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Introductory Comment

Harlington Wood

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INTRODUCTORY

COMMENTS



JUDGE HARLINGTON WOOD, JR.

United States Court of Appeals
for the Seventh Circuit

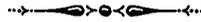
All of us as members of the bar appreciate last year's initial monumental review by the *Notre Dame Lawyer* of the work of this court in 1975. It was promised that the Review would be the result of "intense research, careful analysis, and precise writing" on the part of the staff and editors, and so it proved to be. Justice Stevens forecast in his comments that the Review would demonstrate that "there is a substantial basis for believing that some important issues have not yet been completely understood and therefore may require further analysis and consideration." I believe it will always be so, but that is not all bad. Seldom should we be satisfied with what has already been accomplished, lest further development, improvement, and change be stifled. Jefferson, who understood as well as any man the revolutionary principle that ordinary people are capable of governing themselves, wrote to a friend that "laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the circumstances, institutions must advance." Many are the difficult and important legal issues demanding our resolution which we may expect to arise continually among us in our free, self-governing society. We must work together in that common enterprise.

Assembled on this court and dedicated to accomplishing its share of that endeavor are eight active judges and one senior judge. Even though we sometimes agreeably disagree, I have great confidence in all the members of this court, save one: the freshman member. As to him we will just have to wait and see, and hope. There is among them a broad balance of experience. Among other things, four have been district court judges; one, a member of the Supreme Court of his state; one, president of his state bar association; another, a member of his state board of law examiners; one, the Solicitor General of the United States; and another, the attorney general of his state. They have come here well prepared for the task. In addition, the court from time to time, due to its very heavy case load, has had the temporary assistance of our district judges and visiting judges from other circuits, for which it is most grateful.

That case load for the year under review was the largest in the history of this court, and yet 1977 is already running ahead of 1976. The cases here being reviewed have been culled from among a record 1,236 terminations. During that time docketings pushed upward 11% to a new high of 1,339. This ever-increasing volume is relentlessly encroaching upon the court's time for the thoughtful and careful attention each case deserves.

Hopefully out of it all, as the issues are examined, some satisfaction will be found with the court's efforts. If so, we on the court fully recognize that credit must be given to the members of the informed bar who labor in the preparation and presentation of their cases before us, and to our colleagues on the district courts who first confront the issues as they preside over active legal arenas. The district judges are continually required to render considered judgments, but seldom are allowed the luxury of a few quiet moments for research and reflection before making their decisions.

The court welcomes this objective, critical, and intellectual consideration of the court's 1976 product and hopes that the Review, which has now come of age, will continue each year so that we may be numbered among the many grateful beneficiaries of the scholarship of the *Notre Dame Lawyer*.



JUDGE PHILIP W. TONE

United States Court of Appeals
for the Seventh Circuit

How a court goes about doing its work and the volume of work to be done influence the quality of the finished product. It therefore occurred to me, when I was asked to submit introductory comments for this year's Seventh Circuit Review, that a brief description of how the court does its work and of the mix and volume of its cases might be of interest.

The court has eight active judges, as it has had for the past decade. In addition, one senior judge and a number of visiting judges combine to make a contribution approximately equivalent to that of two active judges. The three-judge panels that decide all cases except for a handful decided *en banc* are drawn by lot for each day the court is scheduled to sit.

The court holds seven sessions each year, sitting for a total of approximately 110 days and hearing six cases orally argued each day. With rare exceptions, only one panel sits on a given day.

Several weeks before the day a case is to be orally argued, two sets of the briefs are distributed to each of the three judges on the panel. The Seventh Circuit is a "hot court," which is to say that the judges read the briefs before the argument. The judge's second set of briefs is for the law clerk assigned to the cases set for that day of argument. Typically, the judge and his law clerk will discuss the cases after they have read the briefs.

Normally, four cases are set for the morning of an argument day, and two for the afternoon. They are likely to vary in complexity. Arguments rarely exceed one-half hour to a side and at least four of the cases are likely to be allotted less time than that. Because the court has read the briefs, it is unnecessary for counsel to state the facts or explain the issues or how they arise. Counsel, usually directed by questions from the court, can come quickly to the essentials of the case.

