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PROMOTING THE PRESIDENT'S POLICIES THROUGH LEGAL ADVOCACY: AN ETHICAL IMPERATIVE OF THE GOVERNMENT ATTORNEY

Before the
Federal Bar Association

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PROMOTING THE PRESIDENT'S POLICIES THROUGH LEGAL ADVOCACY: AN ETHICAL IMPERATIVE OF THE GOVERNMENT ATTORNEY

The Watergate scandal a decade ago precipitated a widespread examination of the ethical norms of government attorneys. Dismay was expressed that so many government lawyers were implicated in some type of Watergate illegality or impropriety. Much celebrated discussion occurred over the causes of attorney wrongdoing, and several pieces of legislation emerged in the aftermath of Watergate, including the Ethics in Government Act of 1978. 1/

The Act imposes extensive financial disclosure requirements on high level government attorneys and other federal officials, 2/ creates an Office of Government Ethics, 3/ establishes broad disqualification requirements applicable to former officers and employees of the federal government, 4/ and mandates a low ceiling on outside earned income. 5/ Relatedly, there has been acrimonious debate and litigation over whether ethical norms should require disqualifying an entire law firm from representing a client in litigation if one of the firm's members is personally disqualified because of prior involvement over the matter in dispute as a government attorney. A consensus seems to be crystallizing around a rule that would permit representation by the law firm if a so-called Chinese wall is constructed between the disqualified erstwhile government lawyer and the remainder of the law firm. 6/

Generally neglected from these omnibus discussions over the ethics of lawyers, however, has been an exploration of the duty a government attorney in the Executive Branch owes to his client, the incumbent President. I submit that ethical imperatives derived from our constitutional system of representative government and separation of powers obligate the government attorney to devote virtually unreservedly his legal talents and insights towards advancing the policies of the President through legal advocacy.

The Executive Branch employs thousands of attorneys, 7/ most of whom are insulated from removal after a change of Administration because of constitutional 8/ or statutory 9/ protections and because of practical limits on recruitment of new attorneys. I do not deplore the impressive array of rights afforded government attorneys against discharge, transfer, or demotion. But these rights create a corollary responsibility to provide unremitting assistance through legitimate legal argument to the incumbent Administration in furtherance of the policies championed by the President. This ethical canon echoes one applicable to the private attorney, which instructs a lawyer to advocate any construction of the law favorable to his client that is not frivolous. 10/ If the ethical obligation of the government attorney is not faithfully discharged, then the electoral system is mocked, the President's ability to implement his policies could be stymied, and unelected lawyers in the Executive Branch will be censurable for disdaining the will of the people.

As President Franklin Roosevelt declared:

> The essential democracy of our Nation and the safety of our people depends upon...lodging [power] with those whom the people can change or continue at stated intervals through an honest and free system of election. 11/

De Tocqueville observed over 150 years ago, that in America, virtually every political question is ultimately transformed into a legal one. 12/ That canonical utterance has withstood the test of time, and perhaps should be crowned as an eternal verity of American political science. Contemporary federal caseload statistics demonstrate prodigious increases in litigation in recent years, 13/ partly attributable to widespread attorney fee awards 14/ and the discovery of innumerable new statutory and constitutional rights, 15/ and the desuetude of doctrines of standing, 16/ mootness, 17/ ripeness 18/ and political questions. 19/. Equally significant is the fact that the statistics reveal an avalanche of litigation assailing government policy. 20/ A President must be successful in litigation defending his actions or initiatives if he is to have a significant role in shaping and implementing public policy.

A brief enumeration of the policies or programs of the Reagan Administration that have been or are being challenged in court is illustrative of the centrality of legal advocacy to the vindication of a President's agenda. Litigation has bedevilled Administration policy concerning tuition tax credits, 21/ voluntary prayer in schools, 22/ abortion, 23/ mandatory busing,

24/ color and gender-blind laws, 25/ federalism, 26/ the regulatory scope of statutes such as §504 of the Rehabilitation Act of 1973, 27/ and Title IX of Higher Education Act Amendments, 28/ the use of cost/benefit analysis to establish standards for employee exposure to toxic substances, 29/ prosecution of draft registration violators 30/, and curtailment of government aid to students failing to show compliance with draft registration rules, 31/ Davis-Bacon Act prevailing wage standards, 32/ the obligation of parental notification when minors receive prescription contraceptives from family planning centers that receive federal funds, 33/ oil and gas leasing on government property, 34/ the award of attorney fees to plaintiffs unsuccessful in challenging government action, 35/ the legislative veto, 36/ and law enforcement safeguards against illegal aliens 37/ or frivolous claims of asylum. 38/

At times, prevailing legal doctrines must be modified, distinguished, or even overruled to accommodate or facilitate many of a President's policy objectives. When Franklin Roosevelt acceded to the Presidency in March of 1933, the cornucopia of New Deal legislation and programs that he trumpeted could be effectuated only by a radical alteration of established constitutional jurisprudence lionizing freedom of contract, 39/ property rights, 40/ and State sovereignty. 41/ Despite formidable constitutional doubts, President Roosevelt orchestrated enactment of a host of laws resting on conceptions of Congressional power under the Commerce and Spending Clauses and the Tenth Amendment that had recently been repudiated by the

Supreme Court. 42/ Many of Roosevelt's major policy initiatives were initially denounced by the Supreme Court as unconstitutional. 43/ On so-called "Black Monday," May 27, 1935, the High Court unanimously invalidated the National Industrial Recovery Act, 44/ and the Frazier-Lemke Act, the latter designed to aid farmers with mortgages in default, 45/ and repudiated the President's asserted constitutional authority to remove members of independent agencies. 46/

Roosevelt, the Attorney General, and government attorneys, however, did not renounce the New Deal policy goals despite these resounding judicial rebuffs. The Executive Branch collaborated in marshalling legal arguments distinguishing or urging modification or overruling of Supreme Court precedents in a quest to obtain a jurisprudence that would countenance New Deal programs. 47/ As then Attorney General Robert Jackson noted, his duty was not to revere the Supreme Court, but to point out its failings or errors where appropriate. 48/

Perhaps inspired by Theodore Roosevelt's boast that although he did not know much law, he knew how to put the fear of God into judges, Franklin Roosevelt unveiled his ill-received "Court Packing" plan in April of 1937. 49/ Shortly thereafter, moved at least in part by the legal advocacy of government attorneys, the Supreme Court commenced the overruling of scores of cases that stood as obstacles to the effectuation of the New Deal. 50/ In sum, President Roosevelt's New Deal would have been stillborn if government attorneys refused to advocate with skill and imagination a dramatic change in prevailing constitutional doctrines.

President Lincoln also confronted anguishing legal obstacles to his policy regarding slavery and the citizenship rights of blacks. The odious Dred Scott 51/ decision of 1857 held that Congress could not outlaw slavery in the territories, and that blacks were disqualified from U.S. citizenship. Despite serious legal questions, Lincoln signed a bill in 1862 prohibiting slavery in the territories, 52/ issued the Emancipation Proclamation, 53/ and allowed blacks to obtain federal patents, visas, and to be masters of vessels engaged in the coasting trade, although pertinent statutes imposed a requirement of U.S. citizenship. 54/

The President and his subordinates, of course, cannot defy court decrees. Moreover, the President should not insist on undertaking policy initiatives where there is no plausible likelihood of surmounting judicial review within the reasonably foreseeable future. But such occasions seldom, if ever, arise. As the sage Justice Holmes observed, the law is not an unchanging brooding omnipresence in the sky. 55/ History demonstrates that legal doctrines are continuously in flux, may change course abruptly, and are frequently riddled with ambiguity.

The Supreme Court has overruled over 230 of its own precedents; 56/ in recent memory, at the urging of the federal government, the Court overruled Plessy v. Ferguson, 57/ a decision endorsing the pernicious separate-but-equal doctrine tolerating racial discrimination, and discarded 58/ the doctrine of Colegrove v. Green, 59/ which instructed federal courts to

abstain from deciding legislative apportionment suits on the ground that they raised nonjustiable political questions.

In addition, numerous areas of the law today are plagued with incertitude because of infelicitous or opaque statutory language, 60/ and cascasdes of equivocal Supreme Court decisions addressing contentious issues such as affirmative action, 61/ gender discrimination, 62/ mandatory busing, 63/ government aid to nonpublic schools, 64/ abortion, 65/ commerical speech, 66/ the death penalty, 67/ Fourth Amendment strictures against unreasonable searches and seizures, 68/ regulation of toxic substances, 69/ and patents. 70/ Uncertainty, inconsistencies, and error in the case law are likely to become more pronounced in the future. The caseload burden of federal courts sharply curtails time for deliberation and clarity of exposition, 71/ and many contemporary federal judges perceive caseload processing as opposed to correct interpretation of statutes and the Constitution as the touchstone of judicial emminence and kudos. 72/

Contemporary features of the adjudicatory process and the legal topography underscores the important advocacy role of the government attorney in the evolution of legal doctrines sympathetic to the policies of the President. A reasonably skilled government attorney can ordinarily assemble a reasonable legal case for sustaining Executive Branch endeavors. The attorney is ethically obligated to do so, unless he encounters the improbable situation where the best legal arguments are

frivolous, that is, they have no likelihood of acceptance by the courts in the reasonably foreseeable future.

The President is, as a practical matter, elected by the people. He is thereby constitutionally endowed with authority to seek to advance his public policy preferences. The President's policies may find expression in proposed legislation, the issuance of rules or regulations, law enforcement strategies or priorities, or unilateral actions regarding foreign policy or national defense. The Constitution, of course, does not guarantee the President success in his policy initiatives. Congress may refuse to pass legislation or may nullify by statute a rule or regulation of the Executive Branch, and courts may hold that actions of the Executive Branch are without legal authority. The President is entitled, however, to the best legal advocacy of government attorneys devoted to shaping the evolution of legal doctrines that will sustain the President's programs and policy objectives. Otherwise, the President's constitutional powers will be blunted, and the will of the electorate thwarted.

Within the Executive Branch, the government attorney is emphatically a servant of the President. Neither the Constitution nor the electorate has entrusted the government attorney with an independence to determine what policies are enlightened or advance the cause of justice, and to dedicate his legal talents to furthering his personal public policy desires. The government attorney should comprehensively research legal issues, and apprise his superiors of the legal risks of

proceeding with a particular policy gambit. If a decision is made to proceed notwithstanding legal uncertainties, however, then the government attorney is ethically obligated to work unstintingly in fashioning legal arguments to uphold the policy. In some instances, this may require the construction of arguments for overturning judicial precedents, even those of recent vintage. Government attorneys did so with persistence and ultimate success during the Presidential tenure of Franklin Roosevelt.

The Supreme Court, it should be noted, has overruled major cases with lightening speed, as occurred regarding decisions addressing the constitutionality of legal tender laws, 73/ the compulsory flag salute for public school pupils, 74/ and taxes on religious pamphletting. 75/ The Court has also overruled precedents of venerable age; it held in Erie Railroad v. Tompkins 76/ that the century-old decision in Swift v. Tyson 77/ must be overruled because it unconstitutionally empowered federal courts to make general federal common law in disputes between citizens of different states.

Thus, the discovery by a government attorney of precedent that seemingly would condemn a Presidential policy does not ordain the conclusion that no responsible legal argument can be assembled to vindicate the policy. To the contrary, in most such situations, rational reasons can be adduced for modifying or reversing the adverse precedent, or distinguishing it, in order to effectuate the President's policy goal. The government attorney is ethically bound to develop when necessary plausible

arguments for altering or overturning existing case law. This duty is comparable to the ethical norm governing private attorneys that endorses advocacy of any non-frivolous construction of law favorable to the client, including constructions dependent on modification or reversal of existing law, without regard to the attorney's professional opinion as to the likehood that the construction will ultimately prevail. 78/ If a government attorney cannot ungrudgingly adhere to the ethical imperative requiring promotion of the President's policies through legal advocacy, then he might seriously consider voluntary resignation from the Executive Branch.

I wish to reiterate that this ethical imperative does not require unthinking or slavish fealty to a President's public policies. If a government attorney, after thorough and careful deliberation, concludes that no legal theory supporting an Executive Branch policy can be elucidated that has any possibility of acceptance by the courts in the reasonably foreseeable future, then there is no duty to defend the legality of the policy. This duty of Executive self-restraint is an important cornerstone of the Constitution's separation of powers.

The Constitution generally entrusts the ultimate determination of the legality of Executive Branch action to the Supreme Court. A Supreme Court decree overturning government action in a particular case would be virtually toothless as a check against Executive Branch abuses, however, if the Executive could flout the rationale of the decision and undertake action

identical to that held unlawful, when no credible argument can be made that the High Court would reconsider its decision and uphold the action if an appropriate case were presented. Without such self-restraint, the Executive could in bad faith exploit the inevitable delays in the judicial process to continue wholesale implementation or enforcement of illegal policies or programs. The constitutionally envisioned role of the Supreme Court as a check against Executive power would thereby be reduced to a mere shadow. Executive self-restraint is as central to vindicating the intent of our constitutional architects as is judicial self-restraint.

The ethical imperative of the goverment attorney traceable to our constitutional system of representative government is at variance with Ethical Canon 7-14 of the American Bar Association's Code of Professional Responsibility. That canon exhorts the government attorney to refrain from instituting or continuing litigation that is "obviously unfair," to seek "justice," and to desist in civil or administrative proceedings from bringing about "unjust settlements or results." The concepts of fairness and justice that are intended to inform the government attorney in complying with this norm are those personal to the attorney. Fairness and justice, however, are elusive concepts. A government attorney's concept of fair or just public policy may diverge substantially from that held by the President or the attorney's other superiors in the Executive Branch. Thus, EC 7-14 seems to endow a government attorney with a right to refuse to support a broad spectrum of legitimate

Executive Branch programs because he believes that they are unfair or unjust. 79/ I do not believe any ethical canon of the ABA or otherwise should so enfeeble the Executive Branch, or place the personal views of a government attorney above those of the President. Proposed changes in the Code of Professional Responsibility are in accord with this belief. 80/

In conclusion, the government attorney must both understand and adhere to the ethical imperative of promoting the President"s policies to avoid constitutional malfunctioning and to display a decent respect for the outcome of Presidential elections. The imperative stems from the constitutional right of the people to self-government, and to control the course of public policy through the exercise of the franchise. The understudied subject of the government attorney's ethical duties to his client can only profit from greater scrutiny and colloquy. I encourage your participation in the dialoque.

FOOTNOTES

1. P.L. 95-521, 92 Stat. 1824

2. Id., Title I, codified at 2 U.S.C. §701; Title II, codified at 5 U.S.C. app.; Title III, codified at 20 U.S.C. app.

3. Id. , Title IV, codified at 5 U.S.C. app.

4. Id. , Title V, codified at 5 U.S.C. §207.

5. Id. Title II, §210, codified at 5 U.S.C. app.

6. See Armstrong v. McAlpin, 625 F.2d 433. (2nd Cir. 1980), vac. 449 U.S. 1106 (1981); See also: the Chinese Wall Defense to Law Firm Disqualification, 128 U. Penn. L. Rev. 677 (1980); ABA Model Rule of Professional Conduct 1.11, June 30, 1982 draft. But see Westinghouse Electic Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978); Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2nd Cir. 1977).

7. As of Oct. 31, 1981, Office of Personnel Management statistics indicate that 17,118 attorneys were employed throughout the government.

8. Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

9. 5 U.S.C. §§ 2301, (Merit System Principles), 4301 (Performance Appraisal), 7511 (adverse action).

10. Canon EC 7-4, ABA Code of Professional Responsibility.

11. The Inaugural Addresses of the American Presidents, 238 (D. Lott., ed. 1961)

12. De Tocqueville: Democracy in America.

13. In 1975, 16,658 appeals were commenced in the Courts of Appeal, as compared with 27,946 in 1982. In the district courts, in 1975, 117,320 civil cases were filed as compared with 206,193 in 1982. 1982 Annual Report of the director, Administrative Office of the U.S. Courts. Similarly, in the 1975 Term, 4761 were on the docket of the Supreme Court, as compared with 5311 on the Court's 1981 docket.

14. Rajender v. Univ. of Minnesota, 546 F.Supp. 158 (D. Minn. 1982).

15. For example, rights to abortion were created in: Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton 410 U.S. 179 (1973); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976); Bellotti: v. Baird, 443 U.S. 622 (1979); new First Amendment solicitude was granted to commercial speech in: Bigelow v. Va., 421 U.S. 809 (1975); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Con Edsion v. Public Serv. Comm'n 447 U.S. 530 (1980);

Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557 (1980); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); In the Matter of R____ M. J. ____, 102 S. Ct. 929 91982); implied private rights of action were created under federal regulatory statutes in: Merill Lynch Pierce Fenner & Smith v. Curran, 50 U.S.L.W. 4457 (1982); Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); and a vast array of procedural due process rights were created, see, for example, Mephis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

16. U.S. v. SCRAP, 412 U.S. 669 (1973).

17. Roe v. Wade, 410, U.S. 113 (1973).

18. Duke Power Co. v. Carolina Environmental Study Group, 98 S. Ct., 2620. (1978).

19. Powell v. McCormack, 395 U.S. 486 (1969).

20. See e.g. Industrial Union Dep't v. American Petroleum Inst. U.S. 607 (1980) (benzine exposure standards); United Steelworkers v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980) (OSHA lead exposure standards); American Fed. of Labor v. Marshall 617 F.2d 636 (D.C. Cir. 1979), aff'd in part sub nom. American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981) (OSHA cotton dust exposure standars); Natural Resources Defense Council v. Nuclear Regulatory Commission, 685 F.2d 459 (D.C. Cir. 1982) (environmental impact of uranium fuel cycle associated with the operation of unclear power plants); Vermont Yankee Nuclear Power v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

21. Mueller v. Allan, 676 F.2d 1195 (8th Cir. 1982), cert. granted, 103 S.Ct. 48 (1982).

22. Jaffree v. Bd. of School Commissioners of Mobile Co., 554 F. Supp. 1104 (S.D. Ala. 1983), rev'd. (11th Cir. May 12, 1983).

23. Planned Parenthood Ass'n. of Kansas City, Mo. v. Ashcroft, 655 F.2d 848 (8th Cir. 1981), cert. granted, 50 U.S.L.W. 3934 (1982); Akron Center for Reproductive Health v. City of Akron, 651 F.2d 1198 (6th Cir. 1980), cert. granted, 50 U.S.L.W. 3934 (1982).

24. Kelley v. Metropolitan Co. Board of Education, 687 F.2d 814 (6th Cir. 1982), cert. denied, 103 S. Ct. 834 (1983); Clark v. Board of Education of Little Rock, slip op. No. 82-1834 (8th Cir. 1983).

25. Williams v. New Orleans, No. 82-3435 slipop (6th Cir. 1982), rehearing granted ___ U.S.L.W. ____ ; Bratton v. Detroit, 483 F. Supp. 930 (1983); Oliver v. Kalamazoo Board of Education, slip op., No 80-1682 (6th Cir. 1983); Spirt v. Grove City, 687 F.2d 684 (3rd Cir. 1982); Arizona Governing Committee v. Norris, 671 F.2d 330 (9th Cir. 1982), cert. granted, 51 U.S.L.W. 3287 (1982).

26. EEOC v. Wyoming, 51 U.S.L.W. 4219 (1983) ; FERC v. Mississippi; 102 S. Ct. 2126 (1982).

27. Georgia Association of Retarded Citizens v. McDanial, 511 F. Supp. 1263

(N.D. Ga. 1981), appeal pending, No. 81-7485 (11th Cir.).

28. North Haven Bd. of Education v. Bell, 456 U.S. 512 (1982); Grove City College v. Harris, 500 F.Supp. 253 (W.D. Pa. 1980), cert. granted, 103 S.Ct. 1181 (1983); Univ. of Richmond v. Bell, 543 F.Supp. 321 (E.D.Va. 1982).

29. American Textile Mfrs. Inst., Inc. v. Donovon, 101 S. Ct. 2478 (1981); Industrial Union v. American Petroleum Inst., 100 S. Ct. 2844 (1980).

30. U. S. v. Wayte, 549 F.Supp. 1376 (C.D. Cal. 1982).

31. Doe v. Selective Service System, 557 F.Supp. 937 (D. Minn. 1983).

32. Building & Construction Trades Dept., AFL/CIO V. Donovan, 553 F. Supp. 352 (D.C.C. 1982), appeal pending, D.C. Cir., Docket Nos. 831118 and 8311157.

33. Planned Parenthood of America v. Schweiker, slip op., Nos. 83-0037, 83-0180 (D.D.C. 1983).

34. California v. Watt, 683 F.2d 1253 (9th Cir. 1982).

35. Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir.) (per curiam), cert. granted 103 S. Ct. 254 (1982).

36. Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir.), cert. granted, ___U.S.___, 70 L. Ed. 2d 81, 50 U.S.L.W. 3244, restored to calendar for reargument, 50 U.S.L.W. 3998.27 (U.S. July 2, 1982); Consumers

Union v. FTC, 691 F.2d 575 (1982), appeal filed; Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), appeal filed.

37. International Ladies' Garment Workers Union, AFL-CIO v. Sureck, 681 F.2d 624 (9th Cir. 1981).

38. Marie Lucie Jean et. al., Lucien Louis et. al., State of Florida, intervenor v. Nelson, slip op., No. 82-5772 (11th Cir. April 12, 1982).

39. Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 reh. denied 299 U.S. 619 (1936).

40. Truax v. Raich, 239 U.S. 33 (1915); Adair v. U.S. 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915).

41. Hammer v. Dagenhart, 247 U.S. 251 (1918); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) cf. Carter v. Coal Co., 298 U.S. 238 (1936).

42. See, e.g., Agricultural Adjustment Act, Ch. 25, 48 Stat. 31; Tennessee Valley Authority Act, Ch. 32, 48 Stat. 58; Gold Repeal Joint Resolution, Ch. 48, 48 Stat. 112; NIRA, Ch. 90, 48 Stat. 195; Gold Reserve Act, Ch. 6 48 Stat. 337; Home Owners Loan Act, Ch. 168, 48 Stat. 643; Jones - Costigan Act, Ch. 263, 48 Stat. 670; Municipal Bankruptcy Act, Ch. 345, 48 Stat. 798; Railroad Retirement Act, Ch. 868, 48 Stat. 1283; Federal Farm Bankruptcy Act, Ch. 369, 48 Stat. 1289; Wagner - Connery Act, Ch. 372, 49 Stat. 449; Social Security Act, Ch. 531, 49 Stat. 620; AAA Amendments, Ch. 641, 49 Stat. 750; Farm Mortgage Moratorium, Ch. 792, 49 Stat. 942; Bituminous Coal Conservation Act,

Ch. 824, 49 Stat. 991; Bituminous Coal Act, Ch. 127, 50 Stat. 72; Agricultural Adjustment Act of 1937, Ch. 296, 50 Stat. 246.

43. Lynch v. U.S. 292 U.S. 571 (1934); U.S. v. Butler, 297 U.S. 1 (1936); Perry v. U.S., 294 U.S. 330 (1935) Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935); Booth v. U.S., 291 U.S. 339 (1934); Hopkins Federal Savings Ass'n v. Cleary, 296 U.S. 315 (1935, Ashton v. Cameron Co. Dist., 298 U.S. 513 (1936); Railroad Retirement Bd. v. Alton, 295 U.S. 330 (1935); Louisville Joint Stock Bank v. Radford, 295 U.S. 555 (1935); Cater v. Carter Coal Co., 298 U.S. 238 (1936).

From 1933 until West Coast Hotel Co. v. Parrish, 300 U.S. 379, in 1937, the Supreme Court overruled five cases; from 1937 to 1941, it overruled 29, including: Adkins v. Children's Hosp., 261 U.S. 525 (1923); Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936); Hammer v. Dagenhart, 247 U.S. 251 (1918); Carter v. Carter Coal Co., 298 U.S. 238 (1936); and Ribnik v. McBride, 277 U.S. 350 (1928). Congressional Research Service, Library of Congress, The Constitution of the United Stated of America, Analysis and Interpretation (1973) note 35, at 1791-93. From 1942 to 1947, it overruled 19 more. See id. at 1793.

