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Introductory Comments

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INTRODUCTORY

COMMENTS



JUDGE ROBERT A. SPRECHER

United States Court of Appeals
for the Seventh Circuit

As Seventh Circuit colleagues, Mr. Justice Stevens and I often speculated, particularly after writing unusually lengthy or complex opinions, whether our efforts on those occasions would ever be read by anyone other than the litigants and their lawyers.¹ As far as the Justice himself was concerned, he need not have worried inasmuch as his approximately 215 Seventh Circuit opinions during his five years of service were probably subjected to closer scrutiny than any circuit judge's opinions in history² and this very scrutiny was a major, if not decisive, factor in his elevation to the highest bench. For the other ninety-seven courts of appeals judges, however, the speculation as to their audience appeal has continued, although occasionally a constant reader has appeared.³ Past experience, however, has justified the uncertainty.

Until comparatively recently one had only to go to his local library to find hundreds of volumes dealing with the Supreme Court and probably none pertaining to the lower federal courts. A book published in 1976 is comprised of twenty-eight "profiles of leading American judges" throughout history.⁴ The list contains twenty-one Supreme Court justices, five state supreme court judges, but only two courts of appeals judges—Learned Hand and Jerome Frank.⁵

Judge Learned Hand has been quoted by name in Supreme Court opinions and in academic publications more often than any other federal lower court judge up to the present time. In his more than fifty years as a federal judge he

1 This thought was undoubtedly on Justice Stevens' mind when he wrote in his Introductory Comments to the first Seventh Circuit Review that such a review "will remind the judges that there is a significant audience—other than the litigants themselves—listening carefully to what they have to say." 51 NOTRE DAME LAW. 985 (1976).

2 The chairman of the American Bar Association's Standing Committee on the Federal Judiciary, former Deputy Attorney General Warren Christopher, indicated that Justice Stevens' opinions were carefully scrutinized by practicing lawyers and legal academicians in order to assist the committee prior to its unanimous conferral of its highest evaluation of him for the benefit of the President and Senate. Beytagh, Jr., *Mr. Justice Stevens and the Burger Court's Uncertain Trumpet*, 51 NOTRE DAME LAW. 946, 947-48 (1976).

3 Erwin N. Griswold told me at the American Bar Association meeting in London in 1971 that as Solicitor General of the United States (1967-1973), he read every opinion emanating from each court of appeals.

4 G. WHITE, *THE AMERICAN JUDICIAL TRADITION* (1976).

5 The author explains that "no judges active at the time of the writing of the book were included," thus explaining the omission of Judge Henry Friendly of the Court of Appeals for the Second Circuit. Judge Friendly has become a present-day giant of the judiciary. The Supreme Court seldom identifies a lower court opinion by its author but invariably does so in regard to Judge Friendly's opinions.

became a legend. He was the subject of several books⁶ and wrote over three thousand opinions. Yet the works of this judicial titan have not survived to the extent of even the lesser Supreme Court landmarks. Mr. Justice Frankfurter said, somewhat enigmatically, that Learned Hand's "actual decisions will all be deader than the dodo before long, as indeed at least many of them are already."⁷ This was a prelude to the compliment that "what underlies decisions is what survives," but the remark, coming from a justice of the Supreme Court in reference to a court of appeals judge's opinions, reflects what at least once was considered the lack of permanence of lower appellate court decisions.

The reasons for this are well-recognized. Whereas the Supreme Court carefully selects the relatively few decisions it decides each year within a tightly structured policy framework, the courts of appeals must hear all appeals. Perhaps as many as eighty percent of those cases are either frivolous, present little opportunity for contrary views, are lacking in precedential value, or fail to evoke policy, much less philosophical, discussions. While the Supreme Court is continuously engaged in an institutional or law-developing function, the courts of appeals are mainly occupied with an ad hoc problem-solving or corrective function. In a sense, courts of appeals stumble into great policy or landmark decisions. Even when this happens, the lower court must be ever cognizant of and seek to foreshadow Supreme Court precedent and policy. Furthermore, courts of appeals panels are also bound by other panels of their own court. Therefore it is rare when an appellate court can write on a clean slate to develop an individual judge's, or even the collective court's, judicial philosophy. Also, after a court of appeals fashions a leading case, frequently the Supreme Court includes that case within its review system and the lower court opinion is merged into the Supreme Court decision, never to be heard from again.