After the last oral argument of the day, the three judges meet in conference to discuss and tentatively decide the cases (except for an occasional case already decided from the bench, which usually happens at the conclusion of the argument for appellant¹). The judges state their view initially in the inverse order of their seniority, and then an informal discussion follows, unless the result is so clear to all that no further discussion is necessary. After all the cases have been tentatively voted upon, the presiding judge, *i.e.*, the chief judge if he is a member of the panel and in his absence the most senior judge, assigns each case for the writing of an opinion or order.

Following the conference, the judge to whom the case has been assigned prepares a draft of an opinion or order and circulates it to the other two judges, each of whom may approve it outright, make suggestions for change, or write and

1 The announcement of the decision is typically accompanied by a brief oral explanation by the presiding judge, frequently supplemented by the other judges, of the reasons for the court's decision. A brief written order follows.

circulate a concurring or dissenting opinion. Upon the final action of all three judges, the decision is issued.

In the Seventh Circuit about forty percent of the cases are disposed of by signed opinion, about fifty-five percent by unpublished order, and the rest by published *per curiam* opinions. The unpublished orders include cases in which the court has announced its decision from the bench.

Our unpublished orders, which, as noted above, represent about fifty-five percent of our decisions in cases argued orally, may not be cited as precedents under Circuit Rule 35, a restriction that continues to be controversial. Most circuits follow this practice, which was recommended by the Federal Judicial Center several years ago. The Seventh Circuit orders, unlike those of some other circuits, contain a statement of the reasons for the decision, usually in detail comparable to that of the traditional published opinion. Space does not permit a discussion here of the merits or defects of the unpublished order practice, but it should at least be pointed out that the practice conserves the time of judges, because writing and editing an explanation for the parties takes less time than preparation of an opinion that is to be published; that if the decision whether to publish is made intelligently and in good faith, there is little lost in the way of useful precedent; and that the practice spares lawyers a substantial increase in the number of volumes of the Federal Second Reporter published annually (the annual average is now over fifteen volumes).² The problem of citability is a separate one, but it is related, for obvious reasons, to the availability of the orders to lawyers.

Each judge is authorized two law clerks but, except for the chief judge, only one secretary. Thus the law clerks must do their own stenographic work. That this is false economy few would deny, but it seems not likely to change.

Working practices vary from judge to judge. I meet with the law clerk assigned to that day's cases immediately after the conference, and report to him the tentative vote and the court's reasoning in each case. If the disposition is to be by signed opinion, I will prepare the first draft, and then turn it over to the law clerk for editing and for additional citations or other matter as directed. An unpublished order may be drafted initially either by the law clerk or by me. The other person then edits the draft. When we are both satisfied with the draft of the opinion or order, it is typed in final form and circulated to the other judges.³

A few words about the mix of cases may be of interest. Leaving out original petitions, about nine percent of our cases come from administrative agencies (one-half of these from the National Labor Relations Board) and one percent from the Tax Court. Approximately one-half of the appeals from

² An analysis of the Ninth Circuit's unpublished order practice is reported in J. Frank, *Remarks Before the Ninth Circuit Judicial Conference*, 16 ABA Judges' Journal 10 (1977). He estimates the time saving for judges is "about half" and concludes that neither "lost law" nor "evasion of responsibility" has resulted, although, largely because of the relatively large number of judges who sit on that court, there is occasionally diversity of results between panels, but this occurs to some degree even with respect to published opinions.

³ Although most of the judge's work consists of reading and writing in connection with the cases orally argued, there are additional duties. These include work on unpublished orders under Federal Rule of Appellate Procedure 2 and Circuit Rule 15 disposing of cases which are not orally argued, ruling on numerous petitions and motions, and consideration of petitions for rehearing *en banc* in cases decided by panels on which the judge did not sit.

district courts are from the Northern District of Illinois. Northern Indiana and Eastern Wisconsin are tied for the second place, each contributing about eleven and one-half percent. Southern Indiana is next with nine percent. Of the appeals from the district courts, thirty percent are criminal cases, although I would guess that not that high a proportion of the judges' time is occupied with criminal appeals.

The Seventh Circuit has had eight judgeships since 1966. In that year the number of filings was 403. In the year ended June 30, 1977, filings totalled 1,123. Until a few years ago, of course, all dispositions were by published opinion, and if that practice had continued the court would be hopelessly in arrears. Some of the additional cases are of relatively low average difficulty, but there are also many new kinds of difficult and complex cases that were unknown to the courts a decade ago. Each new session of Congress gives the federal courts additional tasks. With increasing frequency, as Judge McGowan has observed,⁴ Congress uses open-ended language which leaves important and difficult policy decisions for administrative agencies and ultimately the federal courts.