44. Schechter Poultry Corp., v. U.S., 295 U.S. 495 (1935).

45. Louisville Joint Stock Bank v. Radford, 295 U.S. 555 (1935).

46. Humphrey's Executor v. U.S., 295 U.S. 602 (1935).

47. See Brief of the U.S. in U.S. v. Darby, No. 82 (filed 1940) at p. 69.

48. R. Jackson, The Struggle for Judicial Supremacy, xvii - xviii (1941)

49. Bill transmitted to 75th Cong., 1st Sess., H.R. Doc. No. 142 on Feb. 5, 1937; reprinted at 81 Cong., Rec. 880-81 (1937).

50. The Supreme Court overruled precedents in: Anniston Mfs Co. v. Davis, 301 U.S. 337 (337) (1937); Mulford v. Smith, 307 U.S. 38 (1939); Wright v. Vinton Branch, 300 U.S. 440 (1937); Helvering Davis, 301 U.S. 619 (1937; U.S. v. Bekins, 304 U.S. 27 (1938); Chicot Co. Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); Graves v. N.Y. ex. rel. O'Keefe, 306 U.S. 466 (1939), O'Malley v. Woodrough, 307 U.S. 277 (1939); Tigner v. Texas, 310 U.S. 141 (1940) Madden v. Kentucky, 309 U.S. 83 (1940); Sunshine Coal Co. v. Adkins, 310 U.S. 381 1940; U.S. v. Darby, 312 U.S. 100 (1941); California v. Thompson, 313 U.S. 109 (1941); Alabama v. King & Boozer, 314 U.S. 1 (1941); Helvering v. Mountain Producers, 303 U.S. 376 (1938); Olsen v. Nebraska, 313 U.S. 236 (1941

51. Dred Scott v. Sandford, 60 U.S. (19 How) 393 (1856).

52. Ch. CXI, 12 Stat. 432 (1962).

53. The Amancipation Proclamation is printed at 12 Stat. 1268 (1863).

54. See Works of Charles Sumner, Boston, Lee & Shephard, 1880, Vol. V, pp. 497-98, Vol. VI, p. 144. See also letter of Attorney General Bates to Secretary of the Treasury Sumner, Nov. 29, 1862, 10 Op. Ag. 382, 412, where

Attorney General Bates limited the precedential signficance of the Dred Scott decision as follows:

> In this argument I raise no question upon the legal validity of the judgment in Scott vs. Sandford. I only insist that the judgment in that case is limited in law, as it is, in fact, limited on the face of the record, to the plea in abatement; and, consequently, that whatever was said in the long course of the case, as reported, (240 pages,) respecting the legal merits of the case, and respecting any supposed legal disability resulting from the mere fact of color, though entitled to all the respect which is due to the learned and upright sources from which the opinions come, was "dehors the record," and of no authoity as a judicial decision.

55. Southern Pacific Co. v. Jensen, 244 U.S. 205, 22 (1917) (Holmes, J. dissenting).

56. Congressional Research Service, Library of Congress, The Constitution of the United States of America, Analysis and Interpretation (1973) 1789-1791 and 1982 Supplement.

57. 163 U.S. 537 (1896); Plessy v. Ferguson was overruled by Brown v. Board of Education 349 U.S. 294 (1955).

58. Baker v. Carr, 369 U.S. 186.

59. 328 U.S. 549 (1946).

60 See e.g. Clean Air Act, 42 U.S.C. § 7401 et. seq.; Clean Water Act, 33 U.S.C. § 1251, et. seq. National Environmental Policy Act, 42 U.S.C. § 4321, et. seq. Federal Water Pollution Control Act, 33 U.S.C. § 1251, et. seq.

61. Univ. of Calif. Regents v. Bakke, 438 U.S. 265 (1978); Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers v. Weber, 443 U.S. 193 (1979); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

62. Craig v. Boren, 429 U.S. 160 (1976); Parham v. Hughes, 441 U.S. 347 (1979); Caban v. Muhammed, 441 U.S. 380 (1979).

63. Swann v. Charlotte-Mecklenburg Board of Education, 413 U.S. 189 U.S. 1 (1971), Keyes v. Sch. Dist. No. 1, Denver, Colorado, 413 U.S. 189 (1973), Milliken v. Bradley, 418 U.S. 717 (1974), Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979); Columbus Board of Education v. Penick, 443 U.S. 449 (1979); Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979); Estes v. Metropolitan Branches of Dallas NAACP, 48 U.S.L.W. 4118, 4120 (Jan. 21, 1980) (Powell, J. dissenting from dismissals of writs of certiorari as improvidently granted).

64. Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson, 403 U.S. 672 (1971); Levitt v. Committee for Public Ed. and Religious Liberty, 413 U.S. 472 (1973); Committee for Public Ed. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Meek v. Pittenger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977).

65. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Planned Parenthood of Central Missouri v. Danforth 428 U.S. 52 (1976); Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979).

66. Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); In the Matter of R___ M. J. ____, 102 S. Ct. 929 (1982).

67. Coker v. Georgia, 433 U.S. 584 (1977); Enmund v. Florida, 50 U.S.L.W. 5087 (U.S. July 2, 1982). Furman v. Georgia, 408 U.S. 238 (1972); Woodson v. North Carolina, 428 U.S. 280 (1976); Gardner v. Florida, 430 U.S. 349 (1977); Lockett v. Ohio, 438 U.S. 586 (1978); Godfrey v. Georgia, 446 U.S. 420 (1980); Beck v. Alabama, 447 U.S. 625 (1980).

68. Walter v. U.S., 447 U.S. 649 (1980); Arkansas v. Sanders, 442 U.S. 753 (1979); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Chambers v. Maroney, 399 U.S. 42 (1970); Cardwell v. Lewis, 417 U.S. 583 (1974); U.S. v. Biswell, 406 U.S. 311 (1972). On March 23, 1983, the Supreme Court parented five unilluminating opinions in a search and seizure case, Florida v. Royer, 51 U.S.L.W. 4293, 4303 (1983), which prompted one dissenting Justice to complain that the rationale of the plurality opinion was as clear as an impressionist painting.

69. Industrial Union Dep't v. American Petroleum Inst. 448 U.S. 607 (1980) (benzene exposure standards); American Textile Mfrs Inst. v. Donovan, 452 U.S. 490 (1981) (cotton dust).

70. Gottschalk v. Benson, 409 U.S. 63 (1972); Parker v. Flook, 437 U.S. 584 (1978); Diamond v. Diehr, 450 U.S. 175 (1981).

71. See Rules of United States Court of Appeals for the Second Circuit, Rule 34(g) (determination by court not to hear oral argument), Rule 0.23 (disposition by summary order and oral decision), Civil Appeals Management Plan, Rules 3, 5, 7, Revised Second Circuit Plan to Expedite the Processing of Criminal Appeals; Rules of United States Court of Appeals for the Fourth Circuit, Rules 7(b) (disposition of appeal without oral argument), 18 (unpublished opinions); Rules of the United States Court of Appeals for the Seventh Circuit, Rule 35 (unpublished decisions); Rules of the United States Court of Appeals for the Eight Circuit, Rule 10 (screening procedures for oral argument and disposition without oral argument); Rules the United States Court of Appeals for the Tenth Circuit, Rule 17(c) (disposition by summary order and oral decision); Rules of United States Court of Appeals for the Eleventh Circuit, Rules 23, 24 (establishing a two-calendar system with a "non-argument calendar" and an "oral argument argument calendar").

For a discussion of the problem presented by Rule 0.23 of the Second Circuit Court of Appeals, see Rule 0.23 of the United States Court of Appeals for the Second Circuit, Bar Association of the City of New York, Committee on Federal Courts, published at Record of the Association of the Bar of the City of New

York, Vol. 38, no. 3, p. 249. The authors of the report indicate that the rule allowing publication of opinions to be dispensed with may "incline a judge to spend too little time tracing the possible implications for future cases of the reasons he is prepared to identify as justifying a ruling in the case at bar; if the 'bad law' which 'hard cases' make need not be published, the concern is that there may be more of it." Id. at 258. Justice Rehnquist has also warned that further "streamlining" "could turn the courts, and particularly the federal courts, into bureaucracies that might be hard to distinguish from administrative agencies." Remarks of Justice William Rehnquist, Jurist-in-Residence Program, St. Louis Univ., St. Louis, Mo., Arpil 6-8, 1983. Caseloads of all federal courts have mushroomed over the past decades, forcing curtailment of oral argument and resort to assembly-line procedures for disposing of cases. (See footnote 13, supra.) A majority of incumbent Supreme Court justices have stated that alleviating its caseload burden is imperative. See, e.g., Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendation for a Change, at A-271 through A-224 (1975); "Justice Lewis Powell: A view from the top," Cal. Law., Nov. 1982, at 63, 64 (interview with Justice Powell); Remarks of Justice Lewis F. Powell, Jr., ABA Division of Judicial Administration, San Francisco (Aug. 9, 1982); Washington Post, Oct. 29, 1982, at A3 (article entitled "[Justice] Stevens Presses to Cut Caseload," Warren E. Burger: Annual Report on the State of the Judiciary, ABA mid-year meeting, New Orleans, Feb. 6, 1983, reprinted at ABA Journal, vol. 69 (April, 1983) 442; Remarks of Justice John Paul Stevens, Annual Banquet of the American Judicature Society, San Francisco, Calif., Aug. 6, 1982; Remarks of Justice O'Connor, Joint Meeting of the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, La., Feb. 6, 1983.

Oppressive caseloads make time for trenchant reflection and mastery of records impossible. Circuit Judge Duniway acknowledged in 1975 that the deliberative pressures on federal courts were endangering the decisionmaking process, and explained:

> When I came to the court [in 1961], I had time to not only read all of the briefs in every case I heard myself, which I still do, and all the motion papers . . . . which I still do, but I could also go back to the record and I could take the time as I went along to pull books off the shelves and look at them. And then I had time, when I was assigned a case, to write. And occasionally I could do what I call 'thinking', which was to put my feet on the desk and look at the ceiling and scratch my heard and say, 'How should this thing be handled?' . . . . Today the situation is quite different. I have a strong feeling and I know many of my brothers and sisters on the court have the same feeling--that we are no longer able to give to the cases that ought to have careful attention the time and attention which they deserve.

Quoted in Hruska, "The Commission on Revision of the Federal Appellate System: A Legislative History," 1974 Ariz. St. L.J. 579, 583 n. 14.

72. See Resnick: Managerial Judges, 96 Harv. L. Rev. 376 (1982).

73. Hepburn v. Griswold, 75 U.S. (12 Wall.) 603 (1870), rev'd by Knox v. Lee, 79 U.S. 457 (1871).

74. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940); overruled by W. Virginia School Board of Education v. Barnette, 319 U.S. 624 (1943).

75. Jones v. Opelika, 316 U.S. 584 (1942); overruled by Murdock v. Pennsylvania, 319 U.S. 103 (1943).

76. 304 U.S. 64 (1938).

77. 41 U.S. (16 Pet.) 1 (1842).

78. Canon EC-7-4, ABA Code of Professional Responsibility.

79. It should be noted that fairness and justice are not necessarily the Touchstones of constitutional interpretation. Justice Holmes explained, "That [to do justice] is not my job. My job is to play the game according to the rules." Learned Hand, A Personal Confession," as reprinted in The Spirit of Liberty (3rd ed.)m 397.

80. See, Rule 3.1 (Meritorious Claims or Contentions); Rule 3.8 (Special Responsibilities of a Prosecutor; Rule 5.2 (Responsibilities of a Subordinate Lawyer, ABA, Proposed Model Rules of Professional Conduct, draft of June 30, 1982).

THE WHITE HOUSE

WASHINGTON

June 9, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Justice Report on S. 1156, the "Ninth Circuit Court of Appeals Reorganization Act of 1983"

James Murr of OMB has asked for our views on a proposed letter from Assistant Attorney General McConnell to Chairman Thurmond, conveying the Justice Department's views on S. 1156. S. 1156 would create a new Twelfth Circuit Court of Appeals by spinning Alaska, Idaho, Montana, Oregon, and Washington off of the Ninth Circuit. Justice would like to oppose the bill, primarily because the bill would not solve the basic problems of the existing Ninth Circuit, which are its size and California's dominance. Arizona, Nevada, and Hawaii would feel that dominance to an even greater extent if the bill were enacted. The letter also notes that the Ninth Circuit has adopted procedural devices to ease the problems of managing a 23-judge court. Congress should wait to see how these devices work before taking the fairly drastic step of further balkanizing the circuits to reduce the size of the Ninth Circuit. The letter reports that the bill is opposed by the Ninth Circuit judges, including Chief Judge Browning, who is from Montana but apparently would like his chambers as well as his heart to remain in San Francisco.

S. 1156 was proposed by Senator Gorton (R-Wash.), probably out of parochialism, although it does address the very serious problem of the size of the existing Ninth Circuit. A 23-judge appellate court (28-judge if our bill to add new judgeships is passed) is a jurisprudential nightmare, giving rise to frequent conflicts among different panels and a total lack of coherent legal interpretations. Not too long ago a distinguished Second Circuit judge, when asked by a litigant to overrule a decision by a previous Second Circuit panel, retorted "This is not the Ninth Circuit, counsel." A conflict between the circuits is a recognized basis for the grant of certiorari, but the Supreme Court in recent years has received numerous petitions asserting (correctly) a conflict within the Ninth Circuit. The conundrum, of course, consists in the fact that any effective reduction in the size of the Ninth Circuit would involve splitting

California between different circuits, which raises problems of its own.

These problems will probably have to be resolved at some point, but for now it is enough to agree with Justice that S. 1156 does not adequately resolve the issues, and that more study is needed. In any event, the precise division of the circuits does not affect the President's powers as, for example, the Intercircuit Tribunal proposal would, and we can appropriately defer to Justice's judgment.

THE WHITE HOUSE

WASHINGTON

June 9, 1983

MEMORANDUM FOR JAMES C. MURR
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Justice Report on S. 1156, the "Ninth Circuit Court of Appeals Reorganization Act of 1983"

Counsel's Office has reviewed the above-referenced proposed report, and finds no objection to it from a legal perspective.

FFF:JGR:aw 6/9/83

cc: FFFielding
JGRoberts
Subj.
Chron

ID # 148620 CU

FG052

WHITE HOUSE
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Name of Correspondent: James C. Murr

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Subject: Justice report on S 1156, the "Ninth Circuit Court of Appeals Reorganization Act of 1983"

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD		Type of Response	Code	Completion Date YY/MM/DD
W Holland	ORIGINATOR	83/06/08				/ /
	Referral Note:					
CWAT18	D	83/06/08			S	83/06/18
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C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 6, 1983

Roberts
148620

LEGISLATIVE REFERRAL MEMORANDUM

Legislative Liaison Officer

TO:

Administrative Office of the United States Courts

SUBJECT: Justice report on S. 1156, the "Ninth Circuit Court of Appeals Reorganization Act of 1983"

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than cob June 20, 1983.

Direct your questions to me at (395-4870).

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures
cc: Karen Wilson
Mike Uhlmann
Fred Fielding
Mike Horowitz

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on S. 1156, the "Ninth Circuit Court of Appeals Reorganization Act of 1983." This bill would create a Twelfth Circuit Court of Appeals with jurisdiction over the states of Alaska, Idaho, Montana, Oregon and Washington. It would leave the Ninth Circuit with jurisdiction over Arizona, California, Hawaii, Nevada and Guam. Seven of the Ninth Circuit judges would be transferred to the Twelfth Circuit. The remaining judges would stay with the Ninth Circuit and two new positions would be created, so the new Ninth Circuit would have 18 judgeships. The Department opposes enactment of S. 1156 for the reasons set forth below.

The 1978 omnibus judgeship act 1/ increased the judgeships in the Ninth Circuit from 13 to 23. The Ninth Circuit is far larger than the next largest circuit, the Fifth, which has 14 judgeships. Five more judgeships for the Ninth Circuit were recommended by the Judicial Conference of the United States to handle the 40% increase in filings that has occurred since 1978; these judgeships recently were approved by the Senate.2/ These new judgeships would result in the Ninth Circuit being almost twice as large as the next largest circuit.3/

1/ P.L. 95-486, 92 Stat. 1629 (1978)

2/ S. 1013 was approved by the Senate on April 27, 1983.

3/ The Ninth Circuit would have 28 judgeships. With the addition of the two judgeships provided in S. 1013 for the Fifth Circuit, it would have 16 judgeships and remain the second largest.

The Chief Justice recently proposed dividing the Ninth Circuit into three circuits, arguing that a circuit of its size is not manageable. 4/ When Senator Gorton proposed the substance of S. 1156 on the floor of the Senate as an amendment to S. 1013, he compared the position of his home state of Washington in the Ninth Circuit to the situation that would be faced by South Carolina if it were in a circuit dominated by New York. 5/ To be sure, with 59% of the appellate caseload and 44% of the judges from California, that state is in a position to exert a strong influence on the direction of the circuit's decisions.

The judges of the Ninth Circuit have taken the position that dividing the circuit at this time would be premature. Chief Judge James Browning, who is from Montana, is strongly opposed to dividing the circuit. In an article soon to be published, Judge J. Clifford Wallace suggests that other circuits be consolidated until they are comparable to the Ninth Circuit, in order to improve the management of the circuit courts as a national system and reduce intercircuit conflicts. 6/

The Ninth Circuit has instituted a number of administrative innovations designed to demonstrate that this large of a circuit is manageable and capable of handling its increasing caseload. These include dividing the circuit into three administrative regions, forming "en banc" panels of eleven judges, using bankruptcy appellate panels, deciding about 50 of the easiest cases each month without oral argument, and requiring pre-briefing conferences with the attorneys. To some degree, the circuit has been successful in managing its large volume of cases; despite an increasing appellate caseload, the court is now terminating cases faster than they are being filed. 7/

In his remarks on the Senate floor, Senator Gorton implied that qualitative factors, such as the existence of regional communities of interest, should play a part in determining the proper composition of a circuit. Any decision to divide the Ninth Circuit also should include a conscious determination that the costs of continued "balkanization" of circuits are outweighed by the benefits of the collegial environment possible on smaller courts.

4/ National Law Journal, March 28, 1983, p. 2.

5/ Congressional Record, April 27, 1983, p. S 5340.

6/ Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill? 71 Calif. L. Rev. 913, 940 (not yet published).

7/ Letter from William E. Foley to the Speaker of the House of Representatives, dated February 1, 1983, Attachment 4.

However, any decision to divide the Ninth Circuit would present serious quantitative obstacles. If the proposed Twelfth Circuit is created, the Ninth Circuit would remain the largest circuit, and the dominant position of California in relation to the smaller states left behind would be increased. Any attempt to deal with the balance of the Ninth Circuit would require choosing between two alternatives that present serious concerns: creating a one-state circuit, or dividing a state between two circuits. As the attached chart indicates, California accounts for 59% of the total appeals in the Ninth Circuit, over half of which appeals are from the Central District of California, which includes Los Angeles.

The foregoing discussion makes clear that any decision to divide the Ninth Circuit involves choosing between a number of competing values. Their application to the Ninth Circuit has broad implications for the states involved and to the administration of the federal courts generally. None of the most important implications of a split has been studied adequately. In two years, the administrative innovations instituted in the Ninth Circuit will have been in place long enough to be fairly evaluated. During that time, the Department will evaluate the effectiveness of those innovations, study the qualitative factors that promote sound judicial decision-making, and consider the difficult issue of how to divide the circuit, if a basic decision to do that is made.

The Department cannot state with confidence whether S. 1156 would or would not improve the appellate process in the states in the proposed Twelfth Circuit. Even if that were the case, S. 1156 fails to address the situation in the rest of the existing Ninth Circuit. The Department is of the opinion that the future of the Ninth Circuit is an issue that should be decided at one time, because to the extent the existing situation is unsatisfactory in Washington and Montana, it probably is equally unsatisfactory in Nevada and Arizona as well. Therefore, the Department does not support S. 1156.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General

As of December 31, 1982

Ninth Circuit Case Filings:			Judicial Allocation	
Total Number	3325 (4192) No. of cases	Percent	23 Allocation	Percent
Alaska	74	2.2	1	4.3%
Arizona	290	8.7	3	13.04%
California		58.7	10	43.5%
Northern	543			
Eastern	176			
Central	988			
Eastern	246			
Hawaii	86	2.6	1	4.3%
Idaho	79	2.4	1	4.3%
Montana	90	2.7	1	4.3%
Nevada	108	3.2	1	4.3%
Oregon	211	6.3	2	8.7%
Washington		12.5	3	13.04%
Eastern	119			
Western	298			
Guam	16	.5	0	
No. Mariana Islands	1	.03	0	
Other				
Admin Agencies				
Bank. Appeals				
Original Proceedings				

F.Y.I.
file - Judges

THE BEST AND WORST

APPOINTED FOR LIFE, OUR FEDERAL judges can be enduring tributes to the system or tormenting reminders of its risks—conscientious or lazy, fair or biased, intelligent or dim-witted. Since the first federal district court judges were named in 1789, only three have been removed by impeachment.

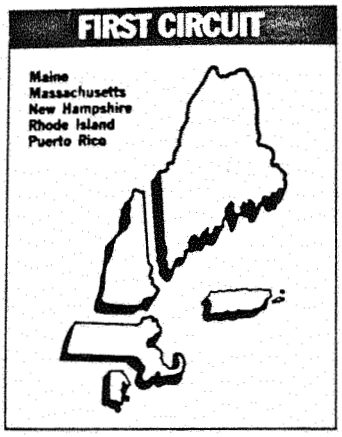
More than three years ago, in the July 1980 issue, *The American Lawyer* reported on how our federal judges measure up to the unique trust we place in them: We profiled the "best" and "worst" district judges in each federal circuit. Now, with one more circuit and dozens of new district judges, we decided to cover that ground again. Are the judges we picked as the worst in their circuits still just as bad? Are the best living up to their promise? Have new appointees outshone the old bests—or outdone the worsts? As in our last effort, because the trial court is where most federal judicial business begins and ends and because, unlike the court of appeals, judges there must make decisions on their own, we restricted ourselves to the district level. We tried to find the "best" and "worst" district judges in each of the 12 judicial circuits. To narrow the scope further, all judges on senior status who are not fully or almost fully active were excluded from consideration, as were those very new to the federal bench. (We did not designate a worst judge in the Fourth Circuit.)

With no regular election campaigns to trigger assessments of their performance, most federal judges have been virtually ignored by the press. Yet their work is usually more important than that of local officials or even members of Congress. This absence of regular press coverage—especially in an age when federal laws affect almost every personal and business transaction—is as surprising as the range of the judges' abilities. We found lawyers who had been telling one another amazing stories about some judge for years, yet not a word about the judge had appeared in the local press, beyond perfunctory mention of a decision that he or she had made.

War stories were not our only resource. After canvassing hundreds of lawyers for initial lists of exceptionally good and bad jurists, we read dozens of decisions rendered by the judges we were tentatively considering and sifted through hundreds of pages of trial records. We consulted law professors, local courthouse reporters, prosecutors, even judges. If a judge was falling into the "worst" category, we aggressively sought out those who might provide a different view.

We had four basic criteria: legal ability, temperament, willingness to work hard, and integrity. Gauging such qualities, not to mention determining priorities, obviously involves subjective judgments. Yet in most instances we found a broad consensus as to the two or three best or worst judges in each region. The tough decisions came in choosing one particularly good or bad judge to spotlight, and in some instances that dilemma is reflected in our mention of one or more runners-up.

Democratic presidents outstripped the Republicans in terms of appointing judges selected in the best category. Carter and Johnson appointed five each; the remaining two are Nixon appointees. On the worst side, the results are more bipartisan. Republican presidents Nixon and Eisenhower appointed, respectively, three and two of the worst judges, while Democrats were responsible for a total of six—three selected by Carter, one by Johnson, and two by Kennedy.