But this structure has slowly yet certainly been changing over the past several years and will change more dramatically in the future. The statistics of the burgeoning caseload at both the district court and court of appeals levels have been repeated so often that every lawyer knows them. He also knows that the Supreme Court can only hear approximately the same number of cases each year. The number of court of appeals cases the Supreme Court does not hear increases tremendously each succeeding year. In the fiscal year ended June 30, 1976, the courts of appeals terminated 16,426 cases,⁸ in only 162 of which, or less than one percent, the Supreme Court granted certiorari.⁹ The courts of appeals made 16,264 final decisions during that term. Even if only twenty percent of the 9,351 cases disposed of after full submission were significant, there would be over 1,800 final important courts of appeals decisions in relation to 162 Supreme Court opinions. This would certainly appear sufficient in numbers

6 I. DILLIARD, *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* (1952); H. SHANKS, *THE DECISIONS OF LEARNED HAND* (1968); M. SCHICK, *LEARNED HAND'S COURT* (1970); K. GRIFFITH, *JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY* (1973).

7 *A Great Judge Retires*, 37 A.B.A.J. 502, 503 (1951).

8 1976 Annual Report of the Director of the Administrative Office of the United States, Table B-1.

9 *Id.*, Table B-2.

to justify law review consideration of the most significant cases from each circuit each year.

In the preface to his 1976 supplement of his *Administrative Law Treatise*, Professor Kenneth Culp Davis, while stating that "the Supreme Court is still the leader," notes that in preparing for his new volume, "the realization developed that the innovative thinking during the 1970's may have come more from the leading judges of courts of appeals than from Justices of the Supreme Court."¹⁰ Consequently, when the Supreme Court refuses or fails to act, or is unable to do so due to time constraints, many of the leading cases come from the courts of appeals instead of from the Supreme Court. That is why most if not all of the eleven courts of appeals each now enjoys the attention of one or more law journals reviewing on an annual basis its decisions.¹¹

A prime example of how a court of appeals decision can gain prominence is *Birnbaum v. Newport Steel Corp.*,¹² a short opinion covering only 2 1/3 pages in the reports and written by Judge Learned Hand's cousin and colleague in the Second Circuit, Judge Augustus Hand. For some reason, the Supreme Court waited twenty-three years before reconfirming the *Birnbaum* principle in the *Blue Chip Stamps* case.¹³ During that time *Birnbaum* was cited in more than 300 opinions, and when the Supreme Court ultimately acted, it referred throughout the opinion to the "Birnbaum rule." In other words, instead of the court of appeals paying deference to a Supreme Court rule, the reverse was true.¹⁴

Because I believe that courts of appeals decisions will attain more importance with each passing year, I echo the sentiments of our Chief Judge, Thomas E. Fairchild, when he said in his introduction of the first annual review that "systematic and scholarly study of the lower federal courts can make a significant contribution."¹⁵ For our part, in addition to attempting to write opinions which can stand scrutiny, we have rewritten our circuit rules, hopefully to make our procedures more efficient and understandable. About three months after the federal courts of appeals were established in 1891,¹⁶ the elder Justice John M. Harlan and two other judges signed and presumably drafted thirty-four handwritten rules for the guidance of the Seventh Circuit.¹⁷ Some of these rules were

10 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* at iv (Supp. 1976).

11 The same is true of state supreme courts and possibly for the same reason: the Supreme Court must determine a smaller percentage of appeals from state courts each year, thus stamping the important unreviewed decisions with finality.

12 193 F.2d 461 (2d Cir. 1952).

13 *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

14 Another example of how a lower federal court opinion can gain acceptance and permanence when the Supreme Court does not act is *Lessard v. Schmidt*. *Lessard* was a three-judge court case holding many sections of the Wisconsin Civil Commitment statute unconstitutional. Twice the Supreme Court vacated the judgment for reasons other than the merits and twice the court reaffirmed its original opinion and decision. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974), 379 F. Supp. 1376 (1974), *vacated and remanded on other grounds*, 421 U.S. 959 (1975), 413 F. Supp. 1318 (1976). An appeal had been sought in regard to the last reinstatement of the decision. When a special session of the Wisconsin legislature passed, and the Governor of Wisconsin signed a new Mental Health Act substantially enacting the *Lessard* decision, the appeal to the Supreme Court was dismissed and the lower court opinion became final. In four years, *Lessard* has been cited by 115 other courts, was the subject of almost 40 law review comments and was substantially incorporated into new mental health codes in several states.