The overloading of the federal courts is a serious national problem that too few responsible persons seem to be taking seriously. In some circuits it has been found necessary, in attempting to cope with heavy backlogs, to utilize increased numbers of staff lawyers in disposing of cases. So far the Seventh Circuit has been able to avoid such a step. But the time available to each judge is finite. When the work to be done rises beyond a given level, there are only two choices: allow a backlog to accumulate or find a way to dispose of cases more quickly. To the extent that our court and other federal courts of appeal are respected, it is because, as Mr. Justice Brandeis said of the justices of the Supreme Court, we do our own work. When that ceases to be true, our society will be the poorer.

Although eventually we can hope for at least the elimination of diversity jurisdiction, the only relief now in sight is the pending legislation to increase the number of federal judges, which Congress has had under advisement for about five years. The Seventh Circuit would receive one additional judge. Needed judgeships for a number of district courts, including both of those in Indiana, that were recommended by the Judicial Conference of the United States and provided in the proposed legislation as adopted by the Senate seem likely to be omitted by the House. It is to be hoped that these judgeships will be restored, and that Congress will soon take final action to give the federal courts the long-awaited additional assistance that will alleviate, though not solve, the overload problem.

These comments cannot be properly concluded without noting that the *Notre Dame Lawyer's* Seventh Circuit Review, now in its third year, has been prepared with scholarship and industry of a high order. This annual feature has proved the value of a periodic scholarly appraisal of a court's work.

4 C. McGowan, *Congress and the Courts*, 62 ABAJ. 1588 (1976).



JUDGE WALTER J. CUMMINGS

United States Court of Appeals
for the Seventh Circuit

With this third edition, the *Notre Dame Lawyer's* Seventh Circuit Review has become a well-established law students' critique of some of our opinions. Happily, the second edition reviewed only 20 cases instead of the 29 reviewed in the first edition, thus allowing a further in-depth analysis in the February 1977 issue. In the first edition, three of my colleagues heralded the advent of the Seventh Circuit Review,¹ whereas in the second edition, another three praised the initial effort.²

To avoid repeating the comments prefacing the prior Seventh Circuit Reviews, these remarks will concern some of the cases discussed in those issues in which I participated at some stage and to some extent will be a rejoinder to the student comments. I should perhaps add that none of us resents critical comment, for deserved criticism betters our output and at times works changes in the law.

Cases Reviewed in First Issue

In the middle of the first Review's opening section on constitutional cases is a discussion of the Court's initial opinion in *Kimbrough v. O'Neal*,³ one of our many cases involving 42 U.S.C. § 1983. The main opinion in that case held that a prisoner does have a cause of action under 42 U.S.C. § 1983 for the taking of his diamond ring by the defendant county sheriff and deputies. In an effort to avoid a dissent, my opinion relied on our then fresh opinion in *Carroll v. Sielaff*,⁴ as establishing this proposition. Judge Swygert concurred on his understanding that simple negligence was actionable under 42 U.S.C. § 1983, and then Judge Stevens concurred on Fourth Amendment grounds while pointing out that an ordinary common law tort claim should not be cognizable in a federal court if there is an adequate state process to redress the wrong.

While the Seventh Circuit Review favored Judge Stevens' notion that claims of intentional deprivation of property should be decided in the state courts rather than under 42 U.S.C. § 1983, this view was rejected by the Supreme Court in *Monroe v. Pape* over Justice Frankfurter's lone dissent.⁵ In light of *Monroe v. Pape*, however, Judge Swygert and I were unable to accept this view regardless of its attractiveness.

After the publication of the first Seventh Circuit Review, *Kimbrough v. O'Neal* was decided by our Court *en banc*.⁶ Six members of this Court held that *Kimbrough* could recover for the taking of his ring under § 1983 if he could prove that the defendants "intentionally or with reckless disregard" caused his

1 51 NOTRE DAME LAW. 985-92.

2 52 NOTRE DAME LAW. 347-53.

3 523 F.2d 1057 (7th Cir. 1975).

4 514 F.2d 415 (7th Cir. 1975).

5 365 U.S. 167 (1961).

