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Introductory Comments

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INTRODUCTORY COMMENTS

JUSTICE JOHN PAUL STEVENS

United States Supreme Court Justice
for the United States Court of Appeals
for the Seventh Circuit

As the recently designated Circuit Justice for the Seventh Circuit, and as a longtime admirer of the continuously improving quality of the Notre Dame Law School, it is a distinct privilege to be allowed to make an introductory comment in the introductory issue containing a critique of the work of the United States Court of Appeals for the Seventh Circuit.

My comment is necessarily made without having had an opportunity to read what appears on the ensuing pages. Nevertheless, I confidently predict that the appraisals contained therein will make a significant contribution to the development of the law for at least three reasons: They will bring to the profession greater awareness of the quality and scope of the work being performed by one of the truly great courts in the country; they will 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; they will remind the judges that there really is a significant audience—other than the litigants themselves—listening carefully to what they have to say. In these ways, as well as others, this issue, like the judges' opinions, will plant seeds that will add to the process of growth and change that is characteristic of our jurisprudence.

HONORABLE THOMAS E. FAIRCHILD
Chief Judge for the United States
Court of Appeals for the Seventh Circuit

CHIEF JUDGE THOMAS E. FAIRCHILD

United States Court of Appeals
for the Seventh Circuit

The *Notre Dame Lawyer's* initial Seventh Circuit Review is a welcome addition to the growing number of scholarly analyses of the product of the federal courts. This study will serve to focus the attention of lawyer and layman on the role of the courts of appeal within the federal judicial system. The Seventh Circuit is honored that its work is being scrutinized by such an able group of commentators. In addition, the federal judiciary is continuously seeking to maintain a perspective on its own work product, both with respect to consistency and clarity of thought and in relation to the precedent and policy of other judicial bodies. The judges of the Seventh Circuit are grateful to the *Notre Dame Lawyer* for placing this perspective within our reach.

Legal scholarship concerning the federal courts has been devoted primarily to the work of the Supreme Court. Understandably, analyses have traditionally focused at the pinnacle. We think, however, that systematic and scholarly study of the lower federal courts can make a significant contribution. Many principles are stated, and policies and trends exposed in opinions which are not reviewed by the High Court. For this reason alone the examination of the work of a circuit is a valuable addition to legal scholarship.

The growing case load of the courts of appeal has made the task of maintaining a high standard of legal research and reasoning in appellate opinions more difficult. Consequently, federal judges must also strive harder to perceive new trends and policies within their own circuits as well as in others. A critical analysis of our year's work serves to facilitate our full appreciation of the scope of the decisions of the panels of our court and furnishes us with a perspective of the Seventh Circuit within the context of the federal judicial system. I express the thanks of our judges for providing us with this important study.

Yet, introductory comments are often laced with platitudes focusing on the significance of the work without critically examining the role which the work plays. Too often kind words are directed without recognition of purpose. Clearly, the planning and writing of a review of court decisions precludes such a convenience. The primary purpose behind a review is to serve the courts, practicing counsel, and students alike by accurately analyzing the "cutting edge of the law." For the authoring court, a review provides an erudite exposition and analysis of its decisions, subjecting to scrutiny the premises, the criteria, and the policies which underlie the judicial decision-making. For the practicing bar, a review offers a perspective on the decisions rendered, by not only placing them within their proper developmental framework, but also by offering predictive guidelines by which new cases might be successfully advocated. Finally, for the student, the review provides the penultimate opportunity to commit his rigorous

academic training to appraise those issues most nearly reflective of contemporary societal concerns. It is to these particular ends that the *Notre Dame Lawyer's* Seventh Circuit Review is directed.

In satisfying its basic objective, the Seventh Circuit Review must often *expose* those decisions, the significance of which is not apparent on their face. Frequently, new attitudes or approaches of statutory construction, constitutional principles, or practical effects do not reveal their impact unless carefully screened and evaluated. Only in proper context do many decisions reveal the value judgments implicitly made by reviewing courts. Yet to expose a decision without providing complementary analysis is to raise giant edifices without proper foundation. The review must analyze each decision, intrinsically on its own merits, as well as extrinsically looking to its effect. In the former inquiry, the examination must discern whether the conclusion rests upon appropriate and well-reasoned premises; it must focus on whether the specific criteria used are those to which an appellate court should give judicial weight. Finally, it must decide whether this controversy is an area where policy notions should prevail over sophisticated legal maneuvering. With respect to the extrinsic factor, the review must appraise whether the Seventh Circuit decision is consistent with extant law, and if not, whether the deviation is warranted under the circumstances; it must be articulately examined and the rationales for decision appraised. Finally, it must look to responses by other circuits and determine whether the result is predicated upon a common perception, or is grounded in factual circumstances peculiar to the case confronting the Seventh Circuit. Only when these considerations are properly evaluated does a review serve the purpose which justifies its existence—and recognition.

One area of importance to me, by inclination as well as by profession, is the concern with the professional competence of the practicing bar. Comments made by the Chief Justice of the United States Supreme Court echo the sentiments of many jurists with regard to the proficiency of trial counsel. Elsewhere concerns mount with regard to the reduction in time—or eventual elimination—of the role of oral argument on appeal. To generate educated discussion in this area, as well as to provide some framework against which to choose values, this initial Seventh Circuit Review highlights some of our recent decisions dealing with the legal profession. Questions concerning the standard of competence used to evaluate lawyers in determining whether Sixth Amendment guarantees have been satisfied are raised and answered. Other issues regarding the input and impact of the judge on the actual trial are considered and responded to. These inquiries are of critical import if we truly are to subscribe to the notion that there is substance, that there is significance to concepts of due process of law and effective representation of counsel. By coming to grips with these difficulties we play the necessary role which this honored profession holds out to us. To the end that this review generates interest in these areas, and provides competent instruction as framework with which to proceed, I welcome its audacity and applaud its success.