BEST

JOSEPH TAURO, 53

Appointed by Nixon in 1972

In 1972, when Joseph Tauro was appointed to the federal bench in Massachusetts, he inherited a class action against Belchertown, a state institution for the mentally retarded. Shocked by the conditions described in the complaint, Tauro ordered counsel on both sides to meet him the following morning at the gates of Belchertown without announcing his visit to the administrators. During his ten-hour surprise tour, Tauro and both parties saw residents who were severely overcrowded, covered with bug bites, and lying in their own excrement. "The conditions were constitutionally indefensible," Tauro recalls announcing at the time. "Outside there were acres of lush green grass. Inside the conditions ranged from a low of a pigpen to a high of a human warehouse."

Tauro's swift inspection resulted in the defendants in *Ricci* v. *Dukakis* deciding to settle and negotiate a major remedial program. A decade later, suits against four other state homes for the mentally retarded have been consolidated with *Ricci* and Tauro is overseeing the implementation of consent decrees in each case. "Judge Tauro's a catalyst," says Massachusetts attorney general Frank Bellotti. "He gets both parties to exchange views. It was important for us to go up for the visit. It was the only case that I decided could not be defended."

Tauro's skills, however, go far beyond activism and diplomacy. Lawyers of all stripes praise his scholarly opinions and his singular ability to hold government attorneys to the same standard as private litigators. Two of Tauro's major decisions on constitutional matters, *U.S.* v. *Chadwick* and *Rogers* v. *Okin*, have gone up to the Supreme Court and changed precedent along the way.

A former assistant U.S. attorney, John Wall, says of a recent trial before Tauro, "I was amazed at the grasp and recall of facts he had. His ability to retrieve testimony that is a couple of months old is literally unbelievable." Adds John Curtin, a litigator at Boston's Bingham, Dana & Gould, "Tauro is always right, even when he's ruled against me on matters of some importance." Tauro is also widely praised as hard-working and extremely efficient. "He's very flexible at the outset of a case in deciding a schedule, but then he holds you to it," says Curtin. "He'll strike a pleading if it's not filed within the appropriate time."

Indeed, when the General Accounting Office did a scathing review of the backlog in Boston's federal district court, Tauro was singled out for praise for his case-management methods. He sends out an extremely detailed pre-trial order in every case and always offers his help for settlement talks, at which he often hands out index cards for counsel to write down their high and low settlement bids. If a settlement is reached, Tauro enters it that day, rather than waiting for closing papers. "I try to create a no-doors tunnel to the end of the case," explains Tauro. "A lawyer never leaves here without a date of return. I don't want any case to get lost." Tauro's backlog of 514 cases (as of May) is well below the national average of 620 for fully active judges.

The only blot on Tauro's record is a controversial mandamus petition raised by the prosecution after a jury deadlocked 11–1 for conviction of state senator James Kelly and Tauro declared a mistrial. In 1981 the First Circuit unanimously upheld Tauro's decision and criticized the U.S. attorney for making the motion, but at the time the Boston newspapers made much of the fact that during Tauro's three years as chief legal counsel to governor John Volpe in the 1960s, Kelly had headed a state senate committee investigating alleged bribes by Volpe. The First Circuit upbraided the U.S. attorney for going forward with the mandamus attempt when an FBI report showed "no evidence whatsoever that Tauro had ever communicated with Kelly" during that investigation.

Some lawyers speculate that the prosecutors' mandamus effort was, as one

Joseph Tauro

criminal lawyer puts it, "just sour grapes" for Tauro's bold and unpopular decisions on such cases as *U.S.* v. *Chadwick* and *U.S.* v. *Pollock*. In *Chadwick*, which was affirmed by the First Circuit and the Supreme Court, Tauro ruled to suppress evidence of marijuana obtained in an illegal search and seizure of a footlocker. In *Pollock*, he dismissed a charge because of government misconduct. "There were clear indications that certain investigative reports had been altered to further prosecution," says Tauro. "Most judges look for a way to save the government's case," says former prosecutor Andrew Good. "Tauro is saying the government can't violate the law in order to convict." Citing Tauro's frequent practice of giving work-release sentences, one criminal lawyer says, "He's the most innovative [judge in the Massachusetts district]—and the most criticized for it."

Tauro's independence may stem from a background marked by broad experience. After receiving his LL.B. from Cornell and serving in the army, Tauro worked for two years as an assistant U.S. attorney under Elliott Richardson. He then spent 11 years in private practice doing business law, with a three-year stint as counsel to the governor. In 1972 he served as U.S. attorney for a year before being appointed to the bench by President Nixon.

Lawyers say Tauro's years as a commercial litigator and corporate lawyer have made him a pragmatic jurist. "He's a very sensitive, practical, no-nonsense judge," says William McCormack of Bingham, Dana & Gould, citing a case Tauro recently helped settle which involved firm client New England Power. New England Power and Boston Edison had been sued for conspiring to limit the selection of power suppliers for the town of Norwood. According to lead defense counsel John Curtin, "Tauro did a very outstanding job of timing and getting the parties in the right position to settle. He trifurcated the trial on issues of monopolization, fact of injury, and damages. He recognized the key interest in the case—that the town needed a guaranteed source of power and that NEP had no money to settle." Tauro helped negotiate a settlement based on credit after three days of trial.

While Tauro sometimes appears to be an outspoken and controversial judge, one of his strengths is designing opinions that balance competing interests. In one of his most famous cases, Tauro walked a fine line, leading both sides to appeal, but his decision is now looked to as precedent. In principle, he ruled in favor of the plaintiffs, who were suing Boston State Hospital for administering antipsychotic drugs against patients' wishes. But he awarded no damages, even to those who suffered from a disease which may have resulted from the drugs, on the theory that the hospital's doctors had acted in good faith. The First Circuit affirmed Tauro's order almost totally, modifying only his definition of "emergency circumstances." Since Tauro issued his 162-page opinion, says plaintiffs' counsel Richard Cole, doctors "use these drugs less and much more carefully."

There is no lack of extraordinary judicial talent among the First Circuit's district judges. Edward Gignoux, the near-legendary district judge of Maine, has been widely praised for his adept handling of the trial of federal judge Alcee Hastings, and Arthur Garrity, the famed architect of Boston's school desegregation, continues to draw favorable reviews. But with Gignoux on senior status and Garrity still tied up with the schools case, litigators consistently choose Tauro as a model jurist—intelligent, impartial, hardworking, and independent. *—by Carey Adina Karmel*

WORST

ANDREW CAFFREY, 63

Appointed by Eisenhower in 1960

A volatile temper and severe prosecutorial bias characterize Andrew Caffrey, the chief judge of the district of Massachusetts, according to more than two dozen Boston lawyers who practice before him. As one partner in a major firm puts it, "There are times you have the feeling you're appearing before the god of vengeance and tasting his wrath." Criminal defense attorneys and civil litigators on both sides of the aisle say they dread arguing in Caffrey's courtroom. While most admit that he is intelligent and capable, lawyers complain that the judge's modus operandi is to assess a case rapidly, pick sides, and give a verbal lashing to a lawyer who has the audacity to continue pressing his client's claim. "Caffrey is petty, venal, arbitrary, capricious, and totally unsuited to being a federal judge," claims one litigator who frequently appears in his courtroom. "He thinks he was anointed, not appointed."

Even in front of a jury, Caffrey dem-

Andrew Caffrey

onstrates his partiality by making obvious gestures. "Caffrey will visibly react to a witness—turn his head to one side and grimace," says an antitrust lawyer. One criminal lawyer recalls that whenever his client was testifying, Caffrey would begin "staring at the ceiling or brushing dandruff off his robe. If the judge doesn't want to listen to you in oral argument," the lawyer continues, "he'll drop his head on the bench or spin in his chair."

Some excuse Caffrey's demeanor as the product of too many years on the bench—23 years, about half as chief judge. Others say the massive increase in filings has made the judge more concerned with speed than with quality. But most agree that whatever the cause, Caffrey's irascibility can have devastating consequences. Last year, during a bench trial of a Title VII case against Gillette Company, Caffrey flatly refused to consider part of the testimony of an expert witness the name plaintiff presented to demonstrate discriminatory practices. Counsel on both sides recall the judge's telling the witness he wasn't interested in talking about logarithms and statistics, the usual methods for proving Title VII claims. Not surprisingly, he then ruled against the plaintiff and proceeded to decertify the class and dismiss the suit—but he did so on his own initiative after having denied similar motions by the defense three times. The First Circuit has since vacated Caffrey's decertification order and remanded the case. Getting evidence admitted is not necessarily the end of the problem: In a civil case several years ago, Caffrey grudgingly admitted an administrative law judge's findings of fact from a related case but then announced that he intended to ignore them, a lawyer on the case recalls.

In his haste to dispose of matters, Caffrey often falls back on the tactics he knows best: those of a prosecutor. At the time of his recess appointment by Eisenhower in 1960 (Kennedy confirmed the

WIDE WORLD (CAFFREY)

appointment), Caffrey had been with the U.S. attorney's office in Boston for five years, initially as a first assistant U.S. attorney and later as chief of the civil division. Several former prosecutors charge that since Caffrey came to the bench, he has often had *ex parte* contact with prosecutors. "He knows a lot more about the government's case than defense counsel does," says one ex-prosecutor. And Caffrey apparently uses that knowledge to strengthen the government's argument. A defense attorney in a recent mail fraud case reports that when a prosecutor missed a key point, Caffrey picked up the pivotal line of questioning and saved the government's case. Defense counsel complain that they never get that kind of assist. (The judge refused to comment on this or any other aspect of this article.)

"I always felt there was another prosecutor in the courtroom," says a criminal defense lawyer who used to appear frequently before Caffrey as an assistant U.S. attorney. "Everyone walks in with the presumption of guilt." Indeed, Caffrey will rarely rule against the government, especially on crucial motions to suppress evidence that has been obtained through questionable means. Says another former prosecutor, "Caffrey decides that the defendant is guilty and then he decides all discretionary rulings against him." The judge almost never accepts defense counsel's recommendations for jury instructions, criminal lawyers say, and he is notorious for issuing extremely heavy sentences, which he delivers without a word of explanation. "There are inmates who classify themselves as 'Caffrey prisoners,' " says one lawyer. "He's harsh as hell in sentencing." According to prosecutors and defense lawyers, Caffrey barely listens to sentencing arguments and never consults with counsel before making up his mind. "The minute you sit down, he's got the decision," says one lawyer who has had more than a dozen sentencings before Caffrey.

The First Circuit has recently reversed Caffrey for being too hasty and too harsh in sentencing. In a marijuana smuggling case last year, the defendants had arranged to plead guilty if the prosecutor would recommend a sentence of 18 months. But Caffrey had learned of the plea bargain in advance and thought it too lenient: He refused to let the prosecutor make any recommendation at all and handed down sentences of at least four years apiece. Caffrey was also reversed in a drug possession case for sentencing a minor to five years of hard time when the defendant was eligible for less severe treatment as a youthful offender.

In civil matters, litigators complain that Caffrey is not so much biased as unpredictable and petty. One lawyer recounts that in the recently concluded, multidefendant *Screws* litigation, Caffrey rejected a government proposal to use three attorneys to present its case and announced that each side would be permitted only one lawyer. (The judge relented within a day or two.) In other civil suits, litigators charge, Caffrey tends to reach a conclusion after hearing only part of the evidence and, as in criminal cases, once he's made up his mind he's against you, he almost never decides a discretionary ruling in your favor.

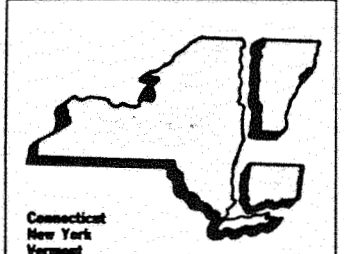
Moreover, they complain, Caffrey does not take the time to handle complex cases properly. The First Circuit made that point rather sarcastically in its recent and total reversal of Caffrey's decision in a land claim against the federal government. The essential issue was the definition of a boundary described in the deed as the "hollow of the beach so called." Caffrey, the appellate court found, had failed to scrutinize the definition carefully enough: ". . .It was improper," the First Circuit opinion read, "to interpret a phrase of six words by defining one of them (beach), making a guess as to another two (hollow of), and omitting the last two altogether (so called). Every word presumptively has a meaning."

As a lawyer who frequently appears in Caffrey's courtroom puts it, "He has a tendency in complicated cases not to pay too much attention to complications of fact." While even his detractors agree that Caffrey's opinions are generally well reasoned, the judge is widely criticized for taking too little care in assessing facts and for cutting off testimony or refusing to admit evidence. "He does not like long cases with facts to resolve," says another litigator in the First Circuit. "He likes cases with legal questions where he can get opinions published."

Since he became chief judge in 1973, Caffrey has cut his civil caseload by half, though he is said to be quite industrious not only in his administrative role—Boston's notorious backlog is shrinking—but also as chairman of the Judicial Panel on Multidistrict Litigation. Having the judge tied up in other duties seems to please litigators; several mentioned with a sigh that Caffrey was passed over for an appellate judgeship three years ago. "A lot of people wanted to get rid of him," says one lawyer.

—by Carey Adina Karmel

SECOND CIRCUIT



BEST

MORRIS LASKER, 66

Appointed by Johnson in 1968

This unusually strong circuit is home to Judge Edward Weinfeld, whom we called the best judge in the Second Circuit (and probably the nation) in our 1980 survey. Weinfeld, who is now 82, is still master of them all; he has not taken senior status or slackened his legendary pace. We name him "best emeritus." Among the less experienced jurists in the circuit, many deserve recognition; but Judge Morris Lasker is a clear standout.

When attorneys appearing before Lasker offer arguments that are long on abstract reasoning but short on common sense, he will sometimes rein them in with two words: "Too lawyerly." Lasker's real sympathies lie with the people who stand as the plaintiffs or defendants behind all the legal maneuverings and who will feel the impact of his decisions long after lawyers have moved on to other clients. (His efforts to humanize the judicial process extend even to his wardrobe; he chooses not to wear his robes during civil proceedings.)

"Judge Lasker is always aware that the law is there to serve people—to be fair to those for whom it exists—and is not just an abstract principle to be woodenly applied," says one of his former clerks, Beth Lief of the NAACP Legal Defense and Educational Fund, Inc.

Lasker says he leaned toward a "public policy" view of the law even before entering Yale Law School at the end of the Depression, where the faculty included many proponents of that view. Inspired by Franklin Delano Roosevelt and his vision of an activist government, Lasker served after graduation on a Senate committee investigating national defense programs and then spent four years in the military. In 1946 he joined the New York firm now called Battle, Fowler, Jaffin & Kheel. He made an unsuccessful bid for Congress in 1950 on a Democratic ticket, and then settled into a general practice at Battle, Fowler. In time he also began to handle the growing labor problems of his corporate clients.

Soon after Lasker was appointed to the federal bench by President Johnson in 1968, he acquired a reputation as a judge who would not make short shrift of civil rights issues, and he was sought out by "judge-shopping" civil rights attorneys. By the mid-seventies, Lasker had written a number of landmark decisions in the area of civil rights, including *Martarella* v. *Williams*, which guaranteed due process safeguards, particularly the right to treatment and special programs, to minors incarcerated as "persons in need of supervision"; and *Kirkland* v. *New York City Department of Correctional Services*, which helped change civil service exams that were found to discriminate against minorities. But none was as far-reaching in its impact as *Rhem* v. *Malcolm*, a class action filed in 1970 that challenged as unconstitutional the conditions in the Manhattan House of Detention, known as the Tombs. There had been little prison litigation up to that time, and there were few guidelines for Lasker to follow. When he was assigned the case in 1972, he made the first of many visits to city jails. In 1974 Lasker ruled in favor of the inmate plaintiffs, writing that "the dismal conditions which . . . exist in the institution manifestly violate the Constitution and would shock the conscience of any citizen who knew of them." He ordered major reforms. New York City was then in the midst of its worst financial crisis; six months passed, and the Tombs remained unchanged. Lasker then ordered that the Tombs be shut down within 30 days unless corrections department and other city officials came up with a plan to improve the jail. The Second Circuit upheld Lasker's ruling, the city shut the Tombs, and Lasker was pilloried by the *Daily News* and excoriated by many public officials for exceeding his authority. The Tombs, totally gutted and renovated under Lasker's monitoring, re-opens this summer.

While Lasker is best known for his civil rights decisions, he is equally at home when presiding over complex commercial litigation, and his thoughtful, well-written decisions are rarely reversed. One occasion on which he *was* reversed by the Second Circuit was in a major antitrust case, *CBS* v. *ASCAP and BMI*, in 1974. CBS had alleged separate price-fixing conspiracies within the country's two biggest music copyright licensing organizations; after four years of discovery and eight weeks of trial, Lasker wrote a lengthy, careful opinion, in which he ruled against CBS. The Second Circuit reversed, but the Supreme Court then remanded the case to the Second Circuit, where a new panel upheld all but a few portions of Lasker's complex opinion.

In criminal cases, lawyers in both the defense bar and the U.S. attorney's office say Lasker differs from many of his colleagues on the Southern District bench by ruling straight down the middle instead of showing a progovernment bias. One former prosecutor, Gary Naftalis, now a partner in the New York firm of Kramer, Levin, Nessen, Kamin & Frankel, recalls a high-visibility stock fraud case he tried in 1971 before Lasker, *U.S.* v. *Projansky*. "There are other judges who might have ruled my way more often than Lasker," says Naftalis, who obtained convictions of 13 of the 16 defendants. "But everybody felt that Lasker listened to everything they had to say, and that they got a fair shake," he adds, echoing what many lawyers have said about their experiences before Lasker. "Lasker gives you the appearance as well as the substance of fairness."

Dozens of lawyers interviewed about Lasker praised him not only as a judge but as a person—a warm and well-rounded individual (a classicist, musician, and voracious reader) who is sincerely concerned about society's ills and those most afflicted, they say. "Lasker wrote the book on decency," declares one lawyer who has appeared before him many times, adding, "I wish I could be more like him."

Among prosecutors, Lasker is notorious for his light sentences. Lasker says he is convinced that prisons do not rehabilitate but usually turn out individuals who are far more hardened than when they went in. He has methodically toured and inspected every prison he has monitored. "Since he *knows* what the clinker is," says one former clerk, "he thinks long and hard about sending someone there." Lasker reads all pre-sentencing reports himself—this same former clerk says that in his two-year clerkship, the judge discussed sentencing with him only once or twice—and apparently keeps an open mind until all arguments are finished. According to this former clerk, the sentence he imposed at the close of a sentence hearing was often different from the notations he prepared before its start.

As one former prosecutor says, with a wry smile, "Lasker listens to the same argument on sentencing that he's heard a

BILL POWERS

SECOND CIRCUIT, continued

hundred times before, as though he were hearing it for the first time. He always believes that someone just may turn around. Sometimes, it seems to me a kind of naiveté—he seems to believe in the perfectibility of human nature."

—by Connie Bruck

WORST

MARY JOHNSON LOWE, 59

Appointed by Carter in 1978

When she presided over *U.S.* v. *Weiss* last winter, New York district judge Mary Johnson Lowe was an even-tempered, diligent jurist who won high marks from both the defense lawyers and the prosecutor. It was a time when Lowe was under special scrutiny. Not only was Solomon Weiss, assistant treasurer of Warner Communications, a high-visibility defendant, but his trial coincided with Lowe's being considered for a slot on the New York Court of Appeals. (She was not one of the four people ultimately recommended by the state commission on judicial nominations.) The showcase aspect of the *Weiss* trial, however, does not detract from what Lowe demonstrated there: that she is capable of being an excellent judge when she wants to be. But that fact would come as a shock to legions of lawyers, both civil and criminal, who have appeared before her during the past five years.

Many of those lawyers know Lowe as a passionately opinionated, abusive, and defensive jurist in whose court they have had no semblance of a fair hearing. In civil cases, lawyers say, her rulings are often arbitrary and capricious, though not guided by any particular bias. In criminal cases, however, bias is all. Unlike many of her colleagues in the Southern District, Lowe's touchstone is her antagonism toward the prosecutors from the U.S. attorney's office and her ready suspicion of their good faith.

"Judge Lowe is half courageous and half crazy," says one former assistant U.S. attorney. "I admire the fact that she is willing to buck the prevailing sentiment in that courthouse, which is pro-government—but I don't admire the fact that she often gets to her rulings in a way no rational mind can fathom."

Lowe's pro-defense posture would surprise few familiar with her background. She spent more than 16 years as a criminal defense litigator in the Bronx. "She was a good defense lawyer," says one prosecutor who has known Lowe as both an attorney and a judge, "and she still is." According to a prosecutor in the Bronx County district attorney's office, Lowe was notorious for her prejudice against prosecutors during her two years as a judge on the Bronx County supreme court. Within two years after she was appointed to the federal bench by Carter in 1978, a full-scale war was raging between Lowe and the U.S. attorney's office. Lowe repeatedly summoned the U.S. attorney or the chief of the criminal division to complain about what she considered to be their assistants' misconduct, and on at least one occasion, she banned a senior assistant from her courtroom. Several times, prosecutors had discussed seeking a writ of mandamus to remove Lowe from a particular case (an action taken by the U.S. attorney's office only once or twice in a decade). But some argued against it, believing it would only exacerbate Lowe's seemingly constant presumption that they were conspiring to thwart defendants' rights. Finally, in December 1980, U.S. Attorney John Martin, Jr., authorized a petition for a writ of mandamus in *U.S.* v. *Jose Antonio Cabrera-Sarmiento*.

In September 1980 Cabrera had been indicted and arraigned in Miami with 14 co-defendants on a narcotics conspiracy charge, and the federal district judge set a trial date in January 1981. Cabrera was then sent to New York to be arraigned on a similar charge, which had been pending since he became a fugitive in 1975. Cabrera's case came before Lowe in mid-November, at which time—over the protests of both the New York and Miami prosecutors—she set a trial date on the New York charge one week after the Florida trial (which would take at least four weeks) was scheduled to begin. The district judge in Florida issued a writ of *habeas corpus ad prosequendum* for Cabrera's return, noting that if Cabrera did not return, the court would be required to hold two separate trials (for the 14 co-defendants and for Cabrera), while a delay in New York would add nothing to the judicial workload. Lowe nonetheless ordered that Cabrera not be removed, and the government petitioned for mandamus.

Lowe based that decision on her belief that the government had interfered with Cabrera's Sixth Amendment right to counsel by obtaining an order from another New York judge barring one of Cabrera's Florida attorneys, Irwin Lichter, from visiting him at the Metropolitan Correctional Center in New York. The government argued in its mandamus petition that Cabrera's other Florida counsel *had* had access to him in New York and that there had been ample reason to prevent Cabrera from seeing Lichter: According to the government's brief, Lichter had been stopped earlier that year by a U.S. Customs agent as he was taking $200,000 to Bogota, Colombia. In any case, the issue had already been litigated, and the Second Circuit had affirmed the order. Finally, the government argued that any remaining issue regarding Cabrera's right to counsel in the Florida case would properly come before the Florida judge—who had indicated that he saw no Sixth Amendment problem.

In a rare, if not unprecedented, action, the Second Circuit panel did not request oral argument on the petition for the writ and did not write an opinion explaining its decision, but granted the mandamus in a one-sentence order.

A self-styled maverick, Lowe seems to make it a credo to go her own way. She reminds lawyers who come before her that she is guided by only one standard—the Constitution—and is not a member of the club. As she stated in the course of hearings in *U.S.* v. *Dunleavy* in June 1980 when a prosecutor made a remark about what was customary practice in the Southern District, "I don't care whatever is done in this courthouse. I took an oath to uphold the Constitution, and I couldn't give a tinker's you-know-what about what anybody else does. I do what I think is right."

Last summer Lowe once again went her own volatile, almost inscrutable way, overturning a $2-million material-witness bond which had been set by Judge Charles Haight, Jr., a colleague on the Southern District bench. Haight had set the bond just before he left on a five-day vacation, and the defendant came to contest it before Lowe. After an acrimonious hearing, which was vintage Lowe—she repeatedly bullied the assistant U.S. attorney, introduced a loophole the defense lawyer had missed, and accused the prosecutor of having misled Haight—she vacated the bond.

The assistant U.S. attorney then appealed to New York district judge Milton Pollack. Pollack, it must be said, is the perfect progovernment analogue to Lowe; in criminal cases, he treats the assistant U.S. attorneys with such favoritism and solicitude that he is known in their office as "Uncle Miltie." (His decisions are rarely reversed, however.)