6 545 F.2d 1059 (7th Cir. 1976) (Judge Wood did not participate).

property loss. In concurring, Judge Swygert again expressed the view that Kimbrough should be able to recover even if his loss was occasioned only by defendants' negligence. The rest of us concluded that *Paul v. Davis*⁷ precluded a recovery for negligence under § 1983. While Justice Stevens clings to his view in *Kimbrough I* that there should be no recovery under § 1983 where there is an adequate state remedy, he recognizes that this idea has not yet been accepted by the Supreme Court.⁸ Consequently, the Seventh Circuit Review's endorsement of his position is presently without other authoritative support.

In *Calvin v. Conlisk*,⁹ where an allegedly deficient police disciplinary system was considered, this Court held that the claim was justiciable and that limited mandatory injunctive relief was proper. Our opinion was issued without the benefit of *Rizzo v. Goode*.¹⁰ After the Supreme Court decided *Goode*, certiorari was granted in *Calvin*,¹¹ and on remand we held that the plaintiffs lacked standing to proceed.¹² The Seventh Circuit Review, using very diplomatic language, discreetly recognized that *Goode* cast "considerable doubt on the validity" of *Calvin*. However, the original *Calvin* panel can take some comfort in the Review's apparent sympathy with the dissent in *Goode*.¹³

*Cass Student Advertising Inc. v. National Educational Advertising Service, Inc.*¹⁴ had a happier outcome than *Calvin*. The unanimous opinion determined that the relevant market in that private antitrust case was the service of representing college newspapers throughout the United States in the placement of national advertising. The Review correctly noted that by defining the relevant product more narrowly than the district court we increased the likelihood of finding monopoly power. Indeed, your prophecy was fulfilled in that very case, for on remand, the district court found that defendant had willfully retained monopoly power in that market and granted appropriate injunctive relief.¹⁵ Thus our "strong concern about containing anti-competitive behavior" was vindicated.¹⁶

The first edition of the Seventh Circuit Review also treated the panel opinion in *Swain v. Brinegar*.¹⁷ The student writer noted that the *Swain* panel, over Judge Grant's dissent, rejected the trend of other decisions permitting the delegation of the duty of preparation of an environmental impact statement to state officials. While your critique approved this holding and a like holding in the Second Circuit, Congress subsequently disagreed and thus caused our full Court to review *Swain*.¹⁸ Because of the enactment of an amendment to the National Environmental Policy Act in 1975, we unanimously held that the delegation of authority by the Federal Highway Administration to the Illinois Department of

7 424 U.S. 693 (1976).

8 See *Ingraham v. Wright*, 430 U.S. 651, 701-02 (Stevens, J., dissenting) (1977).

9 520 F.2d 1 (7th Cir. 1975).

10 423 U.S. 362 (1976).

11 424 U.S. 902 (1976).

12 534 F.2d 1251 (7th Cir. 1976).

13 51 NOTRE DAME LAW. at 1110, 1116.

14 516 F.2d 1092 (7th Cir. 1975).

15 407 F. Supp. 520 (N.D. Ill.), *aff'd per curiam*, 537 F.2d 282 (7th Cir. 1976).

16 51 NOTRE DAME LAW. at 1124.

17 517 F.2d 766 (7th Cir. 1975).

18 542 F.2d 364 (7th Cir. 1976) (*en banc*) (Judge Wood did not participate).

Transportation was lawful; and therefore, we had to rule on the sufficiency of the final environmental impact statement prepared by the Department of Transportation and approved by the Federal Highway Administration. In *Swain II*, four members of this Court held that an environmental impact statement was required for the entire proposed 42-mile freeway rather than merely for the first 15-mile segment. Additionally, concurring Judge Swygert would impose stringent requirements for the EIS. The three dissenting judges concluded that it was proper to confine the environmental impact statement to the short segment. *Swain II* was not covered in your Seventh Circuit Reviews, probably because of its somewhat limited interest.