HONORABLE LUTHER M. SWYGERT
Former Chief Judge for the United States
Court of Appeals for the Seventh Circuit

FORMER CHIEF JUDGE LUTHER M. SWYGERT

United States Court of Appeals
for the Seventh Circuit

The *Notre Dame Lawyer* is to be commended for publishing a review of the recent decisions of the United States Court of Appeals for the Seventh Circuit. Such a review has multiple benefits. It calls the attention of both the

legal academic community and the practicing bar to important decisions of the court and provides a critique of them. It also serves as a means for criticizing the work of the court and detecting trends that might otherwise be overlooked.

The *Lawyer*'s invitation to write a comment is appreciated and I am pleased to comply. The purpose in writing this comment is not, however, to discuss cases decided by the court during the past year—that, I fear, would be an exercise of supererogation—rather, I wish to write about a few of the salutary and innovative procedures that the Seventh Circuit has developed during recent years.

Circuit Rule 28—Publication Plan for Decisions

For quite some time the court has had a rule regarding publication of opinions which has produced both praise and criticism from the bar. In essence it provides two methods for the disposition of cases: (1) published opinions, either authored or *per curiam* and (2) unpublished orders.[1] A conservative estimate is that about forty percent of our decisions are by order. The term "order" does not mean a bare statement that the action of the district court or agency is either affirmed or reversed. It includes a statement of the facts and the reasons for the decision. It may be a single page or several pages in length. The rule provides that the order may not be cited as a precedent within the circuit. The reason for this proscription is that the court does not view orders as having any precedential value and therefore they would serve only as cumulative secondary material in support of a position taken by one of the parties to the appeal. Noncitation is essential to any plan for unpublished orders. If citation were permitted, governmental agencies and large law firms would have an advantage over those practitioners who could not afford the purchase of all the orders that are issued.

Circuit Rule 24—Elimination of Appendices

Rule 30(f) of the Federal Rules of Appellate Procedure provides that a court of appeals may by rule dispense with the requirement of an appendix in all cases and permit appeals to be heard on the original record. Pursuant to this provision the United States Court of Appeals for the Seventh Circuit has by rule (Rule 24) eliminated the requirement of appendices in all cases. In lieu thereof we suggest that the parties include as part of their brief the memorandum decision of the district court, the trial court's findings if there was a bench trial, pertinent provisions of the agreement if a contract is involved, a copy of the patent if it is a patent case, and similar material in other cases. Also, if some part of the testimony or evidence is particularly important it may be included in the back of the brief or by separate short appendix. A proposed revised rule currently being considered by the court would mandate the inclusion of the decision by the trial court or agency.

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1 *See* Hastings, The Seventh Circuit Plan for Publication of Opinions—A Continuing Experiment, 51 Ind. L. J. 2 (1976) pp. 368-69.

The court in fact does not welcome bulky appendices of the record. They are expensive for the parties and their utility is minimal since all the judges have their chambers in Chicago and the original record is readily available to them.

Because the abbreviated material from the record is often included in the brief as an addendum, perhaps it is pertinent to say something about the briefs.

The court does not require printed briefs. Before the advent of photocopy, briefs were either printed or typewritten in pauperis cases. Presently, however, about one half of the briefs are being submitted by the use of photocopy.

Rule 33, Federal Rules of Appellate Procedure—Docketing Conferences

Rule 33 of the Federal Rules of Appellate Procedure authorizes a court of appeals to conduct a "prehearing conference" to consider the "simplification of the issues and such other matters as may aid in the disposition of the proceedings by the court." Pursuant to that rule the Seventh Circuit has been conducting docketing conferences during the past three years in all criminal appeals and since early 1975 in a large number of civil appeals. Conferences with out-of-town counsel are conducted by telephone, while conferences with Chicago counsel are held in chambers.

A date is fixed for the filing of the record, including any necessary transcript of the testimony. This date is usually shorter than the time prescribed by Rule 11 of the Federal Rules of Appellate Procedure. Definite dates are also set for the filing of briefs. These dates, although sometimes shorter than the time periods required by the rules, are actually tailored to fit the particular needs of the case as well as the hearing schedule of the court. The parties are also advised as to the approximate date of the oral argument.

Thus the conferences result in a definite procedural schedule for each individual case. Additional benefits from the conferences have been occasional dismissals of appeals because of lack of appellate jurisdiction, the elimination of repetitious argument through joint or staggered briefs, and the explanation of practices and procedures to lawyers new to the court of appeals. In civil cases settlement possibilities are discussed. The procedural schedule decided at the conference is incorporated in an order furnished to counsel, the district judge, the clerk of the district court, and, if applicable, the court reporter.

These are not all the procedures and rules that the court has developed over recent years in an effort to expedite its work and to improve the appellate process. They are, however, some of the more important.

Appellate courts should have twin goals: to make appeals as inexpensive, easy, and expeditious as possible and, second, to decide cases consistent with the traditions of the common law. Because constant changes in our economic, political, and social systems are inevitable, the law, if it is to serve its high purpose as a means for resolving problems that these changes bring, must be kept viable and responsive. For that reason it is important that appellate judges in shaping the law adopt a philosophy that nurtures viability and responsiveness for procedural as well as substantive law.

To adhere to precedent when appropriate, but to refine the old or create

anew when demanded by the changing flux of life defines the responsibilities of appellate judges. For, as Cardozo wrote, judges must distinguish between the precedents which are merely static and those which are dynamic. It is my belief that the judges of the United States Court of Appeals for the Seventh Circuit as a collegial institution are meeting this responsibility.