 978 F.2d 287 (7th

^{100/} Judge Easterbrook wrote the excellent *en banc* opinion for the Court in Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989)(*en banc*), in which the Seventh Circuit adopted a highly deferential standard of review for Rule 11 sanctions. Both before and since Mars, Judge Easterbrook has written several very strong opinions making clear to the bar that the Court will not be reluctant to uphold or impose severe attorney sanctions (or even to recommend sanctions to the District Court on remand). *See, e.g., Rose v. Franchetti*, 979 F.2d 81 (7th Cir. 1992)(upholding a default judgment as a sanction for discovery non-compliance, even though neither a prior motion to compel had been filed nor an order compelling discovery had been entered); Skycom Corp. v. Telstar Corp., 813 F.2d 810, 819 (7th Cir. 1987)(*sua sponte* suggesting that the complaint, which was not at issue on an appeal from summary judgment, violated Rule 11, and remanding the action to the District Court for the imposition of sanctions).

On occasion, Judge Easterbrook's colleagues have criticized him for perhaps being too aggressive on the issue of attorney sanctions. *See, e.g., Skycom*, 813 F.2d at 819-21 (Will, J., concurring in part and dissenting in part); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1085-96 (7th Cir. 1987)(Cudahy, J., dissenting in part), *cert. dismissed*, 485 U.S. 901 (1988). Judge Easterbrook's aggressive approach to attorney sanctions, while certainly appropriate in some circumstances, has had two negative effects. First, it contributes to a chilling effect upon cutting-edge legal arguments by determining that certain propositions may be "objectively frivolous." *See* Judge Cudahy's dissent in Szabo Food Serv., 823 F.2d at 1086. Second, it has encouraged the growth of "a cottage industry" in sanction motions and appeals.

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Cir. 1992)(broad application of fair housing law to insurance redlining), cert. denied, 113 S. Ct. 2335 (1993); In re CMC Heartland Partners, 966 F.2d 1143 (7th Cir. 1992)(discussing intersection of CERCLA and bankruptcy law); Owens-Corning Fiberglas Corp. v. Moran, 959 F.2d 634 (7th Cir. 1992)(declining federal interference in state court proceeding). Another such example is Judge Easterbrook's recent opinion for the *en banc* Court in Todd v. Societe BIC, S.A., 9 F.3d 1216 (7th Cir. 1993)(*en banc*)(certifying product liabilities questions to the Illinois Supreme Court).^{101/} Whether or not one agrees with the result in Todd, Judge Easterbrook did an excellent job of fairly setting forth the applicable issues, and advancing their discussion.

Judge Easterbrook provides the reader with a clear road map through an opinion, and he can describe extremely difficult and complex legal issues in plain terms. Several attorneys applaud Judge Easterbrook's frequent use of evocative and colloquial language. For example, he described the uncertain state of the law governing the statute of limitations for judicially-created federal securities fraud actions as "one tottering parapet of a ramshackle edifice." Norris v. Wirtz, 818 F.2d 1329, 1332 (7th Cir.), cert. denied, 108 S. Ct. 329 (1987). In characterizing the state of mind required for liability for aiding and abetting violations of § 10(b) of the Securities Exchange Act of 1934, Judge Easterbrook did not adopt the typical legalese common to the cases in the area. Instead, he wrote that plaintiffs in such cases must establish that the defendant has "thrown in his lot with the primary violators" or gained by "bilking" investors or by trying to "feather their nest." Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 497 (7th Cir. 1986). See also Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540, 1546 (7th Cir. 1990)(characterizing defendant's argument that its offering statements were "such obvious hooey that no reasonable investor would be taken in"). One attorney notes that such creative use of everyday language often make Judge Easterbrook's opinions a pleasure to read. Many attorneys question, however, whether Judge Easterbrook's examples sometimes go too far, feeling that some of his statements or examples appear smug or inappropriate.^{102/}

Judge Easterbrook has been very strict in applying procedural rules to defeat discussion on the merits. Many of the opinions discussed in the introduction at pp. 20-28 *supra* were authored by Judge Easterbrook. He has, for example, taken a very narrow view towards filing briefs late or exceeding page limits, see, e.g., EDC, Inc. v. Navistar Int'l Transp. Corp., 915 F.2d 1082 (7th Cir. 1990)(Easterbrook, J., as motion judge); and amending complaints, see, e.g., Holstein v. Brill, 987 F.2d 1268 (7th Cir. 1993); O'Rourke v. Continental Casualty Co., 983 F.2d 94 (7th Cir. 1993). As discussed at pp. 25-28 above, this kind of blind adherence to the rules for their own sake too often sacrifices the litigant in multi-issue or multi-party

^{101/} The Illinois Supreme Court subsequently refused certification. See *Lighter case heads back to 7th Circuit*, Chi. Daily L. Bull. at 1 (Nov. 23, 1993).

^{102/} See, e.g., United States v. Eaken, 995 F.2d 740, 745 (7th Cir. 1993)(Easterbrook, J., dissenting)("Eaken owes the United States a year of his life for failure to file his tax return for 1985"); *id.* at 743 n.3 (Judge Rovner's majority opinion disagrees with Judge Easterbrook's conclusion that one-year sentence would be given on remand if conviction were reversed); United States v. Finley, 934 F.2d 837, 840 (7th Cir. 1991)(explaining how a prosecutor may formulate a question, Judge Easterbrook used the example, "Did you tell me that in the evenings [defendant] is a female impersonator who fleeces customers in seedy bars?").

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cases with real needs for more time or space. Also, by discovering hitherto unsuspected barriers to finality and jurisdiction, he often has turned perfecting an appeal into a minefield for litigants and lower courts alike.

The Role of Economic Analysis in Judge Easterbrook's Opinions.

Judge Easterbrook has been perceived as selecting a result consistent with his views of economic efficiency and then working backwards, and often outside the record, to reach the result.^{103/} As a consequence, Judge Easterbrook's result in many cases appears to be based on unproven factual assumptions or hypotheses not obtained from the record in the case, but instead from his own assumptions about how a market or a transaction should work, or similar economic analysis. This approach quite properly infuriates lawyers. It deprives them of a chance to prove their case, to brief the case law, and even to challenge the factual presentation of expert opinion (which Judge Easterbrook, in effect, unilaterally introduces into his opinion as extra-record, and hence un rebuttable "fact"). This problem is perhaps most prominent in Judge Easterbrook's opinions in significant corporate and securities cases.

For example, in Flamm v. Eberstadt, 814 F.2d 1169, 1173-1174 (7th Cir.), cert. denied, 484 U.S. 853 (1987), Judge Easterbrook, after first citing a wealth of literature from the "Chicago school" of law and economics, concluded in accordance with his own law review article that since management's "silence pending settlement of . . . a deal is beneficial to most investors, most of the time," the failure to disclose pending deals is immaterial as a matter of law and economic policy. See also Easterbrook & Fischel, *Optimal Damages in Securities Cases*, 52 U. Chi. L. Rev. 611 (1985). Shortly thereafter, in Basic Inc. v. Levinson, 485 U.S. 224, 235 n.11 (1988), the Supreme Court expressly criticized Judge Easterbrook's opinion in Flamm for "[r]easoning backwards from a goal of economic efficiency" to achieve the result reached there.^{104/} The "benefit to investors" "fact" that Judge Easterbrook relied upon in Flamm was nowhere decided or even discussed in the record before him. Id. at 1177. Indeed, it is a "legislative," not an "adjudicative" fact, which under the statutory scheme is appropriately left to an administrative agency and not to a common law court, which lacks the hearing and fact-finding decisional process of an administrative agency.^{105/}

^{103/} Judge Easterbrook has also frequently joined in such opinions written by Judge Posner. See, e.g., Rodi Yachts, Inc. v. National Marine, Inc., 984 F.2d 880 (7th Cir. 1993)(applying "cheapest cost avoider" approach to negligence, over criticism in concurrence by Judge Wood); Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273 (7th Cir. 1992)(reversing grant of preliminary injunction over strong dissent by Judge Cudahy attacking economic analysis).

^{104/} See also Wallace v. Robinson, 940 F.2d 243, 249 (7th Cir. 1991)(Cudahy, J., dissenting)("By artfully framing the question in this way, the en banc majority [through Judge Easterbrook] orchestrates its answer.")

^{105/} Influential judges have recently argued that articulation of clear, "bright-line" rules is preferable to fact-intensive distinctions. See Cardozo, supra note 46, at 107; Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182-83 (1989). A related effort is to identify a "default rule" for apparently incomplete contracts. See generally Ayres & Gertner, Strategic Contractual Inefficiency and (continued...)

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Another example is Judge Easterbrook's opinion in Kamen v. Kemper Fin. Servs., Inc., 908 F.2d 1338 (7th Cir. 1990), rev'd, 111 S. Ct. 1711 (1991). In Kamen, Judge Easterbrook confronted the narrow issue whether the District Court erred in dismissing a shareholder derivative action for failure to plead with sufficient particularity facts excusing "demand" on the board of directors. 111 S. Ct. at 1713. Rather than address that issue, however, Judge Easterbrook expressly overruled Seventh Circuit precedent holding that the issue was governed by state corporate law, and concluded that, as a matter of economic policy, the requirement of making "demand" should never be excused. 908 F.2d at 1343-1347. Judge Easterbrook justified his power to use economic policy to create a universal demand requirement by arguing that the issue of demand was governed by federal common law. Id. at 1342.^{106/}

The Supreme Court unanimously reversed Judge Easterbrook's opinion. Suggesting that Judge Easterbrook's decision was a call for "legal reform," the Supreme Court concluded that he had engaged in a "quantum of federal common lawmaking" that exceeds his power as a federal judge. 111 S. Ct. at 1720. The Supreme Court found Judge Easterbrook's refusal to accept the appellant's argument for the application of Maryland law particularly ironic given that neither party ever argued that federal common law should apply. 111 S. Ct. at 1718. Moreover, the Supreme Court chided Judge Easterbrook for writing an opinion that contains little more than elaborate dictum: "the court should refrain from issuing an opinion that could reasonably be understood by lower courts and nonparties to establish binding circuit precedent on the issue decided." 111 S. Ct. at 1718 n.5. According to the Supreme Court, Judge Easterbrook effectively had exploited the posture of the case and exceeded his power as a judge in order to create a federal law of universal demand consonant with his economic philosophy: "The Court of Appeals erred by fashioning a uniform federal common law rule" 111 S. Ct. at 1723.

Regrettably, Kamen and Flamm are merely two examples among many of this troublesome practice in the corporate and securities area. See, e.g., Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 515 (7th Cir. 1989)(employing efficient capital market hypothesis to limit securities fraud liability to the non-disclosure of "firm specific" information); Goldberg v. Household Bank, FSB, 890 F.2d 965, 966 (7th Cir. 1989)(using efficient market theory to limit measure of damages recoverable by victims of securities fraud); Jordan v. Duff & Phelps,

^{105/}(...continued)

the Optimal Choice of Legal Rules, 101 Yale L.J. 729 (1992); Ayres, *Making a Difference*, supra note 98. (For a recent example of an attempt by the Seventh Circuit to identify the appropriate "default" rules, compare the opinions of Judges Cudahy, Posner, and Easterbrook in Bidlack v. Wheelabrator Corp., 993 F.2d 603 (7th Cir.)(*en banc*), cert. denied, 114 S. Ct. 291 (1993)).

The proponents of Court-defined bright line rules, however, fail to demonstrate how a common law appellate court can marshal extra-record evidence and otherwise analyze data in the manner of a legislature or an administrative agency acting in its rulemaking capacity. They also fail to identify the source of a court's after-the-fact competence, in the absence of record evidence such as contemporaneous industry or trade practice, to determine the appropriate default rule. See Bidlack, 993 F.2d at 612-13 (Cudahy, J., concurring in the judgment).

^{106/} Judge Easterbrook did circulate the opinion pursuant to Circuit Rule 40(f), and the Court approved the departure from its prior precedent.

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Inc., 815 F.2d 429, 442 (7th Cir. 1987)(relying upon own theory of optimal damages in securities fraud cases to limit recovery to situations where investors as a whole suffer a net loss), cert. dismissed, 485 U.S. 901 (1988); Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1129-31 (7th Cir.)(employing efficient capital market hypothesis to reject theory of liability based on a fraud that "created" a market), petition for cert. filed, 62 U.S.L.W. 3396 (Nov. 18, 1993)(No. 93-827).

Nor are the cases in the securities field the only area in which Judge Easterbrook appears to rely in large part on assumptions about economic efficiency taken from outside the record. See, e.g., Merk v. Jewel Food Stores, 945 F.2d 889, 898-99 nn.3-4 (7th Cir. 1991) (majority criticizes Judge Easterbrook's dissent for relying on unsupported assertion about economic motives and for ignoring and mischaracterizing controlling precedent), cert. denied, 112 S. Ct. 1951 (1992). See also United States v. Mount, 966 F.2d 262 (7th Cir. 1992)(applying economic analysis to baseball).^{107/}

One such area is attorneys' fee awards to prevailing plaintiffs under civil rights and other statutes. Judge Easterbrook has exhibited a willingness to overturn District Court fee awards that set attorneys' hourly rates based upon the prevailing market rates in the relevant legal community. Notwithstanding the "abuse of discretion" standard that is to be applied on appellate court review of fee awards, Judge Easterbrook freely reverses trial court determinations awarding fees based upon "market" hourly rates which vary from those the prevailing party's attorney typically charges for his or her services. Under Judge Easterbrook's analysis, "[l]awyers do not come from cookie cutters," and a lawyer with a usual hourly billing rate above or below the market rate in the community is presumptively entitled to that rate, and not to one devised by the court. Gusman v. Unisys Corp., 986 F.2d 1146 (7th Cir. 1993). See also Barrow v. Falck, 977 F.2d 1100, 1105-06 (7th Cir. 1992)(reversing and remanding with directions to lower the hourly rate allowed); Hessel v. O'Hearn, 977 F.2d 299 (7th Cir. 1992)(reversing and remanding with directions to increase the hourly rate allowed).

As applied to public interest attorneys, who choose to reduce their hourly billing rates for certain clients or causes, Judge Easterbrook has suggested in dictum, after mentioning

^{107/} See also Kurland, Foreword: The Seventh Circuit as a Criminal Court: The Role of a Federal Appellate Court in the Nineties, 67 Chi.-Kent L. Rev. 3, 7 (1991)(criticizing law and economics approach to the writ of *coram nobis* in United States v. Keane, 852 F.2d 199, 206 (7th Cir. 1988), cert. denied, 490 U.S. 1084 (1989)); Kurland at 14-20 (discussing the willingness of Judges Easterbrook and Posner to go beyond Supreme Court precedent to advance their views in criminal cases); id. at 26-27 n.110 (discussing Brecht); Patterson, *A Fable from the Seventh Circuit: Frank Easterbrook on Good Faith*, 76 Iowa L. Rev. 503 (1991)(discussing Judge Easterbrook's opinion in Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351 (7th Cir. 1990)).

Judge Easterbrook has also issued other "result-oriented" or "activist" opinions in areas not directly tied to economic efficiency, but in which he has a strong view as to a legal question presented. See, e.g., Watkins v. Blinzinger, 789 F.2d 474, 483-84 (7th Cir. 1986)(expanding Eleventh Amendment doctrine to limit Ex Parte Young and thereby limit many suits against states), cert. denied, 481 U.S. 1038 (1987). Cf. United States v. Sassj, 966 F.2d 283 (7th Cir.)(discussing which of the many prior opinions on the subject are the law of the Circuit, and which the Court can ignore), cert. denied, 113 S. Ct. 509 (1992).

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Supreme Court holdings to the contrary, that "if ideology leads some lawyers to favor a particular clientele, and so reduces what these persons must pay for legal services, this is the market at work." Barrow v. Falck, 977 F.2d 1100, 1106 (7th Cir. 1992). In that same dictum, he asserts that "lawyers get consumption value out of working for certain clients," and compares the lower rates they charge to those charged by lawyers "who flock to Arizona for the desert air and scenery." The result of awarding higher hourly rates to such attorneys, he sarcastically concludes, is "a rare treat: psychic income they can spend."^{108/}

Judge Easterbrook's Approach to Issues Not Directly Presented by the Case.

Judge Easterbrook frequently includes in his opinions lengthy discussions of issues that are not directly presented by the case. See, e.g., Koch v. Stanard, 962 F.2d 605, 607-08 (7th Cir. 1992)(Flaum, J., concurring)(criticizing dicta); United States v. Bader, 956 F.2d 708, 709 (7th Cir. 1992). There are many opinions of which it could be said, in Judge Easterbrook's own words from Kerrigan v. American Orthodontics Corp., 960 F.2d 43, 46 (7th Cir. 1992): "All of this is no more than an interesting detour, however." See id., at 47-48 (Shadur, J., dissenting)(criticizing dicta in majority opinion).^{109/} The analyses in these and other cases, however, are so lengthy and detailed that they fall into a category well beyond mere dictum. It has been suggested by members of the Seventh Circuit and the

^{108/} While the criticism expressed in this section suggests a judge committed principally to his own view of the law's development, the conclusion does not necessarily follow that Judge Easterbrook is consistently reaching results that are different from the trial courts or his colleagues. It should be noted that Judge Easterbrook authors only 8% of the Court's reversals, placing him, on a percentage basis, near the center of the Court in terms of the percentage of times in which he writes to reverse a District Court decision. Similarly, Judge Easterbrook dissents in only 6.32% of the cases on which he sits, placing him below the court average of 8.07% with respect to the number of dissents.

In addition to more traditional separate opinions, Judge Easterbrook wrote one unusual opinion in which he described himself as "dubitante." See National Solid Wastes Management Ass'n v. Killian, 918 F.2d 671, 685 (7th Cir. 1990)(Easterbrook, J., dubitante), aff'd, 112 S. Ct. 2374 (1992), and a recent opinion that was neither concurring nor dissenting, Freeman United Coal Mining Co. v. Office of Workers' Compensation Program, 999 F.2d 291 (7th Cir. 1993)(Easterbrook, J.)("Statement . . . respecting the suggestion of rehearing en banc")(calling for Supreme Court resolution of conflict between the circuits).

^{109/} Another example is Judge Easterbrook's opinion in Hrubec v. National R.R. Passenger Corp., 981 F.2d 962 (7th Cir. 1992). After reaching a result necessary to resolve the case, Judge Easterbrook states "Whether bad faith plays any role at all is a question we need not answer." 981 F.2d at 964. After that statement, however, Judge Easterbrook proceeds to discuss whether the Seventh Circuit may eventually adopt the Sixth Circuit's position on the issue. 981 F.2d at 964. Responding to Judge Easterbrook's conclusion that this Circuit was "not apt to follow" the Sixth Circuit's bad faith requirement, Judge Flaum concurred in the judgment in Hrubec, stating:

Because the district court did not base its holding on bad faith, we have no need to review the issue Therefore, I believe we should await an appropriate case before addressing the issue, instead of reflecting on the likely outcome in this circuit.

981 F.2d at 965.

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United States Supreme Court that such analyses are inappropriate. The Council agrees. See, e.g., Basic, 485 U.S. at 235 (suggesting that in his effort to reach a result which "maximizes shareholder wealth," Judge Easterbrook had ignored the "narrow question" presented in Flamm).

As discussed at pp. 8-14 supra, substantive consideration of issues not properly before the Court is inconsistent with the Court's duty to give full and fair consideration to the trial court's resolution of an issue before it and to consider the litigant's presentations of the facts and law with respect to those issues. Cf. PSI Energy, Inc. v. Exxon Coal USA, Inc., 991 F.2d 1265, 1272 (7th Cir. 1993) ("It would be inappropriate for us to address these questions without the benefit of the district court's views"). In addition, other litigants may have had issues properly presented by their cases foreclosed, without the issues ever being fully briefed and presented against the background of a full factual record in the Seventh Circuit.

Judge Easterbrook himself has acknowledged how the Court should act. In Cornfield v. Consolidated High School District No. 230, 991 F.2d 1316, 1328 (7th Cir. 1993), Judge Easterbrook wrote separately to criticize the majority's discussion of a qualified immunity issue that was unnecessary to the decision, since the Court found the defendants had committed no wrong. Judge Easterbrook wrote:

[T]hese subjects lose their significance once we conclude, as we have, that the individual defendants respected Cornfield's constitutional rights. Having made the litigants' contentions irrelevant, we should withhold comment. Our views about these subjects are advisory--pertinent to some other case, perhaps, but inconsequential to this one. That the parties have mooted a subject that turns out to be irrelevant is neither reason nor authority for judicial exegesis on the matter.

Id. at 1328. The Council agrees.^{110/}

Judge Easterbrook has written further about the evils of reaching out to decide issues not before a court:

I have also left out of the list [of praiseworthy qualities in judges] any praise for judges who seize the moment to write essays about issues the parties did not present. Just as parties may choose the terms of their contract, they may choose the subjects of their litigation. Resolving a case on a ground not presented denies the parties this autonomy and increases the risk that an uninformed opinion will impede rather than promote commerce. It is hard enough to navigate when the court sticks to questions fully ventilated by counsel.

Easterbrook, *Afterword: On Being a Commercial Court*, 65 Chi.-Kent L. Rev. 877, 880 (1989).

^{110/} See note 10 supra.

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Despite this language, Judge Easterbrook is one of the Court's chief practitioners of reaching out to decide an issue that has not been briefed by the parties. See, for example, the Kamen, and Flamm cases, discussed above. He apparently does this to present his views of legal issues as soon as possible, and to preempt consideration of other viewpoints after briefing and argument.^{111/} In his willingness to reach out and decide issues not necessarily before the Court, he is an activist judge.

A recent example of reaching out to decide issues not before the Court is the opinion in Gacy v. Welborn, 994 F.2d 305 (7th Cir.), cert. denied, 114 S. Ct. 269 (1993), a case in which the notorious murderer John Wayne Gacy challenged the jury instructions that had been received during the sentencing phase of his trial. On appeal, Gacy's attorneys had requested that the Court remand the case so that Gacy could present to Judge Grady the same evidence that had recently persuaded Judge Aspen of the unconstitutionality of comparable instructions in United States ex rel. Free v. Peters, 806 F. Supp. 705 (N.D. Ill. 1992), vacated, 1993 U.S. Dist. LEXIS 5362 (N.D. Ill. Apr. 15, 1993). Because Gacy had not raised the evidence below (a study by the late University of Chicago professor Hans Zeisel), the state asked the Court to treat the subject as waived. After oral argument, the Court requested additional briefs on the issues raised by Free.

Judge Easterbrook neither remanded the matter, nor treated it as waived. Instead, he treated it as if it had been raised below, concluding that because prisoners cannot wage a series of collateral attacks, "it is best to consider all of the contentions he presses on us." Gacy, 994 F.2d at 309. To support this conclusion, Judge Easterbrook cited to the Supreme Court's admonition that capital appeals are to be resolved expeditiously, and concluded that "[b]oth Gacy and the State of Illinois are entitled to decision without indefinite delay." Id. Judge Easterbrook reached this conclusion even though the Zeisel study was not in the record before him, made up no part of the court's decision below (since that court had denied a motion to hear the evidence), and neither party had asked for a substantive resolution of the matter before the Court. Judge Easterbrook nevertheless provided a lengthy analysis, rejecting the conclusions reached in the Zeisel study and by Judge Aspen in Free. Gacy, 994 F.2d at 309-14. We believe the Court should have followed normal appellate practices and either found the issue waived or remanded it to the District Court.^{112/}

^{111/} See, e.g., Wilcox v. Niagara of Wisconsin Paper Corp., 965 F.2d 355 (7th Cir. 1992) (Cummings, J., concurring) (Judge Easterbrook's suggestion, not raised by the parties' briefs, that the Wisconsin statute at issue "probably is no longer law at all" was not raised by the parties and was unpersuasive).