Pollack reinstated the bond. "Someone got in touch with Judge Haight, who was the trial judge on this case," explains Pollack, "and he said that he considered this witness essential to a proper trial and had tried to ensure his presence by the $2-million bail. There was reason to suppose that without that high a bail, he might not be available—either because he'd skipped the country or been snuffed out.

"I understand that the government said to Judge Lowe that they had located Judge Haight at a motel in Kentucky and that he would explain to the emergency judge [Lowe] the need for this witness—but that Judge Lowe didn't wish to call

Mary Johnson Lowe

him," Pollack adds. Lowe refused to comment on this, or any of the cases described in this article.

Interestingly enough, Lowe's pro-defense zeal in pre-trial motions and trials does not extend to the sentencing phase—where she is occasionally quite harsh. "She's good to try a case before because of her bias," says one criminal defense lawyer, echoing the views of many of his colleagues. "But she's terrible to take a plea before, because the truth is, she has no love for defendants. What rules Judge Lowe is not her love, but her hatred [of the prosecution]."

Although Lowe is not burdened with a predictable prejudice in civil cases, her reasoning is sometimes as opaque as it was in *Cabrera*. One of Lowe's most bizarre decisions was the one she rendered in a shareholders' suit, *Schlesinger Investment Partnership* v. *Fluor Corporation*, in May 1981. The plaintiffs, represented by Stuart Wechsler of New York's Kass, Goodkind, Wechsler & Labaton, were alleging that Fluor had published a tender offer that was ambiguous about its cutoff date, thereby causing shareholders to lose the chance to sell their stock. Less than three weeks after the complaint was filed, Lowe called the lawyers to a status conference, to which Wechsler—thinking that its purpose was to set a discovery schedule—sent an associate. There, Lowe announced her decision to throw the case out *sua sponte* because, she said, the complaint had not stated facts that would support its allegation of a Williams Act violation. Lowe also denied the panic-stricken associate's requests to replead or to conduct discovery.

In the Second Circuit's reversal in March 1982, Chief Judge Wilfred Feinberg wrote that "we are troubled by the procedural aspects of this dismissal," and then went on to cite six rules of federal procedure that Lowe had ignored. Moving on to the merits, the court added, "We are also not convinced that appellant failed to state a cause of action in its original complaint," and concluded that there were issues of fact that had to be tried.

Another civil case, *Charles E. Sigety* v. *Robert Abrams*, demonstrates Lowe's proclivity for reaching a decision via a route that seems almost to defy reason. Charles Sigety, a nursing-home proprietor, had been served in 1975 with a subpoena directing him to produce the nursing home's books and records for a five-year period. When he did not produce records for two of those years, the special prosecutor moved for an order holding Sigety in contempt. At hearings in state court, Sigety introduced several witnesses—but did not testify himself—in an attempt to show that the missing records could not be located. He was cited for contempt and ordered incarcerated until he either produced the records or gave a reasonable explanation for not doing so.

After this decision was affirmed by the New York state appellate courts and his petition for a writ of habeas corpus was denied, Sigety was finally imprisoned in April 1978. Four months later, Sigety petitioned for a review of his contempt citation, offering to testify about his knowledge of the missing records. But at the requested hearing, he denied any knowledge of the whereabouts of the records at the time the subpoena was served. And on cross-examination, when questioned about the location of the records before that time, Sigety refused to answer, invoking his Fifth Amendment privilege. He then testified, with a continuing objection. At the hearing's end, the state court judge found that Sigety had still not given a reasonable explanation for his failure to produce the records and ordered him back to prison.

Sigety's subsequent appeals to the state appellate courts were futile. Then, in June 1979, Sigety filed a petition for a writ of habeas corpus—and came before Judge Lowe. Lowe found that Sigety's assertion of his Fifth Amendment privilege had been proper and that the state court judge had erred in continuing his incarceration based on the compelled testimony.

The Second Circuit reversed, in a tone that can best be described as perplexed. "Assuming *arguendo* that the District Judge's determination that Sigety was within his rights in invoking the Fifth Amendment on cross-examination was correct," wrote Judge Thomas Meskill, "we are unable to affirm the decision below on that ground because we find nothing incriminating in his testimony." The court also pointed out that Sigety was incarcerated not for giving incriminating testimony—indeed, he'd offered only exculpatory answers—but for his contempt of court in failing to give a reasonable explanation for not producing the records.

Many lawyers say that Lowe still con-

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ducts herself like a state court judge, in a way that makes her anomalous on the Southern District bench. She will often take over the cross-examination of witnesses, particularly when they are law-enforcement officials. She also likes to go off the record, another practice more common in state court. Lowe frequently summons lawyers into her robing room where, with no court reporter present, she proceeds to express her notions about a case's just disposition and tries to bully lawyers into coming around to her point of view, usually by abusing and demeaning one side.

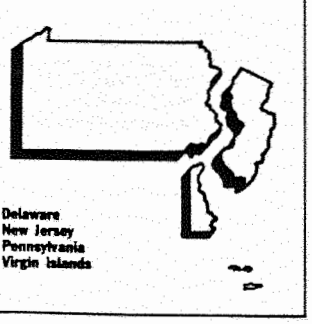
One civil lawyer in a major law firm who tried a jury case in Lowe's court recalls these robing-room experiences as a kind of hazing. She would call him in daily, he says, and, in front of his adversary, demand to know what he saw in his case and lambast him as incompetent. "I would wake up every morning at 4 A.M.," he recalls, "and just lie there, wondering how I would be demeaned that day." (The jury decided in his client's favor.)

These robing-room hostilities tend to go off, like a starting gun, at the very outset of cases. One government lawyer recalls what is an archetypal Mary Johnson Lowe story. At the start of a case, he and the plaintiff's counsel were invited to the robing room for an off-the-record conversation. The plaintiff's counsel delivered a lugubrious speech about his client's constitutional rights having been violated. Lowe listened patiently. Then it was the government lawyer's turn. "Your Honor," he began. "I know you probably haven't had time to familiarize yourself with the record in this case"—there were already over 1,000 pages of transcript—"so let me tell you briefly what's happened."

"Are you implying I can't read?" Lowe reportedly shot back. For the government lawyer, it was downhill from there. He lost before Lowe but won in the Second Circuit.

In the end, Judge Lowe—with her unpredictable rages, her bias, and her apparent suspicion of conspiracy—is as difficult to fathom as some of her rulings. As a former clerk of Lowe's says, "You hear from prosecutors the worst kinds of horror stories. You hear from some defense lawyers laudatory things. You see decisions that can best be described as bizarre. And that's Judge Lowe." —*by Connie Bruck*

THIRD CIRCUIT



BEST

JOHN FULLAM, 61

Appointed by Johnson in 1966

Attorneys practicing before the federal district bench in the Third Circuit are a smug lot. Although they contend that the appeals court "stole our best" (as one lawyer puts it) when Edward Becker was tapped for promotion to the circuit court, lawyers in Pennsylvania and New Jersey say their district courts are still crowded with outstanding judges. This is especially true in Newark, where Frederick Lacey and Dickinson Debevoise sit; in Camden, with John Gerry on the bench; and in Philadelphia, where the stars include Joseph Lord, III (now on senior status) and chief judge Alfred Luongo. The best of the group, though, is Philadelphia's John Fullam.

Fullam, 61, graduated from Harvard Law School in 1948 and began practicing at a small firm in Bristol, Pennsylvania, near Philadelphia. After twice running unsuccessfully for Congress as a Democrat in Bucks County, which is heavily Republican, he was appointed as judge to the Bucks County Court of Common Pleas in 1960. Six years later, President Johnson named him to the federal bench.

A big-firm Pittsburgh litigator who has appeared before most of the Third Circuit judges rates Fullam as number one, saying, "He does a tremendous job. He can take a complicated case and go right to the heart of it."

A good example is the massive reorganization of bankrupt Penn Central Railroad. Fullam presided over the messy $3.5-billion case from 1970 to 1980, and by all accounts, did it superbly. Edwin Rome, name partner at Philadelphia's Blank, Rome, Comisky & McCauley and special counsel to the Penn Central trustees, says, "[Fullam] undertook this enormous task without being relieved from any of the rest of his docket. He was still enormously attentive and available, and he did it all with humor and patience."

Lawyers on the Penn Central case say Fullam was constantly looking for ways of cutting down on paperwork and hearings to get to the issues. For example, Fullam had the lawyers prepare affidavits for witnesses, who were called to testify in person only if needed. The

THIRD CIRCUIT, continued

move was typical of Fullam, who has attempted to transfer the methods of administrative trials—including submitting questions and answers ahead of time—to his own courtroom in an effort to save time and money.

Fullam also heard some of the cases arising from Abscam. In November 1980 he voided the jury's guilty verdict against two Philadelphia politicians, an action that made the front page in newspapers across the nation. Fullam said in his opinion that George Schwartz, former Philadelphia council president, and Harry Jannotti, a councilman, had been entrapped and that there was no evidence

John Fullam

to show that they had a predilection for being bribed.

Fullam said in his opinion that he had reached his decision "with great reluctance. No one who has viewed the videotape evidence in this case could avoid feelings of distress and disgust at the crass behavior the tapes reveal. The jury's verdict represents a natural human reaction to that evidence. But, in the long run, the rights of all citizens not to be led into criminal activity by governmental overreaching will remain secure only so long as the courts stand ready to vindicate those rights in every case." In February 1982 the Third Circuit Court of Appeals overturned Fullam, restoring the jury's guilty verdict, and the Supreme Court denied *certiorari* to the defendants in June 1982.

Lawyers interviewed about Fullam first mention his intellectual capabilities, many describing him as "brilliant." The second adjective is, invariably, "funny." The catch, however, is that, while his wit is often used to instruct or simply to alleviate a tense courtroom, it is also sometimes used against lawyers who "are repetitive and don't seem to grasp the fine point he's honed in on," according to Oliver Biddle, head of the litigation department at Ballard, Spahr, Andrews & Ingersoll.

Biddle recalls being gently chided by the judge when, in oral arguments, he kept using the prepositions "prior to" and "subsequent to." "With a sort of twinkle in his eye," Biddle says, "the judge leaned down and said, 'Can't you say before and after?' " When Fullam's patience is sorely tried, his geniality can vanish. As another litigator in a major Philadelphia firm puts it: "He does not suffer fools gladly. Particularly, he will not tolerate redundancy. He'll cut a guy off with, 'I've *heard* that. What else do you have to say?' And he's right."

—by Leah Rozen

WORST

VINCENT BIUNNO, 67

Appointed by Nixon in 1973

Newark prosecutors have a shorthand way of saying that a case of theirs has just been assigned to Judge Vincent Biunno. They call it being "banished to Biunnoland"—a place where logic is elusive, trials are often protracted, and digressions reign supreme.

Appointed by President Nixon in 1973, Biunno came to the federal bench after more than 30 years with the Newark firm of Lum, Biunno & Tomkins. He had a distinguished career there, helping to draft New Jersey's evidentiary rules and serving a two-year stint (1958–60) as counsel to New Jersey's then-governor Robert Meyner. Biunno went on senior status in March 1982 following a hernia operation, but he continues to handle a nearly full caseload due to a shortage of judges, according to the district court clerk.

Of the dozens of lawyers in both public and private practice who were interviewed, nearly all reported that Biunno's intelligence, honesty, and unfailing politeness make the frustrations of trying a case before him all the more saddening.

"Biunno is brilliant, but spacy," says one attorney, summing up his complaints. "He creates his own litigational reality," says another. Under Biunno's care, the most routine case can become a prolonged and abstruse affair, with the judge bringing up issues and demanding briefs on questions neither side cares anything about. A Newark attorney who was involved in *English* v. *FBI*—a case that languished in Biunno's court for five years before settling out—says, "[Biunno] is a sweet guy, but he gets involved with his own questions. He'd come up with four questions that he'd want briefs on from both sides that didn't have anything to do with the case." The suit challenged the FBI's keeping of files on the plaintiff, but this attorney says Biunno fixated on the intricacies of the FBI's record-keeping methods. Biunno, who had served on the American Bar Foundation's electronic-data-retrieval committee from 1958 to 1973, is something of a technology buff, and he kept asking for more detailed technical information on how the FBI maintained its records. By 1981, when the two sides settled, the suit had slowed to a dead halt. "It was a very old case, which wasn't moving in a direction for either party," recalls the assistant U.S. attorney who settled the case.

Biunno's quirky and often esoteric opinions have gained a measure of fame among Third Circuit attorneys, who circulate the most exotic examples among themselves. Among the most popular are his long digression, in a trademark infringement case, on the etymology of the phrase "jock itch" and his humorous but superfluous discourse on parapsychology and other matters in *Ned Searight* v. *State of New Jersey* (often referred to as "the paper-clips opinion").

In *Searight*, a *pro se* plaintiff had filed a $12-million suit against the state, claiming that in 1962, while in custody, he had been unlawfully injected in the left eye with a "radium electric beam." As a result, Searight alleged, he now heard voices that talked to him inside his brain. After dismissing the suit because the statute of limitations had run out, Biunno's opinion went on to cite several failed ESP experiments, particularly Harry Houdini's failure to establish contact with the spirit world, as reason to doubt Searight's allegations. Biunno also wrote that the case was one of "presumably unlicensed radio communication" and therefore came under the sole jurisdiction of the FCC. Finally, he concluded that "Searight could have blocked the broadcast to the antenna in his brain simply by grounding it. . . . Searight might have pinned to the back of a trouser leg a short chain of paper clips so that the end would touch the ground and prevent anyone from talking to him inside his brain."

Biunno's penchant for going his own way gets him into trouble with the appeals court. A clerk for the Third Circuit in 1979–80 recalls that a circuit court judge once opened arguments on a case Biunno had heard by joking, " 'Biunno was the judge. Is there any further reason we should reverse?' "

In 1979 the appeals court granted mandamus against Biunno in *First Jersey Securities* v. *Bergen*. The suit involved First Jersey's attempt to prevent the National Association of Securities Dealers from proceeding with a disciplinary hearing against the company. NASD had moved for dismissal of the suit, citing First Jersey's failure to exhaust administrative remedies. Biunno denied the motion and retained jurisdiction, spurring NASD to file for mandamus. In granting the writ, the circuit court scolded Biunno for his "unwarranted interference with the administrative process" and ordered him to dismiss the case, which he did.

Biunno has run into trouble with another case involving administrative procedures. In *Higgins* v. *Kelley*, an FBI agent who had been fired brought suit seeking reinstatement and back pay. Biunno granted summary judgment for the FBI, and the agent appealed. The appeals court reversed, ruling that the FBI's refusal to honor the former agent's

Vincent Biunno

request for various documents—a refusal backed by Biunno—made it impossible for the former agent to prepare a proper defense for his administrative hearing. In its opinion, the circuit court chastised Biunno for misinterpreting one of its own rulings, *Twiggs* v. *U.S. Small Business Administration*, in concluding that the documents sought by the plaintiff were irrelevant to the charges. "We find it difficult to share the district court's confidence that the requested material was irrelevant," wrote the appeals court. "Without seeing the documents plaintiff requested, there is little basis upon which to form a conclusion that there are no genuine issues of fact. . . . The plaintiff's request for production of documents does not appear to us as a fishing expedition in a fanciful hope of hooking a cause of action, but a good faith attempt to prepare a challenge to his dismissal."

Arthur Uscher, the Rutherford attorney representing the ex–FBI agent, says, "Somehow [Biunno] took that case and said on the basis of *Twiggs* you can't have this information you're looking for. . . . I've read that case a hundred times and I can't fathom how he came up with that."

Among the harshest of the appellate court's reversals of Biunno came in 1976 in a *pro se* case, *Scott* v. *Plante, Klein, Weinberg et al.* An inmate at a state hospital for the criminally insane had filed several suits charging that his confinement violated his constitutional rights. Biunno dismissed the complaints. The circuit court, saying Biunno had "largely ignored the provisions of the federal rules of civil procedure in disposing of these claims," reversed, and ordered the district court to consider Scott's complaints and his request for the appointment of counsel more carefully. "Certainly, in New Jersey, where the bar has a long tradition of voluntary service, and where three fine law schools engage in extensive public service, there was no need for the court to go it alone," the appeals court wrote.

A particularly notorious Biunno case is *United States* v. *Gallagher*, a bank fraud prosecution in which Biunno was twice upbraided by the appeals court. The first time around, the appeals court found that Biunno had given erroneous instructions to the jury, so it vacated the conviction and remanded the case. The second time, Biunno dismissed the indictment without holding trial. The circuit court again reversed. Summing up Biunno's embarrassing handling of the case, the court wrote in 1979: "In the first appeal, we found sufficient evidence to convict but remanded because of error in jury instructions. The district court read our opinion as setting a new legal standard for the offense, concluded that the proofs submitted at the first trial would be inadequate under this standard, and dismissed the indictment. Regarding the district court's rationale and remedy as repugnant to our original review, we reverse and remand for retrial." Handed the case for the third time, Biunno presided over a new trial, at which the defendants were acquitted.

The trial is remembered fondly by a former assistant U.S. attorney, who still chuckles at the memory of *pro se* defendant Anthony Gallagher conducting a cross-examination of himself, objecting to his own questions and then rephrasing them before answering himself. Gallagher's erratic behavior went largely unchecked by the judge. At one point, says the former prosecutor, Gallagher, an Irish Catholic, made a motion to strike the jury because it included no Irish Catholics from Bayonne, New Jersey, his hometown. "Instead of just dismissing the motion and going on with the trial, Biunno launched into a history of the colonization of New Jersey and the role of Irish Catholics in the state," says the lawyer. "It was wild."

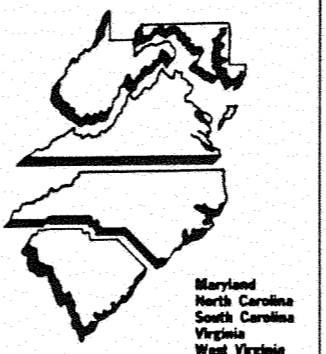
Biunno declined to discuss any of the cases that have come before him. Asked

WIDE WORLD (FULLAM)
NEW JERSEY NEWS PHOTOS (BIUNNO)

to comment on lawyers' complaints that he gets off the track in many trials, he responds, "Every case I have had litigated before me has two sides. Somebody is always unhappy. It depends on who you speak to. My job is to be neutral."

—by Leah Rozen

FOURTH CIRCUIT



BEST

ALEXANDER HARVEY, II, 60

Appointed by Johnson in 1966

Widely considered first among his peers on the federal bench in the Fourth Circuit, Alexander Harvey, II, gets most applause for the sharp-witted efficiency he shows in conducting trials. "With Harvey, you know the case will be tried and not go on forever," says one Baltimore litigator, adding, "There's no waste—he's a lean machine." Charles Bernstein, a former prosecutor and federal public defender and now a partner at Baltimore's Frank, Bernstein, Conaway & Goldman, describes the judge as "brilliant and practical, and always fully prepared. He's incredibly well organized. He invariably knows the case better than the lawyers involved."

Harvey, now 60, was appointed in 1966 by President Johnson. A native of Baltimore, he joined the blue-chip firm now called Ober, Grimes & Shriver when he graduated from Columbia law school in 1950. With the exception of two years as an assistant in the Maryland attorney general's office in 1956 and 1957, Harvey spent his entire career prior to joining the federal bench performing litigation and general practice work at the firm.

Unlike some judges who have achieved renown through the handling of a single major case, Harvey earned his through solid day-to-day performances on the bench. One of the biggest matters he has handled involves suits filed against three Maryland prisons. One of the cases, whose settlement he approved and continues to supervise today, stemmed from a class action brought by prisoners charging that overcrowding and various other prison practices violated their constitutional rights. Harvey, after visiting the prison and conducting hearings, found for the plaintiffs in 1978. That ruling was affirmed in part and remanded to Harvey by the appeals court later that year, when it agreed with his findings but ruled that the state's plan to construct a new prison should be incorporated into Harvey's timetable for lessening overcrowding. In 1981 the appeals court again disagreed with Harvey, allowing more prisoners per room than Harvey had permitted.

Attorneys for both the plaintiffs and the state praise Harvey's work in the prisons case and his dogged adherence to a schedule of monthly status conferences and compliance hearings. Plaintiffs' counsel Nevett Steele, Jr., a partner at Baltimore's Whiteford, Taylor, Preston, Trimble & Johnston, says Harvey did an "excellent job," adding, "He's decisive and he's fair. He's an excellent fact finder and he stayed on top of the cases." Stephen Caplis, an assistant with the Maryland attorney general's office when the case was tried, is equally complimentary. "[Harvey] was extremely fair to both sides. He didn't sacrifice quality for efficiency, but he got to the issues and he made rulings. He clearly indicated what the court expected of both sides."

Lawyers praise, more than any other quality, Harvey's ability to make the right ruling quickly. In a story similar to those told by half a dozen other lawyers, Charles Bernstein says, "I have seen him take proffered instructions, maybe fifty of them, and go, 'Yes on one, no on two, yes on three.' He just spits it out almost like a machine. And his decisions are fair and right under the law." As for Harvey's opinions, they are characterized as "models of clarity" that are produced with very little help, says a former Harvey clerk: "He didn't have his clerks ghostwriting for him."

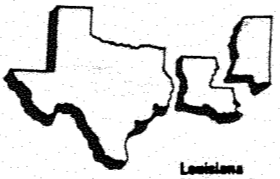
A Baltimore trial lawyer who has frequently appeared before Harvey says he marvels at the judge's ability to keep a trial running smoothly, no matter how convoluted the issue and how many parties are involved. "He just keeps his eye on the ball. He doesn't get bogged down or let the lawyers get bogged down," says this litigator. "And his opinions are practically bulletproof."

Alexander Harvey

The only widespread criticism leveled at Harvey is that he is a bit cold and distant. As one big-firm attorney puts it: "His demeanor is ice." An ACLU lawyer is more generous: "He's a superb judge. He's very thorough, efficient, courteous, and intelligent. He's just not the guy I would pick if I was looking for someone for a fun evening."

—by Leah Rozen

FIFTH CIRCUIT



BEST

JERRY BUCHMEYER, 49

Appointed by Carter in 1979

Just before the Fifth Circuit was split in 1981, keeping Texas, Louisiana, and Mississippi within its bounds and making Georgia, Alabama, and Florida into the Eleventh Circuit, a raft of new judges joined the Texas bench. Jerry Buchmeyer, appointed by Carter to the Northern District of Texas in 1979, was one of this new crop, and he has already drawn the attention of lawyers in Dallas and throughout the circuit for his fairness, independence, and intelligence.

"If I did a poll on judges, Buchmeyer would come out on top," says one Dallas litigator, explaining, "My poll would ask which factors influence a judge the most: the law; natural justice and equity; race, age, or sex of the parties; size of the docket; political or personal connection with the parties or their lawyers; and reversibility. Buchmeyer's rulings are based on law tempered by natural justice and equity."

Buchmeyer, 50, has quickly earned a reputation for penetrating and well-researched rulings in cases ranging from complex commercial litigation to constitutional questions. Lawyers say it is his sheer legal ability, honed by 21 years as a defense lawyer and antitrust litigator at Dallas's Thompson & Knight—he was the firm's lead counsel in the massive and ongoing Arizona concrete litigation—that enables him to untangle even the most complex set of facts rapidly and to focus on the key points. One Dallas litigator cites Buchmeyer's opinion in a highly technical dispute between a savings and loan association and a real estate trust: The judge "issued an extremely lucid opinion" even though he was relatively new to the bench and didn't know banking law, the lawyer says, adding that "the case had been in the system for seven years. No one had touched the issues," he continues, "but Buchmeyer plunged right in and tried it."

Buchmeyer is perhaps best known for his 1982 decision overturning the Texas sodomy statute, an action lawyers say exemplifies not only his scholarship but also his independence and willingness to take a position in an area with few legal precedents. "Buchmeyer spread the issues out beautifully in his opinion," says a Dallas litigator. "It's as if he were outlining it for a class." The opinion points out that although a 1976 Supreme Court opinion affirmed a Fourth Circuit ruling upholding a similar sodomy statute in Virginia, the Court in 1980 implicitly affirmed (by denying *certiorari*) a New York Court of Appeals decision striking down that state's sodomy statute. Lawyers say it is a tribute to Buchmeyer's thoroughness that his opinion has not been appealed.