15 51 NOTRE DAME LAW. 987 (1976).

16 Act of March 3, 1891, 26 Stat. 826.

17 The rules were dated June 16, 1891.

dropped when bills of exceptions, assignments of error and writs of error were abolished and others were eliminated when the Federal Rules of Appellate Procedure were adopted in 1968. Nevertheless the first dozen or so of the 1891 rules remained in substantial effect with new rules being tacked on from time to time in somewhat patchwork fashion.

After more than a year of intensive study by a committee of the court,¹⁸ widespread circulation prior to adoption, and the input of the entire court, the circuit rules were completely rewritten, effective July 1, 1976. The three rules discussed by Judge Swygert in his introduction to the first annual review¹⁹ remain virtually unchanged but bear different rule numbers. The Plan for Publication of Opinions is now Circuit Rule 35; Docketing Conferences are covered in Circuit Rule 3; and the former rule eliminating appendices is now Circuit Rule 12. Circuit Rule 12 requires a short appendix containing the judgment or order under review, and any opinion, memorandum of decision, findings of fact and conclusions of law, or oral statement of reasons delivered by the trial court or administrative agency upon rendering the judgment or order; these items can be bound with the brief or kept as a separate document. The new rule emphasizes that "a full appendix is not required" and "an appendix should not be lengthy, and costs for a lengthy appendix will not be awarded."

The rules are divided into three separate articles. Article I includes the practice rules and comprises the heart of what a practitioner would want to know about practice in the Seventh Circuit. The material in Article I is arranged, insofar as possible, chronologically, beginning with the caption on the notice of appeal and continuing through the record on appeal, briefs, oral arguments and all of the other steps as the appeal progresses. The last rule in Article I covers remands from the Supreme Court.

Article II deals with general rules and includes the rules on fees, attorneys, courtroom photographs and broadcasts, and establishes a new advisory committee "to provide a forum for continuing study of the procedure of the court and to serve as a conduit between members of the bar who have suggestions for change and the court." In addition to certain *ex officio* members, the committee includes one district judge, one attorney and one law school professor each from Illinois, Indiana and Wisconsin.

Article III is devoted to the publication rule, which as noted above is Circuit Rule 35.

All together there are fewer rules. There were thirty-four in 1891, thirty prior to the rewriting and now there are only twenty-four; although the last rule is No. 35, several numbers have been reserved for future use. Copies of the new rules are available from the office of the clerk of the court and from most of the legal printers in the Seventh Circuit.

Finally, I wish to express the gratitude of our entire court for the effort which has been put into this very beneficial review of our last year's work.

¹⁸ The committee consisted of Judges Sprecher and Tone, Circuit Executive Collins T. Fitzpatrick and Court Clerk Thomas F. Strubbe.

¹⁹ 51 NOTRE DAME LAW. 989 (1976).



JUDGE WILLIAM J. BAUER

United States Court of Appeals
for the Seventh Circuit

The invitation to write one of the introductory comments for the second review of the decisions of the Seventh Circuit by the *Notre Dame Lawyer* is one I find most flattering. As one of the newer members of this Court, I carefully read the discussions in the first review and found the material interesting and helpful. It is not very often that we are able to step back from our own decisions and read a comprehensive and scholarly analysis of our work.

The composition of a multi-judge court—particularly a multi-judge appellate court—has always been a source of interest to legal writers, scholars, and practitioners. The work product of such a court, producing decisions of impact, comes from the interaction of various attitudes and training. The varying backgrounds and expertise of the judges provide a wealth of experience for the discussions and writing of these opinions. Many of these decisions represent the free exchange of suggestions from members of the panel who, although not personally authoring the opinions, participate directly in the decision making process.