^{112/} It could be argued that Judge Easterbrook's panel was as in as good a position to decide the issues raised by the Zeisel study as any other panel, and that by requesting supplemental briefs all proper appellate procedures were honored; deciding the issue at that time was the most efficient approach. That argument, however, ignores the damage done to the appellate process by depriving the District Court of the opportunity to consider the issues and gaining the benefit of a District Court decision on the facts of the case before it. In addition, it gives the appearance that the panel was reaching out to decide an issue that was not fully ripe for decision and otherwise would be decided by another, later panel.

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Judge Easterbrook's Use of Precedent and the Record.

In addition, Judge Easterbrook's opinions have been criticized for not accurately reflecting the record or controlling precedent. Several attorneys have gone as far as to state that Judge Easterbrook's use of precedent is unreliable and inappropriate. This position is supported by several opinions critical of Judge Easterbrook.

One example of an opinion by Judge Easterbrook that was criticized as omitting controlling precedent is Will v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985), cert. denied, 475 U.S. 1129 (1986). In Will, Judge Easterbrook stated that a plaintiff alleging that the purchase of one product was illegally tied to a second product must show a danger of the seller obtaining market power or a potential monopoly in the market of the second, tied product. 776 F.2d at 673. Less than a year earlier, however, that position had been rejected by a 5-4 United States Supreme Court opinion in Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984). Judge Easterbrook was certainly aware of the position in Jefferson Hospital, as he had been counsel to Jefferson Hospital in that case before the Supreme Court. In a subsequent opinion by Judge Cudahy, joined by Chief Judge Bauer and Judge Ripple, in Parts and Elec. Motors, Inc. v. Sterling Elec., Inc., 826 F.2d 712, 716-19 (7th Cir. 1987), the Court noted that Judge Easterbrook's prior opinion in Will "apparently misstates the law."

It is not unusual for Judge Easterbrook to refer in a later opinion to his own extensive and free-wheeling dicta as either controlling precedent or creating an open question when the issue that he has foreshadowed actually does present itself in a case before him. For example, by the time he wrote Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540 (7th Cir. 1990), Judge Easterbrook concluded -- based in large part on his own prior expansively written opinions in Flamm and Teamsters Local 282 Pension Trust Fund v. Angelos, 762 F.2d 522 (7th Cir. 1985), as well as the opinions of other federal judges following his lead in those cases -- that "justifiable reliance is not an independent element in securities litigation." Id. at 1546 (emphasis in original)(citations omitted).

In United States v. Chaidez, 919 F.2d 1193 (7th Cir. 1990), cert. denied, 111 S. Ct. 2861, 112 S. Ct. 209 (1991), for example, Judge Easterbrook asserted that "[t]he standard of review for the conclusion that the seizures were reasonable . . . is in transition in this circuit. Several cases hold that review is *de novo* [citing cases]. Recently doubts have been expressed [citing dicta from his own concurrence (joined by Judge Posner) in United States v. Malin, 908 F.2d 163, 169-70 (7th Cir.), 498 U.S. 991 (1990)]." Chaidez, 919 F.2d at 1196.

Judge Ripple would have none of it:

I agree with the panel majority that, under the law of this circuit, our review is *de novo*. I do not know what the panel majority means when it says that the governing law "is in transition." Under the doctrines of precedent and *stare decisis*, this court applies established principles unless and until the full court determines that our former course was erroneous. The disagreement of a particular judge or even several judges, [citing Judge Easterbrook's and Posner's Malin concurrence], hardly justifies an announcement to bench and bar that well-settled principles may no longer control. Such a pronouncement is both premature and presumptuous.

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Chaidez, 919 F.2d at 1203 n.1 (Ripple, J., dissenting)(citations omitted).^{113/}

Judge Easterbrook has also been criticized for mischaracterizing the record below in order to reach certain results.^{114/} The Council received this complaint from attorneys, and it was recently made by Judge Cummings. See Wilcox v. Niagara of Wisconsin Paper Corp., 965 F.2d 355, 365 (7th Cir. 1992)(Cummings, J., concurring)(criticizing Judge Easterbrook's dissenting opinion). In Wilcox, a diversity case, Judge Cummings wrote that

the dissent's mischaracterization of the facts, misstatement of the public policy at issue, and misapplication of Wisconsin precedent compels me to write a brief response It is striking how little this imagined scenario [set forth by Judge Easterbrook] resembles the actual facts presented in the parties stipulated joint appendix.

Id. at 365.^{115/}

In still other cases, particularly criminal cases, Judge Easterbrook is willing to assume facts that are not part of the record in order to support the conclusion he wishes to reach. For example, in United States v. Mosley, 967 F.2d 242, 243-44 (7th Cir. 1992), Judge Easterbrook dismissed an appeal because he found three hypothetical reasons why the appeal was not filed on time and the most likely possibility did not suggest ineffective assistance of counsel. In United States v. Ferra, 948 F.2d 352, 354 (7th Cir. 1991), cert. denied, 112 S. Ct. 1939 (1992), Judge Easterbrook upheld a sentence based on what Judge Cudahy's dissent described as an "unimaginable" assumption. Although the police confiscated only 254 grams of cocaine, Easterbrook accepted the trial court's sentence based on a weight of over 500 grams. The trial court extrapolated from the amount confiscated to over 500 grams based on testimony that Ferra had given 1/16th of an ounce of cocaine to an informant in each of 200 "fencing" transactions. Even though this assumption required the informant to commit more than one robbery per day, Judge Easterbrook upheld the finding because "some burglars are hyperactive." See also United States v. Widgery, 778 F.2d 325, 331 (7th Cir. 1985)(Judge Cudahy's dissent attacks Judge Easterbrook's conclusion that jurors were not prejudiced by inappropriate communications during deliberation as "speculation"); Gacy, 994 F.2d at 308 (speculates that the "question at hand probably did not arise in the jury's deliberations; they must have been in agreement from the outset").

Judge Easterbrook's Judicial Demeanor.

Judge Easterbrook has consistently displayed a temperament that is improper for a Circuit Judge. While Judge Easterbrook has many good qualities, there is a widespread belief

^{113/} See also Rakestraw v. United Airlines, Inc., 989 F.2d 944, 945-48 (7th Cir. 1993)(Ripple, J., dissenting from denial of rehearing *en banc*)(asserting that Judge Easterbrook misread Supreme Court case).

^{114/} For a condemnation of this practice, see Cardozo, supra note 46 at 55.

^{115/} See also Weinstein v. University of Illinois, 811 F.2d 1091, 1098-99 (7th Cir. 1987)(Cudahy, J., dissenting)(criticizing majority's mischaracterizations of issues on the merits).

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that he is arrogant and intolerant with those who do not match his own intellectual level. This problem seriously interferes with the performance of his duties.

Judge Easterbrook has been resoundingly and repeatedly criticized as being extremely rude to attorneys at oral argument. Lawyers report that Judge Easterbrook goes well beyond asking pointed questions; rather, he "attacks" lawyers in an attempt to establish that the advocate has not understood the case or that the judge's knowledge is superior to the advocate's. Such behavior often continues well after the judge has made the point to be established. Judge Easterbrook has gone so far as to cause attorneys to break down, unable to continue effectively. Even attorneys who otherwise praised Judge Easterbrook expressed concern about his judicial demeanor. Unfortunately, some attorneys reported that as a result of the judge's demeanor, attorneys and their clients "rarely feel like they have received a fair hearing."

The tone of Judge Easterbrook's opinions can be particularly harsh, especially in cases in which he is dissatisfied with counsel's conduct. In Kale v. Obuchowski, 985 F.2d 360, 362-64 (7th Cir. 1993), he assessed a litigant's argument on appeal as "pettifoggery," and concluded: "Appellants have other arguments, but displaying them would do little more than illustrate why some members of the public believe that 'shyster' and 'lawyer' are synonymous. This is a frivolous, doomed and sanctionable appeal." Regardless of whether the attorney's conduct in Kale merited sanctions, the language chosen does not enhance the administration of justice.^{116/}

Conclusion.

Judge Easterbrook's performance is divided between the extremes. In some respects he is excellent; in some he is subject to the most severe criticism. His talents should make him one of the great judges in the country, and sometimes he is. He is a brilliant and provocative thinker who is hard working and has full control of his docket. But other qualities are required of judges. All too often, particularly when he disregards the facts or the law, he acts like the worst of judges. Judge Easterbrook needs to control his demeanor and his diversions from the facts and the law.

It is regrettable that Judge Easterbrook's failings prevent the Court and the legal community from gaining the full advantage of his abilities.

JESSE E. ESCHBACH

Jesse E. Eschbach, 73, is a 1949 graduate of the Indiana Law School. He was in private practice from 1949 to 1962, while also serving as a city attorney for Warsaw Indiana, and a prosecutor. He was appointed to the U.S. District Court for the Northern District of Indiana by President Kennedy in 1962, and served as its chief judge from 1974 to 1981.

^{116/} In addition, the issuance of what is, in effect, a published reprimand, without benefit of notice and an opportunity to be heard, violates the spirit, if not the letter, of Circuit Rule 38. See pp. 22-24 supra.

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Judge Eschbach was appointed by President Reagan to the Seventh Circuit in 1981. Judge Eschbach took senior status in 1985.

Judge Eschbach divides his time between the Chicago area and a home in Florida. As a result, he frequently sits by designation in cases heard by the Eleventh Circuit. In each of the last four years, approximately 20% of the cases in which Judge Eschbach participated were cases in the Eleventh Circuit. The Council's review was limited to cases decided in the Seventh Circuit.

Lawyers report that Judge Eschbach is diligent in following the law, regardless of any ideological instincts or predilection. Judge Eschbach draws heavily on his many years of experience as a federal trial judge, giving both his questions at oral argument and his opinions a practical and common sense quality. Judge Eschbach is usually careful not to distort or ignore precedent.^{117/} To the contrary, Judge Eschbach will try hard to reach the result he believes is correct, regardless of any ideological views. At the same time, Judge Eschbach is not prone to break new ground in his opinions.

Judge Eschbach is consistently well-prepared for oral argument. Almost all lawyers arguing in front of or observing Judge Eschbach note that he asked thoughtful and probing questions designed to explore the heart of the case. Moreover, he is generally regarded as courteous and attentive to lawyers appearing before him.

Judge Eschbach's opinions tend to be written with considerable clarity and organization. See, e.g., Wilson v. Williams, 997 F.2d 348 (7th Cir. 1993)(reversing grant of summary judgment since affidavits raised genuine issue of material fact). He invariably begins with a brief statement of the issue and the panel's decision. This introductory statement is usually followed by a detailed statement of the procedural and substantive facts. His writing style is uncluttered, rather formal, and without asides and colloquialisms, and lends itself to quick understanding by the reader. He generally avoids rhetorical flourish or excess and manifests a strong desire to get to the heart of the case presented. In most opinions Judge Eschbach reiterates and addresses point by point the arguments of the parties. Propositions of law are supported by cited authority, conflicts among the Circuits are fully aired, and cases relied upon by the Court are discussed in detail. In statutory construction cases, he discusses the provisions at issue and the legislative history in detail. In many cases, Judge Eschbach explains the policies behind the rules of law at issue, providing even further insight and guidance to practitioners. Because of his concise and careful writing style, many of his opinions are fairly short without sacrificing thoroughness.

Judge Eschbach's opinions do not appear to fall within any particular ideological mold. He infrequently writes separate opinions. He does not appear to favor plaintiffs or defendants in such categories of cases as civil rights, criminal, or labor cases, but rather decides each

^{117/} See, e.g., Vail v. Board of Educ., 706 F.2d 1435, 1441 (7th Cir. 1983)(Eschbach, J., concurring)(questioning Judge Posner's dissent, which Judge Eschbach claimed reasoned from first principals and disregarded precedent), aff'd by an equally divided Court, 466 U.S. 377 (1984)(*per curiam*).

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case according to its merits. He does, however, give considerable deference to trial courts and administrative agencies.

Judge Eschbach is generally praised for the speed and diligence with which he produces opinions. Comparative statistics provide support for this statement. Over the past five years, Judge Eschbach has taken on average one hundred days to produce a majority opinion. This compares quite favorably with the Seventh Circuit average of 141 days. On several occasions, Judge Eschbach dissented when he believed practical considerations of justice were being disregarded by his colleagues. For example, his practical nature is apparent in United States v. Bruscano, 687 F.2d 938, 943 (7th Cir. 1982)(*en banc*)(Eschbach, J. and Cudahy, J., dissenting), cert. denied, 459 U.S. 1211, 1228 (1983), where he relied on his twenty years of experience as a trial judge in agreeing with the panel that the defendant should have been granted a new trial because improper documents, including a newspaper article about the case, had been brought into the jury room. He found that it was impossible to conclude that the jury was not influenced by such materials, particularly since the jury disregarded repeated admonitions from the bench to disregard press accounts. In Kirchoff v. Flynn, 786 F.2d 320, 331 (7th Cir. 1986)(Eschbach, J., dissenting), he would have affirmed the District Court's award of attorneys' fees rather than remand for an explanation of the award because the record showed that the award was reasonable, the trial judge was aware of the relevant considerations, the majority provided no standards or guidance to the trial court, and the remand would encourage appeals of attorneys' fee awards.

A number of Judge Eschbach's dissents were based on policy considerations. In Serpas v. Schmidt, 808 F.2d 601 (7th Cir. 1986), amended, 827 F.2d 23 (7th Cir. 1987), cert. denied, 485 U.S. 904 (1988), the Court affirmed a determination that rules of the Illinois Racing Board authorizing warrantless searches of racetrack dormitories violated the Fourth Amendment. Judge Eschbach, in dissent, would have side-stepped the constitutional issue. He argued for invocation of the abstention doctrine for reasons of federalism and comity, and would have allowed the state court to determine whether the rules exceeded the agency's authority under the enabling legislation. 808 F.2d at 607-08, 827 F.2d at 31. In Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150, 1162-63 (7th Cir. 1984)(*en banc*), rev'd, 470 U.S. 373 (1985), Judge Eschbach dissented from the Court's decision that *res judicata* barred a federal antitrust action. In a one paragraph dissent, he distinguished the Fourth Circuit opinion on which Judge Posner, writing for the majority, relied, and admonished the Court to adhere to precedent.

When writing for the majority, Judge Eschbach generally evidences a solid practical understanding of the facts presented in the appeal and the effects on the litigants. A good example is UNR Industries, Inc. v. Continental Casualty Co., 942 F.2d 1101 (7th Cir. 1991), cert. denied, 112 S. Ct. 1586 (1992). In a complex dispute arising out of the funding of a trust to pay asbestos-related claims, Judge Eschbach's decision for the panel refused to permit a narrow reading of an excess insurer's liability policy that would have provided the insurer with a windfall and reduced available resources for potential claimants.

Judge Eschbach has on occasion departed from his usual careful and deliberative approach and strained to reach a desired result. In In re Scarlata, 979 F.2d 521 (7th Cir. 1992), an opinion which drew a vigorous dissent from Judge Coffey, the Court determined that an option trader's debt to his brokerage firm was dischargeable in bankruptcy, notwithstanding proof that the debtor had made material misrepresentations which caused a \$5 million loss

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to the firm. Although the Bankruptcy Court had found after an evidentiary hearing that fraud was proved by clear and convincing evidence, and that the firm had proved reasonable and actual reliance on the debtor's misrepresentations, Judge Eschbach held that there was insufficient evidence to support the Bankruptcy Court's finding of reliance. Id. at 525-26. The dissent strongly criticized the majority for reweighing the evidence and going out of its way to make a finding that neither the District Court nor the Bankruptcy Court had made, id. at 531, going against authority from seven other circuits, and unduly using the waiver doctrine to refuse to consider an argument that had in fact been raised, id. at 534-35.

Also, in Forrester v. White, 792 F.2d 647 (7th Cir. 1986), rev'd, 484 U.S. 219 (1988), the Court, in an opinion written by Judge Eschbach, held that absolute judicial immunity barred a civil rights action brought by a probation officer who alleged that she was fired by a state trial judge for reasons of sex-based discrimination. Judge Eschbach's reasoning is unpersuasive. He found that immunity applied because the judge was acting within the scope of his authority and the employee worked in the judicial system. Id. at 656-57. The dissent by Judge Posner, arguing that judges should not be immunized for executive functions such as hiring and firing, as opposed to judicial functions, and supported by ample authority, was far more convincing, id. at 663, and the Supreme Court reversed.

In conclusion, Judge Eschbach's record is one generally deserving of praise. His talents are valued and the Council hopes he will continue to participate on the Seventh Circuit in the future.

THOMAS E. FAIRCHILD

Thomas E. Fairchild, 81, is a 1938 graduate of the University of Wisconsin Law School. From 1938 to 1941, 1945-48, and 1953-57, he was in private practice in Wisconsin. He also served as an attorney with the O.P.A. in Chicago during World War II, and as Attorney General of Wisconsin from 1948 to 1951. From 1951 to 1952, he was the U.S. Attorney for the Western District of Wisconsin. Judge Fairchild was a Democratic candidate for the Senate from Wisconsin in 1950 and 1952. Judge Fairchild served as a justice of the Supreme Court of Wisconsin from 1957 to 1966. He was appointed to the Seventh Circuit by President Johnson in 1966. Judge Fairchild served as Chief Judge from 1975 to 1981. He took senior status in 1981.

Judge Fairchild primarily sits in the Seventh Circuit, but sits occasionally with other Circuits. This evaluation focuses on cases decided in the Seventh Circuit since Judge Fairchild took senior status in 1985.

Judge Fairchild is considered to be intelligent, knowledgeable and very fair by the attorneys who appear before him. Many attorneys reported that Judge Fairchild seldom asked questions at oral argument. It was universally reported that when Judge Fairchild does participate in oral argument, he is courteous and polite.

Judge Fairchild's majority opinions follow the same organizational pattern. First he sets forth a brief summary of the procedural history and describes the issues raised on appeal. Then, he describes in appropriate and usually very clear detail the pertinent facts of the case. He next addresses each of the substantive legal issues seriatim. He begins a discussion of

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each issue by raising the appropriate legal precedents and then applies those precedents to the facts presented.

Judge Fairchild's opinions are generally short, concise, and persuasive. He appears to be especially gifted in his ability to describe complex factual situations of all types in a clear and comprehensible matter. See, e.g., Ende v. Board of Regents, 757 F.2d 176 (7th Cir. 1985)(explaining results of complex regression analysis of salaries in "reverse" employment discrimination case); United States ex rel. Bell v. Director, Dep't of Corrections, 847 F.2d 399 (7th Cir. 1988)(habeas corpus case concerning admissibility of prior testimony of deceased victim).

It is very clear that Judge Fairchild's approach to deciding cases is based to a great extent on reaching the "right" result as dictated by the facts. A number of attorneys complimented Judge Fairchild on his practice of addressing and deciding only the issues raised by the litigants and refraining from deciding issues which are not raised by the litigants.

Judge Fairchild is also very adept at analyzing complex statutory schemes and applying both case law and relevant procedural rules. An excellent example is Judge Fairchild's opinion in In re Hartman Bros. Constr. Corp., 835 F.2d 1215 (7th Cir. 1987)(relative priority of tax liens filed by the United States and the State of Indiana against the personal property of a corporation which went into bankruptcy approximately four months after the liens were filed). Judge Fairchild has also written clear opinions in diversity cases explicating state law issues. See, e.g., American Ins. Corp. v. Sederes, 807 F.2d 1402 (7th Cir. 1986)(affirming grant of declaratory judgment to an insurance company disallowing the claim of a widow of a deceased charter pilot for worker's compensation benefits under Illinois law); Young v. Colgate-Palmolive Co., 790 F.2d 567 (7th Cir. 1986)(affirming dismissal of a shareholders' derivative action brought against the directors of a corporation challenging their adoption of a poison pill takeover plan for lack of personal jurisdiction pursuant to Illinois law).

Judge Fairchild, (who ran for the United States Senate in 1952 against Sen. Joseph McCarthy), generally appears to be particularly sensitive to procedural due process claims. See Ramirez v. Turner, 991 F.2d 351 (7th Cir. 1993)(discipline was imposed without adequate due process where evidence suggested hearing officer was biased against inmate and discipline could affect inmate's ability to obtain parole from life plus 99-year term); United States v. Micke, 859 F.2d 473 (7th Cir. 1988)(Fairchild, J., dissenting)(arguing that District Court's decision prohibiting defendant's principal counsel from cross-examining witness because counsel might be called as a witness violated due process).

The main criticism attorneys raised about Judge Fairchild is his delay in rendering his decisions. See Appendix 28-30. Twenty-three of the eighty-eight majority opinions written by Judge Fairchild that we identified after 1985 were issued more than a year after oral argument. Another twenty of Judge Fairchild's opinions during this period were issued eight to twelve months after oral argument. See, e.g., In re Hartman Bros. Constr. Corp., 835 F.2d 1215 (7th Cir. 1987)(622 days between oral argument and issuance of decision); United States v. Kimberlin, 805 F.2d 210 (7th Cir. 1986)(788 days), cert. denied, 483 U.S. 1023 (1987). Absent exceptional circumstances, these delays are unacceptable.

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Some attorneys have also criticized Judge Fairchild on two substantive grounds. First, some attorneys argue that Judge Fairchild's opinions do not always address conflicting arguments adequately. The strongest example of that problem is Ragsdale v. Turnock, 941 F.2d 501 (7th Cir. 1991)(Ragsdale II), cert. denied, 112 S. Ct. 879 (1992). The Ragsdale case involved a class action complaint brought by a physician and several Illinois women challenging the constitutionality of certain statutes adopted by the Illinois Legislature with the purpose of placing substantial constraints on the ability of women to obtain abortions within the state. The District Court had held that most portions of the statutory scheme were unconstitutional in violation of Roe v. Wade, 410 U.S. 113 (1973). The Seventh Circuit affirmed the District Court's decision in Ragsdale v. Turnock, 841 F.2d 1358 (7th Cir. 1988)("Ragsdale I"), joint motion to defer proceedings granted, 493 U.S. 987 (1989), a case in which Judge Fairchild did not participate. The United States Supreme Court had granted certiorari when, in November, 1989 a settlement was reached between the representatives of the plaintiff class and Illinois Attorney General Neil Hartigan who had been defending the constitutionality of the statutes.

Several anti-abortion women objected to the proposed consent decree in the District Court. Several men, claiming to act as representatives of unborn fetuses, sought to intervene as additional defendants to object to the settlement. The District Court held that neither the objecting women nor the intervening men had standing. The standing issue came before the Seventh Circuit in Ragsdale II.

Judge Fairchild wrote a very short, simple opinion in which he affirmed the decision of the District Court on the standing issue as to both the objecting women and the intervening men. Judge Fairchild held that the putative fathers had appeared far too late in the case, nearly five years after its inception, and that there was no extraordinary reason to permit their intervention. Judge Fairchild determined that the women had no standing, as members of the plaintiff class of Illinois women, to object that the settlement was "too favorable" to their class.

Although Judge Posner concurred with the result reached by Judge Fairchild, he relied on different grounds with respect to both the women and the men. 941 F.2d at 506-09. Judge Flaum also concurred. He agreed that the men did not have standing to intervene. However, he dissented from the determination that the women lacked standing to challenge the consent decree, saying that the women were not objecting to the decree on the ground that it was "too favorable" to their class but rather that the women were "challenging the result of the settlement and the process by which that result was reached, the process which as discussed more fully below, left much to be desired." Id. at 511. While Judge Fairchild set forth his own rationale for ruling on the standing issue in a fair and succinct manner, in a case of such extraordinary public importance he should have fully addressed the arguments raised by both Judges Posner and Flaum. In fact, Judge Fairchild did not even mention Judge Flaum's comments and only alluded once to Judge Posner's opinion.