"It's obvious to anyone reading that opinion that Buchmeyer based his decision on the facts and the law and not on whether people would like it," says a Houston lawyer. A member of the Dallas bar adds, "It wasn't what we expected from someone who had been a partner at an establishment law firm like Thompson & Knight."

In his outside activities as a lawyer, Buchmeyer had always played the diplomat, serving as president of the Dallas bar and director of the state bar but never taking an active role in politics. (His selection for a federal judgeship, he says, came as a complete surprise. He was recommended by a friend who serves on a panel that advises Senator Lloyd Bentsen on filling judgeships.) Buchmeyer

Jerry Buchmeyer

surprised the Dallas legal community with his liberal rulings, coming as he did from a big firm with a conservative reputation. "He had to suppress a lot there [at Thompson & Knight]," speculates one Dallas attorney. "He was appointed because he was able to dissemble. I think now we're seeing the real Jerry Buchmeyer coming out."

According to those who appear before him, Buchmeyer is exceptionally well prepared and hardworking, often coming in weekends and staying late. One lawyer who recently tried a complicated commercial fraud case before him recalls that the judge was "so well acquainted with the briefs and exhibits that he considered eight motions at once and ruled without any arguments from counsel."

Buchmeyer's propensity for work and willingness to immerse himself in cases has served him well in learning to try criminal actions, an area in which he had had no experience before coming to the bench. Buchmeyer readily admits he has "a lot to learn about criminal trials," but lawyers say his fairness and open-mindedness place him ahead of many more experienced judges. "He honestly listens, no matter what side you're on; he doesn't just do it because he has to," says a Louisiana criminal defense lawyer who recently appeared before Buchmeyer. "He really hears you and considers your arguments."

Buchmeyer's criminal trial skills have recently been tested in two highly publicized cases, and both prosecutors and defense counsel give the judge high marks.

UDEL BROS. (HARVEY)

FIFTH CIRCUIT, continued

One case, *U.S.* v. *Algiers*, which Buchmeyer heard in March, garnered so much media attention—including a CBS "60 Minutes" segment—that the original trial judge, Adrian Duplantier of the Eastern District of Louisiana, refused to try the case in New Orleans, where it was filed. The civil rights case, in which three blacks and one white claimed criminal violations of their rights by seven New Orleans policemen, was moved to Dallas, and when Duplantier became ill in February, it fell to Buchmeyer. Trial counsel praise him for taking up the reins quickly, keeping the trial running smoothly, and inspiring an atmosphere of respect among lawyers on both sides. "He defused a highly charged, emotional trial by making everyone feel they were being treated as a peer," says a defense attorney. Adds a prosecutor, "Everyone felt he was getting a fair shake, but he didn't let us get bogged down." Three of the seven defendants were convicted; Buchmeyer sentenced each to five years without parole.

Earlier this year, Buchmeyer also handled Dallas's largest drug trial to date—a cocaine-dealing case involving 35 defendants, including some prominent members of the Dallas business community. Both prosecutors and defense counsel praised the judge for his fairness and patience in keeping the heavily covered seven-week trial under control.

Something everyone remarks on is Buchmeyer's concern for jurors. He runs a particularly tight courtroom during jury trials, insisting that proceedings start promptly and that counsel be well prepared. He takes pains to clarify complex material to make sure the jury understands it. "He will reduce ten minutes of very complicated, confusing testimony down to one minute of very lucid testimony," says a lawyer who has presented a number of expert witnesses in Buchmeyer's courtroom. After jurors return a verdict, Buchmeyer invites them back to his chambers to answer questions about admissibility of evidence or other matters not discussed in court and to ask for their impressions of the trial.

One criticism frequently leveled against Buchmeyer is that his docket is backed up. The judge readily admits that he has been behind on trying civil cases. "I was trying too many cases at once and not leaving enough noncourt time for writing opinions and getting out motion rulings," he says, adding that a heavy criminal docket also bogged him down. He restructured his docket, however, and had virtually caught up by July 1.

Buchmeyer may be widely acclaimed as a jurist, but he is even more well known for a humor column he writes each month for the Dallas and state bar publications. A sample from a column Buchmeyer wrote shortly after his appointment, describing his first few days on the federal bench: "I learned that the Miranda warning is not something given to ladies wearing hats with lots of fruit . . . that federal courts do not accept 'Get Out of Jail Free' cards . . . that pleadings, motions, arguments of counsel, etc., are controlled by Kitman's law: 'pure drivel drives out ordinary drivel' . . . and that Doing Justice is like a love affair: if it's easy, it's sleazy."

—by Alissa Rubin

WORST

JOE FISHER, 73

Appointed by Eisenhower in 1959

For many of his 24 years on the bench, Joe Fisher was the only federal district judge in Beaumont, Texas, the heart of the Eastern District. Though he now shares the bench with three judges—two in Tyler and one in Beaumont—Fisher still makes East Texas lawyers toe his line. "You have to go along to get along," says one Beaumont attorney. "If you don't, he'll make your life hell."

Fisher's biggest problem, according to lawyers who have practiced in his courtroom, is his notorious pro-plaintiff bias. The Eastern District, which covers a heavily industrialized but predominantly rural section stretching from the Gulf Coast to Texarkana, has a heavy load of personal injury cases, including numerous asbestos claims, and Fisher, a former plaintiffs' lawyer from nearby Jasper, exhibits a near-total disregard for the jury system, East Texas lawyers say. "He's going to rule for the plaintiff no matter what, and if the jury brings in a defense verdict, he'll grant a new trial," says one defense lawyer, citing three recent examples. A lawyer from a major Houston firm who practices in Beaumont points to this tactic as a sign of Fisher's astuteness: "You can't appeal it when he grants a new trial. You just have to try the goddamn thing again and hope he makes some kind of mistake you can take to the Fifth Circuit," he says.

Fisher was rarely reversed until the last five years, but defense lawyers say

Joe Fisher

that's because the Fifth Circuit had affirmed one of Fisher's pro-plaintiff verdicts in *Borel* v. *Fibreboard*, an early asbestosis case, and thus they were reluctant to appeal and settled or paid damages instead. The turnaround came when, in the wake of *Borel*, the number of asbestos cases mushroomed and the cost of settlements became too high. Since defendants started retaining top litigators to appeal Fisher's personal injury judgments, the judge has been reversed much of the time.

In one case now on appeal, Fisher took a jury to task three times for failing to return a verdict large enough to satisfy him. The two plaintiffs had alleged that exposure to products containing asbestos had caused them to develop asbestos-related diseases. Prior to the trial, 15 of the 16 manufacturers named as defendants settled for about $405,000. Under the joint-and-several liability theory, the remaining defendant, Pittsburgh Corning, would have to pay damages only if the jury determined that the plaintiffs should get more than $405,000; if that happened, Pittsburgh Corning would pay the difference.

As far as Fisher was concerned, the jury's mission was to set damages high enough to compel Pittsburgh to pay a share. So when the jury brought in its first verdict of $100,000, Fisher rejected it, saying, according to the trial transcript, that "the plaintiffs would get zero." (In fact the plaintiffs had already received $405,000.) When the jurors returned a second time with a verdict of $400,000, Fisher again refused to accept it. Before sending them out for a third try, Fisher—in a clear violation of federal rules—announced the amount of the prior settlements and instructed the panel "one more time to make an effort at returning a verdict" since "we want to salvage some benefit from the trial." The jury finally set damages at $505,000.

Marlin Thompson of Stephenson, Thompson & Dies in Orange, Texas, represented one of the plaintiffs in this case and defends Judge Fisher's instructions as necessary guidance for a confused jury. "Fisher is one of the most outstanding plaintiffs' judges, I mean, judges, in the United States," says Thompson. "He's a very resourceful judge. I suppose every plaintiffs' lawyer in the country would like to have their case before Judge Fisher."

Defense counsel agree that Fisher is a plaintiffs' judge, and they say they are therefore forced to settle. "The only difference between winning and losing in Fisher's court is that if you win, you settle cheaper," notes one defense attorney wryly.

One area in which Fisher is not pro-plaintiff is civil rights. Plaintiffs' lawyers in civil rights cases often use the same words in quoting Fisher in explaining what happens when the judge gets a civil rights case. "He takes you into chambers, he tells you he's going to rule against you, and he berates you for 'wasting the court's time,' " says one lawyer in an account repeated by several others.

To support their contention that Fisher is weak in civil rights, attorneys point to the South Park public-school desegregation case, which Fisher handled for more than ten years. It took two reversals and remands by the Fifth Circuit—in 1978 and 1981—and, ultimately, the appointment of another judge, to integrate the South Park system. In remanding the case a second time in 1981, the Fifth Circuit described Fisher's statement that the schools were integrated as "clearly erroneous" and ordered him to design and implement a new plan within three months, warning that no "further extension of time will be permitted."

Fisher then recused himself, saying that he had a relative in the school system. Remarks one civil rights lawyer, "He was prejudiced if he had to integrate the school but impartial if he didn't."

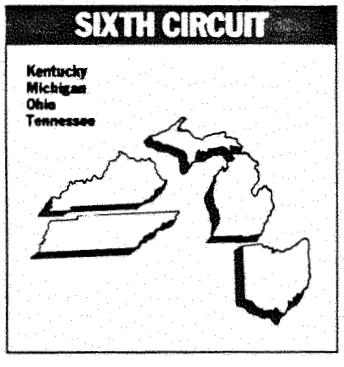
It sometimes takes multiple reversals to convince Fisher to revise his opinions. In a Title VII class action brought in 1976, it took two reversals—one *en banc* 21–1—and a Supreme Court affirmation to convince Fisher that he did not have the power to prohibit the plaintiffs from communicating with potential class members. The Fifth Circuit opinion noted that Fisher's ban was "especially egregious . . . because this is a race discrimination case," and the Supreme Court, in affirming, added that the trial court had "abused its discretion" and failed to cite evidence supporting its ruling. "[This Court looked] in vain for any indication of a careful weighing of competing factors" by Fisher, the Supreme Court opined.

Lawyers also fault Fisher's courtroom manners. Many East Texas attorneys complain that Fisher favors his friends—a few lawyers who practice before him regularly and with whom he socializes when he is not on the bench. One Houston lawyer says, "We try to hire one of Fisher's lawyers when we have a case over there; he does not take to out-of-district folks." Another Dallas attorney brings his client along when he goes to Beaumont "so he can see what goes on. Otherwise he wouldn't believe it." A woman attorney who tried a housing discrimination case before Fisher in March has filed a motion to disqualify him from the case, claiming in an affidavit that he tried to humiliate her during the trial. During her examination of a prosecution witness, the attorney claimed in her affidavit, Fisher said one question was so irrelevant that the only reason anyone would ask it is "female frustration."

Defense and plaintiffs' lawyers agree that Fisher should get credit for bringing the overloaded Beaumont docket under control. Judges in his district handle three times the national average of cases per judge. "He's certainly served a purpose," concedes one defense lawyer. "He's moved a terribly backed-up docket."

—by Alissa Rubin

SIXTH CIRCUIT



BEST

WILLIAM THOMAS, 72

Appointed by Johnson in 1966

Although he went on senior status two years ago, William Thomas of the Northern District of Ohio is still considered the region's most productive and dedicated jurist. His industry is legendary: According to his former clerks, Thomas arrives at the courthouse before 8 A.M. and sometimes returns in the middle of the night to finish drafting a decision. He continues to write most of his own opinions, and works clerks and counsel hard. Lawyers recount the times he conducted pre-trial conferences from a stretcher on the floor of his chambers during a bout of severe back pain several years ago. "Thomas is one of the most outstanding judges in the country," declares James Wilsman, a former chairman of the state judicial screening committee. "He's an absolutely ideal judge in terms of temperament and scholarship. He's scrupulously fair, very quick, and very careful."

But what sets Thomas above his colleagues in the Sixth Circuit is his statesmanlike handling of cases—such as the suits arising from the slaying of students at Kent State and the race discrimination case against the Cleveland police department—that might have become explosive public issues in less able hands.

In September 1978 Thomas was asked

by the Sixth Circuit Court of Appeals to resolve what the court described as "the lengthy and bitterly fought litigation" of the Kent State wrongful death and civil damage claims. The circuit court had just overturned a jury verdict acquitting the National Guards who fired on students during a 1970 protest of the invasion of Cambodia. (The suit had originally been tried before Ohio district judge Don Young.) Thomas set a trial date for two months later, but immediately began exploring settlement possibilities to avoid the trauma of another trial.

William Thomas

The prospects for a settlement, however, seemed bleak: The plaintiffs were demanding a full apology for the killings, signed not only by the guards but by then-Ohio governor James Rhodes—a condition government officials refused even to consider. After shuttling back and forth between the parties, Thomas says he managed to draft a "statement" that satisfied both sides.

"I worded it so it would not be an outright apology," Thomas explains. Then, according to attorneys involved in the case, Thomas hammered out a settlement in which the state agreed to pay $600,000 in damages for the plaintiffs, plus $25,000 in expenses for the ACLU lawyers handling the appeal and $50,000 for the plaintiffs' original counsel. Thomas warned the plaintiffs that the Ohio state legislature would never consent to the settlement if one-third of it went to attorneys' fees.

The plaintiffs' original counsel quickly appealed Thomas's restriction on attorneys' fees, contending that their contingency contract for one-third of recovery should have remained intact. The Sixth Circuit Court of Appeals sustained Thomas's position in 1981, writing that although there was no precedent for superseding a contingency-fee arrangement, Thomas had acted "within his judicial discretion."

The Sixth Circuit also upheld Thomas in two precedent-setting decisions stemming from the Kent State incident. One, *Hammond* v. *Brown*, involved a grand jury report that led to the indictment of 25 students and bystanders on charges of inciting a riot. In 1971 Thomas ordered the physical destruction of the report, ruling that the grand jury had gone beyond the scope of presenting evidence to support the indictments.

The second case, *Krause* v. *Rhodes*, involved a suit to make public all discovery materials prepared for the civil trial of the Kent State cases. Thomas permitted the return of all guard personnel files and grand jury testimony to the government, but ordered the government to release the material once the names of all witnesses, investigators, and third parties were deleted. In its appellate decision in 1981, the Sixth Circuit wrote that Thomas "has sought with extraordinary industry to examine the massive records involved here, to protect state and federal grand jury secrecy provisions and to protect the privacy rights of individuals."

In another controversial case, a discrimination suit against the Cleveland police force, Thomas's findings of racism were never appealed. Attorneys on both sides credit the judge with keeping passions restrained. "Thomas's sensitivity mitigated some of the hostility my client would have otherwise felt," says police force counsel Niki Schwartz of Cleveland's Gold, Rotatori, Schwartz & Gibbons. Two months after the close of the bench trial in 1973, Thomas ruled in favor of the plaintiffs, an organization of black policemen, and ordered that an 18 percent quota system be formulated for hiring and promotion. Three years later, the city signed a consent decree in which it agreed to overhaul all employment practices in the police department, and Thomas's jurisdiction continues today. "Thomas has given a virtuoso judicial performance. He accomplishes the rare feat of giving the losers the feeling they've had a fair day in court," says Schwartz, who lost two appeals on various aspects of the court's remedy.

Thomas first made his reputation as a common pleas judge in Geauga County, an appointment that proved rather costly. His income dropped from $50,000 to $4,700 when he left his practice as a plaintiffs' personal injury and union labor partner at Cleveland's Harrison, Thomas, Spangenberg & Hull in 1951 to fill a vacancy on the court. One year later Thomas was elected to the court by a

SIXTH CIRCUIT, continued

wide margin, largely because of his role in cleaning up the county, formerly known as a gambling haven.

Thomas immediately revamped the county's jury-selection system, previously controlled by the local jury commissioner, and insisted that juries be selected by lot. Thomas recalls that in one early case a county prosecutor leaned over the bench to him and whispered, "Where the hell did you get these jurors? I don't know any of them." Thomas reconvened a grand jury to investigate gambling charges—an earlier investigation resulted in no indictments—and ultimately presided over the convictions of the owners of the major local gambling house, the Pettibone Club.

Thomas spent the next 15 years as a common pleas court judge in Geauga and neighboring Cuyahoga County, until Johnson appointed him to the federal bench in 1966. Although Thomas has been a Democrat ever since his father was laid off with one week's notice during the Depression, his staunch nonpartisanship has earned him the respect of the Cleveland legal community, despite the fact that his rulings in civil liberties cases have often gone against traditional prejudices.

"Thomas absolutely applies blind justice," declares Edward Kancler of Cleveland's Benesch, Friedlander, Coplan & Aronoff. "It's clear that you're going to get as thorough a trial as possible, maybe too thorough. He sets a very rigorous schedule and thus tries more cases than most," Kancler adds. Last year, Thomas presided over the conviction of organized crime leader James Licavoli, and sentenced him to 17 years in prison. "Thomas held both the government and the defense to the highest tests," says Justice Department strike force lawyer Abraham Poretz. "He was most conscientious, extremely fair to both sides, and conducted a very thorough trial." This year, Thomas has been trying a race discrimination suit against a major Ohio realty agency and an antitrust suit against Penn Central. Says George Karch of Cleveland's Thompson, Hine and Flory, "You're continually trying to keep ahead of him."

—by Carey Adina Karmel

WORST

FRANK BATTISTI, 60

Appointed by Kennedy in 1961

Since March, Frank Battisti, the chief judge of the Northern District of Ohio, has been under investigation by a grand jury. The inquiry was launched by the Justice Department's public integrity section after one of Battisti's protegés, bankruptcy judge Mark Schlachet, resigned when the trustee he appointed in the White Motor bankruptcy was convicted of embezzlement. Bankruptcy judge John Ray, Jr., testified in the trustee's trial that he had reported the embezzlement to the chief judge, who reportedly failed to act on Ray's information.

To make matters worse, in May another federal judge on the Northern District bench, Ann Aldrich, released an affidavit which formed the basis of her testimony before the grand jury. She charged that Battisti had used his influence to steer bankruptcy work to his nephew's firm—Cleveland's Climaco, Seminatore, Lefkowitz & Kaplan—in exchange for the nephew's receiving lucrative bonuses. The allegations center on the appointment of the Climaco firm as examiner in the White Motor proceeding—work for which Battisti's nephew, a first-year associate, was paid $40,000, or close to 10 percent of the firm's total fees from the case. *Cleveland Magazine* has also reported Battisti's alleged role in arranging lucrative appointments for at least five other relatives and friends. Battisti has categorically refused to comment on these and other questions.

The local media has not ventured beyond the chief judge's questionable personal ties to examine his 22-year record on the federal bench. Interviews with

Frank Battisti

more than two dozen attorneys who have appeared before Battisti reveal that his tenure has been marred by an aggres sive pro-plaintiff bias, a vitriolic temper, and a determination to steer cases to his own ends. "He doesn't find facts, but fits them into his viewpoint," says one Ohio defense litigator. "He overtly lets the jury know that he does not appreciate proposed pieces of evidence and often demeans lawyers in front of the jury."

Many attorneys speculate that Battisti's pro-plaintiff stance springs from his working-class background. The son of a southern Italian immigrant, he was born in the steel town of Youngstown, Ohio. When he graduated from Harvard Law School in 1950, Battisti returned to the community where he was raised and worked as a solo practitioner, representing the victims of industrial accidents and helping run the city's law department. In 1958 Battisti was elected to the Youngstown court of common pleas, and after just three years he was elevated to the federal bench.

Not surprisingly, Battisti is revered by the plaintiffs' bar, since he regularly awards huge damages and attorneys' fees. Yet his conduct of these cases has formed the basis of several reversals by the circuit court. In one bench trial, Battisti awarded more than $1.6 million to a seven-year-old girl whose face was permanently disfigured when her father accidentally spilled a bottle of liquid drain cleaner on her. In 1978 the Sixth Circuit cut the award by more than half, and, in a 2–1 opinion, wrote: "A careful reading of the entire record of the trial compels the conclusion that the trial judge, from the outset, was emotionally involved. It manifested itself in one-sided interrogation of witnesses by the court, in restrictions on cross-examinations, and even in repeated interruptions of defense counsel's closing argument. That the involvement came from compassion for the pitiable condition of the child is understandable. It was, however, an involvement which at times raised a serious question whether the trial met those fundamental standards of fairness which every litigant before a federal court has a right to expect."

In other cases, attorneys contend, Battisti makes his sympathies with the plaintiff so evident that defense counsel settle to avoid large judgments. Battisti presided over a thalidomide class action filed in the 1970s in which many of the plaintiffs were represented by Craig Spangenberg, a well-known product liability litigator at Cleveland's Spangenberg, Shibley, Traci & Lancione. Spangenberg admits that the judge was sympathetic from the outset. "Battisti intimated pretty broadly that he would form an opt-in class of plaintiffs," says Spangenberg, conceding that Battisti's clear signals led the defendant, Richardson-Merrill, to settle the claims and establish a multimillion dollar trust fund for those harmed by the drug.

Battisti is most criticized for his conduct in the key decision of his career—the sweeping 1976 order to desegregate the Cleveland public schools. Many attorneys familiar with the case contend that Battisti decided it before it was filed and encouraged plaintiffs' counsel to get it on his docket. When the suit, *Reed* v. *Rhodes*, was filed in late 1973, it was brought as a related case to the Metropolitan Housing discrimination suit that Battisti had decided the previous year but to which it was only tangentially related. *Reed* was initiated by the NAACP, whose chief counsel, Nathaniel Jones, has been a close friend of Battisti's since the early 1950s, when the two were city attorneys in Youngstown. (Jones is now a judge on the Sixth Circuit Court of Appeals.)

A month later, when the other judges in the Northern District discovered how Battisti had obtained the case, they convened a meeting to protest. According to one of the judges present, Battisti refused to put the case back in the random-assignment lottery and exerted his power as chief judge to overrule their objections.

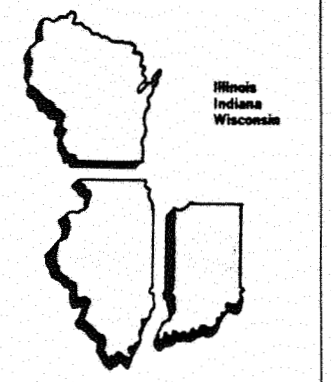
Defense counsel did not learn how Battisti obtained the case until more than a year later, only a month from trial. At that time Battisti called a meeting where he mentioned that the desegregation case had not been randomly assigned to him, but had ended up on his docket as a related suit. Attorneys for the state and from Cleveland's Squire, Sanders & Dempsey who were representing the school board were outraged. "There would have been grounds for having the case refiled," contends one. "It is significant that the NAACP managed to get the case to Battisti." One defense attorney says they felt a recusal motion would boomerang, in light of a recent adverse ruling by the Sixth Circuit on a similar motion, and Battisti did not offer to step aside. "The judge doesn't care about appearances of impropriety," says one of his former clerks. Battisti, again, would not comment.

But even those who agree with the judge's ruling in *Reed* criticize Battisti for making an already painful issue more divisive. "He disparaged counsel and ruled against us on a whole host of evidentiary matters," says one defense lawyer. "At times, he dismissed arguments out of hand," says another, adding that "he was arguing on the plaintiffs' side the whole time." But most point to the time he ordered two school-board officials handcuffed and jailed for failing to pay the fees of a court-appointed special master, whose authority was being challenged by the board. After the incident, one attorney asserts, Battisti was "beside himself with pleasure at having embarrassed these important officials. He was bouncing up and down in his chair and laughing uproariously." The Sixth Circuit Court of Appeals later reversed Battisti's fee award to the special master, calling it "excessive."

Those who defend Battisti, among them some of his former clerks, argue that the judge's decision to implement busing in Cleveland was courageous and that he lived with death threats and bad press for years as a result. The bankruptcy scandal, they contend, is just another piece of retaliation. But many attorneys claim that Battisti is no scapegoat—that, in fact, he has used his position as chief judge to intimidate lawyers and enforce his own brand of justice. One lawyer who has appeared before Battisti since his days on the Youngstown common pleas court asserts, "The judge is not really a judge; he's a duke, a teamster muscleman. He wants to project his power, his ideas, and his people across the whole spectrum of the Cleveland community."