The publication of a review such as this contributes to the educational experience of the bench and bar by providing a rather painless way to review and correlate the more significant opinions so that we may see where we have been and, perhaps, where we are going. In the hectic atmosphere of a driving work schedule it is difficult to stand back and view the legal picture with the horizons visible. Whatever might be said about the “contemplative atmosphere” of an appeals court, the sheer volume of cases prevents any ivory-tower syndrome from closing over the Seventh Circuit. Perhaps because of this pace it is helpful to obtain comments and input from sources not directly involved in the decision making.

The Seventh Circuit has no group philosophy beyond the sincere and collective desire to follow the law where the trail has been marked and to light the way where the trail is dim—all in the hope of advancing the cause of justice. As must be expected, we do not always agree either with each other or with other appellate tribunals. I believe, however, that even our most outspoken critics would be forced to concede, had they the opportunity to participate in the workings of this court, that all its members, active and senior, veterans and newcomers, are men of learning, deep sincerity, and devotion to law and justice.

The work of this court will, no doubt, outlive its present members by at least a few years. It is my hope that legal historians and researchers will read the *Notre Dame Lawyer*, and its review of the work of this court, and know that the Seventh Circuit judges, confronting difficult problems, attempted to solve them with dignity, compassion and integrity.



JUDGE WILBUR F. PELL, JR.

United States Court of Appeals
for the Seventh Circuit

In preparing this *Vorspiel* for the second review by the *Notre Dame Lawyer* of the decisions of the Seventh Circuit I am in a less difficult position than were my brothers Stevens, Fairchild, and Swygert, who authored the introductory comments of *Lawyer's* first effort in reviewing our decisions. While they might have been confident that the review would be scholarly and penetrating in its analysis, they were writing before the fact and were not possessed of the empirical basis that is mine from having seen the first review. Their confidence in the result was not misplaced.

Nevertheless, the task of saying something appropriate is not necessarily easier now that the first venture of the *Lawyer* has proved to be successful. One calls to mind the possible application of the best evidence rule or even *res ipsa loquitur*.

But after some reflection I have decided to take as a given fact that the review is substantially beneficial to those practitioners who traverse the ways of the Seventh Circuit and, instead, to focus my attention on the relationship of the review to the court itself, or more precisely, the judges whose opinions are the subject of the analysis.

Since the time I came to the court nearly 6½ years ago and received the then current bound volume of the Federal Second Reporter, I have added to the shelves of my chambers more than 100 succeeding volumes of the reporter. This is not very surprising when one realizes that appeals commenced in all circuits in fiscal year 1966 were some 7,000, in 1970 they increased to approximately 12,000, and now in the current fiscal year there were more than 18,000. Notwithstanding this growing caseload, the number of judges providing authorship did not increase perceptibly, although their per capita production has nearly tripled in the last fifteen years.

The United States Courts of Appeals fall within the category of Article III, Section I, of the United States Constitution, being "such inferior Courts as the Congress may from time to time ordain and establish." The only court specifically named in that section, the Supreme Court, annually limits itself to less than 200 opinions, which means that both as to the particular claims of affected litigants and as to broad areas of the law between the pillars provided by the Supreme Court opinions, the decisions of the courts of appeals are the final chapter in more than ninety percent of federal appeals.

Notwithstanding this impact, while the opinions of the Supreme Court receive extensive attention from both legal periodicals and the media, most of the outpouring of the courts of appeals goes unnoticed except for particularly controversial decisions.

The approach of appellate judges to law is, ordinarily, not from the broad vista, but from within the confines of frequently narrow factual situations, con-

trolling statutes and administrative regulations, and well-established procedural precedents. Within these restrictions we are mindful, on the one hand, of Holmes' admonition to be sensitive to the felt need of the times and, on the other hand, of Cardozo's words that the judge is not a knight-errant who roams at will in pursuit of his own ideal of beauty or of goodness; instead, he is to draw his inspiration from consecrated principles.

I recently saw a brochure issued on behalf of a candidate for a state trial court judgeship which, at the end of a list of his qualifications for the position, noted that his eyesight and hearing were excellent. Simply stated, it is a reminder that the judges of the Seventh Circuit, as would be true of their brothers of the other circuits, must continue, if their functional purpose is to be achieved, to retain the ability despite the proliferation of the trees to see the forest.

It is in this respect that the *Notre Dame Lawyer* by giving us objective and scholarly analyses of some of our significant opinions will be of benefit to the court itself. We, and I feel certain that I speak for my brothers, therefore thank you for this undertaking.