Judge Fairchild's failure to adequately address arguments and concerns raised by his fellow judges is also demonstrated in less dramatic fashion in other cases. See United States v. Kimberlin, 805 F.2d at 254-55 (Cudahy, J., dissenting)(criticizing Judge Fairchild's majority opinion for failing to adopt any standard for the admission of testimony obtained through hypnosis); Chathas v. Smith, 884 F.2d 980, 990 (7th Cir. 1989)(Fairchild, J., concurring and

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dissenting)(one sentence discussion of excessive force issue failed fully to explain reasons why he disagreed with majority), cert. denied, 493 U.S. 1095 (1990).

Finally, some attorneys questioned whether Judge Fairchild can be unduly deferential to local governmental bodies. See, e.g., International Caucus of Labor Comms. v. City of Chicago, 816 F.2d 337 (7th Cir. 1987)(affirming dismissal of challenge to the constitutionality of the City's regulations regarding the distribution and storage of literature at O'Hare Field, over dissent by Judge Cudahy). See also La Crosse County v. Gershman, Brickner & Bratton, Inc., 982 F.2d 1171, 1177 (7th Cir. 1993)(Fairchild, J., concurring)(distinguishing prior Wisconsin law at great lengths to permit officials to explain their actions); Rathert v. Village of Peotone, 903 F.2d 510 (7th Cir.)(Fairchild, J., concurring)(arguing that village regulation barring police officers from wearing ear studs while off duty was probably unconstitutional, but then joining majority opinion sustaining constitutionality), cert. denied, 498 U.S. 921 (1990).

In general, Judge Fairchild dissents or concurs rarely. When he does dissent, those opinions are usually very short. He often states in only a sentence or two the reason for his dissent or concurrence. He seldom develops those arguments beyond the topic sentence. Consequently, his dissents and concurrences do not appear to advance the development of the law very much.

Overall, Judge Fairchild continues to be an excellent judge who makes a substantial contribution to the work of the Seventh Circuit. He is a clear, crisp and generally persuasive writer. He obviously understands the facts and the law of the cases which come before him. Nevertheless, the Council is concerned about Judge Fairchild's delay in deciding cases. The Council hopes that Judge Fairchild will better balance his workload so as to solve this problem.

JOEL M. FLAUM

Joel Flaum, 57, graduated from Northwestern Law School (J.D. 1963; LL.M. 1964). He was briefly in private practice and then worked as an Assistant State's Attorney (1965-69), Assistant Attorney General (1969-70), First Assistant Attorney General (1970-72), and First Assistant U.S. Attorney (1972-75). He was appointed to the District Court by President Ford in 1975, and served there until his 1983 appointment to the Seventh Circuit by President Reagan.

Judge Flaum is courteous and cordial in all his relationships. He is reluctant to criticize his fellow judges and is deferential to the District Judges.

Judge Flaum prepares carefully for oral argument and takes it seriously (although his preparation may depend on his level of interest in the case). He is unfailingly polite at argument and generally participates.

Judge Flaum's opinions are noticeably free from certain questionable traits. He does not digress into ruminations about what the law might be and generally is careful to avoid unnecessary dicta. He does not make clever remarks at the expense of the litigants or counsel. One gets the sense of a judge who appreciates litigation and lawyers. Judge Flaum's general

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personality -- his collegiality and concern for others' feelings -- as well as his many years of experience as a prosecutor and District Judge are reflected in his opinions, to his credit.

Judge Flaum's opinions are generally well-organized, straightforward, and clearly written. He usually can be relied upon to correctly apply established law. Judge Flaum's judicial style is illustrated by his numerous decisions applying the standard rules of statutory and contract construction.^{118/} Judge Flaum applies these rules as given, with little explanation or discussion of why they should be followed. Judge Flaum does not blindly adhere to these rules, however. He will not apply rules of construction rigidly in a fashion that would produce an impractical result. See, e.g., Marlowe v. Bottarelli, 938 F.2d 807 (7th Cir. 1991)(construing regulatory agreement). At the same time, Judge Flaum's construction of statutes does not appear to be heavily influenced by personal or strongly ideological views about government and social policy.

Practitioners and former clerks say that Judge Flaum rarely advocates bright-line rules. Rather, he attempts to find balancing tests that are quite flexible. He is said by some to seem to go out of his way to avoid making new law. Judge Flaum tries to follow precedent or otherwise avoid saying anything very remarkable in his opinions. He tries to be a consensus builder. This leads some lawyers to suggest that there is no feeling of strong principle underlying what Judge Flaum does.^{119/}

While it is rare to find Judge Flaum announcing new legal rules, he does so on occasion. See, e.g., United States v. Duran, 957 F.2d 499, 505 (7th Cir. 1992)(creating a rebuttable presumption that spouses have authority to consent to searches of all areas in the

^{118/} See, e.g., Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037 (7th Cir. 1992)(construing insurance contract); McCammon v. Indiana Dept. of Fin. Insts., 973 F.2d 1348 (7th Cir. 1992)(construing Indiana statute), cert. denied, 113 S. Ct. 1282 (1993); United States v. Doherty, 969 F.2d 425 (7th Cir.)(construing bank fraud statute), cert. denied, 113 S. Ct. 607 (1992); Resolution Trust Corp. v. Lightfoot, 938 F.2d 65 (7th Cir. 1991)(construing removal statutes); United States v. Carr, 965 F.2d 176 (7th Cir. 1992)(construing postal statute).

^{119/} United States v. Townsend, 924 F.2d 1385 (7th Cir. 1991), is an example of the way in which Judge Flaum will avoid bright-line rules. In Townsend, Judge Flaum developed a complicated test for determining the propriety of linking a number of defendants in a single drug conspiracy. The law on this subject in the Seventh Circuit was much simpler prior to Townsend.

While Judge Flaum's opinions tend to be thoughtful, some lawyers believe he can attempt to find a middle ground or "split the baby," which sometimes produces confusing or incoherent results. See United States v. Neapolitan, 791 F.2d 489 (7th Cir.), cert. denied, 479 U.S. 939, 940 (1986). There, Judge Flaum upheld a RICO conviction but wrote that the government's authority was not unlimited. The limits he proposed included some confusing language about what constitutes a pattern of racketeering activity, apparently requiring pleading with great specificity. Id. at 501. Later decisions appear to be attempts to correct the confusion caused by the Neapolitan decision. See United States v. Crockett, 979 F.2d 1204, 1209 (7th Cir. 1992), cert. denied, 113 S. Ct. 1617 (1993); United States v. Glecier, 923 F.2d 496, 500-01 (7th Cir.), cert. denied, 112 S. Ct. 54 (1991).

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homestead). It is not surprising that Duran is a criminal case. Judge Flaum appears to be much more sure of himself in reviewing criminal cases.^{120/}

Substantive policy preferences make their way into some of Judge Flaum's opinions. For example, in Heck v. City of Freeport, 985 F.2d 305 (7th Cir. 1993), Judge Flaum described his belief that it may be valuable for public employees to be selected for reasons of political patronage, id. at 307, 310, even though the policy goal conflicts with the First Amendment policy of the Supreme Court; see id. at 308.^{121/}

Judge Flaum's policy views and predilections are also reflected in a comparison of his decisions in Montgomery Ward & Co. v. NLRB, 904 F.2d 1156 (7th Cir. 1990), and Cowherd v. HUD, 827 F.2d 40 (7th Cir. 1987). Both cases involved the deference owed to an administrative agency in its interpretation of law. In the Montgomery Ward case Judge Flaum showed virtually no deference to the NLRB, refusing to enforce an NLRB bargaining order, leaving unremedied some extreme labor law violations.^{122/} In comparison, in Cowherd, Judge Flaum showed great deference to a HUD decision to sell and essentially abandon a troubled public housing unit, without requiring future rent subsidies.

Civil rights plaintiffs' lawyers have been disappointed with several of Judge Flaum's opinions, but his opinions in this area generally have been consistent with or affirmed by the Reagan-Bush era Supreme Court. Thus, for instance, Judge Flaum wrote an opinion for the Court denying an attorneys' fees multiplier in a major race discrimination class action. In re Burlington N., Inc. Employment Practices Litig., 810 F.2d 601 (7th Cir. 1986), cert. denied, 484 U.S. 821 (1987). The Supreme Court recently disallowed virtually all such fee multipliers. City of Burlington v. Dague, 112 S. Ct. 2638 (1992). Judge Flaum wrote the opinion for the Seventh Circuit in the Lorance Title VII case, holding that a plaintiff's claim challenging a seniority system is time-barred unless brought within three hundred days of when the seniority system was adopted, even if the plaintiff was not effected by the seniority system until many years later. Lorance v. AT&T Technologies, Inc., 827 F.2d 163 (7th Cir. 1987), aff'd, 490 U.S. 900 (1989). The Lorance decision was affirmed by the Supreme Court and then overturned by Congress in the 1991 Civil Rights Act, 42 U.S.C. §2000e-5(e)(2) (Supp. III 1991).

^{120/} See also Soldal v. County of Cook, 923 F.2d 1241, 1252-53 (7th Cir.)(Flaum, J., dissenting)(Court held that the removal of a trailer home by sheriff's deputies did not constitute a Fourth Amendment seizure), aff'd in part and rev'd in part, 942 F.2d 1073, 1087-89 (7th Cir. 1991)(*en banc*)(Flaum, J., dissenting), rev'd, 113 S. Ct. 538 (1992).

^{121/} The Heck decision may be categorized as part of the general trend of the Seventh Circuit to resist the Supreme Court's First Amendment restrictions on patronage hiring and firing, starting with Elrod v. Burns, 427 U.S. 347 (1976), and leading to Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), rev'd 868 F.2d 943 (7th Cir. 1989)(*en banc*). Judge Flaum participated in dismissing on standing grounds a challenge to political patronage hiring in Shakman v. Dunne, 829 F.2d 1387 (7th Cir. 1987), cert. denied, 484 U.S. 1065 (1988). See also, e.g., Selch v. Letts, 5 F.3d 1040, 1047 (7th Cir. 1993)(Kanne, J.)(criticizing Supreme Court patronage decisions).

^{122/} Judge Flaum also showed great impatience with the NLRB in NLRB v. Affiliated Midwest Hosp., Inc., 789 F.2d 524 (7th Cir. 1986).

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A key question about Judge Flaum is the extent to which he acts to restrain members of the Court who are more activist in their agenda. On several occasions he has resisted unusually expansive theories advocated by some of his colleagues. See, e.g., Maier v. FCC, 735 F.2d 220 (7th Cir. 1984)(holding that decision of FCC that there was no violation of fairness doctrine was reviewable)(dissent by Judge Posner); Koch v. Stanard, 962 F.2d 605 (7th Cir. 1992)(opinion by Judge Easterbrook on §1983 issue)(concurrence by Judge Flaum narrowing the scope of the opinion); Prater v. United States Parole Comm'n, 802 F.2d 948 (7th Cir. 1986)(*en banc*)(joining dissent from Judge Posner opinion on *ex post facto* law issue); United States v. Spears, 965 F.2d 262, 282-83 (7th Cir.)(Flaum, J., dissenting from denial of rehearing *en banc*)(case announced new standards for warrantless searches), *cert. denied*, 113 S. Ct. 502 (1992); Hunter v. Clark, 934 F.2d 856, 867-68 (7th Cir.)(*en banc*)(Flaum, J., dissenting)(Court found harmless error in habeas case where trial court failed to give instruction regarding no adverse influence from defendant's failure to testify), *cert. denied*, 112 S. Ct. 388 (1991).^{123/}

One of Judge Flaum's best-known opinions was his opinion for the Court in Lawson Products, Inc. v. Avnet, Inc., 782 F.2d 1429 (7th Cir. 1986). In Lawson Products, Judge Flaum reconsidered the numerical formula for the grant of a preliminary injunction that Judge Posner had developed in Roland Mach. Co. v. Dresser Industries, Inc., 749 F.2d 380 (7th Cir. 1984), and American Hosp. Supply Corp. v. Hospital Products, Ltd., 780 F.2d 589 (7th Cir. 1986). Judge Flaum carefully restated the traditional preliminary injunction formula, explained why Roland and American Hospital provided "important insights," Lawson Products, 782 F.2d at 1432, and removed Judge Posner's approach, which had been subject to great criticism, from the law of the Circuit.^{124/}

Lawyers view Judge Flaum as a practical judge, applying rules to prevent litigation being unnecessarily protracted. See, e.g., Bennett v. Tucker, 827 F.2d 63, 67 (7th Cir. 1987) (accepting jurisdiction); Buggs v. Elgin, Joliet & E. Ry., 852 F.2d 318 (7th Cir. 1988)(magistrate's correction of damages calculation does not open up merits for appeal); Marlowe v. Bottarelli, 938 F.2d 807 (7th Cir. 1991)(statutory construction). Judge Flaum's opinions show concern for their effects on litigants and counsel. See, e.g., Shine v. Owens-Illinois, Inc., 979 F.2d 93, 98 (7th Cir. 1992). He often dissents from written sanctions or criticisms of attorneys, arguing that an unpublished admonishment would suffice. See, e.g., Smith v. Town of Eaton, 910 F.2d 1469, 1473-74 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1587

^{123/} See also, e.g., Graff v. City of Chicago, 9 F.3d 1309, 1327-33 (7th Cir. 1993)(*en banc*)(Flaum, J., concurring)(criticizing dicta); In re Tolona Pizza Products Corp., 3 F.3d 1029, 1034 n.1 (7th Cir. 1993)(Flaum, J., dissenting)(criticizing strict application of waiver rule to prevent review of questionable District Court reversal of Bankruptcy Court findings); Hrubec v. National R.R. Passenger Corp., 981 F.2d 962, 965 (7th Cir. 1992)(Flaum, J., concurring in the judgment)(criticizing dicta); Doe v. Small, 964 F.2d 611, 627-28 (7th Cir. 1992)(*en banc*)(Flaum, J., concurring in judgment)(criticizing majority's failure to defer to unappealed factual finding of the District Court); Koch v. Stanard, 962 F.2d 605, 607-08 (7th Cir. 1992)(Flaum, J., concurring)(criticizing dicta).

^{124/} See Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1346-47 (7th Cir. 1986)(Will, J., concurring in the judgment)(Lawson was "an attempt to 'bury with kindness' the legal revisionism undertaken in Roland and American Hospital"); Silberman, *Injunctions by the Numbers: Less than the Sum of its Parts*, 63 Chi.-[.]Kent L. Rev. 279 (1987).

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(1991); Auriemma v. City of Chicago, 906 F.2d 312, 314-15 (7th Cir. 1990). See also Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985); Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 940 (7th Cir. 1989)(*en banc*).

While he is usually restrained in rebuking private attorneys in civil cases, Judge Flaum indicates in his writings a belief that government attorneys should be held to a higher standard. See United States v. Alex Janows & Co., 2 F.3d 716, 722-23 (7th Cir. 1993)(criticizing prosecutor for defining "reasonable doubt" in violation of several Seventh Circuit cases); McCammon v. Indiana Dep't of Fin. Inst., 973 F.2d 1348, 1351 (7th Cir. 1992)(criticizing government's brief), *cert. denied*, 113 S. Ct. 1282 (1993); United States v. Threw, 861 F.2d 1046, 1050-51 (7th Cir. 1988)(disapproving of overreaching by prosecutors in plea bargain); United States v. Swiatek, 819 F.2d 721, 731 (7th Cir. 1987)(criticizing prosecutor even though conviction was not overturned), *cert. denied*, 484 U.S. 903 (1987); United States v. Board of Educ. of the City of Chicago, 744 F.2d 1300, 1308 (7th Cir. 1984)(criticizing chief of Justice Department's Civil Rights Division over handling of desegregation case), *cert. denied*, 471 U.S. 1116 (1985).^{125/}

An example of Judge Flaum's unusual concern with courteous behavior, perhaps to the detriment of plain-speaking, is found in Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370 (7th Cir.), *reh'g denied*, 802 F.2d 217 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987). Olympia Equip. was an antitrust monopolization and implied contract case in which the jury returned a verdict of \$54 million, reduced by the trial judge to \$36 million. The panel on appeal consisted of Judges Posner, Flaum, and Bauer, with Judge Posner writing the opinion for the Court. The Seventh Circuit's decision distinguished the very recent Supreme Court case, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), arguing that the Aspen case was really an "essential facility" case. Olympia, 797 F.2d at 377. The Court reasoned that the defendant in the Olympia case could not be liable, because it would make no sense and would violate antitrust policy to require a monopolist to continue a voluntary program of aiding a competitor. *Id.* at 377-80.

The attorneys for the plaintiff wrote a forceful and blunt motion for rehearing and rehearing *en banc*. They argued that Judge Posner, writing for the Court, had been heavily influenced by his own views of proper antitrust policy; had purposefully read the controlling Supreme Court case in an unduly narrow fashion to comport with his policy views; and had engaged in unusual and improper fact-finding on appeal, reflecting his distrust of juries and his unwillingness to live within the limitations of appellate review as set forth by the Supreme Court. It is a widely-held view of lawyers practicing in the Seventh Circuit that Judge Posner has at times engaged in this kind of conduct, particularly in antitrust cases. Plaintiff's lawyers in the Olympia case brought the issue into the open and challenged the panel and the Seventh Circuit as a whole to address it.

^{125/} But see United States v. Belanger, 936 F.2d 916 (7th Cir. 1991). In Belanger, the Seventh Circuit discovered that the criminal defendant received a 30 year sentence when he should have received, at most, a ten-year sentence. In response, Judge Flaum gently chewed out the assistant United States Attorney and the defense attorney for their negligence and chided the U.S. Attorney for not conceding error when it realized it. *Id.* at 920. Judge Flaum's language may have been too gentle: the government attorneys stood by while a defendant was about to have an improper twenty years added to his sentence.

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The panel issued a *per curiam* opinion denying rehearing and no Judge on the Court voted to hear the case *en banc*. Judge Flaum, joined by Judge Bauer, wrote a special concurrence criticizing the plaintiff's lawyers for supposedly showing lack of proper respect for the Court and Judge Posner. Almost no mention was made of the merits. Judge Flaum wrote:

[T]o state as does the petition for rehearing in this case that a judge of this court has seized an opportunity to preempt a ruling of the United States Supreme Court and emasculate its principles while purporting to give the case careful and respectful consideration is simply, in our view, beyond the bounds of acceptable aggressive appellate advocacy.

Moreover, to charge that the panel opinion engages in rampant *de novo* factfinding, ignores or misstates uncontested facts, and treats other factual issues as questions of law to be redecided on appeal constitutes neither respectful nor responsible pleading. In addition, to conclude, at least by implication, that the above described approach is undertaken to advance the individual legal/economic views of the authoring judge is an inappropriate commentary on the perceived thrust of the panel opinion issued in this case as well as the role of the other panel members.

Olympia Equip., 802 F.2d at 219.

Thus, Judge Flaum found it improper for a lawyer to even raise issues about Judge Posner's unusual activism and strong views. We have read the petition for rehearing in the Olympia Equip. case. It is forceful and raises important issues. We do not find it improperly disrespectful. See Gutman, *Advance Sheet: "A Posnerian Trilogy"*, Litig. 51-52 (Winter, 1987)("plaintiff's critique was worthy of thoughtful consideration, not righteous indignation").

As should be clear from this discussion, Judge Flaum's opinions reflect an apparent intent to try to find a middle ground, avoid unnecessary decisions, and respect and defer to the findings and judgments of District Judges and juries. There is substantial debate about whether these qualities, as applied by Judge Flaum, are good or bad. One interpretation argues that Judge Flaum's sense of moderation leads him to be too indecisive and, ultimately, to be a judge without consistent principle. An alternative interpretation argues that Judge Flaum's opinions show a strong and consistent commitment to the "classical" school of judicial restraint.

This issue with respect to Judge Flaum is presented in the trilogy of cases involving the Chicago Board of Education and the United States Justice Department. United States v. Board of Educ. of the City of Chicago, 717 F.2d 378 (7th Cir. 1983); United States v. Board of Educ. of the City of Chicago, 744 F.2d 1300 (7th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985); United States v. Board of Educ. of the City of Chicago, 799 F.2d 281 (7th Cir. 1986). Judge Flaum wrote the opinion for the Court in each of these cases.

In the Board of Education cases, the Justice Department, at the close of President Carter's term in office, entered into a consent decree with the Chicago Board of Education to end a race discrimination case. Under the decree, the executive pledged "to make every good faith effort to find and provide every available form of financial resources adequate for the

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implementation of the desegregation plan." 717 F.2d at 380. When the Reagan administration took office, it backed away from the plan, actively making efforts to reduce funding for the Chicago schools.

On three occasions, the District Court (Judges Shadur and Aspen) held the federal government in contempt and entered extraordinary orders, requiring the Executive Branch to lobby Congress and allocate over \$100 million in education funds for Chicago. On each occasion the Court of Appeals, in opinions written by Judge Flaum, reversed. The Court criticized the parties, particularly the federal government, for failing to act reasonably and in good faith to compromise their differences and live up to the terms of the consent decree. 799 F.2d at 283. In the first two decisions, the Court carefully avoided determining the bounds of what could be demanded under the consent decree. *Id.* at 289. Judge Flaum and the Court avoided the difficult constitutional issues involved. In the third decision, expressing disappointment with the parties, the Court held that the decree was vague as to its terms and could not be read to require specific action. *Id.* at 288-89. Decisions by the executive within a broad range would satisfy the government's obligations, the Court held. *Id.* at 295.

These opinions may be viewed, alternatively, as examples of Judge Flaum's strengths or of his weaknesses as a judge. The positive interpretation argues that these cases illustrate Judge Flaum's consistent adherence to a classical school of judicial restraint, emphasizing the values of federalism, separation of powers, and the primacy of the political (as opposed to the judicial) process. Although Judge Flaum left little doubt that he personally found the conduct of the Executive Branch to be reprehensible, he believed that the dispute was essentially a political struggle over money that was "inevitable in light of the shifting ideological winds in the years since the decree was signed." 799 F.2d at 288. In defining the District Court's role in this political struggle, he realistically acknowledged "the inherent problems with ordering remedial relief against the government." *Id.* at 289. He emphasized that the District Court should exercise "oversight powers without supplanting the continuing responsibilities of the [governmental] parties." *Id.* at 296.

Despite the fact that he had been nominated to the Seventh Circuit by the Reagan administration and might have held hopes for a Supreme Court nomination, Judge Flaum in 1984 sharply criticized the Reagan Justice Department for its conduct in the case. 744 F.2d at 1308.^{126/}

A more critical interpretation, however, argues that this is another example of Judge Flaum substituting rhetoric for difficult substantive decisions. Under this interpretation, Judge Flaum's (and the Court's) unwillingness to make decisions about the proper interpretation of the consent decree and the limits to its enforcement resulted in unnecessarily protracted litigation. This interpretation argues that the rulings issued in the third opinion in 1986 should have been made in the first one, in 1983. This interpretation argues that Judge Flaum's repeated disappointment -- disappointment that the parties could not resolve their dispute themselves and instead looked to the courts to decide the issues -- shows an unfortunate

^{126/} For an additional example supporting a positive interpretation of Judge Flaum's work, *see Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262, 1273-74 (7th Cir. 1984)(Flaum, J., concurring), illustrating concern for the values of federalism.

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distaste for an essential judicial function. The role of the courts is to decide difficult, heated disputes that parties will not and cannot resolve themselves. Judge Flaum's aversion for that function, and his relative distaste for conflict, reflects an underlying weakness as a judge, this interpretation argues.^{127/}

While we present the disagreements among the bar about Judge Flaum's role, we do not reach an opinion on which side is correct. The Council concludes that Judge Flaum has many good qualities that would much improve the Court if shared more widely. His courtesy and respect for lawyers and litigants, his restraint, his familiarity with litigation and recognition of the practical problems of litigation all serve him well as a judge.