—by Carey Adina Karmel

SEVENTH CIRCUIT



BEST

PRENTICE MARSHALL, 56

Appointed by Nixon in 1973

Prentice Marshall again outshines the competition in the Seventh Circuit, which has now completely overcome its once-poor reputation. Marshall's continuing preeminence is all the more remarkable in a circuit that also boasts such strong jurists as Nicholas Bua, Chief Judge Frank McGarr, and newcomer Charles Kocoras.

An impassioned workaholic, Marshall is lauded by those who appear before him for his extreme sense of fairness, his diligence and scholarship, and his innate decency. This assessment is surprisingly unanimous, given the ideological differences among those interviewed. "He is consistently sensible and thoughtful about the rights of both parties in litigation," says a civil liberties specialist, adding, "He shows a fierce compassion for the rights of the downtrodden." "Some deem him pro-defense, but I don't. He's simply the brightest, fairest guy here," says one Chicago prosecutor.

Marshall excelled at civil and criminal litigation, as well as scholarship, before

WIDE WORLD

owners association of Oak Brook, an exclusive Chicago suburb. The couple had arranged to buy a $675,000 house there, but at the last minute was told by the association that the house had already been sold—to the daughter of the multimillionaire founder of the suburb.

After a highly publicized bench trial, Marshall found that the defendants committed "flagrant and willful violation of civil rights law by attempting to block the sale" of the house, and awarded the plaintiffs nearly $300,000 in damages. According to plaintiffs' lawyer F. Willis Caruso of Chicago's Isham, Lincoln & Beale, "Marshall clearly had done voracious reading of all the recent fair-housing laws. Other judges might have been hesitant to give out such a large award, but Marshall, having such a grip on the recent cases in the field, was very aware of the awards being given." Even more significant was Marshall's direct order to the defendants to sell the same house to the plaintiffs. The losers complied.

Since 1970 Marshall has overseen the hiring and promotion of police officers in the Chicago police department. He has been tough on the city when it has not been in compliance with his court orders about minority hiring and promotion, and has on occasion held up thousands of dollars in revenue sharing when the department has failed to meet his standards.

Last year Marshall presided over the circuit's most publicized trial: the bribery, conspiracy, and wire-fraud case against former Teamsters president Roy Williams, co-conspirator Allen Dorfman, who was murdered soon after his conviction, and three others. First Marshall adeptly handled a four-week pretrial hearing on the suppression of hundreds of reels of evidence compiled under the extensive electronic-surveillance campaign mounted by the government. Marshall's 120-page ruling, which held that the reels of FBI wiretaps and other taped conversations were properly procured, is even called "masterly" and "a magnificent piece of scholarship" by two losing defense attorneys. The Chicago strike force received dozens of requests from Justice Department offices across the country for the ruling, which many call the best review of wiretap law ever written.

The ten-week trial of Williams et al. had the potential for becoming a circus. "You had a bunch of hotshot defense lawyers capable of creating disorder—all [of them] assuming they could manhandle a supposedly inexperienced prosecutor [Douglas Roller]—and a year's worth of FBI wiretaps," says one defense attorney. "The whole thing could have been ensnarled in delays and confusion." Marshall held the reins tightly, especially when an attempt was made at jury tampering. After five jurors received ominous early-morning phone calls from unidentified callers, Marshall quickly sequestered the jury and squelched defense motions for a mistrial.

Marshall underwent quintuple-bypass heart surgery in 1981, and his court schedule has been trimmed to four days a week. Still, says one lawyer involved in the bribery trial, "he probably worked harder than most of us." "It was as if on day one, he knew what *might* happen on day forty," says another.

Prentice Marshall

When Marshall errs, it is generally due to the one real flaw in his judicial temperament: an occasionally explosive temper. His moral and legal perfectionism can sometimes lead to outbursts. In the Teamsters trial, he exploded at the government's reluctant "star" witness, Dorfman aide William Webbe, as the alleged co-conspirator strove to help the defense. On another day, Marshall rebuked a Jenner & Block lawyer for neglecting to pay a court reporter for daily transcript. "You stiffed my court reporter, *sir*," Marshall yelled, as he stalked out to his chambers in high dudgeon.

Marshall can be even more stern about improprieties out of court. The judge made local headlines this winter when a brief encounter he had had years before with Republican mayoral candidate Bernard Epton came to light. Epton entered Marshall's chamber one morning in October 1977 and attempted to talk about a case before Marshall involving a company in which Epton had a $1.5-million stock interest. Marshall instantly showed him the door, telling him in no uncertain terms that he did not discuss cases *ex parte*. Epton, who is a lawyer but who was not directly involved in that particular case, wrote Marshall a note that afternoon denying that he intended to act improperly. "I am sorry you saw fit to embarrass me in your outer office," he wrote. "Although you obviously expected less of me, I certainly expected more of you." Marshall replied in kind: "If you believe that you were conducting yourself in accordance with the canons, so be it. But judges have canons, too. They are explicit and I try to live by them." *—by James Warren*

WORST

THOMAS McMILLEN, 67
Appointed by Nixon in 1971

Judge Thomas McMillen is a man given to the unpredictable and the unintelligible. At times, says one Chicago prosecutor, "it's almost impossible to penetrate his logic."

Maybe that accounts for McMillen's decline from a 54.7 percent favorable rating in a Chicago Council of Lawyers survey in 1977 to a bottom-of-the-barrel 37.2 rating in 1979; the only judge scoring lower in that poll was James Parsons, who was rated the circuit's worst in *The American Lawyer*'s 1980 survey but who is now on senior status.

Lawyers who have practiced before McMillen fault him for not understanding issues in complex cases; for showing bias in criminal rulings; for issuing unclear rulings; and for being generally unprepared. And McMillen knows it. Last year he took an embarrassing swipe at all types of judicial evaluations in a *Chicago Bar Record* article, saying that although "judging the judges" has become "a favorite extracurricular activity for a large number of organizations and journalists," he believed most voters rarely paid any attention to unfavorable ratings.

McMillen had judicial experience before being appointed to the federal bench. He was elected to the Cook County Circuit Court in 1966; before that, he was a partner at Chicago's Bell, Boyd & Lloyd. Although McMillen is a Harvard law graduate and former Rhodes scholar, lawyers who practice before him say intellectual inconsistency may be his most frustrating trait. According to one former federal prosecutor, "You can come up on the same motion two days running, and with the exact same facts, and get two different rulings." This attorney recalls that new members of the U.S. attorney's office were explicitly counseled by their superiors to expect bizarre rulings from McMillen. "You just know that one way or another, you'll get burned," concludes the attorney, who still appears before McMillen in his private practice. "But it happens to both sides, so in that respect he's democratic."

During the trial of an FALN terrorist in 1981, McMillen told the prosecutor to begin questioning his next witness—although he had neglected to call the jury back in to hear the testimony. In his written decision after a bench trial in an extortion case, he switched the name of the guilty defendant with that of the government's main witness and repeatedly referred to various decisions by a nonexistent jury. While trying a 1980 freedom of religion case challenging a Nativity crèche displayed in city hall, McMillen asked an attorney to explain the relevance of citing the Fourteenth Amendment to him.

This winter McMillen's disorganization verged on the comic at the sentencing of tax consultant Daniel McGovern, who had been convicted of bribing county tax officials in exchange for tax breaks. At the start of sentencing, McMillen announced that he would not call for the government to make a statement, since the case had ended under a plea agreement. According to an observer, U.S. attorney Scott Turow did a double-take. The prosecutor then struggled, as politely as possible, to remind McMillen that there had been no plea agreement—before or during the jury trial over which McMillen had just presided.

There are no statistics on reversal rates among the circuit's judges, but McMillen has had some noteworthy ones. According to a lawyer who argued a complex truth-in-lending case in 1975 in which class certification was sought, McMillen turned down both sides' motions for summary judgment and held a trial on liability *before* ruling on certification, throwing both sides into confusion. It was only *after* the trial, which the plaintiffs won, that McMillen certified the class. He was reversed for clear errors by the Seventh Circuit. "It was a typical McMillen case," says this defense attorney. "Lawyer A says it should be A, Lawyer B says it should be B, and McMillen says it should be C and screws everything up."

McMillen sometimes willfully ignores the most elemental of rules in favor of his own unique—some say outlandish—form of jurisprudence. ("When E.T. phones home, Judge McMillen answers," observes one prosecutor.) The most legendary example of McMillen's insistence on his own unconventional reasoning occurred in 1976, after the trial and conviction of a defendant on charges of aggravated kidnapping and robbery. U.S. attorney Samuel Skinner learned that the wrong person had been convicted, even though six witnesses had (mistakenly) identified him as the culprit. Acting on new evidence gathered by the FBI after the trial, Skinner, now convinced of the innocence of the convicted man, asked McMillen to vacate the verdict. He steadfastly refused, insisting that all those witnesses couldn't have been wrong. The only compromise he offered was a new trial of the same defendant. Finally, McMillen was pressured by the appellate court to set aside the verdict, which he did, reluctantly.

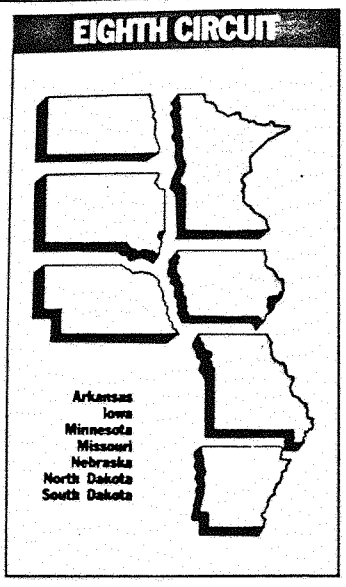
It has fallen to McMillen to oversee the difficult and controversial redistricting of Chicago's ward boundaries. His creation of four new wards this year, each with slight majorities of blacks or Hispanics, has flown in the face of the substantial voting inequalities that the court-ordered redistricting was meant to erase. Lawyers and other courtroom personnel chalk up his performance not to political or racial bias but to his weak grasp of the case. According to an attorney who has monitored the case closely, "the judge has a terrible time understanding most of the evidence put before him and applying the facts to the law."

RUNNER-UP: Appointed by Nixon in 1973, Allen Sharp, 50, is the only judge ever to be reprimanded by the Judicial Council of the Seventh Circuit. The major subject of the council's rebuke this winter was Sharp's behavior during and after an FBI investigation of his girlfriend (now his wife), a former secretary in the U.S. Probation and Parole Service. She was suspected of leaking information to a convicted drug dealer and altering the dealer's probation records; the Justice Department declined prosecution. Sharp was also a target of the investigation, and he apparently sought the transfer or firing of court officials who assisted in the probe.

In late January 1983, Chief Judge Walter Cummings of the Seventh Circuit summoned Sharp to Chicago from his court in South Bend, Indiana, for a dressing down about the affair. According to Cummings, who talked to local newspapers after the reprimand, Sharp was also ordered to surrender three handguns to federal marshals. The guns were the best of several that had been entered as evidence in Sharp's court; he had commandeered the three guns for himself and ordered the rest destroyed. A week after his meeting with Cummings, Sharp received a formal letter of reprimand.

—by James Warren

CHICAGO SUN-TIMES



BEST

HARRY MACLAUGHLIN, 56

Appointed by Carter in 1977

There are many contenders for best district court judge in the Eighth Circuit, and most of them are in Minnesota. Senior judge Edward Devitt is considered an archetype of judicial propriety. Donald Alsop is superb on evidentiary questions. Robert Renner is a criminal procedures expert. And Paul Magnuson wins praise for coupling a warm courtroom manner with an incisive mind. But only Minneapolis's Harry MacLaughlin wins universal praise for his fairness, consistency, and scholarship.

"I think he's one of the best judges I've ever worked in front of," says Robert Tansey, Jr., a plaintiffs' attorney with Minneapolis's Stacker, Ravitch & Simon. "Everything in his court is handled in a fair and orderly manner. MacLaughlin has a combination of trial experience, bench experience, and intelligence that is very rare."

MacLaughlin's career as a judge is tied to the political career of his former law school classmate and partner, Walter Mondale. Mondale also played a substantial role in securing MacLaughlin's appointment to the Minnesota Supreme Court in 1972 and in his appointment to the federal bench five years later. But MacLaughlin has dispelled any doubts that he is merely the beneficiary of political patronage. "I would have no hesitancy about bringing any type of case before him," says Richard H. Kyle, a partner at St. Paul's Briggs and Morgan who represented Minnesota's Republican congressional delegation during the state's latest reapportionment. The reapportionment fell to the courts after the state legislature failed to settle on a plan, and a three-judge panel, including district judges MacLaughlin and Alsop and circuit judge Gerald Heaney, drew up a scheme dividing Minnesota's eight districts into four urban and four rural areas. "There was a great deal of pressure that the reapportionment not be seen as a political decision," says Douglas Blomgren, a state attorney who worked on the case. "What we got was a principled and fair decision." The plan was upheld by the Supreme Court.

James Morrow, who spent five years as an assistant U.S. attorney in Minneapolis and who is now a county court judge, recalls that "it was very frustrating to bring cases before MacLaughlin because he never screwed up. He was the best prepared of the judges and knew what he was doing." Charles Hvass of Minneapolis's Hvass, Weisman & King, echoes the consensus, saying, "MacLaughlin is one of those rare judges who actually listens to both sides and then issues a fair, learned decision."

In 1981 the EEOC brought suit on behalf of a Minneapolis police captain challenging several Minnesota statutes that required police and fire department employees to retire at age 65. The federal Age Discrimination and Employment Act of 1978 prohibits mandatory retirement before age 70, and MacLaughlin ruled that state and local governments were not exempted. Seventeen months later, the Supreme Court noted MacLaughlin's opinion when they voted 5–4 to overturn a similar Wyoming statute in a case filed by a game warden.

Steven Fredrickson, the assistant city attorney who was co-counsel for the police department, says, "MacLaughlin ran a most efficient and effective court. He thoroughly did his homework—[he] read the briefs and asked pertinent questions. From his trial conduct, it was impossible to tell how he would rule."

"I still think he's wrong," Frederick adds, "but I came away very impressed."

Harry MacLaughlin

Losing lawyers often walk out of MacLaughlin's courtroom thinking they have received a fair hearing, though in April the judge decided a case in a way that pleased none of the parties yet demonstrated his common sense. A Minnesota couple had been arrested and put in alcohol-detoxification centers for three days based on orders from a county judge after the couple's 15-year-old daughter complained to two social workers that her parents were alcoholics. The couple were not given notice or a hearing prior to their detention, nor was other evidence sought before they were confined. The couple sued the county, seeking $1 million in compensatory damages.

MacLaughlin agreed with the jury—the couple's due process rights had been violated. But he reduced the award to $260,000 and denied the plaintiffs' attorneys a multiplier in their fee requests, awarding them a total of $64,000. In his opinion, he explains: "The trial . . . was not unusually difficult or complex. . . . The risk of the litigation is offset by its effect on counsel's reputation. The substantial publicity attending the case will no doubt be beneficial to counsel's practice."

MacLaughlin has a reputation as a heavy sentencer in white-collar-crime cases. In 1981 the Eighth Circuit affirmed his four-year maximum sentence of a man convicted of obtaining more than $150,000 in fraudulent loans even though the defendant had no prior convictions. It also affirmed the judge's additional two-year sentence of the defendant for threatening a witness. MacLaughlin himself admits to a tendency to be more lenient with other criminals. "A poor kid from the ghetto who is convicted of a minor crime deserves to be treated differently than someone convicted of a major white-collar crime," he says.

MacLaughlin is also a good administrator. According to the court clerk's office, he usually maintains the lowest pending caseload of all the active judges in the district of Minnesota. "His docket is essentially current," says calendar clerk Patricia Giel. The Eighth Circuit elected MacLaughlin to its Council on Judicial Administration in 1981.

The most frequent criticisms of MacLaughlin are that he is distant and cool on the bench and that he covets a spot on the appellate bench. "MacLaughlin's pretty bland in court," says one plaintiffs' attorney, voicing complaints also made by other lawyers. "He just sits there and looks at you with that slicked-back hair of his. He's also too concerned about what the Eighth Circuit thinks of him. He's always looking over his shoulder at [them], and that's probably why he's reversed so rarely."

Despite these minor gripes, MacLaughlin's straightforward and studious manner seems to win almost universal praise, even from the losers in his courtroom. Says one litigator who not long ago lost a $575,000 patent infringement case before the judge, "MacLaughlin epitomizes what I want in a judge. He's bright and he's concerned about getting the facts before a jury. MacLaughlin's not a gladhander. He studies the law."

—by James Lyons

WORST

WILLIAM HUNGATE, 61

Appointed by Carter in 1979

If worst judges were ranked solely on the size of their mistakes, district judge Scott Wright of the Western District of Missouri would win the nomination for his handling of the *Hyatt* case, the largest group of claims ever filed in Kansas City. In that case, which resulted from the collapse of two skywalks at a Hyatt Regency Hotel, Wright became so intent on certifying a novel, mandatory class action in 1982 that he sought out a class representative himself, contacted him on an *ex parte* basis, and—acting on his own motion and contrary to the wishes of most of the plaintiffs—certified the class. He was later reversed by the Eighth Circuit Court of Appeals, although the court praised Wright's "creative" approach.

Judge Miles Lord of Minnesota, for his part, would emerge as a front runner for continuing to favor plaintiffs in discrimination, antitrust, and consumer suits. In a recent sex discrimination class action against the University of Minnesota, for instance, Lord allowed the class to be defined so broadly that it included even women who never applied to the university faculty because they feared they might be discriminated against. In a 1980 swine flu case, Lord preempted the assistant U.S. attorney's opening argument by pronouncing that he thought the government had committed a tort against all inoculated adults and should consider paying the claims by selling a submarine.

Yet despite their populist bent, both Wright and Lord are conceded to be among the most innovative and intelligent judges in the Eighth Circuit. In contrast, William Hungate of the Eastern District of Missouri is less controversial, but more consistently off the mark in his rulings. Not biased so much as inept, Hungate's poor grasp of legal issues and courtroom procedures has often led to bizarre rulings and unnecessarily harsh treatment of lawyers.

The root of Hungate's weakness, lawyers say, is his inexperience. A six-term U.S. representative who was appointed to the federal bench by Carter in 1979, Hungate seems unfamiliar with the law as it is practiced, even though he chaired a House subcommittee that revised the rules of criminal procedure during his last years in Congress. "You would think he would know them," gripes one assistant U.S. attorney in St. Louis. "But it was pretty clear when he came [to the bench] that he hadn't practiced in a while and that his [congressional] staff had done a lot of the work." (Although Hungate spent two years as a partner with the St. Louis firm of Thompson & Mitchell before being confirmed, "he was not a full-time litigator," according to partner David Ulmer. The last time Hungate litigated on a full-time basis was in 1968, as a partner in the Troy, Missouri, firm of Hungate & Grewach.)

Attorneys complain that Hungate's inexperience is compounded by his inability to admit to it. "Most of the other judges, if they don't know something, take a break and jump into the books," says a former clerk for another district court judge in St. Louis. "He doesn't seem to want to admit when he doesn't know something. It leads to unpredictable rulings." In one recent case the U.S. attorney's office argued that it should be allowed to admit four virtually identical photographs into evidence. The defense objected. Rather than rule one way or the other, Hungate admitted two of the photos and excluded two. In an asbestos case in 1982, Hungate insisted that the multiple defendants choose one lawyer to review jury instructions. "There was only one problem," recalls an attorney. "The defendants had third-party claims against each other."

Behind Hungate's apparent unwillingness to own up to his inexperience is a rigidity lawyers say is extreme. In a district whose turnaround of civil and criminal cases is the fourth-fastest in the country, Hungate still stands out as fast. But lawyers protest that his speed makes him arbitrary—"He never knows why he does anything," complains one—and that he resorts to unorthodox practices to keep the docket moving. In an attempt to streamline his caseload, Hungate passed out "bench passes" to each counsel at a jury trial, and insisted that they use one each time they approached the bench for a conference. "If you ran out of passes, tough luck," recalls an attorney. In other cases, Hungate has limited time for major arguments—in one instance alloting the state of Missouri half an hour to argue a motion that could have cost the state $9 million. "Things you take for granted in other courts, you can't in Hungate's," says one civil rights attorney. "He expects the impossible."

But it is Hungate's handling of the

massive St. Louis desegregation case that has provoked the most controversy. If he signs the proposed settlement he has taken under advisement, the case will become the first interdistrict desegregation suit ever settled voluntarily. But many question the way in which the judge brought about the settlement. When Hungate inherited the nine-year-old case from district judge James Meredith, now on senior status, the state of Missouri and the St. Louis city school board had already been found liable for segregating the city's schools. Under Hungate, 15 of the 23 school districts in and around St. Louis agreed to bus students as part of an interim, voluntary plan. What hadn't been decided—and what was expected to drag on in the courts for years—was the liability and compliance of the school districts and the compliance of the state, which had objected to the cost of the proposed settlement.

Even some of Hungate's supporters say they were surprised by his solution to the threatened delay. Instead of holding a hearing to determine the school districts' liability, Hungate jumped ahead and, in March 1982, held a "remedial hearing" to determine how—*if* the districts were found liable—they would have to comply with the desegregation order. Worse, Hungate excluded the districts and their counsel from participating in the hearing: Only the lawyers for the city, the state, and the plaintiffs, as well as three court-appointed experts, were allowed to make presentations on proposed remedies. (In an appeal by the districts, the Eighth Circuit Court of Appeals upheld Hungate's remedial hearing, but warned the judge that he could not force the districts to comply with his plan unless they were found liable.)

In August Hungate issued a preliminary order announcing that he planned to dissolve and consolidate the school districts if he found them liable. Interpreting this as the action of a judge whose mind was already made up, lawyers for the districts and the city rushed to the settlement table and began negotiating a proposed permanent settlement: a 15 percent minority enrollment in each school, with a goal of 25 percent in the next five years. "The prospect of a trial before him was so unattractive that settlement was better," claims the attorney for one of the parties.

The argument that Hungate had already decided the issue of the school districts' liability is supported by the fact that he had earlier recused himself from hearing the liability phase of the case on the ground that his experience in enforcing city and state compliance with the interim plan had prejudiced him. (The court of appeals later sent the case back to the Eastern District, where the chief judge returned it to Hungate.)

Lawyers say that Hungate's preoccupation with the desegregation case has led him to neglect the rest of his caseload. He interrupted several jury trials midway through in order to hold desegregation hearings. "His defense is that he's handling the desegregation case," says the lawyer on one such case. "[But] it makes it very difficult for a jury to remember what the evidence is." The attorney says that he and others have appealed their cases on this ground; at least one such appeal claims that Hungate became so confused by the interruption that he considered the same question twice—ruling differently each time. "He's a little erratic," concludes the attorney.

Some lawyers believe that Hungate will become more consistent with time. He is considered bright and hardworking—"I don't think the guy has got a bladder," complains one attorney who has been subjected to long court sessions. But for now, as another St. Louis attorney puts it, "He's the one judge [in Missouri] most lawyers would not like to appear before." *—by Cynthia Mayer*

NINTH CIRCUIT

BEST

ROBERT PECKHAM, 63

Appointed by Johnson in 1966

Were one to examine the Supreme Court reversal record of Robert Peckham, chief judge of the Northern District of California, one would not be very impressed. His two most celebrated decisions—the *Stanford Daily* case, involving search and seizure in the newsroom, and *Valtieri*, a significant extension of equal protection jurisprudence to the poor—ended in reversal there. Why, then, are attorneys who have appeared before Peckham so eager to designate him the best federal district judge in the Ninth Circuit?