In *Polish American Congress v. Federal Communications Commission*,¹⁹ the petitioners asked us to hold that the American Broadcasting Company had violated the Federal Communications Commission's fairness doctrine and personal attack rule by refusing them air-time to respond to a broadcast of the Dick Cavett Show containing Polish jokes. We held that the Federal Communications Commission had properly determined that ABC's conclusion that the broadcast did not involve a controversial issue of public importance was not unreasonable or reached in bad faith, so that no relief was warranted. Like us, your expert reviewer was sympathetic to petitioners' concern about Polish jokes but noted that our approach was consistent with that taken by other Circuits and the Supreme Court. While he thought we "did not adequately explain" why we found the complaint deficient,²⁰ the opinion did state that petitioners had not shown that the challenged segment of the broadcast constituted a presentation of views on a controversial issue of public importance and that ABC's overall approach to the subject was unbalanced. We pointed out that petitioners nowhere defined "a question that can serve as an issue around which an important public controversy could form." In this connection, the opinion stated that the only issues presented by the petitioners were whether Polish Americans are inferior persons and whether promulgating Polish jokes is desirable. As the opinion noted, petitioners, of course, did not allege that there was a controversy over whether Polish Americans are less intelligent than other people. The only possible controversy of public importance was whether broadcasting Polish jokes is desirable, but there was no such showing. That is why the Court found that the broadcast of these jokes did not constitute a presentation of views on a controversial issue of public importance. Although the petitioners attempted to obtain Supreme Court review, they were unsuccessful.²¹

The first review also covered *Swanson v. American Consumer Industries, Inc.*,²² dealing with the right to recover attorney's fees. This phase of *Swanson* reiterated an earlier ruling that plaintiff was entitled to reimbursement of reasonable attorney's fees. Both panels followed *Mills v. Electric Auto-Lite*²³ in holding that where a plaintiff has successfully maintained a class suit under the Securities Exchange Act of 1934 that benefits others in the same manner as

19 520 F.2d 1248 (7th Cir.), cert. denied, 424 U.S. 927 (1976).

20 51 NOTRE DAME LAW. at 1172.

21 424 U.S. 927 (1976).

22 517 F.2d 555, 560 (7th Cir. 1975) (this followed an earlier *Swanson* opinion reported in 475 F.2d 516 (7th Cir. 1973)).

23 396 U.S. 375, 389, 397 (1970).

himself, an award of attorney's fees is justified, even though actual money recovery has not been obtained. While your reviewer criticized other decisions of this Court imposing the requirement of a fund in order to recover attorney's fees, concededly no such requirement was imposed in *Swanson*, so that at least there the Seventh Circuit has not "unnecessarily concluded that a fund is indispensable before recovery of attorney's fees will be allowed."²⁴ Any such conclusion would seem to be foreclosed by *Mills*.

The supposed inconsistencies in *Swanson* (1975) and three other cases we decided in 1975 can perhaps be explained by the fact that our panels do not distribute their proposed opinions to other members of the Court, who first see them sometime after their release.²⁵ When litigants bring truly inconsistent opinions to the Court's attention, the matter can be resolved by *en banc* review.

Cases Reviewed in Second Issue

The opening section of the second Seventh Circuit Review is devoted to our *en banc* opinion in *Bonner v. Coughlin*,²⁶ which, like *Kimrough*, deals with the construction of Section 1983. Your opening section constitutes an outstanding treatment of our holding that a defendant's negligent conduct is insufficient to trigger 42 U.S.C. § 1983. In *Bonner I* the panel initially held that the plaintiff could not recover for the loss of his trial transcript because of the prison guards' negligence.²⁷ The majority considered that there was no constitutional violation because of the availability of an adequate state remedy. Because of *Monroe v. Pape*,²⁸ Chief Judge Fairchild disagreed with this reasoning but concurred on other grounds.²⁹

After the rehearing *en banc*, I was assigned the unenviable task of writing the opinion for six of us. Each Circuit Judge will frequently at least wish to add to or subtract from the proposed majority *en banc* opinion, often considerably delaying its release. This experience and my drafting of other *en banc* opinions make it obvious to me why the United States Supreme Court Justices so routinely express their own views in separate opinions instead of trying to achieve a common opinion.

As your student commentator noted, in *Bonner II* this Court deliberately refused to follow Fourth and Ninth Circuit opinions holding that mere negligence is actionable under Section 1983. Since certiorari has been granted in the Ninth Circuit case and is pending in *Bonner II*, the Supreme Court will almost certainly decide this point at its present term.³⁰

24 51 NOTRE DAME LAW. at 1258.

25 As your closely observing commentator noted, of the three cases said to be inconsistent with *Swanson* (1975), two were decided only four days afterwards. The third case, *Burbank v. Twomey*, 520 F.2d 744 (7th Cir. 1975), was decided two months after *Swanson* (1975) and chose to rely upon it. See 51 NOTRE DAME LAW. at 1253, 1255.

26 545 F.2d 565 (7th Cir. 1976) (Judge Wood did not participate).