MICHAEL S. KANNE

Michael S. Kanne, 55, is a 1968 graduate of Indiana University Law School. From 1968 to 1972, he was in private practice in Rensselaer, and was an attorney for that city in 1972. From 1972 to 1982, he was a state trial judge in Indiana. Judge Kanne was appointed by President Reagan to the U.S. District Court for the Northern District of Indiana in 1982, and President Reagan appointed Judge Kanne to the Seventh Circuit in 1987.

Judge Kanne's opinions are straightforward. Attorneys view him as applying precedent fairly in most matters. As is discussed in more detail below, the major negative comments we received about Judge Kanne concerned his delay in issuing opinions, and some questions about his fairness in employment-related matters.

Judge Kanne is generally well-prepared for oral argument. He is moderately active in his questioning. He asks good, reasonable questions that indicate that he has become well acquainted with the briefs and the case. Judge Kanne is always courteous to attorneys at oral argument. His questions are not designed to intimidate attorneys. Judge Kanne has a steady, pleasant judicial temperament. We received no comments indicating that Judge Kanne had ever been less than completely courteous and professional.

Judge Kanne has spent the bulk of his legal career as a trial court judge. (He was first appointed to the state bench at age 34.) This experience has given him a valuable background in how litigation functions, and has strongly shaped his judicial philosophy. For example, in G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989)(*en banc*), Judge Kanne, writing for the *en banc* majority, ruled that a trial court could order a corporate representative to appear for a settlement conference. Judge Kanne clearly sympathized with the need of District Judges to have the ability to mandate participation by parties in settlement conferences. Likewise, in United States v. Best, 939 F.2d 425 (7th Cir. 1991)(*en banc*), cert. denied, 112 S. Ct. 1243 (1992)(discussed at pp. 107-08 *infra*), Judge Kanne voted with the block of Seventh Circuit judges who had prior trial court experience. See also Politte v. United States, 852 F.2d 924, 928 (7th Cir. 1988)(showing Judge Kanne's

^{127/} For another example supporting the interpretation of Judge Flaum as a compromiser who avoids difficult decisions, see Wyletal v. United States, 907 F.2d 49 (7th Cir. 1990)(affirming trial court's determination that both parties were equally negligent, even though the trial court refused to determine who hit whom).

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sympathy for the good faith error of a District Judge); United States v. Hall, 854 F.2d 1036 (7th Cir. 1988)(demonstrating Judge Kanne's experience with the criminal trial process).

Some attorneys criticize Judge Kanne for being too willing to defer to District Judges. While the Council has some concerns that Judge Kanne's deference may, at times, be excessive, the statistical analysis attached hereto shows that Judge Kanne ranked solidly in the middle of the pack in terms of the percentage of reversals by Seventh Circuit judges.^{128/} This normal rate of reversal also held true in our research regarding Judge Kanne's disposition of criminal cases, which showed that the percentage of criminal cases Judge Kanne reverses is almost exactly the same as the average Seventh Circuit percentage.

Our review of Judge Kanne's cases and the comments we received from others indicate that Judge Kanne adheres strictly to precedent. Judge Kanne's approach in his opinions is to recite the established law and apply that law to the facts. Although this is certainly what a judge should do, we found missing from Judge Kanne's opinions a measure of healthy skepticism regarding some precedent or any vision of the law, how it develops, or where it is failing. While Judge Kanne usually provides a clear and straightforward overview of the law and explains how that law applies to the facts, Judge Kanne rarely examines existing law critically or analytically.

Several opinions illustrate these points. In In re Rivinius, Inc., 977 F.2d 1171 (7th Cir. 1992), Judge Kanne held that it was error to allow a defendant to amend its pleadings after trial under Rule 15(b) of the Federal Rules of Civil Procedure. Judge Cudahy dissented, stating that Judge Kanne's holding "elevated the technical over the substantial," and proposed a less strict rule. Id. at 1177. Judge Cudahy also provided facts showing that the plaintiff had waived this appellate issue. Id. at 1177-78. Judge Kanne provided little response to either of these arguments, which leaves the reader wondering whether Judge Kanne's rule will have any significant precedential value. In Cunningham v. Peters, 941 F.2d 535 (7th Cir. 1991), cert. denied, 112 S. Ct. 1484 (1992), Judge Easterbrook indicated in dissent that Judge Kanne had failed to adequately address some important legal questions. 941 F.2d at 542-43. In Swamp v. Kennedy, 950 F.2d 383 (7th Cir. 1991), cert. denied, 112 S. Ct. 2992 (1992), Judges Posner, Easterbrook, and Ripple dissented from the denial of a rehearing *en banc*, stating that recent Supreme Court decisions require a more in-depth examination than provided in Judge Kanne's opinion.^{129/} Id. at 388-89.

Generally, Judge Kanne applies the law to the facts almost mechanically, without disclosing any particular ideology.^{130/} Judge Kanne is generally concerned with following

^{128/} See, e.g., Burda v. M. Ecker Co., 954 F.2d 434 (7th Cir. 1992)(reversing grant of Rule 11 sanctions).

^{129/} See also, e.g., United States v. Belanger, 970 F.2d 416 (7th Cir. 1992), in which Judge Kanne reviewed the relevant facts and law, but failed to justify why his rule is better than the strict requirement the defendant urged, and Fiorenzo v. Nolan, 965 F.2d 348 (7th Cir. 1992)(conclusory reasoning on issue of intent to discriminate).

^{130/} But see Selch v. Letts, 5 F.3d 1040, 1047 (7th Cir. 1993)(criticizing Supreme Court patronage decisions).

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the law. Given the appropriate facts, Judge Kanne will apply the law in favor of individuals. See Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989)(ruling in favor of employee in sexual harassment case); Sulie v. Duckworth, 864 F.2d 1348 (7th Cir. 1988)(while affirming the denial of a habeas corpus petition, Judge Kanne goes against a plurality opinion by the conservative members of the U.S. Supreme Court), cert. denied, 493 U.S. 828 (1989); Gorman v. Robinson, 977 F.2d 350 (7th Cir. 1992)(ruling in favor of plaintiff in §1983 case); United States v. Maciaga, 965 F.2d 404 (7th Cir. 1992)(reversing the enhancement of defendant's sentence).^{131/}

However, in some employment-related opinions, Judge Kanne's political philosophy seemed to affect the outcome of the cases. Despite Judge Kanne's traditional deference to the fact-finder, at times he seems to go out of his way to rule against individuals in employment cases. See, e.g., Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115 (7th Cir. 1992)(illegal aliens cannot get back pay)(Cudahy, J., dissenting); Pugh v. Bowen, 870 F.2d 1271 (7th Cir. 1989)(limiting award of disability benefits)(Fairchild, J., dissenting); Grohs v. Gold Bond Bldg. Prods., 859 F.2d 1283 (7th Cir. 1988)(Judge Kanne refused to defer to Judge Moran's assessment of the evidence), cert. denied, 490 U.S. 1036 (1989); Heerdink v. Amoco Oil Co., 919 F.2d 1256 (7th Cir. 1990)(reversing District Court's finding of sexual discrimination), cert. denied, 111 S. Ct. 2826 (1991). In Hill-Rom Co. v. NLRB, 957 F.2d 454 (7th Cir. 1992)(Easterbrook, J. dissenting), Judge Kanne and Judge Manion acted together to overturn a NLRB decision in favor of the employees based on what were essentially factual disagreements, rather than deferring to the NLRB's role as a finder of fact.

One civil rights opinion was particularly troubling. In Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992), Judge Kanne correctly reversed the District Court's holding and held that counsel should have been appointed for a prisoner. In reaching that result, however, he adopted a standard that seems to put prisoners in a double bind: they cannot get a court-appointed lawyer unless they first try to get a private lawyer, but if they cannot get a private lawyer, that indicates that their claims may be without merit and thus not deserving of court-appointed counsel.

The quality of Judge Kanne's opinions does appear to have improved during his time on the Court. The Council's view that they have, however, been unduly devoid of legal analysis is supported by the statistical report in the Appendix at pp. 1-11, 24, 26-27. The analysis of Shepherd's citations to the opinions of the various Seventh Circuit judges per year on the bench ranks Judge Kanne either at the bottom or second from the bottom in all the important categories, including citations by District Courts within the Seventh Circuit, citations by non-Seventh Circuit District Courts, citations by the Seventh Circuit, citations by other Circuits, and all citations together. Judge Kanne is cited only half as often as the average for the other Seventh Circuit judges.

A major problem with Judge Kanne's performance on the bench has been his difficulty issuing his opinions on a timely basis. From our reading of the cases, this seemed particularly to be a problem for cases from 1989 and 1990, but has improved somewhat in the past two

^{131/} See also United States v. Jungles, 903 F.2d 468 (7th Cir. 1990)(a well-reasoned opinion giving a thorough hearing to a pro se defendant in a tax evasion case, before upholding conviction).

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years. The analysis in the Appendix shows that Judge Kanne's average time to publish an opinion during the past five years was 235 days, the second slowest among the judges of the Seventh Circuit.

There is no indication that Judge Kanne is assigned more difficult opinions than the other judges on the Seventh Circuit. Moreover, many of Judge Kanne's delayed opinions do not seem particularly difficult. For example, it took Judge Kanne 451 days to issue United States v. Dweck, 913 F.2d 365 (7th Cir. 1990), a routine affirmance of a conviction without dissent or concurrences that was seven reporter pages in length. See also United States v. Dillon, 905 F.2d 1034 (7th Cir. 1990)(264 days to issue six-page opinion); United States v. Glas, 957 F.2d 497 (7th Cir. 1992)(184 days to issue two-page opinion); Jupiter Corp. v. FERC, 943 F.2d 704 (7th Cir. 1991)(290 days to publish opinion on simple issue of refunding illegal tax).^{132/}

On seemingly straightforward cases, Judge Kanne has often taken more than 270 days to publish an opinion. Myer v. Zeigler Coal Co., 894 F.2d 902 (7th Cir.)(341 days), cert. denied, 498 U.S. 827 (1990); United States v. Jungles, 903 F.2d 468 (7th Cir. 1990)(354 days); Mary Thompson Hosp. v. NLRB, 943 F.2d 741 (7th Cir. 1991)(358 days); Ray v. Conrail, 938 F.2d 704 (7th Cir. 1991)(291 days), cert. denied, 112 S. Ct. 914 (1992); Hill-Rom Co. v. NLRB, 957 F.2d 454 (7th Cir. 1992)(480 days)(Easterbrook, J., dissented); Robbins v. Lady Baltimore Foods, Inc., 868 F.2d 258 (7th Cir. 1989)(289 days); East Bay Running Store, Inc. v. Nike, Inc., 890 F.2d 996 (7th Cir. 1989)(368 days).^{133/}

Judge Kanne has taken over 500 days to publish some opinions. Illinois EPA v. United States EPA, 947 F.2d 283 (7th Cir. 1991)(617 days); United States v. Ware, 914 F.2d 997 (7th Cir. 1990)(520 days); Daniel J. Hartwig Assocs., Inc. v. Kanner, 913 F.2d 1213 (7th Cir. 1990)(612 days). In Bennett v. Jett, 956 F.2d 138 (7th Cir. 1992), Judge Kanne took 618 days to issue an opinion. Five months later, the opinion was vacated, *per curiam*. 966 F.2d 207 (7th Cir. 1992). The second order, which was one page long, was based entirely on a Supreme Court case, decided six months before the first opinion, that was not cited by the first opinion.

Another troubling part of Judge Kanne's performance is the fact that he has written few separate opinions. The concurrences and dissents he has written are not impressive. Judge Kanne's separate opinions are usually brief and lack any substantial analysis that would improve the Seventh Circuit jurisprudence. See, e.g., Greenberg v. Kmetko, 840 F.2d 467, 475-76 (7th Cir. 1988)(Kanne, J., concurring)(*en banc*); Gillman v. Burlington N. R.R., 878

^{132/} As discussed in the Preface to the Appendix at 1-2, Professor Lessig deleted ten days from the time between oral argument or other submission of a case and the time of publication to accurately state the time a judge was working on an opinion. (The ten days represent the time the Court takes to check and print the opinion). The references to time in this evaluation, and in other evaluations, follow Professor Lessig's approach. To compute the actual time between the date of submission and the date the opinion was issued, therefore, ten days must be added to the numbers contained in the text.

^{133/} See also In re Fullop, 6 F.3d 422 (7th Cir. 1993)(344 days in case involving bankruptcy and Article 9 of the UCC).

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F.2d 1020, 1025 (7th Cir. 1990)(Kanne, J., concurring); Rand v. Monsanto Co., 926 F.2d 596, 603 (7th Cir. 1991)(Kanne, J., concurring).

For example, in United States v. Benson, 941 F.2d 598 (7th Cir. 1991), amended, 957 F.2d 301 (1992), Judge Manion, joined by Judge Fairchild, ruled that the expert testimony of an I.R.S. agent was inadmissible under Rule 702. Judge Kanne dissented, pointing out some of the problems with Judge Manion's holding. 941 F.2d at 615-16. However, because Judge Kanne's dissent is less than a page in length and does not deal with the legal questions in any detail, Judge Kanne missed an opportunity to shed some light on the issues presented and perhaps improve a weak majority opinion.

Judge Kanne's opinions are competent and workmanlike. While generally not imaginative or impressive for their legal analysis, the opinions also generally are not troublesome. Judge Kanne's opinions in the great bulk of cases do not show him to be an ideologue, nor do they show that he is predisposed to imposing any certain result. We do, however, have some concern in the employment area as to whether he leans unduly toward employers. Judge Kanne usually does a good job of reviewing and following the record and applying the law.

In general, Judge Kanne is considered to be a workmanlike judge, which is sufficient for the great majority of the Court's cases. See note 9 supra. The Council, however, believes that Judge Kanne has not demonstrated that he can handle difficult cases well. Indeed, the serious questions raised about Judge Kanne's delay and productivity suggest that he may not be able to handle routine cases as efficiently as the job requires.

DANIEL A. MANION

Daniel A. Manion, 51, is a 1973 graduate of the Indiana University Law School. From 1973 to 1974, he worked in the office of the Indiana Attorney General. He was in private practice in South Bend from 1974, until his appointment to the bench. His private practice did not include substantial federal litigation experience. Judge Manion was a member of the Indiana Senate from 1978 to 1982. President Reagan appointed Judge Manion to the Seventh Circuit in 1986.

Judge Manion is reported to work hard in order to be well prepared for oral argument. He can be an active participant in argument. While a number of attorneys report that he often starts with questions about the parties' basic positions, his questions tend to reflect a thorough familiarity with the advocates' briefs. He is unfailingly courteous in questioning counsel.

Attorneys report that Judge Manion appears to be most comfortable when presented with cases involving tort claims and other matters that he handled as an attorney, or those cases involving issues that he has previously decided as a judge.

Judge Manion's opinions are workmanlike. They tend to be well-organized and solidly reasoned, if occasionally repetitive. For the most part, the opinions clearly and concisely set forth the important facts of the case, lucidly analyze applicable precedents, and effectively treat decisions and arguments contrary to the result the Court reaches. In some more

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complex cases, colleagues question whether he has adequately dealt with all arguments. See, e.g., Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993)(*en banc*)(seven judges in three separate opinions question dicta and analysis of "majority" opinion by Judge Manion).

During his first three years on the Seventh Circuit, Judge Manion produced his decisions very slowly. Of the first 124 majority opinions that he wrote for the Court, 26 (or 21 percent) were issued more than one year after oral argument. Another 12 (or 10 percent) took more than 10 months to complete. In a 1987 interview, Judge Manion attributed these delays to "learning the system." Last year, he told another interviewer that the logistics of setting up an office in his home town of South Bend also contributed to his slowness.

During the past three years, the speed at which Judge Manion issues his opinions has improved dramatically. In that time, he has never taken more than 10 months to produce a decision, and the average interval between oral argument and the release of an opinion has been less than six months. Of the decisions issued by Judge Manion up to March 1993, 13 (11 percent) were issued within three months of oral argument. Still, Judge Manion remains one of the slower, non-senior judges on the Court in terms of writing opinions.

From time to time, particularly when he is faced by a "hard" or "very hard" case, see note 9 supra, Judge Manion seems to depart from the record on appeal in order to support his decision. For example, in Hoffman Homes, Inc. v. Administrator, United States EPA, 961 F.2d 1310 (7th Cir.), vacated, 975 F.2d 1554 (1992), on rehearing, 999 F.2d 256 (1993), Judge Manion authored an opinion holding, in part, that the federal Clean Water Act did not protect small and isolated wetlands. The EPA filed a petition for rehearing, asserting that Judge Manion's opinion had misstated certain facts and seriously misread applicable precedent, including a Supreme Court decision and the legislative history of the Clean Air Act. The EPA also suggested that the Court, through Judge Manion's opinion, "misconstrued its role as a reviewing court and impermissibly substituted its judgment for EPA's scientific expertise." The Court granted the EPA's motion for rehearing and vacated Judge Manion's opinion. After rehearing, the case was reassigned to another member of the panel, Judge Wood, who again ruled against the EPA, but on substantially narrower grounds. Judge Manion issued a concurring opinion.^{134/} However, in some complicated cases, Judge Manion has analyzed the facts and the law thoroughly and competently. See, e.g., Havoco of Am., Ltd. v. Sumitomo Corp. of Am., 971 F.2d 1332 (7th Cir. 1992).

Judge Manion also went beyond the record on appeal to support his partial dissent in United States v. Rodriguez-Nuez, 919 F.2d 461 (7th Cir. 1990). Rodriguez-Nuez was an appeal from the sentence imposed upon a drug offender which had been enhanced pursuant to the federal Sentencing Guidelines because the offense involved possession of a firearm. The Court reversed and remanded, finding that the firearm in question was located too remotely from the defendant to warrant enhancement of his sentence. Id. at 467. Judge Manion's partial dissent speculated that it was "quite possible" that the defendant "carried the weapons with him when he picked up or delivered cocaine to the storage house," where the drugs that

^{134/} It contained the colorful observation: "The commerce power as construed by the courts is indeed expansive, but not so expansive as to authorize regulation of puddles merely because a bird traveling interstate might decide to stop for a drink." 999 F.2d at 263.

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the defendant was convicted of possessing were found. *Id.* at 468 (Manion, J. concurring in part and dissenting in part). Although Judge Manion stressed the necessity of "due deference" to the findings of the District Court, there is nothing to suggest that the District Court's decision or anything else in the record supported Judge Manion's assumption about the travels of the weapon.

Judge Manion's opinions typically afford appropriate deference to the findings of District Judges in bench trials, juries and administrative agencies. *See, e.g., United States v. Fulford*, 980 F.2d 1110, 1114, 1117 (7th Cir. 1992); *NLRB v. Transport Serv. Co.*, 973 F.2d 562, 566-67 (7th Cir. 1992). In other cases -- particularly employment discrimination cases -- Judge Manion has been criticized, expressly or implicitly, for usurping the function of the trier of fact. For example, Judge Easterbrook dissented from a Judge Manion opinion reversing a jury verdict in favor of a Title VII plaintiff where "the inferences cut both ways." *Bruno v. City of Crown Point*, 950 F.2d 355, 365 (7th Cir. 1991)(Easterbrook, J., dissenting), *cert. denied*, 112 S.Ct. 2998 (1992). Similarly, in *EEOC v. Century Broadcasting Corp.*, 957 F.2d 1446, 1457 (7th Cir. 1992), Judge Ripple on behalf of the Court "emphasize[d] that it is not our role to second-guess the determination of the jury." This was a reference to Judge Manion's dissenting opinion, in which he rejected the sufficiency of the evidence supporting a jury verdict finding a willful violation of the Age Discrimination in Employment Act. *Id.* at 1466-67.^{135/}

Judge Manion also generally demands that the Court strictly adhere to the language of statutes, rules, and regulations that it is construing. For instance, in *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 848 F.2d 1415, 1420 (7th Cir. 1988), *rev'd*, 871 F.2d 648 (7th Cir. 1989)(*en banc*)(Manion, J., dissenting), Judge Manion insisted that a federal magistrate had no inherent authority to order a party represented by counsel to appear at a pre-trial settlement conference because Federal Rule of Civil Procedure 16(a) expressly authorizes the compelled appearance of counsel and *pro se* parties only. Judge Manion also expressed concern that compelling parties to attend a pre-trial settlement conference could run afoul of the Federal Rules Advisory Committee Notes caveat against "impos[ing] settlement negotiations on unwilling litigants." 848 F.2d at 1421. Writing in his dissent from the *en banc* decision vacating and superseding his original ruling in the case, Judge Manion stated: "This court should give the drafters [of Rule 16] credit for being able to communicate what they actually intended." 871 F.2d at 668 (Manion, J., dissenting). Judge Manion criticized the majority for "straining to circumvent Rule 16's clear command." 871 F.2d at 671.^{136/}

However, in *United States v. West*, 962 F.2d 1243, 1251 (7th Cir. 1992)(Manion, J., concurring), Judge Manion gave examples of how "a skilled [prosecuting] attorney can avoid some of the pernicious effects of [Federal] Rule [of Evidence] 704(b)," which prohibits an ex-

^{135/} *See also Union-Tribune Publishing Co. v. NLRB*, 1 F.3d 486, 493 (7th Cir. 1993)(Manion, J., dissenting)(arguing against deferring to the NLRB on facts of case where Board found firing of worker due to anti-union animus).

^{136/} Judge Manion later joined in an order requiring "the parties" to participate in settlement discussions with a senior staff attorney for the Seventh Circuit before the Court proceeded with a rehearing in *Hoffman Homes, Inc.*, *supra*. However, Federal Rule of Appellate Procedure 33 and Circuit Rule 33, upon which the Court relied in issuing its order, only authorize the compelled appearance of attorneys, not parties, at a pre-hearing conference.

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pert witness such as a psychiatrist from offering opinions on such ultimate issues of the case as a criminal defendant's sanity. The majority opinion criticized Judge Manion's concurrence, stating that "judicial suggestions on how to avoid Congress' clear prohibition . . . are unfortunate If Rule 704(b) is to be amended, Congress should do so and, until it does, we should not be suggesting ways for prosecutors to avoid it." 962 F.2d at 1249.

Judge Manion's opinions have, for the most part, not been rigidly ideological. Compare, e.g., United States v. Berkowitz, 927 F.2d 1376, 1399-1400 (7th Cir. 1991) (Ripple, J., dissenting)(criticizing Judge Manion's majority opinion for misstating facts and law to evade Supreme Court decision enforcing right to counsel), with e.g., United States v. Balistrieri, 981 F.2d 916 (7th Cir. 1992)(broad, pro-Government decision in Fair Housing Act case), cert. denied, 114 S. Ct. 58 (1993); Houston v. Partee, 978 F.2d 362 (7th Cir. 1992)(denying absolute immunity to prosecutors who allegedly failed to disclose exculpatory evidence to defendants while their direct appeals were pending); Carter v. Casa Cent., 849 F.2d 1048 (7th Cir. 1988)(broad opinion upholding rights of person with multiple sclerosis under Rehabilitation Act).