"His opinions are superb, I might even say brilliant," asserts one litigation partner in San Francisco. "More than that, they are sound." That verdict seems almost unanimous among attorneys familiar with Peckham's decisions, despite his reversals. "That's not what matters," says one Peckham proponent. What is important, the lawyer argues, is that Peckham drafts the kind of opinions that get to the Supreme Court in the first place and that, when reversed, often attract vigorous dissent from Marshall, Brennan, and some of the middle-of-the-road coalition. And Peckham's record in the Ninth Circuit Court of Appeals, a bench that has reviewed his opinions for the 17 years he has been a district court judge, is excellent. The circuit court was sufficiently impressed with Peckham's reasoning in the *Stanford Daily* case to adopt his opinion, word for word, as its own, adding only two short sections before sending it up to the Supreme Court.

That 1976 ruling, which held that in determining the validity of search and seizures, newsrooms were protected by the First Amendment as well as the Fourth Amendment, was hailed by First Amendment advocates; Justice Byron White's reversal has drawn far more criticism from constitutional scholars.

Peckham's penchant for courageous, ground-breaking decisions was evident most recently in the highly publicized "Larry P" case, a challenge by the parents of six black children to the use of IQ tests for school placement. After a six-month trial, Peckham issued a sweeping 130-page opinion in 1979 which found the tests to be racially discriminatory and banned their use in the California public schools.

Armando Menocal, the Public Advocates attorney who litigated the case on behalf of the parents, characterizes "Larry P" as "the most significant case in the country for the black community." Explains Menocal, "The use of IQ tests comes up over and over; they are the linchpin of the theory that blacks are genetically inferior. Peckham's ruling should have a major nationwide impact, if it is upheld." The case is now on appeal to the Ninth Circuit, and despite praise for Peckham's decision, it, too, is deemed a likely candidate for reversal by the Supreme Court.

Menocal says he was particularly impressed that Peckham didn't sidestep any of the difficult or controversial issues in the case—as he could have done procedurally—but ruled that the California department of education had intended to discriminate. Peckham also awarded $975,000 to Public Advocates and attorneys from San Francisco's Morrison & Foerster who helped on the case.

Although decisions like "Larry P," *Valtieri*, and *Stanford Daily* have given Peckham a liberal image, attorneys who have appeared before him say they can detect no political bias in his trial rulings or decisions. He ruled against black plaintiffs in the San Jose school-desegregation case in 1981 and in 1982 held that the promotion of a black employee under the Berkeley fire department's affirmative-action program constituted reverse


Robert Peckham

discrimination. Peckham is also popular with the establishment side of San Francisco's bar.

"He is superb in the sophisticated, complicated, big-business cases that we tend to handle," says Morrison & Foerster senior partner Robert Raven. Raven came before Peckham earlier this year in the consolidated Bank of America and Crocker National Bank cases, in which the companies argued they were exempt from legislation prohibiting interlocking bank and insurance-company directorates. Peckham ruled in favor of the companies' position, based on his reading of the legislative history, even though his opinion makes clear that his personal sympathies were to the contrary. That decision was reversed by the Ninth Circuit, but the Supreme Court sided with Peckham's position this June. Chief Justice Warren Burger wrote the 5–3 majority opinion.

Peckham's courtroom demeanor is also praised by attorneys on the other side of the bar. "He is, without exception, a gentleman of the old school," says James Hewitt, the federal public defender in San Francisco. His calm but firm hand was in evidence during the 1981 trial of Larry Layton, who was charged with conspiring to murder Congressman Leo Ryan, who was killed while conducting an investigation of the Jonestown cult. Peckham was credited with controlling the volatile courtroom, particularly after the jury announced it was hung.

Peckham, 63, came to the federal bench with a nearly ideal mix of legal experience. He worked as an assistant U.S. attorney in San Francisco from 1948 to 1953, and just prior to his appointment, served as a superior court judge for Santa Clara County. Between public-sector posts, Peckham was a general practitioner in small firms in Santa Clara and San Francisco. His varied background, lawyers say, enables Peckham to maintain good relations with prosecutors and defense lawyers, as well as corporate attorneys and public interest advocates.

Although cases are assigned randomly in the Northern District, Peckham has had more than his share of large and important ones. He presided over the asbestos cases consolidated in San Francisco and the Iranian-assets litigation before they were stayed. In both instances he is praised for insisting that most pre-trial matters be consolidated before him, in what he describes as a mini-multidistrict-litigation approach. He is monitoring the San Francisco police department's compliance with a consent decree signed as a result of a race and sex discrimination suit. "He has literally dragged the police department into the twentieth century," says one plaintiffs' attorney involved in the suit.

The only consistent criticism of Peckham's performance is that he is too slow. "He's very careful and thoughtful, and he agonizes over a decision," says Public Advocates attorney Menocal, echoing the comments of many others. "Personally," he adds, "I think that's good."

Peckham's relatively slow pace and the attention he devotes to his written opinions may reflect his sense of history. He is an avid amateur historian, and the founder of the Historical Society for the Northern District Court of California, which arranges public programs on the history of the court and awards research grants. Only three other courts in the country have similar organizations: the U.S. Supreme Court and the Second and Eleventh Circuit Courts of Appeals.

—by James B. Stewart, Jr.

WORST

JACK TANNER, 64

Appointed by Carter in 1978

The worst district judge in the Ninth Circuit—where there is no shortage of candidates—is Jack Tanner of the Western District of Washington. "The tragedy of Tanner," says one local practitioner, "is that it was patently clear before his appointment that he would make a terrible federal judge."

Tanner, who spent more than 20 years as a criminal defense lawyer in Tacoma, has few defenders, even among his former colleagues. "He is arbitrary and capricious," contends one criminal defender in Seattle. "He is heavy-handed

NINTH CIRCUIT, continued

in the courtroom, unfair, and as biased against criminal defendants as any prosecutor I have ever seen."

Prosecutors seem no happier with Tanner's performance. "The government has had to concede error in several appeals where it won in the trial court," asserts one Seattle assistant U.S. attorney. "I'd say at one time Tanner's reversal rate in criminal cases was at least 50 percent," says one criminal lawyer. "And he is unpleasant to everyone who appears before him. I've known Jack for many years, and I like him outside the courtroom. But he puts on the black robe and he just goes berserk."

Lack of judicial temperament is a frequent complaint among lawyers who have appeared before Tanner, though he is said to be less likely to explode in the presence of women attorneys. "Unfortunately, this has more to do with sexism than with courtesy," says one Seattle practitioner. Prior to his confirmation, Tanner riled feminists when he was quoted in *The Tacoma News Tribune* as saying, "There's nothing worse or more obnoxious than a woman lawyer. They cry and they seek special attention." More importantly, Tanner's conduct has led to frequent tangles with the Ninth Circuit Court of Appeals, whose habit of not only reversing Tanner's opinions but remanding the cases to a different judge is giving rise to an unusual body of law.

The most recent and notorious example, lawyers say, is the case of Manuel Larios, who was convicted of conspiring to distribute heroin in a jury trial before Seattle district judge Thomas MacBride. Tanner handled the sentencing, imposing the maximum prison term of 15 years and the maximum fine of $25,000, even though the probation officer's sentencing report stated that the evidence against Larios was "inconclusive."

This did not deter Judge Tanner. Although he refused to read the trial proceedings, Tanner announced at the sentencing hearing that Larios was the "ringleader of the whole operation." In its reversal, the court of appeals wrote: "At one point in the first sentencing hearing, Judge Tanner himself said, 'I don't know who Pasqualito [the ringleader's name] is,' and yet later in the same hearing, without having received any further incriminating evidence, the judge concluded that Larios was the ringleader. Moreover, there was no evidence presented at the trial that Larios was the ringleader and the study for the sentencing hearing also does not support this conclusion.

"Judge Tanner further displayed his lack of familiarity with the case," the court of appeals continued, when he said that "he had not heard evidence [on another] point during the trial. Counsel noted that Judge Tanner had not heard the trial. The judge queried, 'I didn't hear the trial?' Counsel replied, 'No, you didn't sit at the trial, Your Honor,' and the court asked, 'Who did?' "

The appeals court held that Tanner had abused his judicial discretion and took the case away from him. "Under the circumstances of this case, we find that a different judge should do the resentencing," the appeals court said. "Judge Tanner was unreasonable in his initial refusal to wait for a transcript and adamant in his belief that Larios was the ringleader, even in the face of little, if any, evidence to that effect. We, therefore, believe that he could not reasonably be expected to ignore his conclusion when faced with the question again." According to court records, this was the second case in several months that the appeals court had expressly remanded to a different judge.

Many Seattle attorneys believe that Tanner's antidefendant stance and frequently harsh treatment of lawyers and litigants are a kind of overcompensation for having been a criminal defense lawyer and for having weathered a difficult confirmation process. "He's terribly insecure," says one Seattle lawyer who knows Tanner well. "He works long hours; he's trying very hard. But the results have not been good."

Jack Tanner

Tanner's reputation continues to be clouded by allegations that surfaced during his confirmation hearings. Hank Adams, national director of the Survival of American Indians Association, says he recently filed a petition for Tanner's impeachment with the chief judge of the Ninth Circuit. Adams charges that Tanner committed perjury prior to his appointment and then engaged in a coverup to assure his confirmation. (The Ninth Circuit would not confirm or deny the existence of the complaint.)

The allegations stem from Tanner's longtime representation of Bob Satiacum, a controversial Puyallup Indian who built a highly profitable cigarette business by claiming that the reservation's sovereign status exempted the sale of cigarettes there from state and federal tax. During Satiacum's subsequent prosecution for tax evasion and other felonies in 1974, Tanner testified that he had never allowed any of Satiacum's property to be placed in his name in order to avoid seizure by federal and state tax authorities and he specifically denied that Satiacum's Lincoln Continental had been registered in his name. *The Seattle Times* subsequently obtained a copy of the car's registration showing that it had been registered to the judge.

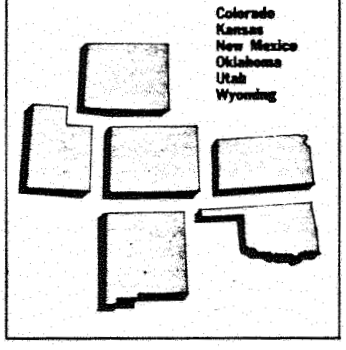
Tanner has declined to discuss his testimony or his relationship with Satiacum, but he told a reporter for *The Tacoma News Tribune*, "I did never, at any time, register that car in my name or know of it until afterward." However, *The Seattle Times* later reported that a copy of the registration was mailed directly to Tanner shortly after it was filed. In a story published this February, the *Times* also reported that the Satiacum matter delayed Tanner's confirmation. During the routine FBI investigation of Tanner, the agency discovered that Satiacum's wife had testified in June 1977 that "this was not the first vehicle which Mr. Tanner purchased for us, using our funds in this way." Six months later, however, she repudiated her testimony and Tanner was confirmed. In his impeachment petition Adams reportedly alleges that Satiacum's wife was pressured into changing her testimony by Tanner's lawyer and a former county prosecutor for Tacoma. (Neither could be reached for comment.)

The Satiacum affair caused one prominent Seattle attorney, Malcolm Edwards of Edwards and Barbieri, to launch his own investigation of Tanner's career, especially since Tanner's testimony in another proceeding had helped convict one of Edwards's clients. "Initially, I supported the idea of Tanner's appointment," says Edwards. "I thought it would be very good to have a black district court judge here. But after these allegations surfaced, I checked into some of the cases he handled. I looked at the briefs he filed on behalf of some of his clients. They were plainly inadequate. It was clear to me that this was not the kind of lawyer who should be a federal judge." Edwards says he filed a complaint with the state bar.

Most Seattle attorneys do not expect the Ninth Circuit Court of Appeals to take action against Tanner, despite the disapproval voiced in some of the court's reversals. There are those who believe that Tanner is "street smart" and, with time, will improve. His recent ruling that conditions in a Washington state prison were unconstitutional drew praise from the criminal defense bar, although it was reversed by the Ninth Circuit. And Tanner does have flair—he's been known to sport a mink bow tie in court.

But praise for Tanner is hard to find. The overwhelming consensus is that on almost every measure of judicial ability—intelligence, demeanor, and fairness—Tanner is an embarrassment to the bench. —*by James B. Stewart, Jr.*

TENTH CIRCUIT



BEST

DAVID WINDER, 51

Appointed by Carter in 1979

David Winder, 51, is not the most imposing of the Tenth Circuit's district court judges. That distinction might go to the excellent, scholarly, but short-tempered Frederick Dougherty of Oklahoma, now on senior status, or to the equally good Richard Matsch of Colorado, known among local assistant U.S. attorneys as "King Richard."

Rather, Winder, appointed to the Salt Lake City bench in 1979 by President Carter, is the best of "a new breed of younger, more professional judges," as partner Gordon Roberts of Salt Lake City's Parsons, Behle & Latimer puts it—a judge whose style is marked less by colorful outbursts than by a businesslike intentness on being impartial, consistent, and courteous. In Winder's case, these important if bland qualities are enriched by other traits: a compulsion to master the details of every matter before oral argument; a talent for whittling each down to its essentials and ruling quickly on them; and a quiet, matter-of-fact courage that has led to some controversial decisions.

Winder's zeal for preparation is legendary. He typically works from 6 A.M. to 6 P.M. on weekdays, as well as many Saturdays, reading every memorandum

David Winder

and affidavit and, in many cases, deposition, before oral argument. "It's incredible," says Robert Wallace, a Utah assistant attorney general. "You come in for oral argument, and you'll be talking along, and he'll say, 'Yes, that's on point four of your memorandum.' " In one instance, recalls Robert Anderson of Salt Lake City's Berman & Anderson, he was midway through settlement negotiations in a $25,000 contract dispute when he discovered that Winder had read the depositions. "He quizzed the other counsel . . . about the depositions," says Anderson. "I was astonished. I must admit *I* hadn't read them [since taking them]."

Winder himself admits he's "a nut about preparedness," adding self-deprecatingly, "maybe because I know I'm not that bright." But lawyers say that he uses his preparation not as a crutch but as a way to shape cases in their early stages, weeding out extraneous evidence and causes of action. He speeds trials along by challenging lawyers to argue him out of, rather than into, positions. "He pares away a case and shapes it up," explains partner Thomas Quinn of Salt Lake's Ray, Quinney & Nebeker. The result is that Winder's cases move quickly and that lawyers are more aware of what is expected of them. "I'm extremely interested in getting out quick decisions," says Winder, adding, "I'm going to start ruling more from the bench."

Singer v. Wadman, Winder's most controversial case, has also been his greatest challenge in terms of mastering complex litigation. The 1979 suit, decided last September, was brought on behalf of the family of a religious fanatic shot to death by state police while being arrested on a number of charges.

Asking for damages of more than $110 million, Singer's counsel, Wyoming's famed Gerry Spence, alleged that Utah state officials, as part of a Mormon-controlled theocracy, had conspired

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against his client, who was an excommunicated Mormon, to deprive him of his constitutional rights.

The suit named some 20 state and county employees ranging from medical examiners to Governor Scott Matheson and discovery lasted close to two years. 'What [Winder] did was wise," notes Robert Burton of Salt Lake's prominent insurance defense firm, Strong & Hanni. "He let everybody have as much discovery as they wanted." Had he limited it, Burton explains, a successful appeal would have been more likely.

But in the fall of 1982, the case came to an abrupt halt. Winder, after having read through hundreds of pages of depositions, took a defense motion for summary judgment under advisement. Spence, in turn, moved to have Winder recuse himself on two grounds: that his old law firm, Strong & Hanni, was representing a minor defendant in the case (no one had objected to this before) and that another defendant, the governor, had appointed Winder to a state court judgeship several years earlier.

Winder refused to recuse himself and, in a painstaking 217-page opinion which quotes extensively from the depositions, he dismissed the case on summary judgment. "Winder is probably the only judge Spence hasn't intimidated," concludes Ross Anderson of Salt Lake's Berman & Anderson.

For Spence, the dismissal was a surprising blow. He was originally very happy to have drawn Winder, says a lawyer familiar with the case, since the judge is the only nonpracticing Mormon district court judge in Salt Lake City and thus a potentially sympathetic ear for the plaintiffs. Spence is now appealing. He recently criticized Winder for the alleged conflicts in an interview in the *Trial Diplomacy Journal* magazine. Winder points out that it took Spence close to two years to object. "I'm very sensitive to claims of bias," says the judge. "If I'd been asked to get off the case up to a year and a half before then [at the beginning of the case], I would have [considered it]." Reached for comment, Spence concedes, "I think he's a pretty good judge anyway. Obviously I wasn't pleased with his ruling, but that doesn't mean he's not a good judge."

While most lawyers dismiss Spence's claims of conflict as frivolous, some contend that the case contained legitimate questions of fact that a jury should have been allowed to decide. Most, however, say Winder made the right decision. "*Singer* was a courageous decision," says Brent Ward, U.S. attorney for Utah. "It took tons of research to lay to rest the issues at the summary judgment stage. It's not popular for a judge to rule on summary judgment," he adds.

"Gerry had a far-out theory," says Quinn. "He just wanted to get the case to a jury. Some judges would let anything go to trial. Judge Winder—if defense counsel is willing to make the motions—won't." Ronald Yengich of Salt Lake's O'Connell & Yengich puts it more plainly: "Winder's got balls enough to piss people off."

Winder's tendency to make crucial rulings early in a case, together with what lawyers say is his vestigial leaning from his days as a partner at Salt Lake City's Strong & Hanni, have earned him the reputation of being a defendants' judge. "He's one of the ten best judges in the country," says Richard Giauque of Salt Lake's Giauque & Williams, who was himself a rival for Winder's judgeship. "He has very high standards for plaintiffs to meet. . . . He clears the decks, dismisses a lot of cases." (Indeed, lawyers say Winder's low reversal rate—only 7 of some 1,600 cases have been overturned—would be even lower if he decided fewer on summary judgment. Peggy Tomsic, one of the judge's clerks, estimates that one-third of the cases she works on are resolved through summary judgment.)

Winder has conducted other controversial cases calmly and with a minimum of fuss. The trial of Newton Estes, the antibusing and antipornography zealot convicted in 1982 of assaulting Supreme Court Justice Byron White, for instance, was preceded by local news stations' repeated screenings of a news clip showing Estes striking Justice White. Winder responded by grilling potential jurors individually on whether they had seen the news reports.

"The jury process took longer than the trial," comments U.S. attorney Ward. "He gave the defendant every chance." In fact, the trial and *voir dire* each took a day. Yengich, defense counsel in the case, praises Winder for the *voir dire* and for his compassionate sentencing, which in this case resulted in Estes's getting just ten days in jail, a $500 fine, and 24 months of probation. "If there's a man or woman who agonizes more about sentencing, I have yet to see them," he says.

In another controversial case, Winder has been praised by *The New York Times*, among others, for a precedent he set when he ruled that Secretary of the Interior James Watt could not reconsider the decision of his predecessor, Cecil Andrus, to forbid mining on lands bordering Utah's Bryce Canyon National Park. (The ruling was not appealed.)

But it is Winder's consistency and attention to even the seemingly unimportant cases that lawyers stress. "He's an exceptionally courteous judge, scholarly and facile," says Daniel Berman, a prominent securities partner at Salt Lake's Berman & Anderson. "I saw him handle an extremely taxing *pro se* mat-

ter, with a bellicose plaintiff. [Winder] was classically what you want to see. He gave the guy a chance, but he didn't get carried away. If every federal judge were as good as Winder, we would have a lot less problems." As a state court judge, a post Winder held for three years before coming to the federal district bench, he earned the nickname "Decent Dave" Winder.

Not surprisingly, if there is one quality lawyers say they find too much of in Winder, it is his concern that all parties get a fair hearing. "I frankly thought he gave [Spence] too free a rein," complains one defense lawyer in the Singer case. "He gave me a little too free rein, too. I kept talking—he's just such a polite individual."

Nevertheless, adds this attorney, "I've won and lost and won and lost [in Winder's court], and I always leave thinking, 'Hey, I didn't get hammered, I had a fair hearing.' "

—by Cynthia Mayer

WORST

FRED WINNER, 71

Appointed by Nixon in 1971

In 1978 Denver district judge Fred Winner flew to Salt Lake City to finish the cases of Willis Ritter, the ailing chief judge of the Utah district and a legendary bad jurist. "Winner took up the slack—appropriately," notes Utah U.S. attorney Brent Ward, who had filed a 1,000-page petition for a writ of mandamus against Ritter just before the judge died. Since then Winner, 71, has matched the judicial exploits of Ritter and earned a reputation as a smart, injudicious judge determined to have his own way.

No one denies Winner's intelligence, wit, knowledge of the law, or ability to write well. "His opinions make great reading," says one Denver attorney. "It's just that I never agree with them." Nor does anyone dispute the fact that the Tenth Circuit Court of Appeals usually *does* agree with him. Rather, lawyers contend that Winner is dangerous because he is cunning enough to stay just within the bounds of judicial discretion. This, they argue, allows Winner to harass lawyers, break rules, and almost always get away with both. "He's Machiavellian," says a former Denver public defender who is now in private practice. "He can twist and distort and pretty much cover anything up."

In court, Winner is an intimidating figure: A former trial attorney, and a very successful one, he has never shed the role of advocate and frequently derides one counsel while conducting the other's suit. "He polarizes every case," says a former Denver district attorney. "In one case I couldn't do anything wrong and the other guy couldn't do anything right. He's sent people out of there vomiting."

Winner often threatens to fine attorneys for being late and once forced an SEC lawyer to take the stand to testify why he didn't know that a hearing had been rescheduled. (The attorney had complained that Winner's secretary failed to notify him.) In a 1980 case reported in *The Denver Post*, Winner repeatedly referred to a defendant as a "government informer." When then–assistant U.S. attorney Susan Roberts objected to the phrase, the judge shot back, "I've *heard* the testimony." When she continued to press her objection, Winner sarcastically invited her to take the bench if she thought she could do better.

Though Winner is conservative on social issues, lawyers say it is often difficult to predict which side he will choose to favor. After one assistant U.S. attorney's first trial before Winner, the judge went around telling everyone the assistant was "the greatest thing since sliced bread," according to one source. But at the start of a more recent trial, Winner threatened to fine the same government attorney for being late; ignored his notice of appeal on a ruling, saying, "I regard it [as] frivolous. There is no such order"; and summoned Colorado U.S. attorney Robert Miller to his chambers to complain about the assistant U.S. attorney's behavior. (Most of this took place before the defense counsel and defendant had even arrived.)

Such complaints about Winner's temperament and partiality pale before those cases in which his conduct has forced the circuit court to step in and restrain him. The most famous example is *U.S. v. Martinez*, a politically and racially charged trial in 1981 in which a Chicano activist was accused of possessing and mailing explosives. In the first two days of the trial, Winner ruled against every motion of the defendant's. On the third day, apparently believing that the prosecutors' case was still lacking, Winner summoned the prosecutors, court personnel, and several government witnesses to an *ex parte* conference at his hotel (the case was tried in Pueblo, Colorado). There, according to a later appellate court ruling, Winner outlined a plan: The prosecutors would wait for the defense counsel to present their case in order to discover their strategy and then move for a mistrial, which Winner would grant. (The judge also suggested ways in which he could force a mistrial.)

Fred Winner

Winner posed a second reason to delay the motion for a mistrial. He wanted to install hidden cameras in the courtroom to record what he believed to be the intimidation of jurors by courtroom observers who, he indicated, may have been planted by the defense.

The next morning, the prosecution asked for a mistrial on the pretext that the names of two jurors had appeared in the papers. The beleaguered defense counsel assented, and Winner—although reportedly angry that the prosecutors had not waited longer—scheduled a retrial for the following week. That night, according to then–U.S. attorney Joseph Dolan, Winner invited the jury to a party where he appeared sporting a "Free Kiko" T-shirt (Kiko was the nickname of the defendant). "This was when he was still scheduled to try the retrial, mind you," adds Dolan.

But the scheme soon fell apart. The defense counsel discovered the *ex parte* meeting and, in an appeal that eventually went to the Eighth Circuit (the Tenth Circuit had quickly recused itself), succeeded in getting a dismissal of the three charges tried by Winner. In a strongly worded opinion, the circuit court stated that prosecutorial and judicial misconduct had led the defense to agree to a mistrial and that a retrial would constitute double jeopardy. The appeals court also noted that "other than the prosecution's and judge's 'belief,' the present record contains no evidence of threats [against] or intimidation [of the jury] occurring during the trial."