27 517 F.2d 1311 (7th Cir. 1975).

28 365 U.S. 167 (1961).

29 517 F.2d at 1321.

30 Certiorari was granted in *Navarette v. Enomoto*, 536 F.2d 277 (9th Cir. 1976), 429 U.S. 1060 (1977), while certiorari is still pending in *Bonner*. See 430 U.S. 651, 657 n.11. The *Bonner* panel and *en banc* opinions were cited in the majority and dissenting opinions in *Ingraham v. Wright*, 97 S. Ct. 1401 (1977), but the Court has not yet indicated whether it feels that recovery should be permitted under 42 U.S.C. § 1983 in cases of negligence.

In *Bonner II*, the *en banc* opinion took its cue from *Paul v. Davis*³¹ that the Supreme Court does not want to provide federal fora for § 1983 claims which are also ordinary state torts. Even the three dissenting Justices in *Paul* went no further than *Bonner II* in concluding that "intentional conduct" infringing a person's liberty or property interests without due process of law is within the ambit of § 1983.³²

Although your commentator seemed to prefer Judge Swygert's dissenting view that § 1983 does reach claims based on negligence, he agreed with the *en banc* opinion that "extension of § 1983 to cases of negligent deprivations of constitutional rights may not be justified by congressional intent."³³ It will be interesting to see whether the Supreme Court adheres to *Paul v. Davis*. If the Court should unexpectedly follow the Ninth Circuit's lead in *Navarette*³⁴ and Judge Swygert's dissent in *Bonner II*, the federal district courts will be further inundated despite already burgeoning civil rights dockets.

Since I was on the panel that produced both opinions in *Evans v. United Air Lines, Inc.*,³⁵ I thought it might be useful to discuss that case even though the opinions were written by a visiting Circuit Judge. The panel first held, as your commentator observed, that the statutory filing time for United's 1968 violation of the Civil Rights Act of 1964 (through its rule against the employment of married stewardesses) had elapsed 90 days after Mrs. Evans' employment was terminated. The panel granted a rehearing of its first opinion because of the Supreme Court's subsequent decision in *Franks v. Bowman Transportation Company, Inc.*³⁶ On rehearing, the panel held that Mrs. Evans' theory of a continuing violation was valid, so that the judicial requirements of Title VII had been met. Your two commentators were fair enough to say: "The *Evans* [II] decision reflects an underlying theme of the Supreme Court in *Franks*. . . ."³⁷

However, the Seventh Circuit Review criticized *Evans II* for permitting suits to be filed during the operation of an otherwise nondiscriminatory company policy, even if the policy is deemed to perpetuate the effects of a prior discriminatory act.³⁸ In this respect, your organ was much more prophetic than the *Evans* panel, for the Supreme Court reversed us,³⁹ holding that its decision in *Franks v. Bowman Transportation Company* was not controlling. The only comfort to the Seventh Circuit panel is that two dissenting Justices agreed that since United treated Mrs. Evans as a new employee on her rehire, even though she had been wrongfully forced to resign, its violation was "continuing to this day" so that her charge was not time-barred.⁴⁰

31 424 U.S. at 693.

32 424 U.S. at 720.

33 52 NOTRE DAME LAW. at 363. See also 545 F.2d at 568.

34 See note 30 *supra*.

1976). Our second opinion is reproduced in 534 F.2d 1247 (7th Cir. 1976). Rehearing *en banc* was denied on June 7, 1976.

35 Our first opinion appears in 11 Empl. Prac. Dec. ¶ 10,665 (7th Cir., Jan. 29,

36 424 U.S. 747 (1976).

37 52 NOTRE DAME LAW. at 377.

38 52 NOTRE DAME LAW. at 377.

39 45 U.S.L.W. 4566 (U.S. May 31, 1977) (No. 76-333).

40 *Id.* at 4568.

Conclusion

As a subordinate court, we cannot decide cases contrary to Supreme Court precedents that still appear viable, even though your Review and we might prefer a different approach. However, we can and do overrule our own decisions that do not withstand the passage of time or such analysis as evidenced in the Seventh Circuit Reviews. Also, as you have noted, we refuse to follow conflicting decisions of our sister circuits if convinced that a different outcome is warranted. In such instances, when forthcoming, your and Supreme Court approval are indeed heartening. In future issues, continue to disagree with us whenever warranted, for your criticism will not fall on deaf ears.