Some attorneys have suggested that Judge Manion tends to defer too much to Judge Easterbrook when they sit together. An example of an unfortunate decision by Judge Manion that can be seen as undue deference to the jurisprudence of Judge Easterbrook can be found in Bell v. Trustees of Purdue Univ., 975 F.2d 422, 430 (7th Cir. 1992), an appeal from a jury verdict against a plaintiff in an Age Discrimination in Employment Act case. Writing for a panel that included Judge Easterbrook, Judge Manion affirmed, holding that "the district court should have granted summary judgment to the defendants" prior to trial. The defendants had not argued this as a ground for affirming the judgment in their favor; in fact, during oral argument, counsel for the defendants expressly rejected Judge Easterbrook's suggestion to this effect. Judge Manion's opinion in Bell cited Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397 (7th Cir. 1989), a decision in which Judge Easterbrook (joined by Judge Manion) had affirmed a jury verdict because of his belief that the trial judge should have granted a previous motion for summary judgment. As many as five other Circuits have rejected the notion that the denial of a summary judgment motion is properly reviewable on an appeal from the final judgment entered after trial.^{137/}

Judge Manion does not, however, uniformly follow Judge Easterbrook's lead. In Sherman v. Community Consol. School District 21, 980 F.2d 437 (7th Cir. 1992), cert. denied, 113 S. Ct. 2439 (1993), the Court considered a First Amendment challenge to an Illinois statute requiring daily recitation of the Pledge of Allegiance in public schools. Judge Easterbrook's majority opinion relied upon the doctrine of "ceremonial deism," an approach to Establishment Clause cases which holds that certain ceremonial references to God have "lost through rote repetition any significant religious content." 980 F.2d at 447. Judge Manion vigorously condemned this approach for the somewhat circular reason that "it selects

^{137/} See Bottineau Farmers Elevator v. Woodward-Clyde Consultants, 963 F.2d 1064, 1068 n.5 (8th Cir. 1992); Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir. 1990); Locricchio v. Legal Servs. Corp., 833 F.2d 1352, 1358-59 (9th Cir. 1987); Glaros v. H.H. Roberston Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986), cert. dismissed, 479 U.S. 1072 (1987). See also Holley v. Northrop World Wide Aircraft Servs., Inc., 835 F.2d 1375, 1377-78 (11th Cir. 1988)(party may not appeal the denial of summary judgment if it admits that evidence was sufficient at trial to submit to the jury or had otherwise changed in favor of party opposing summary judgment).

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only religious phrases as losing their significance through rote repetition," Id. at 448 (Manion, J., concurring).

There are several instances in which Judge Manion's analysis in dissent has been adopted by the Supreme Court in reversing a Seventh Circuit majority. See, e.g., Suter v. Artist M., 112 S. Ct. 1360 (1992), rev'g Artist M. v. Johnson, 917 F.2d 980 (7th Cir. 1990); Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989), rev'g Zipes v. Trans World Airlines, Inc., 846 F.2d 434 (7th Cir. 1988).

On balance, Judge Manion has worked hard to improve his understanding of the law. Judge Manion's performance on the Seventh Circuit has generally been competent, particularly in the "easier" cases, see note 9 supra. However, many lawyers still believe that Judge Manion has not demonstrated sufficient legal ability to serve with distinction on the Court.

WILBUR F. PELL, JR.

Wilbur F. Pell, Jr., 78, was a 1940 graduate of the Harvard Law School. From 1940 to 1942, and 1945 to 1970, he practiced law in Indiana. From 1942 to 1945, he was a special agent of the FBI. President Nixon appointed Judge Pell to the Seventh Circuit in 1970. He took senior status in 1984.

Judge Pell sits on a very reduced schedule with the Seventh Circuit. At oral argument, he is reported to treat lawyers well. Lawyers report that Judge Pell has read the briefs and is very familiar with the issues at the time of the oral argument. Judge Pell is reported to ask pointed questions, although he is not as active in questioning as some other judges.^{138/}

Panel members rarely dissent from Judge Pell's majority opinions, with the exception of Judge Cudahy, who, when sitting with Judge Pell since 1985, has recorded four dissents and one separate opinion from those of Judge Pell. See also Anilina Fabrique de Colorants v. Aakash Chems. & Dyestuffs, Inc., 856 F.2d 873 (7th Cir. 1988) (Posner, J., dissenting).

Judge Pell demonstrates a keen sensitivity to the facts of cases before him. In a case where a criminal defendant was sentenced to prison and not provided with alcohol treatment and counseling, Judge Pell offered policy justification for the Federal Sentencing Guidelines and severely criticized the panel and District Judge for failure to exercise any discretion in sentencing:

In this country there has been a cause of public discontent with sentencing of convicted persons in judicial proceedings. The complaint was that two persons each convicted of essentially the same crime but appearing before different judges would receive widely disparate sentences: One to what was sometimes termed a slap on the wrist and the other to an extended period of incarceration.

^{138/} Judge Pell did join, without opinion, a number of the opinions that are criticized elsewhere in this evaluation, including the Marrese panel opinion, see p. 102 infra, and the American Hosp. Supply Corp. preliminary injunction opinion, see p. 84 supra and p. 109 infra.

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At least in the federal system an effort was made to correct the situation by the imposition of sentencing guidelines. These were greeted negatively by many district judges who thought their discretion in sentencing was being made the subject of undue interference. The resistance ended when the Supreme Court of the United States upheld the sentencing guidelines Nevertheless, at no time, before or after the guidelines, was discretion in sentencing equated with substantial abandonment of discretion. Upon my reading of the record before us, it appears to me that the judge simply did not give any real consideration to the mitigating circumstances of this case. Therefore, I respectfully dissent.

United States v. Barnett, 961 F.2d 1327 (7th Cir. 1992)(Pell, J., dissenting).

Judge Pell's opinions are succinct and usually contain a thorough, if not exhaustive, factual account of the case. Judge Pell is reported to handle statutory interpretation very well. He shows only moderate deference to District Court findings but a clear unwillingness to interfere with the purview of administrative bodies. See United Retail Workers Local 881 v. NLRB, 797 F.2d 421 (7th Cir. 1986)(Pell, J., dissenting).

Judge Pell's sensitivity to the factual record before the Court often leads him to comment in concurring and dissenting opinions when he perceives either the District Court panel opinion has failed to adequately recognize important facts in the record. See, e.g., Nelson v. Monroe Regional Medical Center, 925 F.2d 1555 (7th Cir.)(Pell, J., concurring and dissenting in part)(record fails to present an antitrust claim), cert. dismissed, 112 S. Ct. 285 (1991); United States v. Baxter Healthcare Corp., 901 F.2d 1401 (7th Cir. 1990)(Pell, J., dissenting).

Judge Pell's opinions show an unwillingness to grant summary judgment. See, e.g., Friedman v. Village of Skokie, 763 F.2d 236, 240-41 (7th Cir. 1985)(Pell, J., dissenting)(Court granted summary judgment in a §1983 case arising from the arrest of the plaintiff for disorderly conduct after shaking a video machine). In United States v. Schmidt, 923 F.2d 1253 (7th Cir.), cert. denied, 112 S. Ct. 331 (1991), citizenship of a former Nazi concentration camp armed guard was revoked for "assisting in persecution." 923 F.2d at 1258. In spite of the panel opinion containing an extensive recitation of facts relative to the particular concentration camp and numerous accounts of brutalization of individuals for their religious and political beliefs, Judge Pell dissented. Judge Pell based his dissent on the fact that sufficient knowledge on the part of Schmidt that prisoners were being persecuted was allegedly not proven, id. at 1260. In spite of evidence that Schmidt "guarded concentration camp prisoners who wore color-coded patches to signify their racial, ethnic, social or political status" and escorted prisoners to and from forced labor sites, id. at 1258 n.8, Judge Pell wrote that the record was devoid of knowledge on the part of Schmidt that prisoners were being persecuted because of their beliefs. Judge Pell rationalized that Schmidt only knew that some prisoners were homosexuals, who could be found in jails in the United States in the 1940's:

the only straw that would appear to seem to suggest Schmidt had some idea that some of the work prisoners were persecuted because of beliefs would be found in that he knew from their triangles that they were homosexuals. But,

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as his counsel pointed out, homosexuals were jailed in some of the states of this country at that very period of time.

Id. Judge Pell argued that Schmidt was entitled to "a fair trial" as to his knowledge of and assistance in persecution, in spite of evidence in the record of the grim history of the Sachsenhausen camp, and brutalization of many types of prisoners. Id.

While he usually votes to affirm criminal convictions and leans toward the government in search and seizure issues, he has at times voted to reverse convictions and invalidate searches. See In re Cerro Copper Products Co., 752 F.2d 280 (7th Cir. 1985)(Pell, J., dissenting)(disagreeing that there was a basis for a plant-wide inspection for safety violations)(arguing that the inspection violated 4th Amendment); Mauricio v. Duckworth, 840 F.2d 454 (7th Cir.)(Pell, J.)(reversing and remanding denial of habeas corpus relief holding that the defendant's due process rights were violated by the failure to disclose identity of alibi rebuttal witness), cert. denied, 488 U.S. 869 (1988).

Judge Pell has reacted unfavorably to awards of attorneys' fees to plaintiffs. For instance, in Berberena v. Coler, 753 F.2d 629 (7th Cir. 1985), Judge Pell dissented from a panel decision affirming a \$46,664.45 fee award to Legal Assistance Foundation attorneys representing class action plaintiffs. Judge Pell would have affirmed the Magistrate's reduction of petitioned fees to less than half of what was requested, \$20,504.00, because such a reduction was "realistic." Id. at 633. Judge Pell noted that the Legal Assistance Foundation of Chicago and other such organizations "traditionally have been in the forefront of instituting such litigation when fees were not recoverable," and therefore reasoned that suits against the government would not be "chilled by the lack of the attorney's fees." Id. See also Rivera v. Benefit Trust Life Ins. Co., 921 F.2d 692 (7th Cir. 1991)(Pell, J., concurring and dissenting in part)(case involving an award of attorneys' fees).

Judge Pell recently authored a strong dissent criticizing a panel's overly broad grant of qualified immunity. In Walsh v. Ward, 991 F.2d 1344 (7th Cir. 1993), Judge Pell dissented from an opinion written by Judge Easterbrook, joined by Judge Posner. In that case, a Fire Department Battalion Chief filed a civil rights action claiming that a job reassignment was retaliation for criticism of his supervisors. The majority also ruled that both the Director of the Department of Public Safety and the Fire Chief were immune from civil rights liability in the case. Id. at 1346, holding that "reasonable supervisors acting in 1988 would not have understood that the law 'clearly established' that a promotion to a suitable job can nonetheless violate the constitution when it diminishes an employee's opportunity to make money elsewhere." Id. To the contrary, Judge Pell stated, "I believe that it was quite clear the defendants' actions constituted impermissible interference with Walsh's freedom of speech." Id. at 1348. Judge Pell relied on a line of cases beginning with McGill v. Board of Educ., 602 F.2d 774, 779-80 (7th Cir. 1979). Judge Pell reasoned, "thus, a transfer to a position which is intrinsically less desirable, such as one from an engine company to a training position for which an employee had no previous experience, may be actionable." Id. Judge Pell also took issue with the tone and standards applied in the panel opinion: "I must respectfully disagree with the majority's demeaning characterization about fire fighters holding another job during the 48 hours off duty as 'moonlighting' . . . what the fire fighter does during his 48 hours off time has no relation to his regular job, as moonlighting or otherwise." Id. at 1349.

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Judge Pell criticized the majority opinion because, in his view, the majority made it impossible for the plaintiff to state a claim by requiring him to cite a case with identical facts supporting his case. Judge Pell stated:

[W]hen we require a plaintiff to prove that he has been deprived of a clearly established right by citing cases that are closely analogous to his own, an employee who has been deprived of a more widely-recognized benefit has a much easier burden to carry, since the deprivation he has suffered is more likely to be acknowledged as a violation of a right that has been clearly established. In a case where it appears that under governing law, the right at issue would indeed be clear to the minds of reasonable defendants, it seems to me to be both unnecessary and inappropriate to insist that the plaintiff bring forward cases involving facts that are nearly identical to the facts of his own case. I think Judge Ripple's dissent in Rakovich [v. Wade], 850 F.2d [1180,] at 1207 (7th Cir. 1988), cert. denied, 488 U.S. 968 (1988), while it did not prevail there, points up with particular pertinence here the problem inherent in requiring identical facts:

'The Court's approach to the need for 'closely analogous' case law sends a clear message to those officials, hopefully small in number, who are willing to use their power to inhibit freedom of speech: Choose a novel approach to your abuse of power. Avoid a modus operandi that someone has tried before. Plead a verbal smoke screen by articulating fabricated justifications for your actions. Then, when you are sued, point to the fact that there has never been a case like yours.'

It appears that Judge Ripple's prediction is now fait accompli.

991 F.2d at 1350.

Judge Pell can still be a competent judge, even though he is working on a reduced schedule.

RICHARD A. POSNER

Richard A. Posner, 54, is a 1962 graduate of the Harvard Law School, where he was President of the *Harvard Law Review*. After clerking for Justice William Brennan, Chief Judge Posner spent two years as assistant to a commissioner of the F.T.C., and two years as an assistant to Solicitor General Thurgood Marshall. He spent a year at Stanford teaching law before moving to the University of Chicago in 1968, where he was a law professor until 1981. During his tenure at the University of Chicago, Judge Posner became known as a leading exponent of the "law and economics school." He was a prolific and highly influential scholar, especially in the antitrust area, with 80 law review articles to his credit. In addition to his scholarly activities, then Professor Posner was the co-founder of a highly successful company, Lexecon, Inc., which provides expert witness services to companies and litigants in antitrust matters. President Reagan appointed Judge Posner to the Seventh Circuit in

1981. He became Chief Judge in September 1993. Chief Judge Posner continues to teach at the University of Chicago, and he remains a prolific writer and lecturer.^{139/}

Chief Judge Posner is most widely known in academic circles for advocating the use of economic analysis to gain insights into legal and factual controversies. This "law and economics" approach finds its way into many of his decisions. It is most naturally applicable to commercial cases. In those cases, it has been generally accepted by the Court.^{140/}

Chief Judge Posner's advocacy of cost-benefit analysis becomes far more controversial -- and problematic -- when applied to what are commonly viewed as non-economic issues, such as civil rights, criminal, and procedural matters. See, e.g., United States v. Caputo, 978 F.2d 972, 974-75 (7th Cir. 1992)(applying cost benefit analysis to plain error question in criminal case); Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir.)(applying economic analysis to determination of whether a skeletal argument is waived), petition for cert. filed, 61 U.S.L.W. 3446 (Dec. 3, 1992)(No. 92-977); Roland Mach. Co. v. Dresser Industries, Inc., 749 F.2d 380 (7th Cir. 1984)(economic analysis applied to preliminary injunction standard), American Hosp. Supply Corp. v. Hospital Products Ltd., 780 F.2d 589 (7th Cir. 1986)(same), limited by Lawson Products, Inc. v. Avnet, Inc., 782 F.2d 1429 (7th Cir. 1986); Merritt v. Faulkner, 697 F.2d 761, 768-70 (7th Cir.)(Posner, J., dissenting)(arguing that if a prisoner had a good case, the market would provide counsel)(Cudahy, J., concurring, pointed out that "the barriers to entry into the prison litigation market might be very high" for prisoners), cert. denied, 464 U.S. 986 (1983).^{141/} These areas are discussed in more detail below.

^{139/} His books include: *Antitrust Law: An Economic Perspective* (1976); *Economic Analysis of Law* (4th ed. 1992); *The Economics of Justice* (1981); *The Federal Courts: Crisis & Reform* (1985); *The Economic Structure of Tort Law* (1987)(with William Landes); *Law and Literature: A Misunderstood Relation* (1988); *Cardozo, A Study in Reputation* (1990); *The Essential Holmes* (1992); and *Sex and Reason* (1992). Indeed, Chief Judge Posner's academic writings have provoked frequent commentaries. For a sample of recent articles, see, e.g., Levinson, Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner, 91 Colum. L. Rev. 1221 (1991); Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 Am. U.L. Rev. 7 (1991).

^{140/} We found three dissents to Judge Posner's majority opinions in a random sample of 150 commercial cases. See Burlington N.R.R. v. City of Superior, 932 F.2d 1185, 1188 (7th Cir. 1991)(Flaum, J., dissenting in part); Lorenzen v. Employees Retirement Plan of Sperry & Hutchison Co., 896 F.2d 228, 237 (7th Cir. 1990)(Cudahy, J., dissenting); American Dental Ass'n v. Martin, 984 F.2d 823, 831 (7th Cir.)(Coffey, J., concurring in part and dissenting in part), cert. denied, 114 S. Ct. 172 (1993).

^{141/} In *Cardozo*, supra note 46, at 116-17, Posner's criticism of Justice Cardozo's lack of a rigid ideology is revealing:

Cardozo did not always exploit the facts of his cases to the full. Nor did he explore pertinent policy considerations as probingly, as tenaciously, as he might have done. But fact and policy are opaque and elusive without a framework, and what Cardozo principally lacked in wrestling with cases in which intuitions of substantive justice ran out was an incisive framework for, or technique of, policy analysis such as modern economic analysis provides.

Posner

Chief Judge Posner is a legal realist, who gives little weight to history and is famously derisive of original intent.^{142/} He is candid about the fact that jurists, himself included, make choices that are not always dictated by precedent. He therefore takes responsibility for his positions and defends them.

The Chief Judge has stated his judicial philosophy in a nutshell:

I take a hard line on waiver and jurisdiction. But once a ground is properly before the court, I aim in disposing of it to give the reader a full and candid explanation of the reasons for my disposition. If candor requires me to acknowledge disagreement with precedent, or puzzlement at the parties' failure to explore a particular line of analysis, or distress at the lawyers' incompetence, or belief that proper disposition hinges on an issue not recognized by the parties, I say so; and that is why my opinions strike some lawyers as being outside the professional groove. I say outright what other judges prefer to keep under their hat.^{143/}

Thus, Chief Judge Posner feels less constrained by precedent, history, and the proper limits on appellate judging than, in the Council's view, he should. Chief Judge Posner frequently reaches out to comment on, and decide, issues not presented by the parties or even by the record. In that sense, Chief Judge Posner can fairly be called a judicial activist. All too often, he does not defer to normal procedural rules constraining appellate courts' conduct. See, e.g., United States v. Lechuga, 994 F.2d 346, 352, 355 (7th Cir.) (*en banc*) (separate opinions attack Judge Posner's majority opinion for giving an advisory opinion *en banc*), cert. denied, 62 U.S.L.W. 3349 (Nov. 15, 1993); Reed v. Gardner, 986 F.2d 1122, 1129 (7th Cir.) (constitutional tort case) (Posner, J., dissenting) (arguing that it is permissible for court of appeals to *sua sponte* suggest a remand leading to a grant of summary judgment, even where it has not been requested), cert. denied, 114 S. Ct. 389 (1993); Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388, 1395, 1401 (7th Cir. 1992) (deciding Illinois state law issue despite pendency of same issue in another case in the Illinois Supreme Court and possibility of certifying issue to that court in this case) (Ripple, J., dissenting); Harris v. Board of Governors, 938 F.2d 720, 724-25 (7th Cir. 1991) (Ripple, J., concurring) (criticizing Court for giving an advisory opinion after finding the case moot).^{144/}

Chief Judge Posner also at times refuses to accept existing Circuit or Supreme Court precedent as controlling the outcome of a case. See Kurland, Foreword: The Seventh Circuit

^{142/} See his September 28, 1987 *New Republic* article, "What Am I, a Potted Plant?"

^{143/} Letter from Chief Judge Posner to Chicago Council of Lawyers (Dec. 28, 1993).

^{144/} See also, e.g., United States v. Mittelstadt, 969 F.2d 335 (7th Cir. 1992) (Court lectures District Judge, then rules that it has no jurisdiction for the appeal); Bowers v. De Vito, 686 F.2d 616, 619-20 (7th Cir. 1982) (no duty of state officials to protect public from dangerous madmen under §1983) (strong dissent by Judge Wood on failure to hear oral argument and more fully consider case).

as a Criminal Court: *The Role of a Federal Appellate Court in the Nineties*, 67 Chi.[-]Kent L. Rev. 3 (1991)(discussing cases).^{145/} Judge Posner's loose approach to constraints on appellate courts is exemplified by Marrese v. American Academy of Orthopaedic Surgeons, 692 F.2d 1083 (7th Cir. 1982), vacated en banc and replaced by more narrow panel opinion, 706 F.2d 1488 (7th Cir. 1983), aff'd en banc, 726 F.2d 1150 (7th Cir. 1984), rev'd, 470 U.S. 373 (1985). There, Judge Posner reached out to decide an antitrust issue on the merits when the issue on appeal was properly only the validity of a discovery order.^{146/}

^{145/} Kurland cites at 16 to Judge Wood's opinion in Hanrahan v. Thieret, 933 F.2d 1328, 1337 n.17 (7th Cir.), cert. denied, 112 S. Ct. 446 (1991), which stated the rule that the Seventh Circuit must respect a prior holding by the Supreme Court until it is overruled or formally modified, despite a lack of consistency in the Court's application of the precedent.

See also Chicago Tribune Co. v. NLRB, 965 F.2d 244, 250 (7th Cir. 1992)(recognizing "tension" with earlier, pro-labor opinion, but ruling for company after characterizing earlier opinion as "dictum"); Duran v. Elrod, 760 F.2d 756, 764 (7th Cir. 1985)(Flaum, J., dissenting)(criticizing Judge Posner's failure to defer to the District Court's interpretation of a consent decree involving conditions of confinement of pre-trial detainees); Indianapolis Airport Auth. v. American Airlines, Inc., 733 F.2d 1262, 1272 (7th Cir. 1984)(court not bound by Supreme Court precedent if convinced Supreme Court would no longer follow it); Vail v. Board of Educ., 706 F.2d 1435, 1451-52 (7th Cir. 1983)(Posner, J., dissenting, questioned underlying Supreme Court decision)(Eschbach, J., concurring, questioned Judge Posner's reasoning from first principals and disregarding precedent), aff'd mem. by equally divided Court, 466 U.S. 377 (1984); Kurland, at 19 n. 95, citing Beringer v. Sheahan, 934 F.2d 110, 113 n.2 (7th Cir.)(implicitly criticizing Judge Posner), cert. denied, 112 S. Ct. 641 (1991). See also United States v. Pallais, 921 F.2d 684, 688 (7th Cir. 1990)(criticizing Fed. R. Evid. 801(d)(2)(E)'s agency rationale for the introduction of statements of a co-conspirator, suggesting that, "[a] different and cleaner approach would be to cut loose from the agency issue and ask instead whether the particular hearsay statement was sufficiently reliable to be considered by the jury [as required by] . . . Fed. R. Evid. 803(24)"), cert. denied, 112 S. Ct. 134 (1991); United States v. Rutledge, 900 F.2d 1127, 1128-29 (7th Cir.)(criticizing the rule of United States v. Hawkins, 823 F.2d 1020 (7th Cir. 1987), which requires that appellate courts determine for themselves the voluntariness of a confession rather than reviewing the District Court's decision for clear error), cert. denied, 498 U.S. 875 (1990); United States v. Leibowitz, 919 F.2d 482, 484 (7th Cir. 1990)(requirement that the defendant be "surprised" by the testimony of a prosecution witness who later recants is an "ossified" rule), cert. denied, 111 S. Ct. 1428 (1991). But see Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731 (7th Cir. 1986), a thoughtful and well-reasoned plea for the Supreme Court to overturn the "Enelow-Ettelson" doctrine. See Mullenix, *The Influence of History on Procedure: Volumes of Logic, Scant Pages of History*, 50 Ohio St. L.J. 803, 815-16 (1989)(praising Olson decision).

^{146/} See also, e.g., Sutliff, Inc. v. Donovan Cos. 727 F.2d 648, 654-55 (7th Cir. 1984)(dismissing an antitrust complaint with a fact-pleading analysis, in order to reach merits of antitrust claim).

The initial Marrese decision contained a strong dissent from Justice Stewart, sitting by designation. 692 F.2d at 1096-1100. In addition to being reversed, Marrese was also the subject of much scholarly criticism. See *Tough Love: supra* note 29, at 198.