Winner was never formally censured, but his credibility was badly shaken by *Martinez*. The judge removed himself from the retrial and nine months later, upon turning 70, resigned as chief judge, though he remains active. "I think Fred realized he made a bad mistake in *Martinez*," says a Denver lawyer who is a longtime friend of Winner's. "I tried to tell him how dangerous it was, but he's very courageous and he will do what he wants." Kenneth Padilla, Martinez's defense counsel, remembers Winner's mood differently. "He got caught with his pants down and was just furious," he asserts. "He started sending letters to everyone—to me, to Dolan. He said Mr. Martinez was a threat to the country and that if something wasn't done there would be burning throughout the country."

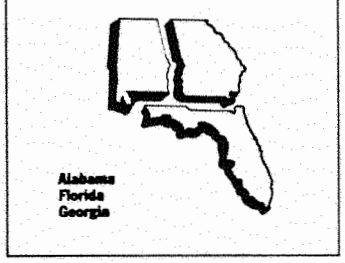
The public uproar caused by his conduct in *Martinez* has not had a marked effect on Winner's style. This May Winner was forced to recuse himself from the trial of six inmates charged with inciting a prison riot after he joked in a speech to law review staffers at the University of Denver that despite their hard work, the prisoners' attorneys "were going to lose," according to a student's later testimony. (All six inmates were acquitted.) This April his comments in open court drew a rebuke from Tenth Circuit Court of Appeals Judge Monroe McKay. Just before ruling against the plaintiff in an employment discrimination case, Winner made this pronouncement: "The only way I know that any school board member or employer can absolutely be sure of avoiding discrimination cases is to hire only handicapped females having as grandparents a Black, a Chicano, an American Indian, and an Oriental, who is over fifty years of age." (Winner's decision was upheld, despite McKay's protest that Winner's "clearly hostile attitude toward [the law] he is obligated to interpret and enforce" rendered the decision suspect.)

In an ongoing case, Winner provoked more criticism when he appointed a receiver for the $6 million recovered in the International Mining swindle, despite the fact that lawyers in three courts are vying for jurisdiction over the fund. One attorney representing the defrauded investors says he has filed an affidavit complaining that Winner physically excluded him and other attorneys from a hearing on the selection of a receiver—the attorney claims he had to resort to listening through the locked doors to Winner's chambers.

As chief judge of the Denver district, Winner won praise for his long hours and administrative skills. "He ran that place like a Swiss train," says former U.S. attorney Dolan admiringly. These qualities, however, are less relevant to his performance as a senior judge. Winner has cut back on his caseload and reportedly told several attorneys that he plans to retire this summer. But most lawyers, noting that Winner has made such announcements before, consider his retirement unlikely. Says one attorney, "The only way they're going to get him out of that courtroom is to carry him out."

—by Cynthia Mayer

ELEVENTH CIRCUIT



BEST

WILLIAM HOEVELER, 61

Appointed by Carter in 1977

Not only those who emerge victorious from Judge William Hoeveler's courtroom praise him. According to several Eleventh Circuit lawyers, even clients who have lost before Hoeveler as civil litigants or who are convicted and sentenced in criminal trials often report afterward that the judge had given them a fair shake. "You can't get a better accolade for a judge," observes a civil lawyer whose losing client saw it that way.

Tall and gaunt-faced (lawyers are forever likening him to Abraham Lincoln), Hoeveler is also thoughtful, incisive, evenhanded, and unfailingly gracious to the lawyers who come before him. In the Dade County Bar Association's biannual poll on judges, Hoeveler has been rated the best, by a wide margin, since 1978.

Lawyers say that while Hoeveler knows how to keep firm control over his court, he also gives attorneys latitude to try their own cases—letting them assist in jury selection, for example, while most other judges in his courthouse in Florida's Southern District do not. Hoeveler was once a trial lawyer himself: He performed mainly insurance defense work, specializing in architects' liability suits, when he was in private practice with the Miami firm of Knight, Peters, Hoeveler, Pickle, Niemoeller & Flynn.

According to Hoeveler, the idea of becoming a federal district court judge had attracted him long before he was appointed in 1977. "This sounds awfully syrupy," he says before explaining that he felt a strong sense of obligation to society: "Being a decent lawyer was, I felt, a contribution—but being a judge would be more of one."

Soon after he became a judge, Hoeveler was assigned a series of messy, politically sensitive prison-condition cases. The oldest of those suits was filed in 1977 by inmates at the Broward County Jail who alleged that conditions at that facility were unconstitutional. The matter has never come to trial; both sides are working to settle, with Hoeveler acting as a monitor in the case. To finance Hoeveler's mandated improvements, a bond issue was passed, and a new jail is now under construction. "Hoeveler has been

a master of moving people into action," says Bruce Rogow, a professor of law at Nova University and an ACLU general counsel who has been involved in the jail litigation. "He played on the good faith of public officials and what he assumed was their own desire to do right."

Rogow likens Hoeveler to Frank Johnson, now on the Fifth Circuit Court of Appeals, who is famous for his civil rights decisions as a district court judge in Alabama in the sixties and seventies. "There was a lot of public resistance to Hoeveler's actions in the Broward County Jail case—people's attitude was, it's not *supposed* to be a hotel," says Rogow. "And plenty of other judges would've tried to shirk it, or avoid responsibility for it by saying something like, I can't help it, the Constitution *makes* me do it. But Hoeveler never did. His approach was, this is what must be done, and we're going to be better people for having done it." For his part, Hoeveler just says that he thinks the public's attitude toward jails is changing: "We're slowly coming out of the Dark Ages."

The judge points to a criminal case in 1979, *U.S.* v. *Kopituk*, as one of the most demanding he has tried. A complex organized crime case, it involved waterfront union officials and employers (there were 22 defendants at the outset, and 11 went to trial) who had allegedly participated for more than ten years in a widespread pattern of corruption aimed at securing control of business activity at several major ports in the southeastern United States. Both defense lawyers and prosecutors in that trial offer high praise for Hoeveler's performance. "He never plays favorites, never ruffles, and he has the patience of Job," says one of the

William Hoeveler

prosecutors.

After nearly seven months of trial, Hoeveler encountered a novel problem when—four days after jury deliberations had begun—a juror became psychotic and had to be discharged. Over the unanimous objections of defense counsel, Hoeveler substituted an alternate juror, thus violating one of the federal rules of civil procedure. He accompanied his order with a careful opinion explaining why the bending of the rules was necessary. The defense moved for a mistrial, unsuccessfully, and the central issue in the *Kopituk* appeal became whether Hoeveler had erred in substituting the juror. The Eleventh Circuit Court of Appeals held that he had not, and the *Kopituk* convictions were affirmed in November 1982.

Some lawyers do complain that Hoeveler can be slow to rule in civil cases, particularly on pre-trial motions. Hoeveler offers this criticism himself, commenting that he thinks he is less efficient than some of his colleagues. But his supporters point out that Florida Southern District judges are laboring under a crushing load of criminal cases, with civil cases almost crowded off the docket. Hoeveler, they say, is slow because he gives each case the kind of individualized attention that many judges with more of a case-count mentality no longer do.

Peter Nimkoff, a U.S. magistrate for the Southern District of Florida, has had the opportunity to view Hoeveler from the vantage point of a defense lawyer, a prosecutor (he was chief of the civil division in the U.S. attorney's office in the Southern District), and his present role. Nimkoff says that he has seen the same model of fairness and courtesy in Hoeveler from each of those perspectives, adding that the judge "makes anyone who believes in the possible majesty of the law want to be a part of his court." —*by Connie Bruck*

WORST

J. ROBERT ELLIOTT, 73

Appointed by Kennedy in 1962

Judges like J. Robert Elliott of Georgia's Middle District are, fortunately, a vanishing breed. An old-line segregationist who flaunts his deep-rooted prejudices against blacks, unions, and criminal defendants, Elliott is less a judge than a despot. He is often compared by lawyers to Mississippi's legendary Harold Cox ["Still Racist After All These Years," *AL*, July 1979], now on senior status in the Fifth Circuit.

Over the last 21 years, Elliott—a Kennedy appointee who went on the bench in 1962—has been heavily reversed (first by the Fifth Circuit and now by the Eleventh). According to Victor Navasky's *Kennedy Justice*, Elliott's reversal rate in civil rights cases during the years that Robert Kennedy was Attorney General (1961–1964) was 90 percent, exceeding even that of Harold Cox.

C.B. King, a black attorney from Albany, Georgia, first appeared before the judge in 1962. Elliott had issued an injunction against King's clients, Dr. Martin Luther King (no relation) and other integrationists, to keep them from demonstrating in Albany. Elliott's ground for the injunction was that the demonstrators would violate the civil rights of local non-integrationist whites. In the 20 years since, says King, "there have been better than fifty civil rights cases in which I've been involved, either as principal counsel or of counsel, and I can't recall a single instance where the relief sought was granted by Judge Elliott. It was always a matter of having to go to the appellate court. And with the exception of four or five of those cases, the circuit court either reversed or remanded."

There was ample indication before Elliott was appointed that he might make the federal bench into a political podium. A Democratic national committeeman from 1946 to 1956, Elliott led the walkout of the Georgia delegation at the 1948 Democratic National Convention in protest of the party's stance in support of civil rights. He was a floor leader for Georgia's segregationist governor, Herman Talmadge, who later became a U.S. senator and was instrumental in getting Elliott appointed to the bench. At a state Democratic convention in 1950, in blasting the press for what he said were their efforts to blacken Talmadge, Elliott declared that if the "mighty moguls of misrepresentation" continued in that effort, the state would punish them with legislation authorizing suit for "libel against society." In 1952, when Elliott was arguing that the county-unit system of conducting elections, which guaranteed white rural domination of Georgia politics, should be written into the state con-

J. Robert Elliott

stitution, he was widely quoted as saying, "I don't want these pinks, radicals, and bloc-voters to outvote those who are trying to preserve our segregationist laws and other traditions."

Elliott's hatred for the press seems to be as pronounced as his segregationist beliefs. In 1974 Lt. William Calley came before him with a habeas corpus petition after being convicted by court-martial of premeditated murder and assault with intent to commit murder. In his opinion setting aside the conviction, Elliott devoted nearly 50 pages to reviewing what he deemed to be the inflammatory news coverage of Calley and his role in the My Lai massacre, and summed up this section by saying that "if there has ever been a case in which a conviction should be set aside because of prejudicial publicity, this is it."

In the rambling and grandiloquent conclusion to his Calley opinion, Elliott declared that "war is war." He illustrated the point by comparing Calley's murder of civilians at My Lai to Joshua's destruction of Jericho as described in the Old Testament, which Elliott quoted at length; to Ivan the Terrible's drowning of the Jews; to Winston Churchill and President Eisenhower's joint bombing of German cities; and, in fullest exposition, to Union General William Tecumseh Sherman's acts of violence against Confederate civilians in his march through Georgia during the Civil War. Elliott closed with this paean to Calley's martyrdom: "He was pummelled and pilloried by the press./He was taunted and tainted by television./He was reproached and ridiculed by radio./He was criticized and condemned by commentators . . . ."

Elliott ruled Calley's conviction invalid and ordered him freed in September 1974. One year later, the Fifth Circuit found Elliott in error on all grounds and ordered Calley back to prison.

WIDE WORLD (ELLIOTT)

ELEVENTH CIRCUIT, continued

For Elliott, Calley was the exception to the rule. Hundreds of other habeas corpus petitions have come before him over the years, but no one familiar with his court can recall a single petition, other than Calley's, that was granted. Elliott's memory is hazy on that point. "I don't remember if that was the *only* one," he says, explaining, "It's been twenty-one years I've been on the bench."

Ronald Spivey, an inmate on death row in the Georgia state prison system, petitioned Elliott for habeas in 1980. Elliott not only denied the petition without a hearing but also denied Spivey's request for his 81-year-old father's deposition to be taken so as to preserve it for appellate review. In 1981 the Eleventh Circuit summarily reversed Elliott on the question of the deposition, reversed Spivey's death sentence, and remanded the case to Elliott for an evidentiary hearing on issues relating to Spivey's guilt or innocence.

Elliott opened the new hearing by saying, "We are not here because this is my idea to be here. We are here because the Court of Appeals has said that this hearing should be conducted." He ended it by finding against Spivey on all issues. After the Eleventh Circuit vacated Elliott's findings in August 1982 and remanded the case for a further "full and fair" hearing, Elliott recused himself. (The next district judge to preside over the hearing found that Spivey's Fifth and Sixth Amendment rights had been violated and ordered that the prisoner be given a new trial. That decision has been affirmed.)

In civil cases where Elliott's considerable biases are not stirred, lawyers say he is not a bad judge—smart enough, and even-tempered. But in those cases that incite his passions, justice in Elliott's court is reduced to a game. Civil rights lawyers say that one of his favorite ploys is avoidance: He simply refuses to schedule cases on his docket that he does not like.

Elliott seemed to be trying out that tactic in a new context in June 1982, when William Henry Hance petitioned for a stay of his execution. Elliott delayed holding a hearing for several days, then conducted one—approximately 40 hours before the scheduled execution—which he ended by saying he was taking the matter under advisement. On the afternoon of the last day before the planned execution, he had still done nothing. The Eleventh Circuit issued a mandamus over the telephone, ordering Elliott to rule, according to Patsy Morris, the ACLU's death-penalty case monitor in Georgia. Elliott denied the stay; but at 6:30 that evening, the Eleventh Circuit granted it. (Hance gained more than time. In January 1983 the Eleventh Circuit reversed Hance's death sentence. However, it refused to grant relief on issues of his guilt or innocence. Hance's lawyers have now filed a petition for *cert* to the Supreme Court on that decision.)

Asked about last year's Spivey mandamus, Elliott replies, "I don't remember about that." Indeed, he seems to neither recall nor heed such rebukes from the higher court, but instead grows more intransigent with the passage of time. In November 1981 Atlanta lawyer John Myer filed a motion before Elliott on behalf of his client, who is black, to have a Section 5 claim under the Voting Rights Act heard by a three-judge panel, as the act specifies. When Elliott denied it, Myer filed a petition for a writ of mandamus, which the Eleventh Circuit granted in July 1982, ordering Elliott to convene the panel. When Elliott had still failed to do so in December 1982, the Eleventh Circuit *again* ordered him, warning him—albeit tardily—that "this court does not take lightly the issuance of a writ of mandamus addressed to a United States District Judge." Elliott has finally taken steps to comply.

The rest of the South has undergone a transformation since Elliott came on the bench. But in Elliott's chambers—where a portrait of Robert E. Lee hangs in honor—and in his courtroom, time stands still. "Elliott's mind stopped around 1864, just before Appomattox," says Albert Horn, an Atlanta lawyer who has known Elliott for many years. "I've appeared before about a hundred federal judges, in different parts of the country, and many of them are very conservative in their thinking. But I have never met one that compares to Elliott. He simply will not uphold federal law. I believe he is the worst sitting federal judge there is."

—by Connie Bruck

D.C. CIRCUIT

BEST

HAROLD GREENE, 60

Appointed by Carter in 1978

Three years ago, when we named Harold Greene the best district judge in the D.C. Circuit, our reporter wrote that "some believe it is too soon to evaluate Greene's performance on the federal bench." The only question that now remains is whether it is too soon to call the 1978 Carter appointee a legend.

Since 1980 Greene has presided over the breakup of American Telephone &

Harold Greene

Telegraph, which many attorneys describe as the most significant act of judicial statesmanship since desegregation. He also refereed the 1981 showdown between the Reagan Administration and the air-traffic controllers in *U.S. v. PATCO*. And, according to attorneys on both sides of the aisle, Greene handled both these challenges with the same firm but gracious control that had consistently earned him the D.C. bar's highest rating during his seven years as chief judge of the D.C. superior court.

Greene has not earned his popularity by mincing words in his opinions or orders. George Saunders, the partner at Chicago's Sidley & Austin in charge of the AT&T antitrust litigation, describes Greene as "a superb judge. You couldn't want anything more." But Saunders concedes that Greene was largely responsible for settling the case on very favorable terms for the government. "He went out of his way, in his rejection of our motion for summary judgment, to indicate that he thought we were guilty. The Reagan Administration was just taking shape then, and I think he was afraid the government might be thinking about dropping the case. He in effect told the government not to drop it," says Saunders. "He had a lot of power, and he used it."

Both AT&T and government lawyers praise Greene's administration of the massive case, which they say is a model of how complex litigation can avoid the quagmire that IBM became. "He kept our feet to the fire," says government lawyer James Denvir III. "We'd ask for two weeks and he'd give us two days. But, you see, he would give us *something*—he never demanded the impossible." When the trial started in January 1981, it was only three months behind the schedule set by Greene in August 1977.

Although AT&T was forced to divest itself of all local operating companies, Saunders believes that the company received a fair hearing in Greene's court. "I had the feeling that he had very strong views from the beginning," says Saunders, "but I always thought his mind could be changed. For example, the existence of economies of scale, or our position on the adverse impact [that the dismantling of AT&T would have] on international trade: I believe he came around on these points, even though they were not consistent with his original views."

"My reaction was one of relief when [the PATCO] case was assigned to Judge Greene," says Richard Leighton, the partner at D.C.'s Leighton, Conklin, Lemov, Jacobs and Buckley who led the defense for the now-defunct air traffic controllers' union. "He is well known for his outstanding judicial temperament and fairness," Leighton continues. "This was vitally important to us, because this was one of the most highly charged judicial proceedings I've ever seen. The courtroom was packed; the press was all over us."

Leighton, like AT&T's Saunders, did not get the result he wanted, but neither did the government. In his opinion, Greene refused to jail the union leadership and denied the federal government's request for a permanent injunction against the strike, but he also fined the union for violating the original temporary restraining order. "He didn't let either side get away with anything," says Leighton. "The government came in with a lot of rhetoric. He cut right through it. His opinion is superb. It's being cited everywhere, and is easily the most important to emerge from the air-traffic strike."

Greene is currently presiding over Freddy Laker's antitrust suit against eight international airlines and McDonnell Douglas, and there has been some grumbling among defense counsel. Pan Am counsel Frederick Turnage, a partner in the D.C. office of Cleary, Gottlieb, Steen & Hamilton, attributes that to the substance of Greene's rulings. "He hasn't ruled for me one damn time," he says. "He's issued some very far-reaching injunctions, and we're appealing. But there's no question that he is a highly competent and an outstanding judge."

—by James B. Stewart, Jr.

WORST

JUNE GREEN, 69

Appointed by Johnson in 1968

There are several arguments against naming June Green the worst district judge in the D.C. Circuit. Most lawyers say that her performance has improved somewhat since she was named worst by this magazine three years ago. Her courtroom demeanor is better—she apparently no longer relies on written notes to herself to keep from losing her temper. One partner at a major D.C. firm who

June Green

appeared before Green recently says he found her "courteous and well prepared."

Yet there remains one overriding reason for naming Green the worst: Every other D.C. district court judge is demonstrably better. Barrington Parker may be the most cantankerous, Charles Richey the most controversial, and Louis Oberdorfer the most overbearing, but all have their champions. Green has personal admirers, but even they concede she is easily the weakest of the district judges on the D.C. bench.

Soon after her appointment to the federal bench by Johnson in 1968, Green acquired a reputation for being intellectually ill-equipped for a federal judgeship. One veteran of Green's courtroom complains, "I've won four cases before Judge Green and all four decisions have been reversed. The last time I won, I called the opposing counsel to congratulate him." Others have had similar experiences, the attorney contends: "She's just not very bright. She tries to be fair, but she goes overboard. She oversimplifies, especially in complicated, technical matters."

Some D.C. attorneys say that Green's reaction to numerous reversals of her early decisions has been to be as vague as possible when explaining her reasons for a particular ruling. "My theory is that she figures she has a fifty-fifty chance of getting the right result, so she just leaves most of the reasoning out," says an attorney who has appeared before Green several times. Whatever the motivation behind the judge's brevity, Green's scanty opinions have often failed to meet the standards of the D.C. Circuit Court of Appeals.

WILLARD VOLZ (GREENE)
UPI (GREEN)

In 1978 the circuit court remanded a case to Green because it was "unable to uphold the district court's order without first receiving a written explanation of its decision." In another action in 1977, Green was reversed in part because her order was accompanied by no explanation at all for its entry. And there is little evidence, lawyers say, that Green's legal reasoning has improved markedly in recent years.

Last June, in an important test case of the "whistle-blowing" statute, designed to protect the jobs of federal employees who expose corruption, Green dismissed the action on an ancillary First Amendment issue and apparently ignored the relevance of the statute. In its reversal, the circuit court wrote that "unfortunately, the district court made one laconic ruling only: that appellant's discharge was 'not tainted by unconstitutional improprieties.' Surely that cannot be enough. . . . A court sitting without a jury is required . . . 'to find the facts specifically and state separately its conclusions of law thereon.' . . . This mandate was not satisfied by the court's single statement." The case was remanded to Green for further proceedings.

During a recent challenge to a complicated set of administrative regulations, Green displayed "no real grasp of the issues," according to one attorney involved in the case. First she refused, without explanation, to grant a temporary restraining order. Then she issued a preliminary injunction that counsel on both sides say was so confusing that, as one lawyer puts it, "we [couldn't] tell which side prevailed." Green has since come full circle, issuing a permanent injunction.

Recently, Green has also displayed a dismaying tendency to take over proceedings, sometimes dispensing with the role of counsel. She outraged public interest lawyers during a 1981 FOIA suit seeking access to materials related to the resignation of former vice-president Spiro Agnew. Without notifying the plaintiffs' counsel, Green journeyed to the U.S. attorney's office in Baltimore, met with one of the defendants, and examined the sought-after documents. According to an appellate brief later filed by the plaintiffs, she subsequently wrote an opinion, which was inexplicably filed under seal, exempting some of the materials from disclosure—again without notice to plaintiffs or their attorneys. In court Green denied the plaintiffs' FOIA motion without giving any explanation. Green says that the plaintiffs' lawyers had nothing to complain about. "This was just a case filed by some students," she explains. "As far as I was concerned, there was no need for counsel." (The action later became moot when the government voluntarily released the materials.)

A more disturbing example of this same tendency reached the attention of the circuit court last year in the case of Bennie Barnes, who was convicted of burning his common-law wife to death. After ordering Green to hear Barnes's claim that his confession was involuntary because he had not been adequately represented by his former attorney, the appeals court found that Green held the hearing "without notifying appellant's current counsel."

"Even those present at the hearing seem somewhat confused on this point," the circuit court wrote. "Judge Green called the first witness. . . . She conducted all of the questioning. Speaking to Barnes, the court urged him to testify if he wished." At times, the court noted, Green seemed to assume that Barnes was represented by his former attorney, who could hardly advance Barnes's claim without attacking the adequacy of his own work. The court concluded that "it is not clear to us that Barnes was represented at all at the September 18 hearing."

Green later consented to the reargument demanded by Barnes's new counsel. But she refused to allot the three hours of time requested, saying, "We had a full and complete hearing before," referring to the hearing where Barnes was not represented. The circuit court also took exception to Green's announcement at the new hearing that "if ever there was a case that had no doubt about it, it was this one." In unusually strong language, the appeals court described the hearing as a "travesty" and overturned Green's denial of Barnes's motion. It added one further warning: "If the court below feels she is unable to approach this case with an unjaded eye, she should recuse herself." The judge subsequently did just that.

Green characterizes her failure to notify Barnes's counsel of the September hearing as "an oversight," but readily concedes that she had already made up her mind before the second hearing. "You'd have made up your mind, too, if you sat through the trial," she says. She attributes the harshness of the circuit court's opinion to the inexperience of its authors. "These judges were newly appointed, and they just didn't understand what trial judges go through."

Some lawyers in the District of Columbia were hoping that Green would move to senior status when she became eligible this June, thereby avoiding the complex cases which they feel have marred her record. They were disappointed. Although Green had earlier indicated she would take senior status, she now says, "I've changed my mind. I've been working for fifteen years and I'm going to continue." □

—by James B. Stewart, Jr.