Posner

Chief Judge Posner has clearly acknowledged that he does not always view the traditional limitations on a judge's role as constructive. See, e.g., Cardozo, supra note 46, at 107.^{147/} This appears to derive from Chief Judge Posner's very expansive view of his role as an appellate judge. He wrote in *Cardozo* "the appellate judge is the central figure in Anglo-American jurisprudence" ^{148/} Whether or not that claim is accurate, it is instructive as a statement of Chief Judge Posner's self-image.

While much of Chief Judge Posner's work is marked by a willingness to reach out to decide issues not clearly before the Court,^{149/} there is also a contrary strain apparent in some cases. Chief Judge Posner has expressed a concern that the federal courts are over-

^{147/} As he wrote there, praising Justice Cardozo:

It was a good point, well worth making, and more useful for the guidance of bench and bar than an interpretation of a particular contract. Legal craft values in a traditional sense that emphasizes meticulous accuracy and an unwavering duty to place decision on the narrowest possible ground are here compromised in pursuit of a larger sense of judicial responsibility.

In the same book, Chief Judge Posner also wrote:

It is often thought a dreadful thing for a judge to have an "agenda"; the judge is supposed to be a tabula rasa, calling the shots as he sees them. The best judges, however, recognizing both the inherent and the contingent shortcomings of the legislative process, have wanted to change the law and have succeeded in doing so. [P.127.]

Despite much pretense to the contrary by judges and lawyers, it is one of the marks of the great judge to recast the issues in cases of his own image rather than to assume a passive, "umpireal" stance. [P.144.]

It is interesting to compare these quotes with Judge Posner's dissenting opinion in *Tom v. Heckler*, 779 F.2d 1250 (7th Cir. 1985), where the Court reversed a social security disability decision and remanded for more evidence. In that case Judge Posner discussed at some length the importance of strict application of the waiver rule in appellate proceedings:

I wonder in what sense we can claim to have an adversarial system of justice if appellate judges conceive their duty to be to search the record in the trial court or the administrative agency for errors that the appellant's counsel missed, and to reverse if any are found. . . . But the adversarial system is the system we have, and *ad hoc* modifications which cast an appellate judge . . . in the role of *judge d'instruction* are unlikely to improve the system

Id. at 1259-60.

^{148/} *Cardozo, supra* note 46, at viii. See also id. at 150 ("For better or for worse, the legal system has its superstars, and most of them -- or at least the most luminous of them -- are judges").

^{149/} See also Tucker v. Department of Commerce, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992)(taking narrow view of political question case).

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worked, to the point of being in an institutional "crisis." See Posner, *The Federal Courts, Crisis and Reform* 59-93 (1985).^{150/} This view may influence his rulings in certain cases where he has sought to avoid ruling on the merits,^{151/} or to limit review of lower court orders.^{152/} From wherever the view is derived, many of the Seventh Circuit's opinions discussed in the introduction to this Report take a strict view of procedural, jurisdictional, and other points were authored by Judge Posner.^{153/}

The tension between Chief Judge Posner's impulse to reach out and decide issues that are of interest to him and his inclination to construe procedural rules narrowly so as to limit access to the Court of Appeals creates an appearance of arbitrariness in his decisions. It contributes to the perception of many lawyers that the Seventh Circuit is unpredictable in the sense that lawyers cannot predict which issues will be decided in a case.

Chief Judge Posner's Approach to Oral Argument.

Chief Judge Posner is extremely well prepared and active at oral argument. Many lawyers admire (and fear) Chief Judge Posner because they say he understands their cases better than they do. Many lawyers feel that one of their greatest professional challenges is the presentation of an oral argument before Chief Judge Posner. His questions are nearly always insightful and often suggest that he is looking at a case differently than the lawyers have conceived of it.

Some lawyers are critical of Chief Judge Posner's performance at oral argument. He is relatively unconcerned with the advocates' point of view, and sometimes uses oral argument to explore the questions that interest him. He often expresses the view that the briefs are not very helpful. As a result, some lawyers feel that they do not get a meaningful hearing. When he first came to the Court many lawyers found his attitude at oral argument to be

^{150/} See Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 Colum. L. Rev. 1378 (1985)(reviewing Posner book). See also Gizzi, *Examining the Crisis of Volume in the U.S. Courts of Appeals*, 77 Judicature 96-103 (1993)(arguing that there is no crisis of volume in federal appellate courts).

^{151/} See, e.g., Ragsdale v. Turnock, 941 F.2d 501, 509 (7th Cir. 1991)(Posner, J., concurring in part and concurring in judgment)(arguing that men had no standing to enforce a statute regulating abortion), cert. denied, 112 S. Ct. 879 (1992). See also People Organized for Welfare and Employment Rights v. Thompson, 727 F.2d 167, 170-71 (7th Cir. 1984)(group seeking to increase voter registration among the indigent, but whose members were registered, lacked standing to challenge state policies about location of voter registration); Minority Police Officers Ass'n of South Bend v. City of South Bend, 721 F.2d 197, 202 (7th Cir. 1983)(feelings of solidarity do not confer standing to sue).

^{152/} See Kurland, *Foreword: The Seventh Circuit as a Criminal Court: The Role of a Federal Appellate Court in the Nineties*, 67 Chi.-[.]Kent L. Rev. 3, 15-19 (1991)(discussing cases).

^{153/} See, e.g., Hartmann v. Prudential Insurance Co., 9 F.3d 1207, (7th Cir. 1993); In re Tolona Pizza Products Corp., 3 F.3d 1029 (7th Cir. 1993)(waiver); Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 230 (7th Cir.), petition for cert. filed, 61 U.S.L.W. 3446 (Dec. 3, 1992)(No. 92-977); Burdett v. Miller, 957 F.2d 1375, 1380 (7th Cir. 1992).

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arrogant to the point of being offensive, but lawyers now report that he has improved over the years. Although he is not overtly rude or hostile at oral argument, he remains somewhat condescending toward advocates.

Chief Judge Posner's Opinions.

Chief Judge Posner's writing can be clear and precise. His style is informal, almost conversational. He often uses colloquialisms that are somewhat startling to find in the midst of serious legal discussion. The fact that their use is startling, however, does not mean that they are inappropriate. For the most part, they liven up the discourse. His relative informality tends to make his opinions accessible, if one is willing to contend with their length.

The informality has its drawbacks, however. The style occasionally seems flip and breezy, conveying the impression that the litigants' concerns are not important. The informal manner in which he often dispenses with arguments might contribute to the impression possessed by some that Chief Judge Posner insufficiently appreciates the "blood, sweat, and tears" expended in good faith by practitioners and litigants.

In some cases, Chief Judge Posner's "breezy" accounts of the facts may cause lawyers on the losing side of a case to question the care with which the factual portion of the opinion is crafted. Although short, concise statements of facts contribute to the smooth flow of his opinions, his frequent abridgment of the facts has provoked negative comments from his colleagues. See, e.g., Indianapolis Airport Auth. v. American Airlines, Inc., 733 F.2d 1262, 1273 (7th Cir. 1984) (Flaum, J., concurring). This approach leaves Chief Judge Posner open to the charge that he distorts the facts to suit a desired outcome. See, e.g., Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 283 (7th Cir. 1992) (Cudahy, J., dissenting) ("[t]he majority's review of the facts here is so lopsided as to be almost droll--if it were not serious business").^{154/} There is considerable debate about whether this is a pervasive defect in Chief Judge Posner's decisionmaking. A very substantial number of lawyers believe that Chief Judge Posner routinely does not pay sufficient attention to the facts, or leaves out crucial facts, in order to reach desired conclusions. Other lawyers believe that Chief Judge Posner is as faithful to the facts as is any other appellate judge. We cannot give a firm opinion on this issue without comparing factual statements to the records of numerous cases. However, the fact that many lawyers of high integrity and ability strongly believe that Chief Judge Posner does not pay sufficient attention to the facts suggests that this is an area of important concern.

Chief Judge Posner's opinions are notable as well for the frequency with which they digress^{155/} -- in dicta of the most elaborate and extended sort -- from what appears to be

^{154/} Chief Judge Posner has criticized such abuse of the facts in his writings. See Cardozo, supra note 46, at 55.

^{155/} Chief Judge Posner is not bashful about his digressions. See, e.g., Traylor v. Husqvarna Motor, 988 F.2d 729, 735 (7th Cir. 1993) (extended discussion of issue raised by party that Judge Posner rules is not necessary to decision) ("What all this has to do with the present case eludes our understanding, however"); Davis v. United States, 972 F.2d 869, 871 (7th Cir. 1992) (same) ("But all this is an aside"); United States v. 7326 Highway 45 N., 965 F.2d 311, 322 (7th Cir. 1992) (Posner, J., dissenting) ("I have strayed from the central point").

the main point.^{156/} Chief Judge Posner's opinions are not only quite lengthy, but they are also sometimes more difficult to follow than they ought to be.^{157/} Many readers find them very confusing. In large part this difficulty results from discussion of issues that need not be addressed, and his stream-of-consciousness approach to legal reasoning. Some readers of Judge Posner's opinions like these digressions,^{158/} but, as discussed at pp. 8-12 *supra*, the Council has substantial concern about the amount of dicta in Chief Judge Posner's opinions. We believe that both he and the Court seriously underestimate the confusion they cause.

The rambling structure of his opinions has one more consequence -- it is often very difficult to find the holding in the case. Lawyers and lower court judges have great difficulty drafting jury instructions from a Posner opinion -- what is it that you quote? Also, certainty and predictability are important for commercial activities, public officials, and others who must conform their conduct to the law as announced in appellate decisions.^{159/} While the literary

^{156/} See, e.g., Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078, 1100 (7th Cir. 1992)(Posner, J., concurring)(reaching out to address laches issue that concededly was not essential to decision of case). Health Equity Resources, Urbana, Inc. v. Sullivan, 927 F.2d 963, 969 (7th Cir. 1991)(Ripple, J., dissenting)((criticizing unnecessary dicta); Illinois Psychological Ass'n v. Falk, 818 F.2d 1337 (7th Cir. 1987)(discussing many areas not necessary to decision); Parks v. Pavkovic, 753 F.2d 1397 (7th Cir. 1985)(discussing many issues not necessary to result), cert. denied, 473 U.S. 906, 474 U.S. 918 (1985); United States v. Kaievic, 711 F.2d 767, 772 (7th Cir. 1983)(extensive dicta criticizing prior Seventh Circuit case "so that the district judges and defense bar of this circuit will be warned that some members of this court, at least, have those doubts"), cert. denied, 464 U.S. 1047 (1984).

^{157/} Chief Judge Posner's characterization of Judge Learned Hand's opinions is clearly also directed at his own.

Hand's opinions are successful imitations of the judge's thinking process as he wrestles with a case. It twists and turns as the judge is pulled now hither, now yon, by the weight of opposing considerations as they present themselves to his mind.

Cardozo, *supra* note 46 at 142. See *id.* at 134-35 (discussing how Cardozo used short sentences to give his opinions power, and many citations to give them an academic patina).

^{158/} See, e.g., Patton v. Mid-Continent Sys., Inc., 841 F.2d 742, 750-51 (7th Cir. 1988)(discussing "efficient" breach of contract); Mucha v. King, 792 F.2d 602, 603, 606 (7th Cir. 1986)(the Art Nouveau movement); Union Carbide Corp. v. U.S. Cutting Serv., Inc., 782 F.2d 710, 716 (7th Cir. 1986)(investment advice). These disquisitions are almost always intellectually illuminating and impressively referenced. One wonders when in the day (or night) Chief Judge Posner has the time and energy to acquire and document such a vast store of knowledge. Practitioners who wish to get quickly to the nub of a case's relevance, however, are put off by such scholarly ramblings, and interpret the frequent use of arcane references to be the work of a show-off rather than the work of a "lawyer's judge."

^{159/} See Easterbrook, *Afterword: On Being a Commercial Court*, 65 Chi.-[.]Kent L. Rev. 877 (1989) (a "good commercial judge prefers rules to standards, for even when a rule is flawed people may form contracts against a known background"); Rakovich v. Wade, 850 F.2d 1180, 1205 (7th Cir. 1988)(*en banc*)(government officials performing discretionary functions are immune from damages if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable

(continued...)

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structure is well designed for examining interesting questions and conducting discussions with the academy, it is not always well suited for the practical needs of litigants and trial judges.

Chief Judge Posner's Comments about Attorneys.

Chief Judge Posner's opinions lay out -- sometimes for practitioners, sometimes for lower court judges -- his suggestions or admonitions about future and past behavior. See, e.g., Traylor v. Husqvarna Motor, 988 F.2d 729 (7th Cir. 1993)(reversing a judgment for a corporate defendant in a products liability action and issuing elaborate instructions to the District Court regarding the conduct of the retrial). Such "mini-lectures" may be intended to help improve the administration of justice or the quality of the bar. These lectures do, however, contain the potential for embarrassment; and while public embarrassment at this level may be good for the administration of justice, such criticism should always be fair and rest upon a complete record. The Council concludes that Judge Posner's criticisms of attorney behavior are often made too hastily, without a thorough record concerning the facts. Negative comments on the performance of lawyers and judges made without the benefit of full investigation tend to promote an impression of distance and, indeed, a lack of respect for judges and practitioners that is not constructive. In order to set fair and high standards for the practicing bar, an appellate judge should convey sensitivity to the demands placed upon trial lawyers and judges.^{160/}

Too often, Chief Judge Posner has admonished counsel or, even worse, recommended disciplinary proceedings, without giving the lawyer an opportunity to be heard. See Hill v. Norfolk & W. Ry., 814 F.2d 1192, 1203 (7th Cir. 1987)(Parsons, J., dissented).^{161/} The most egregious recent example of this seemingly impulsive reaction concerning claims of attorney misconduct is his panel opinion in United States v. Best, 913 F.2d 1179 (7th Cir. 1990), rev'd, 939 F.2d 425 (7th Cir. 1991)(*en banc*), cert. denied, 112 S. Ct. 1243 (1992). In Best, the defendant alleged that an Assistant United States Attorney had permitted the Government's exhibit book, which contained exhibits that had been admitted into evidence, to go to the jury room without the knowledge of the judge or defense counsel. The trial judge

^{159/}(...continued)

person would know")(quoting, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)), cert. denied, 488 U.S. 968 (1988). See also Anderson v. Creighton, 483 U.S. 635, 640 (1987)("unlawfulness must be apparent").

^{160/} On this subject, the August 1, 1993 issue of the *Chicago Lawyer* contains an interesting comparison between the ways in which Judges Bauer and Posner respond to allegedly unethical behavior by lawyers. Id. at 63. Compare Dreis & Krump Mfg. Co. v. International Ass'n of Machinists & Aerospace Workers, 802 F.2d 247, 254-55 (7th Cir. 1986)(Judge Posner reversed Judge Holderman's decision not to impose sanctions on plaintiff's lawyer), with National Wrecking Co. v. International Bhd. of Teamsters, 990 F.2d 957, 963 (7th Cir. 1993)(Chief Judge Bauer reversed imposition of sanctions on a lawyer).

^{161/} See also Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983), which was criticized in *Tough Love*, supra note 29, at 202-03 for affirming the imposition of a sanction for bringing an appeal without a colorable basis, when the losing party's position was supported by a dissent from one of the panel members.

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looked into the allegations and found harmless error. 913 F.2d at 1183. On the basis of a clearly insufficient record and without giving the prosecutor a hearing, Judge Posner's panel opinion sharply criticized the prosecutor, stating that he was persuaded "that in all likelihood the prosecutor dispatched the binders to the jury knowing that they were not supposed to go there" *Id.* The panel referred the prosecutor for disciplinary proceedings. *Id.* The *en banc* decision reversing Judge Posner stated in a footnote:

[W]e note that the findings of the original panel in this case that suggested that . . . the lead prosecutor in this case, had 'quite possibly' engaged in misconduct have been vacated. Had the district court believed an inquiry into . . . [the prosecutor's] conduct warranted, it could have conducted one; we should not perform that task in its stead.

939 F.2d at 431-32 n.3.

The panel opinion in the *Best* case was unacceptable.^{162/} Chief Judge Posner should be careful to give all counsel an opportunity to be heard before criticizing them in an opinion. Public criticism of an attorney by an appellate opinion is a serious sanction. The principles of notice and an opportunity to be heard now embodied in Circuit Rule 38 should be applied in future cases.

Chief Judge Posner's Procedural Opinions.

Chief Judge Posner writes two distinctive types of procedural opinions: he strictly construes procedural rules, and he applies law and economic principles to questions of procedure.

Chief Judge Posner has earned a reputation as being a stickler for procedural detail. See, e.g., *Connecticut Gen. Life Ins. Co. v. Chicago Title & Trust Co.*, 690 F.2d 115 (7th Cir. 1982)(Posner, J., in chambers)(denying leave to file briefs instant)(regretting laxity in enforcing this rule).^{163/} Many of the opinions noted in the introduction at 14-17, 19-28 *supra* were written by Chief Judge Posner.

Chief Judge Posner regularly insists, for example, on a strict construction of the rule that appeals be from orders that are "final," see, e.g., *In re Fox*, 762 F.2d 54 (7th Cir. 1985). In this context, Chief Judge Posner's concern for efficiency finds expression not only in the close examination of questions of appealability, but also in the imposition of sanctions on those who have allegedly used the appellate system frivolously. See *Foy v. First Nat'l Bank*

^{162/} See also *Philips Medical Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600 (7th Cir. Nov. 1, 1993)(reversing sanctions against one side, but ordering District Court's Executive Committee to investigate conduct of the lawyers for the other side); *Court asked to delete comments in opinion on possible misconduct by two lawyers*, Chi. Daily L. Bull. at 1 (Nov. 16, 1993)(discussing motion filed following opinion in *Philips* case).

^{163/} But see *Duff v. Marathon Petroleum Co.*, 985 F.2d 339 (7th Cir. 1993)(reversing summary judgment award, criticizes District Judge for hypercritical procedural approach). See also *Ball v. City of Chicago*, 2 F.3d 752 (7th Cir. 1993), a reasoned, balanced discussion of when a District Court should exercise its power to dismiss for want of prosecution.

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of Elkhart, 868 F.2d 251, 258 (7th Cir. 1989)(sanctions imposed on winning party for arguing that their opponents' losing contentions were frivolous)("A frivolous request for sanctions is itself sanctionable.")

Rules regarding waiver of issues on appeal are very strictly enforced by Chief Judge Posner. Thus in United States v. Kerley, 838 F.2d 932, 935-36, modified per curiam, 838 F.2d at 941 (7th Cir. 1988), he applied the waiver rule against a *pro se* defendant who objected to a flawed jury instruction during the instruction conference but failed to state any grounds for the objection as required by Rule 30. In cases involving allegations of plain error, Chief Judge Posner has applied cost/benefit analysis to the plain error rule:

The benefit of departing from the ordinary processes of adversary justice is maximized when the departure is necessary to save an innocent person. The cost is minimized when the error can be picked out with relatively little difficulty. . . . If it is uncertain whether the trial court committed an error, it will be difficult to say that there is a substantial danger that an innocent man was convicted, unless the appellate court invests substantial resources in determining whether there was error.

United States v. Caputo, 978 F.2d 972, 974-75 (7th Cir. 1992)(emphasis in original).

Caputo is an example of the second type of procedural opinion for which Chief Judge Posner is known -- the application of "law and economics" principles to questions of procedure.^{164/} Perhaps the best known, and least successful, of Chief Judge Posner's procedural opinions was his opinion for the Court in Roland Mach. Co. v. Dresser Industries, Inc., 749 F.2d 380 (7th Cir. 1984). In that case, Judge Posner, over a strong dissent, applied his economic analysis approach to the standard for granting or denying a preliminary injunction. Id. at 386-90. In American Hosp. Supply Corp. v. Hospital Products Ltd., 780 F.2d at 593, Judge Posner followed Roland to create a mathematical formula to, in his view, make more precise the traditional discretionary standard. The Roland and American Hospital opinions were widely criticized for creating the appearance of precision, without advancing the substance of what a District Judge must decide (or an appellate court review).^{165/} The two opinions were effectively overruled by Lawson Products, Inc. v. Avnet, Inc., 782 F.2d 1429 (7th Cir. 1986). See p. 84 supra.

Another well-known opinion applying economic analysis to procedure was Chief Judge Posner's dissent in Merritt v. Faulkner, 697 F.2d 761, 769-70 (7th Cir.)(Posner, J., dissenting), cert. denied, 464 U.S. 986 (1983). There, Judge Posner argued that if a prisoner had

^{164/} See also Villanova v. Abrams, 972 F.2d 792, 796-97 (7th Cir. 1992)(applying economic analysis to civil commitment proceedings); Hill v. Norfolk & W. Ry., 814 F.2d 1192, 1203 (7th Cir. 1987)(applying economic analysis approach to grant of sanctions)(Parsons, J., dissented).

^{165/} See Silberman, Injunctions by the Numbers: Less than the Sum of its Parts, 63 Chi.-[]Kent L. Rev. 279 (1987).

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a good case, the market would provide counsel.^{166/} Accordingly, he dissented from the appointment of counsel in a prisoner's civil rights case. Judge Cudahy, concurring, tartly noted that "the barriers to entry into the prison litigation market might be very high" for prisoners. *Id.* at 768-69. Judge Posner and Judge Cudahy have continued their argument on this issue in a series of subsequent opinions. *See Farmer v. Haas*, 990 F.2d 319, 321 (7th Cir.), *cert. denied*, 126 L. Ed. 2d 372 (1993); *Merritt v. Faulkner*, 823 F.2d 1150, 1154 (7th Cir. 1987)(Cudahy, J., concurring); *id.* at 1155 (Posner, J., concurring)(each insisting they were right the first time the case was before the Court).^{167/}

Chief Judge Posner's Substantive Opinions.

In many of his commercial opinions, Chief Judge Posner uses his law and economics analysis appropriately. *See, e.g., Market St. Assocs. Ltd. Partnership v. Frey*, 941 F.2d 588, 594-97 (7th Cir. 1991)(using economic analysis to discuss the "good faith" obligation). There have been cases, however, where Chief Judge Posner's law and economic approach has led him to attempt to overturn established statutory policy with which he disagrees. The best known such case is the Sears socket wrench case, *Roberts v. Sears, Roebuck, & Co.*, 697 F.2d 796 (Posner, J.), *rev'd en banc*, 723 F.2d 1324, 1344 (7th Cir. 1983)(Posner, J., dissenting). Judge Posner's panel opinion denied patent protection to an invention because:

The framers of the Constitution and the Patent Code would not have wanted patents to be granted where the invention would have been made anyway, and about as soon, without any hope of patent protection. The grant of a patent in such a case would confer no benefits that might offset the costs of monopoly.

697 F.2d at 797. As the *en banc* opinion demonstrated, Judge Posner's analysis did not reflect the accepted construction of the statute, but instead attempted to insert Judge Posner's own view of economic policy. 723 F.2d at 1335.^{168/} *See also Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273 (7th Cir. 1992)(Cudahy, J., dissenting)(criticizing majority's disregard of legislative intent and trial court's findings, in favor of "scholarly musings" and "the exhilarating alchemy of economic theory").

^{166/} *Merritt* built on Judge Posner's earlier opinion in *McKeever v. Israel*, 689 F.2d 1315, 1323-25 (7th Cir. 1982)(Posner, J., dissenting)(attacking right of prisoners to appointment of counsel and questioning whether they should be allowed to file lawsuits against their jailers).

^{167/} In the Council's view, Judge Cudahy is correct. Whether or not the market will provide prisoners with lawyers if they have strong cases, the society should appoint counsel for prisoners with colorable claims. Prisoners are not in a position to seek counsel, and while they deserve to be punished, they also deserve legal help if the state is abusing its power over them.

^{168/} *See* Grady & Alexander, *Patent Law and Rent Dissipation*, 78 Va. L. Rev. 305, 312-13 & n.37 (1992)(theory embodied in Judge Posner's opinion "fails to explain the [Supreme Court] cases" and is criticized as "incoherent and impossible to apply to actual decisions").

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In criminal cases, Chief Judge Posner is apt in many cases to defer to District Court rulings, even when he has to recast the rationale for the ruling.^{169/} Thus in United States v. Cardona-Rivera, 904 F.2d 1149, 1152-53 (7th Cir. 1990), he affirmed the trial court's denial of a motion to suppress where police testimony was "improbable" but not "incredible." He affirmed the denial despite finding that the officers lied on the stand when they testified that the defendant was stopped for a traffic violation, and even though he chastised the Government for arguing that drug dealers often violate traffic laws when, in an earlier case, the Government argued that probable cause can be established by a drug dealer's overly careful driving. Id. at 1153-54. Commenting on the phenomenon of perjury by police officers in Cardona-Rivera, Judge Posner stated that:

The problem of dishonest police testimony is a very old one, but drug dealers are not models of rectitude. The task of determining whose testimony is more truthful is a difficult one in such cases, and it is performed by the trier of fact with little effective power of intervention by the appellate court.

Id. at 1153. Judge Posner then went on to find that the arresting officers had probable cause to stop the defendant and search his car on grounds not advanced by either the Government or the District Court. Id. at 1154-55.^{170/}

Chief Judge Posner is willing to speak out forcefully when he identifies what he views as fundamental unfairness. Accordingly, in United States v. Marshall, 908 F.2d 1312, 1331 (7th Cir. 1990)(*en banc*), aff'd sub nom. Chapman v. United States, 111 S. Ct. 1919 (1991), Judge Posner dissented from a decision upholding a federal sentencing scheme for possession

^{169/} Chief Judge Posner is unlikely to reverse a conviction because of a procedural error unless the case is factually close, so that it is possible, in his view, that a grave injustice was done or an innocent person was convicted. See, e.g., United States v. Fountain, 768 F.2d 790, 795-97 (7th Cir.)(improper cross-examination of defendant not unduly prejudicial, and failure to subpoena defense witness not prejudicial in light of overwhelming evidence), amended on denial of reh'g, 777 F.2d 345 (7th Cir. 1985), cert. denied, 475 U.S. 1124 (1986); United States v. Bruscingo, 687 F.2d 938 (7th Cir. 1982)(*en banc*)(reversing panel decision which held that improper material in the jury room tainted the defendant's conviction), cert. denied, 459 U.S. 1228 (1983). Moreover, it is difficult to prove to Chief Judge Posner that a confession was involuntary. See United States v. Rutledge, 900 F.2d 1127 (7th Cir.)(holding that suspect who confessed after being told that his confession would help him and who was given a sentence four to six times longer than had he not confessed was not misled in confessing), cert. denied, 498 U.S. 875 (1990).

One commentator has commented that Chief Judge Posner is willing to go beyond Supreme Court precedent to advance his views in the area of criminal law. See note 107 *supra*.

^{170/} In ruling on state habeas petitions, Chief Judge Posner frequently seeks to limit the federal courts' role in such proceedings. See, e.g., Phillips v. Lane, 787 F.2d 208 (7th Cir.), cert. denied, 479 U.S. 873 (1986)(reversing a grant of habeas relief because Illinois Appellate Court's consideration of the issue on direct appeal, in the exercise of its plain error jurisdiction, was not enough to save the defendant from a procedural default). Judge Posner spent no time describing or even referring to the District Court's rationale for granting the petition. Chief Judge Posner is, however, willing to apply waiver rules to the state. See Thomas v. State of Indiana, 910 F.2d 1413, 1415 (7th Cir. 1990)(state waived a defense by failing to raise it in its appellate briefs).

of LSD which took into account the weight of the medium in which the LSD was contained rather than just the weight of the LSD itself. Chief Judge Posner struggled with the question of how judges should interpret statutes and whether it was permissible to depart from a positivist's "literal" interpretation of the statute and whether a "naturalist" or "pragmatic" interpretation was permissible. In Marshall, Judge Posner opted for the "naturalist" approach, one which "leads to a freer interpretation, one influenced by norms of equal treatment; and let us explore the interpretive possibilities here." 908 F.2d at 1335 (Posner, J., dissenting). The approach for which he argued would have permitted him to correct an injustice without declaring the statute unconstitutional. 908 F.2d at 1337. The Marshall opinion is instructive because it conveys the tension between Chief Judge Posner's willingness to correct an injustice and his reluctance to declare an act of Congress unconstitutional.

Chief Judge Posner is also loathe to reverse cases involving Fourth Amendment issues. In United States v. Cerri, 753 F.2d 61 (7th Cir.), cert. denied, 472 U.S. 1017 (1985), he upheld a warrantless search of the gun dealer defendant's home on the basis that the home was actually the defendant's place of business under 18 U.S.C. § 923(g), even though the defendant's registered place of business was different from his home.^{121/}

The case that most displays Chief Judge Posner's guarded approach to the Fourth Amendment arose in the civil context. In Soldal v. County of Cook, 923 F.2d 1241 (7th Cir.), aff'd in part and rev'd in part, 942 F.2d 1073 (7th Cir. 1991)(*en banc*)(Posner, J.), Judge Posner ruled for a divided Court that deputy sheriffs who assisted the seizure and removal of an entire motor home without a warrant or probable cause to believe plaintiff was a trespasser did not violate the Fourth Amendment. By taking the entire house, instead of entering it, Judge Posner ruled, the Fourth Amendment did not apply. This decision was reversed by a sarcastic opinion from Justice White, joined by a unanimous Supreme Court. 113 S. Ct. 538 (1992). As was noted by David O. Stewart in the Supreme Court Report column in the October 1993 ABA Journal, Justice White's use of the words "interesting and creative" in describing Judge Posner's Soldal opinion was a euphemism. Mr. Stewart described "interesting and creative" as "judicial synonyms for 'totally wrong.'" *ABA Journal* at 60 (Oct. 1993). See also Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991)(*en banc*)(Illinois Racing Board's drug testing program did not violate the Fourth Amendment).

In civil rights cases, as in other areas of the law, Chief Judge Posner often goes to great lengths to reach the merits of a case. Thus, he often finds ways to decide issues that others think should be remanded or otherwise deferred. See United States v. Cicero, 786 F.2d 331, 335 (7th Cir. 1986)(Posner, J., concurring and dissenting)(arguing that Court should issue injunction itself, instead of remanding, due to strength of case); Duran v. Elrod, 760 F.2d 756 (7th Cir. 1985)(reversing ban on double bunking at jail and modifying consent

^{121/} See also Llaqueno v. Mingey, 763 F.2d 1560 (7th Cir. 1985)(*en banc*)(adopting creative view of probable cause, exigent circumstances, and the warrant requirement); Hessel v. O'Hearn, 977 F.2d 299, 302 (7th Cir. 1992)(adopting another creative view of the warrant requirement and the plain view doctrine, influenced by efficiency theory -- if police take things they should not in a search, they can always give them back, which is easier than getting a warrant to go back and get them).

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decree immediately after oral argument); *id.* at 763-64 (Flaum, J., dissenting)(criticizing majority for engaging in fact-finding unsuited to appellate court).^{122/}

Chief Judge Posner does not often use justiciability grounds to avoid decision. In Tucker v. Department of Commerce, 958 F.2d 1411, 1415 (7th Cir.), cert. denied, 113 S. Ct. 407 (1992), he adopted a narrow view of the political question doctrine. He has rejected the use of the abstention doctrine where others might have invoked it. For example, in an interesting pro-civil rights use of efficiency theory, he rejected Pullman abstention, calling it a "great time waster." See Lynk v. La Porte Superior Court, 789 F.2d 554, 568 (7th Cir. 1986). But see Waldron v. McAtee, 723 F.2d 1348 (7th Cir. 1983)(a very questionable use of Pullman abstention to send a First Amendment vagueness challenge back to state court)(arguably overruled in Houston v. Hill, 482 U.S. 451, 467-68 (1987)). He has been similarly critical of Younger abstention, especially as it interacts with the ripeness doctrine to make constitutional challenges difficult. See Illinois v. General Elec. Co., 683 F.2d 206, 211-13 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983).

In Reed v. Gardner, 986 F.2d 1122 (7th Cir.), cert. denied, 114 S. Ct. 389 (1993), a failure to protect case, he dissented from Judge Flaum's remand, wanting the Court of Appeals to direct summary judgment. In Visser v. Packer Eng'g Assocs., Inc., 924 F.2d 655 (7th Cir. 1991)(*en banc*), Judge Posner affirmed a grant of summary judgment and essentially made his own credibility findings. The opinion was issued over Judge Flaum's dissent that the ADEA plaintiff was entitled to a trial by jury and that Judge Posner had ignored a genuine factual dispute by ignoring relevant testimony in the trial record. *Id.* at 662-63 (Flaum, J., dissenting). In Kawitt v. United States, 842 F.2d 951 (7th Cir. 1988), a suit for reinstatement into the Navy, Judge Posner failed to order exhaustion of remedies through the Board for Correction of Naval Appeals, holding that "since it is also apparent that Kawitt has no substantive basis for this lawsuit, it seems better to terminate the proceeding once and for all, rather than require Kawitt to pester the Board en route to the eventual but certain doom of this lawsuit." *Id.* at 953. Judge Cudahy dissented.

Chief Judge Posner has written several opinions facilitating the prosecution of sexual harassment claims. See Forrester v. White, 792 F.2d 647, 664 (7th Cir. 1986)(Posner, J., dissenting)(arguing against absolute immunity for a judge's sex-based personnel decision), rev'd, 484 U.S. 219 (1988); International Union, UAW v. Johnson Controls, 886 F.2d 871, 902-03 (7th Cir. 1989)(*en banc*)(Posner, J., dissenting)(arguing for "bona fide occupational qualification" analysis when employer restricts employees by sex as part of fetal protection policy), rev'd, 499 U.S. 187 (1991). Cf. Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986)(Posner, J., concurring)(suggesting potential limits to majority's ruling in hostile workplace case).

^{122/} Judge Posner has also gone to some length in refusing to defer to District Court decisions in other civil rights cases. See, e.g., Alliance to End Repression v. City of Chicago, 742 F.2d 1007 (7th Cir. 1984)(*en banc*)(allowing the Justice Department to wiggle out of a voluntarily entered consent decree, on novel grounds); *id.* at 1021 (Cudahy, J., dissenting); EEOC v. Madison Community Unit School District No. 12, 818 F.2d 577 (7th Cir. 1987)(essentially retrying an equal pay case in which the District Judge found for the plaintiffs).

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Chief Judge Posner is not reluctant to use his personal views on the social utility of affirmative action to shape his decisions. In Britton v. South Bend Community School Corp., 775 F.2d 794 (7th Cir. 1985), rev'd, 819 F.2d 766 (7th Cir.)(*en banc*)(Posner, J.), cert. denied, 484 U.S. 925 (1987), in which the majority upheld a collective bargaining agreement prohibiting layoffs of minority teachers, Judge Posner dissented. He argued, among other things, that under economic theory separate schools for blacks and whites may actually increase the opportunities for black teachers. He was obviously offended by the idea of "tak[ing] away a public employee's job because of his racial identity." 775 F.2d at 820 (Posner, J., dissenting). Likewise in Billish v. City of Chicago, 962 F.2d 1269 (7th Cir. 1992), rev'd, 989 F.2d 890 (7th Cir.)(*en banc*), cert. denied, 114 S. Ct. 290 (1993), he dissented from the panel opinion upholding summary judgment against a challenge by white firefighters to the Chicago Fire Department's affirmative action plan. He then prevailed in a 5-4 *en banc* decision, in which he reversed the summary judgment, commenting,

There is concern and resentment about the use of policies of affirmative action or (more bluntly) reverse discrimination to practice a form of racial politics that is the mirror image of discrimination against blacks and other minority persons.

989 F.2d at 897.^{173/}

Chief Judge Posner is also extremely critical of the "ubiquitous oxymoron 'substantive due process,'" Ellis v. Hamilton, 669 F.2d 510, 512 (7th Cir.), cert. denied, 459 U.S. 1069 (1982), and indeed he is reluctant to concede its existence. See, e.g., Schroeder v. City of Chicago, 927 F.2d 957, 961 (7th Cir. 1991)(substantive due process is better tied to provisions of the Bill of Rights, like the Takings Clause).^{174/} He is one of the most influential jurists in the country on the subject of whether due process should give rise to a cause of action for the state's failure to protect citizens. He wrote the appellate decision in Deshaney v. Winnebago County Dep't of Social Servs., 812 F.2d 298 (7th Cir. 1987)(welfare authorities

^{173/} Judges Flaum and Rovner both recused themselves from the *en banc* court, presumably because they had worked on the case in the 1970's when they worked at the U.S. Attorney's Office. If they had participated, a 5-4 decision against the City might well have become a 6-5 decision for it.

Chief Judge Posner's discomfort with the concept of affirmative action has not always led to the rejection of a discrimination claim. In United States v. Board of School Comm'rs, 677 F.2d 1185 (7th Cir.), cert. denied, 459 U.S. 1086 (1982)(state but not suburbs should pay cost of school desegregation), Judge Posner wrote a "scathing dissent that not only revealed limits to his reliance on economics . . . but also showed his political courage." James G. Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter*, 40 U. Miami L. Rev. 1171, 1238 (1986). Essentially, Judge Posner argued that the wealthy white suburbs should not be subsidized by the rest of the state for their discrimination. 677 F.2d at 1193-94 (Posner, J., dissenting).

^{174/} See also In re Edwards, 962 F.2d 641, 644 (7th Cir. 1992)(jurisdictional case)("[a] denial of due process is for the most part treated like any other legal error, and is thus waived if not pressed"). Chief Judge Posner's views towards procedural regularity may be different, however, when business property is involved. See Penn Cent. Corp. v. U.S. R.R. Vest Corp., 955 F.2d 1158, 1161-63 (7th Cir. 1992)(railroads are entitled to predeprivation hearing by due process before land is taken away).

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not constitutionally liable for reckless failure to protect child from parent's abuse), aff'd, 489 U.S. 189 (1989). Judge Posner also wrote Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983)(no §1983 remedy for negligent rescue by state officers), cert. denied, 465 U.S. 1049 (1984), and Bowers v. De Vito, 686 F.2d 616, 618 (7th Cir. 1982)("there is no constitutional right to be protected by the state against being murdered by criminals or madmen"), he concurred in Archie v. City of Racine, 847 F.2d 1211, 1225-26 (7th Cir. 1987)(*en banc*), cert. denied, 489 U.S. 1065 (1989), and dissented in Reed, 986 F.2d at 1128 (suggesting that Court should not have reached failure to protect issue). Through these cases he articulated a jurisprudence which sees the Constitution, in his words, as "a charter of negative liberties," Jackson, 715 F.2d at 1203; Bohen, 799 F.2d at 1189 (Posner, J., concurring). He believes that failure to protect claims, by his definition an expansive category, are not constitutionally based and are better left to state tort law.

Chief Judge Posner's opinions regarding procedural due process seem to be heavily influenced by his law and economics views. Several times he has found that a hearing would be inefficient because the outcome of the hearing seemed obvious to him. See Kawitt, 842 F.2d at 953; In re Special March 1981, 753 F.2d 575, 580 (7th Cir. 1985). But in Marozsan v. United States, 852 F.2d 1469 (7th Cir. 1988)(*en banc*)(Posner, J., concurring), he called for a hearing, saying,

It is natural to be concerned lest the federal courts be inundated with run-of-the-mine procedural challenges dressed up as constitutional claims However, federal courts are not only empowered but directed by Rule 11 . . . to levy sanctions on persons who file frivolous suits.

Id. at 1483.

In civil rights cases, as well, Chief Judge Posner's law and economics theory influences his decisions. As discussed at pp. 109-10 above, an early Posner decision objected to the practice of appointing counsel in prisoner civil rights cases on the basis that the market would take care of the need for counsel when meritorious cases arose. Merritt v. Faulkner, 697 F.2d 761, 769-70 (7th Cir.)(Posner, J., concurring in part and dissenting in part), cert. denied, 464 U.S. 986 (1983). This mode of analysis can be especially grating to the plaintiff's civil rights bar because it tends to reduce civil rights violations to a cost-benefit inquiry.

For example, in Davenport v. De Robertis, 844 F.2d 1310 (7th Cir.), cert. denied, 488 U.S. 908 (1988), Judge Posner upheld an injunction requiring five hours of exercise per week for inmates at Stateville but struck down the portion of the injunction requiring three showers a week. He said,

[t]he necessity to make painful tradeoffs between competing public projects in an era of government fiscal scarcity counsels caution in the formulation of equitable relief requiring public expenditures.

Id. at 1316. See also Patton v. Przybylski, 822 F.2d 697, 701 (7th Cir. 1987)(dismissing a §1983 suit that alleged an eight-day stay in custody without being taken to a magistrate, on the ground that the official policy allegations had to be alleged with greater specificity in light

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of the burden on federal courts): Judge Ripple wrote a stinging dissent accusing Posner of determining credibility and reasonableness on his own. Id. at 702 (Ripple, J., dissenting).

Conclusion.

Chief Judge Posner is unquestionably one of the most influential legal thinkers in the country. He is a man of high personal integrity.

Chief Judge Posner is also a controversial judge. The controversy centers primarily around five characteristics of his decisionmaking. The first controversy involves his use of economic theory in decisionmaking, especially concerning traditionally non-economic issues. The second characteristic of Chief Judge Posner's decisionmaking that draws fire is the report by lawyers that he tends to give short shrift to the facts. His opinions are often attacked by lawyers who feel that he did not take important facts into account or that he ignored facts which would have changed the result had they been acknowledged, or that he simply did not care that much about the actual facts before him. The third criticism is that Chief Judge Posner often looks for ways to modify or overturn settled precedent when he does not care for the outcome that precedent might dictate. Fourth, the Council believes that Chief Judge Posner's opinions could be better structured and that the digressions into dicta should be severely restricted. Fifth, the Council believes that Chief Judge Posner must follow the spirit as well as the letter of Circuit Rule 38 and not continue to impose de facto sanctions in the form of scathing language about the purported inadequacy of attorney performance without notice and a chance to be heard.

In the end, the Council concludes that Chief Judge Posner is too complex a figure to be easily categorized. He has many of the qualities of our finest judges. He is hard working, brilliant, productive, and scholarly. His decisionmaking also has many characteristics, discussed in this evaluation, to which the Council takes strong exception. Some of Chief Judge Posner's weaknesses, in the Council's view, might stem from his lack of a background in the practice of law, and specifically in his absence of a significant litigation and trial background. Some come from his preoccupation with economic analysis. Others may come from his difficulty in cabining himself within the role of an appellate judge. In order to retain an appellate court's legitimacy, appellate judges must be bound by the institutional constraint of precedent and must limit decisions to the matters presented before them. Chief Judge Posner too often has strayed beyond these limits.

KENNETH F. RIPPLE

Kenneth F. Ripple, 50, is a 1968 graduate of the University of Virginia Law School. In 1968 he was an attorney for IBM. From 1968 to 1972, he served with the United States Navy's Judge Advocate General Corps. From 1972 to 1973, he was a legal officer of the United States Supreme Court, and from 1973 to 1977, he was a special assistant to Chief Justice Warren Burger. From 1977 to 1985, Judge Ripple served as a professor of law at Notre Dame University. Judge Ripple was appointed to the Seventh Circuit by President Reagan in 1985.

Judge Ripple is reported to be exceptionally well prepared for oral argument, sometimes referring to matters in the record not directly apparent from the parties' briefs. He

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considers every issue in the case thoroughly, and focuses carefully on each. Judge Ripple is described to be intelligent and very hard working.

Judge Ripple writes with a very effective, logical, straightforward style. His opinions for the Court typically begin with a short paragraph setting forth the District Court or administrative agency decision to be reviewed and the decision reached by the panel, followed by discussions of the facts or factual allegations, the proceedings in the District Court or before the agency and the panel or majority's analysis. Judge Ripple often, but not always, includes a section setting forth the parties' principal contentions. Judge Ripple's numerous concurring and dissenting opinions, although they often are relatively brief, typically set forth his view of the case and the rationale for that view in sufficient detail to make clear the nature and basis of his concerns with the panel or majority opinion.

Judge Ripple's opinions generally are concise but thoughtful, dealing with "easy" issues with relative dispatch, see, e.g., Alexander v. Erie Ins. Exch., 982 F.2d 1153 (7th Cir. 1993)(insurance coverage case decided on summary judgment), and dealing with more difficult issues in a manner reflecting their legal complexity or challenging facts, see, e.g., Government Suppliers Consolidating Servs., Inc. v. Bayh, 975 F.2d 1267 (7th Cir. 1992)(striking down state statutes as violative of the Commerce Clause), cert. denied, 113 S. Ct. 977 (1993). Judge Ripple appears to be more concerned about getting the facts and the result of a case right than in stating broad or original principles of law. His opinions are relatively infrequently cited. App. 1-11, 21, 26-27.

Judge Ripple's opinions generally are courteous to the parties, counsel, the District Court or administrative agency whose decision is being reviewed and the other members of the panel. Judge Ripple does not hesitate to express his differences with other members of the Court, however, as demonstrated by the frequency with which he writes concurring or dissenting opinions. Judge Ripple is faithful to precedent and is careful to decide only the issues before the Court, and will write separately to challenge the scope or reasoning of a panel or majority opinion.

A good example of Judge Ripple's approach is found in United States v. Martin, 964 F.2d 714 (7th Cir. 1992)(Ripple, J., concurring). Martin involved a defendant's challenge to his conviction on the ground that he had been prejudiced by being forced to appear at trial in prison garb, consisting of a blue jumpsuit, after having initially appeared with two co-defendants (who subsequently pled guilty), also dressed in the identical prison jumpsuits. The established constitutional rule, under Estelle v. Williams, 425 U.S. 501 (1976), acknowledged in the majority opinion, is that it violates the right to a fair trial to compel a defendant to stand trial before a jury in prison attire. Notwithstanding this rule, the conviction could have been affirmed on the ground of harmless error in light of overwhelming evidence of guilt. Judge Coffey, for the majority, in fact reached such a conclusion of harmless error. But he went farther, however, finding there was no reason to believe that the jury was able to identify the identical jumpsuits worn by the co-defendants as prison garb. Martin, 964 F.2d at 719. This determination has an air of unreality about it and Judge Ripple wrote separately to express his more convincing view of the matter, stating in part:

Yet, a jury sufficiently intelligent to comprehend the government's case against the defendant was also able to understand the significance of this attire. I

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therefore find it disturbing that the majority seems to limit the Supreme Court's holding in Estelle v. Williams, 425 U.S. 501 (1976), to situations where the prisoner designation on the clothing is more graphic. I certainly hope that prison authorities and trial courts within this circuit view this intimation with prudence and caution. Estelle is still the law of the land. It recognizes that trial in prison garb is a "constant reminder of the accused's condition implicit in such distinctive, identifiable attire." Estelle, 425 U.S. at 504-05. Trial courts are obliged under its mandate to ensure that the defendant's prison clothing is not "a continuing influence throughout the trial." Id. at 505. In implementing this rule, "reason, principle, and common human experience," id. at 504, are to be the guide.

Martin, 964 F.2d at 722 (parallel citations omitted).^{175/}

Another good example of Judge Ripple's approach to judging is found in United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991)(Ripple, J., concurring), cert. denied, 112 S. Ct. 989 (1992). There, then Chief Judge Bauer's majority opinion, in upholding a conviction, stated that Batson v. Kentucky, 476 U.S. 79 (1986), is limited to racially-based discrimination and does not reach gender-based discrimination, in a case where the defendant, according to Chief Judge Bauer, was contending not that the government discriminated against all women in the venire but only against black women. Nichols, 937 F.2d at 1262. Judge Ripple's one paragraph concurrence stated:

The record amply supports the district court's finding that the prospective jurors were excused by the government not because they were black nor because they were female. They were excused because of the instability of their lifestyles. Accordingly, I would not announce definitively and gratuitously that the rationale of Batson is not applicable to gender based discrimination. That difficult question should wait for another day and be decided only when necessary to our decision. In all other respects, I join the majority's comprehensive and well-reasoned opinion.

Nichols, 937 F.2d at 1264.^{176/}

Judge Ripple has written many other useful concurring opinions. See, e.g., Graff v. City of Chicago, 9 F.3d 1309, 1333-35 (7th Cir.)(en banc)(Ripple, J., concurring)(suggesting majority opinion may be inconsistent with Supreme Court cases and calling for further review by the Supreme Court); United States v. Lallemand, 989 F.2d 936, 941 (7th Cir.

^{175/} Judge Ripple also questioned the majority's reliance on a waiver theory, noting his "substantial doubt" that full responsibility for the situation lay with defense counsel, rather than with the lack of a more "cooperative atmosphere" between the District Court and all counsel. 964 F.2d at 722-23.

^{176/} See also, e.g., Ron Tiparelli Ford v. NLRB, 987 F.2d 433 (7th Cir. 1993)(deferring to Board's discretion, but ordering narrow remand for Board to consider correct principles of law before implementing remedy); Holstein v. Brill, 987 F.2d 1268, 1271-72 (7th Cir. 1993)(Ripple, J., dissenting)(advocating remand to Bankruptcy Judge to obtain a full explanation of why amendment to claim was allowed).

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1993)(Ripple, J., concurring in the judgment)(pointing out that majority misanalyzed Sentencing Guideline case and used an unfortunate stereotype); Harris v. Board of Governors Sentencing Guideline case and used an unfortunate stereotype); Harris v. Board of Governors of Federal Reserve Sys., 938 F.2d 720, 724 (7th Cir. 1991)(Ripple, J., concurring)(criticizing the majority for giving an advisory opinion after finding case moot); Save the Dunes Council, Inc. v. Lujan, 899 F.2d 647, 649 (7th Cir. 1990)(Ripple, J., concurring in the result); Toulabi v. United States, 875 F.2d 122, 126 (7th Cir. 1989)(Ripple, J., concurring)("I write separately only because I cannot see the need for, nor do I agree with, the [majority opinion's] suggestion" as to how the government should have defended a conviction challenged under McNally v. United States, 483 U.S. 350 (1987)); Archie v. City of Racine, 847 F.2d 1211, 1227 (7th Cir. 1987)(*en banc*)(Ripple, J., joined by Cummings and Cudahy, JJ., dissenting)(suggesting that U.S. Supreme Court had granted *certiorari* in case which "will undoubtedly provide important and, in all likelihood, controlling guidance with respect to the final disposition of this case," as well as dissenting on merits), *cert. denied*, 489 U.S. 1065 (1989); Barrington Press, Inc. v. Morey, 816 F.2d 341, 344 (7th Cir.)(Ripple, J., concurring)("I write separately simply to emphasize that our holding today leaves undisturbed the settled law of this circuit"), *cert. denied*, 484 U.S. 906 (1987).^{177/}

Judge Ripple's willingness to dissent has been productive. In a variety of contexts, Judge Ripple has written persuasive dissents that cast substantial doubt on the result reached by the majority. See, e.g., Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388, 1400-01 (7th Cir. 1992)(Ripple, J., concurring and dissenting)(criticizing majority's decision of Illinois state law issue and its refusal to certify issue to Illinois Supreme Court, or to wait for decision in another case already pending in that court); United States v. Berkowitz, 927 F.2d 1376, 1399, 1400 (7th Cir. 1991)(Ripple, J., dissenting)(charging that majority opinion misstated facts and law to evade Supreme Court decision enforcing right to counsel); United States v. Chaidez, 919 F.2d 1193, 1203 (7th Cir. 1990)(Ripple, J., dissenting)(Court affirmed criminal conviction), *cert. denied*, 111 S. Ct. 2861, 112 S. Ct. 209 (1991); Patton v. Przybylski, 822 F.2d 697, 702 (7th Cir. 1987)(Ripple, J., dissenting)(Court held that eight-day delay in bringing wrongfully arrested person before magistrate does not state a cause of action).

Our review of Judge Ripple's opinions does not demonstrate any tendency to favor the government over the individual. For example, in Harris v. Davis, 874 F.2d 461 (7th Cir. 1989)(Ripple, J., dissenting), *cert. denied*, 493 U.S. 1027 (1990), an appeal from a jury verdict against a prisoner who claimed that he had been subject to cruel and unusual punishment by forcible administration of an emetic and denial of necessary medical care, Judge Flaum's majority opinion affirming the verdict held that various evidence unfairly prejudicial to the plaintiff erroneously was admitted, but that the errors were harmless. 874 F.2d at 464-65. Judge Flaum noted that several witnesses contradicted plaintiff's testimony and stated that

^{177/} Occasionally, Judge Ripple's brevity goes too far. In several cases, Judge Ripple has issued one sentence opinions concurring in the result. See United States v. Kopshever, 6 F.3d 1218, 1224 (7th Cir. 1993); United States v. Castillo, 965 F.2d 238, 244 (7th Cir.), *cert. denied*, 113 S. Ct. 212 (1992); Concast, Inc. v. AMCA Sys., Inc., 959 F.2d 631, 633 (7th Cir. 1992). While the Council believes that separate opinions need not be long, a paragraph or two stating the ground for the separate opinion seems more reasonable than a single sentence. See, e.g., United States v. Johnson, 999 F.2d 1192, 1198-99 (7th Cir. 1993)(Ripple, J., concurring)(two paragraph concurrence discussing reasons for narrowly circumscribing holding).

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plaintiff's credibility was reduced by his failure to introduce medical evidence. Id. Judge Ripple dissented, stating in part:

The most essential ingredient of any trial in any American courtroom is fairness - fairness for all the litigants. When one of the litigants comes to the trial process marked with a stigma that creates a significant barrier to rational evaluation of the evidence, the trial court faces one of its most difficult tasks. In such a situation, the trial judge is obligated to exercise extreme caution to ensure that the process is a fair one, and that the ultimate determination is based on an objective assessment of the evidence and not upon passion or prejudice.

* * * * *

My disagreement is limited to the court's determination that, on this record, the errors were indeed harmless. As is often the case in prisoner litigation, the plaintiff was required to rely largely on the testimony of adverse witnesses and fellow prisoners. Since he is complaining about the absence of medical assistance at the time he allegedly was suffering from the ingestion of the emetic, we can hardly fault him with respect to the quality of the medical evidence. Under these circumstances, the plaintiff had to rely on his own testimony to support his claim. Here, the defendants impermissibly eroded whatever credibility the plaintiff may have been able to project despite his status. Under these circumstances, the errors clearly cannot be characterized as harmless.

Id. at 466.^{178/} See also United States v. Watkins, 983 F.2d 1413 (7th Cir. 1993)(reversing trial court determination that defendant had waived right to be present at trial).

Perhaps Judge Ripple's major flaw is his slow speed in rendering opinions. As the Appendix demonstrates, he is far slower than the Court's average in writing his opinions. It is a substantial problem. See, e.g., Shakman v. Dunne, 829 F.2d 1387 (7th Cir. 1987)(seventeen month delay between argument and decision), cert. denied, 484 U.S. 1065 (1988). While the Council commends Judge Ripple's painstaking approach to cases, it must be balanced with more concern for keeping the Court's docket prompt.

On balance, Judge Ripple has been a very good judge. His rigorous adherence to procedural regularity and precedent, tempered with a real concern for the fairness of court proceedings, has been a valuable addition to a Court that sometimes loses its bearing on these issues. In addition, his willingness to write separate opinions has been a useful corrective to the excesses of some of his colleagues.

^{178/} Cf. United States v. Bell, 969 F.2d 257, 259-60 (7th Cir. 1992)(Ripple, J., concurring)(casting substantial doubt on police officer's story, but not dissenting from acceptance of that story by the trial court).

ILANA DIAMOND ROVNER

Ilana Diamond Rovner, 55, is a 1966 graduate of the IIT-Chicago Kent Law School. She was a law clerk for a District Judge from 1972 to 1973, then an Assistant U.S. Attorney in Chicago from 1973 to 1977. She served as Deputy Governor in the Chicago office of former Governor Jim Thompson from 1977 to 1984. In 1984, Judge Rovner was appointed by President Reagan to the U.S. District Court for the Northern District of Illinois. President Bush appointed Judge Rovner to the Seventh Circuit in 1992.

Judge Rovner is the newest member of the Seventh Circuit. The Council has evaluated Judge Rovner twice within the past two years, first as part of its 1991 report on the Northern District of Illinois and then in connection with Judge Rovner's 1992 nomination for the Seventh Circuit. Initial indications from Judge Rovner's first year of service on the Seventh Circuit are that she has made a fairly smooth transition to the appellate bench, is performing well, and is maintaining her commendable personal style as appellate judge.

Judge Rovner was praised on the District Court for being an extremely hard-working, careful and caring judge. Judge Rovner seemed aware of the limits of her experience as a practitioner and worked hard to develop the expertise needed to be a trial judge. She clearly grew into the position, and was a respected member of the District Court before her elevation.

It is too soon to evaluate fully Judge Rovner's performance as a member of the Seventh Circuit. Nonetheless, a few early conclusions can be drawn. Judge Rovner continues to be a hardworking judge committed to her preparation. Attorneys appearing before Judge Rovner in her early oral arguments found her uniformly to be prepared for argument and interested in the arguments of counsel. She clearly has worked hard with her law clerks to prepare detailed questions about each case, and she actively questions counsel from both sides in almost every matter. One attorney questioned Judge Rovner's facility in discussing complicated matters once the topic varied from her preparation, but other attorneys did not report that problem.

Judge Rovner's early opinions are straightforward, readable and well-reasoned. See, e.g., Edward E. Gillen Co. v. City of Lake Forest, 3 F.3d 192 (7th Cir. 1993); Wells v. Vincennes Univ., 982 F.2d 1147 (7th Cir. 1992). They get right to the point and are not overly wordy. Counsel we contacted in several early cases were satisfied with the written decisions and found the results reasonable and well-supported by governing authority.

Judge Rovner also shows an early indication of being a prolific writer of dissenting and concurring opinions, a role the Council commends. Although it is problematic to assign great weight to the small number of cases in which she has written so far, Judge Rovner appears to be one of the most active writers of separate opinions in the Circuit. Based on these early cases, she is willing to take on the extra work to write separately to clarify or distinguish points made by the majority. See, e.g., United States v. Ross, 9 F.3d 1182, 1195-97 (7th Cir. 1993)(Rovner, J., concurring in judgment)(criticizing majority, *inter alia*, for unnecessarily reaching out to decide constitutional questions); Unterreiner v. Volkswagen of America, Inc., 8 F.2d 1206, 1213-17 (7th Cir. 1993)(Rovner, J., dissenting); Mayall v. Peabody Coal Co., 7 F.3d 570, 574-77 (7th Cir. 1993)(Rovner, J., dissenting); Richardson v. Gramley, 998 F.2d 463, 468 (7th Cir.)(Rovner, J., dissenting), petition for cert. filed, (Sept. 29, 1993)(No. 93-5248); United States v. Price, 995 F.2d 729, 732 (7th Cir. 1993)(Rovner, J., concurring).

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The early indications are also that Judge Rovner's personal style has travelled well to the appellate bench. She is praised by counsel for being respectful, courteous, gracious, and friendly to all attorneys at argument. She is non-confrontational at argument, on occasion reasoning with counsel rather than lambasting any error or overreaching in an argument. One novice appellate advocate praised Judge Rovner for putting her at ease during argument. Judge Rovner's somewhat informal or supportive judicial style is a welcome addition to the Seventh Circuit, and attorneys believe it works well in an appellate context. Judge Rovner has continued to be universally polite and respectful to attorneys. Attorneys volunteered that they were "quite impressed" by Judge Rovner at oral argument, both in matters of style and substance.

Judge Rovner, as during her trial court tenure, is universally commended for her even-handedness and sense of fairness. She has no apparent biases, and continues to be singularly respectful of litigants.^{179/} Judge Rovner demonstrates no predisposition to favor or oppose governmental or institutional interests, for example, in criminal or civil matters.

One concern raised about Judge Rovner is her speed in issuing opinions. Her initial opinions appear to be arriving slowly. Given the inevitable transition period and the relatively small sample size, it is too early to draw any conclusions about this issue.

If Judge Rovner follows the path she took as a trial court judge we can expect very good to excellent performance from her on the Seventh Circuit. The Council hopes that her command of the law will continue to grow, but that her approach to the law, and to judging, will stay the same. She appears to be an excellent addition to the Court.

HARLINGTON WOOD, JR.

Harlington Wood, Jr., 73, is a 1948 graduate of the University of Illinois Law School. From 1948 to 1969, Judge Wood practiced law in Springfield. He was U.S. Attorney for the Southern District of Illinois from 1958 to 1961. From 1969 to 1973, he held high-level positions at the Justice Department, including Assistant Attorney General for the Civil Division. Judge Wood was appointed by President Nixon to the U.S. District Court for the Southern District of Illinois in 1973. President Ford appointed Judge Wood to the Seventh Circuit in 1976. Judge Wood took senior status in 1992.

Overall reports suggest that Judge Wood is a good judge and a solid performer on the Seventh Circuit. He is considered to be thoughtful, careful, experienced, and fair.

Our reports indicate that Judge Wood is well prepared for oral arguments. He is, however, fairly quiet at oral argument and asks few questions. He is polite to the attorneys and does not attempt to embarrass them or show them up. He also usually takes the time to thank lawyers handling matters *pro bono* for their service.

^{179/} See, e.g., *De Souza v. INS*, 999 F.2d 1156, 1160 (7th Cir. 1993) (Rovner, J., concurring in the judgment) (refusing to join in majority's characterization of unsuccessful claim of a well-founded fear of persecution as "trivial").

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Judge Wood's opinions tend to be well-organized and follow a fairly consistent pattern. In the first paragraphs Judge Wood summarizes both the legal issues involved and the procedural posture of the case. He usually ends this portion with the bottom line, *i.e.*, whether the court affirms or reverses the lower court's opinion. Following the introduction, Judge Wood provides a statement of the facts followed by the discussion of the law. Judge Wood usually seems to state the law fairly. He then applies the law to the facts. His written work does not draw attention to itself, but rather explains what his ruling is and how it is justified.

Judge Wood is a former District Judge. That experience serves him well in understanding the practicalities of litigation. Not surprisingly, Judge Wood's opinions give substantial deference to the trial court, without abdicating the review function. He also defers to the state court's interpretation of state law. Judge Wood usually goes out of his way not to criticize unduly either the trial court or counsel, even when he discovers errors.^{180/} He sets forth the appropriate standard of review and generally follows it honestly. Occasionally, however, Judge Wood seems to stretch to reach an outcome because it seems fair, rather than because a neutral application of the law and the standard of review leads to that conclusion. *See, e.g., Kotsilieris v. Chalmers*, 966 F.2d 1181 (7th Cir. 1992)(Judge Wood gives great deference to finding that sanctions are appropriate, but then finds the award too high and reduces it, without remanding, to what he believes is appropriate).

Judge Wood does not often write separately. From 1985 through March 1993, a LEXIS search indicated that Judge Wood wrote 16 dissenting opinions and 7 concurring opinions. During the same time period he wrote 443 majority opinions. Thus, over 95% of Judge Wood's opinions are majority opinions. When Judge Wood does write separately, he does not engage in the back-biting characteristic of some dissents. Instead, he frequently understates his disagreement with his colleagues, albeit with what appears to be a wry tinge of sarcasm. For example, he appears to be hesitant to join in Chief Judge Posner's economic analysis approach to cases, but does not criticize it directly. Thus, in two cases, Judge Wood concurred in the results reached by Judge Posner without joining the majority opinion. *See Walgreen Co. v. Sara Creek Property Co.*, 966 F.2d 273, 279 (7th Cir. 1992)(Wood, J., concurring)(opinion is limited to "I gladly join in the affirmance reached in Judge Posner's expert analysis"); *Rodi Yachts, Inc. v. National Marine Inc.*, 984 F.2d 880, 890 (7th Cir. 1993)(Wood, J., concurring)(noting that the analysis outlined in Judge Posner's majority opinion, joined by Judge Easterbrook, "may well be a more efficient approach, but unfortunately, not being the expert in economics as are my two colleagues, I would prefer, for now, to approach comparative fault determination on the more traditional basis").^{181/} Even where Judge Wood found that a "dissent necessitate[d] a majority response," *Tom v. Heckler*, 779 F.2d 1250, 1257-58

^{180/} He can, at times, wittily comment on the foibles of the trial court or others. *See, e.g., Horwitz v. Alloy Automotive Co.*, 957 F.2d 1431 (7th Cir. 1992)(chiding District Judge for attempting to bypass rules in order to provide agreed procedure for appellate review).

^{181/} See also Judge Wood's opinion for the *en banc* Court in the Sears socket wrench case, *Roberts v. Sears, Roebuck & Co.*, 723 F.2d 1324, 1329-30 n.5 (7th Cir. 1983)(*en banc*)(rejecting the economic analysis approach of Judge Posner's panel opinion).

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n.12 (7th Cir. 1985), Judge Wood's opinion is much more restrained than the dissent to which he was responding.^{182/}

Judge Wood, in most cases, treats pro se litigants fairly. For example in Hawkins v. Poole, 779 F.2d 1267 (7th Cir. 1985), Judge Wood reversed the entry of summary judgment against a pretrial detainee in a §1983 case. In doing so, Judge Wood stated that "summary judgment cannot be bent to so conveniently dispose of a prisoner case which may be viewed by some as having little import." 779 F.2d at 1268. See also Harris v. Fleming, 839 F.2d 1232 (7th Cir. 1988)(reversing, in part, the entry of summary judgment against a pro se inmate who had been denied appointed counsel).

In criminal cases, Judge Wood rarely reverses a defendant's conviction. This, however, is true for the Seventh Circuit in general.^{183/} In United States v. Lopez, 974 F.2d 50 (7th Cir. 1992), Judge Easterbrook dismissed a criminal defendant's appeal of his sentence for lack of jurisdiction because the sentence was within the limits of the Sentencing Guidelines. The defendant, who had pleaded guilty, appealed the sentence he received from District Judge Richard Mills because at the sentencing hearing Judge Mills had delivered, in the words of Judge Easterbrook, a "tirade [that] was inappropriate both in style and content." Id. at 52.

Judge Wood filed a concurring opinion in which he stated that he viewed the jurisdictional issue to be a close issue. He noted that a sentence that violated a defendant's due process rights to a fair trial could be reviewed by the court even if it was within the sentencing guidelines. Judge Wood concluded that the comments by Judge Mills were inappropriate, but did not rise to the level of a due process problem sufficient to give the court jurisdiction to review the sentence. Id. at 53. Judge Wood, however, then concluded:

If we had jurisdiction, and I think it is a very close question, I would have suggested that this sentence be vacated and the resentencing be by another judge, not only because Judge Mills may have committed a fundamental error, but because I believe it would better serve the appearance of justice, a very important consideration even for a very guilty defendant."

Id. at 55. Despite his apparently substantial concerns about the fairness of the defendant's sentencing hearing, Judge Wood did not dissent and instead concurred with Judge Easterbrook.

While comments concerning Judge Wood were generally favorable, the Council did receive substantial criticism concerning Judge Wood in the areas of civil rights and employment discrimination law. The Seventh Circuit generally is viewed as inhospitable to civil rights

^{182/} Judge Wood joined in dissents in the Marrese and Soldal cases that were subsequently vindicated by the Supreme Court. See pp. 102, 112 *supra*. He also wrote a strong concurrence in O'Rourke v. Continental Casualty Co., 983 F.2d 94, 98 (7th Cir. 1993)(employee not entitled to amend age discrimination complaint to add retaliation claim)(Wood, J., concurring)(cautioning against strict application of majority opinion). See also Dimeo v. Griffin, 943 F.2d 679, 686 (7th Cir. 1991)(*en banc*)(Wood, J., dissenting)(majority opinion allowed broad drug testing of race track employees).

^{183/} Moreover, there are very few dissents to opinions written by Judge Wood in criminal cases.

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claims, and Judge Wood tends to rule in accordance with this general pattern, even where there is a dissenting opinion. See, e.g., McGill v. Duckworth, 944 F.2d 344 (7th Cir. 1991) (*en banc*)(overturning jury verdict finding prison officials negligent in allowing rape of prisoner, based in part upon finding that prisoner assumed the risk of rape), cert. denied, 112 S. Ct. 1265 (1992); Wallace v. Robinson, 940 F.2d 243 (7th Cir. 1991)(finding no liberty or property interest created by rule limiting prison officials' discretion to act for disciplinary reasons), cert. denied, 112 S. Ct. 1563 (1992); Patton v. Przybylski, 822 F.2d 697 (7th Cir. 1987)(finding that eight-day delay in bringing wrongfully arrested person before magistrate does not state a cause of action).^{184/} In each of the above cases Judge Wood, chose to join with the majority rather than the dissent.

In the employment area, Judge Wood also seems to rule primarily for the defendants. In these cases, Judge Wood frequently draws a dissenting opinion. In Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir.), cert. denied, 113 S. Ct. 207 (1992), Judge Wood found that the Civil Rights Act of 1991 did not apply retroactively. Judge Cudahy dissented. In Box v. A&P Tea Co., 772 F.2d 1372 (7th Cir. 1985), cert. denied, 478 U.S. 1010 (1986), Judge Wood affirmed summary judgment in favor of the employer. Judge Wood found that the plaintiff failed to establish a prima facie case of discrimination because she failed to apply for an available position despite evidence that the employer had no system to ensure that employees could apply for a job and despite the fact that the plaintiff had repeatedly requested a promotion. 772 F.2d at 1376-77. Judge Swygert dissented.

Another of Judge Wood's more notable employment discrimination decisions is EEOC v. Sears, Roebuck & Company, 839 F.2d 302 (7th Cir. 1988). In Sears, Judge Wood affirmed the District Court's judgment in favor of Sears and accepted Sears' argument that it did not have many women in higher paying commission sales positions because women were not as interested in commission sales positions as were men. This opinion is often criticized because Judge Wood accepted anecdotal comments about impressions of women's desires, phrased in a very stereotypical fashion, and found that testimony more convincing than very compelling statistical evidence to the contrary. Judge Wood's opinion is criticized for allowing differences in the treatment of groups (blacks and whites, women and men) with equal qualifications to be explained away by suppositions that these groups want to be treated differently. Judge Cudahy's dissent is far more persuasive.^{185/}

In conclusion, Judge Wood is an experienced and careful judge who remains a solid appellate judge.

One point deserves special mention. When Judge Wood notified President Bush that he intended to take senior status and a reduced workload, he made a plea for the appointment of a woman or member of a racial minority to the court to fill his position, observing that no

^{184/} See also Watkins v. Blinzinger, 789 F.2d 474 (7th Cir. 1986)(a major expansion of Eleventh Amendment doctrine in order to eviscerate Ex Parte Young and limit many suits against state), cert. denied, 481 U.S. 1038 (1987).

^{185/} See also, e.g., EEOC v. General Tel. Co. of Northwest, 885 F.2d 575, 581 (9th Cir. 1989)(criticizing Judge Wood's opinion), cert. denied, 498 U.S. 950 (1990).

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women or member of a minority group had ever sat on the Seventh Circuit. Judge Rovner was subsequently appointed to fill Judge Wood's vacancy. The Council commends Judge Wood for his successful effort to encourage President Bush to add diversity to the Seventh Circuit.